
CANADIAN CONSTRUCTION COMPANY LIMITED (*Defendant*) .... } APPELLANT;

AND

BEAVER (ALBERTA) LUMBER LIMITED (*Plaintiff*) ..... } RESPONDENT.

1955

*Feb. 9, 10
*Jun. 28

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Covenant—Restrictive—Real property—Against use of land for certain business—Expressed to be for benefit of vendor—No reference to land retained by vendor—Whether runs against subsequent purchaser—Admissibility of oral evidence to show attachement to retained land—Land Titles Act, R.S.A. 1942, c. 205, ss. 51, 131.

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*PRESENT: Taschereau, Rand, Estey, Locke and Cartwright JJ.

(1) [1948] S.C.R. 486.

The respondent owned two parcels of land situate approximately 1,000 ft. apart and on different streets. It was carrying on a lumber and building material business on one of them, and, in 1944, sold the other under an agreement in which the purchaser covenanted not to use the land for 25 years for dealing in lumber and building materials. It was stated in the agreement that the restriction attached to and was to run with the land sold. There was no reference to the land retained by the vendor, but it was stated that the restriction was to be for the benefit of the vendor.

The respondent took action to maintain against the appellant, a successor in title of the purchaser, the caveat it had filed with the agreement. The amended statement of claim alleged that the covenant had been obtained for the protection of the land not sold and that this land was the dominant tenement. The trial judge held that the covenant was personal to the respondent and not for the benefit of its land. The Court of Appeal reversed this judgment.

Held: The appeal should be allowed. On the true construction of the agreement the covenant was merely personal to the vendor and not for the benefit of the land retained by it and was therefore not binding upon the appellant.

Per Taschereau, Rand, Estey and Cartwright JJ.: The agreement being a formal and carefully prepared instrument obviously intended to be a complete statement of the whole bargain, extrinsic evidence was inadmissible to contradict, vary or add to its contents. However, assuming that all the evidence as to surrounding circumstances received at the trial was admissible, the trial judge was right in his view that the covenant was intended by the parties to be personal to the respondent and not for the benefit of its retained land. In construing the agreement, the difference, stressed by the authorities, between a covenant personal to the vendor and one for the benefit of his land, can hardly be supposed to have been absent from the mind of the draftsman. The mere fact that at the time the respondent owned other land so situate that it might be capable of being regarded as a "dominant tenement", does not give sufficient reason for construing the agreement otherwise than as was done by the trial judge.

There is nothing in ss. 51 and 131 of the *Land Titles Act,* R.S.A. 1942, c. 205, which alters the general law as to restrictive covenants running with the land.

Per Locke J.: Oral evidence was not admissible in construing the agreement. There was no ambiguity in its language, and oral evidence calculated to add a term to the agreement instead of explaining the terms or identifying the subject matter, could not supplement its provisions. *Union Bank of Canada* v. *Boulter Waugh Ltd.* 58 S.C.R. 385, referred to. *Zetland* v. *Driver* [1938] 3 All E.R. 161, *Smith* v. *River Douglas* [1949] 2 All E.R. 179 and *Laurie* v. *Winch* [1953] 1 S.C.R. 49, distinguished. Even if the inadmissible evidence were to be considered, the covenant was a covenant in gross and did not run with the land.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the decision of the trial judge which had ordered the removal of a caveat.

(1) [1954] 2 D.L.R. 702; 11 W.W.R. (N.S.) 494.

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D. F. McLeod for the appellant.

W. G. Morrow, Q.C. for the respondent.

The judgment of Taschereau, Rand, Estey and Cartwright was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta (1), dated March 27, 1954, allowing an appeal from a judgment of Egbert J. pronounced on July 29, 1953.

The question raised is whether the respondent can enforce as against the appellant the observance of certain restrictions upon the use of lands of which the appellant is the owner.

The case was dealt with on an agreed statement of facts, no witnesses being called. We were informed by counsel that the making of this agreement as to the facts was not to prejudice the appellant's argument that extrinsic evidence was inadmissible to vary or add to the terms of the agreement of March 7, 1944, hereinafter set out.

The statement of facts agreed to may be summarized as follows. In 1927, or earlier, the respondent became the owner of lots 3 to 8 inclusive in Block 11 Plan T 3 in the Townsite of Leduc (hereinafter referred to for convenience as "Parcel A"). It used this land as a branch yard where it carried on the business of selling lumber and other building materials until November 1942, when it purchased lots 4, 5, and 6 in Block 18, Plan T 5 in the same Townsite (hereinafter referred to for convenience as "Parcel B"). In November 1942 the respondent moved its business from Parcel A to Parcel B and up to the date of the trial it continued to carry on at Parcel B the same sort of business which it had previously carried on at Parcel A. These parcels are distant approximately 1,000 feet from each other and are on different streets, Parcel B being four blocks to the north and one block to the east of Parcel A.

