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The Difference Between a Duplex and a Semi-Detached House

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Case commented on: *Deagle v 1678452 Alberta Ltd.*, 2013 ABQB 708

Does permission to construct a semi-detached dwelling allow the building of a secondary suite? That was the essence of the controversy in *Deagle v 1678452 Alberta Ltd*., which involved the interpretation of a 1911 restrictive covenant registered against the title to homes in the Glenora community in Edmonton. In deciding the matter, Justice Donald Lee reviewed a large number of cases concerning restrictive covenants that, in one way or another, limited construction to one dwelling house per lot. While each of those many cases ultimately depended on the exact wording in each restrictive covenant, the distinction that Justice Lee made between a "duplex" and a "semi-detached" house goes beyond the particularities of each case in the absence of evidence as to what the parties to any one restrictive covenant intended by their use of those terms at the time the covenant was entered into.

Four property owners from the Glenora community applied to Justice Lee to enforce restrictive covenants that limited the ways in which residential property in their community could be developed. These restrictive covenants were contained in the "Carruthers Caveat" that was filed against all of the relevant titles in December 1911. The restrictive covenants provided that:

> 2. No building of any kind other than a private dwelling house with appropriate offices and outbuildings to be appurtenant thereto and occupied therewith shall be erected upon the said land, and no trade or business of any kind shall be carried on upon any part of the said land, and no part of the said land or any building thereon shall be used as a place of public entertainment, amusement, or resort,
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> 3. Not more than one dwelling house shall be erected upon the said land or any part thereof.
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> 4. The house to be erected upon the said lands shall be either detached or semi-detached…"
>
> (Emphasis added)

The Respondent, 1678452 Alberta Ltd., was incorporated by Suhaib Al-Kurtass and Tatiana (Alice) Horhota for the purpose of buying the house in the Glenora community. Al-Kurtass and Horhota moved into the house in August 2012. According to the Brief filed on behalf of the Respondent, once Al-Kurtass and Horhota moved in they decided to renovate their house.

(Most of the facts about the house and its contested renovations appeared as "background facts" in a Brief filed by the Respondent. Despite what appears to be a lack of evidence, Justice Lee stated that he accepted the facts set out in the Respondent's Brief "for purposes of this application" (para. 3). He does not explain why he was at liberty to do so even though the details about the planned renovation were crucial to his choice of applicable law and to his conclusions about the application of that law to the facts.)

In April 2013, the Respondent applied for and the City issued a Development Permit. A neighbor appealed the Development Permit but the Subdivision Development Appeal Board denied that appeal. According to the Brief filed on behalf of the Respondent, it was only after the Development Permit was granted that Al-Kurtass and Horhota became aware of the Carruthers Caveat on the house. The reason for this late discovery was not given but the validity and enforceability of the Carruthers Caveat does not seem to have been an issue. In any event, Justice Lee found (at para 40) that the Carruthers Caveat was a valid and enforceable caveat protecting the restrictive covenant running with the lands, and that the Respondent's lands and premises were subject to that caveat.

After the appeal was heard, Al-Kurtass and Horhota made some changes to the plans that were submitted to the City. According to the Brief, once completed, the basement would include two bedrooms, a living area, a bathroom, and kitchen. Access to the basement would be from an interior staircase located in the dining room and family room area on the main floor or from an exterior staircase outside the house. The renovated basement would be available for long-term family visits by out-of-country relatives or a live-in nanny, should Al-Kurtass and Horhota have children.

Based upon the restrictive covenants and the facts, the main issue was whether the construction and use of a basement secondary suite contravened the restrictive covenants contained in the Carruthers Caveat restricting construction and use to a private dwelling house. The key concern was how to give meaning to the Carruthers Caveat's seemingly contradictory requirements that only one private dwelling house be constructed on each lot, but that one private dwelling house could be either detached or semi-detached.

As the Court of Appeal stared in *Tanti v Gruden*, 1999 ABCA 150 (CanLII) at paras 9-10, a restrictive covenant is essentially a contract. Therefore principles of contract interpretation are relevant. Courts look at both the words of the covenant in question and also at the purpose the covenant was intended to fulfill when it was entered into. Particularly useful in the context of the case before Justice Lee (and quoted by him at para 42) were the following principles set out by the Supreme Court of Canada in *BG Checo International Ltd. v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 23-24:

> It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms of the question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective...
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> (Emphasis added)

Justice Lee first considered (at para 8) the meaning of the word "dwelling" and the phrase "dwelling house." He noted that section 6.1(26) of the City of Edmonton Zoning Bylaw defines "Dwelling" as "a self-contained unit comprised of one or more rooms accommodating sitting, sleeping, sanitary facilities, and a principal kitchen for food preparation, cooking and serving. A Dwelling is used permanently or semi-permanently as a residence for a single Household." As Justice Lee notes (para 9), if this definition were to be applied to the Respondent's house post-renovation, the house would have two dwellings, one in the basement and one on the main floor.

