<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *Gandhi v. Liao*, 2021 NSSC 208

Date: 20210616
Docket: Halifax, No. 491519
Registry: Halifax

Between:

Uma Gandhi

Applicant

v.

Feng Liao, Julia Jia Liu, and Jili Liu

Respondents

Judge:	The Honourable Justice Ann E. Smith
Heard:	February 17, 2021, in Halifax, Nova Scotia
Post Application Submissions:	April 16, 2021
Counsel:	Barry J. Mason, Q.C., for the Applicant Feng Linda Liao, Defendant Julia Jia Lui, Defendant Jili Liu, Defendant

By the Court:

Introduction

[1] The Applicant seeks a declaration and permanent injunction against the Respondents, barring them from operating a day-care centre which they say is contrary to the restrictive covenants governing the parties' subdivision (the "Restrictive Covenants").

[2] The Respondents say that the Restrictive Covenants are so vague as to be unenforceable. The Respondents also say that the Restrictive Covenants are unenforceable against other purchasers of lots in the subdivision because they do not meet the test for enforceability as set forth by Moir J. in *Moorhouse v. Black*, 2014 NSSC 13.

Background

[3] The evidence before the Court established that the Respondents have been providing daycare services. This is contrary to a plain reading of the Restrictive Covenants, unless the Respondents obtain consent of their neighbours (if all the lots in the development have been sold) or by the developer/grantor (if they have not). This is apparent on the face of the Restrictive Covenants.

[4] The parties live and own property in the "Langbrae Gardens Phase 2D" development. The Applicant owns 155 Roxbury Crescent, and the Respondents jointly own a property next door, at 165 Roxbury Crescent. The Applicant acquired her property from the developer, while the Respondents bought theirs from the previous owners. The Restrictive Covenants open with an unnumbered preamble paragraph:

> The Grantee covenants and agrees with the Grantor to observe and comply with the following restrictions made in pursuance of a building scheme established by the Grantor. The burden of these restrictions shall run with the lands described in Schedule "A" attached hereto (hereinafter referred to as the "Lands") and the benefit of these restrictions shall run with each of the lots and with each part of the land now owned by the Grantor as shown on the plan of Langbrae Gardens Phase 2D, which is registered in the Registry of Deeds. These restrictions shall be binding upon and enure to the benefit of the heirs, executors, administrators, successors and assigns of the parties.

[5] The Restrictive Covenants identify several specific restrictions, including the following:

> 10. The said land or any buildings erected thereon <u>shall not be used for the purpose of any trade, service or manufacture (other than a children's day-care facility approved in writing by the Grantor)</u>, nor as a hospital or other charitable institution, nor as a hotel, rooming house or place of public resort, nor for any sport (other than such games as are usually played in connection with the normal occupation of a private residence), nor shall anything be done or permitted upon any of the said lands or buildings erected or to be erected thereon which shall be a nuisance to the occupants of any neighbouring lands or buildings.
>
> ...
>
> 32. The grantee agrees to obtain from any subsequent purchaser or transferee from him a covenant to observe the building restrictions herein set forth including this clause.

...

34. Upon conveyance by the Grantor of all thirty six lots contained in Langbrae Phase 2D, any owner from time to time of the said lot herein may, by instrument in writing executed by the then owners of each side lot adjacent to the within lot (or one adjacent owner in the case of the end lots in said subdivision) from time to time waive, alter, or modify the above covenants and restrictions in their application to the within lots without notice to the owner of any other lot in the said subdivision.

35. Notwithstanding anything herein contained the Grantor may waive, alter, or modify the above restrictions in their application to any lot, parcel or land comprising part of the lands without notice to the owners of any other lot or lots, parcel or parcels of lands comprising part of the lands.

36. Notwithstanding anything herein contained, the Grantor may assign all or any part of its rights which arise under these restrictions.

(emphasis added)

[6] The Respondents bought their property from the previous owners in July 2018. They subsequently applied for re-zoning and a development agreement allowing them to operate a childcare centre on their property. The Applicant learned in early 2019 that the Respondent, Feng Liao, intended to open a day-care at 165 Roxbury Crescent. She advised the Respondents through counsel in August 2019 that she did not consent, but the Respondents continued the application process. The Applicant has never consented to the operation of a day-care next door to her home.