In March 1944 the respondent agreed to sell Parcel A to one Henderson and entered into an agreement with him dated March 7, 1944, which is set out in full hereafter. A transfer of Parcel A to Henderson was registered and the respondent filed a caveat in the Land Titles Office with a

(1) [1954] 2 D.L.R. 702; 11 W.W.R. (N.S.) 494.

copy of the agreement of March 7, 1944 attached thereto. Thereafter Henderson sold Parcel A to the Municipal District of Leduc No. 75 and that corporation became the registered owner thereof. In August 1950 the appellant purchased Parcel A from the Municipal District of Leduc No. 75 with actual knowledge of the agreement of March 7, 1944, but reserving its rights to maintain that the covenants therein contained were not enforceable against it. The appellant served a notice on the respondent, pursuant to s. 137 of The Land Titles Act, R.S.A. 1942, c. 205, requiring it to take proceedings on its caveat and this action followed.

The agreement of March 7, 1944, reads as follows:—

MEMORANDUM OF AGREEMENT made this 7th day of March, A.D. 1944.

BETWEEN:

BEAVER (ALBERTA) LUMBER LIMITED, a body corporate having its Head Office in the City of Winnipeg in the Province of Manitoba and a branch office in the City of Edmonton in the Province of Alberta (hereinafter called "the Vendor".)

of the First Part

—and—

HOWARD PAUL HENDERSON of the Town of Leduc in the Province of Alberta (hereinafter called "the Purchaser".)

of the Second Part.

WHEREAS the Purchaser is at present the owner of certain buildings situated upon the under-described lands, which said lands are the property of the Vendor, and

WHEREAS the Vendor has agreed to sell the said under-described lands without any improvements to the Purchaser, subject to the terms and conditions hereinafter set out,

NOW THEREFORE THIS AGREEMENT WITNESSETH and it is mutually covenanted and agreed between the parties hereto as follows:—

1. The Vendor does hereby agree to sell and transfer unto the Purchaser Lots three (3) and Four (4) in Block Eleven (11) in the Townsite of Leduc in the Province of Alberta, of record in the Land Titles Office for the North Alberta Land Registration District as Plan T-3, excepting thereout all mines and minerals and the right to work the same, and Lots Five (5) to Eight (8) in Block Eleven (11) in the Townsite of Leduc in the Province of Alberta, of record in the Land Titles Office for the North Alberta Land Registration District as Plan T-3, excepting out of the said Lot Five (5) all mines and minerals and the right to work the same in consideration of the Purchaser paying to the Vendor the sum of One Hundred and Three and Sixty-Two Hundredths ($103.62) Dollars and covenanting and agreeing that the said Lots or any part thereof shall not for the period of twenty-five (25) years from the date hereof be used for the purpose of manufacturing, storing, buying, selling or otherwise acquiring or disposing of any lumber or building materials of any kind whatsoever.

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2. The Purchaser does hereby covenant and agree with the Vendor that each and every part of the said Lots shall be subject to the above restriction and condition for the said period of twenty-five (25) years and that the said restriction and condition shall be binding upon each of the said lots hereby conveyed for the benefit of the Vendor and the said restriction and condition shall be a restrictive covenant attached to and running with the said lots for the said period of twenty-five (25) years.

3. It is further covenanted and agreed that the Vendor shall transfer Title to the said lands to the Purchaser by a separate Transfer and that the above set out restriction and condition shall be deemed to be a term and condition of the said Transfer and that the Vendor shall have the right and privilege of filing a Caveat against the Titles to the said lands to protect its interests under this Agreement.

4. The Purchaser covenants and agrees that he will not transfer, sell, lease, mortgage, encumber or otherwise dispose of all or any part of the said lands and premises, except such transfer, sale, lease, mortgage, encumbrance or disposition be made subject to the above set out restriction and condition.

These presents shall enure to the benefit of and be binding upon the successors and assigns of the Vendor and the heirs, executors, administrators and assigns of the Purchaser.

IN WITNESS WHEREOF the Vendor has hereunto caused to be affixed its corporate seal, duly attested by its proper officers in that behalf and the Purchaser has hereunto set his hand and seal on the day and in the year first above written.

(SEAL OF COMPANY) BEAVER (ALBERTA) LUMBER LIMITED.

