Court of King's Bench of Alberta

Citation: Ferguson v Tejpar, 2022 ABKB 656

Date:
Docket: 2101 00793
Registry: Calgary

Between:

Thomas H. Ferguson

Applicant

- and -

Ali Tejpar, Zahra Tejpar, Registrar of Land Titles for the Land Titles Office, John Doe, Jane Doe, and ABC Corporation

Respondents

Reasons for Judgment
of the
Honourable Justice C. Dario

I. Introduction

[1] This dispute concerns the future use of a lot located in Elbow Park at 1023 – 32 Ave SE (the "Property") that was purchased by the Respondents/Applicants by Counterclaim, Zahra Tejpar and Ali Tejpar. A caveat is registered against title to the Property and the primary issue before me on this application is whether that caveat is binding upon the Tejpars.

II. Facts

[2] The Property, legally described as Plan 3605FO, Block 91, Lot 1, was listed for sale on December 17, 2019. The next day, the Tejpars viewed the title to the Property online and found the following (the "Caveat"):

> Registration Number: 7648FT
>
> Date: 21/05/1948
>
> Particulars: Caveat re: see Caveat
>
> Caveator – Canadian Pacific Railway Company [Calgary address]

[3] The Tejpars were unable to obtain a copy of the referred to "caveat" . Instead, they received a certificate, issued by the Land Titles Office in June 2005 pursuant to section 21 of the *Land Titles Act* (the "LTA", currently RSA 2000, c L-4), stating that the original document underlying the Caveat (the "Instrument") had been lost, mislaid or destroyed and had not been microphotographed. The evidence suggests that the Instrument was lost by the Land Titles office sometime between 1999 and June 2005. The Tejpars called the Land Titles Office in Calgary, but were not able to obtain further information.

[4] On December 18, 2019, the Tejpars made an offer to purchase the Property, subject to a due diligence condition, but not to removal of the Caveat. They state that the designer of the subdivision they had planned for the Property advised them of other developments in the neighborhood, including subdivisions.

[5] On January 2, 2020, the Tejpars, through their realtor, asked the seller's realtor for details regarding the Caveat, but were told that neither the seller nor his realtor was able to provide any further information.

[6] On January 7, 2020, the Tejpars asked the seller to remove the Caveat or reduce the price; the seller refused. On the same day, the Tejpars contacted CP Rail asking for more information regarding the Caveat.

[7] The next day, the Tejpars spoke with Ms. Virtue, President of the Elbow Park Residents Association ("EPRA"), about subdividing the Property. The evidence indicates that Ms. Virtue advised the Tejpars that she did not see an issue with it, but that there was a planning committee process and that there could be opposition from the planning committee, the board or the neighbors. She suggested discussing the proposal with some of the adjacent neighbors. The discussion pertained only to zoning, not the Caveat. Several hours later, despite not having received a response from CP Rail, the Tejpars removed their conditions to purchase the Property. Their evidence was that it was a rising market and there were several other interested purchasers.

[8] On January 10, CP Rail advised that it did not have a copy of the Instrument, but assumed it related to a setback. CP Rail subsequently provided a no interest letter. On January 31, 2020, the sale closed and the Tejpars took possession of the Property.

[9] On August 6, 2020, the Tejpars applied to the City of Calgary for approval of their proposed subdivision and development of the Property. On September 11, 2020, they received conditional approval. That approval, however, stated that "Caveat #7648FT may preclude the registration of

this subdivision at the Land Titles Office". It also noted that the City of Calgary had not reviewed or considered all the instruments registered against the Property and that the owners must evaluate whether the application to subdivide complied with any documents registered on title.

[10] The EPRA planning committee met to discuss the proposed subdivision on August 27, 2020 and Ms. Tejpar attended. After this meeting, the EPRA sent a letter to the City raising certain concerns, but stating that, subject to those concerns, it was not opposed to the subdivision. None of the expressed concerns related to the Caveat.

[11] On August 28, the Tejpars requested a development permit to build a home on the eastern half of the not yet subdivided Property. They entered into a tentative sales agreement for one of the lots that would result from the subdivision.

[12] Around this time, the Applicant/Respondent by Counterclaim, Thomas H. Ferguson, returned from holiday and became aware of the proposed development. Mr. Ferguson owns a lot across the street from the Property. The Caveat is also registered against his lot. On September 7, 2020, a letter was sent to the City on behalf of 41 neighbors opposed to subdivision of the Property. Although their objection was based on contextual sensitivity and City precedent rather than compliance with the Caveat, Mr. Ferguson notes that the City does not base its decisions on registrations against title, but makes its decisions subject to any legal constraints arising from such registrations.

