October 24, 2016

Putting the Negative in Restrictive Covenants

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Case Commented On: *Russell v Ryan*, 2016 ABQB 526 (CanLII)

This is a restrictive covenant case involving a planned golf course and an adjacent residential subdivision. It does not offer any new law on the requirements for a valid restrictive covenant in equity or on the specific requirement that a restrictive covenant must be negative in substance. Nevertheless, by distinguishing the wording of the restrictive covenant in this case from the wording of the restrictive covenant in *Aquadel Golf Course Limited v Lindell Beach Holiday Resort Ltd*, 2009 BCCA 5 (CanLII), reversing 2008 BCSC 284 (CanLII), it usefully contributes to an understanding of when a covenant will be considered negative in substance. *Russell v Ryan* also raises the issue of whether covenants in a development agreement are severable from one another for the purposes of determining if one of them, or a portion of one of them, is negative in substance but, unlike the BC Court of Appeal decision in *Aquadel*, Alberta Court of Queens Bench Justice Joanne Goss does not decide this issue.

Facts

In 1989, Richmond Hill Golf Club Ltd and Wedgewood Developments Ltd agreed to exchange parcels of land near Grande Prairie. As part of that exchange, Wedgewood Developments agreed to pay for the construction of a nine-hole golf course on the lands it had transferred to Richmond Hill Golf Club (the Golf Club lands). The parties agreed that all of Richmond Hills's obligations would come to an end if the nine holes were not finished within five years of the date of this agreement.

Wedgewood Developments registered a Restrictive Covenant against the title to the Golf Club Lands which provided, in part:

> The covenants and conditions attached to the said lands are that *they will be developed only for use as a golf course and for no other use* (including ancillary golf course use such as club house, pro shop or parking lot) whereby the enhancement in value and enjoyment by the owners from time to time of the lands set out in Schedule "A" may be diminished.
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> The covenants and restrictions herein imposed *shall run with the land* and enure to the benefit of the undersigned, being the registered owner in fee simple of the said lands as well as the owner of the lands set out in Schedule "A" and every purchaser or transferee of the undersigned of the lands set out in Schedule "A" hereto, their respective heirs, administrators, executors, successors and assigns for the period of time above stipulated. (emphasis added)

Wedgewood Developments did not construct the golf course by 1994, the end of the five years. Feasibility studies had revealed geotechnical problems which would make the development of a golf course financially and environmentally unfeasible.

In 2003, the County of Grande Prairie adopted a new land use bylaw that changed the zoning in the Wedgewood area in order to reflect the housing already developed or being developed. The County made the zoning change in consultation with Wedgewood Developments which confirmed that a golf course would not be proceeding. The Golf Club lands were re-zoned as Rural Residential (RR-I) and a golf course is not a listed use under that zoning.

The four respondents own property located next to the Golf Club lands, properties that were listed in Schedule A of the Restrictive Covenant. They purchased their properties between 2000 and 2007.

In 2006, the applicants purchased two lots within the Golf Club lands. The rest of the Golf Club lands were either transferred to the County as Municipal Reserve or remain undeveloped. In 2015, the applicants and the County entered into an agreement permitting the development of land that included those two lots. The County also approved the applicants' plan of subdivision and, as a result of subdividing, they now own three lots on the Golf Club lands. Water, sewer and electrical services have been installed for these three lots.

This case is the result of the applicants' desire to build houses on their three lots on the Golf Club lands. The Restrictive Covenant, registered against the titles, stood in their way. The applicants therefore applied for an order under section 48(4) of the *Land Titles Act*, RSA 2000, c L-4 directing the Registrar to discharge the restrictive covenant registered against their three lots. The applicants made two arguments in support of their application: first, that the Restrictive Covenant did not run with the land, and, second, that it conflicted with the provisions of the land use bylaw.

The respondents wanted to enforce the Restrictive Covenant. They believed that the Golf Club lands would remain green space and they felt the development of that land would diminish the value of their properties. They sought a permanent injunction enjoining the applicants from constructing or developing any home or building on their three lots.

Issues

Justice Joanne Goss set out four issues (para 18):

1. Does the Restrictive Covenant run with the land?
2. Does the Restrictive Covenant conflict with a bylaw?
3. Do the Respondents have standing to enforce the terms of the Restrictive Covenant?
4. Are the Respondents entitled to a permanent injunction?

Justice Goss held that the Restrictive Covenant did not run with the land because it was not a negative covenant, and this post will focus on that point. Having decided the first issue in favour of the applicants, Justice Goss did not need to and did not deal with the second and third issues. With respect to the fourth issue, she held the respondents were not entitled to a permanent injunction because there was "evidence that by 1994, well before the Applicants acquired their lands, it had been determined that the only certain object of the covenant – construction of the golf course – was not feasible" (para 47).