SIGNED, SEALED and DELIVERED in the presence of: "Chas. E. Ayre"	Per "J. B. Sinclair, Secy-Treas."
Witness as to the signature of Howard Paul Henderson.	Per "Signature" "Howard Paul Henderson"

This agreement is sealed by the respondent but not by Henderson the purchaser. It will, however, be convenient to refer to the agreements made by Henderson as "covenants" as was done in the courts below and in argument.

In its amended statement of claim the respondent sets out the making of the agreement of March 7, 1944, the registration of the caveat, the purchase by the appellant of the lands described in the agreement with notice of the restrictions and continues:—

9A. The Plaintiff, prior to the 7th day of March, 1944, and on the 7th day of March, 1944, was the registered owner and has continued to be the registered owner and still is the registered owner of the lands described as (Parcel B) and it was for the protection of such land and in order to preserve, maintain and enhance its value that the Plaintiff obtained the covenants hereinbefore set forth at the time of selling the lands described

in paragraph 1 hereof, and the said (Parcel B) constitutes the dominant tenement owned by the Plaintiff for the benefit of which the lands referred to in paragraph 1 hereof (Parcel A) were made subject to the said restrictive covenants.

On this record the learned trial judge was of opinion (i) that the covenant sought to be enforced was clearly negative; (ii) that to be enforceable against the appellant it must have been given for the benefit of and must touch and concern some neighbouring land of the respondent, that "there must co-exist the dominant estate of the covenantee and the servient estate of the covenantor, and the covenant itself must "touch and concern" the dominant estate of the covenantee in such manner as to affect its mode of occupation or be such a covenant as per se, and not merely from collateral circumstances, affects its value;" (iii) that the respondent's land, Parcel B, was so situate in relation to the appellant's land, Parcel A, that the former was capable of being regarded as a "dominant tenement" and the latter as a "servient tenement" within the rule stated in (ii) above; (iv) that the covenant was one which could affect per se the value of such "dominant tenement;" (v) that the "dominant tenement" was still owned by the respondent; but (vi) that on the true construction of the agreement of March 7, 1944, with due regard to the surrounding circumstances, the covenant was intended by the parties to be personal to the respondent and not for the benefit of its land, Parcel B.

Frank Ford J.A., who delivered the unanimous judgment of the Appellate Division, differed from the learned trial judge only as to item (vi) above, as to which he reached a directly opposite conclusion. The accuracy of the views of the learned trial judge set out in items (i), (ii) and (v) above was not questioned before us. I have reached the conclusion that the learned trial judge was right in his view which is summarized in item (vi) above. This makes it unnecessary for me to express any opinion in regard to the questions, fully argued before us, on which the views of the learned trial judge are summarized in items (iii) and (iv) above.

In approaching the question of the construction of the agreement of March 7, 1944, it may first be observed that it is a formal and carefully prepared instrument obviously intended to be a complete statement of the whole bargain

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between the parties so that, according to the general rule, extrinsic evidence is inadmissible to contradict, vary or add to its contents. It was argued for the appellant that as there is nothing in the agreement to indicate the existence or situation of other land of the covenantee intended to be benefited the Court cannot allow the identity of such land to be deduced from the surrounding circumstances. This argument raises a difficult question as to which the authorities, a number of which are collected and discussed in a most helpful article by Sir Lancelot Elphinstone in 68 L.Q.R., 353, are not easy to reconcile. However, I do not find it necessary to decide this question because, assuming that all the evidence in the record was admissible to aid in the construction of the agreement, I would, for the reasons given by the learned trial judge, interpret it as he has done.

Having already expressed my concurrence with the reasons of the learned trial judge as to the interpretation of the agreement, I wish to stress one feature of the matter. The question is whether, on the true construction of the agreement, the respondent and Henderson intended the restrictive covenant therein contained to be (*a*) for the vendor's own benefit and personal to it, or (*b*) for the protection or benefit of the vendor's land, Parcel B. As was said by Lord Shaw in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1), the cases on the branch of the law dealt with in *Tulk* v. *Moxhay* (2) are legion. In these cases and in the text books dealing with them the importance of the difference between covenants intended to be for purpose (*a*) and those intended to be for purpose (*b*) is repeatedly stressed, and can hardly be supposed to have been absent from the mind of the draftsman of the agreement under consideration when he made no mention of any lands retained by the vendor and inserted in paragraph 2 the words "the said restriction and condition shall be binding upon each of the lots hereby conveyed for the benefit of the vendor". I cannot accept the view that the mere fact that at the date of the agreement the respondent owned another parcel of land so situate that it might be capable of being regarded as "a dominant tenement" within the rule stated above furnishes a sufficient reason for construing the agreement otherwise than the learned trial judge has done.

