STATE OF MICHIGAN

COURT OF APPEALS

MARCELLE CRUMBAUGH,

Plaintiff/Counterdefendant-Appellee,

v

VELSICOL CHEMICAL CORPORATION,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
August 29, 2000

No. 212295
Gratiot Circuit Court
LC No. 97-004491-CK

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment in plaintiff's favor, permanently enjoining defendant from disposing of any substance in an underground well it had drilled and used on plaintiff's property pursuant to a lease agreement, voiding the lease agreement, and ordering that defendant vacate the leased property within eighteen months.[1] We affirm.

Michigan Chemical Corporation (Michigan Chemical) and, later, defendant, its successor, operated a chemical manufacturing plant on the banks of the Pine River in St. Louis, Michigan, from 1936 until September 1978. Chemicals produced included polybrominated biphenyl (PBB). The main plant site consisted of approximately fifty acres and several dozen buildings.

Robert Crumbaugh, plaintiff's now-deceased[2] husband, was employed by Michigan Chemical from 1936 until the mid 1940s and worked in the plant's boiler room. From approximately 1944, Robert Crumbaugh owned and farmed a number of acres of land several miles from the plant site and, at the time of the instant proceedings, two of the Crumbaughs' sons farmed and cultivated that farmland.

Until the mid 1960s, the plant's wastewater discharges were pumped into the Pine River. In the mid 1960s, Michigan Chemical drilled an underground injection well (Well # 1) less than one mile from

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[1] Before the instant appeal was filed, this Court denied defendant's motion to remand by order dated September 16, 1998.

[2] Robert Crumbaugh died in January, 1997, several months before plaintiff brought the instant suit.

plaintiff's home to dispose of plant wastewaters. In 1966, Michigan Chemical secured an easement from the Crumbaughs for a subterranean pipeline from the plant to Well # 1 to cross their property. The easement granted Michigan Chemical, its successors and assigns

> the right to lay, maintain, operate, replace, change and remove pipelines for the transportation of brine and other substances, together with such drips, valves, fittings, meters, and similar appurtenances as may be necessary or convenient to the operation of said lines . . . together with the right of ingress or egress for all purposes incident to said grant.
>
> The said Owner(s), their heirs and assigns, hereby agree that no building or buildings shall be erected on or over the said pipelines, but are otherwise to fully use and enjoy said premises except for the purpose hereinbefore granted to said Michigan Chemical Corporation who hereby agree [sic] to pay any damages which may arise to crops, fences, stock and land from the laying, maintaining, operating, and removing of said lines.
>
> The route to be taken by the pipelines is to be restricted to an area within 33 feet of the centerline of the County Road . . .
>
> Michigan Chemical Corporation agrees to bury and maintain said pipelines so as not to unduly interfere with the cultivation or drainage of said land.
>
> This agreement is binding to the heirs, representatives, successors and assigns of the respective parties hereto.

Substances were piped through the pipeline to Well # 1 from approximately late 1966 until 1980.

By a written lease agreement executed on September 22, 1971, Michigan Chemical leased from Robert Crumbaugh and plaintiff one square acre of plaintiff's land in order to drill and operate a second disposal well (Well #2) along the existing pipeline. The two-page lease agreement at issue was drafted by Michigan Chemical and provided that the lessors, Robert and Marcelle Crumbaugh, "hereby warrant to Lessee that it will have peaceful possession under the following terms and conditions:"

> TERM: The term of this lease shall be 99 years, commencing September 15, 1971.
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> RENT: The rental to be paid shall be $600.00 per year commencing September 15, 1971.
>
> USE: The Lessee leases the above described property for the purpose of drilling and maintaining thereon a disposal well. It is agreed that the Lessee may go onto the premises from time to time any time after the fifteenth day of September, 1971, and drill a disposal well and erect any necessary piping and appurtenances and may thereafter pipe into said disposal well such items for disposal as the Lessee shall determine from time to time. Lessee shall have no right to dispose of any wastes other than into the said

disposal well. The Lessors do hereby lease to Lessee the surface rights and subterranean rights for the purpose of drilling said well to whatever depths may be deemed appropriate by the said Lessee. All other mineral rights are reserved to the Lessors and their assigns. Subject to construction and maintenance of said disposal well, Lessors shall have the right to farm the property.

TERMINATION:

A. Unless otherwise terminated as hereinafter provided in this agreement, this lease shall terminate at the end of 99 years from and after September 15, 1971 (September 24, 2070) and at such termination the Lessee agrees to deliver the land back to the Lessors or their successors in title after having capped any wells, and restored the surface by eliminating anything erected thereon and all debris.