[7] The evidence of the Applicant and her husband, Kautilya Gandhi, was that in 2019 and early 2020, before pandemic shutdowns began, they saw children coming and going from the Respondents' premises. Mr. Ghandi stated in his affidavit that

"[f]rom my observations, the Respondent's daycare hosts over thirty (30) children." While on cross-examination he did not insist on the accuracy of the estimate of 30 children, both he and the Applicant maintained throughout their evidence that children had been coming and going in significant numbers.

[8] Moreover, the Respondents confirmed in their own evidence that they had been conducting child-care services on the premises, as well as at other locations outside the development. They said they had not provided care for more than six children on the premises but confirmed that they had sought regulatory approval for a larger number.

[9] Section 10 of the Restrictive Covenants provides that the property "shall not be used for the purpose of any trade, service or manufacture (other than a children's day-care facility approved in writing by the Grantor)." The Grantor is the developer, WM Fares Family Incorporated (referred to as Fares), which is not a party to the application. There is no evidence that the Grantor gave written approval.

[10] Mr. Gandhi, stated in his Supplemental Affidavit that "[t]o my knowledge, [Fares] has not approved the operation of the Respondent's daycare in the subdivision." The source of his knowledge is an e-mail chain between Zana Fares Choueiri of Fares and his neighbour John Flemming, dating from November 2019.

[11] In his Third Affidavit, Mr. Ghandi recounts that in May 2019 "John Flemming of Ocean Contractors advised me that he had spoken with Zana Fares of WM Fares Family Incorporated about the Respondents' proposed daycare operation. Zana Fares advised Mr. Flemming that [Fares] does not support the Respondents' proposed daycare operation and did not consent to the Respondents using their property as a daycare facility." He goes on to say that "[b]ased on the information Mr. Flemming related to me, which I verily believe, I understand that [Fares] has not given written or oral approval to the Respondents to operate a daycare facility at 165 Roxbury Crescent." There is no direct evidence from Fares on this point, only hearsay and double hearsay from Mr. Ghandi.

[12] Ms. Liao said she was told - by someone she cannot now identify - when the Respondents bought the property that all the lots had been sold, triggering section 34 of the covenants, "resulting in the Grantor's permission being no longer required." She said this information was confirmed in an e-mail from her consultant Bill Campbell in January 2019. Mr. Campbell's e-mail states:

> I heard from the Fares Group. Here's what they said:
>
> "Hi Bill. It is our understanding that once a subdivision is complete and occupied, the original owners no longer act as the Grantor of the covenants. Linda should seek legal advice on this matter."

> Could you please tell this to your lawyer? The lawyer may be right on who we need to contact but let him see the information from Fares.

[13] This hearsay evidence - even if admissible - does not establish approval by Fares. At most it implies that Fares took no position and passed the matter off to the Respondents' neighbours under section 34 of the Restrictive Covenants. The evidence is clear that the Applicant never consented under section 34.

[14] Despite the Applicant's refusal to waive the Restrictive Covenants, the Respondents applied to the Halifax West Community Council for approval of a Development Agreement and re-zoning of their property. The application was refused in September 2019, and an appeal was scheduled for November 2020. The evidence on this point comes from the Applicant. The Respondents refer to excerpts of a staff report prepared for the Halifax and West Community Council, recommending approval. The report indicates that "staff have confirmed with the Grantor that the daycare facility is an acceptable use in this area." The staff noted that Restrictive Covenants "are private property agreements that are not within HRM's scope of enforcement authority." There is no assistance for the Respondents from the regulatory situation. Even if the Respondents obtained the necessary development agreement and re-zoning, this would not relieve them of the burden of the Restrictive Covenants.

<u>Other businesses in the development</u>

[15] The Respondents allege that other businesses have been conducted in the development, including an architecture firm operated by the Applicant and her husband. Ms. Liao also says it is "a matter of public record that 10 Roxbury Crescent has been operating a home daycare for years" and cites a link to a website "which confirms their status." The Respondents' suggestion is that the Applicant cannot now rely on the Restrictive Covenants, as she did not raise them in the past against another day-care and has allegedly violated them herself.

[16] The Applicant's evidence was that, while their home address was used as the mailing address on file with the Registry of Joint Stocks, the business is actually operated at 182 Bedford Highway, and no business was conducted at the home. This is confirmed in Mr. Ghandi's supplemental affidavit.

[17] In his third affidavit, Mr. Ghandi states that the residents of 10 Roxbury Crescent "operated a 'day home' until March of 2020". Based on the evidence, this day care only hosted 6 to 8 children. My understanding is that this 'day home' is no longer open. On cross-examination, the Applicant and Mr. Ghandi both testified that they did have objections to the day-care allegedly operated at 10 Roxbury Crescent, but that the Respondents' day-care was operating on a larger scale and was

(unlike 10 Roxbury) next door to their own property, so their intended efforts to raise the covenants against the older day-care became secondary.

