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When There Wasn't Room for Improvement: Courts' Application of Section 37 of the *Conveyancing and Law of Property Act*

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Introduction

This paper examines section 37 of the *Conveyancing and Law of Property Act* (the "**Act**")[2], which provides applicants with the powerful remedy to force the sale of a portion of another person's land, or obtain a lien for the value of any improvements made, if the applicant made a "lasting improvement" while under an honest mistaken belief that he or she owned that property.

The first part of this paper provides a general overview of the Act, and highlights other key sections of note within the Act.

The second part of this paper outlines the court's treatment of various claims of relief made under section 37, focusing on the differentiating factors in cases where relief was granted, and instances where it was refused.

Part I – Overview of the Act and Notable Sections

At a high level, the purpose of the Act is to address particular common law conveyancing principles that have become antiquated or otherwise redundant. As a result, many of its sections appear to be unrelated to one another, since each section responds to, and is meant to overcome, a specific common law rule.

The following are some noteworthy sections from the Act.

Section 5 – Words of Limitation Not Required for Fee Simple Conveyance

Section 5 provides that in the limitation of an estate in fee simple, the word "heirs" is not necessary if the conveyance uses the term "in fee simple" or where other words sufficiently indicate the limitation. This means that even if no words of limitation are used, this section deems that all the estate, rights, title, or interest of the grantor is passed to the grantee, unless other words in the conveyance indicate otherwise.

Section 13 – Presumption of Tenancy in Common

This section states that where land is conveyed to two or more persons, those individuals take the property as tenants in common. If joint tenancy is the desired outcome, then the deed must expressly state that the grantees are to hold as joint tenants. However, where the desired result is

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[1] Thank you to Jasmeen Kabuli, student-at-law, and Emily Papsin, student-at-law, for their contributions to this paper.

[2] *Conveyancing and Law of Property Act*, R.S.O. 1990, c.C 34 ["***CLPA***"].

tenancy in common, it is still recommended that the deed state that grantees are to hold title as tenants in common, rather than solely relying on this section. The deed should also specify the proportions of ownership, whether they are to be split evenly or otherwise.

Section 15 – Easements Deemed to be Conveyed with Land

This section provides that conveyances of land include houses, edifices, trees and hedges, water courses, privileges, and easements appertaining to the lands. Of particular note, this means that easements are conveyed with the land, whether specifically referred to in the conveyance or not.

Section 22 – Restrictions Based on Place of Origin Voided

Section 22 states that any covenant made after March 24, 1950 which restricts the sale, ownership, occupation or use of land due to race, creed, colour, nationality, ancestry or place of origin of any person, is void and of no effect.

Section 37 — Lien or Conveyance of Land for Improvements Made Under Honest Mistake

The provision is particularly notable, given that it is one of the few exceptions to the typical rule that once a property is registered in the Land Titles system, the boundaries are as described in the deed, subject only to prior crystallized prescriptive rights or corrections. This provision provides that if a person makes lasting improvements on land under the mistaken belief that it is their own, they may be entitled to a lien upon the land for the value of the improvements. In certain circumstances, this section also provides that courts can exercise their discretion to direct a conveyance of land to the person who built or improved in error, set a price for the land, or order the removal of the building.

This section is discussed in more detail in Part II, below.

Section 61 — Discharge of Restrictive Covenants

Section 61 allows an individual to apply to a judge for an order modifying or removing any covenant or condition annexed to or running with the land. No modification will be ordered unless the character of the neighbourhood is so changed that the restriction has become unsuitable, and the rights of others will not be affected.[3]

This is another potentially powerful remedy that permits a court to remove what might otherwise be an outdated (but, on its fact, effective) restriction from title.

[3] Donald H.L. Lamont, Lamont on Real Estate Conveyancing 2nd ed (Thomson Reuters Canada Limited, 2021).