B. It is agreed and understood that the Lessee may not want to use the property hereby leased for the term provided herein, and if for any reason the said Lessee shall determine at any time hereafter that it no longer desires to use the said premises as herein intended, it shall have the right to terminate this lease any time after September 16, 1975 upon 30 days written notice. Except that in the event that said land is capable of producing hydrocarbon substances and Lessee is prevented from using the said premises as herein intended as a result of Lessee's agreement with Shell Oil Co. dated August 24, 1971 then the Lessee shall have the right to terminate this lease at any time.

* * *

ASSIGNMENT: It is agreed and understood that this lease may be assigned by the Lessee. If such assignment is made to someone other than a successor to Lessee's business Lessee shall continue to be responsible for the payments herein provided.

SALE OF PROPERTY: This lease shall be binding upon each of the parties hereto and their respective successors, heirs and assigns, and it is agreed that if the Lessors or their heirs should sell the farm of which this acre is a part, the Lessee shall have the option to purchase the acre of land at a price which equals two times the proportionate share of the total price of the farm sold. . . .

The lease agreement was on letterhead of Michigan Chemical's Chicago, Illinois office, and was signed by Robert Crumbaugh and plaintiff, and a Vice-President and a Secretary of Michigan Chemical.[3] Plaintiff and Dunbar testified below that neither Robert Crumbaugh, plaintiff, or Dunbar read the lease agreement. Shortly after the lease was signed, Michigan Chemical drilled and put into use Well # 2, approximately two hundred yards from the Crumbaugh home, at a depth of approximately 3,750 feet.

[3] Neither of the Michigan Chemical signatories testified below.

In approximately 1975, Michigan Chemical piped to Well #2 wastewaters containing trace amounts of PBB (polybrominated biphenyl, a fire retardant).

The manufacturing plant was shut down in 1978, and later demolished and the site remediated. Well # 1 was capped and plugged in 1980. The plant site was placed on the Environmental Protection Agency (EPA) National Priority List and, in 1982, various state and federal agencies[4] and defendant entered into a consent judgment regarding environmental contamination at the main plant site and related matters. *United States v Velsicol Chemical Corp,* Docket No. 82-10303 (ED Mich, 1982).[5] The Crumbaughs were not parties to the consent judgment and the issue whether they were, or should have been, aware of it was disputed below.

The consent judgment required that defendant wall and cap the main plant site, install monitoring wells and a groundwater collection system thereon, and maintain the water table elevation within the main plant site at no greater than 724.13 feet. Defendant built a soil bentonite containment wall; a trench encircling the fifty-acre perimeter of the plant site, filled with a mixture of soil, bentonite and water. A three-foot thick clay cap covered the site. The containment structure's purpose was to prevent hazardous substances from leaking. An appendix to the consent judgment, entitled "Main Plant Site Containment Program and Golf Course Site Remedial Program," provides regarding Well #2:

> 19. Immediately upon the entry of the Consent Judgment of which this Appendix is a part, Velsicol shall apply for an Underground Injection Control (UIC) Program permit or Resource Conservation and Recovery Act permit, or otherwise seek authority for Velsicol's existing deep well, Michigan Mineral Well Permit No. 46737820, issued July 24, 1973, to dispose of decontamination water and contaminated water collected from the main plant site in accordance with the requirements of this containment program, pursuant to either the Safe Drinking Water Act, 42 U.S.C. §300f, et seq., or the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §6901, et seq., as may be appropriate.
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> 20. Any groundwater collected by Velsicol pursuant to Paragraph 15 shall be disposed of by Velsicol in the deep well referred to in Paragraph 19. Such water may be transported by pipeline, truck or other approved method of transportation.

Paragraph 15 provides:

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[4] The consent judgment was signed by representatives of defendant; the EPA; the United States Department of Justice, Land and Natural Resources Division; the United States Attorney for the Eastern District of Michigan; and Michigan's Attorney General.

[5] The judgment provided that the district court retain jurisdiction over both the subject matter and the parties, for the purpose of enforcing, modifying or extending the terms of the judgment, or for granting any other relief not inconsistent therewith, until December 31, 2012, or thereafter if ordered by the court pursuant to motion of any party for good cause shown.

> 15. Velsicol shall maintain the water table elevation within the main plant site . . . to an elevation not greater than 724.13 feet above mean sea level after installation of the containment walls and clay cap. This elevation shall not be exceeded throughout the duration of this Consent Judgment. . . .