[18] In my view the evidence cannot support the suggestion that the Applicant lacks "clean hands" or is otherwise disentitled to rely on the Restrictive Covenants by reason either of any business conducted out of her own home, or due to a failure to take action against the previous day-care enterprise at 10 Roxbury. The evidence does not support the former, and the Applicant and her husband offered a reasonable explanation for the latter.

[19] In view of the language of the Restrictive Covenants, the dispute over the number of children for whom the Respondents have provided childcare in the home is immaterial. Section 10 of the Restrictive Covenants prohibits them from operating "a children's day-care facility" unless it is “approved in writing by the Grantor." Even if all the lots have been sold, so that the Grantor's permission is no longer required, section 34 demands a waiver of the covenant "by instrument in writing executed by the then owners of each side lot adjacent to the within lot..." There is no suggestion that either form of approval has been granted. If the Restrictive Covenants bind the parties, there is no answer to the Applicant's position on these bases.

[20] The real issue is whether the Respondents are bound by the Restrictive Covenants in the first place.

Issue

[21] The only issue before the Court is whether the Restrictive Covenants are enforceable by the Applicant against the Respondents. If they are enforceable, then the Court must determine what remedy is appropriate.

Law and Analysis

[22] The authority on the nature and scope of Restrictive Covenants relied on by the Applicant is *Hi-Way Housing (Sask.) Ltd.* V. *Mini-Mansion Construction Co.* (1980), 115 DLR (3d) 145, 1980 CarswellSask 110 (Sask CA). In that case, the issue was whether a restrictive covenant was enforceable as between the vendor and the purchaser after the conveyance. The court summarized the law on the "nature and scope" of restrictive covenants, and in particular, whether the covenant was "a restrictive covenant that runs with the land as distinct from a personal or collateral one." The court cited the definition of "restrictive covenant" in Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, 6th ed. (1976):

> The expression 'restrictive covenant' used in connection with freehold land refers to an obligation differing from a normal covenant. A 'restrictive covenant' need not

> be created under seal: a mere contract will suffice. It is a burden upon the land of the covenantor, enforceable against his assignee: conversely, it confers an interest upon the covenantee, transmissible in some circumstances to his assignee. Being an interest in land it cannot be created by parol. It is because restrictive covenants are capable of being enforced by and against the assignees of the land of the original contracting parties that they are said to 'run with the land,' which characteristic gives them their chief importance.

[23] The court went on to adopt the authors' three criteria for a restrictive covenant, the lack of any of which would result in the covenant being treated as a personal one:

> 1. The covenant must directly affect the land of the covenantor by controlling its user.
>
> 2. The observance of the covenant must directly benefit the land of the covanantee.
>
> 3. The original contracting parties must have intended that the covenant shall run with the land.

[24] In *Hi-Way Housing* the respondent bought lots from the plaintiff, intending to build houses. The agreement included a restrictive covenant limiting construction on the lots to single-family homes. After purchasing the lots, the defendant began building duplexes. The trial judge found that the respondent was aware of the covenant and of its effect when it bought the lots; however, the trial judge also held that the covenant was a personal one that did not run with the land, given the lack of language to that effect in the agreement. The trial judge further held that the seller's interest in the restrictive covenant passed to the purchaser by operation of the doctrine of merger.

[25] The Saskatchewan Court of Appeal agreed that the covenant was personal, on the ground that the benefited land was not ascertainable from the agreement, so that the covenant did not meet the second criteria: that the observance of the covenant "must directly benefit the land of the covenantee." The Court of Appeal also considered whether, as held by the trial judge, the covenant had merged in the subsequent transfer from the appellant to the respondent. This required a determination of the "true intentions" of the parties, "derived from the documents - the agreement for sale and the transfer - read as a whole and in the light of surrounding circumstances." The Court of Appeal concluded:

> 23 The documents here contain no term that expresses the parties' intentions respecting merger. The nature, however, of the covenant in question - "all construction and lots purchased in this phase will conform to R1 zoning as laid out by the City of Saskatoon" - especially when evaluated in the light of the surrounding circumstances, is such that the parties must have intended that the covenant survive after completion. The 12 lots in question are part of a substantial residential subdivision. They were vacant lots at the time of purchase and were bought by the respondent for the purpose of building homes on them. Construction, of course, could not commence until the respondent received possession of the lots...

