Kaminskas v. Storm et al.
[Indexed as: Kaminskas v. Storm]

95 O.R. (3d) 387

Court of Appeal for Ontario,

Rosenberg, K.N. Feldman and Blair JJ.A.

April 20, 2009

Real property -- Easements -- Applicant using portion of respondent's property to park his car -- Previous owners of respondent's property having verbally consented to that use by applicant and his predecessors in title for over 50 years and previous owners providing applicant with consent in writing in 1991 -- Prescriptive easement not established as use was with permission of respondent's predecessors in title.

The applicant used the single-car driveway between his house and the respondent's to park his car. The driveway encroached on the respondent's property. The respondent, who purchased the property in 2006, objected to the applicant's use of the driveway. The applicant was given written permission to use the driveway in 1991 by the respondent's predecessor in title. He brought an application for a declaration that he was entitled to a right-of-way over the driveway and for injunctive relief. Evidence was adduced that the respondent's predecessor in title had purchased the property in 1950 and had "always given permission" to their neighbours to use the driveway to park their car. The application judge found that the applicant was entitled to a prescriptive easement over the disputed portion of the land. The respondent appealed.

Held, the appeal should be allowed.

For an easement to be created by prescription, the use of the alleged right must be shown to have been (i) continuous and (ii) "as of right". User "as of right" means that the use has been uninterrupted, open, peaceful and without permission for the relevant period of time. Under the Real Property Limitations Act, R.S.O. 1990, c. L.15, a 40-year right will not be considered permissive unless it is enjoyed by written permission. The application judge erred in the manner in which she calculated the time requirement for a prescriptive easement claim pursuant to ss. 31 and 32 of the Act. She determined that the applicant had established an absolute 40-year right that crystallized before the 1991 letter was provided and that the letter of permission could not defeat what was already an absolute prescriptive easement. However, the relevant time period for a prescriptive easement under the Act is "the period next before some action wherein the claim...was or is brought into question", i.e., from the date of the commencement of the application in these proceedings. The 1991 letter of permission therefore operated to defeat the prescriptive right.

The doctrine of lost modern grant, which was raised for the first time on appeal, did not assist the applicant. Although permission can defeat a 40-year period of use for purposes of a prescriptive easement by statute only if evidenced in writing, oral permission is sufficient to defeat a prescriptive easement by lost modern grant. The evidence was that the respondent's predecessor in title at all times gave permission to the use of the driveway for parking.

Cases referred to

Abell v. Woodbridge (Village) (1919), 45 O.L.R. 79, [1919] O.J. No. 107, 46 D.L.R. 513 (S.C. App. Div.), revg on other grounds (1917), 39 O.L.R. 382, [1917] O.J. No. 246, 37 D.L.R. 352 (H.C.); Burrows v. Lang, [1901] 2 Ch. 502 (Ch. Div.); [page388] Henderson v. Volk (1982), 35 O.R. (2d) 379, [1982] O.J. No. 3138, 132 D.L.R. (3d) 690, 13 A.C.W.S. (2d) 110 (C.A.); MacRae v. Levy, [2005] O.J. No. 313, [2005] O.T.C. 68, 28 R.P.R. (4th) 291, 136 A.C.W.S. (3d) 1119 (S.C.J.); Rose v. Krieser (In Trust) (2002), 58 O.R. (3d) 641, [2002] O.J. No. 1384, 212 D.L.R. (4th) 123, 157 O.A.C. 252, 9 R.P.R. (4th) 199, 113 A.C.W.S. (3d) 173 (C.A.)

Statutes referred to

Prescription Act 1832 (U.K.), 2 & 3 Will. 4, c. 71 [rep.]