An attachment to the consent judgment entitled "Operating Procedures for Deep Well" provided:

> 9. CO-ORDINATION
>
> 9.1 The operator shall at all times co-ordinate deep well activities with the landowner upon and adjacent to whose lands the deep well is located.
>
> 9.2 In the event of a dispute, Velsicol, MDNR and EPA shall be notified immediately.

From approximately 1982 to 1984, defendant pumped wastewaters from the plant site through the pipeline to Well # 2, including leachate from a different and separate industrial disposal site that Velsicol had remediated (referred to in the record and the consent judgment as "the golf course site") which had been trucked to the plant area and then piped to Well # 2.

In June 1984, an attorney representing defendant sent the Crumbaughs a letter stating:

> I have been asked on behalf of the Velsicol Chemical Corporation and Conestoga-Rovers Ltd. to advise you that Velsicol has been required pursuant to its consent judgment with the regulatory authorities to install spill control structures at the well site upon your property. The purpose of those structures is obviously to prevent any spillage that could damage your land or the surrounding area.
>
> I am enclosing a copy of the proposed spill containment drawing. This work will be commenced on July 1, 1984, under the terms of the lease agreement dated September 22, 1971. Velsicol, through the Connestoga-Rovers, will attempt to complete this work in the quickest and most reasonable fashion possible and will do its best to minimize damage in the immediately surrounding area.

The drawings included a "Truck Unloading Spill Containment Pad" and "Well Head Spill Containment Pad." While the pipeline was still operational, defendant installed the pad. However, trucks used the pad only to service the well, not to dispose of anything in the well.

From approximately 1984 until 1996, Well #2 lay dormant. No maintenance or inspection of the pipeline portion between Well #2 and the plant site was performed after the mid 1980s. In the early 1990s, water levels at the plant site began to rise above the level permissible under the consent judgment. By that time, regulatory requirements for disposal wells had changed. Defendant apparently

did not begin to explore means of disposal other than Well #2, which did not meet regulatory requirements, until 1994.[6]

In May of 1996, defendant met with plaintiff and her husband, gave them a copy of the consent judgment, and advised them that it intended to reactivate the well. The Crumbaughs immediately objected. A contractor of defendant began work on the well, and in April 1997, plaintiff filed a

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[6] A letter to defendant from the EPA and MDNR dated May 13, 1994 admitted as an exhibit below stated:

> . . . . We are particularly concerned that although Velsicol has known of its noncompliance since at least March 1991, and has also known that the injection well could not meet regulatory requirements to be able to be used for disposal, the company has only recently begun to explore alternate means of disposal. Moreover, Velsicol has taken limited steps to pump out and store the groundwater on site in order to restore and maintain the required water table elevation.
>
> * * *
>
> Because it is important to lower the water levels as soon as possible, the U.S. EPA and MDNR believe that some interim disposal option is necessary until final resolution to the matter is reached. This may include temporary storage of water on-site and/or a temporary discharge to the Alma or St. Louis POTWs, pursuant to permits from the receiving facilities. U.S. EPAs and MDNR's acquiescence in such interim actions should not be construed as vitiating the requirements of the 1982 Consent Decree. Velsicol will continue to violate the consent decree until the required water table level is achieved and maintained; any alternative means for disposing of the contaminated water must be agreed to by the agencies and incorporated into a formal modification to the Consent Decree.

A letter from the EPA to defendant through one of its attorneys in Chicago, dated December 8, 1995, responded to an October 10, 1995 letter of defendant's contractor requesting advance authorization to remove and transport 1.5 million gallons of groundwater from the plant site, in order that water levels not exceed the consent judgment's requirement.

By letter dated March 10, 1997, the EPA wrote defendant's contractor, the EPA and Michigan's Department of Environmental Quality (MDEQ) agreed to allow defendant to collect and transport 750,000 gallons of groundwater from the plant site to a site in Livonia, Michigan. The letter noted that:

> The Agencies understand that Velsicol is making efforts to bring its deep injection well into compliance with permit conditions and Velsicol expects to have secured permission from U.S. EPA's Underground Injection Control Division to begin injecting non-hazardous waste water starting in early June 1997.

complaint for declaratory and injunctive relief. Velsicol's appellate brief states that it was prepared to begin disposal of the excess groundwater into Well #2 by late May 1997.

