SUPREME COURT OF NOVA SCOTIA

Citation: *PATCO Developments Ltd. v. 3195972 Nova Scotia Ltd., 2016* NSSC 9

Date: 20160107
Docket: Bwt No. 419754
Registry: Bridgewater

Between:

PATCO Developments Limited

Plaintiff

v.

3195972 Nova Scotia Limited

Defendant

Judge: The Honourable Justice C. Richard Coughlan

Heard: July 13, 14, 15, August 28, 2015 in Bridgewater, Nova Scotia

Counsel: Rubin Dexter and Benjamin Carver, for the Plaintiff
Blair Mitchell, for the Defendant

By the Court:

[1] PATCO Developments Limited (PATCO) applies for an order it has an easement over lands of 3195972 Nova Scotia Limited (3195972) for all purposes and specifically permitting the use of all water, sewer and other utility connections to its apartment building known as "South Ridge Court". PATCO is also seeking a permanent injunction preventing 3195972 from interfering with or cutting off the water and sewer connections to South Ridge Court. During the hearing of the application PATCO abandoned its claim for a declaration 3195972 is required to complete all work at 3195972's expense, necessary for South Ridge Way to meet the Town of Bridgewater's requirements for a public street.

[2] PATCO is a company incorporated in Nova Scotia. It was created by the amalgamation of 3047066 Nova Scotia Limited (3047066), 2231737 Nova Scotia Limited and Chris-Pat Holdings Limited. Patricia L. Sullivan is president of PATCO.

[3] 3217132 Nova Scotia Limited (3217132) is a company incorporated in Nova Scotia. Bernard Dockrill was at all material times president of 3217132.

[4] 3217132 and Chris-Pat Holdings Limited entered into a development agreement with the Town of Bridgewater dated January 25, 2010, concerning real property of 3217132, being PID's 60383320 and 60036654. 3217132 was referred to as the developer and Chris-Pat Holdings Limited as the mortgagee. The development agreement contained the follow clauses concerning site access and sanitary sewer and water services:

> 4 **SITE ACCESS**
>
> (a) the location of the proposed public streets, which must be built to the Town's design standards in accordance with the Town of Bridgewater's Subdivision By-Law, shall be consistent with that shown on Schedules B1 and B2; and
>
> (b) the Developer shall ensure that a portion of the undeveloped Oakland Drive, connecting Jubilee Road to the Phase 2 cul-de-sac, be built to the Town's design standards in accordance with the Town of Bridgewater's Subdivision By-Law, prior to the commencement of the Phase 2 development; and

(c) the location of the proposed walking trail for the Phase 1 development (Buildings A and B) shall be consistent with that shown on Schedule B1. The location of the proposed walking trail for the Phase 2 development (Buildings C, D, and E) shall be consistent with that shown on Schedule B2; and

(d) the location of the proposed sidewalk (Phase 1) shall be consistent with that shown on Schedule B1; and

(e) the streets, walking trail and sidewalk shall be built by the developer to applicable standards of the Town of Bridgewater within twelve months (12) after the commencement of the phase in which they are located…

7. **SANITARY SEWER & WATER SERVICES**

(a) the Developer shall submit detailed sanitary sewer and water servicing drawings to the satisfaction of the Town Engineer, for each phase of the project as determined by the Town Engineer, prior to the issuance of Development Permits.

[5] Patricia Sullivan and Bernard Dockrill were in a common law relationship. They were involved in a real-estate development, South Ridge at Bridgewater. The project was envisaged to comprise a number of upscale apartment buildings. The development was to be on the lands of 3217132, which were subject to the development agreement with the Town of Bridgewater. The first stage was to consist of two apartment buildings. Ms. Sullivan had financial resources. 3047066 Nova Scotia Limited a company controlled by Patricia Sullivan, constructed the first apartment building containing twenty-seven units.

[6] The building was designed by an architect, Douglas Miller, Ms. Sullivan's company retained Mr. Dockrill through his company (3217132 Nova Scotia Limited), as construction manager at a cost of $10,000 per month.

[7] 3217132 entered into an agreement of purchase and sale to sell Lot T-1-A to 3047066 for $270,000. The agreement contained the following term:

3. …(D) Included in the purchase price The Vender will complete the Road Water and Sewer within the Terms as outlined

> in the Contract Development with the Town of Bridgewater, Nova Scotia.

[8] By deed dated May 10, 2010, 3217132 conveyed Lot T-1-A being PID 60036654 to 3047066.

[9] A twenty-seven unit apartment building was constructed on Lot T-1-A. 3047066 paid the bills in connection with the construction; 3047066 paid for the water and sewer connections on Lot T-1-A.