[13] Despite Ms. Tejpar's attendance at the earlier EPRA meeting, the Caveat was first raised with the Tejpars as an impediment to subdivision at a development permit review meeting on September 22, 2020. During that Zoom meeting, one of the residents emailed to the Tejpars a copy of a document (the "Purported Instrument"). Mr. Ferguson asserted that the Purported Instrument is the Instrument, as defined above. The Purported Instrument was again provided to the Tejpars on October 8 with a letter advising that a number of properties in the vicinity were subject to the Caveat. The Tejpars attempted to authenticate the Purported Instrument with CP Rail and the Land Titles Office, but neither could verify it. Six months later, they were advised that the copy of the Purported Instrument was obtained from Mr. Engbloom, one of the residents, who had held it since purchasing his home in 1982.

[14] Pursuant to the Purported Instrument, over 40 lots in Elbow Park, including the Property, are subject to restrictive covenants. One such covenant is referred to as the "one residence, one lot" rule and prohibits building more than one residence and garage per lot. This would prevent the Tejpars' planned development on the Property.

[15] Mr. Ferguson further raised the Caveat on October 22, 2020 at the appeal of the subdivision approval to the Subdivision and Development Appeal Board. The appeal was unsuccessful because the Board found that a neighbour did not have standing to bring such an appeal. On October 27, 2020, Mr. Ferguson advised the Tejpars by letter that he intended to enforce the Caveat.

[16] On November 9, 2020, the Tejpars filed an application to discharge the Caveat. A removal Order was granted on January 13, 2021. On December 16, 2020, Mr. Ferguson brought a section 21 restoration application to restore the Purported Instrument as the Instrument registered against the properties subject to the Caveat. A restoration Order was granted that day.

[17] At the time of this application, the Caveat is registered against most of the original lots listed in the Purported Instrument, though a handful were never subject to it. For each lot against which the Caveat is registered, an image of the Purported Instrument is now registered and viewable on the land titles system with the registration number 7648FT.

[18] Relying upon the terms of the Purported Instrument, Mr. Ferguson seeks injunctive relief to prevent subdivision of the Property by the Tejpars. The Tejpars counterclaim for declaratory relief confirming that the Caveat is not enforceable against the Property, and therefore does not prevent their proposed subdivision. Each party disputes the other's Removal or Restoration Order, as defined below.

III. Issues

[19] The primary issue in dispute is whether the Tejpars are bound by the Caveat. They assert that they are *bona fide* purchasers for value without notice of the Caveat and, therefore, that it should be discharged from title to the Property. As there is no dispute regarding value or *bona fides*, the sole issue is whether the Tejpars had sufficient notice of the Caveat that they should be bound by its terms. A related issue is whether the Purported Instrument should be restored to the title to the Property as the document underlying the Caveat.

[20] As such, the issues in dispute in this case include:

a) Whether the prior orders obtained by the parties should be vacated;

b) Whether the Purported Instrument should be accepted as the document underlying the Caveat;

c) Whether the Tejpars had notice of the Caveat sufficient to bind them to its terms;

d) Whether there are reasons that the Court should not enforce the Caveat; and

e) Whether the Court should grant an injunction to enforce the terms of the Caveat.

For clarity, I do not view the City development approval as determinative of any of the issues. Provided there is not a conflict, any development must comply with both the City restrictions and the registrations on title. As stated in the approval itself, the City's approval and permitting process does not override a restrictive covenant.

IV. Prior Orders

[21] As mentioned, Mr. Ferguson and the Tejpars obtained separate prior orders of this Court in respect of this matter. Each side applies pursuant to Rule 9.15(a) to set aside, vary or discharge the other's prior order on the grounds that the application was brought without notice to one or more affected persons. While Rule 9.16 codifies the general principle that the Master or Justice who gave the order should hear the application to vary or discharge it, the parties and I all agree that, for the sake of expediency and in accordance with Rules 1.2(1) and (2)(b), I have the authority to hear of all the issues in this matter, including the question of the prior orders.

Further, all agree that this is an appropriate case to set aside the 20-day time restriction set out in Rule 9.15(2).

