NOVA SCOTIA COURT OF APPEAL

Citation: *Grant v. Halifax Regional Water Commission*, 2021 NSCA 22

Date: 20210226
Docket: CA 495137
Registry: Halifax

Between:

Kirby Eileen Grant

Appellant

v.

Halifax Regional Water Commission

Respondent

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	November 12, 2020, in Halifax, Nova Scotia
Subject:	Prescriptive Easement; *Land Registration Act*, S.N.S. 2001 c. 6, ss. 74 and 75; Agency
Summary:	The appellant, Kirby Eileen Grant, is the owner of 7 Hume Street, Dartmouth, Nova Scotia. The respondent, Halifax Regional Water Commission, is the owner of an 8 inch diameter storm water pipe, approximately 150 feet in length, running from Hume Street across the entire length of 7 Hume Street. An easement was never registered against 7 Hume Street for the installation of the storm water pipe. Ms. Grant sought to sell the property, but the potential purchaser could not obtain the necessary permits because Halifax Water claimed a 6 meter easement over the top of the pipe. Ms. Grant applied for an order requiring Halifax Water to remove the pipe, damages, and temporary and permanent injunctions against further trespass.

Halifax Water sought its own declaration that it was entitled to an easement over the property for the purposes of providing storm water services.

The Application Judge dismissed Ms. Grant's application, but allowed the application of Halifax Water and granted it a 5 foot easement over the top of the pipe. Although the Application Judge found that Halifax Water was the agent of Halifax Regional Municipality, the owner of Hume Street and therefore had established a prescriptive easement over the property under the operation of s. 74(2) and 75(1) of the *LRA* which allows the owner of adjacent lands to claim an easement by prescription over their neighbours. Owner is defined as including an agent empowered to act on behalf of an owner.

He did not accept that Halifax Water had established 20 years of open, notorious and continuous use prior to the land being registered under the *LRA* and therefore it could not rely on s. 74(1) of the *LRA*.

Ms. Grant appealed arguing the Application Judge erred in his interpretation of the *LRA* and in failing to award her damages for trespass and the loss of the sale of the property.

Halifax Water cross-appealed arguing that the evidence of a witness, whose credibility was rejected by the Application Judge, had established 20 years of open, notorious and continuous possession prior to the lands being registered under the *LRA*.

Issues: (1) Did the Application Judge err in his interpretation of the *LRA*?
(2) Had Halifax Water established that it had open, notorious and continuous possession of the property prior to it being registered under of the *LRA* in 2009?

Result: The appeal was allowed and the cross-appeal dismissed. The Application Judge erred in finding that Halifax Water was the agent for HRM and further erred in finding that even if it was

an agent of HRM that the application of ss. 74(2) and 75(1) of the *LRA* established a prescriptive easement.

Section 75(1) only allows adjacent land owners to assert a right to easement over their neighbours land. HRM asserted no such easement. Section 75(1) does not permit the agent of an adjacent owner to acquire a prescriptive easement in its own right.

Halifax Water was ordered to remove the pipe within 90 days of the date of the decision, Ms. Grant was awarded $12,000 costs on the original application and $3,000 costs on the appeal.

The issue of damages was remitted to the Application Judge for determination on the basis of the evidence submitted on the original application unless the parties agree otherwise or the Application Judge allows. Any dispute over the removal of the pipe was also remitted to the Application Judge.

If Halifax Water fails to remove the pipe within 90 days of the date of the decision, Ms. Grant can do so and claim the costs of the removal and remediation of land from Halifax Water.

The Application Judge committed no error in rejecting the evidence of the witness for Halifax Water who testified the storm water pipe was in place for 20 years prior to the land being registered under the *LRA.*

NOVA SCOTIA COURT OF APPEAL

Citation: *Grant v. Halifax Regional Water Commission*, 2021 NSCA 22

Date: 20210226
Docket: CA 495137
Registry: Halifax

Between:

Kirby Eileen Grant

Appellant

v.

Halifax Regional Water Commission

Respondent

Judges:	Farrar, Hamilton and Beaton, JJ.A.
Appeal Heard:	November 12, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Farrar, J.A.; Hamilton and Beaton, JJ.A. concurring
Counsel:	Kirby Eileen Grant, appellant in person Richard W. Norman and Lisa Delaney, for the respondent

Reasons for judgment:

Introduction

[1] The appellant, Kirby Eileen Grant, is the owner of 7 Hume Street, Dartmouth. The respondent, Halifax Regional Water Commission (Halifax Water), provides water, waste water and storm water services to customers living in the Halifax Regional Municipality (HRM).