[26] Under the agreement, possession of the property and delivery of the conveyance - "the document in which the covenant was to merge if it is to be accepted that merger is what the parties intended" - were intended to happen the same day. The Court of Appeal held that the suggestion that the purchaser and the vendor, both experienced in dealing with real estate, would have entered the

agreement intending that the covenant would not survive after the sale was completed, was "devoid of logic and contrary to the way persons in the commercial world act. The conclusion that the parties intended that the covenant should survive the completion of the transaction is inescapable". As such, the Court of Appeal found that the trial judge erred in finding that the covenant merged in the transaction. The Court of Appeal noted, however, that "[b]ecause the covenant is a personal one it does not bind any assignee or successor-in-title of the covenantor...".

[27] In the view of this Court, *Hi-Way Housing* is not the governing authority in the circumstances of the enforceability of the Restrictive Covenants as between the parties in this case. *Hi-Way Housing* involved the enforceability of a personal covenant as between the original covenantor and covenantee. The enforceability of a restrictive covenant is subject to different considerations depending on the identity of the parties. In this case, the Applicant is a covenantor seeking to enforce the covenants against another covenantor. With respect to this scenario, Professor Ginn, writing in *Anger & Honsberger Law of Real Property*, sets out a specific analysis, requiring establishment of a "building scheme":

> The foregoing discussion focused on enforceability between covenantee (and assigns) and covenantor (and assigns). However, in some situations the person seeking to enforce a covenant is not the covenantee but another covenantor. This may be possible in equity if it can be shown that the covenant touches and concerns the land owned by the person seeking to enforce and that a building scheme, sometimes referred to as a "scheme of development", exists. It has been suggested

> that: "In the presence of a building scheme, all lots affected are concurrently dominant and servient tenements". A building scheme may exist even if there are only two parcels of land in the scheme.
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> A building scheme will be found to exist if:
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> (a) the plaintiff and the defendant derived title under a common vendor (the original covenantee).
>
> (b) this common vendor laid out the land, or a defined part of it including the lands of the plaintiff and defendant, for sale in lots subject to restrictions intended to be imposed on all lots (these restrictions may vary in detail as to particular lots, but must be consistent, and consistent only with some general scheme of development; this requirement is intended to ensure that each purchaser is aware of "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").
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> (c) the restrictions were for the benefit of all the lots intended to be sold, whether or not they also benefited other lots retained by the vendor; and
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> (d) it was the intention of the common vendor to benefit all lots to be sold and this was the footing on which both plaintiff and defendant, or their predecessors-in-title, purchased their lots.
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> Reciprocity is the essence of a building scheme and, thus, there is no scheme if there is no obligation, express or implied, on the part of the common vendor (original coventantee) to impose similar restrictions on the other lots. It has been held that a building scheme did not exist where the agreement of sale stated that the covenantee was not bound to impose similar restrictions on other lots in the same plan.
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> Where a building scheme is found to exist, the owner of one property may, in equity, enforce a covenant that touches and concerns their land against the owner of another property in the building scheme.

[28] The enforceability of covenants as between purchasers was considered by Moir J in *Moorhouse v. Black*, 2014 NSSC 13. The Respondents referred the Court to this case in their pre-hearing brief, although they did not expand on its applicability to their circumstances. This Court invited post-hearing submissions

from the parties on the applicability of *Moorhouse* to the facts of this case and received same from each party.

[29] In *Moorhouse* the parties were neighbours in a subdivision, both of whom had purchased from the developer. The issue was whether restrictive covenants in their deed, prohibiting construction of a secondary building without the developer's approval, were enforceable by owners of other lots. Moir J described the restrictive covenants in “Schedule B” of the deed:

> 3 The schedule is composed of an unnumbered opening provision followed by twenty-two numbered clauses. In the opening provision, "The Grantee covenants with the Grantor to observe and comply with the following restrictions made in pursuance of a building scheme established by the Grantor."
>
> 4 The opening provision goes on to provide, "The burden of these restrictions shall run with the land ... forever ...". Further, the "benefits of these restrictions shall run with each of lots 101 to 177 inclusive and 200 to 269 inclusive which lots are now owned by the Grantor." Despite the equivocal use of the word "run", and the inclusion of lot 164, I think the only sensible interpretation of this part of the text is that the burden is intended to remain upon the owner and future owners of lot 164 for the benefit of the owners and future owners of the other lots. However, other parts of the text seem to contradict this part.
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> 5 There is no representation that other lots already sold have similar restrictions for the benefit of the owners of lot 164 and no promise that the developer will extract similar burdens benefiting lot 164 and binding on the owners of lots to be sold in the future. Indeed, the opening provision suggests that the scheme is not binding on others where it provides, "These restrictions shall be binding upon and [enure] to the benefit of the heirs, executors, administrators, representatives, successors and assigns of the Grantor and the Grantee." Clause 22 of the schedule defines "Grantor" as Fairmount Developments Inc. Further, clause 18 reads, "Notwithstanding anything herein contained, the Grantor may assign all or any part of its rights which arise under these restrictions."