[22] For the reasons that follow, both of the prior orders are set aside *per* Rule 9.15(a). Briefly, both Mr. Ferguson and the Tejpars were aware of other interested parties when they brought their respective applications, but failed to give notice to them. I observe that Ms. Tejpar and Mr. Ferguson are a practicing and a retired lawyer, respectively, so the obligation to notify interested parties cannot be a surprise to either of them.

[23] As stated in ***Potts v McCann***, 2002 ABQB 734 at para 14, "It is a fundamental principle of the *in personam* jurisdiction of the Court that the rights of parties are not taken away except on proper notice to them, which in court proceedings generally means that the interested parties must be served with court process. ...." In ***Liu v Hamptons Golf Course Ltd***, 2017 ABCA 303, the Court stated at para 22 that "[t]here may be exceptional cases where the interests of all the owners are not impacted, but the general rule is that notice must be given to all." As described further below, on the facts of this case, notice to all potentially affected property owners ought to have been served.

A. The Restoration Order

[24] On December 16, 2020, Mr. Ferguson brought an application pursuant to section 21 of the LTA to restore the Purported Instrument to the Caveat registered on the titles to various properties in the neighborhood. He provided notice only to the Land Titles Office and to a few of the members of the EPRA's caveat subcommittee, not to the owners of other properties against which the Caveat was registered, including the Tejpars. He did, however, provide the Court with copies of the certificates of title against which the Caveat was filed. Justice Malik granted an order directing the Registrar of Land Titles to restore a true copy of the Purported Instrument to the Caveat as Instrument 7648FT (the "Restoration Order").

[25] The Tejpars argue that the restoration application was improper. First, they assert that Mr. Ferguson applied under the wrong section of the LTA. Their position is that, by seeking to restore the Purported Instrument on title, Mr. Ferguson was applying to change or modify a restrictive covenant, so the application should have been brought pursuant to s. 48: see *LTA* s. 139(2). Secondly, the Tejpars argue that Mr. Ferguson failed to provide notice to all affected parties and did not advise Justice Malik that the application was a step in the injunctive relief sought. Finally, the Tejpars argue that there were legitimate concerns about the veracity and authenticity of the Purported Instrument, including that there were several versions of it.

[26] Mr. Ferguson argues that section 21 applies regardless of whether the instrument is a restrictive covenant. He contends that restoring an underlying instrument to a caveat registered against title does not change the nature of the instrument – it was and remains a restrictive covenant. Therefore, s. 139(2) is not triggered. Mr. Ferguson asserts that because the Restoration Order merely restored the Purported Instrument to the Caveat already registered against title, it did not affect any property rights and, accordingly, no notice to other landowners was required. He cites ***Tokiharhpabi Holdings Ltd v Wildman***, 2017 ABQB 277 at paras 34 and 43. Those paragraphs, however, speak to the deemed notice arising from registration of the restrictive covenant, not to the notice required for an application to the Court.

[27] Finally, Mr. Ferguson notes that, although the materials put before the Court made it clear that other properties had the Caveat registered against title, the Court did not order further

service. These arguments ignore the fact that, as Mr. Ferguson was aware, there was some dispute, at least from the Tejpars, as to whether the Purported Instrument was in fact the proper document to be restored to title. The argument that restoration of the Purported Instrument to the Caveat did not change any legal rights assumes that the Purported Instrument is the document originally registered against the titled affected by the Caveat. I note that 1) at the time he provided it to the Tejpars, Mr. Ferguson did not disclose how he had obtained the Purported Instrument, 2) he represented that he had seen more than one version of the Purported Instrument, albeit with similar covenants and 3) the restoration application was a deliberate step towards enforcement of the terms of the Caveat. Further, as some of the properties subject to the Caveat were purchased after the Instrument was lost, those landowners may not have been aware of its terms. In such circumstances, ***Liu*** dictates that all affected parties should have been given notice, regardless of whether the application was brought under s. 48 or s. 21. As stated in ***Liu*** at para 22, "they are all presumptively entitled to notice of court proceedings which will have the effect of modifying, discharging, interpreting, or enforcing the covenants".

[28] The Justice hearing an application relies upon counsel to advise of the relevant circumstances that may affect who should receive notice of that application. Even if the Court ultimately confirms that the Purported Instrument is the proper document to be restored on title against these lands, all affected parties are entitled to receive notice of the proceedings to ensure that if there are challenges to the instrument being proffered, there is an opportunity to bring them. The Justice cannot determine appropriate notice without the assistance of the applicant; neither is he tasked with cross-examining the applicant to understand whether all affected parties are in agreement.