[10] It is clear Patricia Sullivan was involved with Bernard Dockrill in the South Ridge real estate development. Ms. Sullivan wanted to build an apartment building. The company she controlled built South Ridge Court. In the business plan Ms. Sullivan was described as part of the South Ridge development team and was involved in advertising the development. Ms. Sullivan had the financial resources to build the first apartment building, South Ridge Court. After South Ridge Court was built Ms. Sullivan was not involved with additional phases of the development.

[11] Paving was carried out on Lot T-1-A and the property of 3217132 simultaneously. It was cheaper to have the paving on the two properties at the same time. ARCP Atlantic Road Construction and Paving Limited (ARCP) did the paving. ARCP was paid for the work on Lot T-1-A but not paid for the work on 3217132's land.

[12] On December 18, 2012, Tom Hickey, CEO of ARCP, Brad Hickey his partner in ARCP and Mr. Dockrill met to discuss the unpaid bill. Mr. Dockrill said he was "screwed" by his partner. His partner wanted the first building to go to her daughter. After the first building was built Ms. Sullivan pulled out of the project. She had a mortgage on 3217132's property and within a month would probably foreclose. Mr. Dockrill said the only way you have a chance to get your money is if you take over the land. Messrs. Hickey decided to purchase the land.

[13] 3195972 Nova Scotia Limited, a company of which Tom Hickey is president, purchased the lands of 3217132. 3195972 is a company whose function was described by Tom Hickey as "it owns land".

[14] Tom Hickey knew there was a development agreement with the Town of Bridgewater and testified he probably saw it before completing the purchase of the

land from 3217132. 3217132 executed a deed conveying its lands, being the balance of the South Ridge project to 3195972, dated January 30, 2013.

[15] ARCP wanted to get money from PATCO for work they had completed. Tom Hickey thought the purchase of land was the only chance ARCP had to get its money. Its unpaid account was $52,786.25.

[16] Tom Hickey testified he first saw the agreement of purchase and sale between 3217132 and 3047066 when meeting with persons in the planning department of the Town of Bridgewater between February and June 2013.

[17] After acquiring the property from 3217132, Tom Hickey testified he met with Ms. Sullivan and offered her three options; a) she acquire the land from 3195972; b) 3195972 and Ms. Sullivan's company split the cost of the construction and pay 3217132's outstanding creditors or; c) go to court.

[18] In a letter dated June 12, 2013, Tom Hickey, as president of 3195972, wrote to Ms. Sullivan to discuss her company sharing the construction cost for the road and water services. In a letter dated August 22, 2013, counsel for 3195972 set out Southridge (sic) Court's total liability to 3195972 as $320,000 and taxes, before interest and gave notice "should the same not be discharged and acceptable arrangements entered into for additional future maintenance and alterations" the services would be terminated effective September 30, 2013. During cross-examination, Tom Hickey testified if 3195972 did not receive money from Ms. Sullivan's company it was going to cut off water to South Ridge Court.

[19] Bernard Dockrill testified. I have no confidence in his evidence. He told Messrs. Hickey during their meeting of December 18, 2012, concerning 3217132's outstanding account with ARCP, the account was not paid because Ms. Sullivan had reneged on her agreement to finance the development. Mr. Dockrill stated Ms. Sullivan had used him to build South Ridge Court and he could close off the road to Ms. Sullivan but had no money for a lawyer. He told Messrs. Hickey that Ms. Sullivan had a mortgage on his property and would probably foreclose within a month. Mr. Dockrill told them the only chance they had to get their money was to take over 3217132's land.

[20] Mr. Dockrill then deposed an affidavit on October 30, 2013, in which he stated 3217132 was to complete South Ridge Way without further financial contribution from 3047066. The affidavit also provided that Tom Hickey and Brad

Hickey were aware PATCO had a legal entitlement to use the water and sewer connections and South Ridge Way by agreement with 3217132.

[21] Then Mr. Dockrill met with Blair Mitchell, solicitor for 3195972. During the meeting Mr. Dockrill stated there were errors in the affidavit he deposed to October 30, 2013. He said he brought the errors to the attention of R. Andrew Kimball, the lawyer who drafted the affidavit. Mr. Dockrill stated he signed the affidavit without reading it and determining if the errors had been corrected.

[22] When examined by PATCO's counsel during the hearing Mr. Dockrill testified he signed the affidavit of October 30, 2013, and stated "it must be true". However, in cross-examination Mr. Dockrill disagreed with certain portions of his affidavit. For example, he stated he felt there was an obligation on 3047066 to assist in financing a second apartment building.

[23] In an affidavit deposed to December 19, 2014, R. Andrew Kimball tells of meeting with Mr. Dockrill to obtain information concerning the purchase of Lot T-1-A by 3047066. Mr. Kimball is a lawyer who was acting for PATCO. Mr. Kimball stated Mr. Dockrill confirmed to him the facts set out in Mr. Dockrill's affidavit of October 30, 2013, including revisions to the draft affidavit. Mr. Kimball was not cross-examined on his affidavit.

