

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacNeil v. Anban Holdings Ltd., 2005 NSSC 6

Date: 20050111
Docket: SH 234454
Registry: Halifax

Between:

Francis Xavier MacNeil and Tanya Dawn MacNeil
(Formerly Tanya Dawn MacDonald),
of 1021 Bland Street, Halifax, Nova Scotia

Applicants

v.

Anban Holdings Limited, a body corporate
Owner of 1023 Bland Street, Halifax, Nova Scotia

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: December 1, 2004 in Halifax, Nova Scotia

**Final Written
Submissions:** December 20, 2004

Counsel: Allen C. Fownes, on behalf of the Applicants
Brainard Fitzgerald, on behalf of the Respondent

By the Court:

[1] This is an application by way of a stated case under Civil Procedure Rule 27. The court has been charged with determining the following:

- A. Does the erection of a shed on the MacNeil property since at least 1982, operate to extinguish the perpetual, registered 8.5 foot wide easement or right of way in favour of the owner of 1023 Bland Street (Anban] through the MacNeil property?
- B. Does the erection of a fence on the property boundary since at least 1960 operate to extinguish the perpetual, registered 8.5 foot wide easement or right

of way in favour of the owner of 1023 Bland Street [Anban] through the MacNeil property? Is the answer different if there was a gate or opening in the said fence?

[2] The parties agreed on a Statement of Facts, a copy of which is attached as Schedule “A”. The Agreed Statement of Facts incorporated a partial abstract of title for each of the two adjoining lots of land located at 1021 and 1023 Bland Street, Halifax, in the Halifax Regional Municipality, Nova Scotia.

[3] Also attached to the Agreed Statement of Facts were copies of the Halifax City Atlas from 1878 and 1960 along with a number of Survey Location Certificates prepared in the years 1986, 1994, 2000 and two in 2003.

[4] Finally, there were two statutory declarations attached to the Agreed Statement of Facts. One was from a former owner, J. Gordon Allen, LL.B., and a second from John D. Conn, Nova Scotia Land Surveyor. The contents of both statutory declarations, according to the Agreed Statement of Facts, “are open to argument by either party hereto.” [See paragraph 11 of the Agreed Statement of Facts.]

LAW:

[5] An easement is defined in **Black’s Law Dictionary**, Fifth Edition, as:

Easement. A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant), rather than for the benefit of a specific individual (easement in gross). The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement.

A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.

An interest which one person has in the land of another. A primary characteristic of an easement is that its burden falls upon the possessor of the land from which it issued and that characteristic is expressed in the statement that the land constitutes a servient tenement and the easement a dominant tenement. *Potter v. Northern Natural Gas Co.*, 201 Kan. 528, 441 P.2d 802, 805. An interest in land in and over

which it is to be enjoyed, and is distinguishable from a “license” which merely confers personal privilege to do some act on the land. Logan v. McGee, Miss., 320 S.2d 792, 793.

[6] Easements can be created by prescription, by estoppel, by necessity or by express grant or reservation. The easement which is the subject of this application was created by an express reservation in a warranty deed from Chesley G. Abbott and his wife, Christina Abbott, and Cyril F. Abbott and his wife, Carrie Abbott to Elizabeth Moreash. This deed is dated the 29th day of April 1942 and was registered the 17th day of July 1942 in Book 844 at Page 1123 et sqq. This is the same lot which is today owned by Francis Xavier MacNeil and Tanya Dawn MacNeil (the “MacNeils”) at Civic Number 1021 Bland Street.

[7] The right of way reserved out of this lot is as follows:

RESERVING AND ACCEPTING unto Chesley G. Abbott and Cyril F. Abbott, their heirs and assigns and their tenants, servants and all persons authorized by them a perpetual right of way, in common with the Grantee, for persons, animals and vehicles over and along the passageway or strip of land 8 ½ feet in width along the southern side of said lot hereinbefore described from North Bland Street and across the eastern end thereof to the lot in the rear of the dwelling #45 North Bland Street [now 1023 Bland Street - my comment] for passing to and from the lot on which said dwelling house #45 is situated.

[8] The lot at 1021 Bland Street was originally a part of a larger lot of land acquired by Cyril F. Abbott at a sheriff’s sale. The deed is dated the 29th day of October, 1941 and was registered at the Registry of Deeds for Halifax County on the 4th day of December, 1941 in Book 836 at Page 582 et sqq.

