NOVA SCOTIA COURT OF APPEAL
Citation: ***3021386 Nova Scotia Ltd. v. Barrington (Municipality)***,
2015 NSCA 30

Date: 20150325
Docket: CA 424407
Registry: Halifax

Between:

3021386 Nova Scotia Ltd, a corporation

Appellant

v.

Municipality of the District of Barrington, a corporation

Respondent

Judges:	Oland, Hamilton, Fichaud JJ.A.
Appeal Heard:	January 20, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $3,500.00 including disbursements, per reasons for judgment of Hamilton, J.A.; Oland and Fichaud, JJ.A. concurring
Counsel:	Christopher I. Robinson and Eric Slone, for the appellant Kevin C. MacDonald, for the respondent

Reasons for judgment:

Background

[1] The appellant, 3021386 Nova Scotia Ltd, appeals the decision of Justice Pierre L. Muise, dismissing its application for a grant of an implied easement to draw water from a well located on the respondent's land. The respondent is the Municipality of the District of Barrington.

[2] The Municipality owned land containing a junior high school building, a senior high school building, an annex building, a soccer field, and three wells: the "Courtyard Well", the "Soccer Field Well" and the "Annex Well". In October 2006, it issued a Request for Proposals with respect to that portion of its land containing the two school buildings, the annex building, the Courtyard Well and the Annex Well. The Request for Proposals indicated the senior high school building was serviced by the Courtyard Well.

[3] The appellant's president, Kenneth B. Anthony, caused a proposal to be made to purchase this portion of land from the Municipality for $25,001, demolish the junior high school building and renovate the senior high school building for residential and commercial use. It was accepted on or about November 14, 2006.

[4] At that time, both parties believed only the Courtyard Well supplied water to the two school buildings. Neither knew that the pipes that conveyed water from the Courtyard Well to the senior high school building passed through the junior high school building.

[5] An Agreement of Purchase and Sale was signed by Mr. Anthony on November 30, 2006.

[6] Sometime prior to December 5, 2006, John Hogg, Supervisor of Property Services for the Tri-County Regional School Board (not a party), told Mr. Anthony that the Soccer Field Well, on the parcel of land retained by the Municipality, also supplied water to the schools. The judge's findings indicate he accepted Mr. Anthony's testimony during cross-examination, that he understood Mr. Hogg to mean that the Soccer Field Well had been a backup source of water to the senior high school building and that Mr. Anthony did not know if the Soccer Field Well was still hooked up to it. On December 5, 2006, Mr. Anthony asked the

Municipality if he could continue to use water from the Soccer Field Well for the senior high school building. On January 9, 2007, the Municipality refused.

[7] Commencing in December, 2006, the appellant caused the junior high school building to be demolished, unknowingly destroying the underground pipe system that conducted water from the Courtyard Well, through the junior high school building, to the senior high school building. This was not immediately known to the parties as the valve in the senior high school building that controlled the water inflow from the Courtyard Well had been turned off in the Spring of 2006 and the valve that controlled the water inflow from the Soccer Field Well was open, thus providing water to the senior high school building.

[8] The purchase and sale closed February 16, 2007.

[9] In June 2009, the appellant applied to the Royal Bank of Canada ("RBC") for a mortgage. It was told it would not be given a mortgage unless it had a water supply other than the Courtyard Well, because of the proximity of the Courtyard Well to contaminated soil that the appellant had discovered on its land.

[10] Consequently, the appellant dug a well which turned out to have a high iron content. Nevertheless, RBC gave the appellant a mortgage.

[11] The appellant renovated the senior high school building, creating a mixed residential and commercial rental complex, with 28 residential apartments and seven commercial units.

[12] In July 2009, Mr. Anthony asked his plumber to determine where the water in the senior high school building was coming from. The plumber determined it was coming from the Soccer Field Well by putting Javex tablets in that well. On learning this, Mr. Anthony again sought permission from the Municipality to use water from the Soccer Field Well, which was again denied.

