Court of Queen's Bench of Alberta

Citation: Kolias v. Owners Condominium Plan 309 CDC, 2007 ABQB 714

Date: 20071129
Docket: 0601 04644
Registry: Calgary

2007 ABQB 714 (CanLII)

Between:

Ike Kolias and Lisa Kolias

Appellants

- and -

The Owners: Condominium Plan 309 CDC, Bradley G. Nemetz, Virginia M. Nemetz, Hugh Fraser Morrish, Richard S. Aberg, Carol M. Aberg, John Maxwell Robertson, Edith Josephine Robertson and Jean M. Toole

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice Alan D. Macleod

Introduction

[1] This is an appeal from the decision of J.B. Hanebury, Master in Chambers, dated December 21, 2006 in which she dismissed the appellants' Originating Notice of Motion seeking a discharge of a restrictive covenant. The restrictive covenant was registered in 1971 against the lot now owned by the appellants. The purpose of it was to protect the views from units in the neighbouring six storey condominium development called "Covenant House." The respondents are owners of the units in Covenant House who claim that the condominium property benefits from the restrictive covenant.

[2] The Master approached the application as if it were brought under Rule 410 of the Alberta Rules of Court and s. 48 of the *Land Titles Act,* RSA 2000, C. L-4 [*LTA*] and because

there were no material facts in dispute, proceeded on that basis. In the appeal before me no issue was taken with that approach and I agree with it. The Master dismissed the application and directed that the Court's determination or clarification of the restrictive covenant should be registered against the title of Lot 10.

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Facts

[3] The restrictive covenant in issue is found in a Memorandum of Agreement dated September 9, 1971 between Glenview Construction Ltd. ("Glenview") and The A.D. Gelmon Development & Management Corporation ("A.D. Gelmon").

[4] The Agreement divides Lot 10 into three areas and imposes restrictions on the height of the structures that can be built on two of those areas.

[5] Justice Porter developed Eagle Ridge in 1967 and his sons-in law owned the land where Covenant House now stands. Each son-in-law was also given a nearby lot. Two of the nearby lots were sold by the sons-in-law as bare land, including Lot 10 which was adjacent to the Covenant House Lands. Lot 10 is the lot now owned by the appellants. At the time of the sale of the lots, Justice Porter instructed one son-in-law to take the necessary steps to protect the sight lines of the Covenant House condominium units from future construction on those lots. The units had expansive views in three directions, including views of downtown Calgary and the mountains to the west. The son-in-law, with the assistance of a planner, developed a restrictive covenant which was registered by way of caveat against the title to Lot 10.

[6] At the time the restrictive covenant was entered into, Glenview was the owner of Lot 10, now owned by the appellants, as well as land upon which Covenant House sits. The restrictive covenant was entered into as part of an agreement under which Lot 10 was sold by Glenview to A.D. Gelmon. In 1998, the property was sold to the appellants. They signed a purchase and sale agreement and agreed that title to Lot 10 "may be subject to homeowners association caveats, encumbrances and similar registrations". A copy of the restrictive covenant was provided to their counsel prior to closing.

[7] The solicitors for the covenantee in 1971 were also the solicitors for the appellants in 1998. As they were the address for service on the caveat registered with respect to the restrictive covenant, they purported to serve a notice to take proceedings on the caveat on behalf of the appellants by serving their own address. After 60 days elapsed, in what can only be described as inappropriate and self serving, appellants' counsel attempted to file a discharge of the caveat, but the Registrar refused to accept it.

[8] The appellants' counsel then wrote to Mr. Jack Robertson, Q.C. (one of the unit owners of the condominium) and advised that "[a]lthough the caveat does not specify the beneficiary of the restrictive covenant, we understand that the intended beneficiary was the condominium". The letter also stated "[o]ur client wishes to remove the caveat regarding the restrictive covenant

from title to his property". In a subsequent telephone conversation Mr Robertson again confirmed that the intended beneficiary was Covenant House. Mr. Kolias decided not to proceed with trying to remove the Caveat at that time.

[9] On April 13, 2006, the appellants' current counsel commenced proceedings to remove the restrictive covenant.