Part II – Treatment and Application of Section 37 Remedies

Section 37 Remedies Overview

Given the potential (and sometimes unexpected) impact that section 37 can have on property owners, we have considered it further, below.

Section 37 reads as follows:

> *Lien on lands for improvements under mistake of title*
>
> **37(1)** Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.[4]

As described above, the remedies afforded by section 37 are generally a lien (or compensation) for the value of the lasting improvements, or an order for the conveyance of the portion of the property that the lasting improvement encroaches upon. The party requesting relief must have an honest and *bona fide* belief that the land was their own at the time the improvement was made, and the improvement must be lasting, and not temporary. Reasonableness may also be considered in deciding the existence of the applicant's belief, which is to be discerned upon the facts of each case.

When considering the cases below, it is important to recall that the relief envisioned by section 37 is discretionary. Accordingly, while these cases may be instructive, they should not be considered determinative. The surrounding circumstances of each case, and the behaviour of the parties, will almost certainly impact the court's decision in any particular case.

Cases Where Conveyance of Land Ordered

Where Factual Context Supports Reasonableness of Applicant's Mistaken Belief

Noel v. Page ("***Noel***")[5] provides an example of the powerful remedy that section 37(1) can afford an applicant. In this case, the plaintiff, Noel, sought a mandatory injunction compelling the defendant to remove the portion of its property that encroached on the plaintiff's land. The defendant, Page, had made additions to his cottage property and drilled a new well, both of which encroached upon the Noel property. Page believed the land to be his own when he built upon Noel's land. Notably, Page had previously refused his lawyer's advice to obtain a survey of the property. Despite this, Page counterclaimed for a declaration stating that he was entitled to a conveyance of the portion of the Plaintiff's land that he improved, in exchange for adequate compensation.

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[4] *CLPA*, *supra* note 2 at s. 37(1).

[5] [1995] O.J. No. 2441, 47 R.P.R. (2d) 116 ["***Noel***"].

The court, quoting *Gay v. Wierzbicki* ("***Wierzbicki***")[6], stated that in order to qualify for a section 37 remedy, an applicant must have had an honest and *bona fide* belief that the land being improved upon was its own. Interestingly, the court further clarified that the applicant's belief does not have to be reasonable – only *honest* – although reasonableness may be considered in determining the existence of the applicant's belief.[7]

Wierzbicki involved a plaintiff who unknowingly encroached upon the property of his neighbour, the defendant, in his construction of a barn. In that case, the court chose to exercise the discretionary authority afforded to it by the second part of section 37(1) [then section 38(1)].[8] Despite stating that this discretionary power should not "be exercised lightly", the court nevertheless held that on a balance of convenience, the equities favoured conveying the land upon which the farm stood to the plaintiff. The court based its decision on the fact that the barn being built was a lasting improvement, and that it did not seem to adversely effect the utilization of the Defendant's remaining land. [9] The court concluded that the "plaintiff [was] entitled to retain that part of the land of the defendant on which the barn sits, including land under any projecting eaves or overhang, on terms of paying the defendant $200, which [the court] consider[ed] generous compensation."[10]

In the *Noel* case, the court outlined that if the Applicant has an honest and *bona fide* belief, it may be entitled to two remedies under 37(1). The first, as noted above, is a lien that the encroaching party is entitled to when the value of the land encroached upon has been enhanced. The second is a right to retain the land itself.[11] This right to retain the land may exist even if the land does not increase in value – it is a discretionary alternative that exists independently from the claim of the lien.[12] A "lasting improvement" is considered to be something that is more than a repair or replacement of waste, and is considered "lasting" if it refers to permanence, and is not easily removed.[13]

All of these factors considered, the court found that despite the fact that Page was "reckless" in purchasing his property without first obtaining a survey, the evidence showed that most of his neighbours had also not obtained one, including the plaintiff, Noel.[14] The fact that none of the other neighbours had a survey completed seemed to justify the reasonableness of Page's failure to obtain one, thereby creating an exception to the general rule that simple due diligence efforts to determine property boundaries must be undertaken in order to claim for relief under section 37 (outlined in greater detail, below). Additionally, there was a distinctive treeline on Page's property that he relied on in making his improvements (which Noel's family had actually planted), not being aware that Noel's property actually extended beyond this treeline. As such, the court found that

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[6] 1967 CanLII 352, [1967] 2 O.R. 211 ["***Wierzbicki***"].