Next, both the Applicants and Respondent cited a large number of cases considering restrictive covenants limiting development of a parcel of land to "a private dwelling house". However, Justice Lee distinguished most of these cases on the basis that their restrictive covenants did not allow semi-detached buildings, as did the Carruthers Caveat.

The Respondent argued that it was important that the Carruthers Caveat did not require the house to be a "one family" private dwelling house or a "one household" dwelling house and that permitting a semi-detached house, or duplex, allowed for more than one family or more than one household to live in the house. Justice Lee rejected (at para 44) the Respondent's assumption that the restrictive covenant's permission to construct a "semi-detached" building was permission to construct the duplex that the Respondent was erecting. Justice Lee distinguished (at para 44) the two types of dwelling by labelling two houses, one superimposed on the other divided horizontally, a "duplex", and two houses where the division was ordinarily vertical as "semi-detached". He relied upon *Re James and Cutts*, 1922 CarswellOnt 213, [1923] 4 DLR 950 (Ont Sup Ct) at CarswellOnt page 2, which in turn relied upon *Ilford Park Estates Limited v.* Jacobs, [1903] 2 Ch 522 at 526, which in turn relied upon *Grant v. Langston*, [1900] AC 383 for his distinction between a duplex and a semi-detached dwelling:

> In substance each building [what is called in Toronto a duplex house] constitutes two houses which are structurally separate in every respect ... It is merely a case of one house superimposed on another from which it is divided horizontally, while in the ordinary case of semi-detached houses the division is vertical.

Justice Lee noted (at para 48) that the *Re James and Cutts* understanding of what a "duplex" is was consistent with long-standing City of Edmonton Bylaws that defined "duplex" housing as meaning "any development consisting of a building containing only two dwellings, with one dwelling placed over the other in whole or in part. Each dwelling has separate and individual access, not necessarily directly to Grade. This type of development is designed and constructed as two dwellings at the time of the initial construction of the building. This Use Class does not include Secondary Suites or Semi-detached Housing" [emphasis added]. Justice Lee also noted that dictionary definitions for "semi-detached" — e.g., a house joined to another similar house on only one side — were also consistent with the dichotomy set out in *Re James and Cutts*.

It was also significant that the date of the *Re James and Cutts* decision and those of the two cases it relied upon were fairly contemporaneous with the 1911 date of the Carruthers Caveat. The Respondent had not introduced any evidence of what was meant by "duplex" or "semi-detached" in 1911 when the Carruthers Caveat was filed. As a result, Justice Lee concluded (at para 49) that what the Respondent was constructing was a duplex and "not a semi-detached house as described in paragraph 4 of the Carruthers Caveat" because (at para 51) "the Respondent's present development cannot be semi-detached as it is divided or created vertically, not divided by a sidewall(s) horizontally."

Even if the duplex the Respondent wanted to construct fell within the permission for a semi-detached building, Justice Lee held (at para 47) that the Respondent's renovation would create two dwellings, and two dwellings on one lot violated paragraph 3 of the Carruthers Caveat, which stated that "Not more than one dwelling house shall be erected upon the said land or any part thereof." The existence of two cooking and eating areas in one building was the key fact in determining the number of dwellings. As was stated in *Szymanski v Excel Resources Society*, 2004 ABQB 89 (CanLII) at para 21: "The building has one kitchen and one dining room. It was not constructed to accommodate more than one household." In *Szymanski*, with only one kitchen, residents would be living together as one household. In this case, the Applicants argued, and Justice Lee agreed (at para 63), that the basement renovation could comply with the Carruthers Caveat if the kitchen and dining areas were eliminated, leaving only bedrooms, a bathroom and a sitting area "which would not constitute a separate 'dwelling'."

In summary, Justice Lee determined (at para 65) that: (1) a duplex is not a semi-detached house and the Respondent's planned duplex was not saved by paragraph 4 of the Carruthers Caveat which permitted a semi-detached dwelling; and (2) the planned renovation violated paragraph 3 of the Carruthers Caveat that limited construction to one private dwelling house because the renovation would create two dwelling houses on one lot. As a result he issued a permanent injunction (at para 70) enjoining the Respondent from "constructing, developing, renovating or using the lands and the buildings thereon to create one or more additional suites or dwellings or Secondary Suites on the lands or in the building on the lands, or any part thereof".