Cite as: Sawlor v. Naugle, 1990 NSSC 150

1990 S.H. 74834

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

KEITH R. SAWLOR and DEBORAH SAWLOR

Applicants

\- and -

ROY NAUGLE and DARLENE NAUGLE, ROGER REHBURG and DONNA REHBURG, CATHERINE BENNETT and HUBERT BEDNARIK and ANTONIA BEDNARIK, DARRELL THIBAULT and ANNA THIBAULT, STEVE EDDY and PATRICIA EDDY and GEORGE OSBORNE and JUDITH OSBORNE

Respondents

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice G. A. Tidman, Trial Division, on December 10 and 13, 1990

DECISION: December 13, 1990 (Orally)

COUNSEL: Ms. Jean McKenna and Mr. Paul Charlton, for the Applicants
Mr. T. Peter Sodero, Q.C., for the Respondents

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Respondents

TIDMAN, J. (Orally)

This is an application **inter partes** for a declaration that certain restrictive covenants contained in conveyances of land are void or, alternatively, that the respondents cannot enforce the covenants because of acquiescence.

Background

The applicants on April 30th, 1986 purchased from Federal Savings Credit Union Limited Lot 7 in the latter's subdivision in Cow Bay, Halifax County. Lot 7 has a land area of 5.76 acres. The deed contains a covenant stating that only one house can stand on any one of the said lots. Mr. Sawlor, the male applicant, a carpenter by trade, built a home on

the lot. Subsequently, he was granted approval by the Municipality of Halifax County to subdivide the original Lot 7, and Lots 7A and 7B were approved. Mr. Sawlor built a house on Lot 7A. Mr. Sawlor later applied to the Municipality for a further subdivision of the remaining portion of the original Lot 7 and received approval for Lot 7C upon which the applicants' original house was situate. The applicants offered the original home for sale. The prospective purchaser of the home objected to the applicants' title on the grounds that the restrictive covenant prohibited the building of more than one house on the original Lot 7.

Counsel agree that the respondents and applicants are the lot owners of all of the lots of the Federal subdivision and that Federal no longer has a property interest in the subdivision. All of the respondents excepting the Naugles and the Eddys have agreed to release the applicants from the restrictive covenant in question. All of the applicants and respondents obtained their land in the subdivision from Federal. The Naugles obtained their lot on August 16, 1983; the Sawlors theirs on April 30, 1986 and the Eddys theirs on July 9, 1986. To each conveyance was attached a sheet of paper containing 17 numbered paragraphs headed:

"SCHEDULE 'B'
FEDERAL SAVINGS
COW BAY AND DYKE ROAD
SUBDIVISION

Protective Covenants (the legal form of which will be an attachment to the deed):"

The paragraph numbered 1. which immediately follows states:

> "1. The said lands to which these restrictions shall apply (hereinafter called the 'said lands') include the lots described in Schedule 'A'."

Paragraph numbered 4. provides:

> "4. No more than one dwelling house shall be erected or stand at any one time upon any one of the said lots."

The paragraph numbered 16. provides:

> "16. Provided always that, notwithstanding anything herein contained, the Grantor and its successors shall have power by instrument or instruments in writing from time to time to waive, alter or modify the above covenants and restrictions in their application to any lot or lots or to any part thereof comprising part of the said subdivision, without notice to the owner of any other lot in the said subdivision."

The remaining paragraphs all contain restrictions on the use of the lots. There is no express provision that the covenants enure to the benefit of the Grantee or to the other present or future owners of land in the subdivision.

Schedule "A" contains a metes and bounds description of Lot 7.

Mr. Naugle confirms that when he purchased his lot from Federal he was shown a plan showing lands of Federal which was revised October 13, 1982. That plan shows a large block of land labelled "Lands of Federal". It shows only five numbered lots in the subdivision which are situate along the Cow Bay Road and numbered X3 through X7. The land area of each numbered lot ranges between 1 and 1¼ acres. The plan shows a proposed road running from the Cow Bay Road between Lots X3 and X4 to undeveloped lands of Federal. Lots X3, X4, and X6 are outlined in dark print and a Municipal approval stamp indicates that the subdivision of those lots was approved by the Municipality on November 5, 1982.