[2] Halifax Water is the owner of an eight inch diameter storm water pipe, approximately 150 feet in length, running from Hume Street, across the entire length of 7 Hume Street. Any storm water collected in the pipe empties into Lake Banook.

[3] In 2017, Ms. Grant decided to sell 7 Hume Street. The prospective buyer wished to develop the lot. Halifax Water took the position that it had an unrecorded six meter easement over the pipe.

[4] As a result, the potential buyer was not able to obtain the necessary approvals to develop the land and the sale fell through.

[5] By Notice of Application in Court Ms. Grant sought damages; an order requiring the Halifax Water to remove the pipe; and temporary and permanent injunctions against trespass.

[6] Halifax Water filed a Notice of Contest and Notice of Respondent's Claim to Ms. Grant's application seeking a declaration that it had an easement over 7 Hume Street for the purposes of providing storm water services.

[7] The matter was heard before Justice Jamie L. Chipman on September 5, 2019, and by written reasons dated September 17, 2019 (reported 2019 NSSC 281), the judge dismissed Ms. Grant's application, allowed the claim by Halifax Water, and granted it a five foot easement over the existing pipe.

[8] Ms. Grant appeals and Halifax Water cross-appeals.

[9] For the reasons that follow, I would allow the appeal, dismiss the cross-appeal, and award Ms. Grant costs in the amount of $3,000.00, inclusive of disbursements on this appeal. I would also award costs of $12,000 to Ms. Grant on the application below. Halifax Water, at its cost, shall remove its pipe from 7 Hume Street within 90 days of the date of this decision and remediate any damage

caused by the removal. If the pipe is not removed within 90 days and the parties have not otherwise reached an agreement, Ms. Grant may have it removed and claim the cost of doing so, and any remediation, from Halifax Water.

[10] I would remit the matter to the Application Judge for a determination of any remaining issues of damages arising under Ms. Grant's Notice of Application based on the evidence introduced at the original hearing unless the parties otherwise agree or the Application Judge allows. I would also remit any dispute over the removal of the pipe to the Application Judge.

Background

[11] The property, 7 Hume Street, Dartmouth, is a vacant lot which has been in existence since at least 1948 in its present rectangular configuration of 25 feet wide and 150 feet long.

[12] In 2009, the property was sold to Ms. Grant who, at that time, owned the adjacent property at 5 Hume Street. Just prior to the conveyance, the property was migrated from the Registry of Deeds System to the Land Registration System as required by the *Land Registration Act*, S.N.S. 2001 c. 6. There were no title or interest encumbrances recorded against the property.

[13] At some point, prior to Ms. Grant's ownership, a green polyvinyl chloride drain pipe, 8 inches in diameter, had been installed underground at 7 Hume Street along the length of the boundary line with 9 Hume Street, from a catch basin in the street to Lake Banook.

[14] When the pipe was installed was not a matter of record. The Application Judge found that it was likely installed in 1993 based on some field notes prepared by a City of Dartmouth surveyor in the fall of that year. The notes are dated October 25, 1993, and are titled "Hume Street… location for easement".

[15] In 2007, Halifax Water and HRM entered into a transfer agreement where the responsibility for waste water and storm water was transferred to Halifax Water. Although the pipe is not identified, it would have been among the assets transferred by HRM to Halifax Water.

[16] In 2009, when Ms. Grant purchased the property, the lot was undersized and not capable of being developed. However, later that year, HRM changed the status of undersized lots in Dartmouth to be capable of being developed.

[17] In the fall of 2017, an Agreement of Purchase and Sale was executed for the sale of the property, on conditions, including the ability of the purchaser to obtain a development permit and a building permit for the construction of a house. Halifax Water would have had to approve any building permit.

[18] The purchaser made inquiries to Halifax Water about the pipe in October 2017. Halifax Water claimed it had a 3 metre easement on each side of the pipe.

[19] On November 23, the purchaser advised Halifax Water a recorded easement did not exist on the property, but he was prepared to sign an easement for a pipe running alongside the proposed house.

[20] On February 13, 2018, HRM approved a development permit for the proposed house. The closing date of the sale had been postponed several times and was now scheduled for June 1, 2018. On February 27, 2018, Halifax Water denied the purchaser's building permit application, advising:

> The Halifax Regional Water Commission (HRWC) requires a stormwater easement, 3 meters on each side of the existing stormwater pipe. Permanent structures are not permitted within the easement.
>
> Since the Siting & Grading Plan dated February 23, 2018 shows a permanent structure within the 3 meters of the stormwater pipe the building permit will be **denied** by HRWC. [emphasis in original]

[21] Further discussions took place between Halifax Water and Ms. Grant. In correspondence dated April 4, 2018, Halifax Water's legal counsel acknowledged it did not have an easement over the property:

> To confirm, Halifax Water does have stormwater infrastructure in the ground at 7 Hume Street, in respect of which there is no easement in favour of Halifax Water.