[30] These provisions resemble the preamble to the Restrictive Covenants in the within case, to the point that they can be regarded as substantively identical. As in *Moorhouse*, the covenants before this Court open with an unnumbered preamble identifying the grantee and grantor as the parties bound by the covenants; both refer to a "building scheme"; and both assert (in varying language) that the covenants run with the land. Both provisions state that "[t]hese restrictions shall be binding upon and [enure] to the benefit of the heirs, executors, administrators, successors and assigns" of the parties. In each case, there is no representation that other lots already sold have similar restrictions for the benefit of the owners of the allegedly burdened lot, and no promise that the developer will extract similar burdens in favour of the burdened lot from owners of lots to be sold in the future.

[31] The covenants in *Moorhouse* included certain absolute prohibitions, and various permissions and approvals that were subject to the developer's discretion. Despite this distinction, between absolute and discretionary prohibitions, Moir J. noted, "clause 21 gives the developer power 'to waive, alter or modify the above covenants and restrictions'. It may do so 'without notice to the owners of any other lots'."

[32] The same pattern appears in the Restrictive Covenants before this Court: some restrictions are absolute, such as section 2: "No building shall be erected on the said lands other than a detached private dwelling house to and for the use of a single family with or without an appropriate garage or carport." Others contemplate waiver by the developer, such as section 5: "Upon receipt of approval, in writing, from the Grantor, no construction of a dwelling lot shall proceed past the pouring of footings until the Grantee has submitted a surveyors certificate of location for the Grantor's approval." As in *Moorhouse*, the Restrictive Covenants before this Court leave the grantor with an absolute discretion to "waive, alter, or modify" the covenants (see section 35).

[33] Turning to the law governing restrictive covenants, Moir J. in *Moorhouse* said the law in Nova Scotia "on the subject of a purchaser enforcing restrictive covenants against other purchasers of lots in a subdivision" was set out in *Cleary v. Pavlinovic* (1987), 80 NSR (2d) 22 (SCTD), and *Sawlor v. Naugle* (1990), 101 N.S.R. (2d) 160 (SCTD), which drew on "decisions of the Supreme Court of Canada, which in turn refer to English authorities." He said:

> [17] The courts distinguish covenants imposed for the developer's benefit, covenants imposed to protect remaining lands only, and covenants imposed by the developer on the lots sold to the various purchasers for them to enjoy the benefits of the covenants and to be bound by them as well. The third kind makes for a building scheme. See, *Sawlor* at para. 14.

> [18] Building scheme covenants are enforceable among the purchasers only if four requisites are met. The requisites are discussed in the authorities referred to in *Sawlor*, also at para. 14. I would state them this way:
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> 1) The parties derive title under a common vendor, the developer.
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> 2) The vendor laid out its lands, or a part of them, for sale in lots, including the lots now owned by the parties, subject to restrictions imposed on all the lots, that may have varied in details but were consistent only with some general scheme of development. That is to say, the "scheme must be set out in a way that it can be known or ascertainable from the very beginning of the development": *Sawlor*, para. 18.
>
> 3) The developer intended the restrictions to be for the benefit of all the lots in the subdivision and they were, in fact, for the benefit of each of the lots.
>
> 4) The parties, or their predecessors in title, purchased their lots on the footing that the restrictions were to enure for the benefit of other lots in the subdivision.

[34] Moir J. found that the parties both derived title under Fairmount Developments Inc, and that Fairmount had laid out lots for sale subject to identical restrictions imposed on all the lots.

[35] In the present case before this Court, both lots originated with the developer as the original vendor, but the Respondents derive title directly from the original grantees for their lot. There is no specific evidence as to whether the lots were laid

out for sale subject to restrictions imposed on all the lots, although this might be inferred from the language of the preamble.