Plaintiff's first amended complaint alleged that defendant's facility was demolished and declared a U.S. EPA superfund site by virtue of PBB contamination, that on information and belief the clay liner sealing the site had become permeable, that groundwater had leached into the superfund site, and that defendant intended to truck such leachate to the well on plaintiff's property. The complaint alleged that the parties' lease agreement provided that the items for disposal be piped, and not trucked, to the well, and that specific representations were made to plaintiff that the well would be used only for disposal of a naturally occurring substance, brine, and for no other purpose. The complaint alleged that defendant planned to erect structures and install utility poles, lines and equipment on plaintiff's property in April 1997, and that such use was never contemplated by the written lease or the parties. The complaint requested both preliminary and permanent injunctive relief, on the basis that defendant's activities and proposed use of the well would result in irreparable harm, by impeding the use and operation of farm equipment, blocking the public road and restricting access to plaintiff's home, damaging field tile, causing loss of acreage, and impairing the ability of plaintiff and her successors or assigns to encumber the premises by mortgage, among other things. Plaintiff alleged that defendant's activities constituted a breach of the lease.

Plaintiff attached to her original complaint an affidavit of C.W. Dunbar, which stated that he was an employee of Michigan Chemical in 1971 and approached Robert Crumbaugh "requesting permission to drill a well . . . for the purpose of disposing of brine," that he advised Robert Crumbaugh that brine would be piped to the site by pipeline and disposed via the disposal well to be drilled on the Crumbaugh property, that he secured the signatures of Robert and Marcelle Crumbaugh "on a lease to such effect," that the only purpose contemplated for use of the well was disposal of brine, that no other liquid bi-product of Michigan Chemical's operation existed which could have been disposed of via pipeline at the proposed disposal well, that he informed the Crumbaughs that the well would be used for the disposal of brine, and that he did not prepare the lease executed.

Defendant's answer admitted that it intended to truck excess water from the main plant site to Well #2 for injection, but denied that the lease precluded trucking the excess water. Defendant's affirmative defenses included laches. Defendant also counterclaimed, alleging, inter alia, that the state and federal agencies wanted defendant to have Well #2 available for disposal of excess water from the plant site and would not agree to amend the consent judgment to authorize an alternative method of disposal on a permanent basis, that the excess water had low levels of any hazardous constituents, that its use of Well #2 would not cause the impediments plaintiff's complaint alleged, that plaintiff and her relatives were attempting to block or interfere with defendant's construction and other activities, which were undertaken under the terms of the lease, and that it had expended large amounts of money in preparing Well # 2 for operation consistent with currently-prevailing environmental standards. Defendant's counterclaim stated that at the time the lease was negotiated "it was contemplated that a pipeline would be used to pipe brine and other liquid materials" to Well #2 "but other lawful methods of transportation of such liquids to the well are not prohibited by the lease."

The trial court granted plaintiff's request for a preliminary injunction following a hearing in May 1997. After a bench trial in March and April 1998, the trial court permanently enjoined defendant from disposing of any substance in Well # 2, voided the parties' lease agreement, and ordered that defendant vacate the leased property within eighteen months. This appeal ensued.

I

Defendant argues that the key issue is whether the parties intended the lease to limit Velsicol to the disposal of plant brine process waste or whether it allowed Velsicol to dispose of other substances at its discretion. Defendant argues that the lease was clear and unambiguous on that question, and that the trial court thus erred in admitting parol evidence on that issue.

Plaintiff argues that the trial court did not err in ruling on the threshold question whether the written lease agreement fully incorporated the parties' agreement, and properly admitted extrinsic evidence of prior or contemporaneous agreements or negotiations on that question. Plaintiff also argues that parol evidence would be admissible to explain technical or trade terms in the lease agreement susceptible to more than one definition, including the term "items" in the phrase stating that the lessee "may thereafter pipe into said disposal well such items for disposal as the Lessee shall determine from time to time."

A

As a prerequisite to the application of the parol evidence rule "there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." *NAG Enterprises v All State Industries, Inc*, 407 Mich 407, 410; 285 NW2d 770 (1979). Parol evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on the threshold question whether the written instrument is an integrated instrument that is a complete expression of the parties' agreement as to the matters covered. *Id.; UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). However, if the written instrument contains an express integration clause, parol evidence on this threshold question is not admissible. *UAW-GM Human Resource Ctr, supra* at 495-496.

Although parol evidence is not admissible to vary a contract that is clear and unambiguous, parol evidence may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract. *Mid-America Management Corp v Dep't of Treasury*, 153 Mich App 446, 459-460; 395 NW2d 702 (1986). The question whether contract language is ambiguous is a question of law. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Id.* at 491. "A contract is ambiguous if 'its words may reasonably be understood in different ways.'" *Id.* at 491, quoting *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). When contract language is ambiguous, a court may consider the language employed, the subject matter, and the circumstances surrounding the making of the agreement to determine the parties' intent. *Remes v Holland*, 147 Mich App 550, 555; 382 NW2d 819 (1985); *Keller v Paulos Land Co*, 5 Mich App 246, 255-256; 146 NW2d 93 (1966), aff'd 381 Mich 355; 161 NW2d 569 (1968).