[10] The restrictive covenant provides as follows:

> 2. The Purchaser agrees:
>
> (a) as to the portion of said Lot Ten (10) designated as "area "1" no structure of any kind will be built on the said area except: driveway, flagpole, fences, swimming pool, diving board and barbeque and in any event no such structures nor hedges or shrubs shall be permitted beyond the height of six (6') feet and no cluster of trees shall be placed so as to obstruct materially the sight line.
>
> (b) as to "Area "2" no structure, except chimneys or radio or T.V. antenna, will be built to height in excess of fourteen (14') feet and no trees allowed to grown over the said fourteen (14') feet.
>
> (c) as to Area # 3 there shall be no restriction on the height of any structure so long as it complies with applicable zoning and building by-law.
>
> 3. It is mutually understood and agreed that the restrictive covenants herein contained shall be deemed to run with the land, and that this agreement may be registered against said Lot Ten (10) and shall enure to the benefit of and be binding upon the respective heirs, executors, transferees and assigns of each of the parties hereto.

[11] Schedule A of the restrictive covenant contains a drawing outlining the plan of Lot 10 and the "areas" in question, reflecting the sight lines for Areas 1, 2 and 3.

Judgment Below

[12] Master Hanebury concluded that the dominant tenement could not be properly ascertained on the face of the document but found that extrinsic evidence could be used to resolve the matter.

Grounds of Appeal

[13] The main arguments advanced on behalf of the appellants were as follows:

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a. Under our land title system, in order for a restrictive covenant to "run with the land" it must identify in some way the dominant tenement; otherwise it is a personal covenant.

b. A prospective purchaser must be able to determine from a review of the title to be purchased the precise interest including the identity of the beneficiary of any burdens registered against the property. A purchaser should not have to become a forensic land titles investigator; it is inimical to the Torrens System. Thus, extrinsic evidence should not be admitted.

c. The failure to comply with s. 67 renders the restrictive covenant invalid or unenforceable.

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Standard of Review

[14] Under our rules, an appeal from a Master takes the form of a hearing *de novo* although as a practical matter we accord deference. Not much turns on this here, however, because the appellants maintain that the Master erred in law in concluding that the covenant was enforceable and by her reference to extrinsic evidence. It is common ground that the standard of review on questions of law is one of correctness.

The Legislation

[15] The relevant portions of the *LTA* are as follows:

> 48(1) There may be registered as annexed to any land that is being or has been registered, for the benefit of any other land that is being or has been registered, a condition or covenant that the land, or any specified portion of the land, is not to be built on, or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land.
>
> (2) When any such condition or covenant is presented for registration, the registrar shall enter a memorandum of it on the proper certificate or certificates of title.
>
> (3) Notwithstanding subsection (2), before a memorandum of condition or covenant may be entered on a certificate of title under subsection (2), certificates of title must exist for all the parcels of land affected by the condition or covenant, including the parcel of land that comprises the servient tenement and the parcel of land that comprises the dominant tenement.
>
> (4) The first owner, and every transferee, and every other person deriving title from the first owner or through tax sale proceedings, is deemed to be affected with notice of the condition or covenant, and to be bound by it if it is of such nature as to run with the land, but any such condition or covenant may be

modified or discharged by order of the court, on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant or that the condition or covenant conflicts with the provisions of a land use bylaw or statutory plan under Part 17 of the *Municipal Government Act,* and the modification or discharge is in the public interest.

(5) The entry on the register of a condition or covenant as running with or annexed to land does not make it run with the land, if the covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land.

67 When an easement or an incorporeal right in or over land for which a certificate of title has been granted is created for the purpose of being annexed to or used and enjoyed together with other land for which a certificate of title has also been granted, the Registrar shall make a memorandum of the instrument creating the easement or incorporeal right on the existing certificates of title of the dominant and servient tenements respectively.

137 (2) In the case of a caveat in which
(a) the nature of the interest claimed is
(i) an easement
(ii) a party wall agreement
(iii) an encroachment agreement, or
(iv) a restrictive covenant running with or capable of being annexed to land, and
(b) the dominant tenement is identified,

the caveat may be withdrawn only by the registered owner of the dominant tenement or, if the registered owner of the dominant tenement is the caveator and the caveat was signed by an agent, by the registered owner or the agent

139(1) In the case of a caveat that is registered to protect a restrictive covenant running with or capable of being annexed to land,
(a)section 138 does not apply, and
(b)where the dominant tenement is not identified in the caveat, section 137(1) does not apply,

(2) Subject to section 137 (2), a caveat referred to in subsection (1) may be modified or discharged only by an order of the court made under section 48.

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Is this restrictive covenant "of such nature as to run with the land"?