[29] Accordingly, the Restoration Order is set aside.

B. The Discharge Order

[30] Although filed before the restoration application, the Tejpars' application to have the Caveat discharged from title to the Property was heard before a Master (as they were then called) on January 13, 2021. This was after the Restoration Order was granted, but the Tejpars had no knowledge of it and therefore did not apprise the Master. The Master granted an order discharging the Caveat from title to the Property (the "Discharge Order"). Mr. Ferguson asserts that the Discharge Order should be set aside as the Tejpars failed to provide notice to the affected parties.

[31] The Tejpars maintain that the Discharge Order should be upheld on the basis that, at the time of the application, the Restoration Order had not been granted and the Purported Instrument had not been restored to title. They assert that, pursuant to sections 21 and 141 of the *LTA*, the only party they had an obligation to notify was caveator, CP Rail, which had provided them with a letter of no interest. The Tejpars note that the Master did not require notice of the application to be served on any other party.

[32] Mr. Ferguson acknowledges that CP Rail no longer had any interest in the Caveat, but takes the position that the affected parties were the other property owners whose titles were subject to the Caveat. The Tejpars reply that the Purported Instrument cannot be used to determine the interested parties until it has been authenticated.

[33] Section 21(2) of the *LTA* contains an error that appears to have arisen with an amendment in October 2010; the words "originating notice" are missing from subsection 21(2). As I read this

provision, an originating notice commencing an application to deal with an instrument or caveat must be served on those persons having an interest in the land affected by the instrument or caveat. The Court has discretion as to the *manner* of service, not the parties to be served.

> **21(1)** When the Registrar
>
> (a) is required to produce an instrument or caveat, and
>
> (b) certifies that the Registrar is unable to produce the instrument or caveat by reason that it has been destroyed, is lost or cannot be found and another record of the instrument or caveat has not been made,
>
> a person having an interest in the land affected by the instrument or caveat may apply by an originating notice to the court for an order dealing with the instrument or caveat in any manner that the court considers appropriate.
>
> **(2)** The [originating notice] referred to in subsection (1) **shall** be served on those persons and in any manner that the court directs. [Emphasis added.]

[34] That the Master did not direct others to be served with the originating application or the Discharge Order is not a sufficient shield in this case. At the time of the application, the Tejpars had a copy of the Purported Instrument and were aware of its terms and of the other properties potentially subject to it. They also had notice of Mr. Ferguson's intention to enforce the Caveat. That the Purported Instrument had not yet been validated also is not a sufficient justification. The Tejpars were aware that the Purported Instrument could affect the Property and the other properties against which the Caveat was registered or that it contained provisions that in substance were the same restrictive covenants contained in the Instrument. They had an obligation to provide the Master with sufficient information to allow him to make an informed assessment of whether service was sufficient. The Master could not divine this information, nor is he tasked with cross-examining the Tejpars to ensure that there were no undisclosed affected parties.

[35] The Tejpars also point to section 141 of the *LTA* as justification for not providing additional notice of the application. That section merely states that the owner may apply to require the caveator to show cause why the caveat should not be discharged; it does not speak to which parties are required to be served. Both sections 21(2) and 192(1) do, however. Section 21 is addressed above and section 192 states that for *any* matter submitted to Court, the Justice can direct any interested parties to be notified. This, of course, requires that the Justice (or, in this case, Master) be informed of the relevant facts. Clearly, had the Purported Instrument been made available to the Master, the Tejpars could not have relied on section 141 to limit notice to CP Rail as the caveator. Many historical restrictive covenants are registered as caveats and notifying only the original caveator is not necessarily sufficient for a discharge application.

[36] While the Tejpars correctly state that the Caveat itself did not disclose a restrictive covenant, by the time they had brought the application for discharge, they were aware of the Purported Instrument setting out a restrictive covenant. In ***Vallieres v Vozniak***, 2014 ABCA 290, the Court held at paras 23-24:

> … it appears that the restrictive covenant was removed *ex parte*. That is a flawed procedure, because restrictive covenants can only be properly removed on notice to all of the other 186 property owners who enjoy the benefit of the restrictive covenant: ***Potts v McCann***, 2002 ABQB 734 at paras. 12-7, 21-2, 325 AR

> 137; ***Furano v Montgomery***, 2006 ABQB 230, 398 AR 391. If proper notice had been given, it is likely that one of the other owners would have pointed out that there was nothing wrong with the registration. In fact, any one of those owners who did not get proper notice could apply to have the restrictive covenant restored: ***Champion v Smith***, 2014 ABQB 48 at paras. 6, 12; ***Jukes v 1735560 Alberta Ltd.***, 2014 ABQB 131 at para. 1, 96 Alta LR (5th) 30; ***Potts v McCann*** at para. 17.
>
> The rights of the parties to this appeal must accordingly be determined on the basis that the restrictive covenant was properly registered against the title.

