COMMENT

Implied Easements of Necessity in Manitoba: Case Comment on *Norman* v. *Vincent*

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IN *NORMAN* V. *VINCENT*,[1] the defendant (hereafter the "vendor") subdivided his land and sold one parcel to the plaintiff (hereafter the "purchaser") while retaining the remaining adjoining land for himself. Subsequent to this the vendor sold the remaining land to another purchaser (hereafter the "neighbour"). At the time of their respective purchases neither the purchaser nor the neighbour knew that a sewer pipe ran from the purchaser's land across the neighbour's land. The neighbour later interfered with the sewer pipe and the purchaser suffered damages.

The purchaser sued the vendor in small claims court and was awarded a judgment of one thousand dollars. The vendor appealed to the Court of Queen's Bench and, pursuant to the rules, was afforded a *trial de novo*. The Queen's Bench affirmed the judgment of the small claims court, citing an apparent breach of a covenant in the contract of purchase and sale. This covenant indicated that the land was"free from encumbrances."

The vendor then brought a further appeal to the Manitoba Court of Appeal.

The Manitoba Court of Appeal ruled that they did not have jurisdiction to hear the appeal. In short reasons they noted that the appeal before them involved questions of mixed fact and law whereas the provisions of the *Court of Queen's Bench Small Claims Practices Act*[2] provided for an appeal on a question of law only. They also noted that the record before them did not, in any event, provide a sufficient evidentiary foundation for the legal point involved. Quite properly, therefore, the court refused to rule on the merits of the case.

While it was impossible for the Court of Appeal to rule on the merits of the case, the limited facts as we know them raise an

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[1] Unreported, Manitoba Court of Appeal, released 19 November 1990.

[2] S.M. 1982-83-84, C. 83, Cap. C285.

interesting point of law with respect to the issue of implied easements of necessity and the little known rule in *Wheeldon* v. *Burrows*.[3] Briefly, this rule operates when there is a subdivision of land and confers on the purchaser of the dominant tenement, the transferee of a part of the vendor's lands, the benefit of any easement over the land retained by the vendor, which the vendor himself had found it convenient to exercise on his own behalf prior to the sale to the purchaser.

Before the sale to the purchaser, therefore, this easement constituted a so-called "quasi-easement" for the simple reason that both the dominant and servient tenements were under the common ownership of the vendor, so the requirements for an actual easement were not met.[4]

Pursuant to the rule in *Wheeldon* v. *Burrows*, therefore, the purchaser receives as easements such rights over the tenement still retained by the vendor which the vendor had previously found to be necessary for the proper enjoyment and utilization of the tenement now transferred to the purchaser.

As noted by Thesinger J. in *Wheeldon* v. *Burrows*, however, there are limitations upon the kinds of rights which may pass to a transferee of land under the rule in the case. He wrote as follows on these limitations:

> [O]n 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 easements* (which, of course, I mean quasi-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 owners of the entirety for the benefit of the part granted.[5] [emphasis added]

Applying these comments to the facts in *Norman* v. *Vincent*, the threshold question therefore arises as to whether the sewer in that case constituted an easement that was "continuous and apparent" or "necessary for the reasonable enjoyment" of the land.

Considering, first, authority from legal monographs, Megarry and Wade[6] indicate that it is by no means clear how far the requirements

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[3] (1879), 12 Ch.D. 31 (C.A.).

[4] For a discussion of the requirements of an easement see *In Re Ellenborough Park*, [1956] Ch. 131 (C.A.), per Danckwerts J..

[5] *Supra*, note 3, at 49.

[6] *The Law of Real Property*, 4th ed. (London: Stevens & Sons Limited, 1975).

of "continuous and apparent" differ from "reasonable necessity." As these authors note, in *Wheeldon* v. *Burrows* they are treated in one place as synonymous and in another as alternative. With respect to "continuous and apparent," they write in the following general terms:

> A "continuous" easement is one which is enjoyed passively, such as a right to use drains or a right to light, as opposed to one requiring personal activity, such as a right of way. An "apparent" easement is one which is evidenced by some sign on the dominant tenement (or perhaps the servient tenement) discoverable on "a careful inspection by a person ordinarily conversant with the subject." *Thus an underground drain into which water from the eaves of a house runs may be both continuous and apparent.* Other examples are a watercourse running through visible pipes, windows enjoying light, and a building enjoying support.[7] [emphasis added]

Arguably, if water from eaves running into an underground drain qualifies as "apparent," then water from a sink or toilet and running into an underground drain might be considered "apparent" as well.