(1) [1926] A.C. 108 at 119. (2) (1848) 2 Ph. 774.

It remains to consider Mr. Morrow's submission that, whatever might have been the result of the appeal apart from the provisions of *The Land Titles Act,* R.S.A. 1942, c. 205, ss. 51 and 131 of that statute require a decision in favour of the respondent. We were informed by counsel that this point was argued in both courts below although there is no mention of it in the reasons for judgment. In my view there is nothing in these sections that alters the general law as to restrictive covenants running with land. Their purpose appears to be merely to provide methods of registering covenants so as to bring them to the notice of persons intending to deal with lands registered under the Act and to confer power upon the court to modify or discharge such covenants in certain circumstances. The intention of the Legislature not to alter the general law appears to me to be indicated by the words in s. 53 (3), "if it is of such nature as to run with the land", and by the words of s. 53 (4) reading as follows:—

(4) The entry on the register of a condition or covenant as running with or annexed to land shall not make it run with the land, if the covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land.

I have already expressed my view that the covenant in question was a covenant personal to the respondent not touching or concerning any land retained by it. That is to say it was a covenant in gross and so on account of its nature would not run with the land.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

LOCKE J.:—The issues raised by the pleadings in this matter were tried upon an agreed statement of facts. We were informed upon the argument that in agreeing to the matter being disposed of in this manner the present appellant reserved to itself the right to object that evidence was not admissible to add to or vary the terms of the agreement of March 7, 1944, made between the respondent and Henderson.

That agreement contained a covenant by the purchaser that:—

the said lots or any part thereof shall not for the period of twenty-five (25) years from the date hereof be used for the purpose of manufacturing, storing, buying, selling or otherwise acquiring or disposing of any lumber or building materials of any kind whatsoever.

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The agreement further stipulated that each of the lots should be subject to the restriction for the stated period, that the covenant was "a restrictive covenant attached to and running with the said lots" and that if the lands were transferred by the purchaser the restriction should be deemed to be "a term or condition of the said transfer" and that the vendor might file a caveat against the land to protect its interest.

While, in my opinion, evidence that the respondent was at the time of the sale to Henderson the owner of other lots in the Townsite of Leduc is not admissible as between the parties to this action in determining the construction to be placed upon the agreement with Henderson, the agreed statement of facts discloses that in the year 1927 the respondent had acquired Lots 3 to 8 in Block 11 and carried on there the business of a lumber yard until the year 1942, when it transferred its business to Lots 4, 5 and 6 in Block 18 in the Townsite and was carrying on its business there at the time the action was instituted. Prior to that time, however, it had disposed of its remaining property in Block 11.

While the date upon which the property in question was transferred by the respondent to Henderson is not given, it was presumably on or before March 15, 1944, as on that date the respondent filed a caveat against the lands. The terms of the caveat are not stated in the agreed statement nor a copy of that instrument produced, but there was filed with it a copy of the agreement in question. In these circumstances, I must assume that the caveat was in the terms of Form 32 in the Schedule to the *Land Titles Act* (R.S.A. 1942, c. 205), and simply gave notice that the caveator claimed an interest in the lands under the restrictive covenant contained in the agreement and said nothing which would convey to a purchaser of the lands any more information than might be obtained from perusing the agreement.

Henderson sold the lands to the Municipal District of Leduc No. 75, from which they were purchased by the appellant by an agreement dated August 17, 1950. This document contains no reference to the caveat filed by the respondent or to the agreement with Henderson, but it is admitted that at the time the appellant purchased the

property it knew of the agreement of March 7, 1944, and purchased the property reserving its right to contest "the validity of the agreement dated the 7th of March A.D. 1944 and Caveat No. 2737 F.O. as being a good and valid charge against the said lands and premises as against the Municipal District of Leduc No. 75, and the Defendant."

The statement of claim in the action, after reciting the covenant in the agreement with Henderson and the latter's covenant that he would not sell the property other than by a disposition subject to the restriction expressed in the covenant and that, by its terms, it was declared to enure to the benefit of and be binding upon the heirs, executors, administrators and assigns of the purchaser, said that the caveat had been filed "giving notice of its claim under the said agreement" and that the defendant had purchased the land with notice of the caveat and of the plaintiff's interest in the land and asked for a declaration that it had "a good and valid caveat against the said land and prays for an Order of this Honourable Court to that effect."