[36] With respect the third requirement - that "the developer intended the restrictions to be for the benefit of all the lots in the subdivision and they were, in fact, for the benefit of each of the lots" - Moir J. said, in *Moorhouse*:

> [19] The third requisite, the requirement for reciprocity, was elaborated in *Sawlor* in light of a provision allowing the developer to waive the application of a restrictive covenant to any lot in the building scheme. At para. 19, Justice Tidman said:
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>> It is also questionable whether the covenant in issue, which restricts building to one dwelling per lot, was intended by the common vendor Federal to be and was for the benefit of all the lots intended to be sold. To so conclude, one must, as a matter of equity, find an implied mutual contract by which each purchaser is to have the benefit of the promise by all the other purchasers. In this case, there is no express term that the covenants are to enure to the benefit of or be binding upon each purchaser. If a mutual covenant is to be found, then it must be implied from the express covenant between the grantor Federal and the individual purchasers. Covenant 14, however, provides that the grantor without notice and, thus, without the consent of the owner of any other lot, has the power to waive, alter or modify the so-called protective covenants in their application to any other lot. The protection of the covenant seems to me to be for only the vendor and not for the various purchasers. A prospective purchaser upon reading that clause could hardly be said to believe, to the extent that it should be implied in equity, that he would by virtue of purchasing a lot enter a mutually binding contract with every other lot owner that only one house will be placed on each lot.
>
> On that basis, Justice Tidman found that the third requisite had not been met...

[37] The Restrictive Covenants likewise provide, at section 35, that "[n]otwithstanding anything herein contained the Grantor may waive, alter, or

modify the above restrictions in their application to any lot, parcel or land comprising part of the lands without notice to the owners of any other lot or lots, parcel or parcels of lands comprising part of the lands."

[38] In *Moorhouse*, rejecting the applicants' argument that the court should follow British Columbia authority holding restrictions effective as between purchasers without reciprocity, Moir J. noted that British Columbia had "a statutory system for the creation of restrictive covenants mutually binding on the owners of lots in a subdivision." Moir J said, "[a] developer may impose restrictive covenants under the British Columbia statutory scheme without reciprocity, but equity will not, without statutory reform, enforce a restrictive covenant as between common purchasers unless the four requisites are present in the beginning, including reciprocity."

[39] Justice Moir noted that section 61(1) of the *Land Registration Act*, SNS 2001, c 6, provides that a "successive owner of a parcel is affected with notice of a condition or covenant included in an instrument registered or recorded with respect to that land and is bound thereby if it is of such nature as to run with the land...". In interpreting this provision, Justice Moir said:

> [30] The stipulation for binding effect gives further force to the notice provision. Otherwise, it merely refers us back to common law and equity with the phrase "if

> it is of such nature as to run with the land". The restrictive covenant runs with the land if it is part of a building scheme that meets the four requisites.
>
> [31] Further, there is no legislative provision in Nova Scotia that gives binding effect, as among lot owners, to a restrictive covenant even if the developer retains a power to waive the covenant.
>
> [32] Therefore, the discussions in the various British Columbia authorities about what happens when a developer who has power to waive restrictive covenants sells the last lot or dissolves have no bearing on the question in Nova Scotia of whether a power to waive a restrictive covenant undermines the ability of others to enforce it.
>
> [33] Is the requisite for reciprocity met by a scheme that includes a discretion of the developer to waive some or all of the restrictive covenants for some or all of the lots in the subdivision? In Nova Scotia, we are thrown back to the common law and equity for an answer, back to *Sawlor* and the authorities it cites.

[40] Moir J. went on to hold that "[d]espite some wording to the contrary, (3) the restrictive covenants were not, in fact, for the benefit of each of the lots, and (4) the parties, or their predecessors, did not purchase their lots on the footing that the restrictions enured for the benefit of other lots in the subdivision." He elaborated:

> [37] As discussed in para. 4, the opening provision of Schedule "B" contains statements suggesting that the burden of the restrictions is intended to remain with the lot being conveyed and the benefit is to remain for all of the lots in the subdivision. It needs to be emphasized that these are statements, like a recital in a preamble. They are not terms. At that, they are statements of intent. The reader awaits the terms to see how the intention is carried forward. It is not.
>
> [38] The statements about the benefits running with the other lots includes "which lots are now owned by the Grantor". It was written for the conveyance of the first lot, but the phrase remained unchanged in later conveyances. So, at the time the restrictive covenants were drafted only the developer's interests were in mind. It was probably an oversight that this phrase was not removed or modified

> in the rest of the conveyances, but the fact that it was not removed or modified suggests no one's mind was much on the thought that purchasers of other lots may have an interest in enforcing the covenants.
>
> [39] Also, the lot numbers always include the lot being conveyed, the lot sought to be restricted, in the phrase that says that the benefits "run" with the lots in the subdivision. Nowhere do the recitals suggest that restrictions have been, or will be, placed on the other lots for the benefit of the lot being burdened. In this sense, the recitals support what we find when we turn to the actual terms: the restrictions are in the exclusive control of the developer.
>
> [40] These terms fail to meet the requisite because there is no reciprocity in fact. They are not, in fact, for the benefit of each lot.

