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Endless Covenant Deemed Expired After 40 Years

In a recent decision, the court clarifies that there can be temporal limits on registered restrictive covenants even though they are intended to last "forever".

Andrews and Rago were each the current owners of adjacent properties, Lot 99 and Lot 97, respectively. A dispute arose over Rago's use of a three-foot strip of land owned by Andrews, and which ran between their homes to the rear property line. Rago's present-day rights ostensibly stemmed from a 1966 registered grant by the prior owners of Andrews' land.

At that time, the grant was made to cure a shortfall in the minimum lot frontage of Andrews' land (Lot 99), in contravention of a municipal by-law. The previous owners of Rago's land (Lot 97) granted fee simple title to the strip to the then-owner of Lot 99, as well as their heirs and assigns for their "sole and only use forever." The grant also included restrictive covenants prohibiting the owner of Lot 99 from removing structures and improvements on the strip and retained a right-of-way in favour of Lot 97's owner.

When Andrews took over sole title to Lot 99 in 2008, the transfer contained express references to both the right-of-way, and to the restrictive covenants in the original 1966 deed. At that point, Rago already owned the adjacent Lot 97.

A dispute arose between them in 2010. Although Andrews did acknowledge Rago's right-of-way over her strip of land, she claimed he was actually treating it as his own, in disregard of her legal rights. For example, he had recently installed a concrete walkway along one portion of it, and an asphalt driveway covering another. She claimed Rago was essentially trespassing, because the 1966 restrictive covenants in his favour had expired in 2006, being 40 years after registration. She relied on s. 119(9) of the *Land Titles Act* ("LTA"), which states that registered covenants with no stipulated end-date or expiry are deemed to expire after 40 years.

On the strength of that LTA provision, Andrews applied for a court order deleting the covenants preventing her from removing Rago's structures and improvements. Rago objected, claiming the LTA provision did not apply, and that his rights should continue.

In resolving the conflict, the court confirmed that s. 119(9) of the LTA applies only to registered covenants with no expiry date. Under the plain meaning, "expiry" refers to the end of a legal right by the passage of time. The outcome for Rago thus hinged on whether the restrictive covenants that benefitted him bore any wording to indicate an express period, or an end-date.

The court concluded they did not. Perhaps ironically, the court ruled that the word "forever" in the registered grant suggested that the rights granted to the owner of Lot 99 would be *permanent*, not that they were envisioned to *expire* at any point. This meant the covenants were caught within the ambit of s. 119(9) of the LTA and expired in 2006, even though they were expressly referred to in the 2008 transfer to Andrews.

Andrews' application was allowed; she was no longer bound by the restrictive covenants. Rago was ordered to remove all encroachments on the strip and was precluded from constructing or parking on it. He did retain a right-of-way for the purpose of ingress and egress. See: *Andrews v. Rago*, 2019 ONSC 800.

Developer's Receivership Rescinds Sale Agreement

In 2005, a buyer named Jung purchased two unbuilt commercial condominium units from the developer of the Trump International Hotel in downtown Toronto. Prior to the closing date – which had been delayed for three years – Jung was given a revised disclosure statement indicating the development would have only 60 stories, rather than the 70 stories initially promised. He was also told that the commercial units would not have a kitchen as originally envisioned, and that the hotel would not be connected to the nearby network of underground walkways.

The developer disagreed with Jung that these were "material changes" giving him the right to rescind the agreements under condominium law. The court resolved the dispute in the developer's favour and the notices of rescission Jung had purported to submit to the developer were declared void.

After affirming an intent to close, the developer set a new 2014 closing. However, Jung objected to the statement of adjustments he received, since it called for him to pay occupancy fees, and calculated the interest very unfavorably. The developer refused to amend it to Jung's satisfaction and the matter headed for court again, this time with Jung requesting the return of his deposit.

Meanwhile, the developer ran into financial difficulty and a receiver was appointed on November 1, 2016. As part of that receivership process the court ordered the units transferred to the developer's main creditor free and clear of any security interest, excluded contracts, adverse interests and any right or claim of specific performance. The transfer included the commercial units that the

developer had agreed to sell to Jung.

Once the receiver was discharged, the developer no longer owned the units; this meant Jung could no longer obtain specific performance. He therefore brought a motion to ask for the return of his deposit, which was successful.

The motion judge characterized the developer's statement of adjustments to be "aggressive and overreaching", and ruled that Jung was not wrong in refusing to close. He was merely exercising his right to insist on fair and accurate information in the statement of adjustments.

