SUPREME COURT OF NOVA SCOTIA
Citation: Burpee v. Bernikier, 2013 NSSC 272

Date:20130924
Docket: Hfx. No. 324881
Registry: Halifax

Between:

RAY BURPEE and **DIANNE BURPEE**

PLAINTIFFS/
DEFENDANTS BY
COUNTERCLAIM

v.

ERIKA BERNIKIER, SHELDON BERNIKIER and
ST. ANDREWS VILLAGE ESTATES LIMITED,
a body corporate

DEFENDANTS/
PLAINTIFFS BY
COUNTERCLAIM

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: March 4th, 5th, 6th, 7th and 25th, 2013 in Halifax, Nova Scotia

Written Decision: September 24th, 2013

Counsel: Jessica L. White solicitor for the Plaintiffs/Defendants by Counterclaim

Peter C. Rumscheidt solicitor for the Defendants/Plaintiffs by Counterclaim

By the Court:

[1] This action involves a dispute between Ray and Dianne Burpee and Erika and Sheldon Bernikier. The Burpees and the Bernikiers are neighbours in a subdivision known as St. Andrews Village, in Fall River, Nova Scotia. The developer of the subdivision, St. Andrews Village Estates Limited (referred to as "St. Andrews"), is also involved in the litigation.

THE BURPEES' EVIDENCE

[2] In the spring of 2007, Ray and Dianne Burpee were looking to purchase a property. They eventually contacted Jerry Murphy who, at the time, was a real estate agent with Remax Nova, in Bedford, Nova Scotia. Mr. Murphy showed the Burpees a number of properties, including Lot 133, High Road, which is located in St. Andrews Village.

[3] Mr. Murphy also introduced the Burpees to Jim Slaunwhite of W.C.H. Builders Limited. The Burpees were considering building a home on Lot 133 and having W.C.H. Builders Limited do the construction. During the initial meeting between Mr. Slaunwhite, Mr. Murphy and the Burpees, Mr. Murphy provided the Burpees with a copy of the restricted covenants relating to the subdivision in question. Mr. and Ms. Burpee reviewed the covenants and, in particular, Restrictive Covenant 18, which provides:

> No fence or wall shall be erected or maintained on the lands or any part thereof other than an iron or wooden fence of open construction with or without brick or stone foundations, unless approved in writing by the Grantor and no such fence shall be higher than six (6') feet, or be situated within twenty (20') feet of the street line in front of the lands on which said fence is erected or within ten (10') feet of any other street line. Screens for landscaping purposes may be erected upon written approval from the Grantor.

[4] Mr. Burpee testified that after reading Restrictive Covenant 18 he advised Mr. Murphy that he and his wife would want to put a perimeter fence around the property

in question and they would not buy the property unless they had the right to put up a fence. He said that this was a "make-or-break" part of the agreement. The Burpees also indicated that they wanted to erect a storage shed on the property. According to the Burpees, Mr. Murphy indicated that the developer of the subdivision was out of town but he had a contact that he would get a hold of to get an answer to these issues.

[5] The Burpees met again with Mr. Murphy and Mr. Slaunwhite a few weeks later. According to Mr. and Ms. Burpee, at this second meeting, Mr. Murphy advised that he had been successful in getting approval for them to put up a fence and a storage shed on the property. The Burpees then executed an Agreement of Purchase and Sale between themselves and W.C.H. Builders Limited for a new home to be constructed on Lot 133, High Road. Attached to the Agreement of Purchase and Sale were the restrictive covenants relating to St. Andrews Village subdivision. At Ms. Burpee's request, Mr. Murphy put two handwritten notations on the last page of the restrictive covenants. One of these notations read:

> Seller Agrees To Allow Buyer To Construct A Shed On Property As Well As A Fence.

[6] Mr. Murphy initialled this handwritten notation, as did each of the Burpees.

[7] At this same meeting, the Burpees and W.C.H. Builders Limited signed a Limited Dual Agency Agreement acknowledging that Mr. Murphy was representing all of them in this transaction.

[8] Shortly thereafter, W.C.H. Builders Limited entered into an Agreement of Purchase and Sale for Lot 133, High Road with St. Andrews. As in the agreement between W.C.H. and the Burpees, Mr. Murphy represented both parties in this transaction.

[9] Construction commenced and on November 1st, 2007, the Burpees moved into their new home.

[10] Mr. Burpee testified that shortly after he and his wife moved in, a hurricane-type weather system came through the area, with lots of rain. He noticed water coming up between the wall and the slab in the furnace room on the southwest side of his home. He asked Mr. Slaunwhite to inspect the matter. It was thought that the rain gutters might be allowing rainwater to run down the outside face of the wall and end up in the basement. Mr. Burpee purchased and installed vinyl pipe to move water away from the house.

[11] Mr. Burpee also testified that in the spring of 2008, when the snow melted, he noticed water accumulating on the southeast corner of his property near High Road. The water did not dissipate. He had a small excavator dig a trench which allowed the water to move, but the area remained wet. Mr. Burpee then arranged for a trench to be dug from the culvert under his driveway to a ditch near the south side of his property. He installed a pipe and crushed stone and then covered the trench. According to Mr. Burpees' evidence, after this work was completed there was little ponding in this area.

[12] As indicated previously, the Bernikiers are the Burpees' neighbours. Mr. Burpee gave evidence about a discussion that he and his wife had with the Bernikiers over dinner in April of 2008. He said that the Bernikiers asked whether he and his wife would consider trying to get the developer (St. Andrews) to do something about drainage, as there was water collecting at the front of their respective properties. Mr. Burpee said that he told the Bernikiers that he wasn't interested in pursuing the issue with the developer at that time.

[13] Mr. Burpee further testified that in the late spring and the summer and fall of 2008, he experienced water in the area of the boundary line between his property and Lot 131, High Road, which is owned by the Bernikiers. He said that it was almost a pond at times between the slope of his driveway and the area of the common sidelines. He said that in the spring of 2008, the water would accumulate anywhere

from two to six inches deep and could take days to dissipate. He testified that at times it was a boggy, stinky, mosquito-infested area.

[14] When asked about the source of this water, Mr. Burpee said that on the north side (presumably of his property) the water was coming off Lot 131 (the Bernikiers' property.) He said that the water was working over the common line and was pooling on both properties but more was lying on his property since it was lower than the Bernikiers' land.

[15] According to Mr. Burpee's evidence, in July of 2008, the Bernikiers did some landscaping on the south side of their property. He recalled a discussion with them about a drain pipe coming off their roof gutter. He recalled discussing a french drain that was apparently being installed parallel with the boundary lines of Lots 131 and 133. He said he warned the Bernikiers that this was going to generate more water coming across the boundary line between the two properties which would be ponding and which would affect his property.

