Court of Queen's Bench of Alberta

Citation: Blackburne Creek Homeowners Association v Burt, 2019 ABQB 608

Date:
Docket: 1303 10019, 1303 10020, 1303 10021
Registry: Edmonton

Between:

1303 10019

Blackburne Creek Homeowners Association

Plaintiff

- and -

John Burt and Charlene Burt

Defendants

1303 10020

Blackburne Creek Homeowners Association

Plaintiff

- and -

Angeline Battochio

Defendant

1303 10021

Blackburne Creek Homeowners Association

Plaintiff

- and -

Joanne Normand

Defendant

Reasons for Decision
of the
Honourable Mr. Justice M. Kraus

I. Overview

[1] The Defendants are the owners of three homes in the Blackburne Creek subdivision in southwest Edmonton. Their homes are subject to the Blackburne Creek Restrictive Covenant Caveat registered on title. The Plaintiff Blackburne Creek Homeowners Association has the right and responsibility to enforce the Restrictive Covenant against homeowners.

[2] The relevant clause in the Restrictive Covenant with respect to roofs is that "All roofs are to be wood shakes or shingles only." On July 5, 2013, the president of the Homeowners Association noticed that the Defendants had new synthetic rubber roofing materials delivered to their homes. The Homeowners Association immediately notified the Defendants that the synthetic rubber roofing materials did not comply with the Restrictive Covenant. The Defendants disregarded the notice and installed the synthetic rubber roofing materials on their roofs to replace the old pine wood roofing materials which had reached the end of their life cycle.

[3] At this trial, the Homeowners Association seeks to enforce the Restrictive Covenant by means of a mandatory injunction against the Defendants to have them replace their synthetic rubber roofing materials with wood roofing materials. The Defendants state that the synthetic roofing materials comply with the terms, objectives, and intent of the Design Guidelines in the Restrictive Covenant and therefore seek a dismissal of the action.

[4] For the reasons below, the Restrictive Covenant is enforceable against the Defendants, the roofing materials must be made out of wood, and the Homeowners Association is entitled to a mandatory injunction against the Defendants to compel them to replace the synthetic rubber roofing materials with wood roofing materials.

II. Evidence

A. Background Facts

[5] Blackburne Creek is a neighbourhood subdivision in southwest Edmonton bordered by powerlines and the Anthony Henday Freeway to the north, Calgary Trail to the east, Ellerslie Road to the south, and 111 Street to the west. The subdivision was developed by Blackburne Creek Development Corporation ("BCDC") in the early 1990s. The development includes 480 homes. The BCDC registered the Restrictive Covenant on title to 417 of these homes, including on title to the lands owned by the Defendants. 63 of the homes in the subdivision and a parcel of land owned by the City of Edmonton with a gazebo are not subject to the Restrictive Covenant.

[6] The Defendants are three adjoining neighbours in Blackburne Creek. Each bought their respective home with knowledge of the Restrictive Covenant. Prior to 2013, each home had wood pine roofing materials. By 2013, the life cycle of the wood pine roofing materials was reaching its end. Each Defendant undertook a significant amount of research and deliberation

over many months or even years to arrive at a decision for the selection of replacement roofing materials. This included attending trade shows, viewing samples, viewing roofing materials in other subdivisions, internet research, speaking with neighbours, viewing roofing materials installed by the Homeowners Association on a gazebo on a parcel of land owned by the City of Edmonton in the subdivision, and reviewing the Restrictive Covenant.

[7] Each Defendant was dealing with the roof replacement issue independently, but after each found out that their neighbours were also looking at replacing their roofs, the three Defendants decided to purchase the same synthetic rubber roofing materials to replace the old pine wood roofing materials on their roofs. Each Defendant was satisfied that the synthetic rubber roofing materials complied with the Design Criteria in the Restrictive Covenant – it met the definition of shingle, it had a wood like look consistent with the intent of the Design Guidelines, and it compared favourably with treated wood products. The decision to purchase the synthetic rubber roofing materials was made in the spring of 2013. These new roofing materials were ordered on or about June 13, 2013 and delivered to the Defendants on Friday, July 5, 2013. The demolition of the old pine wood roofing materials commenced on or about July 2, 2013 and the installation of the new synthetic rubber materials on all three roofs was completed on or about July 11, 2013.