[13] In May 2012, the Municipality told the appellant it intended to disconnect the water supply from the Soccer Field Well to the renovated senior high school building. On July 11, 2012, the appellant commenced the application that gave rise to the judge's decision.

[14] The Municipality agreed to continue to allow the appellant to use water from the Soccer Field Well during this litigation.

Judge's Reasons

[15] In his reasons, the judge sets out the background and finds facts. He extensively reviews the law concerning an implied grant of easement, including:

> **OVERVIEW OF TEST FOR IMPLIED GRANT OF EASEMENT**
>
> [17] *Anger & Honsberger*, "Law of Real Property, Third Edition" (Toronto: Thompson Reuters Canada Limited, 2012), at pages 17-9 and 17-10 states:
>
> > "When land owned by one person is divided and part of the land conveyed to another, even if there are no words in the instrument expressly creating an easement, a court will imply that the new owner was granted easements of necessity and any continuous and apparent easements which existed as quasi-easements during unity of ownership. Thus, the implied grant will render the retained lands servient and the newly acquired portion dominant.
> >
> > …
> >
> > In order for a quasi-easement which was exercised during unity of ownership to become an easement by implication of law, the right claimed must meet certain criteria:
> >
> > (a) it must be necessary to the reasonable enjoyment of the part granted;
> >
> > (b) it must have been used by the owner of the entirety for the benefit of the part granted up to and at the time of the grant; and
> >
> > (c) it must have been apparent at the time the land for which the easement is claimed was acquired.
> >
> > For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection."
>
> …
>
> [25] It is clear from all of the authorities that the Applicant must establish all three criteria. If the Applicant fails to establish one criterion, its claim must fail.
>
> …
>
> [31] Therefore, clearly, the Applicant is not required to establish that, without the easement, it could not use or enjoy the property at all.

[16] The judge sets out the appellant's arguments with respect to the first criterion of the test, that the water supply from the Soccer Field Well must be necessary to the reasonable enjoyment of the granted land:

> [42] The Applicant submits, in my view correctly, that a supply of potable water is necessary to the reasonable enjoyment of the residential development property in question.
>
> [43] It further submits that there are no existing alternative supplies of potable drinking water located on the property purchased, and, creating an alternate safe well would involve considerable inconvenience.
>
> [44] There are three existing wells on the property. One is a well referred to as the Mowatt Well which the Applicant had drilled to satisfy the lending requirements of the Royal Bank of Canada, which loan was obtained for the purposes of developing the property. That well was never hooked up to the former Senior High School and has 30 times the allowable level of iron. A second well is a dug well referred to as the School Board or Annex Well. It is located well over 150 feet from the former Senior High School. It was never hooked up to it. Mr. Hogg testified that he thought the well was "bad". The third well is the Courtyard Well. I will address whether, in my view, that well is an alternative making the use of the Soccer Field Well not necessary to the reasonable enjoyment of the property.
>
> [45] The Applicant argues that it is not an appropriate alternative because it was never directly piped to the former Senior High School and is now no longer piped even through the former Junior High School. It further argues that there is a serious question regarding the safety of the water in the Courtyard Well as it has been shown to contain hydrocarbons. [Justice Muise's underlining]

[17] The judge did not accept the appellant's argument that the Courtyard Well was not an appropriate alternative source of water to the senior high school building because the supply of water from the Courtyard Well had been disrupted when the appellant had the junior high school building demolished. He found the appellant was responsible for this disruption and accepted Mr. Hogg's evidence, that before this disruption, all that was required to resume drawing water from the Courtyard Well to the senior high school building was to reopen the valve.