[16] Mr. Burpee also testified about a drain pipe located in the southwest corner of the Bernikier's property which was moved from time to time. He testified that after this pipe was moved, the amount of water coming onto the back part of his property near his septic field increased.

[17] Mr. Burpee gave evidence about the methods that he used to deal with the water on his property near the common line with Lot 131. He testified that, originally, he filled in the ponded areas with topsoil and wood chips but over time, with rain, the wood chips and soil disappeared. Accordingly, in late November of 2008, he had Elmsdale Landscaping Limited build up the common line between his lot and the Bernikiers' lot by twelve to sixteen inches. He then sodded the front portion of his property along the common line and completed the back area with ground bark. He said he did this in order to stop the water from flowing over Lot 131 onto his property. In addition, he had a swale constructed between his driveway and the

common line with Lot 131 so that any water coming off of his driveway or coming from the area of the common line would be carried out to his culvert.

[18] Mr. Burpee testified that he paid $30,630.91 for the Elmsdale Landscaping work. He testified that as a result of this work, there was no more pooling on his side of the common line.

[19] On December 12th, 2008 (after the Elmsdale Landscaping project was completed), the Burpees had a flood in their basement. There had been heavy rains for a number of days at the time of the flood. Mr. Burpee testified that the basement was covered in approximately 2 ½ to 3 inches of water. One of the areas where the water was coming in was the northwest corner of the foundation, which is located in the area of the boundary line of Lots 131 and 133. Mr. Burpee checked the outlet of the footing drain located at the southwest corner of his property and discovered that a piece of drainage pipe was partially collapsed. He also found a space of 4 to 5 feet where the pipe was missing. The Burpees brought a Small Claims Court action against W.C.H. Builders Limited and Contour Excavation & Septic as a result of this flood but were unsuccessful in their action (see **Burpee et al. v. W.C.H. Builders Ltd. et al.**, Unreported, May 14, 2009, Halifax, Docket: SCCH 308289).

[20] The year after moving into their new home, the Burpees decided to erect a fence on their property. Ms. Burpee testified that around the middle of August, 2008 she received an email from Mr. Murphy. He indicated that St. Andrews had learned that the Burpees were erecting a fence and it was requesting a description or a photograph of the fence. According to Ms. Burpee, Mr. Murphy said that he was inquiring on behalf of St. Andrews. Ms. Burpee responded that they were going to erect a six foot galvanized chain link fence on the two sides and the back of their property. She reminded Mr. Murphy that they already had permission to erect the fence. Ms. Burpee testified that she did not hear anything further from Mr. Murphy and that two or two and a half months after providing her response, she deleted his

email. In October of 2008, the Burpees erected their fence at a cost of approximately $7,600.00.

MR. MEDJUCK'S EVIDENCE

[21] Franklyn Medjuck, Q.C. testified on behalf of St. Andrews. He is the president and director of the company. He testified that St. Andrews is a rural, forested development outside of Fall River, Nova Scotia. He says that the company used restrictive covenants in the subdivision in order to create a standard environment for the neighbourhood. The developer's intention was to have homes that contained natural material with "country style" lots. The properties were not expected to have "manicured fancy lawns". Mr. Medjuck added that it was necessary to have the land in a natural state so that water would flow "the natural way".

[22] Mr. Medjuck, who is a lawyer, drafted the St. Andrews Village covenants himself. The covenants in question in this action are numbers 17, 18 and 24. Restrictive Covenant No. 17 provides:

> 17. No lands nor any building erected or to be erected thereon shall be used, without the prior written consent of the Grantor, which consent may be arbitrarily withheld, for the purpose of any profession, trade, employment, service, manufacture, or business of any description, nor as a school, hospital or other charitable institution, nor as a hotel, apartment house, rooming house or place of public resort, nor for any sport (other than such games as are played in connection with the occupants of a private residence) nor are any of the lands or building erected or to be erected thereon shall be a nuisance to the occupants of any neighbouring lands or buildings.

[23] Restrictive Covenant No. 18 is set out in ¶ 3 above.

[24] Restrictive Covenant No. 24 provides:

> No landscaping of the lands surrounding any building erected on the lands shall remain uncompleted for more than six (6) months after completion of the

> construction of the building located on the lands, specifically, lands to the front, rear and sides of the building disturbed during construction shall be sodded and landscaped to the standards of a first-class residential neighbourhood and in accordance with the requirements of the Provincial Department of Environment; in addition, lands between the street line(s) and ditch(es) abutting the Grantee's property shall be landscaped by the Grantee at its expense and lands undisturbed during construction and not mentioned above shall remain in a natural state.

[25] Mr. Medjuck confirmed that the St. Andrews Village lots on High Road were listed through Jerry and Annette Murphy at Remax Nova. He referred to the Murphys as "my real estate agents" (Ex. No. 9 at p. 14) Mr. Medjuck testified that Mr. Murphy did not have authority to exempt purchasers from the restrictive covenants that ran with the subdivision. Nor did Mr. Murphy have authority to give consent on behalf of St. Andrews in relation to any of the restrictive covenants.

[26] According to Mr. Medjuck's evidence, he did not give permission for the Burpees to erect a fence on Lot 133, nor did Mr. Murphy ask him for approval for them to do so. He said the first time he saw the handwritten notation on the restrictive covenants attached to the Agreement of Purchase and Sale between the Burpees and W.C.H. Builders Limited was during this proceeding.

[27] Mr. Medjuck also denied speaking with Mr. Murphy in August of 2008 about a fence being erected on the Burpees' property or of knowing about an email that month between Mr. Murphy and Ms. Burpee concerning the erection of such a fence.

EVIDENCE OF MR. MURPHY

[28] Jerry Murphy was the real estate agent involved in the purchase of the Burpees' property. He testified that in 2007 he and his wife were the primary listing agents for St. Andrews Village. The Murphys advertised that they represented St. Andrews in the sale of its lots.

[29] According to Mr. Murphy, he met with the Burpees twice in May of 2007. He recalled reviewing the restrictive covenants relating to the St. Andrews Village subdivision with the Burpees, but did not indicate in his testimony when this review took place.

[30] Mr. Murphy testified that the Burpees wanted to make sure that they could have a fence on Lot 133. He acknowledged that this issue was important to them and that the Burpees indicated that having a fence was a hurdle to purchasing the property. He testified that he told the Burpees that the covenants permitted a fence, but it would have to be approved by the developer. He testified that the Burpees also indicated that they wanted a shed (which I take to mean a shed on the property) and, in addition, they wanted an easement removed that was apparently running across Lot 133.

[31] Mr. Murphy testified that he did not have contact with anyone at St. Andrews on the issue of the fence. In addition, he denied telling the Burpees that he had spoken to someone at St. Andrews about the fence. He did recall speaking to "someone" at St. Andrews about having the easement removed. He did not indicate who he spoke to.

