

RESTRICTIVE COVENANTS

A covenant affecting land is restrictive if it restricts the doing of something to, on, over or under land or in relation to an estate or interest in land: Elphinstone -Covenants Affecting Land, page 5.

Normally, a restrictive covenant is contained in a deed conveying land, although there is nothing to prevent a restrictive covenant from being created by a separate document.

At first glance, one might ask why this subject is being included in a course on "Practical Property", since the above description of a restrictive covenant appears to rest on contractual rather than property principles.

If A conveys land to B, and in the deed B, in consideration of the conveyance, agrees not to use the land for purposes other than residential purposes, does not the usual requirement of privity of contract apply, and if this requirement is not met, can it not be said that A only has a remedy against B if B breaches this covenant, unless there is a voluntary assumption of liability for its breach by B's successors in title to the land?

This was the case until 1848 when Tulk v. Moxha (1848), 41 E.R.1143 was decided.

Until that time, it was possible for A, who had the benefit of the covenant, to assign the benefit of the covenant to the purchaser when he sold the property, but, in the absence of a voluntary assumption of liability on the covenant by subsequent purchasers of the land the benefit of the covenant would be practically useless, the covenant being designed, as it was, to enhance the value of the property retained by A by restricting the use of the neighbouring property originally conveyed to B.

As D. J. Donahue pointed out in his book the Conveyancer's Guide to Real Estate Practice in Ontario, at pages 72-73,

"A restrictive covenant is a contract between two neighbouring land owners by which the covenantee, anxious to maintain the saleable value of his property, acquires the right to restrain the covenantor from putting his land to certain specified uses."

At common law, therefore, the **purchaser of a property**, the use of which was restricted by covenant, **could, with** full knowledge of the covenant, purchase the property and ignore the restriction, and nevertheless be free from all liability for its breach, and, by the same token, the person who made the covenant could sell the property in question the next day at a profit and free from the restriction.

As a result, the courts of equity intervened in Tulk v. Moxhay (supra). In that case, the covenant under consideration was a covenant by the purchaser of property which included Leicester Square to maintain Leicester Square as a garden. A successor in title to the purchaser cleared the entire area of vegetation and the original covenantee brought an action against him to restrain this breach of the covenant.

The court pointed out how inequitable the result would be if the covenantee was left without a remedy when it said, at page 1144:

"nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price in consideration of the assignee being allowed to escape from the liability which he had himself undertaken."

The Court, in this case, treated the covenant not only as a contract but also as an interest in real property appurtenant to the land owned by the covenantee, or the person having the benefit of the covenant originally, which burdens or encumbers the title to the land owned by the person who originally gave the undertaking under the covenant.

Restrictive covenants which benefit land and burden other land, therefore, are akin to easements, since there must be both a dominant tenement, that is, the land to be benefited, and a servient tenement, that is, the land to be burdened.

However, in order for a restrictive covenant to have this effect, certain conditions must be met. These I conditions are correctly described at page 52 of Elphinstone - Covenants Affecting Land, as follows:

(a) The intention of the parties that the benefit of the covenant should be capable of passing with the land to be benefited, must appear from the instrument creating the covenant;

(b) the covenant must have the object of protecting land which, at the date of the covenant belongs to, and after the date of the covenant, is retained by, the covenantee;

(c) at the dates of the covenant and of the conveyance or assignment and at the date of the breach complained of, the covenant must be capable of protecting the land intended to be protected; and

(d) the land intended to be protected must be described by the instrument creating the covenant so as to be ascertainable with reasonable certainty.

The covenant must also be negative in substance: Zetland v. Driver [1939] Ch. 1.

Let us examine each one of these characteristics more closely.

The first characteristic, that is, the characteristic that the parties intended that the benefit and burden of the covenant should be capable of passing with the title must appear either expressly or by implication in the document creating the covenant.

In order for a covenant to have the second characteristic, that is, have the object of protecting land, it must "touch or concern" the land. As pointed out by Farwell, J., in Rogers v. Hosegood [1900] 2 Ch. 388, at page 395

"Adopting the definition of Bailey, J., in Congleton Corporation v. Pattison (1808), 10 East 130, 135, the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land".

Accordingly, a restrictive covenant burdening one property must be capable of benefiting another property. For example, a covenant that property shall be used only for residential purposes clearly benefits, and enhances the value of the property which is intended to be benefited, notwithstanding who the owner of that property may be.