[18] Nor did the judge accept the appellant's argument that the Courtyard Well was not an appropriate alternative source of water for the senior high school building because its water was unsafe. He carefully reviewed the evidence of the tests conducted on the Courtyard Well water and concluded that the appellant had not proved the first criterion of the test, that an implied easement to draw water from the Soccer Field Well was necessary to the reasonable enjoyment of the parcel of land it purchased:

> [61] Based on these points, in my view, more likely than not, the Courtyard Well is a safe supply of drinking water.
>
> [62] In contrast, the Soccer Field Well was never tested for the presence of hydrocarbons; and, in April and May of 2012, it tested positive for the presence of coliforms, resulting in "boil orders". On the west side of the building, which is the side on which the Soccer Field Well is located, there is an area which, based on the concrete pad and metal strapping in place, appeared to be the area where there was once a buried fuel tank. Robichaud's Pumping Service (1993) Ltd. collected a soil sample in that area and analysed it. The results of the analysis indicated the presence of hydrocarbons at concentrations exceeding the applicable Guidelines. Even though the Soccer Field Well appears to be further away from that contaminated area than the Courtyard Well is from the excavated site on the east side of the building, there is no evidence regarding the direction of ground water flow on the west side of the building. Therefore, in my view, it has not been established, on the evidence, that the Soccer Field Well is any better or safer potable supply than the Courtyard Well.
>
> [63] Even if I were to consider the level of inconvenience required now to re-connect the Courtyard Well to the former Senior High School Building, I would not be of the view that it would amount to substantial inconvenience. All the Applicant would have to do is dig a new trench through the paved area and run a new pipe from the Courtyard Well to the former High School building. From the figures in the Environmental Assessment Report, the Courtyard Well only appears to be about 125 feet from the area of the building where the pipes enter, and about 80 feet to the nearest part of the building. In my view, the cost of installing a pipe would be nowhere near as substantial as the cost of making the changes that would have been required in *Trizec* [*Canada Lands Company CLC Ltd. v Trizechahn Office Properties Ltd.*, 2000 ABQB 166] and in *Germain* [*Germain v Brar*, 2010 ABQB 530]. It would be more akin to the cost of running a new drain, as in *Tanner v. Hiseler*, [(1898), 40 N.S.R. 250] and likely somewhat less extensive than the cost of moving a driveway, as in *English v. Wood* [(1981), 46 N.S.R. (2d) 441].
>
> [64] Based on the foregoing, I am of the view that the Applicant Numbered Company has failed to establish that an implied easement to draw water from the Soccer Field Well is necessary to the reasonable enjoyment of the property purchased from the Municipality.

[19] Although this conclusion was sufficient to dismiss the appellant's application, the judge went on to consider the second and third criteria. He found the second criterion of the test, that the Soccer Field Well was used by the Municipality to supply water to the senior high school building at the time of conveyance was met, even though unknown to the parties at the time:

> [67] … Consequently, I am of the view that the Soccer Field Well quasi-easement was being used by the Municipality at the time of the conveyance.

[20] He found the third criterion of the test, that it must have been apparent at the time of conveyance that the Soccer Field Well was supplying water to the senior high school building, was not met:

> [68] *Anger & Honsberger*, at page 17-10, states:
>
> > "For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection."
>
> [69] At footnote 19, the following examples of apparent easements are extracted from various case references:
>
> > "The presence of pipes running under the surface of and emptying into a gully on the quasi-servient tenement"; "a stovepipe passing from the quasi-dominant tenement through the quasi-servient tenement to a chimney"; "offensive odours emanating from the quasi-dominant tenement over land of the quasi-servient tenement"; and, "the position of windows of a house".
>
> [70] These appear to be situations where the easement was reasonably detectable by simply being aware of the sights, sounds and smells present on the property, without introducing any testing procedure.
>
> [71] The Applicant argues that a reasonable inspection includes the placement of Javex tablets in the Soccer Field Well to see if the smell of Javex can be detected in the water emanating from the taps. Once that test was conducted it became apparent that the water was being drawn from the Soccer Field Well.
>
> …
>
> [74] In the case at hand, it is undisputed that neither the Municipality, nor the Applicant, knew, at the time [of] the conveyance, that it was the Soccer Field Well which was open to having water drawn from it to supply the former Senior High School. Both were under the understanding that it was the Courtyard Well that was open to having water drawn from it to supply that building. It was not until July of 2009 that that was discovered by Mr. Anthony and conveyed to the Municipality through Mr. Holland.
>
> …
>
> [76] In my view, up to July of 2009, and it was not apparent to either party that the Soccer Field Well was open to having water drawn from it into the building. Until then, it was not apparent to either party that, post-conveyance, water was actually being drawn from the Soccer Field Well.