[32] Mr. Murphy acknowledged that on the restrictive covenants attached to the Burpees' Agreement of Purchase and Sale with W.C.H. Builders Limited he wrote:

> Seller Agrees To Allow Buyer To Construct A Shed On Property As Well As A Fence.
>
> Easement Across Property To Be Removed On Or Before Aug 30/07.

[33] At trial, Mr. Murphy acknowledged that when he wrote "Seller" in the first line, he meant "Grantor".

[34] Mr. Murphy testified that the Burpees were concerned "more than usual" about having a fence and a shed and to assure them that this could happen he wrote it on the restrictive covenants. He said that in his view, this did not relieve the Burpees from having to get approval from the developer for the erection of the fence and a shed.

[35] Mr. Murphy does not recollect having any further contact with the Burpees about the issue of the fence between the time that the notes were written on the restrictive covenants and the time the fence was erected in late October of 2008. In particular, he denied emailing the Burpees about the fence in August of 2008 and testified that he "wasn't really using" email at that time. Further, he denied having contact with anyone at St. Andrews Village on the issue of the Burpees' fence between the time that he wrote on the restrictive covenants and the time that the fence was installed.

[36] Mr. Murphy testified that he did not have authority to give permission on behalf of St. Andrews in relation to the restrictive covenants and denied holding himself out as having such authority.

MR. WILLIAMS'S EVIDENCE

[37] Mr. Steven Williams of Mac Williams Engineering Limited testified on behalf of the Defendants. Mr. Williams is an engineer who was qualified by consent to give opinion evidence on the subject of water flow patterns, water drainage systems and the impact of alterations to such patterns and/or systems.

[38] Mr. Williams was involved in preparing the plans for the development of Phase 6 of St. Andrews Village, which phase included the Burpees' and the Bernikiers' lots.

[39] Mr. Williams inspected the Burpees' and the Bernikiers' properties on December 4th, 2008, just after the Burpees had raised the level of their lot. In a report directed to Mr. Medjuck dated December 9th, 2008, Mr. Williams noted that, in

general, the natural flow of stormwater from the Bernikier property was southwesterly over portions of the Burpee property. He went on to state that as a result of the home and driveway construction on the Burpees' property the natural stormwater flow patterns were altered and water was now gathering on the boundary line between Lots 131 and 133. He noted that stormwater that was gathering on the southeasterly area of the Bernikier property was unable to drain away in light of the newly raised grade of the Burpee property and suggested that a drainage swale/ditch be installed down the boundary lines between the two properties so that the water could flow into the forested area at the rear of the lots.

[40] In a more detailed report dated August 12th, 2011, Mr. Williams indicated that the natural lay of the land slopes from Lot 131 (the Bernikier property) to Lot 133 (the Burpee property) in a south to southwest direction and proceeding westerly into the lots they slope in a more westerly direction. At page 3 of this report, Mr. Williams stated:

> It is also our opinion, that the construction of the home and driveway on Lot 133, along with the lot re-grading and chain link fence installation in late 2008, raised the existing grade elevations on a large portion of the property to a point where the surface water flow on and around Lot 133 was substantially altered. The final grading along the boundary line of Lots 131 and 133 saw the addition of fill on Lot 133 ultimately raise the land elevation in this area creating a damming effect whereby the natural surface water flow, which was originally in a south to south west direction from Lot 131 was impeded. Some areas began to pond and hold water in areas which likely held no water prior to the development of Lot 133. The only solution was to have a ditch/swale installed down the adjoining boundary line in an effort to keep the storm water flowing and to prevent ponding.

THE BERNIKIERS' EVIDENCE

[41] Mr. and Ms. Bernikier purchased Lot 131 High Road in the spring of 2006. They had a home built on the property which was completed in the fall of 2006. They did not move into their new home until August of 2007. Between the purchase of the lot and moving in, the Bernikiers visited the property regularly. During that time they

noticed that after heavy rains there was a moist area in the southeast front corner of their lot where water would stand in the hollows and wild "bushy" grass would grow.

[42] When the Bernikiers' home was built, their contractor decided to lead all of the property's rainwater into a single catch pipe, which extended out from their home into the southwest corner of their lot. In September of 2007, the Bernikiers had this pipe extended. This extension brought the pipe closer to the borderline with the Burpees' property.

[43] In June of 2008, the Bernikiers had additional landscaping done to their property. In particular, they had a french drain put in (at their expense) at the boundary line between their lot and Lot 129. Ms. Bernikier testified that Lot 129 was higher than the Bernikiers' lot and when it rained water gathered just beyond the mutual boundary line and came to rest on the Bernikier's property. As a result, they decided to install a french drain in that area. They also arranged for additional sodding on their property.

[44] According to Ms. Bernikier, the company that did this landscaping also informed them that they installed a small french drain on the southwest side of the Bernikier's property. Ms. Bernikier testified that she does not know whether this drain was actually installed. Mr. Bernikier testified that he did not see a french drain in this area of the property.

[45] After this additional landscaping was done, the Bernikiers extended their rainwater pipe even further. Ms. Bernikier testified that this extension took the pipe further away from the boundary line of the Burpees' property.

[46] Ms. Bernikier testified that this landscaping work concluded in late June of 2008. She said there were no changes to the water accumulation patterns between the completion of this landscaping work and the time that the Burpees raised the level of their property in late November or early December of the same year.

[47] Ms. Bernikier acknowledged that an old logging road crosses their property and that after heavy rain, water accumulates at the end of it on the southeast corner of the property. She testified that prior to the Burpees doing their landscaping (presumably the landscaping that they did in late November and early December of 2008) this "moisture" would go onto the Burpees' property.

[48] Ms. Bernikier recalled the discussion that she and her husband had with the Burpees in April of 2008. She testified that she raised the issue of the front portion of Lots 131 and 133 (where the bushy grass was growing) and volunteered to call the Halifax Regional Municipality to see if there was anything "drainage-wise or moisture-wise [that] could be improved". She contacted the Municipality and was apparently told that someone would come out to look at the problem, but no one ever came.

[49] Ms. Bernikier testified about the landscaping work that was done on the Burpees' property in late November or early December of 2008. She said that shortly after this work was completed there was noticeable pooling of water on her lot along the boundary line with Lot 133, to a degree she had never seen before. According to her evidence, in December of 2008, trees began to fall in the back of her property quite close to the boundary line. In January or February of 2009, more trees fell. That spring, there were large areas of water in different sections of the Bernikiers' property.

[50] According to Ms. Bernikier's evidence, she contacted Mr. Medjuck to discuss the situation and he indicated that he would send Jerry Murphy out to look at the property. Shortly thereafter, the Bernikiers received a copy of Mr. Williams's December 9th, 2008, report from Mr. Medjuck. The Bernikiers decided to follow Mr. Williams's advice and install a drainage swale/ditch along their boundary line with the Burpees' property. In order to build this ditch the Bernikiers had a 12 x 265 foot path cut in the woods along the south side of their lot.