[24] Mr. Dockrill appears to say whatever suits his immediate purposes. All the different versions he tells cannot be accurate.

[25] The development agreement provided the developer, 3217132 was to provide detailed sanitary sewer and water, servicing drawings before development permits were issued.

[26] PATCO submits it has an easement by express grant over and under the lands owned by 3195972 Nova Scotia Limited, PID 60687555 for all purposes and specifically permitting the use of all water, sewer and other utility connections to its apartment building "South Ridge Court."

[27] The deed from 3217132 Nova Scotia Limited to 3047066 Nova Scotia Limited, which was one of the companies which were amalgamated to form PATCO, dated May 10, 2010, contained the following grants of rights of way:

> **TOGETHER WITH** a free and unobstructed Right-of-Way to be used at all time and for all purposes in common with the Grantor herein, 3217132 Nova Scotia Limited, their successors and assigns, over a parcel of land designated South

> Ridge Way (proposed public street), as shown on a Plan of Subdivision No. 14,001-A, prepared by Berrigan Surveys Limited dated April 9th, 2010 and filed at the Registry of Deeds for Lunenburg County under No,. 95788361;
>
> **ALSO TOGETHER WTH** a free and unobstructed Right-of-Way to be used at all times and for all purposes, in common with the Grantor herein, 3217132 Nova Scotia Limited, their successors and assign, over a strip of land, 7 metres in width, extending from the proposed public street, South Ridge Way and extending along the Northeastern side line of Lot 1-A, a distance of 23.369 metres, as shown on the Plan of Subdivision No. 14,001-A, prepared by Berrigan Surveys Limited, dated April 9th, 2010 and filed at the Registry of Deeds for Lunenburg County under No. 95788361.

[28] PATCO submits considering the terms and circumstances surrounding the conveyance of Lot T-1-A by the 2010 deed the first right-of-way easement should be interpreted to include a right to use the water and sewer connections. PATCO says clause 3(D) of the agreement of purchase and sale dated November 1, 2009, between 3217132 and 3047066 which dealt with the property conveyed by the 2010 deed is one of the terms surrounding the conveyance which is to be used in interpreting the extent of the rights-of-way granted. Clause 3(D), which was written by Bernard Dockrill and initialled by Mr. Dockrill and Ms. Sullivan, states:

> 3. …(D) Included in the purchase price The Vender will complete the Road Water and Sewer within the Terms as outlined in the Contract Development with the Town of Bridgewater, Nova Scotia."

[29] In giving the Court's judgment in *Knock v Fouillard*, 2007 NSCA 27, Fichaud, J.A., commented as to the approach, to be employed to determine the extent of a right-of-way by express grant in the presence of an ambiguity from the surrounding circumstances at the time of the deed's execution stating at paragraphs 59 & 60:

> [59] A right-of-way's purpose is not the same as its mode of usage. The purpose relates to the intended activity on the dominant tenement – eg. to harvest seaweed. The mode relates to how the passage is accomplished over the servient tenement - for instance pedestrian or vehicular. *Gale on Easements*, ¶ 9-02, 9-05 to 9-13, 9-15 to 9-26. The 1993 deed says that the right-of-way is "for all purposes" but is silent on mode of usage. So the deed is unclear whether the right-of-way includes travel by motor vehicle.
>
> [60] Absent a direction from the words in the deed, the court may draw assistance to resolve ambiguity from the surrounding circumstances at the time of

the deed's execution. *Anger and Honsberger*, ¶ 17; 20.30(a) summarizes the approach to determine the extent of a right-of-way by express grant:

> . . . The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument: (1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect of the intention of the parties.(2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.(3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee.

[30] Recently, the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, addressed the issue of contractual interpretation and Rothstein, J., in giving the Court's judgment stated at paragraph 50:

> 50. With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[31] Justice Rothstein went on to deal with the role and nature of using surrounding circumstances in interpreting a contract stating at paragraphs 57 and 58:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court

> effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
>
> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, [page 662] at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[32] In *Anger & Honsberger Law of Real Property*, 3rd ed. (Canada Law Book, looseleaf), a right of way is defined at §17:20.30(a):

> **§17:20.30(a) *Right-of-Way***
>
> A public right which is open to and enjoyed of common right by all members of the public as, for example, a highway, is not an easement. A private right-of-way is an easement which permits the owner of the dominant tenement to pass over some defined portion of the servient tenement in order to gain access to or egress from the dominant tenement for some purpose connected with the better enjoyment of the dominant tenement.
>
> A right-of-way is an easement only and must be distinguished from the fee simple in the land over which the right is exercised. The owner of the servient land may exercise all other rights of ownership not inconsistent with the right-of-way and may exclude those not entitled to the easement.
>
> A right-of-way may be created by any of the methods described previously. The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument:
>
> > 1. The grant must be constructed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant. (3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee.