Real Property Limitations Act, R.S.O. 1990, c. L.15, ss. 31, 32

Authorities referred to

Gaunt, Jonathan, Q.C., and Paul Morgan, Q.C., Gale on Easements, 17th ed. (London: Sweet & Maxwell, 2002)

Law Commission Consultation Paper No. 186, "Easements, Covenants and Profits a Prendre" (Belfast, Ireland: The Stationary Office, 2008)

Law Reform Committee, "Acquisition of Easements and Profits by Prescription" 14th Report, Cmnd 3100 (1966)

Megarry, Robert, and William Wade, Law of Real Property, 6th ed. (London: Sweet & Maxwell, 2000)

Mew, Graeme, The Law of Limitations, 2nd ed. (Markham, Ont.: LexisNexis Butterworths, 2004)

Oosterhoff, A.H., and W.B. Rayner, Anger and Honsberger law of real property, 2nd ed., vol. 2 (Aurora, Ont.: Canada Law Book Inc., 1985)

APPEAL from the judgment of Tucker J., [2007] O.J. No. 661, 54 R.P.R. (4th) 239 (S.C.J.) declaring that the applicant was entitled to a prescriptive easement.

Arthur Robert Camporese and Karen Power, for appellants.

Nicholas F. Ferguson, for respondent.

The judgment of the court was delivered by

BLAIR J.A.: --

I. Background

[1] The Storms and Mr. Kaminskas are the owners of modest homes adjacent to each other in the City of Niagara Falls. Their homes are separated by a single paved driveway, which encroaches 3 feet onto the Storms' property. There is no room for a car to drive into the space between the houses. Mr. Kaminskas uses the portion of the single-car driveway between the entrance steps to the houses and the front sidewalk to park his car. In doing so, he says he is following a pattern that has been accepted by previous owners of these two homes for over 56 years. The Storms -- who purchased their property in 2006, and whose daughter and son-in-law actually reside in the home -- object. [page389]

[2] The seeds for a potential dispute are readily apparent from a glance at the photo which is attached as Schedule A to these reasons. There is no dispute that the driveway to Mr. Kaminskas' home encroaches on the Storm's titled property.

[3] To resolve the dispute, the Storms sought to build a fence down the middle of the driveway between the buildings and a three to four inch concrete curb on the dividing line of the open paved area. This did not find favour with Mr. Kaminskas, who applied to the court for a declaration that he is entitled to a right-of-way over the driveway and for injunctive relief. He succeeded. Tucker J. found that he was entitled to a prescriptive easement over the disputed portion of the land and that he would be entitled to an injunction preventing the Storms from interfering with his use of the property. The Storms appeal.

[4] Consent or permission operates to defeat a claim to a prescriptive right. While Mr. Kaminskas and his predecessors in title had exclusive and continuing use of the driveway for parking purposes for over half a century, the evidence is clear that they used the driveway in that fashion with the permission (oral or written) of the prior owners of the Storm property. Respectfully, the application judge erred in failing to calculate the period of unpermitted user as the period "next before" the commencement of the application. Moreover, her attempts to characterize the permission granted as ineffective, or to differentiate it as something else, are not supportable on the evidence.

[5] I would allow the appeal.

II. Facts

[6] Mr. Kaminskas purchased the property at 5087 Kitchener St. in October 1991 from a Mr. Parisi. Mr. Parisi, in turn, had purchased the property in 1980 from his grandfather, who had owned it since 1970.

[7] The Storms acquired the adjacent property at 5091 Kitchener St. in March 2006 from Ross and Harriet Angiers, who had owned it since 1950.

[8] Mr. Kaminskas claims, himself, to have had exclusive and continuous use of the disputed driveway -- which encroaches approximately 3 feet onto the Storms' side -- for 16 years prior to the application. His predecessors in title enjoyed a similar use as far back as 1950. The existence of the right to the use is important to him because the city by-law prohibits parking on the street at that

point and there is no other parking available on his property. The Storm property, on the other hand, has its own driveway on the opposite side of the building. [page390]

[9] The evidence is that Mr. Parisi used the driveway in the same fashion during his tenure. Mr. Parisi stated in his affidavit that his grandfather also used the driveway, to his knowledge and belief, although his grandfather, himself, did not drive.

