1996 Real Estate Conference and Workshop

Restrictive Covenants Revisited

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RESTRICTIVE COVENANTS REVISITED

Introduction

In October, 1984, Art Fordham presented a paper at a CLE Real Estate Conference which explained and gave the history of the law relating to restrictive covenants. We have been asked to bring that law up-to-date by reviewing the decisions of Canadian, and particularly Nova Scotian, Courts over the last 11 1/2 years.

For your ease of reference and a most worthwhile review, Art Fordham's paper is attached to the end of this paper.

Restrictive covenants can be intended to burden only one lot to the benefit of another or they can be part of a building scheme, i.e.: attached to all lots within a particular subdivision with the intention that they place a burden and give a benefit to each lot. This paper will concentrate on restrictive covenants found in building schemes.

Refresher Course

To refresh the memory, the requisites for a building scheme were set out in Elliston v. Reacher, [1901] 2 Ch. D. 374 by Parker, J. They are as follows:

(a) the person claiming the benefit of the restrictions and the person bound by the restrictions must claim under a common vendor;

(b) before selling either the land protected by the restrictions or the land bound by the restrictions, the common vendor must have laid out a defined area belonging to him (including the land protected and the land bound by the covenants) for sale in lots, subject to restrictions intended to be imposed on all the lots which, though they may vary in detail as to particular lot, are consistent only with a general scheme of development;

(c) the restrictions must have been intended by the common vendor to be and have been for the protection of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor, but not comprised in the scheme; and

(d) the land protected and the land bound by the restrictions must have

been purchased from the common vendor upon the footing that the restrictions were to enure to the benefit of the other lots included in the scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

To these must be added the very important requisite which is necessary for any restrictive covenant: the land intended to be benefitted must be described by the instrument creating the covenant so as to be ascertainable from the instrument itself with reasonable certainty.

The Cases

The recent cases under discussion can be divided into three categories: those in which a building scheme has been found not to exist; those in which a building scheme has been found to exist, but there are arguments why the covenants can be breached in the particular case (whether successful or not); and those in which particular restrictive covenants are interpreted.

(i) No Building Scheme

A. Rockingham Development v. Highgate Village Limited (1984), 65 N.S.R. (2d) 439 (NSTD)

The building scheme was rejected because the deed containing the restrictive covenants did not sufficiently describe the land to be benefitted and there was no evidence of intention by the developer to create a building scheme. Prior to the conveyance in question, there had been a number of conveyances by the developer with no restrictions at all and others with different restrictions.

B. Cleary v. Pavlinovic et al (1987) 80 N.S.R. (2d) 22 (NSTD)

S owned land once owned by people called Kennedy. In 1945 S conveyed Lots 1 and 2, Block E to K by a deed which set up restrictive covenants said to be for the benefit of all lots in the Kennedy subdivision. S then conveyed the remaining lands to AR Limited, a company in which he played a major role, by a deed which contained no restrictive covenants and no recitals referring to any subdivision. In 1946, AR Limited conveyed an unnumbered lot adjacent to Lots 1 and 2, Block E to K using the same restrictive

covenants that S used. AR Limited made further subdivisions in 1946, 1953 and 1956, always using the same restrictive covenants and referring to Kennedy Subdivision. The applicants, who wanted to enforce the restrictive covenants, owned Lot 1, Block F created with the restrictive covenants in 1946 and the respondents owned Lots 1 and 2, Block E and the unnumbered lot. The Court noted that Lot 1, Block F was not shown on the original plan; Lots 1 and 2, Block E were shown as separate lots and the unnumbered lot was there, but not as a separate lot.

Mr. Justice Nathanson held that the applicants could not enforce the restrictive covenants against the respondents because none of the requisites were fulfilled. Firstly, there was no common vendor. S imposed the restrictive covenants on K and AR Limited, which was not bound by the covenants, imposed them on the predecessors in title to the applicants. The Judge declined to take the more "liberal approach" suggested in Re Dolphin's Conveyance, [1970] 2 All E.R. 664 (Ch. D.) which held that one could imply from the circumstances that the parties intended that there be a building scheme even though not expressed exactly in writing. Thus, even though the restrictive covenants imposed by S and AR Limited were the same and referred back to the same original subdivision, there were still two building schemes.

The second requisite was not fulfilled because the land must have been laid out in lots before the common vendor sold the first lot and the original plan did not show the applicant's lot or the unnumbered lot as such. S sold the remaining lands to AR Limited before these lots were created. The third and fourth requisites were not fulfilled because there were no recitals in the deed from S to AR Limited.