[33] The use of which may be made of the right-of-way is set out at §17:20.30(b):

§17:30.30(b) Use of Right-of-Way

The use of a right-of-way must be within the terms of the grant or of the accustomed use (in the case of a right acquired by implied grant, implied reservation, or prescription), and it must be reasonable. As a general rule, the use of a right-of-way depends on the nature of the servient land and the purposes for which the right-of-way is intended to be used. If the grant of right-of-way is not limited to any particular purpose, or if a way has been used for several purposes, a general right-of-way may be inferred. However, this will not be the case where the evidence shows intended use for the particular purposes only.

There are certain general limitations on the use of a right-of-way:

> (a) a right-of-way to one property does not include a right-of-way to a place beyond that property;
>
> (b) The owner of the dominant tenement is restricted to the legitimate use of the right; and
>
> (c) The burden on the owner of the servient tenement cannot, without their consent, be increased beyond the terms of the grant or, where the right-of-way is based on implied or prescriptive rights, beyond the accustomed use.

The use that is permitted usually turns on the facts. The grantee of a right-of-way cannot enlarge the privilege conveyed by the grant. Unlawful or excessive use of a right-of-way is trespass on the servient tenement.

The servient tenement, on the other hand, cannot unduly restrict the use of the right-of-way. An act which substantially interferes with the exercise of a right-of-way is a nuisance. There is an actionable disturbance of a right-of-way if the way cannot be practically and substantially exercised as conveniently after as before the inference. To be actionable, the inference must be substantial. Thus, the erection of a gate is not necessarily an inference with a private right-of-way if the owner of the dominant land has reasonable access to the way. In determining the degree of inference, the nature of the obstruction is also relevant. Thus, where the obstruction is permanent this may be seen as creating the requisite degree of obstruction although the actual interference with the right-of-way is not great.

> [W]here the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears…to be almost impossible to say that there is not a real and substantial interference with the right conveyed.

> If the owner of the servient tenement obstructs the right-of-way, the owner of the dominant tenement may remove as much of the obstruction as is necessary in order to exercise the right-of-way, or may deviate and go around the obstruction if it cannot be easily removed. The right to deviate must be exercised in a reasonable manner.

[34] In the 2010 deed in addition to the grant of rights-of-way there is a reservation of an easement for a waterline as follows:

> **SUBJECT** however to a 6 meter wide Easement for a waterline crossing the herein described lot in favour of the owner or owners from time to time of Remainder Lot 1-A, said Remainder Lot 1-A and the Easement being shown on the herein referred to Plan of Subdivision.

[35] The use of the words "right-of-way" over certain lands and the word "easement" to describe the reservation of the easement for a waterline indicates the grant of rights-of-way are for the right of passage over the land subject to the rights-of-way. The use of the words "to be used at all times and all purposes in common with the Grantor" refers to the times, purposes and modes of usage in which PATCO may use the rights-of-way – PATCO is not restricted in how it may exercise the rights-of-way. It may use the rights-of-way as a general right-of-way as described in *Anger & Honsberger Law of Real Property*, supra, above.

[36] Interpreting the words in the grants of right-of-way in the 2010 deed to include the right to use of all water, sewer and other utility connections to its apartment building would, in the words of Rothstein, J. in *Sattva Capital Corp. v. Creston Moly Corp*. supra, be deviating from the text such that the court was effectively creating a new agreement. The language used in the grants of right-of-way in the 2010 deed is free and clear from doubt.

[37] I find the grants of right-of-way in the 2010 deed do not give PATCO an easement to use all water, sewer and other utility connections to its apartment building South Ridge Court.

[38] PATCO claims an equitable easement by proprietary estoppel over lands owned by 3195972 identified as PID 60687555 for the benefit of its lands identified as PID 60036654 for all purposes and specifically permitting the use of all water, sewer and other utility connections to South Ridge Court.

In *Maritime Telegraph & Telephone Co. v. Chateau Lafleur Development Corp*. 2001 NSCA 167 in giving the Court's judgment Cromwell, J.A., as he then was, in dealing with the nature of proprietary estoppel stated:

> 1. Equitable Easements:
>
> [36] An easement is a right attached to the land of a dominant owner allowing use of the land of a different owner (the servient owner) in a particular way for the benefit of the dominant owner: A. H. Oosterhoff and W. B. Rayner, *Anger and Honsberger Law of Real Property* (2d, 1985) at para. 1803. The essential qualities of an easement are that there must be dominant and servient land, the easement must accommodate the dominant land, the owners of the dominant and the servient land must be different persons and the right must be capable of forming the subject-matter of a grant: *Ibid* at para. 1803.2. An easement may be created by statute, express or implied grant, prescription or through the application of equitable principles: *Ibid* para. 1803.4. I am concerned here with this last type of easement.
>
> [37] Equitable easements may arise through the operation of the equitable doctrines of proprietary estoppel and part performance or through the operation of related equitable principles. Proprietary estoppel comes into operation when one party is encouraged to act to its detriment in relation to its land by the promise or encouragement of another in circumstances in which it would be unjust to allow the latter to insist on its strict legal rights: J. McGhee, *Snell's Equity* (30th, 2000) at para. 39-12.
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> [38] As stated in a leading English case, when the doctrine of proprietary estoppel is raised, the court must answer three questions: first, whether an equity is established; second, what is the extent of the equity; and, third, what relief is appropriate to satisfy the equity: *Crabb v. Arun District Council* (1975), [1976] 1 Ch. 179 (Eng. C.A.) at pp. 192 - 193. Whether an equity arises and its extent depends on the dealings between the parties, including their contract, their promises and their conduct: see, e.g. *Crabb*, above at p. 187 - 8. The ultimate question in light of all of this is whether it would be inequitable to permit one party to insist on its strict legal rights.
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> [39] *Crabb* has been approved and followed in Canada, notably in the recent decision of the British Columbia Court of Appeal in *Zelmer v. Victor Projects Ltd.* (1997), 147 D.L.R. (4th) 216, B.C.J. No. 1044 (B.C.C.A.); see also: *Hill v. Nova Scotia (Attorney General),* [1997] 1 S.C.R. 69 (S.C.C.) at para. 11; *Hastings Minor Hockey Association v. Pacific National Exhibition* (1981), 129 D.L.R. (3d) 721, [1981] B.C.J. 1388 (B.C.C.A.).
>
> [40] If the equity arises, the courts have broad discretion to fashion an appropriate remedy. As the editor of *Snell's Equity*, *supra*, puts it, effect is given

> to the equity "... in whatever is the most appropriate way taking into account all relevant circumstances including the conduct of the parties": at para. 39-19.
>
> [41] An easement arising in equity is binding on everyone except a purchaser of the servient tenement who buys without notice of the equitable right: see Jonathan Garret and Paul Morgan, *Gale on Easements* (16th, 1997) at para. 2-25. In the present case, therefore, the issue of whether there is an equitable easement binding on the appellants which they are obliged to maintain in favour of MTT depends on the answer to two questions. Did such an equitable easement arise as between MacCulloch and MTT? If so, was Chateau LaFleur a purchaser in good faith without notice?

[39] The first question to address is: did an equity arise?

[40] PATCO's predeceasor in title 3047066 entered into an agreement of purchase and sale with 3217132 the predeceasor in title of the respondent 3195972.

[41] The agreement of purchase and sale contained provision 3(D) which provided 3217132 will complete the road, water and sewer within the terms outlined in the development agreement with the Town of Bridgewater.

[42] 3047066 purchased the subject property from 3217132.

[43] 3217132 installed a water and sewer infrastructure on its property connecting the Town of Bridgewater's water and sewer system to the boundary of the property purchased by 3047066.

[44] 3047066 built the apartment building South Ridge Court and paid for water and sewer connections on its property, which it had purchased from 3217132.

[45] The water and sewer systems constructed by 3217132 and 3047066 were connected and used to supply water and sewer systems to South Ridge Court.

[46] I find an equity did arise. 3047066 as part of the agreement to purchase the property from 3217132 was promised that road, water and sewer as set out in the development agreement with the Town of Bridgewater would be installed and the cost of the installation was included in the purchase price. 3047066 purchased the property which was the subject of the agreement of purchase and sale. 3047066 then built South Ridge Court and installed water and sewer systems on its property which was connected to the water and sewer systems on 3217132 lands.

[47] Between 3217132 and 3047066 an equity arose. Both were aware of the provision in the agreement of purchase and sale that 3217132 was to complete the

road, water and sewer, the cost of which was included in the purchase price. Both companies signed the agreement, completed the sale and installed the road, water and sewer as set out in the agreement.

[48] Did 3195972 have notice of the equity between 3217132 and 3047066? Notice was described in *Maritime Telegraph & Telephone Co. v. Chateau Lafleur Development Corp.*, supra, as follows:

> [62] In this context, the term "notice" includes three types of knowledge: actual knowledge (what the party in fact knew), constructive knowledge (what the party might reasonably be considered as having known) and imputed knowledge (what the party's agent knew). All of this is well summarized in the following passage from R.E. Megarry, H.W.R. Wade and Charles Harpum, *The Law of Real Property* (6th, 2000) at pp. 144 - 145:
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> > A person is commonly said to have "actual notice" of a fact where he subjectively knows of it, regardless of how that knowledge was acquired.
> >
> > ... Equitable interests would have been entirely insecure if it had been made easy for purchasers to acquire the legal estate without notice, as by merely asking no questions. Accordingly the Court of Chancery insisted that purchasers should inquire about equitable interests with no less diligence than about legal interests, which they could ignore only at their own peril. The motto of English conveyancing is *caveat emptor*: the risk of incumbrances is on the purchaser, who must satisfy himself by a full investigation of title before completing his purchase.
> >
> > ... By the doctrine of constructive notice equity adopted a similar principle and adapted itself to the ordinary conveyancing practice. A purchaser would be able to plead absence of notice only if he had made all usual and proper inquiries, and had still found nothing to indicate the equitable interest. ...