[77] In my view, in those circumstances, it would be unfair to the Municipality to impose upon it the burden of an implied easement to use the Soccer Field Well.

…

[79] *Anger & Honsberger*, at page 17-3, states:

> "The existence of an apparent easement, such as a water course, is shown by some sign. Where an easement is non-apparent, such as a right to draw water, there is no external sign of its existence."

[80] This suggests that, in many cases, because water pipes are almost always buried, the right to draw water will be non-apparent.

[81] In the case at hand, even Mr. Finley, who is a hydrogeologist, took samples from the reservoir in the former Senior High School thinking that the water in that reservoir was being drawn from the Courtyard Well. Therefore, it obviously was not apparent to him that the water was being drawn from the Soccer Field Well, at that time, which was in February of 2008.

[82] There is no evidence of the plumbing or piping arrangement inside the building, nor whether it is complex. There was only evidence that all that was needed to commence drawing water from the Courtyard Well was to turn on a valve. There was evidence of a pipe from the Courtyard Well coming into the old Senior High School from the direction of the old Junior High School and the Courtyard Well. There was no evidence of where the pipe from the Soccer Field Well entered the building.

[83] When a person purchases a building, it is reasonable to expect that that person will test the water inside the building. It is reasonable to expect that that person will examine the plumbing in the building. However, in my view, it is not reasonable to expect that person to conduct a trace test to see which well is having water drawn from it, unless there is a concern at the time of purchase in relation to which well is being used. In the case at hand, there is no evidence of concern over that at the time of purchase. Both parties understood that water was being drawn from the Courtyard Well. The Applicant was content with that arrangement. It only wanted access to the Soccer Field Well as an additional source of water.

[84] Consequently, in my view, in the circumstances of the case at hand, a trace test, using Javex tablets placed in the well, was not part of what constituted a reasonable inspection at the time of conveyance. That is the time that is relevant to the assessment of whether the implied easement sought was apparent**:** *Hart v. McMullen*, [[1900] 32 N.S.R. 340; leave to appeal denied 30 S.C.R. 245] paragraphs 9 and 10.

[85] In addition, in my view, it would not be reasonable to have expected the Municipality itself to conduct such a trace test at a time when all parties understood the Courtyard Well was feeding the school.

> [86] It would be unfair to saddle the Municipality with an easement that was not apparent to either party at the time of conveyance. It would be giving the Numbered Company something it did not expect it was getting and forcing from the Municipality, something it did not think it was giving, and had no reason to so think.
>
> [87] In light of the foregoing, I'm of the view that the Applicant has failed to establish that the implied easement it seeks was apparent at the time of conveyance.

[21] The appellant argues that the judge's decision should be overturned because (1) he erred on the basis of the evidence before him and (2) the fresh evidence it seeks to introduce, indicating the Courtyard Well was not accepted by the Nova Scotia Department of Environment and Labour for registration as a public drinking water supply, confirms the Courtyard Well is not an appropriate alternative source of water for the senior high school building so the first criterion of the test is met.

Fresh Evidence

[22] I will first deal with the appellant's application for the admission of fresh evidence.