The parties rely on testimony presented at both the preliminary injunction hearing and the bench trial. The trial court concluded after the preliminary injunction hearing:

. . . . In this case, parol evidence has been offered to explain the meaning of the two page lease . . . And in my judgment, that's been necessary in this case, one reason being there is no suggestion in the writing that the parties intended it to be a final and complete statement of their agreement. Lawyer talk, there's no integration clause. Second, it's clear to me that no matter how you look at the lease as viewed by the Crumbaughs or whether you look at the lease as viewed by Velsicol, there are ambiguities in it. There is language used in it that would lead a reasonable person to question the meaning attributed by the parties at the time they signed the lease to the words they used. And if there is this good faith question, this ambiguity, this uncertainty about what the parties meant when they selected words to use in their written agreement, the law says that the only way to give meaning to the intent of the parties is to find out what they meant when they used the words on the basis of evidence beyond the lease, outside the lease, parol evidence, in this case, in the form of testimony. . . .

It's interesting that Mr. Steketee [defendant's counsel] in his argument concerning, for example, the word "may" therefore pipe, the word "may" suggests to him that alternative methods of access to the wellhead are authorized, and to say that a person may pipe to the wellhead isn't to say that they shall only pipe or they must pipe, but rather that they could truck. Another way of looking at that language and, I think, a stronger reading of that language given the syntax, is that "may" is a grant of permission to utilize pipes to reach the wellhead for purposes of depositing the waste materials. All that tells us, seems to me, isn't that Mr. Steketee's interpretation is right or that his interpretation is wrong, but just that good faith people, acting reasonably, could ascribe different meanings to the language selected by the parties in their lease. That opens the door for parol evidence.

* * *

Who was there for Velsicol's predecessor, for Michigan Chemical? Mr. Dunbar was there, and Mr. Dunbar, I thought, was a fairly remarkable witness. His testimony was, I thought, unambiguous, unlike the lease, straightforward, detailed, sensible. I understand that he has been a friend of the plaintiff, that he has had and does have reason to want them to prevail in this case, and that that gives one pause in assessing his testimony. . . . He was a friend of this Bob—Bob Crumbaugh. He was someone who worked at the same plant. He was someone who talked Bob Crumbaugh into giving Michigan Chemical this lease because well number one for brine disposal was inadequate . . . .

Then the question is, for what? And the answer that the evidence gives is for the disposal of residual brine from the production plant at Michigan Chemical. What's happened is that the purpose of this well, it is suggested, should be shifted in a radical way. At one point in 1971, when Mr. Dunbar and Mr. Crumbaugh were talking, they were talking about a disposal well secondary to ongoing production at an operating facility of brine. From the best I can tell, this brine is pulled out of one well, run through the plant where things are taken out of it, and then pumped down another well. Now

what's suggested is that the same well be used for the disposal in the Dundee formation of contaminated groundwater from a closed Chemical Plant site. A fundamental change in the purpose being served by the well.

How was the brine to get there? The well – the lease document, in my judgment reading it, contemplates it being piped there. But more importantly, I think Mr. Dunbar's testimony and the lease – or the easement agreement of 1966 demonstrate, that the parties understood in 1971 that this brine would be piped there. And as I understood Mr. Dunbar's testimony, this would be accomplished through a six-inch pipe. . . . The pipe, then, served as the vehicle for taking the brine to the well and disposing of it.

* * *

The fifth question then becomes, does the intended use violate the terms of the lease? And sixth, if so should an injunction be granted? First, as to the proposal to truck groundwater to the site, the use of that mode of transportation, I think that is inconsistent with the terms of the lease. I think it's a manner of transportation not within the contemplation of the parties at the time they executed the lease. I think it's inconsistent with their agreed method or manner of transportation being by six-inch pipeline, but I don't think it's the kind of violation where an injunction would be appropriate. . . .

* * *

The heart of the question, does the deposit of groundwater from the Michigan Chemical plant site in Saint Louis in a well that was mutually intended by the parties to be used for the deposit of residual brine, violate the lease and, if so, is an injunction appropriate? And that's really the last question. With regard to the use for the deposit of groundwater, I'm satisfied that is far beyond the intended scope of the use of the disposal well intended by the parties at the time they signed the lease. This was for a brine well, that's why they entered into the lease, that's what had to be done to avoid scale backs in production and work force, that's what Mr. Dunbar prevailed upon Mr. Crumbaugh to allow, that's what they agreed to, a brine well.