[41] Moir J pointed out that the "requirements for approvals, and the discretionary powers, are entirely between the developer and the lot owner, to the exclusion of other lot owners. There is no provision for present or future lot owners to have any say over plans and specifications for a dwelling, the landscape design, or future alterations." This approach, he wrote, "culminates in clause 21 by which any of the covenants may be waived by the developer 'without notice to the owners of any other lots'." Moir J said that such a scheme was "incompatible with the statement in the opening paragraph of Schedule "B" that the restrictions 'run with the land … forever' and that the benefits 'run' with lots 101 to 177 and 200 to 269." The developer's exclusive power over approvals and waiver of covenants was, "however, consistent with the terms in the opening paragraph of Schedule "B" that make the restrictions binding upon, and for the benefit of, the developer and the grantee, and empower the

developer to assign part or all of its rights arising under Schedule "B"." Moir J. concluded:

> [43] The restrictions were for the exclusive benefit of the developer, who had absolute discretions to approve or disapprove improvements or alterations without recourse to the other lot owners, who had power to waive anything in the schedule without consent of the other lot owners, and who had a right to assign its interests under the schedule to anyone. Therefore, the covenants were not, in fact, for the benefit of each of the lots.
>
> [44] For the same reason, these restrictions fail the fourth requisite. The parties cannot have purchased their lots on the footing that the restrictions enured for the benefit of other lots in the subdivision because the footing did not include a term by which similar restrictions had been and would be imposed on the other lots, and it did include terms as follows:
>
> - Binding effect is upon the grantor and the grantee only.
> - The developer may assign rights in connection with the restrictions to anyone.
> - Numerous of the restrictions create discretions exclusive to the developer.
> - The developer can waive or modify any or all restrictions on any lot without notice to the other lot owners.

[42] As such, the applicants in *Moorhouse* had "no right to enforce any covenant in Schedule "B" of the deed between Fairmount Developments Inc. and the Blacks."

[43] In most important respects, the covenants in *Moorhouse* resemble the Restrictive Covenants, and the same reasoning can be applied. In particular, Moir J's findings on the third and fourth considerations are generally applicable to the Restrictive Covenants, which, as this Court reads them, demonstrate the same

attributes as those in *Moorhouse*. Despite the Applicant’s assertion that the covenants run with the land (also present in *Moorhouse*), it is not apparent from the Restrictive Covenants that the restrictions are reciprocal as between lots. Further, the developer retains significant unilateral power to waive or modify restrictions without notice.

[44] As in *Moorhouse*, I find that the Restrictive Covenants fail to meet the third and fourth requirements identified by Moir J.

[45] One distinction between the Restrictive Covenants and those in *Moorhouse* is that there is no mention in *Moorhouse* of a provision equivalent to section 34 of the Restrictive Covenants, which states:

> Upon conveyance by the Grantor of all thirty six lots contained in Langbrae Phase 2D, any owner from time to time of the said lot herein may, by instrument in writing executed by the then owners of each side lot adjacent to the within lot (or one adjacent owner in the case of the end lots in said subdivision) from time to time waive, alter, or modify the above covenants and restrictions in their application to the within lots without notice to the owner of any other lot in the said subdivision.

[46] In this Court’s view there are several objections to the enforceability of this provision. First, it is not reciprocal. There is no indication that owners of other lots have the same power to waive, alter, or modify the covenants with their neighbours' consent. A second issue with section 34 arises from the developer's power under section 35 to "waive, alter, or modify the above restrictions in their application to

any lot", without notice to the owner of any other lot, directly succeeds section 34. In other words, the developer purports to retain a unilateral power to waive, alter, or modify the covenants even after all the lots have been sold. There is authority indicating that "once the common vendor has sold all of the lots affected by the building scheme, that individual may no longer enforce the covenants. In order to retain the right to enforce, the vendor must retain some of the affected land..." See Ginn, *supra*, at 16.20.10(e), note 38.

