SUPREME COURT OF NOVA SCOTIA
Citation: Moorhouse v. Black, 2014 NSSC 13

Date: 20140116
Docket: Hfx No. 408346
Registry: Halifax

Between:

David Moorhouse and Paige Moorhouse

Applicants

v.

Terry Black and Vicki Lynn Black Respondents

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: July 29, 2013

Final Written Submissions: August 12, 2013

Counsel: Marc Dunning, for the applicants
Brian P. Casey and Geoffrey J. Franklin, for the respondents

Moir J.:

Introduction

[1] The parties are neighbours in Fairmount subdivision at Fairview. Their backyards border each other at the rear. The Blacks moved into their home in 2003, and the Moorhouses in 2008.

[2] The dispute concerns an outbuilding the Blacks started to build in their backyard in July of 2013 and restrictive covenants in deeds for the lots of Fairmount subdivision. The main issue is whether restrictive covenants in the Blacks' deed against construction of a secondary building without approval of the developer are enforceable by owners of the other lots in the subdivision.

Conveyances and Restrictions

[3] The Blacks acquired 43 Peace Court, also called lot 164 of Fairmount subdivision, directly from the developer, Fairmount Developments Inc. The deed makes the conveyance "subject to the Restrictive Covenants in Schedule 'B' ". 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.

[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 ensure 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."

[6] Clause 1 is a lengthy series of paragraphs titled "Building and Landscaping Approval". I emphasize the word "Approval".

[7] The first paragraph of clause 1 reads:

> No building other than a single family detached dwelling with or without an attached family garage shall be constructed on the Lands and construction including any excavations for any dwelling on the Lands shall not commence until the site plan, grading plan, building plans, specifications, including exterior materials and exterior colours have been submitted to the Grantor and the Grantor's approval in writing has first been obtained. The Grantor may in its absolute discretion refuse to approve any such site plan, building plans and specifications including exterior materials and exterior colours, which in its opinion are unsuitable or undesirable in relation to the character of the surrounding area. In deciding whether to approve or not, the site plan, building plans, specifications including exterior materials and exterior colours, the Grantor may take into consideration any matter which in its opinion, may affect the surrounding area including but not so as to limit the generality of the foregoing, the material and colour of all roofs, exterior walls, wood work, windows, hardware and lighting fixtures, fencing, paving and landscape details which are proposed and the harmony thereof with the surroundings and the effect of the structure as planned on the outlook from adjacent or neighbouring lands.

[8] This paragraph can be broken down and edited into several independent sentences:

a) No building other than a single family detached dwelling … shall be constructed on the lands.

b) [The dwelling may have] an attached family garage.

c) Construction … for any dwelling on the lands shall not commence until the [plans and specifications] have been submitted to the Grantor and the Grantor's approval in writing has been obtained.

d) The Grantor may in its absolute discretion refuse to approve any such [plans and specifications] which in its opinion are unsuitable or undesirable in relation to the character of the surrounding area.

e) The Grantor may take into consideration any matter which in its opinion, may affect the surrounding area including ... [numerous subjects] ... and the harmony thereof with the surroundings and the

> effect of the structure as planned on the outlook from adjacent or neighbouring lands.

[9] The next paragraph in clause 1 prescribes what must be in the site plan and the grading plan. The third paragraph prescribes minimum square footage and a minimum amount of masonry.

[10] The fourth paragraph requires the lot to be "fully landscaped", it calls for a "landscaping design", and it provides:

> The dwelling on the Lands shall be constructed in strict accordance with the plans, specifications and drawings which have been submitted and approved first by the Grantor in writing … .

[11] The next paragraph restricts future changes:

> No alterations, addition or change to the structure or exterior appearance including colour shall be made, done or permitted to be done except with the express written approval of the Grantor.

And, the last paragraph of clause 1 provides deadlines for construction and landscaping without any express discretion to extend them.

[12] Note that, although the title of clause 1 suggests it is all about approvals, the prohibition against buildings other than a single family detached dwelling is expressed in absolute terms, as are the size and masonry requirements and the deadlines. Otherwise, the paragraphs of clause 1 concern information the lot owner has to give to the developer and the developer's discretionary approvals and permissions.