[37] For these reasons, the Discharge Order also is set aside. For each of the Restoration Order and Discharge Order, each party shall bear their own costs of their respective applications.

[38] As I have set aside both the Discharge Order and the Restoration Order, title to the Property is as it was at the time the Tejpars purchased it.

V. Analysis

A. Are the Tejpars *bona fide* purchasers for value without notice?

[39] As stated, the primary issue in this dispute is whether the Tejpars are *bona fide* purchasers for value without notice of the restrictive covenant contained in the Instrument and therefore are not bound by its terms. The question is whether the registration of "Caveat re: see Caveat" on title constitutes sufficient notice of the restrictive covenant or if instead the Instrument or enough information to ascertain the nature of the interest set out in the Instrument had to be available to the Tejpars. There are compelling arguments on both sides of this issue.

[40] The Tejpars argue they have no obligation to look beyond the title itself. Their position is that if the instrument underlying a caveat is not available (due to being lost, destroyed or misplaced) and there is not sufficient information on the title itself to permit them to ascertain the nature of the interest claimed, then they have discharged their obligations and are not bound by the caveat. Clearly, the words "Caveat re: see Caveat" are wholly insufficient to convey any meaningful information as to the nature of any restriction. The Tejpars suggest that even if the title had referred to a restrictive covenant, that would not have been sufficient information to bind them to its terms. They argue that notice cannot be imputed where there was no way for them to inform themselves of the nature of the restrictions. They assert that Alberta's Torrens system prizes certainty and that the "trade-off" is that some meritorious claims will be defeated in order to ensure that certainty.

[41] In support of their position, the Tejpars cite ***Bank of Montreal v 1323606 Alberta Ltd***, 2013 ABQB 596 ("***BMO***") at paras 21-24, and ***1864684 Alberta Ltd v 1693737 Alberta Inc***, 2016 ABQB 371 at para 20, in which the Court held that the Torrens system is designed to save persons from having to go behind the title to investigate a predecessor's title and to provide certainty of title to people dealing with land. In both cases, however, the Court held that there is "no legal obligation to investigate possible *unregistered* claims which may be attached to land.": ***1864684*** at para 30 (emphasis added); see also ***BMO*** at para 30. In this case, the Caveat is registered on title.

[42] In ***Ruptash and Lumsden v Zawick*** [1956] SCR 347, the Supreme Court of Canada stated that a caveat must describe the interest being claimed and refused an attempt to enforce rights that went beyond what was reflected in the caveat. That case dealt with an attempt to enforce rights between two parties that went beyond what was stated in the caveat instrument attached to the title. I note that the case addresses the wording of the caveat instrument, as opposed to the memorandum of caveat registration on title.

[43] In ***Kolias v Condominium Plan 309 CDC***, 2008 ABCA 379, the Court held at para 31:

> It would be socially harmful to encumber land with an obligation of unknown extent. That is particularly inimical to the Torrens system, which features a simple title, easy to read, subject only to a few types of encumbrances, noted directly on the title, which encumbrances are themselves easy to access and read.

[44] That case dealt with a restrictive covenant that did not identify a dominant tenement and was worded too vaguely to meet the requirements of a restrictive covenant, even with extrinsic evidence. In the present case, no one disputes that the Purported Instrument constitutes a restrictive covenant (as address further below). It, however, was not available for review at the relevant time and the issue is whether the Tejpars had some obligation to make further inquiry beyond searching the registry.

[45] At paragraph 21 of ***Willman v Ducks Unlimited (Canada),*** 2003 MBQB 41, aff'd 2004 MBCA 153, the Court cited with approval the statement from ***National Trust Co v Johnson***, 2002 MBQB 143 at para 20 that a "caveat is merely a warning of a claim". While it need not set forth all the details of the claim or even attach the underlying agreement or instrument, it must state with reasonable specificity the nature of the interest claimed: ***National Trust*** at para 20. The Court in ***Willman*** stated at para 21:

> ... This of course makes sense, for while it is incumbent upon one who, on searching title, sees the caveat to make further inquiry to ascertain full details of the interest being claimed under the caveat, this obligation only goes so far.

