SUPREME COURT OF NOVA SCOTIA

Citation: *3021386 Nova Scotia Ltd. v. Barrington (Municipality)*, 2014 NSSC 1

Date: 2014-01-04
Docket: Yarmouth No. 404871
Registry: Yarmouth

Between:

3021386 NOVA SCOTIA LIMITED, A CORPORATION
APPLICANT

v.

MUNICIPALITY OF THE DISTRICT OF BARRINGTON, A CORPORATION
RESPONDENT

Judge: The Honourable Justice Pierre L. Muise

Heard: July 4 and 5, 2013, in Shelburne, Nova Scotia

Counsel: Christopher I. Robinson, for the Applicant
Kevin C. MacDonald, for the Respondent

[3]

FACTUAL BACKGROUND

[1] A new Barrington High School was built. The students moved into it in or around the spring of 2006. The property encompassing the old Barrington High School was returned from the Tri-County Regional School Board to the Respondent Municipality of the District of Barrington.

[2] The Municipality issued a Request for Proposals for Disposition and Use of the Former Barrington Municipal High School dated February 1, 2006 and a Request for Proposals for Development of the Former Municipal High School Property dated October 2006. Kenneth B. Anthony, initially on behalf of Anthony Properties Limited, submitted proposals in relation to both requests for proposals. His proposal in response to the October 2006 request was accepted. It culminated in an Agreement of Purchase and Sale for the property, with the exception of the portion encompassing the Soccer Field. The purchaser in the Agreement was the Respondent Numbered Company, 3021386 Nova Scotia Limited, and the Agreement was signed by its President, Mr. Anthony, on November 30, 2006.

[3] John Hogg, Supervisor of Property Services for the School Board, advised Mr. Anthony that two wells supplied water to the old High School. One was on

the soccer field portion of the property, which I will refer to as the Soccer Field Well. The other was in the courtyard in the front of the old Senior High School, which I will refer to as the Courtyard Well. At that time, and until July of 2009, the Municipality and Mr. Anthony understood that the water being drawn into the old High School was from the Courtyard Well.

[4] On December 5, 2006, Mr. Anthony asked Brian Holland, Municipal Clerk/Treasurer for the Municipality, whether he could continue to use the water from the Soccer Field Well without any liability to Mr. Holland, nor the Municipality. On January 9, 2007, Mr. Holland communicated to Mr. Anthony that the Municipality decided to deny his request.

[5] The sale of the property closed on February 16, 2007.

[6] On or about November 14, 2006, the Municipality, when it had accepted the proposal submitted on behalf of Anthony Properties Limited, had also given Mr. Anthony permission to begin demolishing the old Junior High School Building prior to the closing of the sale transaction. That demolition commenced in December of 2006. Unbeknownst to the Municipality and to Mr. Anthony, the piping from the Courtyard Well went through the old Junior High School before feeding into the old Senior High School. In or around the

spring of 2006, the valve to the water supply line from the Courtyard Well, located in the old Senior High School, was closed, and the line from the Soccer Field Well was kept open. However, all that had to be done to recommence drawing water from the Courtyard Well was to open that valve.

[7] Unfortunately, during the demolition of the old Junior High School, the line from the Courtyard Well was destroyed. The area under which it ran has now been paved over and is used for parking.

[8] It was not until July 2009 that Mr. Mr. Anthony was informed that the water being drawn into the old Senior High School building was actually being drawn from the Soccer Field Well. It was discovered by Mr. Anthony's plumber who put Javex tablets in the Soccer Field Well and was able to detect the odor of Javex in the water flowing from the tap at the old Senior High School. The plumber engaged in such testing after being asked by Mr. Anthony to attempt to determine the source of the water supplying the old Senior High School.

[9] Mr. Anthony informed the Municipality of his discovery and once again asked permission to use the Soccer Field Well. Once again, that permission was denied.

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[10] In December of 2007, the Numbered Company's contractor, while working on the property, discovered what was described as oil, which appeared to have contaminated some of the soil on the property. The area was excavated. However, no analysis of the soil was conducted to determine what the substance was, nor whether it met the provincial guidelines. The Courtyard Well was in close proximity to the excavated area. Therefore, Mr. Anthony had an Environmental Site Assessment conducted by ECCO Environmental, and a report was generated dated March 13, 2008. A number of test pits and monitoring wells were created around the area of the Courtyard Well and the excavation. None of the samples revealed the presence of hydrocarbons above levels accepted by the Nova Scotia Guidelines for soil and potable water. As part of the assessment, a water sample had been taken from the reservoir inside the former Senior High School. It tested negative for hydrocarbons. It is uncertain whether the reservoir contained water from the Courtyard Well as well as the Soccer Field Well, or only water from the Soccer Field Well. The reason for that is that the reservoir was fairly large and the valve to the Courtyard Well was only shut off when the students moved into the new Barrington High School.

