Date: 19970516 Docket: CA 131997

NOVA SCOTIA COURT OF APPEAL
Cite as: Archibald v. Mountain Golf & Country Club Ltd., 1997 NSCA 98

Roscoe, Pugsley and Flinn, JJ.A.

BETWEEN:	)	
	)	
CLIFFORD ARCHIBALD, MAIZIE ARCHIBALD, MICHAEL DALE, KIM DALE, JERZY NOWAK, KENT ARCHIBALD, SHELLEY ARCHIBALD, PEGGY ALLAN, DAN FOOTE, J.M. FERGUSON and KATHLEEN FERGUSON	)	Peter R. Lederman for the Appellants
Appellants	)	
- and -	)	
MOUNTAIN GOLF AND COUNTRY CLUB LIMITED	)	Gary A. Richard for the Respondent
Respondent	)	
	)	Appeal Heard: May 16, 1997
	)	Judgment Delivered: May 16, 1997

THE COURT: The appeal is dismissed with costs to the respondent of $500.00, plus disbursements as per oral reasons for judgment of Roscoe, J.A.; Pugsley and Flinn, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

[1] This is an appeal from a decision of Justice J. E. Scanlan denying an application by the appellants for a declaration that a lot of land owned by the respondent is subject to restrictions on its use. The land in question is a strip 20 feet by approximately 900 feet parallel to the southern boundary of Eastmount Court, which is the only street in a small rural subdivision in East Mountain, Colchester County. The appellants own homes on the northern side of Eastmount Court. The respondent owns and operates a golf course immediately to the south of the strip of land in dispute and in 1992 obtained title to the strip. A plan of the subdivision dated May 13, 1971 contains the notation "reserved for hedge or ornamental trees" on the strip of land in question. Since acquiring ownership of the strip of land the golf club has cleared some of the trees on it and constructed four driveways or access roads to the golf course from Eastmount Court.

[2] Justice Scanlan determined that since there were no restrictive covenants relating to the use of the land in question contained within either the conveyance to the golf club or in the deeds to the appellants, that the homeowners would have to prove the existence of a building scheme. He concluded that the appellants had not proven the existence of all of the conditions for a building scheme contained in the recognized authoritative case of **Elliston v. Reacher**, [1908] 2 Ch. 374; affirmed [1908] 2 Ch. 665 (C.A.) where Parker, J. listed the requirements of a building scheme as follows: (at page 384)

> . . . (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit 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; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the

> common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. . .

[3] The fifth requirement necessary for a building scheme was added by a later case: **Reid v. Bickerstaff**, [1909] 2 Ch. 305 (C.A.) where Cozens-Hardy, M.R. said (at page 319) that an essential requirement of a building scheme was that:

> . . . there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. . .

[4] We are of the unanimous view that the appeal should be dismissed. We agree with the trial judge that the appellants did not meet the burden of proving the existence of a building scheme. There are several reasons. None of the descriptions in the appellants' deeds refer to the plan of 1971 which shows the notation on the strip of land. There was no evidence that any of the appellants had notice of the alleged restrictive covenant or knowledge of the 1971 plan at the time of their purchase. Assuming there was a common vendor, there is no proof of what the intention of that vendor was in setting aside the strip of land, nor of the exact extent of the land which the restriction was intended to benefit. As well, there was no well-defined area subject to the burden, since the point at which the strip ends is not clear from the plan. Finally, there is no reciprocity of the burden, since the appellants' lots are not subject to any restriction for the benefit of the owner of the strip of land.

[5] For these reasons, the appeal is dismissed with costs to the respondent of $500.00, plus disbursements.

Roscoe, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.