[8] The president of the Homeowners Association, Brian Hawrelak, testified that he was out for a morning walk in the neighbourhood on July 5, 2013, when he saw a flatbed truck with roofing materials being delivered to the Defendants. He spoke to the delivery driver and was advised that the delivered roofing materials were made from synthetic rubber. Based upon this information, Mr. Hawrelak immediately called the secretary of the Homeowners Association, Grant Ainsley, to confirm whether or not the Defendants were subject to the Restrictive Caveat.

[9] Upon receiving confirmation from Mr. Ainsley that the Defendants had the Restrictive Covenant registered on title to their lands, Mr. Hawrelak and Mr. Ainsley contacted the Defendants (by telephone or in person) on July 5, 2013 to advise them that the new roofing materials did not meet the roofing requirements in the Restrictive Covenant. The Homeowners Association followed up with a letter to each Defendant on the same day, i.e. July 5, 2013, confirming that the new roofing materials did not meet the roofing requirements in the Restrictive Covenant. One of the Defendants received a second letter dated July 6, 2013 to correct the addressee in the Homeowners Association letter to correspond with the name registered on title.

[10] A follow up letter from the Homeowners Association's lawyers was sent out on July 9, 2013 to each Defendant, which letter threatened litigation if the Defendants did not comply with the Restrictive Covenant. A special meeting of the Homeowners Association was held on July 11, 2013, at which time it was resolved that the Homeowners Association would instruct its lawyers to take appropriate legal action against the Defendants to have them comply with the Restrictive Covenant. On July 15, 2013, the Homeowners Association filed three Statements of Claim, one against each Defendant. By Consent Order dated August 2, 2018, the trial of the three actions was ordered to be heard concurrently.

[11] Evidence at trial was heard from Mr. Hawrelak, the president of the Homeowners Association, and from the Defendants. In addition, a report from a roofing expert on behalf of the Defendants was entered into evidence by agreement, without calling the expert as a witness at trial.

B. The Restrictive Covenant

[12] The Blackburne Creek Restrictive Covenant Caveat consists of two parts: the Caveat and Exhibit 1 Land Use and Development Restrictive Covenant Schedule. Schedule 3 to Exhibit 1 is the Blackburne Creek Design Guidelines.

[13] It is not in dispute that the Caveat was registered by the BCDC on title to the lands owned by the Defendants, that the Caveat runs with the land, and that enforcement of the Restrictive Covenant fell to the Homeowners Association once 75% of the subdivision homes were sold by the BCDC. It is not in dispute that over 75% of the lands were sold by the BCDC prior to 2013 and that the BCDC was no longer in existence in 2013. It is not in dispute that the Homeowners Association has the right and responsibility to enforce the Restrictive Covenant.

[14] The relevant portions of the Design Guidelines Objectives in the Restrictive Covenant are as follows:

- There are two (2) primary objectives which have been considered in developing these design guidelines:

1. Quality of the Community – the Design Guidelines are the mechanism which encourages the community to be of a high level of quality, reflecting an image appropriate to its setting.
2. The Community Image – The general architectural theme of this community will encourage homes which are in keeping with the more "traditional" styled homes which would be more compatible with the natural woodland setting afforded by the development area.

- Roofs – *All roofs are to be wood shakes or shingles only* (my emphasis). Other metal tiles or sheet roofing, clay tiles, slate or asphalt shingles, including the heavier weight shingles, are not permitted.

III. Issues

[15] The overarching issue to be decided is the interpretation of the Restrictive Covenant and, more specifically, whether or not the Homeowners Association can enforce the Restrictive Covenant to require the Defendants to have wood roofing materials to the exclusion of other roofing materials.

[16] A number of issues were raised by the parties, which may be summarised as follows:

a) What is the proper interpretation of the design guidelines for roofs in the Restrictive Covenant?

b) Is the Restrictive Covenant restrictive and enforceable?

c) Is the Restrictive Covenant ambiguous?

d) Is the Restrictive Covenant unenforceable because it is not being enforced uniformly?

e) Is the equitable remedy of a mandatory injunction sought by the Homeowners Association fair and appropriate?