Land Titles Act

> 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.*
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> . . .
> (4) The first owner, and every transferee, and every other person deriving title from the first owner … 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 ….
>
> (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. (emphasis added)

Decision

The emphasized portions of section 48 make it clear that a covenant does not run with the land so as to bind future owners simply because the people creating it specify that it will (para 44). As Justice Goss noted (at para 20), the Alberta Court of Appeal held in *Kolias v Condominium Plan 309 CDC*, 2008 ABCA 379 (CanLII) at para 10, the *Land Titles Act* "preserves the common law respecting restrictive covenants."

What is required for a covenant to run with land at common law was summarized by V DiCastri in *Registration of Title to Land* (Carswell, 1987) at 10-3 to 10-5, and subsequently adopted by numerous other cases (e.g., *Westbank Holdings Ltd v Westgate Shopping Centre Ltd*, 2001 BCCA 268 (CanLII) at para 16; *Canada Safeway Ltd v Thompson (City)*, [1996] MJ No 393, [1996] 10 WWR 252 (Man QB) at para 20, affirmed [1997] MJ No 271 (Man CA)). Among those conditions is a requirement "that the covenant must be *negative in substance* . . .; *no personal or affirmative covenant requiring the expenditure of money or the doing of some act runs with the land*" (*Russell v Ryan* at para 21, emphasis added). The key question in this case was whether or not the covenant was negative in substance, i.e., could the covenant be complied with without "the expenditure of money or the doing of some act." Determining the first issue — whether the covenant ran with the land — depended on deciding whether or not the covenant was negative.

Because it is a restraint on alienation, a restrictive covenant must be construed strictly (at para 24), and "[a]ny ambiguity about whether a restrictive covenant should apply … ought to be resolved in favour of the free use of the land" (at para 26). The parties' intention to create a restrictive covenant "must be shown in clear and unambiguous language" (at para 24). Justice Goss also mentioned the Supreme Court of Canada decision in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (CanLII) for the proposition that a court must read an agreement "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (at para 25).

Despite citing *Sattva*'s approach to contract interpretation, Justice Goss was prepared to assume, without deciding, that the Restrictive Covenant in this case contained two severable covenants (para 40). The first was that the Golf Club lands "will be developed only for use as a golf course." The second was that the Golf Club lands would be developed "for no other use … whereby the enhancement in value and enjoyment by the owners from time to time of the lands set out in Schedule "A" may be diminished." She relied (at paras 37-39) upon *Aquadel Golf Course Limited v Lindell Beach Holiday Resort Ltd*, 2009 BCCA 5 (CanLII), reversing 2008 BCSC 284 (CanLII) for this approach, although she noted that the BC Court of Appeal held in that case that the covenants were neither severable nor negative.

In *Aquadel*, the BC Supreme Court had interpreted an agreement as containing three severable covenants: (1) not to use the land for any purpose other than as a golf course; (2) to maintain the golf course to an acceptable standard; and (3) to give certain persons a preferential rate for use of the golf course. The lower court held that the first covenant was negative in substance, but the second and third covenants imposed positive obligations. The BC Court of Appeal, however, held that first covenant was also positive in substance even though it used negative language because it required the property to be used only as a golf course, and there was nothing in the language or surrounding circumstances to suggest that doing nothing — i.e., leaving the land undeveloped — was intended (*Aquadel* at paras 16-17). The second and third covenants, which were clearly interrelated with the first covenant, were meaningless unless there was an obligation to use the land as a golf course, and so the covenants were not severable (*Aquadel* at para 18).

Justice Goss held (at para 39) that it was even clearer in this case, as compared to *Aquadel*, that the first covenant imposed a positive obligation to develop the Golf Club lands as a golf course. In *Aquadel* the language used was negative ("not to use the land for any purpose other than as a golf course") whereas the language in this case was "clearly positive in substance" ("they will be developed only for use as a golf course").

And what of the second covenant in this case — that the Golf Club lands would be developed "for no other use … whereby the enhancement in value and enjoyment by the owners from time to time of the lands set out in Schedule "A" may be diminished" — assuming it could be severed from the first? The question here, according to Justice Goss, was what "other use" might diminish the "enhancement in value and enjoyment by the owners" of the adjacent properties? On this question, Justice Goss referred to *Podwin v Gondziola*, 2004 SKQB 225 (CanLII), where the covenant in question prohibited the planting of trees or placing of objects which would "unreasonably obstruct" others' view of the river. The judge in that Saskatchewan case held that covenant was likely unenforceable due to ambiguity and uncertainty. In this case, Justice Goss held that "it would be virtually impossible to determine with any certainty what development of the land, within the range of developments possible under the current bylaw, might 'diminish the enhancement in value and enjoyment' by the owners of the Schedule A lands" (at para 42). The answer would depend on "the purely subjective views of those owners" and therefore "it would be unenforceable as it is too vague and uncertain" (at para 42).