It is because of this principle that a covenant **which** is expressed to benefit lot A by restricting the use of lot B, which may be many miles away, is probably not enforceable. Thus, if A owns property in the south end of the City of Halifax and owns another property in the north end of the City, sells the property in the north end, and purports to include a covenant in the deed for the benefit of the south end property to the effect that the **north end property** will be used for residential purposes only, that covenant is clearly incapable of actually benefiting the south end property, notwithstanding what the parties intended, and is therefore only enforceable between the original parties and not between the successors in title to the south end property and the north end property.

The next characteristic of a restrictive covenant which runs with land, it will be recalled, is that the land intended to be protected or benefited must be described by the instrument creating the covenant so as to be ascertainable with reasonable certainty, although a full legal description is probably not necessary if the property is otherwise identifiable with reasonable certainty: In Re Union of London and Smith's Bank Limited [1933] Ch. 611, 631.

Finally, a covenant which runs with land must be negative in substance. This is so because the remedy for a breach is injunctive in nature and the courts are reluctant to

grant injunctions which require the doing of positive acts which require continuous supervision by the courts. However, a covenant may be positive in form but negative in substance. For example, in Tulk v. Moxhay (supra), a covenant which was positive in form, providing, as it did, that the covenantor would maintain Leicester Square as a garden, was held to be negative in substance as actually being a covenant not to use the property for any purpose other than as a garden.

In addition to meeting these general conditions, when drafting restrictive covenants, one should also keep in mind the following considerations:

(a) A restrictive covenant which forbids the sale, mortgage or lease of land is void and unenforceable under the general principle that any restriction on alienation is void if it is designed to prevent the exercise of a power, such as the power of alienation, which is inherent in the ownership of a legal estate in fee simple: Shaw v. Ford (1877) 7 Ch. D. 669 at page 674.

(b) If a covenant is intended to protect only a part of the land described, and is only expressed as benefiting all the land described, but is actually capable of benefiting only part of that land, it does not run with all the land notwithstanding that it may be capable of benefiting a part of it. For example, in the case In Re Ballard's Conveyance [1937] Ch. 473 where the covenant was with the owner of the Childwickbury Estate, which consisted of 1700 acres, there were no words such as "all or any of the lands" to indicate that the benefit of the covenant was to pass by a conveyance of a part of the land. Accordingly, Clauson, J. held that while the covenant might touch or concern a small portion of the Childwickbury Estate, it did not touch or concern the remainder of it and that the covenant could not be severed and treated as annexed to that part of the land as was actually touched by or concerned by the covenant. He did, however, say this (at page 481):

"In Rogers v. Hosegood the benefit of the covenant was annexed to all or any of certain lands adjoining or near to the covenantor's land and no such difficulty arose as faces me here; and there are many other reported cases in which, for similar reasons, no such difficulty arose."

What are the practical considerations which result from these principles?

First of all, let us place ourselves in the position of a solicitor for a client who is planning to sell part of his property and to protect the property being retained by him, for all time, by creating a restrictive covenant which will burden the land which he intends to sell and benefit the land which he intends to retain. He must determine whether the covenant is

(a) capable of benefiting the land to be retained, regardless of who the owner may be, and

(b) contrary to the policy of the law, such as a restriction on alienation.

Once the solicitor has satisfied himself on these points, he should ensure that the deed contains a covenant which is negative, that the deed clearly expresses an intention that the burden and benefit run with the title to both lots A and B, and that the problem which arose in the case In Re Ballard's Conveyance (supra) is avoided by using the words suggested by the Court in that case..

Accordingly, the deed should contain a covenant **which** could be in the following form:

To the intent that the benefit of the following covenant runs with and to the benefit of all or any of the lands described in Schedule A and the owner, owners, occupier or occupiers from time to time of such lands, and that the burden of that covenant runs with and burdens all or any of the lands described in Schedule B, the grantee, his heirs, executors, administrators, successors and assigns covenant with the grantor, his heirs, executors, administrators, successors and assigns as follows:

(Here insert negative covenant)

It will be remembered that the grantee is creating an equitable interest in the lands being sold which is appurtenant to the title to the lands being retained. Accordingly, the client who wishes to protect the property he is retaining is concerned not only as to whether or not the covenant is enforceable against the title to the land he is selling but also that the interest he is receiving, as owner of the retained land, is a first charge on the property being sold so that the benefit of the covenant cannot be destroyed by some prior charge.

What then, is the effect of a mortgage on a property which is made before the creation of a restrictive covenant affecting the same property?