[11] The Report concluded that there were "no concerns related to the consumption of the potable water supplying the property" which, at the time, was thought to be the Courtyard Well.

[12] In July of 2012, a two litre pop bottle containing a water sample purportedly taken from the Courtyard Well was left at the office of Russell Finley, Manager and Senior Hydrogeologist with Rochon Engineering Ltd., and the author of the ECCO Environmental Assessment Report. The sample had been left in a black mailbox located outside. It stayed there for about a day in the July heat. Mr. Finley advised Mr. Anthony that it was not an official sample and suggested that proper samples be taken. Mr. Anthony asked that it be analyzed anyway. The analysis revealed the presence of what appeared to be lube oil. However the concentrations were within the levels specified in the Nova Scotia Provincial Guidelines as being acceptable for potable water.

[13] In contrast, the taking of a proper sample required strict adherence to sample bottle and sampling procedure requirements. The sample bottles were glass. Each sample used two 250 ml bottles and three 40 ml bottles, because of the importance of having the proper head space. Nitro gloves were to be worn. Samples were to be refrigerated. Mr. Finley only permitted the taking of

samples by people who he was comfortable had the ability and the knowledge to collect the samples properly.

[14] In December of 2012, Mr. Finley arranged for the collection of proper samples from the Courtyard Well, both before it was purged and after it was purged. He had it done by one of his workers who he trusted to so properly, and gave him directions on how to do it properly. No hydrocarbons were detected in either of those samples.

[15] The Numbered Company argues that the Courtyard Well is not a safe supply of drinking water. It indicates that the property, which has been developed into a building housing multiple residential units, needs a safe supply of drinking water, and claims an implied grant of easement to draw water from the Soccer Field Well for that purpose.

ISSUE

[16] The only issue to be determined is whether there was an implied grant of easement to the Applicant Numbered Company, giving it a right to draw water from the Soccer Field Well.

LAW AND ANALYSIS

OVERVIEW OF TEST FOR IMPLIED GRANT OF EASEMENT

[17] *Anger & Honsberger,* "Law of Real Property, Third Edition" (Toronto: Thompson Reuters Canada Limited, 2012), at pages 17-9 and 17-10 states:

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

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> For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection."

[18] Other formulations or expressions of the three criteria to establish an implied easement are contained in the following cases.

[19] In *Hart v. McMullen*, 1900 CarswellNS 73 (S.C.C.), at paragraph 9, the Court stated:

> "In the case of *Suffield v. Brown*, Lord Westbury's observations are to the effect that on a grant by an owner of an entire heritage, of part of that heritage as it is then used and enjoyed, there will pass to the grantee, all of those continuous and apparent easements which have been *and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted*. In the well known case of *Wheeldon v. Burrows*, Thesiger L.J. says that on the grant by the owner of a tenement, of part of that tenement as is then used and enjoyed there will pass to the grantee all those apparent and continuous easements, or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are *at the time of the grant* used by the owner of the entirety for the benefit of the part granted." (emphasis in original)

[20] In *Dobson v. Tulloch*, 1994 CarswellOnt 691 (C.J.), at paragraph 29, the Court stated:

> "The law relating to implied easements of apparent accommodations is conveniently summarized in *Halsbury's Laws of England*, Fourth Edition, Vol. 14 (London: Butterworths, 1975), paragraph 68:
>
> > Upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee all those continuous and apparent accommodations afforded by the part retained to the part granted which (1) are of such a nature that they might form the subject matter of an easement, (2) are necessary to the enjoyment of the property granted, and (3) have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted."

[21] In *Canada Lands Company CLC Limited v. Trizechahn Office Properties Limited*, 2000 ABQB 166, at paragraph 15, the Court stated:

> "The rule in ***Wheeldon v. Burrows*** has been applied in various Canadian cases. It provides that to establish an easement of this nature, Trizec must show:
>
> (a) the easement was continuous and apparent,
>
> (b) the easement was necessary for the reasonable use of the property granted, and

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(c) the easement was used by an owner before the transfer.