[23] The fresh evidence the appellant seeks to have admitted is the affidavit of Mr. Anthony sworn October 14, 2014, with the Offsite Inspection report of Kevin Turner dated May 15, 2014 attached. In his affidavit Mr. Anthony swears:

> 4. From November 2006 when I discussed the water supply to the former Barrington Municipal High School Property (the "Property") with John Hogg, the then operations manager for the Tri-County Regional School Board (the "School Board"), until the Appellant's plumber tested the water supply to the Property in July 2009, it was my belief that the well in the front of the Property (the "Courtyard Well") was supplying the water to the Property.
> 5. In July 2009 as a result of tests done by the Appellant's plumber, I learned that it was the well in the rear of the Property (the "Soccer Field Well") that was in fact supplying water to the Property.
> 6. Based on my discussions with Mr. Hogg it was my understanding that the Courtyard Well had been, for many years, supplying water to the Property, and therefore I presumed that the Municipality of the District of Barrington (the Municipality") or the School Board had previously registered the Courtyard Well as a public drinking water supply.
> 7. Following the January 2014 release of the decision of Justice Muise in this matter which indicated the Courtyard Well should be used as a water supply,

> I contacted Kevin Turner, an Inspector Specialist with the Nova Scotia Department of Environment and Labour ("NSDEL"), regarding the Courtyard Well.
>
> 8. As a result of my discussion with Mr. Turner I learned that the Courtyard Well was not registered as a public drinking water supply by either the School Board or the Municipality.
>
> 9. Following my discussion with Mr. Turner which took place in late February or early March 2014, I applied to the NSDEL to have the Courtyard Well registered as a public drinking water supply.
>
> 10. In response to my application I received an Inspection Report dated May 15, 2014 from the NSDEL (the "Report") which indicated that the Courtyard Well was not accepted for registration as a drinking water supply.
>
> 11. The Report indicated that the well was located in close proximity to soil contaminated by hydrocarbons and therefore the NSDEL would not accept its registration.

[24] The law on fresh evidence is set out in **Armoyan v. Armoyan**, 2013 NSCA 99, leave to appeal denied by the Supreme Court of Canada on February 6, 2014:

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, paras 77-79, leave to appeal denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services)*, 2012 NSCA 106, para 30.

[25] It is the first and fourth considerations in the **Palmer** test that concern me here.

[26] The first consideration is whether the appellant exercised due diligence, in connection with the hearing before the judge, with respect to the Province's refusal to register the Courtyard Well as a public drinking water supply. The appellant says it did. It says there was no lack of due diligence because Mr. Turner's report could not have been adduced at the hearing because it was not in existence at that time. It says its failure to initiate the process that resulted in the report prior to the hearing was not a lack of due diligence because it did not intend to use the Courtyard Well for water at that time.

[27] I am satisfied the appellant did not exercise due diligence. Paragraph 6 of Mr. Anthony's affidavit indicates that prior to the hearing, he presumed such registration had been obtained, which indicates he knew of this requirement. The appellant's main argument before the judge on the issue of necessity, the first criterion of the test for an implied grant of easement, was that the Courtyard Well was not an adequate alternative to the Soccer Field Well. It was incumbent on the appellant to make all relevant inquiries with respect to this argument prior to the hearing, which the proposed fresh evidence suggests it failed to do. Waiting until after the judge's decision to determine if the Courtyard Well was registered as a public drinking water supply suggests a tactical decision. Trial by installment is to be discouraged.

[28] The fourth **Palmer** consideration is whether the fresh evidence could reasonably have affected the result. The appellant argues this evidence could reasonably have affected the judge's decision because it indicates the Courtyard Well is not an appropriate alternative source of water for the senior high school building.

[29] I agree that Mr. Turner's report could reasonably have affected the judge's determination with respect to the first criterion in the test for an implied grant of easement, that of necessity. Having said that, I am not satisfied it is determinative of the necessity criterion. Because Mr. Turner was not offered as a deponent for the fresh evidence, the Court has no opportunity to learn through his cross-examination, what information he relied on in issuing his report, what precautionary conditions or alternative measures would have sufficed to satisfy the concern about proximity to hydrocarbon contaminants or whether his decision is final or one that can be appealed.