[7] *Noel, supra* note 5 at para. 31.

[8] *Wierzbicki, supra* note 6 at para. 17, citing *Ward v. Saunderson* (1912), 21 O.W.R. 254, 3 O.W.N. 802, 1 D.L.R. 356 (C.A.).

[9] *Ibid* at para. 12.

[10] *Ibid* at para. 15.

[11] *Noel, supra* note 5 at para. 32.

[12] *Noel* citing *Wierzbicki, supra* note 6 at para. 9.

[13] *Wierzbicki, supra* note 6 at para. 14.

[14] *Noel, supra* note 5 at para. 38.

Page had the requisite belief component. In considering whether to grant the remedy, the court also determined that it would be very expensive, if not impossible, to move the encroaching portion of Page's property. Considering the balance of convenience along with the enumerated other factors, the court ordered Noel to convey the portion of land that Page improvements encroached upon.[15]

Where Due Diligence Efforts to Determine Land Boundaries Undertaken

In *Dupuis-Bissonnette v. WM. J. Gies Construction Ltd*. ("***Dupuis-Bissonette***")[16], the Dupuis-Bissonnettes were the applicants who applied for a declaration that they were entitled to retain part of a lot belonging to the respondent, Gies Construction Ltd., upon which the applicants had built a stone retaining wall. The applicants relied on section 37 in advancing their claim. In opposition, the respondent sought removal of the retaining wall through its own application. The court considered both applications on a balance of convenience.[17]

The court made various findings of fact in reaching its conclusion, including that the retaining wall affected less than 1.5 per cent of the respondent's property, it was a permanent structure that supported several feet of fill and an in-ground swimming pool, the applicants had obtained a survey when they bought the property as a vacant lot, the encroachment occurred inadvertently as the applicants believed it was their own land and instructed the contractor accordingly, and the contractor's project manager also believed that the wall was located on the Applicants' property. On the other hand, the court acknowledged that the respondent was the aggrieved party and found that at the time the encroachment was discovered, the respondent had entered into an agreement with a purchaser with respect to the subject lot. However, the court found that with respect to the respondent's purchase and sale agreement, and contrary to the respondent's assertion, the purchaser did *not* request removal of the encroachment as the only resolution of the matter.[18]

On the totality of the evidence before it, the court found the wall to be a lasting improvement. In addition, the cost of removal, the *de minimis* nature of the encroachment, the applicants' honest belief as to the lot lines, and their reasonable actions in obtaining a survey and hiring a competent contractor to complete the work, all favoured the retention of the land by the applicants as the most just solution. Relying on its discretionary powers under section 37, the court ordered that the applicants were entitled to the portion of land upon which it encroached, and responsible for the full cost associated with the corresponding minor variance application, as well as the property severance and conveyance.[19]

Cases Where Repayment for Improvement Was Ordered

In the case of *Sagle v. Ball*[20], the applicant, Sagle, had obtained title to a certain Lot 6. His understanding of the boundary of the lot came from representations made by a neighbouring

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[15] *Ibid* at para. 57.

[16] 2010 ONSC 3680.

[17] *Ibid* at para. 29.

[18] *Ibid* at para. 21.

[19] *Ibid* at para. 28.