Moreover, Jung neither breached the agreements, nor forfeited the deposits. The agreements remained valid and in force when the receiver was appointed, but were repudiated once the units Jung wanted were sold to a third party. That termination arose through no fault of Jung's and he was entitled to have his deposits back.

The Court of Appeal rejected the developer's appeal of the motion judge's ruling. The developer offered no basis on which to challenge the conclusions that the statement of adjustments was in error, that it was "aggressive and overreaching", and that Jung had been justified in refusing to close. The motion judge was correct in finding that the agreements were terminated as a consequence of the receivership and not because of anything said or done by Jung.

The developer's appeal was dismissed and Jung remained entitled to the return of his deposits, with interest. See: *Jung v. Talon International Inc.*, 2019 ONCA 644.

Improvident Sale Not Proven by Third Mortgagee

In *Kalfayan v. Stanley* the court considered a third mortgagee's claim that the second mortgagee exercised her power of sale improvidently, effectively leaving no funds from which to realize on his security.

The buyers had purchased the property for $699,000, financed with a first mortgage of $500,000. The second mortgagee was Stanley, who advanced $89,000. The third mortgagee was Kalfayan, who loaned $180,000.

When the second mortgage went into default in late 2015, Stanley opted to exercise her power of sale. The property was listed for seven months in early 2016 for $739,000. No offers were received. It was re-listed with a new agent in September 2016 and a buyer named Rahman offered $760,000 for it. He submitted a $20,000 deposit and executed an agreement in November 2016. The transaction did not close at that time, partly because of disputes over the amounts in the first mortgagee's discharge statements. Still, Rahman maintained the purchase agreement was binding, and he registered a caution on title after paying another $17,000 in land transfer taxes.

Meanwhile, the original mortgagors declared bankruptcy in 2017. They concurrently obtained an $800,000 offer from another party, Chan, but this was essentially a notional offer since the promised $8,000 deposit was never paid.

Stanley persisted in trying to sell. She got several appraisals in July 2017, and obtained values of between $730,000 and $775,000. After obtaining a writ of possession she served a second Notice of Sale and continued with her search for a buyer. Rahman, in the meantime, still insisted that he was entitled to the property under the agreement he signed. Adding to his $37,000 investment so far, he increased his offer to $780,000 (up by $20,000 from the original) to more closely reflect the most recent fair market value evaluations. Stanley eventually accepted Rahman's offer, and the sale closed in October 2017.

As a result of this sale, the first mortgagee was paid out in full, with interest. As second mortgagee, Stanley realized only part of the $89,000 she had advanced, due to certain fees that had to be deducted.

Kalfayan, who was the third mortgagee, received nothing. He sued Stanley, alleging that she had made an improvident sale and could have obtained a larger sum than the price Rahman paid. Stanley brought a motion for summary judgment, dismissing Kalfayan's action.

Her motion was granted. The court began by stating the correct test for whether Stanley conducted an improvident sale. It involved assessing whether she acted negligently and contrary to her duty of care, in light of the particular facts of the case. That duty of care required her to take reasonable precautions to attempt to obtain the market value of the property. This in turn involved the court considering whether: (1) she exercised the power of sale in good faith; (2) she obtained appraisals and tried to obtain fair market value; and (3) the property was marketed widely, including the use of a multiple listing service. The court also had to consider how long the property was on the market.

Here, the court rejected Kalfayan's complaint that Stanley ought to have re-listed the property to solicit other offers during August 2017 when the first listing expired. At that point, the property had already been listed for six months; this was in addition to the prior six-month listing period in 2016 where no offers were received except from the ultimate buyer, Rahman. The offer from the other potential buyer, Chan, was only slightly higher; it was also suspect since he offered (but never paid) only a minimal deposit and there were questions about his financial ability to close the deal.

Other facts supported the conclusion that Stanley had acted reasonably. Kalfayan had tendered no evidence that the property sold for below market value. The appraisals Stanley had obtained were not low. Indeed, they were similar to the ultimate purchase price obtained from the buyer, Rahman. Moreover, a decision not to sell to him at that price would likely have sparked litigation, since he believed he was entitled to buy the property. This would have raised Stanley's costs as well.

In these circumstances, it was not unreasonable for Stanley to decide there was nothing to gain from listing the property again. The court concluded that the sale was not improvident and the action against her was dismissed. See *Kalfayan v. Stanley*, 2019 ONSC 4680.