[30] More importantly perhaps, I do not agree that Mr. Turner's report could reasonably have affected the judge's final decision. All three criteria of the test must be met in order for an implied grant of easement to be ordered. As I will discuss later in my reasons, I am satisfied the judge did not err in finding that the third criterion, apparency, was not met.

[31] Being satisfied that Mr. Turner's report could have been available and introduced at the hearing by the exercise of due diligence by the appellant and that it could not reasonably be expected to affect the result as regards the third criterion of the test, I would not admit the fresh evidence.

Issues

[32] To dispose of this appeal, it is only necessary to consider two issues:

1. Did the judge err by applying the wrong test when determining what the appellant had to prove to obtain a grant of implied easement?
2. Did the judge err in finding the use of the Soccer Field Well as a water supply for the senior high school building was not apparent at the time of conveyance?

Standard of Review

[33] The parties agree that the standard of review with respect to the first issue is correctness. If the judge applied the wrong test, he erred in law. The second issue is one of mixed law and fact, without an extricable issue of law. The standard of review is palpable and overriding error.

Analysis

[34] The judge properly sets out the test for determining an implied grant of easement:

> [17] *Anger & Honsberger*, "Law of Real Property, Third Edition" (Toronto: Thompson Reuters Canada Limited, 2012), at pages 17-9 and 17-10 states:
>
> > "When land owned by one person is divided and part of the land conveyed to another, even if there are no words in the instrument expressly creating an easement, a court will imply that the new owner was granted easements of necessity and any continuous and apparent easements which existed as quasi-easements during unity of ownership. Thus, the implied grant will render the retained lands survient and the newly acquired portion dominant.
> >
> > ….
> >
> > In order for a quasi-easement which was exercised during unity of ownership to become an easement by implication of law, the right claimed must meet certain criteria:
> >
> > (a) it must be necessary to the reasonable enjoyment of the part granted;
> >
> > (b) it must have been used by the owner of the entirety for the benefit of the part granted up to and at the time of the grant; and

> (c) it must have been apparent at the time the land for which the easement is claimed was acquired.
>
> For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection."

[35] The appellant agrees with this but argues that the judge then errs by confusing the test for an implied **grant** of easement with that for an implied **reservation** of easement, which was the issue in *Germain v. Brar*, 2010 ABQB 530, when he states:

> [26] As a further general comment, the Court "should be loathe to imply" easements: *Germain v. Brar*, 2010 A.B.Q.B. 530.

[36] The test for determining an implied **reservation** of easement is more restrictive than that for an implied **grant** of easement as set out in *Anger & Honsberger*, 17-10 and 17-11:

> An implied reservation of an easement may occur where land is severed and the quasi-dominant land is retained. Because of the rules that a grantor cannot derogate from their grant and that a grant is always strictly construed in favour of the grantee, courts are unwilling to recognize easements which have not been expressly reserved in the instrument conveying the quasi-servient land. …
>
> Because courts are more stringent where the owner of the retained land, rather than the owner of the newly acquired land, is arguing that an easement should be implied on severance, it seems that continuous and apparent quasi-easements cannot be reserved by implication unless such an easement also meets the test of necessity.

See also **St. Mary's Milling Co. v. Town of St. Mary's** (1916), 32 D.L.R. 105, 37 O.L.R. 546 (CA).

[37] Despite the judge's reference to courts being loathe to imply an easement, the whole of his reasons clearly indicate he applied the correct test applicable to grants of easements without any increased burden when he determined what the appellant had to prove in order to obtain a grant of implied easement. He made no error.

[38] The second issue is whether the judge erred in finding the use of the Soccer Field Well as a water supply for the senior high school building was not apparent

at the time of conveyance. If the judge did not err in this finding, the appeal must fail.

[39] The judge found that it was not apparent to either party until well after the February 2007 closing that the Soccer Field Well was open to or actually supplying water to the senior high school building:

> [76] In my view, up to July of 2009, it was not apparent to either party that the Soccer Field Well was open to having water drawn from it into the building. Until then, it was not apparent to either party that, post-conveyance, water was actually being drawn from the Soccer Field Well.