[20] 1993 CarswellOnt 2962, 44 A.C.W.S. (3d) 368.

owner. The applicant, the neighbouring owner and the vendor of Lot 6 were all walking the property when the representation about the location of the boundary was made. Under his honest and good faith belief, Sagle made various improvements to the property, including clearing that was done, and constructing a passable roadway. He also built a cottage, which was eventually relocated to his property. None of the parties questioned Sagle's honest and good faith belief in the property boundaries.[21]

In this application, Sagle sought adverse possessory title for both the cottage and the roadway, which encroached onto land belonging to two different neighbours. He was ultimately unsuccessful in making either claim of adverse possession. With respect to the cottage, the court also dismissed the applicant's claim for a lien under section 37, given that the application of section 37 would conflict with the purposes of the *Municipal Sales Tax Act*, which provided a complete code in providing a registered owner fee simple free of all estates and interests by tax deed. However, the court did find that the roadway, which encroached upon the other neighbour's land, was a lasting improvement to the property made by the applicant under the honest belief that it was his own, and accordingly, ordered payment of costs with simple interest to Sagle.[22]

Cases Where Section 37 Remedy Refused

When There is No Honest Mistaken Belief

In the case of *Metzger Estate v. Gardiner*[23], the tenants, Barbara and Paul Gardiner, had occupied the subject property owned by the Estate of Albert Metzger, the landlord, for 24 years. The parties had a tenancy agreement, whereby the tenants agreed to maintain and pay municipal taxes in lieu of rent. The tenants stopped making the necessary payments, and the landlord brought an application for termination of tenancy and writ of possession, as well as payment of arrears of rent. An order terminating the tenancy and granting possession was issued, but the tenants paid the arrears and brought a motion to set aside the termination and lift the writ of possession. The Tenants again failed to make the payments, and the Landlord again served the notice of termination.[24]

In response to the notice of termination, the tenants raised multiple arguments. One such argument was that the tenants were entitled to compensation pursuant to section 37 because they had made improvements to the land. The court dismissed the tenants' argument, given that the Tenants had never believed the land upon which they made improvements was their own. Moreover, the court noted that in all the instances where the tenants had defended against the landlord's application for termination, they had never once raised the issue of their possessory title in the property, and at one point, even expressed interest in purchasing the property. Given their lack of requisite belief, the tenants could not succeed in their section 37 claim.[25]

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[21] *Ibid* at para. 2.

[22] *Ibid* at para. 20.

[23] [2000] O.J. No. 2280, [2000] O.T.C. 455.

[24] *Ibid* at para. 24.

[25] *Ibid* at para. 47.

In *Olson v. Olson*[26], the plaintiff advanced several arguments, with the goal of taking ownership over a portion of the land that had been transferred to his brother by their father. One of these arguments was his invocation of section 37(1) to seek compensation for the improvements he had made to the land. The plaintiff claimed that his father verbally gifted him the land, and thus he had an honest belief that his father would transfer him the land. The court found the evidence did not support the plaintiff's allegation that such a gift had been made to him, particularly given the lack of relationship between the plaintiff and his father, and other contradictory facts that did not align with a true honest mistaken belief, and the application of section 37(1) to this case.[27]

Similarly, in the case of *Oro-Medonte (Township) v. Warkentin*[28], there was also no possibility of a genuine or reasonable belief of ownership. In this case, the status and ownership of a concession lot known as the "Promenade" was in dispute.[29]

For eighty years, the Promenade provided enjoyment to local residents, who were the respondents. Many of them held property that abutted the lot. The respondents claimed that they had maintained the Promenade as if it was their own, and that many residents had built docks, stairs, and even boathouses that partially encroached onto the Promenade lands. They claimed that the Township, who was the applicant, was entirely aware of this practice, but was only now bringing the action to resolve the ownership of the Promenade in the Township's favour. In opposition, the Township's position was that it has always clearly owned the land in question, and sought a declaration of that.