[10] Mr. Angiers swore he and his wife "were always aware of the previous and current owners of 5087 Kitchener Street, using the single car driveway that encroached onto [their lands]". In fact, he said that to the best of his knowledge and recollection, the driveway "was already on the property" when he and Mrs. Angiers bought it in 1950 and "had been in use of the then owners" at that time. He and Mr. Parisi Sr. (the grandfather) paved the driveway together. Mr. Angiers swore that he made the person he thought was the buyer of their property -- Mr. Balice, the son-in-law who now occupies it with the Storm's daughter -- aware of the encroachment and that they "shook hands agreeing to this encroachment and condition". He said that Mr. Kaminskas "has had the exclusive use" of the driveway and that he and Mrs. Angiers "had always given permission to the previous and present owners of 5087 Kitchener Street . . . to the use of this single car driveway and the said encroachment".

[11] Although the encroachment is visually obvious, no declarations of possession were ever tendered on either the Kaminskas purchase in 1991 or the Storm purchase in 2006.

[12] In 1991, when Mr. Kaminskas acquired 5087 Kitchener St. from Mr. Parisi, the Angiers provided Mr. Kaminskas with a letter consenting to his use of the disputed driveway. This letter said:

To: Janice Parker2 & John Kaminskas:

> We, Ross & Harriet Angiers give our consent to Janice and John for full use of the mutual driveway at 5087 and 5091 Kitchener Street.

Sincerely,

[Signed] Ross S. Angiers

[13] The Storms' side of the story was put forward partly through the affidavit of Mr. Balice. He says the problems began when Mr. Kaminskas started to park on the encroachment part of the driveway, rather than on his own side.3 From the [page391] perspective of Mr. Balice and the Storms' daughter, if Mr. Kaminskas were to park on "his" side, they would allow him to use the disputed portion of the driveway to get in and out of his car on the driver's side. They wish to use the driveway to put out their garbage and to have access to their backyard. When Mr. Kaminskas parks in the centre of the driveway, they are unable to do so.

[14] Mr. Balice says that he did not know of the letter from Mr. Angiers to Mr. Kaminskas, cited above. As the application judge noted, however, neither he nor Mr. Storm specifically deny the conversation with Mr. Angiers concerning the use of the driveway and shaking hands on it. Nor do they specifically deny knowing about the claimed easement, either from the surveys or from the visual appearance and use of the property.

[15] The application was heard and determined on the basis of the affidavit evidence filed. No one was cross-examined.

III. The Grounds of Appeal

[16] The appellants make two principal submissions.

[17] They argue, first, that the application judge erred in the manner in which she calculated the time required for a prescriptive easement claim pursuant to the Real Property Limitations Act, R.S.O. 1990, c. L.15, ss. 31 and 32. The application judge determined that Mr. Kaminskas had established an absolute 40-year right that crystallized before the 1991 letter was provided and, therefore, that the letter of permission could not defeat what was already an absolute prescriptive easement. The appellants submit, however, that the relevant time period for a prescriptive easement under the Act is "the period next before some action wherein the claim . . . was or is brought into question", i.e., from the date of the commencement of the application in these proceedings. The 1991 letter of permission therefore operates to defeat the prescriptive right, they say.

[18] Secondly, the appellants submit there were insufficient facts before the court to enable the application judge to find a prescriptive easement and Mr. Kaminskas failed to meet his burden of proof in that respect.

[19] I agree with the appellants' submission that Mr. Kaminskas' claim under statute is defeated by the written consent provided to him by the Angiers in 1991. Further, the evidence failed to establish that the user was "as of right". [page392]

IV. Law and Analysis

The applicable principles

Methods of acquisition of easements by prescription

[20] In law, there are three ways in which an easement may be acquired by prescription:

(a) prescription at common law;
(b) prescription by the doctrine of lost modern grant; and
(c) prescription by statute (Real Property Limitations Act).