The action was commenced in May of 1951 and the defence filed in the same month. On May 28, 1953, however, the plaintiff obtained leave to amend the statement of claim by alleging that prior to the 7th of March, 1944, it was the registered owner and had continued to be the registered owner of the property in Block 18 above referred to, that it was for the protection of such land and, in order to maintain and enhance its value, that the plaintiff had obtained Henderson's covenant and that the plaintiff's said lands constituted the dominant tenement for the benefit of which the lands were made subject to the restrictive covenant.

While the learned trial judge was of the opinion that in construing the agreement of March 7, 1944, he might consider the evidence afforded by the admissions as to the length of time the present respondent had carried on its business in Leduc and as to its ownership of other lands in the Townsite, he concluded that it had not been the intention of the parties that the restrictive covenant should enure to the benefit of these lands and that, accordingly, the covenant was merely a covenant in gross and thus not binding upon the present appellant.

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The reasons for the unanimous judgment of the Appellate Division (1) delivered by Frank Ford J.A. show that, in construing the agreement of March 7, 1944, and reaching a conclusion as to its legal effect, the learned judges considered the evidence as to the ownership of other property by the respondent in Leduc at the relevant times and as to the business carried on by it at that place. Having done so, they found that the intention of the parties to that agreement was that of profiting or benefiting the land upon which the vendor was carrying on and intended to continue to carry on business of the same nature as that covered by the restrictive covenant and that this covenant, so construed, was binding upon the appellant.

As has been pointed out in *Union Bank of Canada* v. *Boulter Waugh Ltd.* (2), the cardinal principle of the Torrens system is that the register is everything except in cases of actual fraud on the part of the person dealing with the registered owner, subject to certain other statutory exceptions which do not affect the present consideration. The Municipal District of Leduc, from which the property in question was purchased by the appellant, held a certificate of title to the lands of which those in question formed part and the only claim of which the appellant was affected with notice was that referred to in the caveat and the attached agreement. As pointed out by Farwell J. in delivering the judgment of the Court of Appeal in *Zetland* v. *Driver* (3), 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. On the face of it, the covenants in the agreement in question fell within the first of these classes and as such, despite its term to the contrary, would not run with the land.

I am unable, with great respect, to agree with the view that, in construing this agreement, oral evidence was admissible. I do not consider that the cases referred to in the

(1) [1954] 2 D.L.R. 702; 11 W.W.R. (N.S.) 494.

(2) (1919) 58 Can. S.C.R. 385 at 387.

(3) [1938] 3 All E.R. 161.

judgment at the trial support that view. In *Bowes* v. *Rankin* (1), the report does not indicate whether the agreement sought to be enforced identified the dominant estate, and the question as to the admissibility of the evidence does not appear to have been argued. In *Zetland* v. *Driver*, as pointed out by Farwell J. at p. 162, the conveyance of the lands referred to the settlement in which the lands, of which those conveyed formed part, were referred to and expressly stated that the covenant was for the benefit of the unsold part of the land comprised in the settlement. In *Smith* v. *River Douglas* (2), the conveyance to the plaintiff Smith, in terms, provided that it was conveyed with the benefit of the agreement of April 25, 1938, which referred to, though it did not describe by metes and bounds, the lands entitled to the benefit of the covenant and the learned judges of the Court of Appeal considered that evidence to identify these lands might be given. In *Laurie* v. *Winch* (3), there was ambiguity in the terms of the grant which, Kellock J. held, might be explained by oral evidence, relying upon *Waterpark* v. *Fennell* (4), and other authorities to the like effect. In that case, the head note is to the effect that, where parcels are described in old documents by words of a general nature or of doubtful import, evidence of usage is proper to be received to show what they comprehend. There is no ambiguity in the language of the agreement of March 7, 1944, and, in my opinion, its provisions cannot be supplemented by oral evidence, not explanatory of its terms or identifying its subject matter but adding a term calculated to bring the covenant within the second class referred to by Farwell J. in *Zetland's* case.

I respectfully agree with the conclusion of the learned trial judge that the covenant in question was merely personal to the respondent and did not create an interest in the lands in question and was not binding upon the appellant.

I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Cartwright and concur in his opinion that, even if the evidence which I think to have been inadmissible is considered in construing the agreement, the covenant was a covenant in gross and did not run with the land.

(1) [1924] 2 D.L.R. 406.
(2) [1949] 2 All E.R. 179.
(3) [1953] 1 S.C.R. 49.
(4) (1859) 7 H.L.C. 650.

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I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *German, Mackay, McLaws & McLeod.*

Solicitors for the respondent: *Simpson & Henning.*