The respondents sought a lien for the value added by the installations that had been built on the Promenade. However, the court found that the respondents' claim under section 37 could not succeed because the "honest and genuine belief" factor in terms of holding title "involves proof of some reasonable basis for the belief and whether or not due diligence was exercised by the claimant.[30] Here, was not even a remote chance that title was held by the local residents, as even a "cursory" look at title would show that the applicant Township was the owner.[31] The respondents' claim under this section was therefore denied.

When Simple Due Diligence Could Have Resolved Mistaken Belief

In contrast to the *Dupuis-Bissonnette* case, in *Byron v. Hilton Beach (Village)*[32], the court declined to grant relief under section 37 due to the fact that a survey would have immediately revealed the true boundary lines. In this case, the applicant, Byron, purchased a lot in the Village of Hilton Beach consisting of a cottage and an out-building, both of which they believed to be within the boundaries of the purchased lot. A subsequent survey revealed that the cottage and the out-building were a part of the Village of Hilton Beach's road allowance, and not the lot. Consequently, the applicant sought relief of sale under section 37. However, the court noted that the remedy of a

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[26] [1996] O.J. No. 3964, 18 O.T.C. 373.

[27] *Ibid* at para. 67.

[28] 2013 ONSC 1416.

[29] *Ibid* at para. 1.

[30] *Ibid* at para. 159.

[31] *Ibid*.

[32] [2000] O.J. No. 50, 94 A.C.W.S. (3d) 178.

forced sale is a drastic one, and not one applicable in the present case given that at the time of the purchase, Byron did not obtain a survey which would have immediately revealed the cottage building was not on his lot. This could not be construed as an honest mistake as contemplated by section 37, since the requisite due diligence was not exercised by the applicant.[33]

Along similar lines, in *Meconi v. Crichton*[34], the plaintiff alleged that he was entitled to a lien on the defendant's land for the value of a hedge planted on the defendant's property by the plaintiff, pursuant to section 37(1). The plaintiff argued that he and his wife had an honest but mistaken belief that they planted the trees on their own property. The court found the plaintiff failed to prove this honest belief. Like in *Byron*, the evidence in this case showed that the plaintiff's family and friends were simply "digging holes and flopping trees in" and made no attempt to locate the lot line. An honest belief must be based on fact or logic, which were absent in the plaintiff's case.[35] For instance, the plaintiff could have easily located the property line based on the surveyor's iron bar placed in the ground near the plaintiff's house, but instead, chose to plant the trees based on convenience. For this reason, plaintiff's section 37(1) claim for compensation failed.

Where the Improvements Are Not "Lasting"

In *McGuire v. Warren*[36], the applicant McGuire brought an application requiring the respondent Warren to remove a deck, walkway and fence encroaching upon the applicant's property. Over the course of a few years, the respondent had constructed these structures without obtaining a work permit. The municipality issued a stop work order and as a result of this order, the respondent had a survey completed. This survey revealed the applicant's encroachments.

The court articulated a three-part test for assessing whether relief ought to be granted under s. 37: (1) the person making the improvements must genuinely believe that he or she owned the land, (2) the improvements made must be of a "lasting" nature, and (3) if the first two parts are met, the court must determine whether it is appropriate to either grant a lien on the land for the value of the improvements, or to transfer the lands to person who made the improvements for compensation.[37]

In this case, the respondent could not meet any part of the test, particularly because the respondent had recently purchased her property and received a reference plan from her lawyer clearly setting out the boundaries of the property and the structures located thereon.[38] The respondent also failed to acquire the required work permits before beginning the work on the property, suggesting that either she deliberately did not obtain the permits knowing she would not be able to legally construct the improvements she sought, or at best, was wilfully blind for not referring to the plan in her possession. In addition, the respondent's improvements were not lasting because the deck, gravel walk, and lattice fence were not permanent structures that were incapable of being moved. As such, the applicant's request for relief was granted, and an order compelling the removal of the encroaching improvements was granted.

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[33] *Ibid* at para. 6.