[49] Here Tom Hickey, the President of 3195972, is also the CEO of ARCP which performed work on the lands of 3217132, described by him as the "South Ridge development." He described the work as preparing the lands for a roadway and to pave the roadway and sewer and water lines. ARCP was not paid for the work it did for 3217132.

[50] Tom Hickey and Brad Hickey, his business partner, met with Bernard Dockrill on December 18, 2012, concerning the outstanding accounts of 3217132 in the amount of $52,986.25. Tom Hickey was aware that the building on the land now owned by PATCO (Lot T-1-A) was serviced by the road, sewer and water

lines on the lands of 3217132. Mr. Dockrill told Messrs. Hickey the only way ARCP would have a chance to get its money was if it purchased the land. Messrs. Hickey decided to purchase 3217132's land. Tom Hickey testified he knew there was a development agreement with the Town of Bridgewater and probably saw the development agreement before his company purchased the property. I find Tom Hickey did see the development agreement before 3195972 purchased the property from 3217132 by deed dated January 30, 2013. Tom Hickey testified he could not remember if Mr. Dockrill showed him or told him about the agreement of purchase and sale between 3217132 and 3047066 prior to January 30, 2013.

[51] In his affidavit deposed to October 15, 2014, Tom Hickey stated:

> 14. Mr. Dockrill informed us that ARCP's invoices would be unpaid along with those of several other trade creditors' accounts because Ms. Sullivan had reneged on an agreement she had made with him to finance the development and construction of the balance of the lands.
>
> 15. Mr. Dockrill stated that she had used him to build the premises now identified as "Southridge," that she had promised to finance a further development on the balance of the lands on the development site from which he would have carried on to pay development expenses.
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> 16. Mr. Dockrill stated that she sought to have the full benefit of the road she didn't pay for and was causing him to go bankrupt.
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> 17. Mr. Dockrill said that he had transferred Lot T-1-A to Pat Sullivan for $275,000.00 although it was worth $450,000.00.
>
> 18. He said he could close off the road to her, but he had no money for a lawyer.
>
> 19. On December 21, 2012, I met with Mr. Dockrill again. He said that Pat has "screwed" everyone to get a $4.5 million building and a free road.

[52] I find 3195972 through its president Tom Hickey and its secretary Brad Hickey, who were also secretary and president respectively of ARCP knew PATCO was using the road and water and sewer lines on the property 3195972 purchased from 3217132. It knew Ms. Sullivan's company (3047066) constructed the apartment building "South Ridge Court" on the property 3047066 acquired from 3217132. 3195972 knew PATCO's predeceasor in title had installed water and sewer lines on Lot 1-T-A.

[53] 3195972 had actual notice 3047066 constructed the apartment building, and the owner of Lot T-1-A was using water and sewer lines on the property 3195972 was purchasing from 3217132 to service the apartment building on Lot T-1-A. Considering what has been established Tom Hickey knew, it is inconceivable he did not make inquiries concerning the status of the water and sewer service to Lot T-1-A. It is of significance Tom Hickey could not remember whether Mr. Dockrill showed him or told him about the agreement of purchase and sale. One would think a business person would remember when such an important document was first seen – especially when the issue of closing a road was discussed at the December 18, 2012, meeting. An experienced business person, such as Tom Hickey, would examine the legal position of the various parties. I find 3195972 had knowledge of the easement prior to purchasing the property from 3217132 in January 2013.

[54] I find PATCO the successor in title to 3047066 has an equitable easement over the sewer and water lines from Jubilee Road over the lands of 3195972 to Lot T-1-A.

[55] PATCO also claims an equitable easement by common intention over 3195972 Nova Scotia Limited's land PID 60687555 for all purposes and specifically permitting the use of all water, sewer and other utility connections to South Ridge Court.

[56] There can be an easement by common intention. In *Barton v. Raine*, (1980), 114 D.L.R. (3d) 702, (Ont. C.A), a case in which an easement by common intention was found to exist, Thorson, J.A., in giving the court's judgment stated at page 707**:**

> …*Gale on Easements*, 14th ed. (1972), suggests at p. 108 that, apart from the two exceptions already noted, there may be an implied reservation where
>
> ... a grantee can be shown positively or, for instance, *by necessary inference from the effect on the property granted or some physical characteristic of the property retained*, to have recognised and acquiesced in an intention on the part of the grantor to use his retained property, or part of it, in some definite manner detracting from the natural rights incident to the ownership of the property granted.
>
> (Emphasis added.) Gale goes on to say, however:
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> Clearly it is not enough that the grantee knows the grantor retains adjoining land and would probably wish to use it in the same way as before.