[22] The parties had further discussions, however, Halifax Water did not change its position. It continued to deny the purchaser's building permit based on the proposed location of the house within three meters of the pipe. As a result, the sale of the property was lost.

[23] On July 27, 2018, matters came to a head. In correspondence from Ms. Grant to Halifax Water's legal counsel, she advised Halifax Water it had no legal right to have the pipe on her property; she did not consent to it being there; and it could remove the pipe or pay her compensation:

> Thank you for the response. Unfortunately, it does not provide clarification. The existence of the drainpipe is preventing the development of the lot under the By-law. Halifax Water has no legal right to have the drainpipe on the property and I do not consent to it being there. I see this as a situation where Halifax Water can remove the pipe and deal with draining the street with other infrastructure or where there has been a de facto expropriation.
>
> The prospective purchaser submitted buildings [sic] plans, after receiving an HRM development permit, and Halifax Water would not approve the plans citing the Grading By-law because it needed an area of easement for its pipe. The area required removes the ability to develop the property fullstop. In this circumstance, Halifax Water should be acquiring the area or vacating it.
>
> The application I reference below would be the commencement of legal action, not for a building permit that would be rejected to preserve the land Halifax Water says it requires. This is not a matter of complying with the By-Law by the owner when Halifax Water infrastructure, and it [sic] attendant specifications, precludes development. It is a matter of paying compensation for the use of my property and because that use has taken its development value.
>
> Kindly advise if Halifax Water wishes to negotiate the compensation owing. Thank you for your attention to this matter.

[24] The parties were unable to resolve the matter and, as noted earlier, on January 23, 2019, Ms. Grant filed a Notice of Application in Court and on April 5, 2019, Halifax Water filed a Notice of Contest and Notice of Respondent's Claim claiming a prescriptive easement on the property. On April 12, 2019, Halifax Water filed a Certificate of *Lis Pendens* under the *LRA* certifying that it had commenced action to confirm its interest in 7 Hume Street.

[25] To round out the pleadings, on April 17, 2019, Ms. Grant filed a Notice of Contest of the Respondent's Claim denying that Halifax Water had a prescriptive easement on the property.

[26] Before the Application Judge, Halifax Water argued it had a prescriptive easement over the property. Its position was that it had open, notorious and continuous use of the pipe on the property for 20 years preceding the registration of the property as required by s. 74(1) of the *LRA.*

[27] Alternatively, Halifax Water argued that it had established a prescriptive easement pursuant to ss. 74(2) and 75(1) of the *LRA*, which allows owners of an adjacent parcel of land to claim an easement by prescription over the lands of their neighbours. Halifax Water argued that it was the agent of HRM, the owner of an adjacent parcel, and was therefore entitled to claim an easement pursuant to s. 75(1).

[28] The Application Judge found that Halifax Water had not established an easement pursuant to s. 74(1), but it had a prescriptive easement through the operation of 74(2) and 75. I will discuss these provisions in more detail later in these reasons.

[29] Ms. Grant appeals. She raises a number of grounds of appeal, however, I only need to address one to dispose of the appeal:

> 1) Did the Application Judge err in finding Halifax Water was an agent of HRM, and therefore, had established a prescriptive easement pursuant to s. 75(1) of the *LRA*?

[30] I will comment on the other issues raised in Ms. Grant's Notice of Appeal at the conclusion of these reasons.

[31] In its cross appeal Halifax Water raises one issue:

> 1) Did the Application Judge err in rejecting the evidence of Hume Street resident, Keith Clattenburg and, if so, was a claim for a prescriptive easement made out pursuant to s. 74(1) of the *LRA*?

Standard of Review

> *1) Did the Application Judge err in finding Halifax Water was an agent of HRM, and therefore, had established a prescriptive easement pursuant to s. 75(1) of the LRA?*

[32] Determining whether Halifax Water had established a prescriptive easement involves an interpretation of the *LRA*. Statutory interpretation is a question of law. The standard of review on a question of law is correctness (see *Sparks v. Holland*, 2019 NSCA 3, ¶ 11).

[33] The legal test defining an agency relationship is an extricable question of law and is reviewable on a correctness standard. If the Application Judge articulated the correct legal test, then his application of the test to the evidence is also a question of law and is to be reviewed on a correctness standard. If he identified and applied the test properly his findings on whether there was agency are to be reviewed on a palpable and overriding errors standard (see *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38, ¶ 27).