[21] Prescription at common law is no longer relevant. It requires use of the disputed right since "time immemorial". Time immemorial, for purposes of the period of legal memory is defined as the year 1189, the beginning of the reign of King Richard I. Obviously, a prescriptive right at common law is somewhat difficult to prove in modern times, particularly in Canada. It has been said that prescription by common law cannot exist here because there is no legal memory on which to found it: see A.H. Oosterhoff & W.B. Rayner, Anger and Honsberger law of real property, vol. 2, 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1985), at p. 936, citing Abell v. Woodbridge (Village) (1917), 39 O.L.R. 382, [1917] O.J. No. 246 (H.C.), revd on other grounds (1919) 45 O.L.R. 79, [1919] O.J. No. 107 (S.C. App. Div.).

[22] The doctrine of lost modern grant, on the other hand, "is alive" and -- as Cory J.A. noted, drily, in Henderson v. Volk (1982), 35 O.R. (2d) 379, [1982] O.J. No. 3138 (C.A.), at p. 382 O.R. -- "if not well is at least surviving in the province of Ontario". This doctrine was developed in common-law jurisprudence to overcome the inconvenience of the common-law rule (where the right could be defeated if it could be proven that the right claimed did not exist at any point in time within legal memory). Under the doctrine of lost modern grant, the courts will presume that there must have been a grant made sometime, but that the grant had been lost. Uninterrupted use as of

right at any point in time will create the prescriptive right under this doctrine, provided it was for at least 20 years.

[23] Cory J.A. described the doctrine of lost modern grant in Henderson v. Volk, at pp. 382-83 O.R.:

> The doctrine indicates that where there has been upwards of 20 years uninterrupted enjoyment of an easement and such enjoyment has all the necessary qualities to fulfil the requirements of prescription, then apart from some aspects such as incapacity that might vitiate its operation but which do not concern us here, the law will adopt the legal fiction that such a [page393] grant was made despite the absence of any direct evidence that it was in fact made.
>
> It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the Limitations Act. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.
>
> As well, the enjoyment must not be permissive. That is to say, it cannot be a user of the right-of-way enjoyed from time to time at the will and pleasure of the owner of the property over which the easement is sought to be established.

(Citations omitted)

See, also, Rose v. Krieser (In Trust) (2002), 58 O.R. (3d) 641, [2002] O.J. No. 1384 (C.A.).

[24] As the years passed, the doctrine of lost modern grant was found to be more and more unsatisfactory, because it called upon juries to presume the existence of a lost grant as a fact, even where they did not believe it existed. The English Prescription Act 1832 (U.K.), 2 & 3 Will. 4, c. 71 may have been enacted, at least in part, to overcome this problem.4 Its preamble states that it was enacted to prevent common-law claims from being defeated by evidence of the commencement of use after 1189 (the very rationale for the development of the doctrine of lost modern grant). Sections 31 and 32 of the Ontario Real Property Limitations Act echo the language of the 1832 legislation.

[25] The wording of these sections is tortuous at best.5 Stripped to their essentials, for purposes of this appeal, they read as follows: [page394]

Right of way, easement, etc.

> 31. No claim that may be made lawfully at the common law, by . . . prescription or grant, to any way or other easement . . . when the way . . . has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that the way . . . was first enjoyed at any time prior to the period of twenty years, but, nevertheless the claim may be defeated in any other way by which it is now liable to be defeated, and where the way . . . has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and

indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

How period to be calculated, and what acts deemed an interruption

32. Each of the respective periods of years mentioned in [section] 31 shall be deemed and taken to be the period next before some action wherein the claim . . . to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those sections, unless the same has been submitted to or acquiesced in for one year after the person interrupted has had notice thereof, and of the person making or authorizing the same to be made.