IV. Analysis

A. General principles of interpretation of the Restrictive Covenant

[17] The Plaintiff and Defendants agree that the interpretation of the Restrictive Covenant is like the interpretation of a contract which requires that it be interpreted as a whole and that its words be used to find the intentions of the parties and reconcile all of its terms: ***Tanti v Gruden***, 1999 ABCA 150; ***Deagle v 1678452 Alberta Ltd***, 2014 ABCA 406; ***Goodwin v Ridley***, 2006 BCCA 581 at para 8.

[18] A decision maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract, while not allowing the surrounding circumstances to overwhelm the words of the agreement and should consist only of objective evidence of the background facts at the time of the execution of the contract: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 47-48 and 57-60 and ***Hole v Hole***, 2016 ABCA 34 at para 33.

[19] Both parties agree that the Court should interpret the Restrictive Covenant and Design Guidelines in a practical common-sense approach consistent with the objectives of the Design Guidelines relating to the Quality of the Community, as being of a high level of quality and reflecting an image appropriate to its setting, and the Community Image, as being traditional styled homes compatible with the natural woodland setting in the subdivision.

B. What is the proper interpretation of the Design Guidelines for roofs in the Restrictive Covenant?

[20] The clause in dispute is "All roofs are to be wood shakes or shingles only." The meaning of the word "or" is pivotal in the interpretation of the Design Guidelines for roofs in the Restrictive Covenant.

[21] The Homeowners Association argues that the word "or" must be understood in the context of the entire Restrictive Covenant and Design Guidelines to be inclusive and therefore that the adjective "wood" modifies the noun "shakes" and also that the adjective "wood" modifies the noun "shingles" with the result that roofs have to be made from wood shakes or wood shingles.

[22] The Homeowners Association points out that the next sentence after the clause in dispute reads as follows: "Other metal tiles or sheet roofing, clay tiles, slate or asphalt shingles, including the heavier weight shingles, are not permitted." The Homeowners Association argues that if shingles did not have to be made from wood, it would lead to the absurd result that shakes must be made from wood but shingles could be made from any other non-prohibited materials such as, for example, terracotta or cloth, all of which would not harmonize with and defeat the objectives of the Design Guidelines. In other words, the Homeowners Association argues that shingles have to be made from wood and that other materials, including those that are specifically prohibited and those that are not wood but mimic the appearance of wood, are prohibited.

[23] The Defendants agree that the word "or" must be understood in the context of the entire Restrictive Covenant and Design Guidelines but, unlike the Homeowners Association's interpretation, the Defendants argue that the word "or" is disjunctive. In other words, the adjective "wood" modifies the noun "shakes" only, but the adjective "wood" does not modify the

noun "shingles". Thus, shakes have to be made from wood, but shingles do not have to be made from wood.

[24] Further, the Defendants argue if the material for the roof is not specifically prohibited, it is allowed, provided the shingles harmonize with the objectives of the Design Guidelines. More specifically, the Defendants argue that the synthetic rubber roofing materials are of a high level of quality reflecting an image appropriate to its setting and mimic the appearance of wood to have the appearance of an architectural theme of traditional styled homes in a woodland setting. In other words, the synthetic rubber roofing materials are shingles and comply with the objectives of the Design Guidelines.

[25] Generally speaking words should be given their ordinary meaning. In ordinary usage, "and" is conjunctive and "or" disjunctive. However, these two conjunctions are ambiguous and their use is often problematic. In ***566779 Alberta Inc v Comac Food Group Inc***, 2000 ABCA 211, our Court of Appeal stated at para 4:

> In E.A. Driedger's Construction of Statutes (1983, Butterworth: Toronto), the writer comments on the meaning of "or" as follows (at p. 16):
>
> "Or does not mean and, and and does not mean or. But in normal usage, and and or can produce the same result. Thus, in an enumeration of power to make regulations, for example, if the separate items are joined by and, the powers are normally regarded as joint and several, and the authority may exercise all or any of them; but if the conjunction is or the powers are normally regarded as inclusive and the authority may exercise any or all of them.
>
> There are situations where the enumerated items are mutually exclusive; in that case, and must be read as several but not joint, and or must be read as exclusive."
>
> [Footnotes omitted in 566779 Alberta]

[26] In ***Ahluwalia v College of Physicians and Surgeons (Manitoba)***, 1999 CarswellMan 230, the Manitoba Court of Appeal stated at paras 14-17:

> While the word "or" is normally read in a disjunctive fashion, both academic and case law authority have consistently approved the view that it may be read in a conjunctive sense if that is the perceived legislative intent.
>
> In Maxwell on the Interpretation of Statutes (12th Ed. 1969), by P. St. J. Langan, at pp. 232-233, it is stated:
>
> "In ordinary usage, 'and' is conjunctive and 'or' disjunctive. But to carry out the intention of the legislature it may be necessary to read 'and' in place of the conjunction 'or,' and vice versa."
>
> There are any number of Canadian and English authorities that have construed the word "or" in a conjunctive manner. It depends upon the purpose or intention of the legislature and the context in which the word appears.
>
> In Federal Steam Navigation Co. v. Department of Trade and Industry, [1974] 2 All E.R. 97 at p. 99 (H.L.), the statute under consideration provided that:
>
> "If any oil ... is discharged ... into a part of the sea which is a prohibited sea area, ... the owner or master of the ship shall, ... be guilty of an offence ..."

> The question was whether only the owner or only the master, or both the owner and the master, should be liable. In the result, the majority held that the word "or" should be construed conjunctively and should be replaced by "and". Lord Wilberforce noted at p. 110:
>
> "In logic, there is no rule which requires that 'or' should carry an exclusive force. Whether it does so depends on the context."
>
> And Lord Salmon wrote at p. 113:
>
> "There is certainly no doubt that generally it is assumed that 'or' is intended to be used disjunctively and the word 'and' conjunctively. Nevertheless, it is equally well settled that if so to construe those words leads to an intelligible or absurd result, the courts will read the word 'or conjunctively and 'and' disjunctively as the case may be; or to put it another way, substitute the one word for the other. This principle has been applied time and again even in penal statutes: see for example R. v. Oakes, [[1959] 2 All E.R. 92 (C.C.A.)]."

[27] The interpretation of the words "shake" and "shingle" is also important to understand in the clause in dispute "All roofs are to be wood shakes or shingles only."

[28] The Defendants rely on the report of a roofing expert, Justin Bell. Mr. Bell does not define "shake" in his report but cites the National Roofing Contractors Association for the definition of a "shingle" as "a small unit of prepared roofing designed for installation with similar units in overlapping rows or courses on inclines normally exceeding 3:12 slope." He goes on to provide an opinion that the Eurolite shingle installed by the Defendants fits the definition of shingle and "provides a cost-effective alternative to wood roofing products while maintaining or exceeding the performance/visual characteristics of the wood products that are available in our market". In other words, the synthetic rubber shingles harmonize with the objectives of the Design Guidelines because they are of a high level of quality reflecting an image appropriate to its setting and keep with the appearance of traditional styled homes compatible with the natural woodland setting in the subdivision.

[29] In addition, Chris Battochio, the husband of the Defendant Angeline Battochio, gave evidence that he was involved with the initial drafting in the early 1990s of the Design Guidelines in the Restrictive Covenant as part of his employment with Beaverbrook Homes, the parent company of the BCDC. Mr. Battochio said that the intent of the Design Guidelines was for them to be flexible to allow for innovation in the future including for roofing materials. The Design Guidelines state that "the possibilities for creative design and the use of more natural materials is myriad". However, the Design Guidelines do not specifically state that non-wood roofing materials are allowable and do not specifically contemplate non-wood roofing materials in the future.

[30] The words "shake" and "shingle" were used interchangeably prior to and at trial. A June 13, 2013, GEM Inc. shipping order and three GEM Inc. invoices, dated July 5, 2013, refer to the synthetic rubber roofing materials as a Eurolite "shake". The July 10, 2013 email from board member, Cornelia VanDewark, to the board refers to "shingles/shakes" on the gazebo. Mr. Battochio refers to the replaced wood roofing materials as pine "shakes", the synthetic rubber roofing materials as "shake" in his July 6, 2013 email to Mr. Hawrelak, and he refers to the synthetic roofing materials as "shingle" at trial. In his report, Justin Bell refers to "wood

shake/shingle," "cedar shingle," "wood shingle," and to the synthetic rubber roofing materials as a Eurolite "shingle". As mentioned previously, Mr. Bell provided a definition for "shingle", but not for "shake".