[16] As Slatter J. said in *Potts v. McCann* (2002), 325 A.R. (4th) 269 (Q.B.), 2002 ABQB 734, the common law has long recognized negative covenants which relate to the land itself. Indeed, my reading of s. 48 leads me to the conclusion that it largely codifies the common law. To run with land, a covenant must be negative in nature, *i.e.* a covenant that the land or a specified portion of it is not to be used in any particular manner. Further, it is not sufficient that it bind the servient tenement; it must demonstratively benefit the dominant tenement. Subsection 3 requires that there be a certificate of title in existence for parcels of land affected by the covenant. The fact that the registrar accepts the restrictive covenant or the caveat for registration as "running with the land" does not make it run with the land if it would not otherwise do so because of its nature or the manner in which it is expressed.

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[17] In my view, there can be little doubt that the restrictive covenant at issue is of such a nature as to run with the land. It clearly exists to protect the sight line of the dominant tenement by preventing the owner of the servient tenement from erecting buildings or any other thing on certain portions of the lot in excess of a certain height. The protection of sight lines from a particular parcel of land directly affects the mode of occupation of the servient tenement. This is to be contrasted with the sort of covenant which was found to be personal in nature in *Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd.*, [1955] SCR 682 or *Galbraith v. Madawaska Club Ltd.,* [1961] S.C.R. 639.

Is the manner in which the restrictive covenant expressed such that it would not otherwise run with the land?

[18] This is a fundamental issue in this appeal. The appellants observe that the restrictive covenant does not identify the dominant tenement and, indeed, one could not ascertain the identity of the dominant tenement without doing some investigation beyond the restrictive covenant itself. It is argued that because of this, the restrictive covenant does not comply with the basic requirements as set out by the Supreme Court of Canada in *Canadian Construction v. Beaver* and *Galbraith v. Madawaska Club LTD.* Mr. Jordan also urged upon me the case of *Sekretov v. Toronto (City),* [1973] 2 O.R.161(C.A.). While that case concerned legislation in that province, it was forcefully argued that the rational of the case is particularly applicable to our land title system. The court in that case said at 167:

> Our courts have recognized that the purchaser of land needs to know before he is sued, or, indeed, before he forms a decision whether or not to breach a particular covenant, or to purchase property burdened with it, who is the person who will seek to enforce it, and what parcel of land is claimed to enjoy the benefit of the covenant. Will a search in the Registry Office provide the solution? Charges of this nature are registered against the name of the owner whose estate is intended to be burdened, *i.e.*, the covenantor. The name of the covenantee will appear in the title deeds, but it may not be possible to trace him or otherwise ascertain the identity of the land to be benefited. It is much more

> satisfactory for the purchaser of the encumbered land be provided with an indication in the deed to show which is the land to be benefited. He is placed in a most precarious position if he must first breach the covenant and then wait in fear and trembling to see if he is to be sued.

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[19] While the *Canadian Construction Co.* case was from Alberta, a careful reading of it does not provide a great deal of assistance. There were two judgments in that case: one delivered by Cartwright J. on behalf of himself and three others; the other by Locke J. The essence of Justice Cartwright's reasons is that he agreed with the Trial Judge that the covenant in that case was intended by the parties to be personal to the respondent and not for the benefit of its land. He does reference the appellants' argument that there was nothing in the agreement to indicate the existence of other land of the covenantee which was intended to be benefited. Nevertheless, he specifically did not find it necessary to decide that question.

[20] Similarly, Locke J. construed the agreement in such a manner that the covenant did not run with the land but in addition did say that he would not have allowed oral evidence in construing the agreement. In his view, this was clearly a covenant that was imposed by the vendor for his own benefit. The essence of the covenant there was that the purchaser not carry on a business similar to that of the vendor.

[21] In *Galbraith*, the main argument surrounded a bylaw that was incorporated into a covenant purporting to run with the land and it had the effect of restricting occupation of a dwelling or premises to members of the club or others "by special permission of the Board of Directors." In essence, the Supreme Court found that the covenant did not touch or concern the land, *per se*, and was not of such a nature as to be able to run with the land. In addition, Judson J., for the majority, added a statement that is the most oft quoted statement from the case at 653:

> There is nothing in the conveyance from the Club to Mrs. Firth which attempts to annex the benefit of the covenant to any land retained by the Club. Further, there is no evidence anywhere in the record to indicate whether the Club had any such land capable of being benefited. ... *This fails to meet what I think must be regarded as the minimum requirements that the deed itself must so define the land to be benefited as to make it easily ascertainable."* [Emphasis added]

This case turns upon the meaning of the last sentence.