Notice of Cross-Appeal

[34] With respect to the issue on the Notice of Cross-Appeal – whether the Application Judge erred in rejecting the evidence of Keith Clattenburg, it involves an assessment of witness credibility and reliability and is entitled to deference (*Comeau v. Gregoire*, 2007 NSCA 73, ¶ 7).

Analysis

1) Did the Application Judge err in finding Halifax Water was an agent of HRM, and therefore, had established a prescriptive easement pursuant to s. 75(1) of the LRA?

[35] In my view, the Application Judge made two legal errors, either of which are fatal to his conclusion that Halifax Water had established a prescriptive easement over the property. The first was finding Halifax Water was the agent of HRM and second in his interpretation of s. 75 of the *LRA.*

Halifax Water as agent for HRM

[36] The Application Judge found that Halifax Water was an agent of HRM for the purposes of owning and maintaining the pipe, based on section 6 of the *Halifax Regional Water Commission Act* and a Transfer Agreement between HRM and Halifax Water dated May 18, 2007:

> [35] For the purposes of owning and maintaining the pipe, Halifax Water is an agent of HRM. According to the *Halifax Regional Water Commission Act*, HRM owns Halifax Water, as the *Act* states:
>
> > Owner of business
> >
> > 6 The Regional Municipality is the owner of the business of the Commission for all purposes, including surplus payments as provided for herein and entitlement to the assets of the Commission in the event of dissolution or winding down of the Commission.
>
> [36] Exhibit "H" of Kevin Gray's affidavit contains an agreement between HRM and Halifax Water with respect to the management and ownership of storm-water infrastructure, including the pipe. This agreement establishes that Halifax Water is HRM's agent with respect to ownership and maintenance of the pipe. As HRM's agent, Halifax Water is therefore capable of claiming an interest in the land by way of prescription as an agent of an "owner" of an adjacent parcel under the *LRA*.

[37] He did not explain how s. 6 of the *Halifax Regional Water Commission Act* establishes an agency relationship, nor did he refer to or identify any provision in the Transfer Agreement which would give rise to an agency relationship. With respect, neither the *Halifax Regional Water Commission Act*, nor the Transfer Agreement, create a relationship of agency between HRM and Halifax Water.

[38] The Application Judge's conclusion that Halifax Water is the agent of HRM is simply that: a conclusion. He did not set out the legal test defining an agency relationship, nor did he explain how it arose on the evidence before him.

[39] Agency has been described by Gerald Fridman in *Canadian Agency Law*, 3d ed. (Toronto: LexisNexis Canada Inc., 2017) as follows:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property. (p. 5) [emphasis added]

[40] This description was endorsed by this Court in *Globex Foreign Exchange Corp. v. Launt*, 2011 NSCA 67, ¶ 18.

[41] *Halsbury's Laws of Canada First Edition*, as cited in *Spidell v. LaHave Equipment Ltd*., 2014 NSSC 255, explains there are three essential elements of an agency relationship, and various ways that an agency relationship can come into existence:

> 21 In *Halsbury's Laws of Canada First Edition*, "Agency" paragraph HAY-2 the three essential ingredients of an agency relationship are:
>
> 1. The consent of both the principal and the agent.
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position.
>
> 3. The principal's control of the agent's actions.
>
> And at Agency paragraph HAY -11 the manner in which an agency relationship may be created are set out:
>
> 1. the express or implied consent of principal and agent,
>
> 2. by implication of law from the conduct or situation of the parties or from the necessities of the case,
>
> 3. by subsequent ratification by the principal of the agent's act done on the principal's behalf, whether the person doing the act was an agent exceeding his authority or was a person having no authority to act for the principal at all,

> 4. by estoppel, or
>
> 5. by operation of the principles of law.

[42] In *1196303 Ontario Inc. v Glen Grove Suites Inc*., 2015 ONCA 580, the court found both the agent and principal must agree for a consensual agency relationship to exist, and the principal must give the agent the authority to affect their legal position:

> 70 In order for a consensual agency relationship to exist, both principal and agent must agree to the relationship, and the principal must give the agent the authority to affect the latter's legal position: Fridman, at pp. 4-5; see also *Applewood Place Inc. v. Peel Condominium Corp. No. 516*, at para. 35.
>
> 71 While agency is often created by an express contract, setting out the scope of the agent's authority, the creation of an agency relationship may be implied from the conduct or situation of the parties: see *Francis v. Dingman* (1983), 2 D.L.R. (4th) 244 (Ont. C.A.), per Lacourciere J.A., at p. 250, leave to appeal to S.C.C. refused, (1984), 23 B.L.R. 234 (note) (S.C.C.). Whether an agency relationship exists is ultimately a question of fact, to be determined in the light of the surrounding circumstances: *Ogdensburg Bridge & Port Authority v. Edwardsburg (Township)* (1966), 59 D.L.R. (2d) 537 (Ont. C.A.), at p. 542, leave to appeal to S.C.C. refused (1967), 59 D.L.R. (2d) 546 (note) (S.C.C.).