The Sawlors purchased their lot, which is Lot 7, on April 30, 1987. At that time a plan of the Federal subdivision dated January 22, 1986 and revised on April 7, 1986, shows Lot X3 as being owned by the respondents Rehburg and Lot X6 as being owned by the Naugles. It shows Lot X4-Y as being comprised of the lots previously designated X4, X5, the previously mentioned road allowance, and some additional land which was part of land designated on the previous October 13, 1982 plan as lands of Federal. Lot 7 is shown as being situate at the intersection of the Cow

Bay and Dyke Roads as it was on the previous plan, but its size was increased from approximately 1¼ acres as shown on the first plan, to 5.76 acres. Part of the lot borders on Lot X6 owned by the Naugles. It also shows Lots 8 through 12 and Lot 14 fronting on the Dyke Road which lots have a land area ranging between two and three acres. It also shows Lot 15. Lot 15 is of irregular shape having a road frontage of only approximately 100 feet along the Dyke Road from which the lot extends south widening to approximately 375 feet, then extends west along the rear of Lots 8 through 12 and Lot 14 approximately 1,200 feet and then south again approximately 600 feet. Lot 15 has a total land area of 19.62 acres.

When the Eddys purchased Lot 12 on July 9, 1986, they were shown a plan which was revised on April 7, 1986. The respondents Rehburg prior to April 1986 acquired Lots X3, X4, X5, the road allowance, and some additional land contiguous to the west of those lots and road allowance. The original Lot X3 remains intact but the remaining lands acquired by the Rehburgs have now been subdivided into two lots being Lot X4-Y-W which contains an area of just under five acres, an approved plan of which shows two dwellings located thereon, and Lot X4Y-V having an area of slightly over one acre which was approved as a lot for construction of a single family dwelling.

The evidence of Mr. Naugle is that no complaint was made by the Naugles to the Rehburgs of their apparent violation of the one lot-one dwelling covenant.

I accept the evidence of Mr. Sawlor in finding that no complaints were made to him of a violation of the same covenant until he sought a release of the covenant from the Naugles shortly before the commencement of this application. I also accept Mr. Sawlor's evidence that when he first went to see Mr. Eddy about signing the waiver of the covenant, Mr. Eddy agreed to sign but later refused after the Naugles had refused. Mrs. Naugle is Mr. Eddy's sister. I also accept Mr. Sawlor's evidence that sometime before he asked the Naugles to sign the waiver Mr. Naugle had on two occasions asked Mr. Sawlor to sell him a part of Lot 7 and Mr. Sawlor had not agreed to do so. Mr. Naugle would have signed the waiver for a sum of money and an area of land.

Issue

The issue is, first, whether there has been a violation of the covenant in question and, if so, is the covenant binding.

In relation to the issue of violation Mr. Sawlor says that since there was no covenant prohibiting subdivision he assumed and construed the covenant to mean that he could

subdivide the lot but could only build one house on each subdivided lot.

Submissions of Counsel

Mr. Sodero, on behalf of the respondents, the Naugles and Eddys, submits that the wording of the restrictive covenant clearly indicates one lot - one house and that it thus is a valid restrictive covenant to which effect should be given.

Ms. McKenna argues, first of all, that the specific wording of the covenant does not prohibit subdivision and, thus, additional construction on the lot. Secondly, that if the additional construction is prohibited by the wording the covenant is void because of vagueness. Thirdly, that even if the covenant is valid it cannot be enforced because its violation was acquiesced to by the respondents.

The Law

Ms. McKenna argues that the covenant in question does not contain all the necessary elements required in law to give it binding effect. In support of her argument she cites the following passage from a decision of Van Camp, J., in **Re Lakhani et al and Weinstein** **118 D.L.R. (3d) 61 (Ontario High Court of Justice)** at p. 64 and 65, which was accepted by Nathanson, J. of this court in **Cleary and Cleary v.** Pavlinovic et al **(1987), 80 N.S.R. (2d) 22,** Van Camp, J. states:

"... Since the middle of the last century, equity has recognized that the burden of a covenant negative in nature may run with the land of the covenantor under certain conditions. In **Canadian Construction Co. Ltd. v. Beaver (Alberta) Lumber Ltd., [1955] S.C.R. 682 at p. 692, [1955] 3 D.L.R. 502 at p. 506, Locke, J.,** recognized that:

> '... covenants restricting the user of land imposed by a vendor upon a sale fall into three classes: (i) covenants imposed by the vendor for his own benefit, (ii) covenants imposed by the vendor as owner of other land of which that sold formed a part, and intended to protect or benefit such unsold land, and (iii) covenants imposed by a vendor upon a sale of land to various purchasers who are intended mutually to enjoy the benefit of, and be bound by, the covenants.'