[9] The remaining piece, now known as Civic Number 1023 Bland Street, is currently owned by Anban Holdings Limited (“Anban”). It was conveyed by Chesley G. Abbott et ux, Christina Abbott and Cyril F. Abbott et ux, Carrie Margaret Abbott to Robert Lawrence Stailing by warranty deed dated the 15th day of September, 1943 and registered the 29th day of September, 1943 in Book 863 at Page 673 et sqq. This conveyance included a perpetual right of way described as follows:

Together with a perpetual right of way for the said Robert Lawrence Stailing, his heirs and assigns, and his tenants, servants and all persons authorized by the owners or occupiers of the property Civic No. 43 North Bland Street [now 1021 Bland Street - my comment] for persons, animals and vehicles over and along the passage way or

strip of land eight and one-half feet wide along the southern side of said property Civic No. 43 North Bland Street and across the eastern end thereof to the lot herein above described as reserved in the Deed from Cyril F. Abbott and wife and Chesley G. Abbott and wife to Elizabeth Moreash, registered in the Registry of Deeds office at Halifax, N.S.

[10] This right of way was included as part of the legal description for 1023 Bland Street until at least 1982. It was, for some unknown reason, deleted in a deed of conveyance from one Lester Albert Daurie to BCD Developments Limited in 1986. This pattern was continued in two subsequent deeds (in 1987 and in 1995) before once again being resurrected in the conveyance to Anban in 2003. The right of way description used slightly modified wording but nonetheless it appears to be the same right of way as the one originally reserved out for the benefit of 1023 Bland Street.

[11] The reservation of the right of way in the legal description to 1021 Bland Street (the “MacNeil” property) continued from its creation in 1942 until conveyed to Alissa A. Allen [wife of the declarant, J. Gordon Allen, whose statutory declaration was attached at Tab “J” of the Agreed Statement of Facts] and Evelyn Lucy Kent in 1994. Again, for some unknown reason, the reserved right of way was dropped from the legal description in conveyances after 1994 (in 2000 and in the deed to the MacNeils in 2003). There was an apparent attempt to release it to the MacNeils’ immediate predecessor in title, Robert John Harris, on April 22, 2003. This release of right of way from John A. Withrow and James C. Withrow, carrying on business under the firm name and style of “Rawdon Realities”, is registered in Book 7333 at Page 504 et seq. at the Halifax County Registry of Deeds. Messrs. Withrow were never the owners of 1023 Bland Street. Consequently they could not release a right of way serving a property they did not own.

[12] It should be noted that estoppel was not raised as a possible argument to defeat the applicants’ claim although it was mentioned by the court. For reasons that will become apparent, I do not feel it necessary to deal with estoppel in making my decision.

[13] Counsel for the MacNeils and Mr. Brainard Fitzgerald, President of Anban, on behalf of the respondent, referred to a number of cases dealing with the abandonment or extinguishment of a right of way. In addition, the court made reference to the case of **Jansons v. Iwanczuk** (1991), 17 R.P.R. (2d) 308 (Ontario Court of Justice - General Division) and extended an invitation to the representatives of each party to

offer any comment he wished to make. Both sides subsequently filed supplementary letters regarding this case which was cited in the **Nova Scotia Real Property Practice Manual**, by Charles MacIntosh, Q.C., at section 13.6, footnote 6a., section 13 - 142.

[14] In the case of **King v. Brockins** (1980), 35 N.S.R. (2d) 328 at p. 334, Glube, J. (as she then was) in deciding that there had not been an abandonment of a right of way wrote:

The first issue before me is the status of the easement. This is an easement created by an express grant. The law on this matter indicates that there would have to be very definite evidence of abandonment and, in the case of an easement by way of a deed or a right-of-way by way of a deed, that, in order to release it, there would have to be an express release recorded.

The mere fact that an easement has not been used for periods of time does not indicate abandonment. The circumstances based on the facts of this case, clearly grant the easement to the plaintiff and do not deny him of that easement as originally granted.

[15] In the case of **Levy v. Stevens** (1978), 26 N.S.R. (2d) 236 (N.S.C.A.) at p. 249, paragraph 51, Coffin, J.A., writing for the court stated:

I also agree with the trial judge's finding that there was no intention on the part of Fred Nowe to abandon the right of way and that a mere cessation of use for a limited period does not result in the loss of the right to use.