[43] Neither section 6 of the *Halifax Regional Water Commission Act*, nor the Transfer Agreement contain any language which could create an agency relationship as described above.

[44] An agency relationship may be implied, however, there must be some course of conduct to indicate acceptance of the agency relationship (*Canadian Agency Law* at page 46, citing *Crampsey v. Deveney*, [1986] S.C.J. No. 96 (SCC)). Stated another way, did HRM act in such a way it could be implied Halifax Water could affect HRM's legal position with respect to Hume Street? The evidence falls far short of establishing an implied agency relationship between HRM and Halifax Water.

[45] Halifax Water's position, in oral argument on this appeal, was the cooperation between Halifax Water and HRM supported the Application Judge's finding of an agency relationship, by reference to the affidavit of Kevin Gray, manager of Engineering Approvals at Halifax Water. Counsel cited paragraphs 14, 15, and 16 of his affidavit as evidence of the agency relationship. For context I will reproduce those paragraphs, along with paragraph 13, of his affidavit:

> 13. I also understand and verily believe, based on review of Property Online, that there is not a registered easement in favour of Halifax Regional Water Commission for the ownership, maintenance, and operation of the Pipe.
>
> 14. I directed Mr. Fourgnard to contact HRM, to enquire if the catch basin was necessary for street drainage or if it could be relocated. HRM determines where catch basins are to be located. HRM grades the street appropriately to direct stormwater to the catch basin.
>
> 15. I understand and verily believe that HRM determined in 2018 Hume Street was properly graded to the catch basins. This was the conclusion of a meeting of the Halifax Water / HRM Special Technical Committee at which I was a participant. The meeting occurred in May 2018.
>
> 16. If the catch basin were to be moved, HRM and Halifax Regional Water Commission would require:
>
> > (a) a design prepared by a Professional Engineer to the specifications of the Halifax Regional Water Commission;
> >
> > (b) an easement, centred over the pipe with three metres on either side;
> >
> > (c) all costs of installation, materials, easement acquisition and legal surveys to the developer.

[46] In my view these paragraphs do not evidence an agency relationship. To the contrary, they show that Halifax Water did not have the authority to deal with Hume Street, nor the placement of the catch basin and needed HRM's approval to make any changes with respect to it.

[47] The Transfer Agreement referred to by the Application Judge transferred municipal waste-water facilities, and municipal storm-water facilities from HRM to Halifax Water. The term "municipal storm-water facilities" is defined in the Transfer Agreement as follows:

> 3(e) "municipal storm-water facilities" means
>
> (i) those storm sewers, ditches, pipes and culverts and other elements of "stormwater systems" as defined within the Municipal Government Act which are located within municipal road rights-of-way; and
>
> (ii) storm-water retention and drainage facilities and other elements of "stormwater systems" as defined within the Municipal Government Act which are operated for municipal purposes except those solely dedicated to servicing municipal parks and recreation lands, or other municipal buildings or spaces
>
> In the designated area, being the area defined by the red line in the attached Schedule "A"; and "municipal storm-water facilities" and "municipal storm-water services" have corresponding meanings; [emphasis added]

[48] Based on the inclusion of storm sewers, ditches, pipes and culverts in the definition of "storm-water facilities", the ownership of the pipe was transferred from HRM to Halifax Water. The Transfer Agreement does not provide that HRM retained any interest in the pipe, such that Halifax Water could be acting on its behalf in relation to the pipe. The effect of the Transfer Agreement was any interest HRM had in storm-water facilities was transferred to Halifax Water.

[49] The wording of the Transfer Agreement is inconsistent with an agency agreement. There is nothing in it which would suggest that Halifax Water is the agent of HRM. Halifax Water owns the pipe. It does not need to be, nor could it be, acting as an agent for HRM with respect to the ownership and maintenance of the pipe, to establish a prescriptive easement.

[50] In my view, the Application Judge erred in finding Halifax Water was an agent of HRM. This error would be sufficient to allow this ground of appeal. However, as I will explain, even if Halifax Water were an agent of HRM, it could not have obtained a prescriptive easement under s. 75(1) of the *LRA*. This is the second legal error in the Application Judge's analysis.