* * *

The trial court's findings and conclusions of law, stated on the record after the bench trial, noted that an ambiguity existed regarding the intended use of the well, and that evidence of the parties' intent was clear that the "purpose of this disposal well was to provide a depository for liquid waste of some kind, secondary to the ongoing operation of Michigan Chemical as a chemical manufacturing facility." The trial court found that defendant's proposed use was inconsistent with the lease as intended by the parties:

At page 34 of [defense counsel's] Mr. Steketee and Mr. Kenney's brief, they write, quite correctly, I think:

> "This case is not, as the plaintiff says, about whether Robert Crumbaugh made a knowing waiver of the lease terms in the 1980-1984 period when he knew material other than brine from the old Michigan Chemical plant was being put down the well. Rather it is about what the parties intended when they signed the lease, and that is really not in any doubt."

I think those two statements are absolutely true. It's not about waiver, even though most of the oral argument from Velsicol today has dealt with waiver. . . . The fact that the agreement was made a long time ago, depending on your standards, doesn't change that. The fact that some of those . . . who may have been concerned or involved, are no longer with us, doesn't change that fact. It think it's true that not all the key actors are dead. . . .

* * *

The issue is whether the promises the parties made to each other, that is the terms of the contract, are clear and unambiguous so as to prevent either party to the contract from offering other evidence, parol evidence . . . .

Now, one way the parties can tell us that what they wrote is intended to tell us the whole story, is through what counsel called an integration clause. . . . We don't have one of those, and that's important under Michigan law. That's a factor that the Courts consider in determining whether or not parol evidence ought to be admitted. Here the parties haven't told me that this is an integrated, complete, total agreement, statement of their understanding. And I think that's pretty obvious.

We have a document that is in substance two pages long, and it's as thorough as perhaps the circumstances required at the time. But when you read the paragraph regarding use, it's clear that nobody is claiming today that that paragraph determines the manner in which this well can be used. For example, the document says that Michigan Chemical is given the authority to pipe into the disposal well whatever it wants. That isn't what we're talking about. We're talking about a use different than that contemplated by the lease. . . .

So, it's clear to me that there 's a question as to what the parties intended at the time they signed this agreement that is not answered by the agreement. It is plain to me that there is an ambiguity as to the use to be made of the well and to simply say, well, the agreement suggests that the lessee shall determine from time to time whatever to put down the well, doesn't answer that question. It's part of asking the question.

So, when we conclude that there is no integration clause and, it seems to me, an ambiguity as to the intended use, we have to look beyond the written agreement to what those who made it intended. And when you do that, you go to Mr. Dunbar's testimony, and it's as plain as any testimony I've ever had occasion to hear, that the purpose of this disposal well was to provide a depository for liquid waste of some kind, secondary to the ongoing operation of Michigan Chemical as a chemical manufacturing facility. You look at all the evidence in this case, you see this pressure through the '60's from the Water Resources Commission directed toward encouraging Michigan Chemical to divert the flow of wastewater from the river. The Resources Commission didn't want as much going into the river as was going in and wanted a plan from Michigan Chemical to reduce that. . . .

Now I know environmental law and technology has come a long ways [sic] in 30 years, but you don't have to be a rocket scientist, even in the 60's, to know when you're putting wastewater from a chemical plant into a river, not a good idea. So, Water Resources Commission says, don't do that. Michigan Chemical says, okay, we'll try and slow down. One thing we got is this disposal well number 1, to which we pipe, and I think that's important, water from this ongoing operation. But now as the 60's unfold, the pressure increases. Michigan Chemical, I had understood from the preliminary hearing, was doing well in terms of business . . . For whatever reason, the amount of waste from the plant operation was increasing and the need to find alternative depositories for it was augmented from the Water Resources Commission, to the point where Mr. Dunbar approaches Mr. Crumbaugh and, in essence, says, hey, look, you're our last hope, we've checked around, we can't find anybody else who'll let us put a disposal well, we need your help. The conversation was, in essence, in order to see to it that we can maintain and continue operations at Michigan Chemical so folks have jobs. And Mr. Crumbaugh, who is, I think, pretty clearly in this case in charge of these discussions for himself and his wife, says okay, put that well in place. And they do and they sign this lease in September of '71.

It seems clear to me that when that lease was signed in 1971, nobody knew about PBB. Nobody knew in 1971 that within a few years this plant would be closed, this site would be capped, there would be an ongoing firestorm of public concern about PBB. Nobody knew that. Seems to me the testimony demonstrates that in 1971 there wasn't a cloud in the sky. . . . Looked like Michigan Chemical was doing fine. . . . It was after that and after the PBB that all of these other problems came to bear. And I agree that in large measure, given the rulings I've made right or wrong, those subsequent problems are irrelevant.