Anger and Honsberger[8] describe "apparent" in the following manner:

> 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 quasi-servient tenement which could be seen, heard or smelt by a reasonable inspection such as the presence of pipes running under the surface of and emptying into a gully on the quasi-servient tenement. . . .[9]

Finally, Chesire and Burns[10] address continuous and apparent easements as follows:

> Strictly speaking a continuous easement is one, such as the right to light, the constant enjoyment of which does not, as in the case of a right of way, require the active intervention of the dominant owner. The word "continuous," however, is not in this context to be taken in its strict sense but rather in the sense of permanence. The two words "continuous" and "apparent" must be read together and understood as pointing to an easement *which is accompanied by some obvious and permanent mark on the land itself, or at least by some mark which will be disclosed by a careful inspection of the premises.* Instances are:
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> (i) *watercourse consisting of some actual construction such as pipes;*
> (ii) a made road;
> (iii) light flowing through windows;

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[7] *Ibid.*, at 834.

[8] *Law of Real Property*, 2d ed. (Aurora: Canada Law Book, 1985).

[9] *Ibid.*, Vol. II at 933.

[10] *Modern Law of Real Property*, 14th ed. (London: Butterworth's, 1988).

(iv) *drains which can be discovered with ordinary care.*[11] [emphasis added]

Turning to the case law, there are several decided cases that have held underground sewers constitute a continuous and apparent easement. In *Israel* v. *Leith*,[12] for example, there was a classic *Wheeldon* v. *Burrows* fact situation in that an undivided piece of land was divided and sold to the plaintiff. The facts indicate that the defendant "had no actual notice or knowledge of the existence of the pipes, and made no inquiries at the time of making the purchase."[13] The defendant later cut off the sewer pipes to the plaintiff's house and the plaintiff sued for damages.

In allowing the plaintiff's action for damages, Street J. stated:

It is clearly established law that where the owner of two adjoining lots conveys one of them he impliedly grants to the grantee all those continuous and apparent easements which are necessary to the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part grant: *Suffield* v. *Brown*, 4 D.J. & S. 185; *Watts* v. *Kelson*, L.R. 6 Ch. 166; *Wheeldon* v. *Burrows*, 12 Ch.D. 31; *Bayley* v. *Great Western R.W.Co.*, 26 Ch.D. 434; *Birmingham &c.* v. *Ross*, 38 Ch.D. at 308; *and the rights of drainage and aqueduct are within this category of easements.* See *Pyer* v. *Carter*, 1 H.& N. 916 which does not seem to have been doubted in this respect.[14] [emphasis added]

The case of *Pyer* v. *Carter*,[15] referred to by Street J. above, has been overruled in *Wheeldon* v. *Burrows* so far as it rested purely and simply on the doctrine of implied reservation.[16] Be that as it may, as indicated above, the decision in *Pyer* does not appear to have been doubted to the extent that rights of drainage, generally, can constitute an implied easement. On this point, Watson B. wrote:

We think the owners of the plaintiff's house are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with reason, that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the

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[11] *Ibid.*, at 512.

[12] (1890), 20 O.R. 361 (Q.B).

[13] *Ibid.*, at 362.

[14] *Ibid.*, at 367.

[15] (1867), 1 H.& N. 916, 156 E.R. 1472.

[16] See *Wheeldon* v. *Burrows*, per Thesinger J. at 59.

drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house such as it is. If that were not so, the inconvenience and nuisances in towns would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole.[17]

Israel v. *Leith, supra,* was followed in *Torosian* v. *Robertson.*[18] In this fact situation, the vendor sold land to the plaintiff. There was a drain that ran from the plaintiff's land under the vendor's land. The vendor later sold the land to the defendant and, when the defendant obstructed the drain, the plaintiff commenced an action for an injunction restraining the defendant from interfering with the drain.

Barlow J. granted the injunction and, in awarding $100.00 in damages, wrote as follows:

> The plaintiff, by virtue of the grant by Benjamin Robertson the common owner to his predecessor in title, obtained an implied grant of easement with respect to he said drain. See *Israel* v. *Leith* (1890), 20 O.R. 361 at p.367 where Street J. said: "Where the owner of two adjoining lots conveys one of them he impliedly grants . . . all those continuous and apparent easements which are necessary to the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part grant . . . ;and the rights of drainage and of aqueduct are within this category of easements."
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> See also *Polden* v. *Bastard* (1895), L.R. 1 Q.B. 156 at p.161, where Erle C.J. says: "that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant."[19]

As in many complex areas of the law, however, there are cases that go the opposite direction and hold that sewers and drains are not continuous and apparent. Illustrative of this view is the decision in *Oland* v. *MacKintosh.*[20] In that case the majority held, on the basis that there was no "express reservation" of the right upon severance of the tenement, that a drain did not constitute an apparent easement. Significantly for our purposes, however, Drysdale J., in dissent, recognized that drains easily qualify as that class of apparent easement that can pass by implied grant. He commented:

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[17] *Supra,* note 15, at 1474 (E.R.).

[18] [1945] 3 D.L.R. 142 (Ont. H.C.).

[19] *Ibid.,* at 143.

[20] (1910), 45 N.S.R. 13 (C.A.).