The requirements of that third class (which has been called a building scheme, a scheme of development, a local law) were set out by Middleton, J., in **Re Wheeler (1926), 59 O.L.R. 233 at p. 231-232, [1926] 4 D.L.R. 392 at p. 398-399,** where he said:

> 'In the case of **Elliston** v. **Reacher**, [1908] 2 **Ch. 374,** Mr. Justice Parker thus sums up the requisites of a building scheme (p. 384): --
>
> > "It must be proved (1) that both the plaintiffs and the 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 lots retained by the vendor; (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"'."

It is common ground of counsel that the covenant in issue falls within the third category of covenants restricting the use of land as described by Locke, J., in the Canadian Construction case. Ms. McKenna argues that the covenant lacks the essential elements described by Parker, J., in the Elliston case and is, therefore, invalid.

There is no question that the applicants and respondents all derived title under a common vendor so that the first requisite has been met.

Dealing with the second requisite, it is, first of all, questionable whether the vendor Federal has laid out a defined

estate, but I will consider that question later. For now I will deal with the question of whether or not the covenant in issue, assuming it is intended to be imposed on all of the lots, consistent only with some general scheme of development? The covenant states that only one dwelling is to be built on the lot. If interpreted to mean, as is alleged by counsel for the respondents, that the subdivision of the lot is prohibited then there is no comprehensible scheme as to the required size of the lots upon which only one dwelling may be placed. When the listed covenants were first imposed, or at least at the time the Naugles purchased their lot, only five lots were shown on the plan of subdivision all of which ranged from 1 to 1½ acres in size. The same covenants were attached to the later conveyances when the applicants and the Eddys purchased their lots, but the Federal plan of subdivision then showed additional lots ranging in size from just over an acre, the size of the Naugle lot, to 19.62 acres, the size of Lot 15 shown on the plan. Although there is no evidence as to whether or not the grantor Federal or its successor waived compliance with covenant No. 4 in relation to any other lots, no such waiver was granted to the applicants.

I accept Mr. Sawlor's statement that he did not require a waiver because he intended to build only one house on each subdivided lot. In my view, no reasonable person would

believe that a building scheme in relation to the Federal subdivision would permit only one dwelling per lot regardless of whether its size was 1 acre, 5 acres or 19 acres. Such a scheme, in my view, is not "... some general scheme of development" as Parker, J. says it must be. To be so defined the general scheme must be set out in a way that it can be known or ascertainable from the very beginning of the development. In this case it was not because the lots as set out in the original plan of subdivision were substantially altered in subsequent plans. Thus, the second requisite has not been met.

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.

I would thus find also that the third requisite as set out by Parker, J., has not been met.

In dealing with the fourth requisite, from the actions of at least some of the lot owners it is not apparent that the lot owners purchased their lots from Federal upon the footing that the restrictions were to enure to the benefit of and be binding upon such purchaser and all other purchasers. Apparently, nobody complained to the Rehburgs when they breached the covenant, nor apparently did the Rehburgs ask permission of the other lot owners to violate the covenant. We do know for certain, however, that the Naugles voiced no complaint to the Rehburgs for violating the covenant and that the Rehburgs did not seek permission from the Naugles to do so. The applicant Mr. Sawlor, as he says and which I accept, did not consider himself bound

to others or others to him because he believed there was no restriction on the subdivision of the lots. No lot owner voiced an objection to the construction of the second house on Mr. Sawlor's lot to indicate a perceived entitlement to the benefit of the covenant. A complaint was made only when Mr. Sawlor after being told there was a problem practically invited complaint by asking the other purchasers for a release from the covenant, and then only two owners sought to rely on the covenant.

I would thus find also that the purported scheme does not comply with the fourth requisite set out by Parker, J.