[31] The Restrictive Covenant must be interpreted as a whole in a contextual manner and factual matrix by giving the words their ordinary and grammatical meaning but the surrounding circumstances known to the parties at the time of formation of the contract, such as to Mr. Battochio, cannot overwhelm the words in an agreement.

[32] In my view, the correct interpretation of the clause "All roofs are to be wood shakes or shingles only" is that the word "or" is used conjunctively and the words "shake" and "shingle" are used interchangeably. In other words, the intention of the Restrictive Covenant is to prescribe the exclusive use of wooden roofing materials such that the roofing materials must be made of wood, whether those roofing materials are shakes or shingles. Therefore, the Defendants' synthetic rubber roofing materials are prohibited under the Restrictive Covenant.

C. Is the Restrictive Covenant restrictive and enforceable?

[33] The building scheme extends over the 417 homes in the Blackburne Creek subdivision who have the Restrictive Covenant registered on title. The owners of the lands may enforce the Restrictive Covenant and are subject to the Restrictive Covenant: ***Potts v McCann***, 2002 ABQB 734 at para 14; ***Crump v Kernahan,*** 1995 Carswell Alta 348 at para 33; ***Restrictive Covenant Instrument 213AT (Re)***, 2019 ABQB 309 at para 11.

[34] The other 63 homes in Blackburne Creek and the City of Edmonton land with gazebo are not subject to the Restrictive Covenant.

[35] Brian Hawrelak gave evidence that the Homeowners Association had to enforce the Restrictive covenant under the Homeowners Association Articles of Association. Sections 2.9 and 2.9.6 of the Articles of Association states as follows:

> The Homeowners Association shall have the following duties: ...
>
> To enforce to the best of its ability the restrictive covenant and restrictive covenant caveat that is registered at the Office of the North Alberta Land Registration District by the Developer against the titles of the Lots and Units located in the Subdivision.

[36] In ***Crump***, the Court stated that there are three requirements for a Restrictive Covenant to be enforceable at para 16:

> In order for a covenant to be enforceable against an assignee of the original covenantor's land, in this case Mr. Crump, equity has traditionally demanded that three conditions be fulfilled: 1) the covenant must be negative in nature; 2) the covenant must be made for the protection of land retained by the covenantee or his assignees; 3) the burden of the covenant must have been intended to run with the covenantor's land. If any of these three conditions is not met, then the burden of the covenant will not run with the land. (See R.E. Megarry and H.W.R. Wade, The Law of Real Property, 5th ed. (London: Stevens & Sons, 1984), pp. 773-80.)

[37] It is not disputed by the parties that the Restrictive Covenant satisfies the second and third requirements of the test. The Restrictive Covenant was made for the protection of the land retained by the covenantee or assignee and the burden of the Restrictive Covenant runs with the

covenantor's land. The Restrictive Covenant imposes a building scheme over an area of land in the subdivision to regulate the development of the subdivision. The Defendants state, however, that the Restrictive Covenant does not satisfy the first requirement of the test. The Defendants state that the Restrictive Covenant is not negative or restrictive and therefore not enforceable.

[38] In ***Lindner v Chittick***, 2010 ABQB 819 at para 31, the Court explained the first part of the test as follows:

> The essence of the first requirement is that the covenant must prohibit. It does not matter whether the language itself is positive or negative. For example, the covenant may not require the owner to build, but if the owner choses to build, the covenant may impose restrictions on how she or he will build: ***Crump*** at para 11.

[39] In my view, the Restrictive Covenant is restrictive and enforceable. The Restrictive Covenant does not allow any development, but only development which provides for the construction of a high level of quality traditional styled homes compatible with natural woodland areas within and adjacent to the subdivision. There are many restrictions in the Restrictive Covenant. As discussed above, there is a restriction on roofing materials such that the roofing materials must be made from wood and the roofing materials cannot be metal tiles or sheet roofing, clay tiles, slate or asphalt shingles, including heavier weight shingles. Other parts of the Restrictive Covenant, not quoted above, also put restrictions on other matters such as exterior design, setbacks, minimum size requirements, building elevations, cladding materials, chimneys, detailing, driveways and sidewalls, landscaping, fencing, lot grading, and retaining walls. The Restrictive Covenant does restrict and thus satisfies the first requirement for a Restrictive Covenant to be enforceable.

D. Is the Restrictive Covenant ambiguous?

[40] The Defendants argue that enforcement cannot occur because the Restrictive Covenant is ambiguous and that when there is ambiguity, the ambiguity should be resolved in favour of the free use of the land.