Since *Wheeldon* v. *Burrows*, the rules to be applied in such a case are pretty well settled, and I think it cannot be well urged here that the drain in question does not come within that class of quasi-easements, that, by implication, pass under the grant of the house. The plaintiff purchased here houses as they then were and surely with the closets, sinks and main drain. The defendant at the same sale purchased his lot and that lot was then burdened with the drain in question, and I think it was not open to him under such circumstances to cut off or obstruct the drain.[21]

Regard may also be had to the decision in *Tanner* v. *Hiseler*.[22] In that case, Townsend J. found a drain not to be continuous and apparent as evidenced in the following comments:

On this question Mr. Ritchie, for the defendant, contends that in inquiring whether it was apparent or not, we must look to the time of severance, and that it must have been known to the devisees. No evidence has been adduced as to the knowledge of the devisee of plaintiff's house, or those claiming under her, until Peters put in the crock drain in 1868, and it would, therefor be a mere matter of inference, which I do not see I am warranted in making, that she did know it. I do not think it can be regarded as absolutely necessary to defendant's enjoyment, as it is quite practicable for him to make a drain to the sewer from his own house. I do not so decide without doubt, but, looking at the circumstances, I think this drain cannot be regarded as apparent and necessary.[23]

The court in that case, however, found an easement by prescription as least with respect to the discharge of clear, as opposed to foul, water.

THE TORRENS SYSTEM

IF WE ACCEPT THAT an underground sewer meets the limitations in *Wheeldon* v. *Burrows*, the crucial question arises as to the significance of the rule under the Manitoba Torrens system and the provisions of the *Real Property Act*.[24] Put another way, under a Torrens system of indefeasibility of title, what is the effect of the fact that no evidence of the implied easement appears on the Certificate of Title?

Again, if we accept that an implied easement exists in the facts of *Norman* v. *Vincent*, it appears that the action should have properly been framed against the owner of the servient tenement (that is, the

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[21] *Ibid.*, at 25.

[22] (1898), 40 N.S.R. 250 (Q.B.). See also *Baker* v. *Griffin* (1923), 24 O.W.N. 34 (H.C.), aff'd 24 O.W.N. 293 (S.C. App. Div.).

[23] *Ibid.*, at 254.

[24] R.S.M. 1988, c. R30.

neighbour) for trespass to an easement, rather than against the vendor.

Support for this conclusion can be found on a simple reading of the *Real Property Act*. The relevant section of the *Act* is s.58(1)(c), which reads:

> *Restrictions on Certificate*
> 58(1) The land mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to . . .
> (c) any right-of-way or other easement, *howsoever created*, upon, over, or in respect of, the land. [emphasis added]

Prima facie, therefore, an implied easement need not be evidenced on the Certificate of Title to be effective.[25] Regard may also be had to the following comments of Ronald Cantlie:

> It would appear that the existing rules governing implied grants fit quite easily into the system of The Real Property Act. In order for the implication to arise, there must be an express grant by the owner of part of his tenement. This grant will normally be a registered transfer; the creation of the easement, therefore, arises by implication from a registered instrument. Thus no difficulties about lack of registration will arise, and the easement is a legal easement which will bind the land in the hands of all subsequent transferees.[26]

In all, on the facts in *Norman* v. *Vincent*, it appears as if the action should have been directed towards the neighbour (the servient tenement) for trespass to the plaintiff's implied easement. The neighbour could then seek his own remedy against the vendor.

Of course, the purchaser could seek a remedy against the vendor directly if the proper evidentiary foundation is laid. For example, if the contract of purchase and sale contained an express covenant for title or quiet enjoyment then the purchaser could certainly file suit directly against the vendor.[27]

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[25] See, in this regard, *Rural Municipality of Assiniboia* v. *Montgomery et al.*, (1930), 38 Man. R. 527 (Man. C.A.) wherein Trueman J.A. held that an equitable easement, based upon an oral consent, need not be noted on title.

[26] "The Creation of Easements Over Land In Manitoba Under the Real Property Act" (1960) 32:5 Manitoba Bar News 89 at 102.

[27] See, for example, *Turner* v. *Moon*, [1901] 2 Ch. 825 and *Great Western Ry. Co.* v. *Fischer*, [1905] 1 Ch. 316.

CONCLUSION

WE HAVE SEEN THAT, absent a clear covenant in a contract for the sale of real estate, the unknowing purchaser of a servient tenement could find himself embroiled in a law suit with the owner of the dominant tenement for trespass to an implied easement. Unquestionably, this is an unfortunate situation for the litigants as the plaintiff is forced to sue someone other than the vendor (in this case the neighbour) and the neighbour, in turn, is then forced to turn around and sue the vendor.

Accordingly, real estate practitioners in Manitoba should be aware of the hidden problem of implied easements of necessity and, to protect their respective clients, should consider inserting the appropriate covenants into their contracts of purchase and sale and the corresponding Declaration as to Possession.