A further question to be considered to which I earlier referred is whether Federal has laid out an estate or defined portion thereof to be benefitted by the restrictive covenants. In order to justify a finding that a restrictive covenant in a conveyance runs with the land the dominant tenement to be benefited by the covenant must be ascertainable by reference to the conveyance.

In Harrietsfield-Grandlake Community Association v. Municipality of the County of Halifax (1978), 26 N.S.R. (2d) 198, Mr. Justice Cooper in a dissenting judgment, which dissent has no bearing on the issue here, quotes with approval

from the judgment given by Schroeder, J.A., in **Re Sekretov** **and City of Toronto, [1973] 2 O.R. 161** where at p. 165 and 166 he states:

> "The law of Ontario and of the other common law Provinces plainly require that the dominant land for the benefit of which a restrictive covenant is imposed in a deed from the covenantee to a purchaser of other lands of the covenantee must be ascertainable from the deed itself; otherwise, it is personal and collateral to the conveyance as being for the benefit of the covenantee alone and not enforceable against a successor in title to the purchaser."

The Alberta Court of Appeal also dealt with this issue in **Guaranty Trust Company of Canada v. Campbelltown Shopping Centre Ltd. (1986), 44 Alta. L.R. (2d) 270.** The specific issue in that case was whether a covenant restricting the use of a lot in a shopping centre could be enforced against a subsequent purchaser of the lot. The court found that it could not be so enforced because the original deed containing the restrictive covenant did not in itself define, either specifically or by reference, the land to be benefited. To decide otherwise would render it too onerous on the part of a purchaser to have to search further in order to determine the identity of the land to be benefited.

In the case at bar, the heading of the listed protective covenants states that "... the said lands to which these restrictions shall apply (hereinafter called the 'said lands')

include the lots described in Schedule 'A'". In the deed from Federal to the applicants the only lot described in Schedule "A" is Lot 7 of the Federal subdivision. Nowhere in the conveyance are the said lands described either specifically or by reference.

Mr. Sodero submits that it may be inferred that the "said lands" are those referred to in the heading of the schedule, namely, Federal Savings, Cow Bay and Dyke Road Subdivision. I cannot agree. In order to comply with the requirements there must be either a metes and bounds description of the lands, a reference to a plan identifying the lands or some other specific reference by which the lands to be benefited may be readily identified or ascertained.

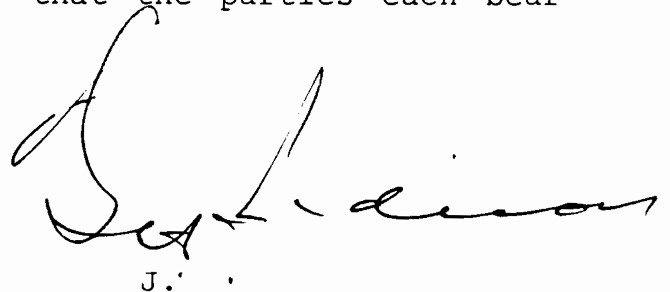
Even if the purchaser should conclude, as Mr. Sodero suggests, that the land to be benefited is the Federal Savings, Cow Bay and Dyke Road Subdivision, that description alone lacks the specificity required to enable the "dominant tenement" to be readily identified or ascertained.

Even if I were to find that the covenant is binding on Mr. Sawlor as a personal covenant, which for reasons stated I do not, I find that the lands to be benefited by the covenant are not ascertainable from the deed itself thus the covenant does not run with land and is not binding on subsequent purchasers.

Conclusion

In conclusion I find that the covenant in question does not have the necessary requisites as set out by Parker, J. in **Elliston v. Reacher** (supra) and is, therefore, invalid.

Costs though they normally follow the cause are always in the discretion of the court. Although I suppose, on the one hand, it could be said that the respondents, the Naugles and the Eddys, could have avoided the risk of costs by signing the release as requested by the applicants, on the other hand it was not unreasonable on their part to believe that the covenant in issue effectively restricted the building of more than one dwelling on each lot. None of the parties to this application, in fact, created the problem that brought the matter before the courts. So, under those circumstances I am inclined to exercise my discretion in favour of the respondents and thus will order that the parties each bear their own costs.



J.

Halifax, Nova Scotia
December 13, 1990