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Case Name:

Kolias v. Condominium Plan 309 CDC

Between
Ike Kolias and Lisa Kolias, Appellants (Applicants),
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

[2008] A.J. No. 1251

2008 ABCA 379

Docket: 0801-0013-AC

Registry: Calgary

Alberta Court of Appeal

J.E.L. Côté and J. Watson JJ.A. and W.V. Hembroff J. (ad hoc)

Heard: October 9, 2008.
Judgment: November 14, 2008.

(38 paras.)

Appeal From:

On appeal from the Judgment by the Honourable Mr. Justice A.D. Macleod. Dated the 29th day of November, 2007. Filed on the 14th day of January, 2008 (2007 ABQB 714, Docket: 0601-04644).

Counsel:

A.J. Jordan, Q.C. and J. Brown: for the Appellants (Applicants).

C.D. Simard: for the Respondents.

Reasons for Judgment Reserved

The judgment of the Court was delivered by

J.E.L. CÔTÉ J.A.:--

A. Facts

1 The appellants appeal dismissal of their application to discharge a restrictive covenant registered against the title to their Lot 10 in the Calgary community of Eagle Ridge. The respondents own condominium units in adjacent Covenant House, and oppose the appeal.

2 The restrictive covenant is contained in a written Agreement dated September 9, 1971 between Glenview Construction Ltd. and The A.D. Gelmon Development & Management Corporation. Glenview then owned the Covenant House land, and Lot 10 was owned by Gustave Engbloom. The restrictive covenant was registered against Lot 10 on September 17. On that same date, title to Lot 10 was transferred first to Glenview, then to Gelmon Development, and finally to The Gelmon Corporation. Title to Lot 10 later passed to Eva Gelmon, and then to the appellants in 1998 (A.B. v. 2, pp. 1, 64-65 and 67).

3 I quote the restrictive covenant:

> The Purchaser agrees:
>
> > as to the portion of said Lot Ten (10) [the Kolias Property] 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.
> >
> > 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 [sic] over the said fourteen (14') feet.
>
> 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-laws.
>
> It is mutually understood and agrees [sic] 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.

4 Schedule A to the restrictive covenant contains a drawing of Lot 10 with "Areas 1, 2 and 3" designated.

5 On April 13, 2006, the appellants started proceedings to discharge the restrictive covenant.

B. Identifying the Dominant Tenement

6 The appellants' primary argument before the Master and the chambers judge was that the restrictive covenant should be discharged because the dominant tenement which it is probably designed to benefit cannot be readily ascertained on the document's face. The appellants argue that as a result, the restrictive covenant does not run with the land, and cannot be enforced against them as subsequent purchasers.

7 Admittedly, no specific term in the restrictive covenant purports to identify the dominant tenement. However, the respondents argue that it is nonetheless readily ascertainable from the restrictive covenant itself that the Covenant House lands are the dominant tenement. In the alternative, they argue that extrinsic evidence should be admitted to identify the dominant tenement. In the further alternative, the respondents seek to rectify the restrictive covenant.

8 The Court of Queen's Bench found that the dominant tenement could not be readily ascertained on the face of the restrictive covenant itself, but that extrinsic evidence could be used to identify the dominant tenement. The parties' arguments before this Court are much the same as their primary arguments before the courts below.

9 The mere fact that an instrument is registered as a restrictive covenant does not determine whether it actually is one and runs with the land. Section 48(5) of the *Land Titles Act* expressly says that:

> 48(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.

10 The chambers judge appeared to emphasize the fact that nothing in s. 48 of the *Land Titles Act* specifically requires that a restrictive covenant identify the dominant tenement. However, this section does not codify what is required to constitute a restrictive covenant at law. In fact, s. 48(5) says the opposite. So the Act preserves the common law respecting restrictive covenants: ***Potts v. McCann***, 2002 ABQB 734, 5 Alta. L.R. (4th) 269.

11 An important related argument by counsel for the respondents is that the covenant here expressly refers to "sight lines". But that only appears in cl. 2 (governing Area #1), and I read it as only applying to the third (of three) restrictions in cl. (a) (Area #1). So it is only about trees. Counsel for the respondents reads it as applying to all of cl. (a). His interpretation would be very awkward, as it would render vague the first two restrictions in cl. (a). The sight-lines qualification is only needed (or compatible) with the third restriction, trees, because they are not otherwise restricted (i.e. neither a height limit in feet, nor a complete bar). The first two restrictions are either a total ban, or a height limit in feet.

12 What does the common law say about restrictive covenants which contain no specific term purporting to identify the dominant tenement?