Interpretation of Section 74(2) and 75(1) of the LRA

[51] The Application Judge granted Halifax Water a prescriptive easement through the operation of ss. 3(1)(l), 74, and 75 of the *LRA* which provide:

> Interpretation
>
> 3 (1) In this Act,
>
> (l) "owner" includes an agent empowered to act for an owner;
>
> […]
>
> Adverse possession and prescription
>
> 74 (1) Except as provided by Section 75, no person may obtain an interest in any parcel registered pursuant to this Act by adverse possession or prescription unless the required period of adverse possession or prescription was completed before the parcel was first registered.
>
> (2) Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this Act is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this Act, unless
>
> (a) an order of the court confirming the interest;
>
> (b) a certificate of *lis pendens* certifying that an action has been commenced to confirm the interest;

> (c) an affidavit confirming that the interest has been claimed pursuant to Section 37 of the *Crown Lands Act*; or
>
> (d) the agreement of the registered owner confirming the interest, has been registered or recorded before that time.
>
> Limit on land acquired
>
> 75 (1) The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.
>
> (1A) An owner of an undivided interest in a parcel may acquire the whole interest in the parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act.
>
> (2) For the purpose of this Section, adverse possession and prescription include time both before and after the coming into force of this Act. [emphasis added]

[52] With respect to the interaction between ss. 74(2) and 75(1), the Application Judge reasoned:

> [31] Given my finding that a prescriptive easement under s. 74(1) of the *LRA* is not made out, I am of the view that a prescriptive easement should be granted under ss. 74(2) and 75 of the *LRA* instead. In this regard, the *LRA* allows owners of an adjacent parcel of land to claim an easement by prescription of the land of their neighbours. The term "owner" in the *LRA* includes agents of the owner…

[53] Up to this point, the Application Judge was correct in his interpretation of s. 75(1) of the *LRA*. The section allows the owner of an adjacent parcel to acquire an interest in a parcel, by prescription, after it is registered and the adjacent owner can do so through an agent.

[54] The Application Judge fell into error when he concludes that as HRM's agent, Halifax Water is capable of claiming an interest in the property:

> [36] ... As HRM's agent, Halifax Water is therefore capable of claiming an interest in the land by way of prescription as an agent of an "owner" of an adjacent parcel under the *LRA*.

[55] This erroneous conclusion is contrary to the Application Judge's own interpretation which immediately precedes it. Halifax Water is not capable of claiming an interest in the land by being the agent of the owner of an adjacent parcel. Rather, HRM is the owner of the adjacent parcel, i.e. Hume Street. It is the only party who may be able to claim an easement on 7 Hume Street. The Application Judge's analysis would allow the agent of an adjacent land owner to

claim an easement of 7 Hume Street for itself. Section 75(1) does not lend itself to such an interpretation.

[56] A similar argument was made by the respondents in *National Gypsum (Canada) Ltd. v. Veinot*, 2019 NSSC 326. In that case, the court found the owner of an adjacent parcel can establish the claim under section 75(1), but an agent acting on their own initiative cannot make their own claim under that section.

[57] National Gypsum claimed damages for trespass and sought an injunction against three brothers, Vaughn Veinot, Geoff Veinot, and Blaine Veinot. The brothers contested the claim and claimed adverse possession of the property in accordance with the *LRA*. Each brother possessed a parcel or lot of land around the property.

[58] National Gypsum's property had been migrated in 2005. Therefore, in order to bring a claim the brothers either had to establish that they had asserted their interest in the land within 10 years of the migration, per s. 74 of the *LRA*, or bring claims as adjacent owners under section 75. The brothers did not assert their interest within the 10-year time frame and therefore had to rely on section 75. Each brother had to prove they were an adjacent owner.

[59] One of the brothers, Geoff, lived on property owned by Blaine. That property bordered the National Gypsum property and was an adjacent parcel for the purpose of s. 75(1). Geoff claimed to be acting as Blaine's agent in his acts of adverse possession, which included putting structures on National Gypsum's property. This argument was properly rejected by the Court on the basis that Geoff was acting on his own initiative, and not as his brother's agent:

> 54 Geoff Veinot does not own the property where he lives (Lot LS-1). He claims that Blaine Veinot owns this property and that he acted as Blaine's agent in his acts of adverse possession. The evidence before the Court was that Geoff Veinot acted on his own initiative when he placed structures on the Property. Not only does the evidence before the Court not support that Geoff was acting as Blaine's agent when he put certain structures on the Property, the *LRA* does not allow for such a finding on any reasonable interpretation. The legislation refers to "owners." I find that Geoff Veinot is not the owner of any parcel adjacent to the Property and cannot claim under s. 75 of the *LRA*. [emphasis added]

[60] Similarly, in order to have resort to s. 75, Halifax Water would have to establish it is the owner of an adjacent property; in this case it is not. It cannot bootstrap itself to the adjacent landowner HRM, and then rely on its own use of the land for the pipe it owns, to establish a prescriptive easement.