The rule, as stated by Professor Ziff, 'serves as a form of consumer protection, allowing a purchaser to acquire amenities (in the form of easements) that the purchased land appears to enjoy': *Principles of Property Law*, 2d ed. (Toronto: Carswell, 1996) at p. 399."

[22] In *Cringle v. Strapko*, 1994 CarswellOnt 734 (C.J.), at paragraph 13, the Court stated:

"The law concerning implied grants of easement is well settled, and may be summarized as follows:

When the owner of two adjoining tenements sells one of them and retains the other, he will be held to have impliedly granted all those continuous easements over the land which he has retained which are necessary for the convenient use and enjoyment of the land which he has sold, but he will not be held to have reserved any easements over the land which he has sold, except easements of necessity. He may also be held to have granted a right of way over the land, which he retains if there is a distinct and formed road over such land which he has been accustomed to use and enjoy in connection with the tenement which he has sold. *Knock v. Knock* (1897), 27 S.C.R. 664; *Israel v. Leith*, ante"

[23] In *DuVernet v.Eisener*, 1951 CarswellNS 24 (C.A.), at paragraph 21, the Court stated:

> "It was contented, however, that there was an implied grant of right to use the driveway when the conveyance was made to Teasdale. Whether this be so, I think, depends upon the intention of the parties as expressed in the conveyance. To determine that intention the Court looks not only at the words used in the conveyance but also at the circumstances existing at the time the conveyance was made, including the manner in which the land was being used by the common owner at the time the conveyance was made. If there is evidence to show that the common owner in the occupancy of the land conveyed used this driveway as though it was appurtenant to it and that it was necessary for the reasonable and convenient use of the land conveyed and that such user was continuous and apparent, then a grant of right of way will be implied and that which was a quasi-easement appurtenant to the land conveyed before the severance becomes an easement on severance."

[24] *Dobson, DuVernet* and *Cringle* expressed the necessity criterion in a slightly different way from that in which it is expressed in the other authorities cited. The *Dobson* case simply speaks of being "necessary to the enjoyment of the property", without any adjective qualifying the enjoyment. *DuVernet* speaks of the easement being "necessary for the reasonable and convenient use of the land conveyed". However, it is noteworthy that it cites in support the *Wheeldon v. Burrows* case which speaks of "those easements which are necessary to the reasonable enjoyment of the property granted". The *Cringle* case speaks of

those easements "which are necessary for the convenient use and enjoyment of the land" sold. The Applicant places significant emphasis on the word "convenient" in support of its argument that the easement requested in the case at hand should be granted. I will explore that word further in my discussion of the necessity criterion below.

[25] It is clear from all of the authorities that the Applicant must establish all three criteria. If the Applicant fails to establish one criterion, its claim must fail.

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

WHETHER THE EASEMENT IS NECESSARY TO THE REASONABLE ENJOYMENT, OR FOR THE REASONABLE AND/OR CONVENIENT USE, OF THE PROPERTY

[27] It is important to distinguish the test for necessity as it relates to an easement of necessity, from the test of necessity as it relates to an implied easement.

[28] In *Anger & Honsberger*, at page 17-9, it states:

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"The test for necessity is fairly stringent. In order to make a successful claim for an easement of necessity, it would have to be shown that it would be impossible to enjoy the dominant land otherwise. A common example is a right-of-way which would provide the only possible access to a piece of land."

[29] The Court in *Dobson*, at paragraph 40, stated:

"As summarized in *Haisbury's*, supra, at p. 31, para. 61:

> In connection with the doctrine of the creation of easements by implication of law there is a distinction of great importance between easements of necessity and easements which are merely necessary for the reasonable enjoyment of the property granted, for where an owner of land grants part of land and retains the other parts himself all easements necessary for the reasonable enjoyment are usually implied in favour of the parts so granted; but such easements are not raised by implication in favour of the part retained unless they are easements of a much more restricted class, namely 'easements of necessity', without which no enjoyment at all would be possible."

[30] The Court in *Cringle*, at paragraph 14, commented on this passage from *Dobson* as follows:

"Pardu J., in finding the defendants had proven the existence of an implied easement of apparent accommodations, held that there is an implication that on a grant there will pass all the easements that are necessary to the reasonable

> enjoyment of the property. In this context, what is a necessity was interpreted with more latitude than the requirement of necessity in the context of an easement of necessity."