[57] Thorson, J.A., went on to state at page 708:

> In the still later case of *Re Webb,* each of the foregoing cases was considered by the Court, which then held that in the case before it there was no implied reservation in favour of the landlord to carry on an activity not dealt with in the lease. Commenting on the two established exceptions to the general rule set out in *Wheeldon v. Burrows,* Jenkins, L.J., stated at p. 141:
>
> > It is, however, recognised in the authorities that these two specific exceptions do not exhaust the list, which is, indeed, incapable of exhaustive statement as the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor or such as to preclude the grantee from denying the right consistently with good faith, *and there appears to be no doubt that where circumstances such as these are clearly established the court will imply the appropriate reservation.*
>
> (Emphasis added.) Jenkins, L.J., then referred to *Simpson v. Weber* (1925), 133 L.T. 46, which had held that because there was no evidence negating a common intention, the easement contended for in that case was reserved by implication. He expressed doubt about the correctness of this decision but indicated at p. 143 that it could be supported on the basis that:
>
> > ... the physical circumstances at the date of the severance may, perhaps, have sufficed to support an implication of an intention common to grantor and grantee that the easements in question should be reserved ...
>
> However, he disagreed with the idea that a common intention should be inferred unless disputed. Rather, he stated, there must be a "necessary inference" of a common intention, and he expressed the view that the landlord had to establish "at least that the facts are not reasonably consistent with any other explanation" (p. 145).

[58] Leave to appeal *Barton v. Raine* to the Supreme Court of Canada was dismissed.

[59] Here 3217132 Nova Scotia Limited conveyed Lot T-1-A to 3047066 Nova Scotia Limited, PATCO's predecessor in title, by deed dated May 10, 2010. The agreement of purchase and sale between them provided:

> 3. …(D) Included in the purchase price The Vender will complete the Road Water and Sewer within the Terms as outlined in the Contract Development with the Town of Bridgewater, Nova Scotia.

[60] 3217132 built South Ridge Way and installed water and sewer from the Town of Bridgewater facilities across its property to the boundary of Lot T-1-A. In turn, 3047066 built an apartment building on Lot T-1-A and installed water and sewer infrastructure which it connected to the water and sewer infrastructure installed by 3217132 to the boundary of Lot T-1-A.

[61] The evidence shows, and I find, 3217132 connected the water and sewer infrastructure on Lot T-1-A to the water and sewer infrastructure constructed on 3217132's remaining lands and billed 3047066 for the connection in the amount of $10,385.70. The account was paid by 3047066. Since the sewer and water infrastructure on Lot T-1-A and the lands of 3217132 was connected that has been the water and sewer system used to service the apartment building on Lot T-1-A.

[62] From the date of the agreement of purchase and sale up to the conveyance by 3217132 of its property to 3195972 Nova Scotia Limited by deed dated January 30, 2013, no bill was submitted to 3047066 or its successor in title by 3217132 or anyone for the use of the water and sewer infrastructure on 3217132's property which 3047066 used to connect to the Town of Bridgewater's water and sewer system. Since its construction South Ridge Court used the water and sewer infrastructure constructed on 3217132's property to access the Town of Bridgewater's water and sewer system.

[63] The evidence leads irresistibly to the inference that 3217132 and 3047066 had a common intention the owner of Lot T-1-A was to have an easement to use the water, sewer and utility connections on the property of 3217132 Nova Scotia Limited and I so find as a fact.

[64] The respondent submits PATCO is not entitled to equitable relief in that it does not have "clean hands" and pleads the *Assignments and Preferences Act* R.S.N.S. 1989, c. 25 and the *Statute of Elizabeth*, 1570 (Imp.) 13 Eliz., c.5.

[65] 3195972 Nova Scotia Limited submits Patricia L. Sullivan who controlled 3047066 and Bernard Dockrill who controlled 3217132 were in a common law relationship from 2006 to early 2013. Ms. Sullivan and Mr. Dockrill were partners to develop an upscale five apartment building development including the building now owned by PATCO. 3195972 says the consideration for the conveyance of Lot

T-1-A by 3217132 to 3047066 in May 2010 was inadequate as the land had a market price greater than $270,000 - the purchase price set out in the agreement of purchase and sale between the parties. 3195972 further submits the purchase price was partly paid by the discharge of $10,650 of debts owed not by 3217132 but by Mr. Dockrill or his real estate company and the purchase price did not accurately reflect the value of the sewer and water connections under the property of 3217132, the cost of curbing on the right-of-way done by 3217132 or the actual value of Lot T-1-A.