13 In the ***Galbraith*** case, the Supreme Court found that a restrictive covenant not referring to the intended dominant tenement did not run with the land. See ***Galbraith v. Madawaska Club*** [1961] S.C.R. 639, 29 D.L.R. (2d) 153. In so finding, the Court stated at p. 653 that, at a minimum, "the deed itself must so define the land to be benefited as to make it easily ascertainable" (emphasis added). This Court adopted the ***Madawaska*** "easily ascertainable" test, in ***Guaranty Tr. Co. of Can. v. Campbelltown Shopping Centre*** (1986) 72 A.R. 55, 44 Alta. L.R. (2d) 270 (C.A.).

14 Counsel for the respondents tries to uphold the restrictive covenant here by arguing that the Supreme Court of Canada's decision in ***Galbraith v. Madawaska Club****, supra*, is about other topics, and that the words of the Supreme Court of Canada quoted by the appellants and used to attack this restrictive covenant are merely *obiter*. Even if they are *obiter* (a point on which I reach no settled conclusion), they are still persuasive authority. Nor are they a mere brief throwaway line. They are a considered discussion. See ***R. v. Henry***, 2005 SCC 76, [2005] 3 S.C.R. 609, 342 N.R. 259.

15 Even persuasive authority should be followed unless there is good reason not to. No Supreme Court of Canada or Alberta Court of Appeal decision directly contrary to the Supreme Court of Canada's words in ***Galbraith v. Madawaska*** has been suggested, so there is no bar to following the words of the Supreme Court of Canada in ***Galbraith v. Madawaska***.

16 Furthermore, those words in ***Madawaska*** have often been followed by various courts in Canada. See ***Re Sekretov and Toronto*** [1973] 2 O.R. 161, 166, 33 D.L.R. (3d) 257 (C.A.); ***Hi-Way Housing (Sask.) v. Mini-Mansion Constr. Co.***, [1980] 5 W.W.R. 367, 4 Sask.R. 415 (C.A.); ***Guaranty Tr. Co. of Can. v. Campbelltown Shopping Centre****, supra*.

17 And Canadian textbooks seem uniformly to treat the words in ***Madawaska*** as reflecting Canadian law. See Ziff, *Principles of Property Law* 382 (4th ed. 2006); LaForest (ed.), Anger & Honsberger, *Law of Real Property*, v. 2 s.s. 16:20.10(b), (c); di Castri, *Registration of Title to Land*, para. 332 (looseleaf, release 8, 2006); di Castri, *Law of Vendor and Purchaser*, s. 406 (looseleaf, release 4, 2008).

18 Even where an appeal court is free to change the law, it is usually a bad idea to do so where people have come to rely upon that law and to found transactions upon it. Conveyancing is always held to be such a topic. People must be able to get and rely upon legal advice as to which transactions are valid. Similarly, they must be able to rely on legal advice as to which clouds on land titles are not valid, and can be safely accepted when closing a purchase.

19 The dominant tenement in this case cannot be easily ascertained on the face of the restrictive covenant itself. The respondents urge multi-stage explanations on us of how the Covenant House land is ascertainable as the dominant tenement. In our view, the words of Hetherington J.A. in ***Guaranty Trust****, supra,* at p. 272, are apt:

> While we now understand, after an explanation which took most of the morning, how counsel for Campbelltown contends that this part of the dominant tenement can be ascertained, we are of the view that it would not be correct to say that this can be done easily. It requires not only a search at the land titles office, but a fairly complicated deductive process involving the restrictive covenant agreement and the plans. Even after this process has been completed, the extent of the dominant tenement is in doubt.

20 Having found that the dominant tenement could not be readily ascertained on the face of the documents, the chambers judge here held that extrinsic evidence was admissible to identify the dominant tenement, relying on ***Kirk v. Distacom Ventures*** (1996), 81 B.C.A.C. 5, 4 R.P.R. (3d) 240 (C.A.). ***Kirk*** involved a restrictive covenant which included a description of the intended dominant tenement, but it was ambiguous. The Court held admissible extrinsic evidence of surrounding circumstances existing at the time the covenant was made, in order to resolve that ambiguity.

21 The chambers judge also relied on this Court's decision in ***Guaranty Trust v. Campbelltown****, supra*, in admitting extrinsic evidence. However, ***Guaranty Trust***, like ***Kirk***, involved a restrictive covenant which included some reference to the dominant tenement. Indeed the Court in ***Guaranty Trust*** did not expressly consider the issue of

extrinsic evidence.

22 In my opinion, extrinsic evidence is not admissible in this case. Apart from the word "sight lines" (discussed above), the restrictive covenant does not contain any reference whatever to the existence of an intended dominant tenement. Therefore, even if the law allowed extrinsic evidence to resolve ambiguous descriptions of dominant tenements, there is no such ambiguity here. This omission is not equivalent to an ambiguity. Ambiguity must exist in the language of the restrictive covenant as written. It cannot be created by the evidence sought to be adduced: Fridman, *The Law of Contract in Canada* 445-46 (5th ed. 2006). The chambers judge, therefore, erred in law when he admitted extrinsic evidence to identify the dominant tenement in this case.