[41] It is not in dispute that the terms of a restrictive covenant must be clear and unambiguous in order to be enforceable: ***585582 BC Ltd v Anderson***, 2015 BCCA 261 at para 21; ***Anderson v Dickie (1915)***, 84 LJPC 219 at 227 (HL).

[42] In ***Russell v Ryan***, 2016 ABQB 526 at para 26, the Court stated:

> Any ambiguity about whether a restrictive covenant should apply to prevent the construction of a dwelling house on a new lot, or should not do so, ought to be resolved in favour of the free use of the land: ***Noble v Alley***, [1951] SCR 64, [1950] SCJ No 34, citing ***Anderson v Dickie*** (1915), 84 LJPC 219 at 227.

[43] Assuming, without deciding, that the free use of the land applies not only when there is ambiguity about the use of the land but also when there is ambiguity about building related matters such as roofing materials, the correct approach to interpret a restrictive covenant is set out in ***Hofer v Guitonni***, 2011 BCCA 393, the BCCA as follows at para 14:

> Thus, interpreting a restrictive covenant, whether found in a building scheme or not, involves no special approach. It is a contractual document, and the general principles of contract interpretation apply.

[44] In my view, the Design Guidelines in the Restrictive Covenant are not ambiguous. The roofing materials, shakes or shingles, must be made of wood. Therefore, there cannot be a free use of the land with respect to the roofing materials.

E. Is the Restrictive Covenant unenforceable because it is not being enforced uniformly?

[45] The Defendants argue that enforcement of the Restrictive Covenant cannot occur because the Homeowners Association is not enforcing the Restrictive Covenant uniformly.

[46] The Defendants presented evidence about breaches of the Restrictive Covenant by other homeowners in the subdivision. The alleged breaches were not particularized so it is not clear if the breaches were from the group of 417 homes subject to the Restrictive Covenant or from the group of 63 homes which were not subject to the Restrictive Covenant. The alleged breaches of the Restrictive Covenant relate to landscaping and fencing such as not having two trees in the front yard, having prohibited colours of fence or prohibited colours of wood on roofs, having prohibited materials for fences and gates, having plastic grass, having rocks and shrubs landscaping without lawns, and other alleged breaches.

[47] The Homeowners Association argues that the Defendants did not put these alleged breaches to Mr. Hawrelak in cross examination so the Homeowners Association could not respond to the alleged breaches as part of the Plaintiff's evidence and that I should therefore exclude this evidence, based upon the rule in ***Browne v Dunn*** (1893) 6 R 67 (HL), and reiterated in ***R v Werkman***, 2007 ABCA 130 at para 7. Even if the allegations are admissible, I give little or nor weight to these allegations.

[48] The president of the Homeowners Association, Brian Hawrelak, owns land in the subdivision which is subject to the Restrictive Covenant. Mr. Hawrelak had a storage shed with a flat metal clad roof in July, 2013. The storage shed did not have a sloped roof and did not have roofing materials made from wood. The Defendants argue that the storage shed did not comply with the Design Guidelines, that the Homeowners Association did not take steps to enforce the Restrictive Covenant against its president, Mr. Hawrelak, and that therefore the Homeowners Association was not enforcing the Restrictive Covenant uniformly.

[49] The Homeowners Association responds that Mr. Hawrelak's storage shed was a moveable structure and not subject to the same restrictions, conditions, and covenants in the Restrictive Covenant as a permanent structure. I do not need to decide whether the storage shed is subject to the same considerations as a permanent structure in the Restrictive Covenant because by the date of trial, the roof of the storage shed was sloped and was made from wood materials. Even if Mr. Hawrelak's shed had breached the Restrictive Covenant in 2013, the breach was cured by the time this matter proceeded to trial.

[50] A Restrictive Covenant can become unenforceable through violations and lack of enforcement: ***March v Evans***, 2017 ABQB 200 at para 29. However, I agree with the statement of the Court in ***Hearthstone Properties Ltd v Thiessen***, 2006 ABQB 135 at para 61, where the Court stated:

> I must also reject submission of counsel for the Batchelors that the evidence tendered by the Batchelors of matters of non-compliance by established land owners with respect to other aspects of the restrictive covenant are such that the action for breach of the restrictive covenant cannot be maintained. The evidence

submitted was of *de minimus* value complaints some of which were at best temporary.