If the property to be burdened by the restrictive covenant is, at the time the restrictive covenant is created, subject to a prior mortgage, or a judgment, (under the Registry Act a judgment has the same effect as a mortgage) it is my view that if the property subject to the **restrictive covenant** is sold at a foreclosure sale respecting the mortgage or at an execution sale respecting the judgment, the purchaser at the sale takes the property free of the restrictive covenant, since the purchaser at the sale gets all the interest which the owner of the burdened property had at the time the mortgage or judgment came into existence. In this case, the property was not burdened by the restrictive covenant at the time the mortgage or judgment came into existence.

As a result, when acting for a client who wishes to have his property protected by the device of a restrictive covenant on an adjoining or neighbouring property, it is essential that a full title search of the adjoining or neighbouring property be carried out and that if any prior encumbrances are found, those encumbrances be released or subordinated to the rights of the person entitled to enforce the restrictive covenant.

From the point of view of the person who is, for a consideration, burdening his property with a restrictive covenant, it must be remembered that the covenant is, as far as he is concerned, not only a negative easement on his title, but also a contractual obligation. Accordingly, it is advisable, from his point of view, to include in the restrictive covenant a provision that he is liable in damages in an action in contract only for a breach of the restrictive covenant which occurs while he is the owner and occupier of the property.

So far, I have discussed the first major intervention by the courts of equity in a field which, were it not for this intervention, would only be contractual in nature.

The next major extension to the law was made in Elliston v. Reacher [1908] 2 Ch. D. 374.

This further extension of the equitable principle laid down in Tulk v. Moxhay became necessary as a result of developers selling off lots in accordance with plans of subdivision without expressly burdening the unsold lots with the same restrictive covenants contained in the deeds to the lots.

In such cases, an extension of the doctrine in Tulk v. Moxhay (*supra*) was necessary in order to have the burden of restrictive covenants imposed on lots as they are sold burden the unsold lots, so that the owner of each lot in a subdivision may enforce the restrictions which burden his lot against other lots in the subdivision.

In order to overcome this problem the courts, beginning in Elliston v. Reacher, (*supra*), have, under certain circumstances, held that on each sale, the purchaser not only covenants with the vendor to observe the **restrictions imposed on** his lot but that the vendor also covenants impliedly with the first purchaser to observe the same restrictions with respect to each unsold lot. As a result, each unsold lot becomes burdened in equity with the implied covenant and the lot sold to the first purchaser is not only burdened by the covenant but benefited with its protection as against the title to the other lots.

This device is known as a "building scheme", but before a building scheme will be implied the following conditions, as outlined in the judgment of Parker, J. in Elliston v. Reacher

(supra), must be met:

- (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 of land belonging to him (including the land protected and the land bound by the covenant) 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 lots, are consistent only with the 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;
- (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 to the benefit of other land retained by the vendor but not included in the scheme;
- (e) the first purchaser must have had notice of the relevant facts; and
- (f) the scheme must have been formulated before the first sale.

It is apparent that whether a series of conveyances with restrictions amounts to a building scheme is a question of fact in each case, and that it is not essential, as it is in cases which do not amount to a building scheme, to describe the land to be benefited.

A building scheme, properly created, amounts to a general local law for a subdivision which each owner can enforce against the other by injunction.

In a building scheme, the technical drafting is not as important as is the intent of the parties to be gathered from all the circumstances: Re Lakhani and Shapiro (1981), 16 R.P.R. 305 at pages 313 and 314 (Ont. H.Ct.).

However, in view of the fact that it is difficult to predict whether or not a court will imply an intent to create a building scheme, I would, notwithstanding this rule, recommend that the formalities, such as specifically mentioning the land to be benefited, be followed when drafting restrictive covenants in a subdivision.

I now return to certain additional steps which should be taken when imposing restrictive covenants either by the device of a building scheme or pursuant to the doctrine in Tulk v. Moxhay.

Is it necessary that the purchaser sign the deed creating the restrictions? In Gilpinville Ltd. v. Dumaresq [1927] 1 D.L.R. 730 (N.S.S.C.T.D.) Harris, C.J. held that a purchaser who accepts title under a deed containing a restrictive covenant is bound thereby although he did not sign the deed, and an agreement containing a similar covenant signed by him as a preliminary to the giving of the more formal deed, is admissible as evidence of his intention to be bound.

In the result, if it can be shown that the first purchaser accepted the deed containing the restrictive covenant but did not sign it, he is bound by the covenant, and the covenant runs with the land. The signing is only an evidentiary matter and the lack of a signature is not fatal if the court concludes, on all the evidence, that the purchaser did, in fact, accept the restrictive covenant.