[22] In ascertaining which position best accords with the purpose of the Torrens System, one should first look to the act which implements that system, the *LTA*. I see nothing in s. 48 which requires that a restrictive covenant identify the dominant tenement. Indeed, s. 139 is a strong indication that a restrictive covenant can run with the land where the dominant tenement is **not** identified. Nevertheless, there must be in existence a dominant tenement and moreover the idea of a dominant tenement which cannot be readily ascertained does not sit comfortably with the other provisions of s. 48.

[23] I conclude, therefore, that the *LTA* does not require that the dominant tenement be identified on the document creating the restrictive covenant. If that were a formal requirement I would have expected to see it in the *LTA*. While there is no doubt that it could be argued that s. 48(5) preserves the common law requirements, I am not persuaded that there is a clear common law requirement that the dominant tenement be identified in the instrument. Furthermore, s. 139(1) would seem to confirm that this requirement is not a pre-requisite to a restrictive covenant which is capable of being annexed to land.

[24] Nevertheless, I further find that s. 48 requires that there be certificates of title in existence for the servient tenement and the dominant tenement and this is consistent with the idea that the dominant tenement be "ascertainable" within the meaning of the authorities. I am strengthened in that belief by a decision of this province's Court of Appeal in *Guaranty Trust Co. v. Campbelltown Shopping Centre Ltd.* (1986), 72 A.R. 55 (C.A.). In that case, the court expressly adopted the "easily ascertainable" test set out by Judson J. in *Galbraith*. While the Court did not specify what that phrase meant precisely, it refused to give effect to the restrictive covenant in that case because even after a fairly complicated investigative process, the extent of the dominant tenement was in doubt. I think, however, it supports the view that extrinsic evidence is admissible.

What evidence may be examined?

[25] In the absence of Alberta or Supreme Court authority directly on point, the learned Master looked to British Columbia authority for guidance. These cases, *Kirk v. Distacom Ventures Inc.*, [1996] 4 R.P.R. (3d) 240 (B.C.C.A.) and *Gubbles v. Anderson* (1985), 8 B.C.L.R. (3d) 193 (B.C.C.A.) involve different facts, but they are instructive as to what sorts of evidence may be examined on this issue. They indicate that the Court may look at the evidence of the surrounding circumstances at the time the covenant was entered into. The factual matrix which existed at that time can to be used to establish its true nature.

What is "easily ascertainable"?

[26] In this case, it is easy to do a search as to the state of affairs surrounding Lot 10 and the parcel of land upon which Covenant House stood as at the date of the agreement between Glenview and A. D. Gelmon. As was noted by the respondents, at that time Glenview owned the Covenant House lands which immediately joined Lot 10 to the east. They were the only lands adjoining Lot 10, owned by the covenantee, at the time the document was signed. The restrictive covenant itself deals with height restrictions to preserve "the sight line." These lines run in an east-west direction and it would have been clear with little or no deduction that the parcel of land upon which Covenant House is located is the dominant tenement. Indeed, it proved to be easily ascertainable by the appellants in this case.

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[27] This is clearly not a case where the dominant tenement was not traceable such that the appellants could be left in the dark.

[28] Accordingly, I am in agreement with the learned Master and would dismiss the appeal on this point.

What is the effect of the failure to comply with s. 67?

[29] Under s. 67, the appellants argue that the Registrar was required to have made a memorandum reflecting the restrictive covenant upon both the dominant and servient tenements.

[30] S. 67 does not specifically refer to restrictive covenants. Because s. 48 is more specific in its reference to restrictive covenants, I think that section sets out the requirements for registration of a restrictive covenant.

[31] If I am wrong, I further conclude that s. 67 is a direction to the Registrar and the Registrar's failure to follow that direction ought not to affect the interests of those involved in otherwise *bona fide* real estate dealings. Also, it would be a bizarre result if the failure of the registrar to follow a direction in the *LTA* results in the elimination of legal rights when the acceptance for registration, by virtue of s. 48(5), does not create legal rights.

Conclusion

[32] In conclusion, I dismiss the appeal.

[33] I would like to thank all counsel for their assistance in this well argued appeal. Costs may be spoken to, if necessary, by correspondence.

Heard on the 22nd day of June, 2007.
Dated at the City of Calgary, Alberta this 29th day of November, 2007

Alan D. Macleod
J.C.Q.B.A.

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Appearances:

Anthony J. Jordan, Q.C.
for the Appellants

Mr. Christopher D. Simard
for the Respondents

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