Because I don't think this is a case about waiver . . . . it seems pretty clear to me that Mr. Crumbaugh knew after the plant was closed that waste was being injected in the well. And it seems to me he knew that wasn't what he and Mr. Dunbar had been

> talking about, but I don't think he cared much . . . . But I don't think that constitutes a waiver . . . and I don't think there is anything that would constitute latches [sic].
>
> So, it seems to me, that the proposed use not only is not consistent with the lease, but cannot be consistent with the lease as intended by the parties at the time it was executed, because the lease was executed for the purpose of facilitating the disposal of liquid waste from an ongoing chemical plant operation, that is not and can, I don't think, never be in the foreseeable future reestablished as an ongoing chemical plant operation. It seems clear to me that the essential purpose of the lease has been frustrated by events beyond the control, frankly, of either one of the parties . . . any use of the well by Michigan Chemical at this point would be inconsistent with the lease as understood by the parties at the time it was executed, and would violate that lease agreement.
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> * * *
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> Second, it seems to me, that by way of relief, we're at a point where the essential purpose of the lease can no longer be served, that the best course of action, equitably, is to simply rescind the lease, to void the lease, and to direct that any property of Michigan Chemical be removed from the real estate. . . .
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> * * *

A

We agree with the trial court that the lease agreement did not contain an integration clause and that the court could thus consider parol evidence pertinent to the threshold question whether the agreement as written constituted the complete agreement of the parties as to matters covered. See *NAG, supra* at 410; *UAW-GM Human Resource Ctr, supra* at 492. Even assuming that defendant is correct that the lease agreement's "Use" provisions appear clear and unambiguous on their face, the trial court could still properly admit evidence on that threshold question absent an express integration clause. *NAG, supra* at 408. We conclude that after the trial court received the testimony of C.W. Dunbar regarding the context of the lease negotiations, and the lease negotiations that lead up to the signing of the lease agreement, and other evidence, the trial court did not abuse its discretion in concluding that the written lease did not fully incorporate the parties' agreement.

We also agree with the trial court that an ambiguity existed regarding the portion of the lease stating that defendant "may" pipe materials into Well #2, because the language was susceptible to more than one meaning. The phrase could be interpreted to mean that the lease granted defendant access to the well by pipeline or other mode, or that defendant was permitted only one method of access to the disposal well, through the pipeline. Similarly, the term "items" in the phrase "may thereafter pipe into said disposal well such items for disposal as the Lessee shall determine from time to time," was susceptible to more than one meaning, depending on whether all items were to be transported into the well by pipeline from the plant, or could be trucked from other sources, and depending on whether the source of the items was intended to be the ongoing chemical plant operation. Under these

circumstances, we reject defendant's argument that the trial court erred in admitting parol evidence regarding the well's intended use.[7]

II

Defendant next argues that even if the trial court properly allowed the parol evidence, the relevant evidence showed that the parties did not intend the lease to limit Velsicol to the disposal of waste "brine" from the operating plant. We disagree.

We review the trial court's factual findings for clear error. *Beason v Beason*, 447 Mich 1023; 527 NW2d 425 (1994); MCR 2.613(C). "If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties." *UAW-GM Human Resource Ctr, supra* at 491-492.

The record amply supports the trial court's determination that the parties intended that only waste brine from the operation of the plant be disposed in the well, including Dunbar's testimony and a number of documents admitted below in which Michigan Chemical represented that it would use Well #2 only to dispose of brine.[8]

We agree with defendant that there was evidence from which it could be inferred that Robert Crumbaugh was aware Well # 2 was being used after the plant closed in 1978. However, we do not agree with defendant's argument that the court failed to recognize that Robert Crumbaugh did not object to this post-closure use because he knew the lease allowed it. The record amply supports that the Crumbaughs were told that only brine would be disposed of in Well #2, by pipeline, that their permission was never sought for use of the well to dispose of substances other than brine, that the Crumbaughs were first told of defendant's proposed use of Well #2 in May 1996, and that they first received a copy of the consent judgment at that time. Although Robert Crumbaugh was sent a letter in June 1984 that referred to the consent judgment, the letter, quoted *supra*, did not state defendant's intended new use of Well #2 and it is undisputed that Well #2 was unused between 1984 and 1996.

Defendant's argument that the trial court improperly interpreted the parol evidence it considered fails. The court's factual findings were not clearly erroneous.