[26] Sections 31 and 32 do not displace the right to establish a prescriptive easement based on the doctrine of lost modern grant, which continues to exist in this province: Henderson v. Volk, at p. 382 O.R.; MacRae v. Levy, [2005] O.J. No. 313, 28 R.P.R. (4th) 291 (S.C.J.), at para. 59; Graeme Mew, The Law of Limitations, 2nd ed. (Markham, Ont.: LexisNexis Butterworths, 2004), at p. 237. Moreover, the nature of the enjoyment necessary to establish a prescriptive easement under the doctrine of lost modern grant is precisely the same as that required for a prescriptive easement under the statute: Henderson v. Volk.

Characteristics of prescriptive easements

[27] To establish a prescriptive easement of either kind, the user must first meet the four essential characteristics of an easement at common law, namely:

(a) there must be a dominant and servient tenement;
(b) an easement must accommodate the dominant tenement;
(c) the dominant and servient owners must be different persons; and
(d) a right must be capable of forming the subject matter of a grant. [page395]

[28] In addition, for an easement to be created by prescription, the user of the alleged right (for the applicable time period) must be shown to have been (i) continuous and (ii) "as of right".

[29] Here, there is no real issue that the proclaimed easement meets the four essential criteria of an easement at common law, or that the use of the driveway by Mr. Kaminskas and his predecessors was continuous. The appeal hinges on whether the user was "as of right".

[30] User "as of right" means that the use has been uninterrupted, open, peaceful and without permission for the relevant period of time. It is often described using the Latin maxim nec vi, nec clam, nec precario (i.e., without force, without secrecy and without "precario"). "Precario" in this sense is taken to mean "[t]hat which depends not on right, but on the will of another person": Burrows v. Lang, [1901] 2 Ch. 502 (Ch. Div.), at p. 510, cited in Jonathan Gaunt, Q.C., and Paul Morgan, Q.C., Gale on Easements, 17th ed. (London: Sweet & Maxwell, 2002), at para. 4-82. Nec precario, therefore, means "without permission".

Differences between prescriptive easements under statute and lost modern grant

[31] There are three important differences between a prescriptive easement arising by statute and a prescriptive easement arising by lost modern grant, however. First, in order to establish a prescriptive right by statute, it is necessary for the use to have been continuous, uninterrupted, open, peace-

ful and without permission for a period of 20 or 40 years immediately preceding the commencement of the action or assertion of the claim -- in the language of s. 32, during the 20- or 40-year "period next before some action wherein the claim . . . to which such period relates was or is brought into question" (emphasis added). For the right to accrue under the doctrine of lost modern grant, however, the requisite user need not be for the period "next before" the action, but may exist during any uninterrupted 20-year period or longer.

[32] While the "next before" requirement may give rise to unfairness in some circumstances, there are policy reasons founded in the need to promote certainty and stability in conveyancing law that support its existence. As the authors of a leading text, Robert Megarry & William Wade, The Law of Real Property, 6th ed., by Charles Harpum (London: Sweet & Maxwell Ltd., 2000), observe, at p. 1138, footnote 76:

> It should be noted that, for all its shortcomings, prescription under the Prescription Act 1832 is, from a conveyancing point of view, preferable to prescription by lost modern grant. Because it has to be exercised without [page396] interruption "next before some suit or action", it may be easier for any purchaser of the servient tenement to discover. If an easement has been acquired by lost modern grant . . . [a] purchaser may be bound by it even though he could not have discovered its existence.

[33] In addition, the "next before" requirement under the legislation confines the courts review to a relatively recent period of time, when the evidence will be easier to obtain and evaluate, and therefore may be preferable to the lost modern grant regime for that reason: see U.K., "Easements, Covenants and Profits a Prendre", The Law Commission Consultation Paper No. 186 (Belfast, Ireland: The Stationary Office, 2008), at p. 80, para. 4.213.

