Claim No: SCBW-462612

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Greater Molega Lake Lot Owners Association v. MacClure,* 2017 NSSM 42

BETWEEN:

GREATER MOLEGA LAKE LOT OWNERS ASSOCIATION
Claimant

- and -

ROBERT FRASER HARRISON MacCLURE
and FREDA MAXINE MacCLURE
Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Bridgewater, Nova Scotia on August 8, 2017

Decision rendered on August 14, 2017

APPEARANCES

For the Claimant	Mark Taylor Counsel
For the Defendants	self-represented

BY THE COURT:

[1] The Claimant is a registered non-profit Society that exists solely to represent and serve the interests of the hundreds of people who own property around Molega Lake.

[2] Molega Lake is a large irregular shaped lake in Queens County, Nova Scotia, approximately a half hour outside of Bridgewater. The surrounding area is a mainly seasonal cottage area with some year round residential subdivisions. Much of the current development dates to the late 1970's or later.

[3] As is common in many parts of rural Nova Scotia, the developer builds roads that are private in the sense that the local municipality or county takes no responsibility for maintenance or snow clearing. As a condition of development, the developer is obliged to create a property owners association (such as the Claimant here) that has all of necessary legal powers to collect money from the property owners sufficient to maintain and clean the roads in perpetuity, and to supply other needed services.

[4] A common way to impose obligations on property owners to contribute their fair share of common costs is to place a covenant in the original deed from the developer, that compels owners to become members of the lot owners association and to abide by its bylaws and other lawful dictates, including annual membership fees and assessments for services provided. The association, for its part, must abide by the requirements of the *Societies Act* by giving proper notice of meetings and allowing members to stand for election to the Board of Directors.

The Claimants

[5] The Claimant, Mr. MacClure, has owned land on Molega Lake since the late 1970's. Originally he was a seasonal user. In 1990 he purchased a different lot from one Roy Michael Taylor, who was himself an original owner who had bought his lot from one of the developers. This is where the MacClures currently reside. That property was initially seasonal, but sometime after Mr. MacClure retired in the early 2000's they became year-round residents.

[6] It was in or about the early 2000's that the Claimant made a change in its fee structure to reflect the fact that more and more owners were becoming year round residents. Roads had to be plowed and sanded on a consistent basis, both to serve the needs of those residents and also to allow access to the development for service vehicles such as police or fire, Nova Scotia Power crews, oil deliveries and so on.

[7] At that time, the Claimant made the decision to charge year round residents more than seasonal residents for snow removal and sanding, on the theory that those year round residents got greater value for this service, in that it allowed them the capability to drive in and out of the development at all times. That extra charge has amounted to no more than several hundred dollars a year.

[8] The Defendants (or at least Mr. MacClure) have taken a principled stand against such extra fee, and have consistently refused to pay it. I say “principled” not because there is any apparent injustice in being assessed such fees, but

because the refusal stems from a deeply held belief in the rightness of such view.

[9] In this Claim, the Claimant seeks recovery of the assessed amounts for the years 2012, 2013, 2014, 2015 and 2016, totalling some $1,162.20.

[10] The Defendants base their defence in part on a general principle that it is unfair to differentiate between seasonal and year-round residents. They also raise a technical argument to the effect that, they say, the deed covenants which oblige them to belong to the association are “positive” covenants.

[11] The Defendants’ assertion that they are being treated unfairly does not resonate with me. Mr. MacClure suggests that the road clearing and sanding benefits all owners because having year round access increases the value of all of their lots. While there may be some truth to that, it does not answer the counter argument that year round residents get the greater benefit of being able to access their properties year round, a benefit of some considerably lesser value to seasonal residents.

[12] More to the point, it does not matter what Mr. MacClure or I think. Reasonable people may differ. However, the distinction is one that the Claimant, and no one else, is entitled to make. There is nothing in the evidence to suggest that the Claimant has not been properly constituted or that it does not have the legal authority to make the distinctions that it does, and to issue the assessments that it has. The issue is essentially political, not legal.

[13] Mr. MacClure complained at the hearing that he has trouble getting information about the inner workings of the Claimant. He submitted as evidence some random pages from various versions of the Claimant's bylaws, which contain a stipulation that the Claimant cannot change its bylaws without the written consent of the developers. This was met with evidence from the Claimant's witness, Treasurer Sylvia Cherry, to the effect that the requirement for the developers' approval was legally removed many years ago, as the development companies had less of a presence in the community.

[14] Even if the developers' input was still required, I would not accept the proposition that the Claimant did not have the authority to begin charging year round residents more for winter snow removal than it charges seasonal residents.

[15] Also, I cannot give any effect to Mr. MacClure's complaints about the supposed lack of transparency of the association. I suspect that his trouble getting information has more to do with his lack of computer literacy, and the fact that he owes money to the Claimant and is in a disputatious relationship with it.

[16] This brings us to the Defendants' main argument, that they are not bound by so-called positive covenants.

[17] In the original deed from the developer to Mr. Roy Taylor, the following words are found within the Schedule "D" covenants:

> 5. The Purchaser agrees to join and become a member of a lot owners' association to be formed amongst all the lot owners of the subdivision and to abide by all the rules and by-laws established by the association. The

> Vendor agrees to convey to the aforesaid lot owners' association all the roads and green areas set out on the plan of subdivision. The Vendor reserves a right-of-way over all green areas and roads conveyed, for all and any purposes which the Vendor shall deem necessary.....

[18] The Purchaser also agrees in that deed to place words in subsequent deeds that impose the same obligations on subsequent purchasers.