[16] In the case of **Jansons v. Iwanczuk**, *supra*, Bland J., stated at page 6 of the Quicklaw version:

Having considered all of this evidence on the alleged issue of abandonment, I am satisfied this express grant of easement was never extinguished or abandoned. There was no express release or merger of owners. There was no evidence of any act of abandonment, no evidence of intention to relinquish the right of way and no barrier of any consequence. An easement or right of way created by express grant cannot be lost by non use. [emphasis added]

[17] It is clear then that the right of way will not be terminated for non-use alone. There must be "very definite evidence of abandonment" to use the words of Glube, J.

[18] The court must decide whether or not there is sufficient evidence to establish an intention on the part of either the current or one of the previous owner of 1023 Bland Street (the dominant tenement) to abandon the right of way that was created by express reservation in the 1942 deed from Abbott et al. to Moreash.

[19] Counsel for the MacNeils advanced the following arguments to support an intention of abandonment:

1. The existence of a fence separating the two adjoining properties for a period in excess of 40 years. [See Agreed Statement of Facts, Tab “D” - 1960 City Atlas and Tab “J” - Statutory Declaration of J. Gordon Allen, LL.B. and Tab “K” - Statutory Declaration of John D. Conn, N.S.L.S.].

2. The presence of an outbuilding on the right of way for a period in excess of 20 years [See Agreed Statement of Facts, Tab “E” - Survey Location Certificate dated January 17, 1986 and Tab “F” - Survey Location Certificate of Kenneth Whalen dated November 30, 1994 and Tab “G” - Survey Location Certificate of Paul Slaunwhite dated August 25, 2000 and Tab “H” - Survey Location Certificate of David R. Hiltz dated April 10, 2003 and Tab “J” - Statutory Declaration of J. Gordon Allen dated August 12, 2003 and Tab “K” - Statutory Declaration of John D. Conn dated March 12, 2004]

3(a) The removal of any reference to the included right of way in the legal description for the Anban property from 1986 until it was resurrected again in 2003. During this period there were three conveyances - 1986, 1987 and 1995.

(b) The removal of any reference to the reserved right of way in the legal description for the MacNeil property from 2000 onward. There were two conveyances during this period - 2000 and 2003.

[20] It should also be noted that Mr. Allen’s declaration makes reference to the existence of a certain tree “...approximately 18 inches in diameter...” which is located “...adjacent to the shed and in the middle of the purported right-of-way along the eastern end of the property” which in Mr. Allen’s opinion “... would prevent any sort of vehicular traffic over any purported right-of-way.” [See Tab “J”, page 2, first paragraph].

[21] Mr. Fitzgerald on behalf of Anban argued that the evidence presented on behalf of the MacNeils was insufficient to establish abandonment of the right of way by the previous owners of the dominant tenement.

[22] The various location certificates and City Maps, although they do show the existence of both a fence and a shed, do not convince me that there has been an abandonment of the right of way. The City Map of 1962 (Tab “D”) actually shows an outbuilding but it is not located on the 8.5 foot right of way. There also appears to be an opening in the fence albeit not on the right of way but an opening nonetheless that could have been used to access the backyard of 1023 Bland Street.

[23] The location certificates at Tabs “F”, “G” and “H” show the outbuilding (entitled “shed” on all three certificates) only partially obstructing the right of way. It does not completely obstruct the deeded right of way.

[24] I am also not persuaded that the removal of the reference to the right of way in the legal description for the Anban property in 1986 and the later removal of the reference for the MacNeil property in 2000 is proof of abandonment. On the contrary it suggests to me that the owners from time to time of the servient tenement acknowledged the existence of the right of way reservation through their property until relatively recently.

[25] The right of way is an important feature that benefits the Anban property. Without it the owners of the property would have difficulties in properly maintaining and repairing the structure located thereon. Their only access to the backyard would be through the house. There would be no way to get large objects to the backyard unless they were dropped from the sky. Obviously this would not be very practical.

[26] The onus is on the applicants to satisfy me, on a balance of probabilities, that, in the absence of an express release of the right of way, there is “very definite evidence of abandonment”. They have not satisfied me of this and consequently the declaratory relief sought by the applicants is denied. The respondent is entitled to the continuing enjoyment of the 8.5 foot right of way that has existed by express reservation since 1942.

[27] I have not heard from the parties regarding costs. If they cannot agree, I am willing to entertain further written submissions within 30 days from the date of this decision.

[28] I will also ask counsel for the applicants to prepare an order reflecting this decision.

J.

