

COURT OF APPEAL FOR ONTARIO

CITATION: Metro Ontario Real Estate Limited v. Embee Properties Limited,
2024 ONCA 51
DATE: 20240125
DOCKET: COA-23-CV-0193

Hourigan, Miller and Nordheimer JJ.A.

BETWEEN

Metro Ontario Real Estate Limited

Applicant (Respondent)

and

Embee Properties Limited

Respondent (Appellant)

James Bunting and Anna White, for the appellant

Adam J. Stephens and Madeleine Dusseault, for the respondent

Heard: December 11, 2023

On appeal from the order of Regional Senior Justice Leonard Ricchetti of the Superior Court of Justice, dated December 29, 2022, with reasons at 2023 ONSC 503.

REASONS FOR DECISION

Introduction

[1] This dispute is about a shopping centre's common parking lot area. The owner of the shopping centre, Embee Properties Limited ("Embee"), wishes to expand the shopping centre to accommodate a retail space for a new lessee, the

Liquor Control Board of Ontario (the “LCBO”). One of its tenants, Metro Ontario Real Estate Ltd. (“Metro”), objected to the expansion on the basis that it impermissibly interfered with the parking spots it was entitled to under its lease for customers of its grocery store.

[2] Metro brought a successful application to determine its rights regarding the common parking lot area. The application judge found that Metro’s interest in the common parking area was both a leasehold proprietary interest and an easement. He determined that the shopping centre’s expansion violated Metro’s rights and that the appropriate remedy was a permanent injunction.

[3] For the following reasons, we allow the appeal and set aside the application judge’s order. In short, we conclude that he erred in law in his finding that Metro has a leasehold proprietary interest in the common parking lot area, and in failing to consider the extent to which any easement that it might have has been interfered with by the shopping centre’s expansion.

Background Facts

[4] Since 1971, Metro has leased a store at the shopping centre to operate a grocery store. It is one of several tenants of the shopping centre. The lease from 1971 (the “1971 Lease”) provides the following:

WITNESSETH that the Lessor hereby leases and demises to the Lessee the store building to be erected upon and contained within the limits of the Centre and shown in red on plot plan attached hereto (Exhibit “A”),

and more particularly described in Schedule “A” annexed hereto, which said building, together with rights in Mall and Parking Areas, are hereinafter called the “Leased Premises”.

[5] Schedule “A” contains two clauses, one which describes the building currently used by Metro for its grocery store and one which describes the common parking lot with a minimum capacity for 201 vehicles. A site plan reflecting these descriptions was attached to the 1971 Lease.

[6] In 1983, the lease was amended (the “1983 Amendment”), and the paragraph reproduced above was deleted and replaced with the following:

Landlord hereby leases to Tenant and Tenant hereby takes from Landlord the premises labelled “Enlarged Demised Premises” including the area marked “Addition” and shown on Exhibit A and the improvements now or hereafter erected on said premises (said premises and improvements being hereinafter collectively called the Leased Premises or leases premises), together with the benefit of any and all easements, appurtenances, rights and privileges now or hereafter belonging thereto. The Leased Premises are located within that certain parcel of land (herein called the Land) described in Exhibit B. Any buildings and improvements now or hereafter erected on the Land shall be hereinafter called Improvements. The Land and the Improvements shall be hereinafter collectively called the Centre. Landlord hereby grants to Tenant the right to use, in common with other permitted tenants of the Centre, all portions of the Centre not included within the building sites referred to in Section 3A hereof including, but not limited to, parking areas, roads, streets, drives, tunnels, passageways, landscaped areas, open and enclosed malls, exterior ramps, walks and arcades (hereinafter collectively called the Common Area) for all customary and proper purposes.

[7] Pursuant to the 1983 Amendment, the 1971 site plan was replaced with a new one, providing for a minimum of 215 parking spaces. At some point before 2000, the shopping centre was expanded such that the amount of available parking spaces was reduced from 215 to 211.

[8] Embee purchased the shopping centre in 2000.

[9] In 2016, Metro renovated its grocery store, reducing available spaces from 211 to approximately 206. No issue is taken with these various changes to the number of parking spots in this application.

[10] In 2021, Embee entered into a lease with the LCBO, requiring it to reconfigure 36 parking spaces directly adjacent to the grocery store operated by Metro.

Decision Below

[11] The application judge held that the 1971 Lease granted Metro leasehold rights over the parking area in common with other tenants. He found that a landlord who wishes to retain rights to alter common areas of leased spaces must expressly include permissive language to that effect in its lease.

[12] The application judge also concluded that the 1983 Amendment did not alter Metro's leasehold interest in the common parking area, aside from increasing the number of spaces from 201 to 215. Although it removed the particularized description of the common parking area in Schedule "A," which defined the

demised premises, the amended lease confirmed Metro's "right to use in common with other tenants" the parking area. He found that the proposed reconfiguration of the parking spots violated Metro's leasehold interest.