[34] [2000] O.J. No. 2457, 35 R.P.R. (3d) 12.

[35] *Ibid* at para. 23.

[36] 2006 CanLII 23923 (ON SC), 46 R.P.R. (4th) 113.

[37] *Ibid* at para. 7.

[38] *Ibid* at paras. 8 and 9.

The permanence of a disputed improvement was also a central consideration in *Wigle v. Vanderkruk* (2005)[39], wherein the defendant had constructed a polyhouse on his neighbour's property. In its analysis, the court stated that the standard for "lasting improvements" requires some level of permanence to the construction. In this case, the defendant's own witness testified that polyhouses are temporary structures, and the defendant himself testified that polyhouses could be removed and erected elsewhere, albeit with some difficulty.[40] On this basis, in addition to the fact that the defendant did not have a *bona fide* belief that the disputed land was his, the court found that section 37(1) was not available to the defendant.[41]

Routine Care and Maintenance Fail to Establish Reasonable Belief in Ownership

In *Halton Hills (Town) v. Row Estate*[42], which only contains a brief discussion of section 37, the court stated that the Town of Halton Hills could not have been said to have a reasonable basis for its belief in ownership of the subject lands by merely undertaking one of the incidents of ownership, being routine care and maintenance.

Owners of Property Cannot Claim Benefit of Section 37

The factual background of *Zegil v. Opie* (1997)[43] involved a couple who held property as joint tenants, and subsequently had a falling out. Zegil, the respondent in this appeal, had attempted to impose a lien on the appellant Opie's portion of the property for the improvements he made upon it. However, given that the respondent knew full well that he had gifted a half interest in the property to the appellant at the time that he made the improvements, the court found that the respondent had in fact deceived himself into believing the appellant had no interest in the property at the time of construction. The court ruled that a party cannot rely on their own self-deception to deprive another of that to which they are legally entitled, and refused to grant the requested relief. This case is also notable for the court's confirmation of the principle that an owner or part-owner of a property cannot claim the benefit of section 37.[44]

Claims of Predecessor Interest in Land

In *Szymanski v. Alaimo*[45] the respondent, Alaimo, had recently purchased the disputed property in a tax sale, and subsequently destroyed a set of pillars located on the property. The applicant, who owned the neighbouring property, advanced various arguments claiming title to the land on which the pillars once stood, including the fact that the applicant's predecessors in title had allegedly acquired possessory title to the land before it was placed onto Land Titles Absolute. As such, the applicant claimed that pursuant to section 37, she was entitled to retain the encroached land upon which pillars were built. On the other hand, the respondent submitted that the pillars were entirely on her property, and entitling her to remove them, and that even if the pillars existed when the

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[39] [2005] O.J. No. 3032 ["***Wigle***"].

[40] *Ibid* at para. 88.

[41] *Ibid* at para. 89.

[42] [1993] O.J. No. 1222, 41 A.C.W.S. (3d) 185.

[43] [1997] O.J. No. 2085, 28 R.F.L. (4th) 405.

[44] *Ibid* at para. 6.

[45] 2016 ONSC 2527, aff'd on appeal.

property was placed in Land Titles Absolute in 1966, once the property was placed in Land Titles Absolute, any possibility of possessory title was extinguished.[46]

In analyzing the applicant's section 37 claim, the court found that the property could only have been placed in Land Titles Absolute if adjoining owners were given notice and an opportunity to advance any claims. It further found that there was "no evidence that the applicant's predecessor in title advanced any claim, or if he did, that any such claim was recognized by the Director of Titles".[47] As such, there was no possibility that any possessory interest may have been held by the applicant's predecessors in title or the applicant. There was also no evidence to establish the applicant's belief that the land upon which the pillars once stood actually belonged to her. As such, the court also rejected any application of section 37 in this case.[48]

[46] *Ibid* at para. 48.

[47] *Ibid* at para. 64.

[48] *Ibid* at para. 64.