[31] Therefore, clearly, the Applicant is not required to establish that, without the easement, it could not use or enjoy the property at all.

[32] As noted above, the Applicant emphasizes the importance of the use of the word "convenient" by the above-noted authorities in expressing the test for establishing the necessity criterion. It argues that convenience of use is a "critical" factor. It submits it is not required to spend any resources in attempting to create any alternative to the easement sought, nor in proving that there are no other alternatives.

[33] However, it is noteworthy that, the Court in *Cringle*, which used the word "convenient" extracted the test from authorities decided in 1897 and 1890. The *DuVernet* decision was a 1951 case, and based its formulation of the test on *Wheeldon v. Burrows*, as well as cases decided in 1887 and 1900, including the *Hart v. McMullen* case.

[34] The online Merriam-Webster Dictionary notes that a now obsolete definition of "convenient" is "suitable" or "proper". When those now obsolete

definitions are substituted for the word "convenient" in the *Cringle* and *DuVernet* formulations, in my view, it creates a sentence that is more fitting and makes more sense in the context, than would be the case using the modern definitions of convenient. Those modern definitions include the following:

> "(a) suited to personal comfort or to easy performance;
>
> (b) suited to a particular situation;
>
> (c) affording accommodation or advantage; and
>
> (d) being near at hand."

[35] In the context of use and enjoyment of land, it makes much more sense to refer to suitable or proper use and enjoyment, than to use and enjoyment "suited to personal comfort or to easy performance", "suited to a particular situation", "affording accommodation or advantage", or "being near at hand". Therefore, in my view, the use of the word "convenient", in *Dobson* and *Cringle*, was simply another way of saying that the use or enjoyment being referred to was that which was reasonable, suitable or proper.

[36] I do not take the use of the word "convenient" as indicating that the grantee need not incur any inconvenience or expense in sourcing alternatives to the easement sought.

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[37] The standard required to establish the necessity criterion is not clearly established in the authorities. However, it is clear that "considerable inconvenience" in creating an alternative to the easement will suffice: *Trizec*, paragraph 17; *Germain*, paragraph 50.

[38] The Court in *Trizec* found that the claimant would incur considerable inconvenience in finding an alternate location for, and in moving, the waste system. The waste system was composed of a chute, dumpster and compactor located on a concrete pad approximately 20 feet by 54 feet in size. The compactor was affixed to the concrete foundation by large bolts embedded in the concrete.

[39] In *Germain*, the claimant would have had to have re-structured and renovated the home and retaining wall to access the garage in order to avoid having to drive over some portion of the purported servient tenement.

[40] In *English v. Wood*, 1981 CarswellNS 261 (S.C., T.D.), the Court found an implied easement even though the driveway in question could be moved 13 feet to the north. However, it did not comment on the expense and effort required to move the driveway, nor on whether it amounted to substantial inconvenience, or any other level of inconvenience.

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[41] However, in *Tanner v. Hiseler*, 1898 CarswellNS 93 (S.C.) the Court found that a drain easement was not necessary to the enjoyment of the property in question because it was "practicable … to make a drain to the sewer from his own house".

[42] The Applicant submits, in my view correctly, that a supply of potable water is necessary to the reasonable enjoyment of the residential development property in question.

[43] It further submits that there are no existing alternative supplies of potable drinking water located on the property purchased, and, creating an alternate safe well would involve considerable inconvenience.

[44] There are three existing wells on the property. One is a well referred to as the Mowatt Well which the Applicant had drilled to satisfy the lending requirements of the Royal Bank of Canada, which loan was obtained for the purposes of developing the property. That well was never hooked up to the former Senior High School and has 30 times the allowable level of iron. A second well is a dug well referred to as the School Board or Annex Well. It is located well over 150 feet from the former Senior High School. It was never hooked up to it. Mr. Hogg testified that he thought the well was "bad". The

third well is the Courtyard Well. I will address whether, in my view, that well is an alternative making the use of the Soccer Field Well not necessary to the reasonable enjoyment of the property.

[45] The Applicant argues that it is not an appropriate alternative because it was never directly piped to the former Senior High School and is now no longer piped even through the former Junior High School. It further argues that there is a serious question regarding the safety of the water in the Courtyard Well as it has been shown to contain hydrocarbons.