[13] Regarding the appropriate remedy, given the difficulties in quantifying damages, the application judge held that this was an appropriate case for a permanent injunction preventing the proposed reconfiguration of the parking spots.

Analysis

[14] The application judge was inconsistent in his terminology regarding the nature of Metro's interest in the common parking area. At some points, he stated that Metro has an easement over the parking spots. At other points, he found that Metro has a leasehold proprietary interest in the parking spots. For example, he stated that:

Metro's rights to use the Parking Area is a proprietary interest – a leasehold interest having been given to it for the "peaceful enjoyment and possession of the Leased Premises" (para. 3, 1971 Lease) which was defined to include the "rights in the Mall and Parking Areas" and that "all parking area now or hereafter developed in the Center shall be kept reasonably available by the Lessor for the free parking of automobiles for customers or persons doing business in the Centre, and no person shall be permitted by the Lessor to park motor vehicles thereon except for the purpose and to the extent aforesaid" (para. 30, 1971 Lease). [Emphasis in original.]

[15] With respect, the application judge erred in law in finding that Metro holds a leasehold proprietary interest in the common parking area. A leasehold proprietary

interest arises under the terms of a binding lease agreement and provides a tenant with an exclusive right to possess, occupy, and use the property in question. This right exists against all of the world, including the landlord, meaning that any interference by a landlord with the property will constitute a trespass: *Wal-Mac Amusements Ltd. v. Jimmy's Dining & Sports Lounge*, 1997 ABCA 183, at paras. 15-17; *Exchange Corporation Canada Inc. v. The Corporation of the City of Mississauga et al.*, 2012 ONSC 6221 (Div. Ct.), at para. 22, citing *Re B.A. Oil Co. & Halpert*, [1960] O.R. 71 (C.A.), pp. 80-81. In the case at bar, the critical element of exclusivity was absent because all of the tenants in the shopping centre have a right to use all of the parking spots for their customers.

[16] At the appeal hearing, there was much debate about whether the nature of Metro's interest in the parking spots constituted an easement. Embee submits that there cannot be an easement because the dominant and servient owners must be different persons: *Hodkin v. Bigley*, [1999] 20 R.P.R. (3d) 9 (Ont. C.A.), at para. 11. Metro responds that there is support in leasing textbooks and American authorities for the proposition that a commercial tenant in a shopping centre has an easement over parking spots: see e.g., *Walgreen Co. v. American Nat. Bank & Trust Co. of Chicago*, 281 N.E. 2nd 462 (Ill. App. Ct. 1972); *Madigan Bros., Inc. v. Melrose Shopping Center Co.*, 463 N.E. 2nd 824 (Ill. App. Ct. 1984); and Richard Olson, *Commercial Tenancy Handbook* (Toronto: Thomson Reuters Canada Limited, 2023), §3:74, §13:3.

[17] It is unnecessary for this court to determine whether Metro has an easement because, even if we assume that it does, a servient tenement's alteration of the area covered by the easement is actionable only if the dominant tenement shows that its right to use the easement has been substantially interfered with: *Weidelich v. de Koning*, 2014 ONCA 736, 122 O.R. (3d) 545, at paras. 9-10. The application judge did not engage in a factual analysis to determine whether there has been substantial interference. This may be because he found that Metro had a leasehold proprietary interest, and therefore, any interference would constitute a trespass.

[18] In our view, there has not been substantial interference. The nature of the encroachment at issue is not a reduction in available spaces, only a reconfiguration of them. Further, the record establishes that the total parking demand for the whole shopping centre, including the proposed LCBO, would be 182 spaces, and the peak parking demand would be 197. After the addition of the LCBO, there will still be 204 parking spaces at the shopping centre. Further, not all of the 36 affected spaces will be moved to an area further from Metro's entrance. In any event, Metro did not have any contractual right to particular parking spots or particular locations for those parking spots. It had the same rights as all of the other tenants, that is, general access to all of the parking spots provided. The same point can be made with respect to Metro's complaint about any impact on access through the west entrance to the parking lot.

[19] We conclude that Metro's right to use the parking lot for the purpose for which it was granted is not substantially interfered with by the proposed reconfiguration, given that its right can be exercised in generally the same way despite the reconfiguration.

[20] In light of this conclusion, it is unnecessary for us to address the issue whether a permanent injunction was the appropriate remedy.

Disposition

[21] The appeal is allowed, the application judge's order is set aside, and Metro's application is dismissed.

[22] Regarding costs, pursuant to the parties' agreement, the costs ruling by the application judge is reversed so that Metro will pay Embee the all-inclusive sum of \$60,000 for the costs of the application. Metro shall also pay Embee the all-inclusive sum of \$30,000, as agreed, for the costs of the appeal.

"C.W. Hourigan J.A."
"B.W. Miller J.A."
"I.V.B. Nordheimer J.A."