[51] According to Ms. Bernikier's evidence, the drainage system recommended by Mr. Williams works well, although after heavy rain there can still be some standing water which takes time to dissipate. In addition, weeds and bulrushes grow along the boundary lines of the two properties.

[52] Ms. Bernikier testified that once the drainage ditch was built the catch pipe for their rainwater was rerouted to drain into the ditch.

[53] According to Mr. and Ms. Bernikier, the raising of the Burpees' land and the subsequent need for the Bernikiers to cut down numerous trees and build the drainage ditch on their lot has had a significant impact on their enjoyment of their property.

[54] Mr. Bernikier testified that the southeast (front) corner of his lot was always damp. He confirmed that when it rained, there would be pools of water on the boundary line between the Burpees' property and the Bernikiers' property which would evaporate after three to four days. He said that after the Burpees raised the level of their property in late 2008, the situation changed significantly. The water no long dissipated. Instead, it collected on the boundary line and stayed there.

[55] Mr. Bernikier testified about the stress (financial and otherwise) that the situation has caused.

PROCEDURAL HISTORY

[56] This matter began in the Small Claims Court in November of 2009 when the Bernikiers and St. Andrews filed a Notice of Claim against the Burpees alleging, *inter alia*, breach of certain restrictive covenants as well as nuisance. The Burpees filed a defence and counterclaimed for nuisance and negligence. In addition, they alleged that the claims exceeded the jurisdiction of the Small Claims Court.

[57] Shortly thereafter, the Burpees commenced this action in the Supreme Court of Nova Scotia against the Bernikiers and St. Andrews. They claimed in nuisance and negligence against the Bernikiers and, in addition, sought a declaration that they are in compliance with the restrictive covenants attached to their land. At the conclusion of the trial, the Burpees' solicitor advised that the negligence claim against the Bernikiers was no longer being advanced.

[58] The Bernikiers defended the action and counterclaimed against the Burpees for nuisance. In their Counterclaim, they alleged that the actions of the Burpees violated their riparian rights. This claim was withdrawn prior to the commencement of the trial.

[59] In addition, St. Andrews Village seeks a declaration that the Burpees are in breach of Restrictive Covenants 17, 18 and 24.

[60] In April of 2010, the Small Claims Court of Nova Scotia stayed the Small Claims Court action.

THE BURPEES' POSITION

[61] The Burpees say that the Bernikiers' decision to move their rain leader closer to the boundary line with Lot 133 and the installation of a french drain on the southwest side of the Bernikiers' property created a nuisance for which the Bernikiers are liable. They submit that these two matters caused substantial interference with the enjoyment of their land and caused them to do extensive landscaping in order to alleviate the problem. They are claiming special damages in the amount of $30,630.91 for the remedial work done on the north side of their lot.

[62] In relation to the Bernikiers' claim against them in nuisance, the Burpees say that they are permitted by law to prevent the flow of surface water across their property, provided that they do not redirect the flow of water from their land onto that

of their neighbours. They submit that their landscaping work done in November/December of 2008 was designed to accomplish that task.

[63] Finally, the Burpees submit that they are in compliance with Restrictive Covenants 17, 18 and 24.

THE POSITION OF THE BERNIKIERS AND ST. ANDREWS VILLAGE

[64] The Bernikiers submit that nothing they did created a change in the natural flow of water between their lot and the Burpees' lot. Further, they say that none of their actions resulted in a substantial or unreasonable interference with the Burpees use and enjoyment of their land.

[65] In relation to the counterclaim, the Bernikiers allege that the Burpees' actions in raising their lot and damming the water from coming onto Lot 133 created a substantial and unreasonable interference in the Bernikiers' use and enjoyment of their land, which renders the Burpees liable in nuisance. The Bernikiers have claimed special damages against the Burpees in the amount of $12,648.27, plus general damages of $7,500.00.

[66] Finally, St. Andrews Village alleges that the Burpees are in violation of Restrictive Covenants 17, 18 and 24. It seeks an order requiring the Burpees to remove their chain link fence and pay damages in the amount of $15,000.00 for the breach of Restrictive Covenants 17 and 24.

ISSUES

[67] The issues in this case can be summarized as follows:

(a) Are the Bernikiers liable to the Burpees in nuisance? If so, what are the damages that are payable?

(b) Are the Burpees liable to the Bernikiers in nuisance? If so, what are the damages that are payable?

(c) Are the Burpees in breach of Restrictive Covenants 17, 18 or 24? If so, what is the appropriate remedy?

LAW AND ANALYSIS

[68] Both the Burpees and the Bernikiers have framed their actions in nuisance. Before dealing with the specific issues, it is useful to review the law of private nuisance.

[69] In **Antrim Truck Centre Ltd. v. Ontario (Transportation)**, 2013 SCC 13, the Supreme Court of Canada provided a useful and comprehensive review of the elements of the tort of private nuisance. There, Cromwell J., writing for the court, confirmed that nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable. The court noted that the first part of the test (whether the interference is substantial) requires a threshold of seriousness that must be met before an interference is actionable. At ¶ 22 the Court stated:

> What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm 'means that compensation will not be awarded for trivial annoyances': para.77. In. *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that 'substantially alte[r] the nature of the claimant's property itself' or interfere 'to a significant extent with the actual use being made of the property' are sufficient to ground a claim in nuisance: p.915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling inference. As La Forest J. put it in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, actionable nuisances include 'only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes', and not claims based 'on the prompting of excessive 'delicacy and

> fastidiousness' ': p.1191 Claims that are clearly of this latter nature do not engage the reasonableness analysis.
>
> [Emphasis in the original]

[70] If the court is satisfied that the interference is substantial, it goes on to consider whether the interference is unreasonable. Only unreasonable interference justifies compensation.

[71] Traditionally, the courts have assessed whether interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances. When considering the gravity of the harm the court may consider, *inter alia*, the severity of the interference, the frequency and duration of the interference, the character of the neighbourhood and the sensitivity of the claimant. Courts are not bound to, or limited by, any specific list of factors. They are to conduct the balancing exercise taking into account the factors relevant in the particular case (**Antrim**, *supra*, at ¶ 26). Generally, the focus is on whether the interference suffered by the claimant was unreasonable, not on whether the nature of the defendant's conduct was unreasonable (**Antrim**, *supra*, at ¶ 28). The nature of the defendant's conduct is not, however, an irrelevant consideration (**Antrim**, *supra*, at ¶ 29). Ultimately, the goal of the law of nuisance is to protect people from substantial interference in the use or enjoyment of their land that is unreasonable in all of the circumstances.

Are the Bernikiers liable to the Burpees in nuisance? If so, what are the damages that are payable?