[34] Secondly, a statutory claim to a prescriptive easement based on 40 years' use can be defeated by permission only where that permission was given in writing. This is established by the closing words of s. 31, which, for convenience, I repeat:

> [W]here the way . . . has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

[35] Under the statute, a 40-year right will not be considered permissive ("precario") unless it is enjoyed by written permission. However, claims to a prescriptive right based on the doctrine of lost modern grant (or with respect to the statutory right based on 20 years' use) can be defeated by consent or permission, whether written or oral.

[36] Finally, it is noteworthy that the 40-year concept is a creature of the statutory prescriptive right. It has no application to the doctrine of lost modern grant, which requires only an appropriate use of 20 years or more without permission.

Application of the principles to this case

[37] In light of the foregoing review of the principles underlying prescriptive easements, it is apparent where the dilemma for Mr. Kaminskas arises. His claim under statute is defeated by the written consent provided to him by the Angiers in 1991, less than 20 years "next before" the com-

mencement of his application. It is also defeated by the permission -- by inference, an oral permission -- that Mr. Angiers says he and his wife "had always given" to the owners of the Kaminskas property, whether the claim is based on statute or on the doctrine of lost modern grant.

The application judge's reasons

[38] The application judge rejected the argument "that aeconsent' or aepermission' somehow operated to remove what [she found] to [page397] be an easement since at least 1950 and, accordingly, [was] now a prescriptive easement". She went on to say (at para. 25):

> In any event, from 1950 until 2006, Mr. Angiers makes it clear that the neighbours have used as a right the driveway that encroaches on his lands. I agree that the words used in 1991 were "permission" and "mutual driveway", however, as indicated, Mr. Angiers would not be in a position in 1991 to grant permission to anyone having acknowledged and accepted the use of the property by the predecessors in title and the fact that the use pre-dated his occupation of his property. In this regard, I quote from the case of Rose v. Krieser (2002), 58 O.R. (3d) 641, in which the Court of Appeal considers s. 31:
>
> > Examined in context, it is apparent that the closing words of s. 31 relating to the 40 year time period are to be read in contrast with the preceding part of the section dealing with the 20 year time period. The words "consent or agreement expressly given or made for that purpose by deed or writing" in relation to the 40 year time period relate to the common law defence of permission given by deed or writing, and clarify that the defence of permission does not apply in full measure to the 40 year period. Rather, the defence is limited to written permission with respect to the 40 year period.
> >
> > Moreover, it is clear, in my view, that the words "consent or agreement expressly given or made for that purpose by deed or writing" cannot apply to a use as of right given by deed or writing. The very foundation of the law of prescription is the presumption that the use originated with a grant of the right claimed. Proof of a written agreement granting the right simply displaces prescription; it does not constitute a defence of the claim. On the other hand, permission negatives a claimant's assertion that his use was "as of right" and constitutes a real defence to the claim.
>
> Here, I find that the use was a right. The rights accrued 40 years prior to the 1991 letter without "permission." I find it was not a mere acquiescence; it was acceptance and the use of the term permission does not erase that right.

(Emphasis in original)

[39] These findings appear to have been based on a prescriptive easement by statute -- the application judge earlier cites the relevant law as being centred in ss. 31 and 32 of the Real Property Limitations Act and makes no reference to the doctrine of lost modern grant -- and to have been founded on the notion that prescriptive title had been acquired before the letter of 1991 was provided.