[61] Section 75(1) is not complicated. The Application Judge found that HRM was the adjacent owner of Hume Street, not Halifax Water. The only way s. 75(1) would be in play would be if HRM asserted a right to an easement over the lands of Ms. Grant. It did not, nor did it participate in any way in these proceedings. Section 75(1) simply does not permit the agent of an adjacent owner to acquire a prescriptive easement in its own right.

[62] I would allow this ground of appeal and set aside the prescriptive easement found to exist, based on the proper interpretation of s. 75(1) of the *LRA*.

Notice of Cross-Appeal

1) Did the Application Judge err in rejecting the evidence of Keith Clattenburg and, if so, was a claim for a prescriptive easement made out pursuant to s. 74(1) of the LRA?

[63] Keith Clattenburg was 67 years of age and a long-time resident of 8 Hume Street in Dartmouth. He swore an affidavit and was cross-examined at the hearing. The Application Judge set out, in no uncertain terms, that he did not accept the evidence of Mr. Clattenburg. His decision on this issue is quite short, and I repeat it in its entirety:

> [16] Mr. Clattenburg proved to be a most unreliable witness, lacking in credibility. He was a very reluctant witness, expressing his view (even before he completed his oath) that he did not want to be in Court. Mr. Clattenburg added that he was "frustrated" with the process and wondered why he had to say anything. Many of his answers were qualified with "I'm not sure" and when pressed on (important) dates, "it could have been later or earlier".
>
> [17] Mr. Clattenburg was asked about para. 9 of his affidavit:
>
> > 9. I recall that in the 1970s or early 1980s, Bruce Higgins and Carl Wolff had a discussion about water saturating the ground near the shed. I spoke with both men and was aware of this discussion. I knew that the saturation of the ground came from the Pipe.
>
> [18] In the next para. of his affidavit Mr. Clattenburg deposes a neighbour dug around the pipe "in the 1970s or the early 1980s but not later than 1985"; however, when asked specifics he did not know on what property or if he touched the pipe. Later he allowed that he had no recollection of anyone fixing a broken pipe.
>
> [19] In argument it was pointed out that Mr. Clattenburg's para. 5 was not challenged on cross-examination. This reads:

> 5. I have observed the storm-water drain pipe on 7 Hume (the "Pipe") that runs from Hume Street down to the lake. I have known about its existence for about 40 years.
>
> [20] By way of response, Ms. Grant argued that based on his overall evidence, Mr. Clattenburg should not be relied upon for anything he said in his affidavit.
>
> [21] Having considered the totality of Mr. Clattenburg's evidence, I strongly agree with the submissions of Ms. Grant's counsel. On balance, the witness was so uncertain about dates and events, I cannot ascribe any weight to his affidavit, even though it was not challenged on a line by line basis. Indeed, given the overall tenor of the evidence, such an approach was not required. In short, the Court is loathe to accept anything proffered by Mr. Clattenburg and I have therefore disregarded both his written and oral evidence. I am not persuaded to accept anything coming from the completely unreliable and incredible witness. [emphasis added]

[64] Determining the credibility of witnesses and assigning the degree of weight to be accorded to their testimony is an exercise entrusted to the trial or hearing judge. For this Court to overturn a finding of credibility would require a very compelling case.

[65] Halifax Water argues on this appeal that the Application Judge misapprehended the evidence of Mr. Clattenburg. It says the inconsistencies and discrepancies in Mr. Clattenburg's evidence were not an issue of credibility, but rather the result of Mr. Clattenburg having difficulty hearing the questions.

[66] It says that had Mr. Clattenburg been properly accommodated for his hearing issue, the inconsistencies and difficulty in giving his evidence would not have occurred. His evidence, filtered through this lens, would be sufficient for Halifax Water to prove, on a balance of probabilities and in accordance with s. 74(1) of the *LRA*, that the pipe had been on the property prior to 1989, more than 20 years prior to the property being migrated in 2009.

[67] With respect, I cannot agree. Mr. Clattenburg's evidence, as found by the Application Judge, was not only internally inconsistent, it was inconsistent with other evidence. For example, the Application Judge found that the pipe was likely placed on the property in 1993. This is consistent with the contents of Mr. Keeping's field notes about 7 Hume Street dating back to 1993, and inconsistent with Mr. Clattenburg's evidence on this pivotal issue.

[68] Further, there is nothing to suggest the Application Judge's rejection of the evidence was in any way associated with Mr. Clattenburg's inability to hear or understand the questions.