[51] Further, a breach of a Restrictive Covenant by a few does not make the Restrictive Covenant unenforceable. In ***Amar Developments Ltd v Jaswal***, 2016 ABQB 636 at paras 49-51, the Court stated as follows:

> In certain circumstances, a valid restrictive covenant may become unenforceable. This was explained by this Court in ***Potts v McCann***, 2002 ABQB 734 at para 32:
>
> > At common law an otherwise valid restrictive covenant could become unenforceable if the character of the neighbourhood changed significantly after the imposition of the covenant. This would usually be an indication that the owners of the property in question had acquiesced in numerous violations of the covenant, such that the original objectives of the building scheme had been defeated. The covenants might also become spent, obsolete or unworkable. Further, the Court might decline to enforce a covenant if its enforcement was vexatious.
>
> Evidence of other minor and major violations of a valid restrictive covenant may cause a restrictive covenant to be unenforceable: ***Lafortune v Puccini*** (1991), 2 OR (3d) 689 (Ont Gen Div).
>
> In ***Potts***, the Court stated at para 35 (emphasis added):
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> > The law is however clear that the mere discharge of a restrictive covenant from one property in the building scheme, or the breach of the covenant by a few owners, is not sufficient to undermine the entire covenant.
>
> This court has defined the term "vexatious" to mean that a litigant is attempting to "abuse or misuse the legal process": ***Jamieson v Denman***, 2004 ABQB 593 at para 127.

[52] The Homeowners Association built a gazebo with synthetic rubber roofing materials on a parcel of land owned by the City of Edmonton located within the Blackburne Creek subdivision. The synthetic rubber roofing materials on the gazebo were viewed by the Defendants and influenced them to select similar synthetic rubber roofing materials for the roofs of their own homes. The Defendants argue that the Homeowners Association is being capricious and arbitrary in allowing the synthetic rubber roofing materials on the gazebo but not on the roofs of the Defendants' homes.

[53] The problem with the position of the Defendants is that the City of Edmonton owns the parcel of land with the gazebo and the Restrictive Covenant does not apply to that land. The gazebo is like the 63 homes out of the 480 homes in the subdivision which do not have the Restrictive Covenant registered on title. The president of the Homeowners Association estimates that there are three roofs in the 63 single family dwellings which do not have wood roofing materials. There is no beach of the Restrictive Covenant when the Restrictive Covenant is not registered on title to the land.

[54] Although the wisdom of the Homeowners Association to install synthetic rubber roofing materials on the gazebo on City of Edmonton land in the subdivision may not be apparent, for the sake of clarity, I do not find that the Homeowners Association is being vexatious in seeking

to enforce the Restrictive Covenant against the Defendants. Further, I do not find that the Restrictive Covenant has become unenforceable through other alleged breaches or lack of enforcement.

F. Is the equitable remedy of a mandatory injunction sought by the Homeowners Association fair and appropriate?

[55] The Homeowners Association argues that a mandatory injunction is fair and appropriate to enforce the Restrictive Covenant. The Defendants argue that the equitable remedy sought by the Homeowners Association is not appropriate and not a fair result.

[56] The value of a Restrictive Covenant affecting land rests with the continued observance of the Restrictive Covenant rather than monetary compensation for a breach. Accordingly, the presumptive remedy after a trial for a breach of a Restrictive Covenant is an injunction rather than a judgment for damages although the Court retains discretion to exercise whether an injunction is appropriate: ***Amar Developments Ltd*** at para 66; ***Potts*** at para 43; ***Crump*** at para 31; ***Tanti*** at para 27.

[57] In ***GA Developments Ltd v Girard***, 1999 ABQB 719, the Court stated as follows at para 45:

> Often, as the Applicant suggests, a prohibitory injunction will be granted to restrain a breach of a restrictive covenant: Crump v. Kernahan et al (1995), 173 A.R. 123 at 25 (Q.B.); Tanti v. Gruden, [1999] A.J. No. 526 at 27 (C.A.). Mandatory injunctions, as in this case, to tear down a fence, are given out less readily. Both remedies are in the equitable jurisdiction of the court and are thus discretionary and will be refused if it would be inequitable to grant them. As well, equitable defences may be raised against them: Miller v. R., [1927] Ex. C. R. 52, aff'd [1928] S.C.R. 318 (S.C.C.) [Fed.]. As Megarry, J. noted in Shepherd Homes Ltd. v. Sandham, [1971] Ch. 340 at 351, [1970] 3 All E.R. 402:
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> > The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a 'fair result', and this involves the exercise of a judicial discretion.