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[7] Defendant also argues as part of its first issue that plaintiff "essentially contends that the Court should allow parol evidence because the lease does not say what she thought it said." Defendant contends in that regard that the fact that plaintiff and her deceased husband did not read the lease does not permit the lease to be revised twenty-five years later. We do not address this argument because there is no indication that the trial court's admission of parol evidence was founded in the fact that plaintiff and her husband did not read the lease.

[8] For example, the August 24, 1971 agreement between Michigan Chemical and Shell Oil referred to in the lease agreement, stated that Michigan Chemical agreed that it would use the well "solely for the purpose of disposing of brine." Michigan Chemical's application to the Michigan Department of Natural Resources for Well #2, dated September 23, 1971 stated that the application was to drill a well for "brine disposal."

III

Defendant last argues that had the trial court properly balanced the equities, it would have denied plaintiff injunctive relief and dismissed plaintiff's claim under the doctrine of laches. We disagree.

"The granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case." *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999), quoting *Holly Twp v Dep't of Natural Resources*, 440 Mich 891; 487 NW2d 753 (1992). Injunctive relief is an extraordinary remedy, and is granted only when justice requires, no adequate remedy at law exists, and the party seeking the injunction faces a real and imminent danger of irreparable injury. *Schadewald v Brule*, 225 Mich App 26, 40; 570 NW2d 788 (1997).

We review the trial court's finding that laches did not bar relief for clear error. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998); *Sedger v Kinnco, Inc*, 177 Mich App 69, 73; 441 NW2d 5 (1988). "The doctrine of laches reflects 'the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.'" *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982), quoting Walsh, Equity, § 102, p 472; *Kuhn v Secretary of State*, 228 Mich App 319, 334; 579 NW2d 101 (1998). Laches denotes "the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." *Lothian, supra* at 168, quoting *Tray v Whitney*, 35 Mich App 529, 536; 192 NW2d 628 (1971). Laches is not measured by the mere passage of time, *Lothian, supra* at 168, but rather, is concerned with unreasonable delay, *In re Contempt of United Stationers*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000). The defendant must prove both a lack of due diligence on the plaintiff's part and resulting prejudice. *Gallagher, supra* at 369-370.

In support of its argument that plaintiff faced no real or imminent danger of irreparable injury defendant states that it "was merely proposing to use the well in a manner completely consistent with the way it had lawfully been used in the past and in the manner contemplated by the lease." We cannot agree. The record does not support that the parties contemplated that substances would be trucked to Well #2, or that defendant ever had trucked any substance to Well #2 for disposal, including groundwater from the remediated plant site, or that defendant coordinated with or advised plaintiff of its intent to do so before May 1996. Under these circumstances, we conclude that the trial court did not abuse its discretion in continuing the preliminary injunction based on its finding that placing contaminated groundwater on or under plaintiff's property without plaintiff's consent would constitute a continuing trespass for which injunctive relief was appropriate. See *Schadewald, supra* at 39-40. The trial court's decision was not arbitrary and was based on the facts of the case. *Cipri, supra* at 9.

Defendant also argues that plaintiff's claim should have been barred under the doctrine of laches because plaintiff delayed in objecting to defendant's use of the well for twenty-five years, and that the Crumbaughs had implicitly accepted defendant's interpretation of the lease and accepted regular payments pursuant thereto. Defendant argues that, in reliance on the language of the lease and the Crumbaughs' failure to object to disposal of non-brine substances in the well, it entered into the consent judgment, which provides only one mechanism for disposal of groundwater from the plant site—Well

#2, and that defendant thus changed its position in reliance on its reasonable belief that the lease authorized use of Well #2 in the manner contemplated by the consent judgment. Defendant argues that in reliance on the lease agreement and the Crumbaughs' conduct, it constructed the pole barn and spill containment structures in 1984, conducted extensive and expensive studies, and obtained all necessary federal and state government approvals. It argues that it spent over $300,000 to prepare the well for plant site groundwater.

As discussed above, defendant has not shown that plaintiff inexcusably delayed in objecting to defendant's proposed use of Well #2. Defendant does not state when it incurred the $300,000 to prepare Well #2, but we gather from the record that significant amounts were expended between January and May 1997,[9] i.e., after plaintiff objected to defendant's proposed use of Well #2 in May 1996. The trial court's finding that laches did not bar relief was thus not clearly erroneous.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White

[9] For example, defendant's application for building permit pertinent to building new storage tanks and an earthen berm on plaintiff's property, at an estimated cost of $60,000, was dated April 2, 1997. A survey of the acre defendant leased was submitted as an exhibit below. The survey was completed on March 18, 1997 and there was testimony that it cost defendant approximately $4,000.

There was testimony below that defendant planned to have Consumers Power install two power poles on the leased acre in February 1997.