[72] As indicated previously, the Burpees' claim in nuisance is based on two allegations. First, that the Bernikiers installed a french drain system on the southwest side of their property which the Burpees allege resulted in an increase in the amount of water pooling on their property. Further, the Burpees allege that the Bernikiers' decision to move their rain leader closer to the boundary line with Lot 133 resulted in pooling of water on the Burpees' land. In the Burpees' Statement of Claim they

suggest that the landscaping that they had done to their property in late 2008 was required in order to alleviate flooding and hydrostatic pressure on their foundation and septic system that resulted from high water content in the soil. The Burpees claim the sum of $30,630.91 from the Bernikiers for the cost of this landscaping.

[73] It is clear that the Burpees had numerous problems with water on their lot almost from the time that they moved into their home. The problems arose in various areas of their property including the southwest side of their home, the northwest corner of the foundation, the southeast corner of the property and the boundary line between Lots 131 and 133.

[74] The Burpees have not satisfied me that there was hydrostatic pressure on their foundation or septic system or that any flooding that occurred on their property was caused by the conduct of the Bernikiers. In my view, the evidence does not support that conclusion.

[75] I am satisfied, and I find, that there was pooling of water on the Burpees' property along the boundary line with the Bernikiers' property. I find that this pooling was significant at times, particularly after heavy rains. Mr. Burpee testified that at times the pooling of water in that area would be two to six inches deep. His evidence in this regard was confirmed by Gabriel Welsh and Matt Nelson, two men that helped Mr. Burpee with some landscaping on the property.

[76] I find that the major cause of the pooling on the north side of the Burpees' property was the natural topography of the land which resulted in surface water flowing from the Bernikiers' lot to the Burpees' lot in a southwesterly direction. In addition, I am satisfied that the construction of the Burpees' home and driveway altered the flow of the surface water and, in the area of their driveway, contributed to the pooling of water on the north side of their land.

[77] I am unable to conclude, based on the evidence presented, that a french drain was installed on the southwest side of the Bernikiers' property or, if one existed, that any such drain resulted in pooling on the Burpees' land.

[78] The evidence in relation to the french drain system that was thought to have been installed on the southwest side of the Bernikiers' property was equivocal at best. According to Ms. Bernikier's evidence, the landscaping company that she and her husband hired in 2008 suggested that they were going to install a small french drain in that area of the property. A note written by Ms. Bernikier in support of this litigation (located at Tab 36 of Ex. 1) indicates that the landscaping company put a small french drain in this area. However, both Mr. and Ms. Bernikier testified that they did not actually see this french drain. There was no evidence that either of the Burpees saw a french drain being installed in that area, and Mr. Burpee acknowledged at trial that he had no evidence suggesting that there actually was a french drain in this area. In a letter from Mr. Williams to Mr. Medjuck dated March 25th, 2009, Mr. Williams indicated that he did not see any evidence of a french drain in this area. No one called any witnesses from the landscaping company to establish whether a french drain had been installed in this area of the Bernikiers' lot. At the end of the day, I am not satisfied, on a balance of probabilities, that a french drain was actually installed on the southwest side of the Bernikiers' property or, if one existed, that any such drain resulted in pooling on the Burpees' property.

[79] Further, the evidence has not satisfied me that the Bernikiers' decision to move their rain leader closer to the boundary line with Lot 133 resulted in a substantial interference with the Burpees' use or enjoyment of their land.

[80] The Bernikiers had a single rain leader which collected the roof water from their approximately 2000 square foot home. The end point of this rain leader was adjusted several times, but it generally faced the southwest corner of the Bernkiers' property. The first time it was adjusted (in 2007) it was moved closer to the boundary line between Lot 131 and 133. The second time that it was altered (in 2008) it was

angled away from the boundary line. Mr. Burpee testified that when the rain leader was moved in 2007, more water went over the back part of his property near his septic field. Ms. Bernikier denied that this alteration affected pooling in that area.

[81] While I accept that the relocation of the rain leader brought water closer to the boundary line of the two properties, I am not satisfied that this action resulted in a substantial interference with the Burpees' use or enjoyment of their land. In my view, the major cause of the pooling on the north side of the Burpees' property was the natural topography of the land, which resulted in surface water flowing from the Bernikiers' property onto the Burpees' property. In addition, the construction of the Burpees' driveway and home affected the flow of water. I am not satisfied that the Bernikiers' rain leader played a significant role in the pooling of water in that area.

[82] As noted in Mr. Williams's report of August 12th, 2011, rural lot development does not have much oversight from the Halifax Regional Municipality when it comes to grading and drainage. This is unfortunate for the parties as it is clear that there were drainage issues with these properties. It is notable, for example, that in addition to the swale constructed by the Bernikiers on the south side of their lot (after the Burpees raised the grade of their land) they also installed a large french drain at the boundary line with Lot 129 due to water gathering in that area of their property. Further, both the Burpees and the Bernikiers testified about water in the southeast front portions of their lots.

[83] As indicated, I am satisfied that the Burpees had water gathering in the area of their boundary line with Lot 131, but I am not satisfied that this condition was caused by a french drain installed by the Bernikiers or, to any significant extent, by the relocation of the Bernikiers' rain leader. As a result, the Burpees' claim in nuisance against the Bernikiers will be dismissed.

Are the Burpees liable to the Bernikiers in nuisance? If so, what are the damages that are payable?

[84] In their pleadings, the Bernikiers' claim in nuisance is based solely on the extensive landscaping work that was done by the Burpees in late 2008 which resulted in the raising of the level of the Burpees' lot on the boundary line with the Bernikiers' property. At the conclusion of the trial, however, their counsel advised that the construction of the Burpees' driveway also forms part of the Bernikiers' nuisance claim.

[85] I have found that the construction of the Burpees' home and driveway altered the flow of surface water on Lot 133. I am not satisfied, however, that the construction of the driveway resulted in a substantial interference in the Bernikiers use or enjoyment of their land.

[86] As indicated previously, when considering an action in nuisance the focus is typically on the nature of the interference suffered by the claimant more so than on the nature of the defendants' conduct. The Burpees moved into their home on November 1st, 2007. Presumably, their driveway would have been constructed by that date. Neither of the Bernikiers testified about any interference with the use or enjoyment of their land due to water prior to December of 2008, when the Burpees' major landscaping project was undertaken. The evidence does not support the suggestion that the construction of the Burpees' driveway resulted in a substantial interference in the Bernikers' use or enjoyment of their land.

[87] That takes me to the issue of whether the raising of the north side of the Burpees' lot and the resulting damming of water onto Lot 131 renders the Burpees liable to the Bernikiers in nuisance. This issue involves the law relating to surface water and certain unique principles that have been developed in relation thereto.