It is to be noted that the restrictive covenants were said in the deeds which contained restrictive covenants to attach to "...all the lands so subdivided and of further lots of said so-called Kennedy Estate property which may hereafter be subdivided and added to the before referred to subdivision..." The Judge held that these references were not to a defined area that is easily ascertainable and the deeds, therefore, also failed with respect to the description of the land to be benefitted.

C. Sawlor v. Naugle (1990), 101 N.S.R. (2d) 160 (NSTD)

The Sawlors owned Lot 7 comprising 5.76 acres. There was a restrictive covenant in the subdivision which held that there may be only one house on each lot. The Sawlors subdivided the lot into 7A, 7B, and 7C. They obtained a release of the covenant from all owners in the subdivision except the Naugles and the Eddys.

The common vendor was Federal Savings Credit Union. The Naugles bought their land in 1983, having been shown a plan showing Lots X3 to X7, each 1 to 1¼ acres in size. Before the Sawlors bought in 1986, they were shown a plan in which Lots X4 and Lot 5 had been consolidated and joined to other land, the new lot being approximately 5.7 acres. The plan also showed Lots 8 to 12 and 14, each 2 to 3 acres in size and Lot 15 with 19.62 acres. The Eddys also bought in 1986, but they were shown a plan in which the new lot, X4 and X5 plus, had been reconfigured to show one lot just under 5 acres (with two dwellings) and one lot just over 1 acre.

Mr. Justice Tidman held that there was no building scheme (and, therefore, the restrictive covenants did not bind) because the second, third and fourth requisites were not fulfilled and the lands to be benefitted were not adequately described. On that last point, he held that there must either be a metes and bounds description of the benefitted lands or reference to a plan or some specific reference by which the lands could be readily identified. The name of the subdivision may not be enough.

The second requisite was not fulfilled because it made no sense to restrict each lot to one dwelling no matter whether its size was 1 acre, 5 acres or 19 acres and the original subdivision plan was substantially altered in subsequent subdivision plans.

It was not clear that the vendor intended the restrictive covenants to be for the benefit of all because there was no express term that the covenants were to enure to the benefit of and be binding upon each purchaser. The mutual covenant would have to be implied. But clause 14 of the covenants stated that the vendor could waive, alter, or modify the covenants in application to any other lot which made

it appear that the protection of the covenants was for the benefit of the vendor alone. [This does not mean that the necessary intention is absent any time there is a clause which allows the developer to modify the restrictive covenants in particular cases. See London Life Insurance Co. v. W.L.R. Construction Limited referred to below.]

With respect to the fourth requisite, there was no evidence that the purchasers bought in the belief that the restrictions were for the benefit of all in the subdivision. The neighbours did not complain about what happened with X4 and X5 and, indeed, did not complain about the Sawlors until lawyers told them to go out and get releases [!] [This could also have been argued to be acquiescence].

Across Canada, the Courts seem inclined for the most part to interpret the requisites for building schemes very strictly. Re Clarke (1991), 18 R.P.R. (2d) 109 (Ont Gen. Div.) gives another example of the land to be benefitted not being adequately described. Care must obviously be taken to make sure that the deed granting the lands subject to the restrictive covenants very clearly lays out the lands to be benefitted.

In Lakhani v. Weinstein (1980), 31 O.R. (2d) 65 two neighbouring developers got together and decided that their respective subdivisions should together form a building scheme. Although the covenants were the same, the benefitted lands identified, and the intention of the vendors there, the Court refused to uphold the building scheme. The absence of the common vendor was fatal.

It is worth mentioning Munro v. Jaehrlich (1994), 1 B.C.L.R. (3d) 388, [1995] 4 W.W.R. 85 (S.C.) which dealt with a subdivision made up of three phases, two of which opened together while the third came later. The restrictive covenants binding each phase contained a height restriction. Several owners in Phase 3 brought action to enforce the height restriction against an owner in Phase 2. The action was dismissed. The Court held that there was no evidence that before selling the lots in the first two phases the developer laid out the lots in the third phase. There was also no evidence of intent on the part of the developer or the owners of the first two phases that the third phase be part of the original scheme. In order for the restictions to be enforceable by the owners in the third phase, all of the owners in the first two phases would have had to agree that the third phase be added to the scheme.

(ii) **Exceptions Allowed**

A. Berrigan v. Higgins et al (1984), 64 N.S.R. (2d) 20.

In 1965 Lot C25, which was in a subdivision which was encumbered by a restrictive covenant which forbade subdivision, was subdivided into C25A and C25B. The house was built on C25B. In 1979, the current owner of C25A and C25B tried to sell C25A. The sale did not go through because of the restrictive covenant. The owner, Berrigan sought releases from all of the other owners in the subdivision. Six owners refused to give releases. It should be noted that Lots B4 and B5 in the same subdivision had been consolidated and then subdivided into 3 lots.