However, when creating a restrictive covenant, it is advisable to have conclusive evidence that the purchaser accepted the restrictive covenant and therefore it is the better practice to have each first purchaser from the subdivider execute the deed containing the **restrictions**.

It is also important, when preparing or perusing an agreement of sale, to make sure that the agreement clearly provides that the deed to be given at the closing be subject to the restrictive covenants and that the covenants be specifically set out in the agreement. It is true that the standard form of agreement of purchase and sale provides that the title to be given is subject to "easements and restrictions which do not materially affect the enjoyment of the property". However, since it may be highly arguable whether the particular restrictive covenants which a vendor proposes to put in a deed do, in fact, materially affect the enjoyment of the property to be sold, I would recommend that the agreement of purchase and sale specifically set out the restrictive covenants which the subdivider intends to put in the deed.

It is also important to remember that even if the agreement of sale contains a provision that the deed be subject to restrictive covenants, if the deed given pursuant to the agreement, at the closing, does not contain the restrictive covenants, then the deed prevails and the restrictive covenants mentioned in the agreement cannot be enforced: Millborn v. Lyons [1914] 2 Ch. 231.

Since a restrictive covenant is an equitable charge on land it can, if not recorded, be defeated by a subsequent registered instrument taken by a purchaser for value in good faith without notice of the restrictive covenant. Section 25 of the Registry Act provides as follows:

"No equitable lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same person, his heirs or assigns."

Accordingly, whether the restrictive covenants are contained in a deed or in a separate instrument, the document creating them should be registered in the registry of deeds in order to preserve them against subsequent purchasers for value and without notice of them.

I now turn to the position of a solicitor for the purchaser of real property subject to restrictive covenants. If, in searching the title, the solicitor comes across covenants in a deed in the chain of title, and the agreement of purchase and sale does not provide that the conveyance is to be made subject to the restrictions, and the purchaser does not wish to take the property subject to the restrictions, then, because restrictive covenants create an equitable charge, there is an objection to title, and the removal of the restrictions must be requisitioned within the time, as provided in the agreement, that other requisitions to title must be made.

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At the outset, I should point out that it is not true that merely because a restrictive covenant is framed as being in effect for all time, it offends the rule against perpetuities and is therefore not enforceable. This is not the law and, indeed, unless a restrictive covenant becomes unenforceable in other circumstances which I will mention shortly, it remains enforceable for all time, no matter how long ago it was created: MacKenzie v. Childers (1889), 43 Ch. D. 265 at page 279.

If a solicitor for a proposed purchaser finds, in his search, covenants which appear to him to be restrictive covenants which may run with the land, and has instructions to requisition a release of those covenants, it is important that the requisition be not only made on time, but that it be framed properly.

The requisition must be for a release from the present **owner of**, and anyone else who has an interest in each property benefited of the covenant, together with a release from each mortgagee and each encumbrancer of the property benefited by the covenant, including a tenant, since the benefit of a restrictive covenant, when it is expressed to benefit the owner of the property and his "assigns", extends to a tenant of the owner: Taite v. Gosling (1879), 11 Ch.273. It is immediately apparent that in the case of a large subdivision, where most or all of the lots have been sold, such a requisition, for all practical purposes, could be fatal to a sale.

However, if, in each deed, the subdivider has reserved to himself the right to vary or give consent to a breach of a building restriction, then a release from the owners of the lots is not necessary and the scheme may be varied by the original subdivider only, since each **purchaser bought on** this footing: Whitehouse v. Hugh [1906] 1 Ch. D. 253.

The form of the release is important. It will be remembered that a restrictive covenant not only imposes a contractual obligation but also creates an equitable right in property and therefore the release should not only release the purchaser from any liability in contract, but, in addition, should release the property right in the lot.

As a result, the release should contain, in addition to a release of personal liability in contract, the following clause:

"The releasor also releases to the releasee any right, title or interest the releasor has in the (describe the lands being sold) by virtue of a restrictive covenant contained in a deed dated the _____ day of _____ made between as grantor and _____ as grantee, registered in the registry of deeds at _____, in book _____ at page _____."

When a purchaser requisitions a release of a restrictive covenant, the vendor often takes the position that the covenant is contractual in nature and does not "run with the land" because it does not meet all the tests which must be met before a covenant runs with land.

It is apparent that more often than not there is no clear answer to this question, and, as a result, a court, in an application made under the Vendors and Purchasers Act, may be asked to determine whether a covenant does run with land and therefore whether or not an objection to title which is made respecting a covenant is valid.