Comment

The common law requires a restrictive covenant be negative in substance. If it is positive, the covenant cannot run with the land so as to bind future owners. No matter whether it is worded positively or negatively, a covenant is positive if it requires "the expenditure of money or the doing of some act" (at para 21). This case, with its positively worded covenant that the lands "will be developed only for use as a golf course" is usefully compared to the negatively worded

covenant in *Aquadel* with its promise "not to use the land for any purpose other than as a golf course".

In *Aquadel*, the BC Court of Appeal held that the covenant was positive in substance, despite its negative wording, "because it required Whitlam to use the property only as a golf course, with related faculties, and as the location for two residences" (*Aquadel* at para 16). And because the first covenant was not severable and could not be read in isolation from the second and third covenants to maintain the golf course and to give some people a preferential golfing rate, the covenant could not be read as allowing a choice to allow the land to return to wilderness (*Aquadel* at paras 17-18).

In *Russell v Ryan*, the wording was positive and thus made it easier to find the obligation was positive in substance. The respondents argued that the covenant did not require a golf course to be built; it only prevented development for anything other than a golf course and the land could be left as undeveloped green space. Justice Goss, however, determined that the covenant required that the land "*will be developed* for use as a golf course", holding that "the wording in this case is clearly positive in substance" because it imposes a positive obligation to develop the lands (para 39, emphasis in original).

I am not sure how *wording* can be positive in substance, rather than in form, as Justice Goss states. But I am sure that the positive form of the covenant in *Ryan v Russell* did make it easier to find the covenant was positive in substance. The interpretation in *Aquadel* was forced to rely heavily on the second and third covenants to find that the land could not be left undeveloped. Although Justice Goss did not rely on the second covenant, it is unlikely that considering the two together would have made a difference, because the second part of the covenant refers to the "enhancement" in value and enjoyment, suggesting the lands must be developed.

With those two covenants having been found to be positive in nature, one might ask what sort of covenants have been held to be negative in substance. Most of the Alberta examples of negative covenants are from cases involving building schemes, where the test for the validity of the covenant is different than it is for the *Tulk v Moxhay* (1848), 41 ER 1143 (Eng Ch Div) type of covenant we see in *Russell v Ryan*. However, because we are only considering whether a covenant is negative or positive and both of these types of covenants require negative covenants, the examples are still helpful:

- "Each building on any of the listed lots shall be set back from the front property line a distance of not less than 25 ft. and side yards shall be at least 10% of the width of the lot."

  Despite the "imperative language of a positive flavour", Justice Rawlins in *Crump v Kernahan*, 1995 CanLII 9145 (AB QB), held this covenant was "essentially negative in nature" (para 11). In order to comply with the covenant, the owner was not required to build; if he chose to build, certain restrictions applied.

- "Only one family dwelling house and a private garage, attached or unattached to such dwelling house may be erected on each lot."

  In *Lindner v. Chittick*, 2010 ABQB 819 (CanLII) at para 31, Justice Lutz relied on *Crump* to state that, to be negative, a "covenant must prohibit". As in *Crump*, "the covenant may not

require the owner to build, but if the owner choses [sic] to build, the covenant may impose restrictions on how she or he will build."

- "THAT no dwelling house or any other private building shall be erected or stand at any time on any lot within 20' from the side of the lot…".

In *Lim v. Titov*, 1997 CanLII 14886 (AB QB), Justice Deyell, held that "[t]he language used to express the 20 foot sideyard restriction is negative and easily satisfies this element of the test", unfortunately suggesting that the wording governs the substance. However, it is easy to see that this covenant could be complied with by simply not building because it is a prohibition.

- "… that he will not erect, or use, or cause, or suffer, or permit to be erected on less than Two of the aforementioned lots more than One such dwelling house …".

In *Potts v. McCann*, 2002 ABQB 734 (CanLII), Justice Slatter does not specifically address whether this covenant fulfills the requirement that it be negative (at paras 24 and 30). However, because he held the covenant was valid, he must have found it to be negative.

Four hundred and thirty-three years ago, in *Spencer's Case* (1583), 5 Co Rep 16a, 77 ER 72 (KB), Sir Edward Coke lamented some of the difficulties within this area of law, referring to "the many differences taken and agreed concerning express covenants and covenants in law, and which of them run with the land, and which of them are collateral, and do not go with the land …". If you think the distinction between covenants which are negative and those which are positive seems a fine one to draw, then you are in good company.

This post may be cited as: Jonnette Watson Hamilton, "Putting the Negative in Restrictive Covenants" (24 October, 2016), on-line: ABlawg, http://ablawg.ca/wp-content/uploads/2016/10/Blog_JWH_RussellvRyan_Oct2016.pdf

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