[40] The appellant says the judge made a palpable and overriding error in this finding in light of the evidence that Mr. Hogg informed Mr. Anthony in November/December 2006 that water had been supplied to the senior high school building by both wells and that Mr. Anthony conveyed this information to the Municipality. It says this evidence makes it clear both parties knew prior to the conveyance, and therefore at the time of the conveyance, that both wells were supplying water to the high school building.

[41] What the appellant does not mention is the other evidence that was before the judge, which he was required to consider in reaching his conclusion. This evidence is referred to in the Municipality's factum:

> [112] The following evidence was before His Lordship:
>
> - On December 5, 2006 when Ken Anthony emailed Mr. Holland seeking permission to use the Soccer Field Well, Mr. Anthony understood that the courtyard well supplied all the water. As he planned to develop the property, Mr. Anthony thought it would be beneficial to have another water supply available if needed. [Anthony Affidavit, Appeal Book, Part II, Vol. 1 of 3, p. 207, para.8]
> - Prior to arranging for the plumber to place javex tablets in the Soccer Field Well in July, 2009, it was Mr. Anthony's understanding that the water in the development had been supplied by the courtyard well. [Anthony Affidavit, Appeal Book, p. 207, paras. 18-19]
> - During a telephone discussion with Mr. Holland on July 22, 2009, Mr. Anthony believed that Mr. Holland was as surprised as Mr. Anthony to learn that the Soccer Field Well had been supplying the development with water and not the courtyard well. [Anthony Affidavit, Appeal Book, Part II, Vol. 1 of 3, p. 207, para. 21]
> - **On cross-examination, Mr. Anthony testified that, based on his discussion with Mr. Hogg, Mr. Anthony understood that the**

> **courtyard well was servicing the senior high school and the junior high school. It was Mr. Anthony's understanding that the Soccer Field Well was a back-up. Mr. Anthony testified that he did not even know if the Soccer Field Well was hooked up.** [Appeal Book, Part II, Vol. 2 of 3, p. 687, lines 13-21; p. 688, lines 1-7]
>
> - On cross-examination, Russell Finley, the hydrologist retained by the Appellant was questioned about the following statement in the report attached as Exhibit "A" to Mr. Finley's Affidavit sworn on June 14, 2013 [Affidavit of Russell Finley, Appeal Book, Part II, Vol. 1 of 3, p. 114] "although the Municipality provides septic services, potable water is obtained from a drilled well located within the courtyard." [Affidavit of Russell Finley, Appeal Book, Part II, Vol. 1 of 3, p. 125]. Mr. Finley confirmed that was his understanding at the time and he obtained that understanding from Mr. Anthony. It was not Mr. Finley's recollection that Mr. Anthony mentioned the Soccer Field Well to him. [Appeal Book, Part II, Vol. 2 of 3, p. 524, lines 11-20]
> - Brian Holland is the Municipal Clerk Treasurer for the Respondent and was cross-examined during the Application. Mr. Holland testified that he was not aware that the Soccer Field Well was providing water to the courtyard building. [Appeal Book, Part II, Vol. 2 of 3, p. 737, lines 16-21; p. 738, lines 1-21; p. 739, lines 1-8; p. 740, lines 16-18; p. 741, lines 8-12]
>
> [Emphasis added]

[42] It was for the judge to resolve any conflict or ambiguity in the evidence concerning what the parties knew at the time of conveyance about the supply of water to the senior high school building from the Soccer Field Well. There is evidence supporting the conclusion he reached. He did not make a palpable and overriding error in this finding.

[43] Accordingly, I would dismiss the appeal and order the appellant to forthwith pay costs, including disbursements, in the amount of $3,500.00 to the respondent.

Hamilton, J.A.

Concurred in: Oland, J.A.

Fichaud, J.A.