[19] The law has traditionally made an important distinction between positive and negative, or so-called restrictive, covenants. Restrictive covenants, if not otherwise objectionable (such as by being discriminatory against certain categories of people) are said to "run with the land." Once such covenant is registered, it binds all successors in title regardless of what their deed may say. For example, a restrictive covenant may forbid buildings above a certain height. A subsequent owner who ignores such a restriction can be legally compelled to comply with it.

[20] A positive covenant, on the other hand, sets out what someone is positively obligated to do, such as to belong to a homeowners association and to pay certain moneys to it. Positive covenants are said not to run with the land. In other words, a landowner cannot be compelled to perform the covenant merely because he holds title to the land and would be deemed to have notice of the registered covenant. Something more is required.

[21] This is the distinction that the Defendants raise to argue that they are not bound to pay the fees levied by the Claimant, although they pay a part of those fees voluntarily.

[22] The law is commented upon by the Ontario Court of Appeal in *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited,* 2002 CanLII 44913 (ON CA):

> [17] The rule that positive covenants do not run with the land has been a settled principle of the English common law for well over a century and it is undisputed that it has clearly been adopted in Canada: *Parkinson v. Reid*, 1966 CanLII 4 (SCC), [1966] S.C.R. 162, 56 D.L.R. (2d) 315. It appears to be equally undisputed that the rule at times causes inconvenience, that its application in some cases may even result in unfairness, and that the present state of the law should be modified to meet the needs of modern conveyancing. However, it is my view that the call for reform is not one for the courts to answer but for the legislature. Any change in the law in this area could have complex and far- reaching effects that cannot be accurately assessed on a case-by-case basis. The need to preserve certainty in commercial and property transactions requires that any meaningful reform be achieved by legislation that can be drafted with careful regard to the consequences.
>
> [18] Therefore, since positive covenants do not run with the land, Amberwood is not bound by the positive covenant to pay the interim expenses under the Reciprocal Agreement solely by virtue of having acquired the Phase 2 lands with notice of its terms. The question remains whether Amberwood is liable to pay the expenses under some other recognized legal principle.

[23] That case illustrates the fact that the technical legality may be inconvenient and potentially lead to an injustice. As such the court looked to find another way to hold the defendants liable.

[24] The fallacy in the Defendants' argument is that the covenant does not need to run with the land, in order to be enforceable, if its effect can be shown to operate in some different fashion. In the case here, the first and most obvious place to look is the deed wherein the Defendants took their title. That deed from Mr. Roy Taylor to Mr. MacClure, on its face page, contains the following:

> THE GRANTOR hereby conveys to the GRANTEE, Robert F. H. MacClure, the lands described in Schedule "A" to this Warranty Deed, and hereby consents to this disposition, pursuant to the Matrimonial Property Act of Nova Scotia, SUBJECT TO the building restrictions and covenants contained in Schedules "B" and "C" as set out in a Deed from Twin Lake Estates Limited to Roy Michael Taylor dated October 2, 1978 and recorded in the Registry of Deeds Office at Liverpool, N. S., in Book 174 at Page 753.
>
> AND IT IS DECLARED and agreed that the said restrictions and covenants shall continue in force and shall be binding upon and in respect of the lands hereby conveyed for the benefit of and be enforceable by the GRANTOR and every other person seized or possessed of any part of lands known as Twin Lake Estates Subdivision, area of Beaver Dam Lake, Queens County, Nova Scotia.
>
> AND THE SAID GRANTEE, his heirs, executors, administrators and assigns hereby covenant, promise and agree to and with the said GRANTOR and his assigns that they will observe and perform the aforesaid restrictions and covenants, with the intent that all subsequent purchasers shall be bound by the aforesaid restrictions and covenants.

[25] This page was signed by Mr. MacClure.

[26] I note a minor discrepancy between the deed to Taylor and the wording above. The covenants are actually in schedules “C” and “D,” not “B” and “C” as the later document would suggest, but I believe that the intent is clear and this discrepancy may be treated as an innocent mistake.

[27] The net effect is that Ms. MacClure positively bound himself to those covenants, and is subject to the legal authority of the Claimant.

[28] The Claimant also seeks recovery against Ms. MacClure, the spouse of Mr. MacClure. Ms. MacClure was not in court. The evidence before me is that at some point in recent years, Mr. MacClure executed a deed from himself to

himself and his spouse, jointly. A copy of that deed is not before me. Given Mr. MacClure's opposition to the Claimant, I will assume for present purposes that this later deed did not contain that same positive covenant that personally binds Mr. MacClure.

[29] In that case, I would have to agree that Ms. MacClure is not contractually bound to be a member of the Claimant and to pay its assessments. The point may be academic, because Mr. MacClure is liable for the debt, so someone in that household will have to pay.

[30] Counsel for the Claimant suggested that it was enough that Ms. MacClure had knowledge of the covenants, but I cannot agree, as that would be the equivalent of suggesting that the covenant runs with the land. It does not, to the extent that it imposes a positive obligation. I will note that because the Claimant legally owns the roads, it may have other legal means at its disposal to compel Ms. MacClure to pay the assessments, should push come to shove, but that question is not before me.

[31] The last argument made by Mr. MacClure was to the effect that the Small Claims Court lacks jurisdiction to hear this claim, because (he suggests) it involves an interest in land. This argument misconceives the claim. It is based on contract, not on an interest in land. Mr. MacClure has contractually bound himself to belong to the Claimant and "*observe and perform the aforesaid restrictions and covenants*." One aspect of that performance is to pay the assessed amounts for snow removal. The claim is recoverable as a contractual debt.

[32] The other cases cited by Mr. MacClure do not assist him; indeed, they support the view that a claim of this nature is within the competence of the Small Claims Court.

[33] The Claimant shall accordingly have judgment against Mr. MacClure for $1,162.20 plus its costs of $204.66. The claim against Ms. MacClure will be dismissed.

Eric K. Slone, Adjudicator