[40] This may be a fair result, if the application judge were exercising a discretionary or equitable jurisdiction in making her decision. Respectfully, the foregoing passage from her reasons discloses a number of misconceptions of the evidence and of the law. I do not see how her conclusion can be born out on the record, given the law described above and the uncontested evidence of Mr. Angiers. [page398]

Error in how time was calculated under the Act

[41] Insofar as the application judge purported to find a prescriptive easement by statute, she failed to apply the "next before" time parameters of s. 32. I agree with the appellants' submissions in this regard. Even if Mr. Angiers' evidence is explained away as acceptance, rather than permission, throughout the period between 1950 and 1991, the 1991 letter granting Mr. Kaminskas consent to use the driveway for parking broke any prior period of open and uninterrupted use without permission. And it did so within the 20-year period immediately preceding the commencement of the application, which is sufficient to prevent the right from crystallizing under the Act.

The user was not "as of right"

[42] Mr. Angiers' evidence does not make it clear, however, -- or, indeed, even suggest -- that his neighbours had used the driveway "as a right". His evidence is that they used it at all times with his and his wife's permission. Mr. Angiers -- who would know -- was not cross-examined on his affidavit. He did not say he and his wife "acquiesced" in their neighbours' use of the driveway (a state of affairs that would justify the finding of a prescriptive easement, other factors being equal). His evidence was unequivocal: "My wife, Harriet Angiers and I had always given permission to the previous and present owners of 5087 Kitchener Street . . . to the use of this single car driveway and the said encroachment" (emphasis added).

[43] Further, the application judge's comment [at para. 25] that Mr. Angiers "would not be in a position in 1991 to grant permission to anyone having acknowledged and accepted the use of the property by the predecessors in title and the fact that the use pre-dated his occupation of his property" is based on the same misconception of the evidence. Mr. Angiers did not say he "acknowledged and accepted the use of the property". He said they gave permission for the use.

[44] The legal premise that the prescriptive right had already crystallized before the 1991 letter of consent was provided is also mistaken. The application judge focused on the point that permission can only defeat the 40-year period if it is evidenced in writing. This is apparent from her quotation from Rose v. Krieser and from her own statement that [at para. 25] "[t]he rights accrued 40 years prior to the 1991 letter without aepermission'".

[45] Her reasoning appears to have pursued the following logic. Mr. Kaminskas and his predecessors in title had used the [page399] driveway since at least 1950, and perhaps before that time. There was at least 40 years' use before 1991 and the rights had "accrued" by that time. Mr. Angiers was therefore not in a position to give "permission" by the date of the letter and the letter was, in effect, meaningless. Oral consent is not capable of defeating a 40-year prescriptive right. The use before 1991 was therefore without permission.

[46] This logic does not get Mr. Kaminskas to where he needs to be, however. The 40 years' use was founded upon the Angiers' permission.

Doctrine of lost modern grant

[47] Finally, the doctrine of lost modern grant -- not alluded to by the application judge, but raised on appeal -- does not assist Mr. Kaminskas either. Although permission can defeat a 40-year period of use for purposes of a prescriptive easement by statute only if evidenced in writing, oral permission is sufficient to defeat a prescriptive easement by lost modern grant. Here, the evidence is that the Angiers at all times gave permission to the use of the driveway for parking. It is not said whether that permission was oral or written, but since the 1991 letter is the only reference on the record to consent in writing, it is a reasonable inference that, prior to the letter, the ongoing permission was oral. In any event, a prescriptive right by lost modern grant cannot be established if the use was by permission, whether written or oral -- it can only arise where the use is "as of right".

[48] This result may seem unfair to Mr. Kaminskas. It is apparent that he and his predecessors in title have had the continuous, open, uninterrupted, peaceful and exclusive use of the driveway for purposes of parking over a period of at least 56 years before the commencement of these proceedings. Everyone was in agreement, except for the current occupants and owners of the Storm property. But it is also apparent that this use was with the permission of the predecessors in title to the Storms. And permission defeats a prescriptive easement.

V. Disposition

[49] For the foregoing reasons, I would allow the appeal, set aside the judgment below and dismiss the application.

[50] The appellants are entitled to their costs here and below. Costs of the appeal are fixed in the amount of $5,000, as agreed by counsel.

Appeal allowed. [page400]

SCHEDULE A