[46] I will address the piping issue first. Mr. Hogg provided evidence that, prior to the Applicant hiring a contractor to demolish the former Junior High School, all that was required to resume the drawing of water from the Courtyard Well to the former Senior High School was to reopen the valve in the pipe carrying water from that well to the school. He had no interest in the proceedings and his evidence was not refuted. I accept his evidence.

[47] The demolition of the former Junior High School occurred with the permission of the Municipality prior to closing. The work was done by R. & T. Excavation at the direction of the Applicant. In my view, the Applicant is

responsible for the actions of the excavation company it hired as it directed the demolition to occur.

[48] The Applicant suggested that the Municipality had an obligation to warn it that there was a pipe running through the former Junior High School connecting the Courtyard Well to the former Senior High School and, that having failed to do so, it would be unfair for it to ask this Court to consider the Courtyard Well as being one from which the water could be drawn simply by opening a valve. However, Mr. Holland, who testified as a representative of the Municipality, stated that he did not know the pipes ran through the former Junior High School. The property had only fairly recently been returned to the Municipality from the School Board. There is no evidence he, or anyone on behalf of the Municipality, inspected the property. There is no evidence that anyone other than Mr. Hogg knew about that piping arrangement. Mr. Anthony, who had signed the agreement to buy the property, did not know. Therefore, Mr. Holland's evidence that he did not know makes sense, and I accept it. Further, in my view, the onus was on the Applicant to ensure the demolition occurred without damage to any of the infrastructure it would need to service the residential building it was developing. In my view, it would be inequitable for the Applicant Numbered Company to use the Municipality's graciousness and

accommodation in permitting the demolition to commence prior to closing against it.

[49] Therefore, I will consider the question of the Courtyard Well as an appropriate alternative on the basis that the water in it could be accessed simply by opening a valve. The question remains whether the Courtyard Well is a safe supply of potable water.

[50] Only one sample of water tested positive for hydrocarbons. It was the sample that was collected in the two litre pop bottle which was left in a black mailbox located outside the office of Mr. Finley. The only evidence there is of its collection is that Kenneth Anthony, on behalf of the Applicant, "arranged for the water from the well in front of the property to be tested". There is no evidence of who collected the sample in the two litre bottle. There is no evidence of where the two litre bottle came from. There is no evidence whether or how it was cleaned. There is no evidence how the sample was taken. Mr. Finley indicated to Mr. Anthony that it was not a proper sample and recommended the taking of a proper sample. In my view, the results of the analysis of that sample are not a reliable reflection of the contents of the water

from the Courtyard Well, and there is insufficient evidence to establish that they correctly reflect the contents of the water in the Courtyard Well in July 2012.

[51] Further, even if they were, they indicate that the level of hydrocarbons in the water is within the Provincial Guidelines for drinking water.

[52] In addition, the detected hydrocarbon is consistent with lube oil, rather than some other hydrocarbon such as fuel oil. That indicates that, even if the lube oil was in the well, more likely than not, the hydrocarbon source would not be leakage from fuel tanks which had previously been on the property.

[53] Two samples of water, taken in December of 2012, directly from the Courtyard Well, using proper sampling containers and procedures, conducted both before and after the well was purged, were analysed. No hydrocarbons were detected.

[54] Mr. Finley, in the ECCO Environmental Assessment Report dated March, 2008, which he authored, concluded that:

> "The analytical results of the samples [of water from the Courtyard Well] submitted suggests there are no concerns related to the consumption of the potable water supply in the property".

[2]

[55] That comment was made with knowledge of the results of the analysis of samples of soil and water taken from multiple test pits and monitoring wells located in close proximity to the Courtyard Well and excavated area, and forming an arc around them. Following receipt of the results of the analysis of the July 2012, and of the December 2012 water samples, he indicated he was unable to provide an opinion regarding whether the well should be used as a potable source of water. Notably, the only additional information of concern that he had at that time was the results of the analysis of the July 2012 sample which I have found to be unreliable.

[56] The excavated area is located east and southeast of the Courtyard Well, and is in close proximity to it. ECCO, in conducting its environmental assessment, tested the ground water flow and discovered that it was in a southerly direction. Therefore, the ground water flows away from the well as it goes through the excavated area.

[57] Eight test pits were dug in a rough arc near the drilled well and around the excavated area as part of the environmental assessment process. Soil samples were taken from those test pits and analysed. No hydrocarbons were detected in any of them.