[88] One of the leading cases on the issue of surface water is **Edwards v. Scott (Rural Municipality)**, [1934] 1 W.W.R. 33 (Sask. C.A.), affirmed at [1934] S.C.R. 332. Edwards illustrates the distinction in the law between surface water and water flowing in a defined channel. The plaintiff in that case had erected a dam on the west side of his property in order to prevent water which had accumulated on a nearby property from moving onto his land. He sought an injunction restraining the defendant municipality from interfering with the dam. The defendant counterclaimed seeking an injunction restraining the plaintiff from erecting and maintaining the dam. The trial judge found that there was a natural watercourse in the area in question and granted the defendant an injunction restraining the plaintiff from maintaining the dam. The plaintiff appealed. The Saskatchewan Court of Appeal rejected the notion that there was a watercourse on the land in question. It held that the question for determination was whether surface water caused by heavy rains and melting snow could be prevented by the plaintiff from passing on to his land. The court stated at p. 40:

> .....The doctrine of the civil law is that the rights of drainage of surface water, as between owners of adjacent lands of different elevations, is governed by the law of nature and that the lower proprietor is bound to receive the water which naturally flows from the upper estate. The doctrine of the common law is stated to be that the upper proprietor has no legal right, as an incident of his estate, to have surface water falling on his land discharged on the lower estate, although it naturally would find its way there, but that **the lower proprietor may lawfully, in the proper use of his land, erect obstructions to prevent the water from overrunning his land, even if such obstruction has the effect of forcing the water back on the lands of the upper proprietor.**
>
> [Emphasis added]

[89] At p. 44 the court held:

> I cannot but conclude that the weight of authority in the provinces of Canada where the English common law prevails is that the principles which apply to water flowing in a defined channel do not apply to surface water – water of a temporary and casual character – which does not flow in any regular channel and has no certain course but

> which merely squanders itself over the surface of the ground. A right of drainage of surface water does not exist *jure naturae* and the plaintiff was within his rights in attempting by the erection of the dam on his own property to keep the surface water which had accumulated on sec. 20 and on the road allowance from draining on to sec. 21.

[90] On appeal to the Supreme Court of Canada, the court stated: "We concur with the conclusions of the Court of Appeal and see no reason to add anything to the reasons given in support of those conclusions by Mr. Justice Martin which, in our view, are entirely satisfactory." (p. 332)

[91] The general principle enunciated in **Edwards v. Scott (Rural Municipality),** *supra*, which provides that a lower land owner may lawfully erect obstructions to prevent surface water from overrunning his land even if such obstruction results in forcing the water back onto the lands of his neighbour has been qualified to provide that the lower land owner is not entitled to gather water on his property and throw it back upon his neighbour's land. In **Smith v. Autoport Ltd.** (1973), 11 N.S.R. (2d) 569 (N.S.S.C. T.D.), Jones J. reviewed the law relating to surface water and stated at ¶30:

> Under these authorities a party is under no obligation with respect to the natural drainage of surface water in undefined channels. **A person may change the surface on his property without liability for the incidental effect upon adjoining lands. A party cannot, however, by artificial means gather the water on his property and throw it upon his neighbour's land**.....
>
> [Emphasis added]

[92] The issue of surface water was also reviewed by the Nova Scotia Court of Appeal in **Loring v. Brightwood Golf and Country Club Ltd.** (1974), 8 N.S.R. (2d) 431. There, the court noted at ¶ 27:

> The law, since earliest times, has been concerned with the supply and use of water, and, particularly, with the rights and duties of upper proprietors to retain or pass on water to lower proprietors and of the latter to receive or block receipt of water by them.....

[93] At ¶ 49 the court stated:

> *Farnham on Waters and Water Rights*, supra, at p. 2619 summarizes the American law respecting surface water in a statement which in my opinion would also describe the present state of Canadian law:
>
> > With respect to water as it falls from the clouds the burden must rest where it falls so long as the water remains in a diffused state, without being gathered into any channel. In such condition the water will, ordinarily, do no particular harm, and if it is necessary to obtain drainage for it, resort must be had to the aid of the state by means of public drainage proceedings. While the water is in that condition any landowner may make such improvements upon his property as he chooses. **He may build upon or change the surface at pleasure, without liability for the incidental effect upon adjoining property. He cannot, however, by artificial means gather the water upon his property together and throw it upon the property of his neighbour, whether the grade of the latter's land is higher or lower than his.** The property of the neighbour is under no servitude to furnish artificial drainage for his property. Furthermore, the upper owner cannot change the course in which the water flows over the surface of his property, nor can he render his surface impervious so as to collect the water at his boundary and cast it on to his neighbour, nor can he do anything to relieve himself of the water at his neighbor's expense.
>
> [Emphasis added]

[94] See also the Supreme Court of Canada decision in **McBryan v. The Canadian Pacific Railway Company** (1899), 29 S.C.R. 359.

[95] The Bernikiers submit that the Burpees' surface water is being thrown upon or redirected onto their land. Alternatively, they say that the general principles enunciated in the cases dealing with surface water must be tempered by a reasonableness analysis. In other words, the Burpees were only entitled to raise the level of their land if the circumstances justified such action. The Bernikiers suggest that any pooling on the boundary line between Lots 131 and 133 was occasional and did not warrant the significant action taken by the Burpees.

[96] In the pretrial brief filed on behalf of the Bernikiers reference is made to the case of **Swartz v. Verrette**, 2011 NSSM 23, where Adjudicator Slone stated at ¶ 9:

> Landowners have a right to make changes to their land, but must take responsibility if someone else is adversely affected.....

[97] Further, reliance is placed on ¶ 11 of the said decision where Adjudicator Slone stated:

> The upshot is that there is a kind of status quo with respect to water drainage that must be maintained, failing which the perpetrator of the change is liable for any damage that results.

[98] In response, the Burpees submit that they were entitled, in law, to raise the level of their land to deal with the water that was coming onto their property and that according to the authorities dealing with surface water, they are not liable to the Bernikiers for the incidental effect upon their land.

[99] The Burpees dispute the suggestion that they were only permitted to raise the level of their land if the circumstances justified the taking of such action and say that they were entitled to do exactly what they did – build a dam. Alternatively, they submit that their actions were reasonable in the circumstances. They note the various problems that they had with water collecting on their land and the various solutions that they implemented to deal with these issues. They say the boundary line between Lots 131 and 133 was a boggy mess and they should not be obliged to live with such conditions.

[100] The Burpees submit that Adjudicator Slone's comments in **Swartz v. Verrette,** *supra*, are not in keeping with the current state of the law dealing with surface water. They referred the court to a number of authorities which deal with surface water including **Wakelin v. Superior Sanitation Services Ltd.** (1994), 116 Nfld & P.E.I.R.