[58] Irreparable harm does not need to be proven for a permanent injunction to be granted. In ***McDonald's Restaurants of Canada Ltd v West Edmonton Mall Ltd***, 1994 CarswellAlta 205, the Court state as follows at paras 82-3:

> Because of the presumption in favour of a permanent injunction, the plaintiff may not need to establish irreparable harm or damage at trial, although absence of such may be a factor for the court to consider in the exercise of its equitable jurisdiction.

> There are several reasons for not necessarily requiring proof of damage. First, damages are usually not an appropriate remedy because the purpose of the negative covenant is to prevent parties from committing breaches, not to force them to pay for committing the breaches: ***Chatsworth Estates Co. v. Fewell***, [1931] 1 Ch. 224 at 233. Second, by granting a permanent injunction, the court is doing nothing more than giving sanction to what two parties, fully apprised of the circumstances and possessed of competent legal advice, have agreed. The law on this point is summarized at 24 Halsbury's (4th), para. 904:
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> > *Proof of damage unnecessary* ... The [perpetual] injunction does nothing more than give the sanction of the process of the court to that which is already the contract between the parties. In effect it is the specific performance by the court of that negative bargain which the parties made with their eyes open. [Footnote omitted.]

[59] The Restrictive Covenant affects 417 homeowners in the subdivision including the Defendants. Verbal and written notice about a breach of the Restrictive Covenant was provided to the Defendants on July 5, 2013, which was the same day that Mr. Hawrelak discovered that the synthetic rubber roofing materials were delivered to the Defendants. Although the removal of the old pine wood roofing materials had begun on July 2, 2013, the installation of the new synthetic rubber roofing materials had not yet commenced on July 5, 2013. A follow up demand letter was provided from the Homeowners Association's lawyers on July 9, 2013 to the Defendants prior to the completion of the installation of the new synthetic rubber roofing materials (although one of the Defendant families was away on vacation and did not receive the letter until later in the month). The Homeowners Association held a board meeting on July 11, 2013 at which time it was resolved that their lawyers would be instructed to take appropriate legal action. Statements of Claim were filed on July 15, 2013.

[60] In my view, the Homeowners Association acted promptly and decisively with respect to the Defendants in July, 2013. The time frame for the installation of the synthetic rubber roofing materials was short and did not allow for a reasonable amount of time to obtain a prohibitory injunction prior to the installation of the new synthetic rubber roofing materials. The Defendants ignored the verbal and written warnings from the Homeowners Association about non-compliance with the Restrictive Covenant to their peril. There are 480 homes in the subdivision, including approximately 63 homes not subject to the Restrictive Covenant. None of the 417 homes subject to the Restrictive Covenant, other than the Defendants' homes, have used non-wood roofing materials. The Defendants chose to replace their old wood roofing materials with new synthetic rubber roofing materials. Compelling the three Defendants to now comply with the Restrictive Covenant will impose a burden on them, but that burden could have been avoided if they had not disregarded the warnings they received from the Homeowners Association.

[61] Although this matter took nearly 6 years to get to trial, the remedy at trial for the Homeowners Association is the same remedy the Homeowners Association would have been entitled to if the trial was held shortly after the completion of the installation of the synthetic rubber roofing materials by the Defendants in July, 2013. In all the circumstances, a mandatory injunction is a fair and appropriate remedy.

Conclusion

[62] There is a breach of the Restrictive Covenant by the Defendants. A mandatory injunction is granted in favour of the Homeowners Association against the Defendants to require the Defendants to comply with the Restrictive Covenant to have wood roofing materials on their homes.

[63] If the parties cannot agree upon costs, they may contact me within 60 days of this decision.

Heard on the 29th day of April, 2019 to the 1st day of May, 2019.
Dated at the City of Edmonton, Alberta this 8th day of August, 2019.

M. Kraus
J.C.Q.B.A.

Appearances:

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for the Defendants