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[58] Five monitoring wells were dug in an arc around the Courtyard Well and excavated area. Water samples were taken from those wells on February 27 and 28, 2008. Hydrocarbons were detected in some of the samples. However, none contained hydrocarbons at a level above the Provincial Guidelines for potable water.

[59] Boreholes were also drilled in some of the monitoring wells. Soil samples from those bore holes were analysed and no hydrocarbons were detected.

[60] Further, the December 2012 water samples taken from the Courtyard Well also tested negative for coliforms.

[61] Based on these points, in my view, more likely than not, the Courtyard Well is a safe supply of drinking water.

[62] In contrast, the Soccer Field Well was never tested for the presence of hydrocarbons; and, in April and May of 2012, it tested positive for the presence of coliforms, resulting in "boil orders". On the west side of the building, which is the side on which the Soccer Field Well is located, there is an area which, based on the concrete pad and metal strapping in place, appeared to be the area where there was once a buried fuel tank. Robichaud's Pumping Service (1993) Ltd. collected a soil sample in that area and analysed it. The results of the

analysis indicated the presence of hydrocarbons at concentrations exceeding the applicable Guidelines. Even though the Soccer Field Well appears to be further away from that contaminated area than the Courtyard Well is from the excavated site on the east side of the building, there is no evidence regarding the direction of ground water flow on the west side of the building. Therefore, in my view, it has not been established, on the evidence, that the Soccer Field Well is any better or safer potable supply than the Courtyard Well.

[63] Even if I were to consider the level of inconvenience required now to re-connect the Courtyard Well to the former Senior High School Building, I would not be of the view that it would amount to substantial inconvenience. All the Applicant would have to do is dig a new trench through the paved area and run a new pipe from the Courtyard Well to the former High School building. From the figures in the Environmental Assessment Report, the Courtyard Well only appears to be about 125 feet from the area of the building where the pipes enter, and about 80 feet to the nearest part of the building. In my view, the cost of installing a pipe would be nowhere near as substantial as the cost of making the changes that would have been required in *Trizec* and in *Germain*. It would be more akin to the cost of running a new drain, as in *Tanner v. Hiseler*, and likely

somewhat less extensive than the cost of moving a driveway, as in *English v. Wood*.

[64] Based on the foregoing, I am of the view that the Applicant Numbered Company has failed to establish that an implied easement to draw water from the Soccer Field Well is necessary to the reasonable enjoyment of the property purchased from the Municipality.

[65] Having so concluded, I need not address the remaining two criteria. However, I will do so briefly.

WHETHER THE EASEMENT TO DRAW WATER FROM THE SOCCER FIELD WELL WAS USED BY THE MUNICIPALITY FOR THE BENEFIT OF THE FORMER SENIOR HIGH SCHOOL UP TO AND AT THE TIME OF THE CONVEYANCE TO THE APPLICANT

[66] At the time of the conveyance, the former Senior High School was not being used and no water was being drawn from the Soccer Field Well into the reservoir located inside the building. The water contained in the reservoir, more likely than not, contained water that had been drawn from the Soccer Field Well. It could easily have also contained water that was drawn from the

Courtyard Well as the valve from that well had not been shut off until the students had moved to the new High School. While the former High School was operating, water was being drawn from both wells. Therefore, in my view, both wells were being used by the School Board. There is no evidence that water was actually drawn from either well after the school was returned from the School Board to the Municipality, and before the sale to the Applicant. The only evidence of one of the water supplies being stopped is that the valve to the Courtyard Well was closed. After the Applicant took over he unknowingly began drawing water from the Soccer Field Well as soon as he started using water. Therefore, I infer that the Soccer Field Well was open for the Municipality to draw water from while it had the former High School.

[67] In those circumstances, I cannot accept the argument of the Municipality that the Soccer Field Well was not used by it at the time of the conveyance to the Applicant. Even if no water was actually being drawn, that water supply was hooked up and water would have been drawn from it to feed the reservoir had the water from the reservoir been used. Consequently, I am of the view that the Soccer Field Well quasi-easement was being used by the Municipality at the time of the conveyance.

[2]

WHETHER THE EASEMENT WAS APPARENT AT THE TIME THE PROPERTY WAS CONVEYED FROM THE MUNICIPALITY TO THE APPLICANT

[68] *Anger & Honsberger*, at page 17-10, states:

> "For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection."