239 (P.E.I.S.C. T.D.), affirmed at (1995), 125 Nfld & P.E.I.R. 267 (P.E.I.S.C. A.D.). In that case, Campbell J. stated at ¶ 12:

> The defendant also refers to **Wilton v. Murray**, supra, and to the exposition of the law pertaining to watercourses, at p. 39 (Man.R.) where Bain, J., quotes with approval the dictum of Moss, J.A., in **Ostrom v. Sills** (1897), 24 O.A.R. 526:
>
> > 'As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists **jure naturea** [sic], and that, as long as surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein, the lower proprietor owes no servitude to the upper to receive the natural drainage.' This being the law, it follows that the lower proprietor may protect himself by the erection of a wall, or embankment, or other obstruction, on his own ground, though the effect may be to turn the water back upon and to overflow the lands of the neighboring proprietor.

[101] Campbell J. concluded at ¶ 15:

> I would also conclude that a lower proprietor may not gather up divers sources of surface water and cast it upon the higher land of his neighbour but he owes no servitude to an upper proprietor to receive the natural drainage and may repel surface water which merely squanders itself over the surface of the ground.

[102] I am satisfied, and I find, that the water that was collecting on the boundary line between the Burpees' property and the Bernikiers' property was surface water which was collecting after rain. It was not a watercourse.

[103] I find as a fact that in late November of 2008 the Burpees raised the level of the north side of their lot by twelve to sixteen inches the result of which was to dam the surface water which was flowing from the Bernikiers' property. I am not satisfied, nor do I find, that thereafter the Burpees' surface water was being thrown upon the Bernikiers' land or was being redirected from the Burpees' property to the Bernikiers' property. I find that the swale that the Burpees constructed between their driveway

and the common line with Lot 131, and the design of the landscaping work done in that area of their property, prevented their surface water from being redirected onto the Bernikiers' land.

[104] That takes me to the issue of whether the Burpees were entitled to raise the level of their land without regard to the effect on their neighbours. In other words, were the Burpees entitled to dam the north side of their property without liability for the incidental effect on the Bernikers?

[105] I am satisfied that the raising of the north side of the Burpees' property resulted in a substantial interference with the Bernikiers' use or enjoyment of their land. The evidence is clear that the raising of this portion of the Burpees' property resulted in a significant accumulation of water on the Bernikiers' lot which required them to take the remedial action recommended by Mr. Williams. The issue is whether the interference was unreasonable.

[106] I have concluded that in light of the authorities that hold that a lower proprietor owes no servitude to an upper proprietor to receive the natural drainage of surface water and may change the surface of their land without liability for the incidental effect upon their neighbours, the interference in this case was not unreasonable. In other words, in light of the principles enunciated in cases such as **Edwards v. Scott (Rural Municipality)**, *supra*, and **Loring v. Brightwood Golf and Country Club Ltd.,** *supra*, which in my view, are binding on this court, the interference complained of is not actionable.

[107] I have carefully considered Mr. Rumscheidt's argument that the lower landowner may erect a wall or other obstruction on his property to prevent the flow of surface water on to his land only if such conduct was reasonable in all of the circumstances. This position fits in nicely with the general law relating to nuisance.

[108] The difficulty that I have with Mr. Rumscheidt's argument is that it adds a qualification to the surface water cases that, in my view, does not presently exist. The principles relating to surface water enunciated in **Edwards v. Scott (Rural Municipality)**, *supra*, and **Loring v. Brightwood Golf and Country Club Ltd.**, *supra*, are not qualified by a finding of reasonableness. If such a qualification is going to be read into these cases, it will have to be from a higher court. I consider myself bound by **Edwards** and **Loring** and, based on these authorities, I conclude that the Burpees are not liable to the Bernikiers in nuisance for the raising of the north portion of their lot.

[109] As indicated previously, the Bernikiers rely upon the comments of Adjudicator Slone in **Swartz v. Verrette**, *supra*, in support of their claim. I have not found that case to be particularly helpful in the circumstances before me. As a preliminary matter, with respect, I have difficulty with the generality of Adjudicator Slone's statements relied upon by the Bernikiers. Further, in my view, **Swartz v. Verrette**, *supra*, is distinguishable from the case at bar. That case involved an upper landowner who changed the course in which water flowed over his property. In addition, the court found that a drainage pipe or weeping tile was either put in place, or exposed, which had the effect of diverting considerably more water onto the claimant's property than had been draining previously. It did not deal with the issue of the ability of a lower landowner to change the level of his land to deal with surface water and whether such action can result in him being liable in nuisance for the incidental effect upon his neighbour's land.

[110] The Bernikiers' claim against the Burpees in nuisance will be dismissed.

Are the Burpees in breach of restrictive covenants 17, 18 or 24? If so, what is the appropriate remedy?

[111] Restrictive Covenant 17 provides, *inter alia*, that the lands or buildings erected thereon shall not be a nuisance to the occupants of any neighbouring lands or

buildings. St. Andrews submits that the Burpees are in breach of this restrictive covenant.

[112] I have concluded that the Burpees were entitled to raise the surface of their land and are not liable in nuisance for this action. They are not in breach of Restrictive Covenant 17.

[113] Restrictive Covenant 18 bears repeating. It provides:

> No fence or wall shall be erected or maintained on the lands or any part thereof other than an iron or wooden fence of open construction with or without brick or stone foundations, unless approved in writing by the Grantor and no such fence shall be higher than six (6') feet, or be situated within twenty (20') feet of the street line in front of the lands on which said fence is erected or within ten (10') feet of any other street line. Screens for landscaping purposes may be erected upon written approval from the Grantor.

[114] Mr. Medjuck testified that the purpose of this covenant was to leave the subdivision "open" so that there would be no fences between neighbours and the wildlife would remain. He stated that "the whole point was to have no fencing whatsoever, leave it open". St. Andrews takes the position that by erecting a chain link fence the Burpees are in breach of this covenant.

[115] The Burpees take the position that they are in compliance with this restrictive covenant. They say that they erected a chain link fence of open construction made of galvanized steel, which is an alloy of iron. They submit that since the fence is made with an alloy of iron, they have complied with the covenant in question. Alternatively, they say that they received permission to erect this fence from St. Andrews' agent, Jerry Murphy. Finally, the Burpees note that other individuals in the subdivision have chain link fences around portions of their property and, accordingly, the character of the neighbourhood has changed to make this restrictive covenant obsolete or unenforceable.

[116] Restrictive Covenant 18 does not preclude the erection of fences in St. Andrews Village. It allows for the erection of iron or wooden fences of open construction without permission from the Grantor. If, on the other hand, a property owner wishes to erect a fence constructed of a material other than iron or wood, that owner must obtain the written approval of the Grantor.

[117] The first question to be answered is whether the Burpees erected an iron fence. Mr. Burpee gave evidence at trial that steel is made out of iron ore. He was not qualified as an expert on metals so his evidence in this regard is of limited assistance.