[13] The mixture of prohibitions without apparent means for relief and developer's discretions continues in the other substantive clauses of the schedule. A detached garage (clause 2), excavation and dumping (3), use other than as a single family home, and use as a home before the dwelling is finished (14) are prohibited. So are fences (4), clotheslines (8), incinerators (9), livestock (10), firewood stacked outside the backyard (12), out of doors boats, vehicles, and trailers (13), commercial vehicles (13), and motor vehicle repairs (15). On the other hand, the homeowner can do some things only with the permission of the developer, such as remove soil (3), build a fence towards the back (4), build a wolmanized fence (4), put up a sign (5), remove a tree that is not dead (7), or install an antenna (11).

[14] Despite the distinction apparently created between absolute prohibitions and prohibitions that are subject to the developer's discretion, 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".

[15] The Moorhouses purchased 65 White Clove Terrace, also called lot 154 of the Fairmount subdivision, in January of 2008. Their "Schedule 'B' Restrictive Covenants" is identical to the Blacks', to the point that the phrase "which lots are now owned by the Grantor" in the opening remains. The evidence shows that many lots had been sold by 2008, including the sale of lot 164 to the Blacks. This further clouds the meaning of "The … benefits of these restrictions shall run with each of the lots 101 to 177 inclusive and lots 200 to 269 inclusive which lots are now owned by the Grantor."

When Restrictive Covenants Become Enforceable by Lot Owners

[16] There has been no change in the case law of this province on the subject of a purchaser enforcing restrictive covenants against other purchasers of lots in a subdivision since *Cleary v. Pavlinovic*, [1987] N.S.J. 193 (Nathanson J.) and

Sawlor v. Naugle, [1990] N.S.J. 409 (Tidman J.). These decisions refer to decisions of the Supreme Court of Canada, which in turn refer to English authorities.

[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:

1) The parties derive title under a common vendor, the developer.

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.

[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:

> 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: Para. 20.

[20] The Blacks rely on the holding in *Sawlor* about lack of reciprocity where the developer retains a right to waive restrictive covenants. The Moorhouses respond by referring to some British Columbia authorities on the status of the right to waive restrictive covenants after the development is complete and after the corporate developer is dissolved, which is the situation here.

[21] *Tri-X Timber Corp. v. Rutherford*, 2012 BCCA 71 held at para. 17 that

> where the grantor ceases to exist or ceases to own any of the land, an owner wishing relief from any of the restrictions contained in the building scheme must either obtain the consent of all of the other owners or apply under s. 35 of the *Property Law Act* for modification or cancellation of the scheme.

[22] In *High Point Enterprises Ltd. v. Subdivision Plan 47460*, 1993 CarswellBC 2688 (S.C.), Justice Houghton referred, at para. 6, to a passage at para. 432 of the third edition of DiCastri: "It is apprehended that an express power to vary ceases when the last lot in the development has been sold." Justice Houghton concluded at para. 7:

> In this case HPE has disposed of all of the lots in the subdivision and does not retain any property interest in the subdivision. The company does not have any authority to waive or relax the restrictions contained in the Building Scheme. I understand the petitioners did not seriously contest this.

Since that proposition was not seriously contested, the court turned to "whether the petitioner can succeed in having the Building Scheme modified as requested pursuant to s. 31 of the *Property Law Act*" (para. 8).

[23] The Moorhouses submit, "Although these cases dealt with statutory building schemes from British Columbia they are still useful for the principles they articulated." I respectfully disagree. 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.

[24] British Columbia has long had a statutory system for the creation of restrictive covenants mutually binding on the owners of lots in a subdivision. The *Land Registry Act* of 1960 was amended in 1970 and 1973 to bring in s. 24B. It became s. 220 of the *Land Title Act*, R.S.B.C. 1996, c. 250, which was summarized at para. 15 of *Tri-X Timber*.

[25] Subsection 220(1) provides for a developer to register "a Declaration of Creation of Building Scheme". The registrar makes an endorsement referring to the declaration and, under s. 220(3),

> From the date of the endorsement, the restrictions created by the declaration of building scheme run with and bind all the land affected and every part of it without further registration, but subject to this section and to the provisions of an applicable lease or sublease, render
>
> (a) the owner,
>
> (b) each purchaser, lessee and sublessee of all or part of the land, and
>
> (c) each successor in title, future purchaser, lessee and sublessee of the land
>
> subject to the restrictions and confer on them the benefits of the building scheme, unless in the declaration of building scheme the owner in fee simple or the

> registered lessee expressly reserves the right to exempt that part of the land remaining undisposed of at the time the exemption takes effect from all or any of the restrictions and benefits.