An application under the Vendors and Purchasers Act is certainly a speedy and fairly cheap method of having this question determined in a summary manner by a chambers judge on an agreed statement of facts. However, the application may only be between the vendor **and the purchaser, and the** question arises as to whether or not an order made in such an application is binding on those persons entitled to enforce the covenant but who are not parties to the application.

It is not safe to assume that because a restrictive covenant was made more than twenty years ago it is no longer effective because of the Limitation of Actions Act. It must be remembered that the time for bringing an action with respect to a restrictive covenant begins to run not from the time when the restrictive covenant was created but from the time of its breach: Turner v. Moon [1901] 2 Ch. 825.

Although a restrictive covenant is, subject to this limitation period, enforceable at any time, there are other circumstances in which a restrictive covenant becomes unenforceable.

It must be remembered that the enforcement of an equitable charge is by way of injunction and that an equitable remedy cannot be pursued if there is any delay or laches in bringing the action.

In addition, a person entitled to the benefit of a restrictive covenant affecting land may be estopped from enforcing the covenant if he

(a) knows of his own rights and of another person's intention to commit a breach of the covenant;

(b) by his acts or omissions causes or permits the other person to believe that the covenant does not

exist, or
is no longer enforceable against that other
person or
that he, the person entitled to enforce the
covenant,
has waived his right; and

(c) by his acts or omissions causes or permits the other person to commit a breach of the covenant and incur expenditure in reliance upon such belief:
Elphinstone - Covenants Affecting Land, page 107.

Also, a restrictive covenant becomes unenforceable if there is a general change in the character of the neighbourhood. For example if a subdivision, originally designed to be residential, and subject to restrictive covenants which require that lots shall be used for residential purposes only, becomes, nevertheless, commercial in nature, then the restrictive covenants are no longer enforceable.

Elphinstone - Covenants Affecting land, p. 110.

Finally, a right to an injunction against an owner will be lost if there has been acquiescence in previous breaches by other owners. For example in Turney v. Lubin (1980), 10 R.P.R. 89 (B.C.S.C.) it was held that the failure to initiate proceedings with respect to previous breaches by other owners subject to the covenant amounted to an implied approval of the breach complained of in that case.

If property is expropriated, does the expropriation extinguish any burden on the title to the property created by a restrictive covenant entered into before the expropriation?

This question is answered in Megarry and Wade - The Law of Real Property (4th Ed.) at page 775 as follows:

"Where land which is subject to a restrictive covenant is acquired compulsorily by a public authority under statutory powers, no action lies for breach of the covenant if what is done on the land is validly done in the exercise of statutory powers. The authority of Parliament then overrides the contractual restriction, and the covenantee's only remedy is to claim compensation for the injurious affection of his own land which was previously benefitted by the covenant. But this does not extinguish the covenant, which continues to bind the acquired land as regards any use not authorized by statute. Thus where the Air Ministry compulsorily purchased agricultural land for use as an aerodrome and later let it to a firm for use for commercial flying, an injunction was granted to prevent the firm from so using the land in breach of a covenant restricting it to agricultural use; but an injunction to prevent them from using it for **Air Ministry work was refused.**"

In closing, I will briefly discuss the nature of the remedies which may be sought in the event a restrictive covenant is breached.

If a restrictive covenant is breached and the original covenantee or any other person entitled to the benefit of the covenant brings the action against the original covenantor, the court, on proof of the breach, will grant an injunction as of course without requiring proof of any injury or prospect of any injury in the future. If, however, the action is against a successor in title of the original covenantor and the plaintiff is thereby entitled to sue in equity only, an injunction will be granted only where it is shown that continuance of the breach will cause injury to the plaintiff in the future: Elphinstone - Covenants Affecting Land, pp. 96, 97. Accordingly, it is **my view that** if there is a restrictive covenant against pruning trees, an injunction probably would not be granted against a successor in title to the original purchaser, unless the plaintiff showed, in some way, that the continuance of this activity would cause him substantial injury in the future. It should be noted that the plaintiff's motive in bringing the action is irrelevant, once he has discharged this burden: Collins v. Castle (1887), 36 Ch. D. 243, 254.

Finally, it should be noted that a person entitled to

enforce a restrictive covenant cannot use a self-help remedy to stop a continuing breach: in *Urban Housing Company v. Oxford City Council* [1940] Ch. 70 damages were awarded for using a steam roller to demolish a wall erected in breach of a restrictive covenant.

It should be noted that a restrictive covenant is enforceable against a squatter: Megarry and Wade - *Law of Real Property* (4th Ed.) 759.