[47] Further support for the view that the Restrictive Covenants do not apply automatically to the Respondents as subsequent purchasers from the original grantees can be found in section 32. This provision requires the grantee - i.e. the original purchaser from the developer - to "obtain from any subsequent purchaser or transferee a covenant to observe the building restrictions herein set forth...". The Court notes that the obligation on the grantee is to obtain a new covenant from the purchaser, not to merely inform the purchaser that the property is subject to the covenants. The implication is that the covenants do not attach automatically to the interest of a purchaser buying from the original grantor.

[48] The Applicant's supplementary submissions do not convince this Court that *Moorhouse* is inapplicable. In essence, counsel for the Applicant submits that the restrictive covenants govern here by virtue of the mere use of the word "assigns" in

the preamble, along with the obligation of grantees to obtain covenants from subsequent purchasers in section 32 (which was not done here).

[49] However, it is apparent from *Moorhouse* that in the highly technical area of the applicability of restrictive covenants, it is not sufficient to point to such isolated indicators of the developer's subjective intentions if the full context of the document does not meet the necessary prerequisites. Crucially, in this Court's view, as in *Moorhouse*, these covenants do not meet the "reciprocity" requirement.

[50] The Applicant says the use of the word "assigns" is of great significance. However, counsel does not explain why this is different from *Moorhouse*, where identical language appeared in the covenants (*Moorhouse* at para 5). The decision in *Klenman v Isman*, 1924 CanLii 82 (SKCA) that counsel relies on is of no relevance; it stands the proposition that "the meaning to be given to the word "assigns" must, in each case, depend upon the context of the enactment or covenant in which the word is found and the subject-matter to which it relates" (*Klenman* at para 49).

[51] While counsel for the Applicant says that the Restrictive Covenants in this case are of the third class described by Justice Moir in *Moorhouse* – being "covenants imposed by the developer on the lots sold to the various purchasers for them to enjoy the benefits of the covenants and to be bound by them as well", in

other words, a "building scheme" – counsel does not, in this Court's view show why these circumstances are distinguishable from *Moorhouse*. Contrary to counsel's submission, the mere use of the phrase "run with the lands" is not decisive; the same language was found in the Moorhouse covenants (para 15).

[52] The Applicant's counsel also says that reciprocity in the application of the covenants is apparent from the preamble's statement that the benefit of the restrictions "shall run with each of the lots" and be binding on assigns. But essentially identical language appeared in the *Moorhouse* covenants; Justice Moir regarded these as "statements of intent" rather than actual terms, and held that these intentions were not borne out in the rest of the document (para 37).

[53] Counsel for the Applicants also suggests that Justice Moir misinterpreted the preamble, which stated that "[t]hese restrictions shall be binding upon and ensure to the benefit of the heirs, executors, administrators, representatives, successors and assigns of the Grantor and the Grantee." Justice Moir said this "suggests that the scheme is not binding on others" (*Moorhouse* at para 5). Counsel purports to "disagree with Justice Moir's finding that this phrase suggests that the scheme is *not* binding on subsequent purchasers" and submits that the use of the word "assigns" is all that is necessary to do so. However, this ignores the context: Justice Moir was talking about the absence of any statement "that other lots already sold have similar

restrictions...” (*Moorhouse* at para 5). This is what he meant by “others”, I believe; he wasn’t talking about assigns or other successors in title.

[54] Counsel goes on to submit that the use of the word “assigns” would be redundant “if the restrictive covenants were to benefit the developer only...”. Once again, the covenants in *Moorhouse* likewise used the word assigns (para 5).

[55] In summary, then, this Court finds that the text of the covenants in *Moorhouse* support the conclusion that the Restrictive Covenants in this case cannot be enforced by the Applicant against the Respondents.

[56] Fundamentally, as this Court reads and interprets *Moorhouse*, the absence from the Restrictive Covenants of language establishing reciprocity means the requirements of a building scheme have not been established.

Conclusions

[57] The Restrictive Covenants are not binding on the Respondents. As a result, the Applicant's motion is denied with costs to the Respondents.

[58] Nothing in this decision should be read to limit the applicability and enforceability of any applicable Municipal by-law or regulation which places

restrictions on the operation of a daycare, including by number of children, that may apply to the Respondents.

[59] If the parties cannot agree on costs, the Court will receive written submissions from the parties within twenty (20) calendar days of this decision.

Smith, J.