23 Near the end of his oral argument, counsel for the respondents made an interesting statement. He said that the condominium plan was registered (August 25, 1971) before the caveat for the restrictive covenant was (September 17, 1971). The appeal book confirms that. That order of registration belies the implicit suggestion that the vendor merely kept one lot and sold the adjoining Lot 10, putting a covenant against the latter. In fact, there is not one single lot neighboring Lot 10: there is a host of parcels, because a vertical condominium development is the neighbor. And counsel for the respondents concedes that the photos near the end of the appeal book show that the building's higher floors have little to fear. A new structure (say) 20 feet tall would affect the view only of the 6th floor or lower floors. So it is by no means clear on the ground which are the dominant tenements and which are not.

24 That the adjoining neighbors are many and their situations differ, undercuts the main argument of counsel for the respondents, that going to the site would speedily make it obvious what was the dominant tenement benefitted.

25 And the law, and the whole nature of the Torrens system, bar another argument by counsel for the respondents: that the caveat and restrictive covenant annexed to it put the buyer on notice, and gave him a duty to make inquiries. See *Land Titles Act*, R.S.A. 2000, c. L-4, s. 64(9).

C. Framing Workable Law For All

26 Certainty of conveyancing and respect for precedent must trump dislike of a claim jumper or top-leaser.

27 It is very easy to be sympathetic with someone trying to enforce a restrictive covenant or other encumbrance against someone who later took title knowing of this encumbrance, probably fully understanding what it entailed. To invoke in that purchaser's favor the restrictions in land titles law, or the law of restrictive covenants, may seem like relying upon technicalities in order to defeat a just claim.

28 However, the fallacy in that approach is that it looks at only the two parties now before the court, and takes the facts as given. If instead one looks forward and asks what rules of conduct the law lays down for future transactions, and what conduct it wishes to encourage or discourage, the picture widens dramatically.

29 Among the principles of land law and conveyancing, two are important here:

> there must be few and carefully-defined restrictions on free alienation of land; and
> conveyancing needs a high degree of certainty, and profits greatly from conveyancing which is quick and cheap.

The Torrens system emphasizes both of these principles, especially the second.

30 Both principles are enshrined in ss. 64(2), (9) of the *Land Titles Act*.

31 Another example of principle (b) above is our law of caveats. The statute and the case law hold that a caveat must describe with a fair degree of particularity the interest being claimed by a caveat. See ***Ruptash v. Zawick*** [1956] S.C.R. 347, 2 D.L.R. (2d) 145, 154. It would be socially harmful to encumber land with an obligation of unknown extent. That is particularly inimical to the Torrens system, which features a simple title, easy to read, subject only to a few types of encumbrance, noted directly on the relevant title, which encumbrances are themselves easy to access and read.

32 That rule of clear caveats is important for two reasons. First, it is a good and prominent example of an actual legal rule used every day, and embodying principle (b) above. It is a product both of several Canadian legislatures, and also a uniform line of decisions of Canadian courts.

33 And second, the restrictive covenant in question here was not filed as such. It was filed only by way of a caveat (to which it was annexed). It would be anomalous if a restrictive covenant filed by way of caveat could escape the requirements of both the law of caveats and the law of restrictive covenants.

34 The absence of any mention of, or reference to, an intended dominant tenement lends support for the view that this agreement was intended to be a personal covenant restricting only Gelmon, as between Gelmon and Glenview.

35 In any event, the restrictive covenant does not run with the land because it does not identify the dominant tenement, and it is not enforceable against the appellants as subsequent purchasers.

D. Rectification

36 The respondents' factum seeks rectification of the restrictive covenant in the alternative (paras. 63-66). In particular, the respondents ask this Court to add a new clause to the restrictive covenant identifying the Covenant House lands as the dominant tenement: (A.B. v. 1, pp. P2, P5). This is not an appropriate case for rectification. Whatever may be the general law of rectification between contractual parties, extrinsic evidence is not admissible in these circumstances to identify the intended dominant tenement, so it would be inappropriate to use it to rectify the restrictive covenant. It is telling that the respondents rely on the same evidence for both purposes. The respondents cannot do indirectly what they cannot do directly.

37 What circumstances bar rectification in this case? It would prejudice a third party subsequent purchaser, and so it is not consistent with the principles behind the Torrens System. A new purchaser assumes a known filed document, not negotiations to which he or she was not a party.

E. Conclusion

38 I would therefore allow the appeal. The Registrar of Titles for the South Alberta Land Registration District will discharge the caveat annexing the restrictive covenant, being instrument number 4106 LB, from the Certificate of Title in respect of Plan Calgary Eagle Ridge 130 J.K., Block One (1), Lot Ten (10).

J.E.L. CÔTÉ J.A.
J. WATSON J.A.:-- I concur.
W.V. HEMBROFF J. (ad hoc):-- I concur.

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