The Court found that there was a valid building scheme and then went on to discuss the doctrines of laches and acquiesence.

The right to ir sist on a restrictive covenant may be lost through laches - such a course of inaction as to amount to something like complacency. In this case, there was no laches because although the subdivision took place 14 years before, there was no physical evidence of subdivision for neighbours to see. The bare lot was not built upon or altered in anyway.

As to acquiesence, allowing others to do what was now complained of in another, the Court found that 5 of the 6 owners did acquiesce in the consolidation and re-subdivision of Lots B4 and B5. They could, therefore, not complain about this lot. One neighbour, however, had not acquiesced and she was allowed to stand against this subdivision. The injunction [presumably against selling the lot] was, therefore, granted.

B. London Life Insurance Co. v. W.L.M. Construction Limited [1995] N.S.J. No. 508 (NSCA).

The builder agreed to purchase 8 lots in a certain subdivision from the developer. The restrictive covenants binding the lots called for the buildings to have an 8 foot side yard clearance, but stated that

the grantor could alter, waive, or modify any of the restrictions so long as the substantial character of the subdivision was maintained. Before building on the lot in question, the builder had received written waivers allowing a 4 foot side yard clearance on 4 other lots. There was no written waiver for the subject lot, but the building was built with a 4 foot side yard clearance. The Trial Division held that the builder had breached the restrictive covenant.

In the Court of Appeal, the builder argued that the stamp of approval on the site plan was missing through inadvertence because the variation from the restrictive covenant had been requested and verbally agreed to. The Court found that there was a consistent pattern of dealings between the builder and the developer. There were good reasons why the developer might have failed to stamp its approval (its manager was terminally ill at the time); the developer must have known and been said to acquiesce in the location of the building because it made no complaint when it was being built and the location of the building on this lot was known to the owner of the neighbouring lot because he did not buy until after the footings were in on this lot. Thus, the court was content to hold that the covenant was properly waived by the developer.

One further case of interest is Lafortune v. Puccini (1991), 16 R.P.R. (2d) 16; 2 O.R. (3d) 689. In that case the Court found that a significant and substantial change in the character of the neighbourhood of the lot subject to the restrictive covenants since the restrictive covenants were first put on was such that the restrictive covenants were no longer enforceable.

(iii) **Interpretation**

A. Black Point Estates Limited v. MacPhee (1994), 134 N.S.R. (2d) 165 (NSTD).

A restrictive covenant binding the subdivision prohibited any "trailer or truck with living accommodation" from being used as a residence. The purchaser wanted to place a mobile or mini-home on the site and the subdivision developer did not want that, claiming that a mobile or mini-home was a trailer. The Court held that the covenant was meant to prevent people from residing in travel trailers and like vehicles which a mobile home was not. The mobile

home should be allowed.

Cases of interest across Canada are Kepron v. Vogt (1984), 24 M.P.L.R. 199; 2 D.L.R. (4th) 752 (Q.B.); and Alexander v. Luke (1991), 16 R.P.R. (2d) 23 (B.C.S.C.). In Kepron the plaintiff lived in a subdivision subject to a restrictive covenant which held that the properties could only be used as single family dwellings. The Municipality wanted to use some houses for groups of mentally disabled people. The Court upheld the covenants and forbade the group homes saying that planned accommodation for unrelated mentally disabled adults did not constitute occupancy by one family only in any domestic sense.

In Alexander, there was a covenant which indicated that no structure of any kind could be erected without the consent of the developer. When the respondent wanted to put an addition on his house, the developer was defunct. Numerous owners objected to his application for a building permit.

The Court held that the covenant was valid and not rendered unenforceable either because its terms were wide enough to prohibit any change to structures in the subdivision or because the developer was gone so that changes would never be possible again.

Food for Thought

One has to consider what effect the *Marketable Titles Act* will have on restrictive covenants.

Because they run with the land restrictive covenants are not always mentioned in deeds which follow the original deed encumbering the property. This gives rise to a number of questions: for example, if the covenants are not specifically mentioned for 40 years do they cease to encumber the property? do fellow subdivision owners have to file notices of claim with respect to all of the lots in the subdivision to keep the other lots under the burden? does every lot owner have to file against every other lot owner in order to keep the building scheme in effect throughout the subdivision? should lawyers be changing their practice to make sure that in every case the restrictive covenants are at least referred to in the legal description?