[66] In *Bank of Montreal v. Crowell* (1980), 37 N.S.R. (2d) 292 (N.S.S.C.–T.D.), Hallett J., as he then was, described the application of the *Statute of Elizabeth* at page 303.

> To succeed under the *Statute of Elizabeth*, the plaintiff need only prove three facts:
>
> 1. The conveyance was without valuable consideration. It may not be sufficient if the plaintiff proves only that the consideration was somewhat inadequate (*Leighton v. Muir, supra);* In that case, there was inadequate consideration and although the court held that the conveyance could not be set aside under the *Statute of Elizabeth*, it was set aside under the *Assignments and Preferences Act*. The consideration must be "good consideration"; so-called meritorious consideration, that is, love and affection, is not valuable consideration and therefore not consideration within the meaning of the *Statute of Elizabeth* (*Cromwell v. Comeau* (1957), 8 D.L.R. (2d) 676, at 684..)
>
> 2. The grantor had the intention to delay or defeat his creditors. It is not necessary that the creditor exist at the time of the conveyance (*Traders Group Ltd. v. Mason et al., supra.*). However, the court will impute the intention if the creditors exist at the time of the conveyance provided the conveyance is without consideration and denudes the grantor debtor of substantially all his property that would otherwise be available to satisfy the debt (*Sun Life v. Elliott*, supra). Apart from that situation, intention to delay or defeat creditors is a question of fact. The Court must look at all the circumstances surrounding the conveyance. The court is entitled to draw reasonable inference from the proven facts to ascertain the intention of the grantor in making the conveyance. Suspicious circumstances surrounding the conveyance require an explanation by the grantor.
>
> 3. That the conveyance *had the effect* of delaying or defeating the creditors. This too is a question of fact. The plaintiff must first obtain a judgment against the debtor prior to commencement of proceedings to set aside the conveyance under the *Statute of Elizabeth* and must on the application to set aside adduce sufficient evidence to enable the court to make a finding that the conveyance had the effect of delaying or defeating the creditors.

[67] In this case there is no evidence that 3217132, (the grantor) had any intention to delay or defeat its creditors by conveying Lot T-1-A to 3047066. The conveyance was part of the development – to get the first apartment building constructed. In addition 3217132 retained land in Bridgewater which it conveyed to 3195972 Nova Scotia Limited in January 2013. 3195972 then mortgaged the property for $500,000 and paid out an existing $300,000 mortgage. There is no evidence the conveyance from 3217132 to 3047066 had the effect of delaying or defeating creditors. Tom Hickey, the CEO of ARCP Atlantic Road Construction and Paving Limited (ARCP) performed work and provided materials to construct and pave a road surface on lands of 3217132 in late 2011 – long after the conveyance of Lot T-1-A in May 2010.

[68] Necessary factors for the *Statute of Elizabeth* to apply not being present, the Statute does not apply.

[69] The *Assignments and Preferences Act*, supra, provides:

> **Interpretation**
>
> **2.** In this Act,
>
> (c) "property" means goods, chattels or effects, bills, notes, or securities, shares, dividends, premiums or bonus in any bank, company or corporation, and every other description of property, real and personal;
>
> **Void property transfer**
>
> **4. (1)** Every transfer of property made by an insolvent person
>
> (a) with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them; or
>
> (b) to or for a creditor with intent to give such creditor an unjust preference over other creditors of such insolvent person, or over any one or more of such creditors,
>
> shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

[70] The *Assignments and Preferences Act*, supra, requires proof that the conveyance in question was made by an insolvent person. I am unable to conclude 3217132 was insolvent at the time of the conveyance to 3047066 in May 2010. As stated above, 3217132 retained the lands it conveyed to 3195972 in January 2013. There is no evidence that 3217132 was insolvent at the time of conveyance to

3047066 in May 2010. The *Assignments and Preferences Act*, supra, does not apply in this case.

[71] There is nothing present which prevents PATCO from receiving any equitable remedy to which it might be entitled.

[72] Having found PATCO has an equitable easement it is not necessary to address the effect of s. 280(2) of the *Municipal Government Act*, SNS 1998, c.18 and whether it gives PATCO the easement it claims pursuant to the section.

[73] I find PATCO Development Limited, the owner of lands being PID 60036654 has an equitable easement in favour of the lands PID 60036654 over and under the lands of 3195972 Nova Scotia Limited described in the deed from 3217132 Nova Scotia Limited to 3195972 Nova Scotia Limited dated January 30, 2013, PID 60687555 for the use of all water, sewer and other utility connections as currently used.

[74] PATCO shall also have a permanent injunction enjoining 3195972 Nova Scotia Limited, its officers, directors, employees, agents or servants or any other person acting under its direction or on its behalf from in any way interfering with or cutting off the water and sewer connections to South Ridge Court.

[75] I will hear the parties as to how the easement is to be described with certainty in the order.

[76] If the parties are unable to agree I will hear them on costs.

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Coughlan, J.