[118] During summation, Ms. White provided the court with the following definition of steel contained in the *Canadian Oxford Dictionary*, 2d ed. (2004), *sub verbo* "steel":

> **Steel** • *noun* **1** a hard strong usu.grey or greyish-blue alloy of iron with carbon and usu. other elements, much used as a structural and fabricating material (*carbon steel; stainless steel*).....

[119] The question arises as to whether I am able to take judicial notice of the fact that steel is an alloy of iron based on this dictionary definition or otherwise.

[120] Reliable dictionaries can provide a basis for judicial notice. In **R. v. Krymowski,** 2005 SCC 7, Charron J. stated at ¶ 22:

> A court may accept without the requirement of proof facts that are either '(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy': *R. v. Find,* [2001] 1 S.C.R. 863, 2001 SCC 32, at para. 48. The dictionary meaning of words may fall within the latter category: see J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at §9.13 and § 19.22.

[121] That is not to suggest that the court will necessarily take judicial notice of the dictionary meaning of words. Certain words (such as certain scientific or technical

terms) will require additional proof. In this case, I am satisfied that I am able to take judicial notice of the fact that steel is an alloy of iron with carbon and usually other elements. That, however, does not conclude the matter. I must still consider whether a fence made from an alloy of iron and other elements can be considered to be an iron fence.

[122] Counsel for St. Andrews takes the position that iron and steel are not the same and that the terms are not interchangeable. In my view, the question is not whether steel and iron are the same thing. The question is whether a steel fence that is made of an alloy of iron and other elements is capable of being considered to be an iron fence.

[123] In **Triple "F" Holdings Ltd. v. The Minister of National Revenue** (1981), 81 D.T.C. 135 (T.R.B.) the terms "corrugated iron" and "galvanized iron" were found to mean "corrugated steel". The Board in that case had expert evidence from a metallurgist who testified that steel is iron with a lower carbon content and also containing manganese. In addition, the Board referred to a definition of "iron" contained in *Webster's Dictionary* which provided, *inter alia*, that:

> .....Steel is iron which is malleable between certain (variable) limits of temperature and is either capable of being cast into an initially malleable mass, or becomes extremely hard when suddenly cooled or possesses both of these properties.

[124] In the case at bar, unlike **Triple "F"**, I have not been provided with expert evidence from a metallurgist, nor have I been provided with a definition of the term "iron". Nevertheless, I am satisfied that a fence made of an alloy of iron and other elements is capable of being considered to be an iron fence.

[125] During the course of the trial the suggestion was made that the covenant in question was intended to permit the erection of wrought iron fences. No evidence was given to this effect. Even if such evidence had been given, the restrictive covenant in question does not refer to wrought iron; it refers to "iron". If the

developer had intended to restrict fences to wrought iron (or wood), it should have referred to "wrought iron" in the restrictive covenant.

[126] Counsel for the Burpees has referred the court to Di Castri on **The Law of Vendor and Purchaser**, 3rd ed., (loose leaf, current to January 22, 2013), where it is stated at §408:

> The general purpose and intention of the restrictive covenants are important elements for consideration in their interpretation. The language used is to be given its ordinary or popular meaning and is not, at any rate, as a general rule, to be read in a legal and technical sense.
>
> If this language is vague and indefinite, the restrictive covenant will not be enforced.
>
> As a general rule, where a vendor or his agent is the author of the contract, any ambiguity in an expression relating to a restriction will be resolved in favour of the purchaser.....
>
> It is submitted that doubtful cases, where the words, considered in the light of the surrounding circumstances, remain ambiguous, should be resolved in favour of the free use of property and against the restriction.....
>
> [citations omitted]

[127] In this case, the general purpose and intention of Restrictive Covenant 18 is of limited assistance. As indicated previously, Mr. Medjuck testified that the purpose of the covenant was to leave the subdivision open and not have fences between neighbours. The covenant that was drafted, however, does not reflect that intention. It allows for the erection of iron or wooden fences of open construction without the consent of the Grantor.

[128] In my view, there is an ambiguity relating to this restrictive covenant and in particular, in relation to the meaning of the word "iron". It is unclear whether "iron" is restricted to solid iron or wrought iron or whether it can include alloys of iron and other elements. I resolve this ambiguity in favour of the free use of the property and

against the restriction. I find that the Burpees are not in breach of Restrictive Covenant 18.

[129] In light of my conclusion in this regard, it is unnecessary for me to determine whether the Burpees received permission from St. Andrews' agent to erect a fence or whether this restrictive covenant is obsolete or unenforceable.

[130] That takes me to the issue of whether the Burpees have breached Restrictive Covenant 24. This covenant provides, *inter alia*, that lands undisturbed during construction shall remain in a natural state. St. Andrews submits that the subdivision in question was intended to create rural lots which were left, as much as possible, in a natural state. Manicured and carefully landscaped properties were not intended or envisioned. St. Andrews states that the landscaping project that was conducted by the Burpees in late November/early December of 2008 encompassed portions of the Burpees' property that were undisturbed during construction and significantly altered the natural state of their land.

[131] The Burpees submit that the north side of their property had already been disturbed during the construction of their home. In other words, this area of their lot had already been altered from its natural state when their house was built. They say they simply re-landscaped this area in late 2008 to deal with the issue of water on their property.

[132] In addition, the Burpees refer to Restrictive Covenant 15 which provides:

> No excavation shall be made on the lands except excavations for the purpose of building on the lands at the time of commencement of construction or for the purpose of improving the gardens and grounds thereof. No soil, sand or gravel shall be removed from the lands except with the prior written permission of the Grantor.
>
> [Emphasis added]

[133] The Burpees submit that the landscaping that was done in late 2008 was to help deal with the pooling of water that was taking place on their property and was for the purpose of improving their gardens and grounds.

[134] During the trial, Mr. Burpee testified about the clear cutting that was done to his property in order to construct his home. He marked on Ex. 5 the general area where the trees were removed. He also provided photographs of the property taken just prior to he and his wife moving into their new home.

[135] I am satisfied from the evidence presented, and I find, that the north side of the Burpees' property had been disturbed during construction and had already been removed from its natural state when their home was originally built. I therefore conclude that the Burpees are not in breach of Restrictive Covenant 24 as a result of the landscaping that they undertook in late 2008.

CONCLUSION

[136] The Burpees' action against the Bernikiers will be dismissed. The Bernikiers' action against the Burpees will also be dismissed. An Order will issue declaring that the Burpees are not in breach of Restrictive Covenants 17, 18 and 24. Finally the action of St. Andrews Village Estates Ltd. against the Burpees will be dismissed.

[137] I will receive written submissions on costs in the event that the parties are unable to agree on this issue.

Deborah K. Smith
Associate Chief Justice