[69] Rather, his concern was with the quality of the responses to the questions put to Mr. Clattenburg on cross-examination. When challenged, Mr. Clattenburg was evasive, uncertain about dates, vague in his responses and argumentative with counsel. A review of the record finds ample support for the Application Judge's conclusion that the evidence of Mr. Clattenburg should have been rejected in its entirety.

[70] I am satisfied that the Application Judge committed no error in rejecting Mr. Clattenburg's evidence. I would dismiss the Cross-Appeal.

Other claims set out in the Notice of Application

[71] In her Notice of Application, Ms. Grant made the following claims:

> 12. The Applicant repeats all of the preceding paragraphs hereof and claims from the Respondent as follows:
>
> a) Temporary and permanent injunctions to enjoin or otherwise prohibit the Respondent from their trespass onto the Applicant's property;
>
> b) An Order requiring the Respondent to remove the drainpipe from the Applicant's property;
>
> c) General Damages;
>
> d) Pre-Judgment Interest;
>
> e) Costs; and
>
> f) Such further relief as this Honourable Court may deem fit.

[72] In the pre-hearing brief filed before the Application Judge, Ms. Grant sought the following relief:

> For all of the foregoing reasons, the Applicant asks this court to grant the following relief: a declaration that no easement exists on the property, and that the pipe should be removed, or in the alternative, a finding that a de facto expropriation has occurred and compensation payable under the *Expropriation Act*. Any other finding would legitimate unacceptably cavalier behaviour on the part of the commission, and would undermine the purpose of the Province's land registration system. The Applicant asks for judgment accordingly.

[73] In her Notice of Appeal, Ms. Grant sets out five grounds of appeal. They are as follows:

The grounds of appeal are:

(1) the Court erred in law by dismissing the Appellant's claim of trespass by the Respondent on the Appellant's property where there was no evidence of consent or authority to occupy it;

(2) the Court erred in law by allowing the Respondent's claim that it had acquired a prescriptive easement over on the Appellant's property where the legal requirements were not met or were misconstrued;

(3) the Court erred in law by finding that the Respondent was an owner of an adjacent parcel under s. 75 of the *Land Registration Act*, 2001, c. 6 thereby extending the statutory limitation of time;

(4) the Court erred in law by not addressing and not dismissing the claim of the Respondent that it is entitled to, or can require, a six metre wide easement on the Appellant's property by virtue of Halifax Regional Municipality By-law L400;

(5) alternatively, the Court erred in law by not addressing and not finding that a de facto expropriation or compulsory taking had resulted from the actions of the Respondent.

[74] In her factum, Ms. Grant asks the following:

104. The Appellant seeks the following relief:

- That the decision of the Hearing Court finding a prescriptive easement be overturned.
- That the claim of trespass be allowed with damages.
- That Halifax Water shall remove the pipe, or that Halifax Water shall not deny any future building permit application because of the presence of the pipe.
- That the Court find that the denial of the building permit was an incorrect application of the Grading By-Law L400 causing damages, and that Halifax Water shall not deny any future building permit application due to the pipe.
- That the damages caused by the denial of the building permit are awarded, calculated by pre-judgment interest on the consideration of the lost sale of the property from the date of denial of the permit.
- That the court award costs to the Appellant.

[75] As can be seen, the damages sought on this appeal are broader than was set out in the Notice of Application and the submissions before the Application Judge. In particular, I note, although general damages were sought in the original application, special damages were not.

[76] There was no argument with respect to the appropriate amount of damages for trespass or loss of the sale of the property contained in the pre-hearing brief or before the Application Judge. On this appeal, Ms. Grant asks us to award damages for trespass and special damages equal to the consideration on the lost sale. There is very little evidence on the record which would allow us to assess damages. Further, it is not at all clear the aborted sale resulted in any damages.

[77] Because damages were not addressed in any meaningful way before us or on the application below, the appropriate way to deal with any damages arising under the application is to remit it to the Application Judge to consider that aspect of the application which he did not address on the terms I previously set out in ¶ 10 above.

[78] On this appeal, I would decline to grant any additional relief beyond setting aside the prescriptive easement. However, I do so without prejudice to Ms. Grant's right to assert her right to damages in her original application.

Conclusion

[79] I would allow the appeal and dismiss the Cross-Appeal. Halifax Water shall have 90 days from the date of this decision to remove the pipe from 7 Hume Street and to remediate any damage caused by its removal at its own expense. If it fails to do so, Ms. Grant may do so and claim the costs from Halifax Water. I would award costs on this appeal of $3,000, inclusive of disbursements, to Ms. Grant. On the application below, I would award her costs of $12,000, inclusive of disbursements.

[80] The determination of any damages arising under the Notice of Application are remitted to the Application Judge.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Beaton, J.A.