Schedule "A"
AGREED STATEMENT OF FACTS

The Parties hereto agree, unless the contrary is indicated, that the following are undisputed facts:

1. **Anban Holdings Limited** ["ANBAN"] is the registered owner of real property situate, lying and being at 1023 Bland Street, in the City of Halifax, Province of Nova Scotia, described in Schedule "A" attached hereto.
2. **Dr. Francis X. MacNeil** and **Tanya MacNeil** ["MacNeil"] are the registered owners of real property situate, lying and being at 1021 Bland Street, in the City of Halifax, Province of Nova Scotia, described in Schedule "A" attached hereto.
3. The **MacNeil** property was purchased May 1, 2003, by deed from Robert John Harris, registered in Book 7333, at pp. 480-484.
4. The **Anban** property was purchased on September 10, 2003, by deed from Clyde and Ruth Farquhar registered September 10, 2003, in Book 7472, at pp. 920-922.
5. An abstract of title for the *Anban* property from 1900 forward is attached hereto as Exhibit "A".
6. An abstract of title for the *MacNeil* property from 1900 forward is attached hereto as Exhibit "B".
7. The abstract of title in **Exhibit "A"** shows that when BCD Developments Limited obtained title in 1986, in Book 4123, at pp. 1, the deed made no reference to an easement in favour of the Anban property over the 1021 Bland Street MacNeil property, until the conveyance to the Respondent *Anban* in Book 7472, pp. 920 at which time reference to the easement was again made at the foot of the description.
8. The Abstract of Title in **Exhibit "B"** shows that from the 2000 deed to present day [i.e. the deed from Harris to the Applicants *MacNeil* in Book 7333, at pp. 480-484] reference to an easement in favour of the Anban property over the 1021 Bland Street MacNeil property, was omitted from the deeds in the chain of title. This was done without any written consent by the previous owner of the Anban property.
9. That the Anban easement was conveyed to it by the grantors Farquhar in Book 7472 at pp. 920-922 using the following language:

Together with any interest that the Grantor may have to a certain eight and one-half foot wide right of way which runs along the Southerly boundary of Civic Number 1021 Bland Street (formerly referred to as 43 North Bland Street) and then along the Eastern boundary of the said 1021 Bland Street to the land herein described.

Schedule "A", continued

10. That the following additional documents are attached as Exhibits "C" through "I",
- Exhibit "C" - excerpt from 1878 Halifax City Atlas
 - Exhibit "D" - excerpt from 1960 Halifax city Atlas
 - Exhibit "E" - Survey Location Certificate - 1986 - showing both 1021 and 1023 Bland Street
 - Exhibit "F" - Survey Location Certificate - 1994 - showing both 1021 and 1023 Bland Street
 - Exhibit "G" - Survey Location Certificate - 2000 - showing both 1021 and 1023 Bland Street
 - Exhibit "H" - Survey Location Certificate - 2003 - showing both 1021 and 1023 Bland Street
 - Exhibit "I" - Survey Location Certificate - 2003 - showing both 1021 and 1023 Bland Street
11. That a Statutory Declaration from a former owner [Gord Allen] is attached hereto as Exhibit "J", and a Statutory Declaration from John Conn, Nova Scotia Land Surveyor, is attached hereto as Exhibit "K", the contents of which are open to argument by either party hereto.
12. That there was an attempt by the previous solicitor for the McNeil's [sic, MacNeil's] to release a right of way through the McNeil [sic, MacNeil] property by securing a Release of Right of Way by instrument dated 22 April 2003 from John A. Withrow and James C. Withrow, recorded in the Halifax Registry of Deeds at Book 7333 at Page 504. See attached Exhibit "L".
13. The floor layout of the Anban property at 1023 Bland Street prevents the passing of lengthy building materials or other objects for proper maintenance from the front to the back of the said property.
14. The issues to be resolved are as follows:
- (A) Does the erection of a shed on the MacNeil property since at least 1982, operate to extinguish the perpetual, registered 8.5 foot wide easement or right of way in favour of the owner of 1023 Bland Street [Anban] through the MacNeil property?
 - (B) Does the erection of a fence on the property boundary since at least 1960 operate to extinguish the perpetual, registered 8.5 foot wide easement or right of way in favour of the owner of 1023 Bland Street [Anban] through the MacNeil property? Is the answer different if there was a gate or opening in the said fence?

Dated at Halifax, Nova Scotia this day of October, A.D., 2004.

Submitted by:

(Original signed)

Allen C. Fownes
Solicitor for Francis X. MacNeil

- and -

(Original signed)

Brainard Fitzgerald
For Anban Holdings Limited