[69] At footnote 19, the following examples of apparent easements are extracted from various case references:

> "The presence of pipes running under the surface of and emptying into a gully on the quasi-servient tenement"; "a stovepipe passing from the quasi-dominant tenement through the quasi-servient tenement to a chimney"; "offensive odours emanating from the quasi-dominant tenement over land of the quasi-servient tenement"; and, "the position of windows of a house".

[70] These appear to be situations where the easement was reasonably detectable by simply being aware of the sights, sounds and smells present on the property, without introducing any testing procedure.

[71] The Applicant argues that a reasonable inspection includes the placement of Javex tablets in the Soccer Field Well to see if the smell of Javex can be detected in the water emanating from the taps. Once that test was conducted it became apparent that the water was being drawn from the Soccer Field Well.

[72] In *Tanner v. Hiseler*, at paragraph 9, the Court found that the drain easement in question was not apparent because there was no evidence from which it could even infer that the owner of the dominant tenement knew about the drain easement at the time of the severance.

[73] In *Babine Investments Ltd v. Prince George Shopping Centre Ltd.*, 2002 BCCA 289, at paragraph 51, the Court found that it was not unfair to find the existence of an implied easement because:

> "Prince George Investments knew when it granted lot 3 to Babine Investments that the building would continue to be used for a food store and muffin shop or some other commercial purpose. It was assigning its interest in leases to tenants operating those businesses. It knew the tenants would require access to the rear doors of the building. It knew its lease to Muffin Break required the tenant to dispose of garbage in a dumpster located wherever Prince George Shopping Centre designated. The dumpster was located in the parking lot, and relocated to the laneway in 1994."

[2]

[74] In the case at hand, it is undisputed that neither the Municipality, nor the Applicant, knew, at the time the conveyance, that it was the Soccer Field Well which was open to having water drawn from it to supply the former Senior High School. Both were under the understanding that it was the Courtyard Well that was open to having water drawn from it to supply that building. It was not until July of 2009 that that was discovered by Mr. Anthony and conveyed to the Municipality through Mr. Holland.

[75] A request was made at that time, by Mr. Anthony, on behalf of the Applicant, to use the Soccer Field Well. A prior request had been made before the closing. The Municipality refused both requests.

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

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

[2]

[78] In *Torosian v. Robertson*, 1945 CarswellOnt 2011 (H.C.), a drain running from the Plaintiff's house, under a street, and the Defendant's property, into a gully, where it emptied was found to be the subject of an implied easement. However, in that case, the issue of whether or not the drain was apparent was not in dispute. The case was contested on the grounds that the Plaintiff purportedly exceeded the limit to the easement, which was to discharge clear water only. I, therefore, infer that the presence of the drain in that case was apparent.

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

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

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

[81] In the case at hand, even Mr. Finley, who is a hydrogeologist, took samples from the reservoir in the former Senior High School thinking that the water in that reservoir was being drawn from the Courtyard Well. Therefore, it

obviously was not apparent to him that the water was being drawn from the Soccer Field Well, at that time, which was in February of 2008.

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

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

that arrangement. It only wanted access to the Soccer Field Well as an additional source of water.

[84] Consequently, in my view, in the circumstances of the case at hand, a trace test, using Javex tablets placed in the well, was not part of what constituted a reasonable inspection at the time of conveyance. That is the time that is relevant to the assessment of whether the implied easement sought was apparent: *Hart v. MacMullen*, paragraphs 9 and 10.

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

[86] It would be unfair to saddle the Municipality with an easement that was not apparent to either party at the time of conveyance. It would be giving the Numbered Company something it did not expect it was getting and forcing from the Municipality, something it did not think it was giving, and had no reason to so think.

[87] In light of the foregoing, I'm of the view that the Applicant has failed to establish that the implied easement it seeks was apparent at the time of conveyance.

[2]

[88] My conclusion regarding unfairness to the Municipality is further supported by the fact that, during the request for proposals process, Mr. Anthony, initially on behalf of Anthony Properties Ltd., and ultimately on behalf of the Applicant Numbered Company, indicated that he did not need an environmental assessment prior to closing and was prepared to assume the environmental risks associated with the property.

CONCLUSION

[89] In light of the foregoing, I am of the view that the Applicant Numbered Company has failed to establish the criteria required for an implied grant of easement to draw water from the Soccer Field Well. I therefore dismiss its application.

ORDER

[90] I ask the lawyer for the Municipality to prepare the Order.

COSTS

[91] If the parties are unable to reach agreement on the issue of costs, I will hear submissions in writing.

[2]

Muise, J.

[2]