This provision makes the binding effect of restrictive covenants on other owners dependent, not on the four requisites, but on the registration of a declaration.

[26] Further, this legislation expressly allows for exemptions by the developer, which makes the question "What happens when all the lots are sold or the developer dissolves?" one of statutory interpretation.

[27] Another feature of British Columbia legislation that fundamentally distinguishes its law of building schemes from the equitable principles of building schemes is s. 35 of the *Property Law Act*. It, too, is central to the reasons in *Tri-X Timber*, *High Point Enterprises*, and British Columbia decisions to which they refer. Section 35 has long been part of the statute law of British Columbia. It allows the court to modify or cancel adjectival interests in land, including restrictive covenants. However, the circumstances in which this may be done are expressly limited. The petitioner must bring herself within the limits, and the exercise of the power is not "a 'balancing' exercise": *Wallster v. Erschbamer*, 2011 BCCA 27 at para. 19.

[28] The new *Land Registration Act* touches on the binding nature of a restrictive covenant. It gives the court power to modify or discharge a covenant in limited circumstances. However, it leaves the question of whether a restrictive covenant binds other lot owners, and is enforceable by them against one another, largely to the common law and equity.

[29] Subsection 61(1) of the *Land Registration Act* provides:

> Every 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, but a condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that
>
> (a) the modification or discharge will be beneficial to the persons principally interested in the enforcement of the condition or covenant;
>
> (b) the condition or covenant conflicts with the provisions of a land-use by-law, municipal planning strategy or development agreement issued, made or established pursuant to an enactment and the modification or discharge is in the public interest; or
>
> (c) the condition or covenant offends public policy or is prohibited by law.

This provision does three distinct things:

- It provides for registration or recording of a restrictive covenant to constitute notice, as with other registered or recorded interests.

- It stipulates that successive owners are bound by the registered or recorded restrictive covenant "if it is of such nature as to run with the land".

- It gives the court power to modify or discharge the restrictive covenant in limited circumstances.

[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.

Whether the Fairmount Subdivision Restrictive Covenants are Enforceable by Lot Owners?

[34] (1) The parties derive title under Fairmount Developments Inc. (2) The conveyancing satisfies me that Fairmount laid out parts of its lands, referred to as phases, for sale in lots subject to restrictions imposed on all the lots. The restrictions are exactly the same for each lot. The parties own two of them.

[35] Despite 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.

[36] The third requisite, the requirement for reciprocity, fails in this case for reasons similar to those in *Sawlor*. However, there are distinctions between the restrictions in *Sawlor* and those in the present case that require us to look more deeply into the question of reciprocity. *Sawlor* was decided on the basis that "there is no express term that the covenants are to enure to the benefit of and to be binding upon each purchase".

[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] 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.

[42] This approach 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". The overall scheme, and particularly the exclusive power in clause 21, are incompatible with the statement in the opening paragraph of the 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 exclusive approvals and the exclusive power to waive covenants is, 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".

[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.

[45] Therefore, the Moorhouses have no right to enforce any covenant in Schedule "B" of the deed between Fairmount Developments Inc. and the Blacks.

Other Issues

[46] The Blacks obtained a document on Fairmount Developments Inc. letterhead approving their plans for the outbuilding. The Moorhouses produced documents showing that the company surrendered its certificate of incorporation over a year before the letter was signed. The parties briefed me on what happens when a corporation that is struck under the *Companies Act* has an outstanding power such as that created by clause 21 of Schedule "B" to the Black and Moorhouse deeds.

[47] While I am grateful for the work of counsel on this subject, my conclusions on the third and fourth requisites make the issue of the attempted waiver academic.

[48] As discussed in connection with the applicability of British Columbia authorities on a developer's discretion to waive or modify a restriction, s. 61(1) of our *Land Registration Act* gives this court discretion to modify or discharge a restrictive covenant in limited circumstances. Alternative to their position about whether their neighbours could enforce the restrictive covenants, the Blacks sought the court's new statutory discretion. Both sides presented evidence relevant to the exercise of the discretion.

[49] This issue is also moot. I do not think it wise to give alternative reasons. My interpretation of the covenants would influence my exercise of the discretion.

Conclusion

[50] I will grant an order dismissing the application. The parties may address costs in writing.

J.