[46] In that case, there was an agreement registered as a caveat and a separate extension agreement that was never registered. The Court found that a caveat should not require someone searching a title to go beyond the terms of the agreement or interest protected to research the parties' dealings since the filing of the caveat. Therefore, the interest protected by the caveat was the 21-year period of the initial agreement, not the 30-year period of the extension agreement and the applicant was not bound by the unregistered extension. The issue in the present case, however, is the extent to which a party is obligated to make "further inquiry to ascertain full details of the interest being claimed" where the supporting instrument (which sufficiently sets out those interests) is not available on the registry.

[47] The Tejpars argue they had neither actual nor constructive notice of the Instrument at the time of purchase. They submit that, despite extensive investigations, the only information available to them was that the Caveat was held by CP Rail, which no longer had an interest in it. The Tejpars assert that their inquiries prior to purchase of the Property met or exceeded their obligations under the Torrens system and that the steps they took after the purchase were incidental and do not change the fact that they were *bona fide* purchasers for value without notice.

[48] The *bona fide* purchaser for value without notice defence was explained in **i *Trade Finance Inc v Bank of Montréal***, 2011 SCC 26 at para 60. Its effect is to render the owner unencumbered by pre-existing equitable proprietary rights, which are stripped away in the transaction by which the owner acquires its legal proprietary rights.

[49] Looking at the wording of the *LTA*, sections 48(1) and (2) permit restrictive covenants to be registered on title and provide that the Registrar shall enter a memorandum on the certificate or certificates of title. Section 1(n) defines a memorandum as the endorsement on a certificate of title of the *particulars* of an instrument or caveat presented for registration. What constitutes "particulars" is not articulated, but section 25 provides that a memorandum entered on a certificate of title must include, among other things, the nature of the instrument or caveat to which it relates and any other particulars the Registrar considers appropriate.

[50] In the present case, the memorandum on the title itself does not contain particulars of a restrictive covenant, but merely references an attached caveat. Historically, many restrictive covenants and other instruments were registered in this way, but the Tejpars argue this is insufficient where the underlying instrument has been lost and cannot be reviewed. They argue that to require them to go beyond searching the title would frustrate the policy objective of the Torrens system, which is to provide a clear, definitive mechanism to evaluate the status of land: see ***BMO*** at para 22.

[51] The interpretation of what constitutes a "memorandum" for the purpose of section 25 has broader implications. Arguably, a finding that the words "Caveat: see caveat" do not meet the definition of memorandum because they failed to disclose the particulars of the interest registered (being a restrictive covenant), could then be extended to find that the Caveat is not valid for all other forty plus title holders, even those with prior notice of the Caveat. Further, if these words are insufficient in the present case to satisfy the requirements of section 48(2) (which requires the Land Titles Registrar to enter a memorandum of the condition or covenant), this could potentially impact the applicability of section 48(4) similar registrations for other caveats registered on title with similar wording, even where the associated restrictive covenant was a registered instrument and available for viewing. Alternatively, the "memorandum" could be viewed as the words registered on title together with the underlying instruments registered on title at the time. Case law and practice favor the latter interpretation.

[52] Sections 48(1), (2) and (4) of the *LTA* provide:

> **(1)** There may be registered as annexed to any land that is being or has been registered, for the benefit of any other land that is being or has been registered, a condition or covenant that the land, or any specified portion of the land, is not to be built on, or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land.
>
> **(2)** When any such condition or covenant is presented for registration, the Registrar shall enter a memorandum of it on the proper certificate or certificates of title.
>
> ....
>
> **(4)** The first owner, and every transferee, and every other person deriving title from the first owner or through tax sale proceedings, is deemed to be affected

> with notice of the condition or covenant, and to be bound by it if it is of such nature as to run with the land, but any such condition or covenant may be modified or discharged by order of the court, on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant or that the condition or covenant conflicts with the provisions of a land use bylaw or statutory plan under Part 17 of the *Municipal Government Act*, and the modification or discharge is in the public interest.

[53] As the Torrens system is generally premised on notice by registration on title, what is achieved through the deeming notice provision in section 48(4) of the *LTA* must have a meaning beyond the notice achieved by other registrations on title. Such deemed notice is effective provided that upon registration, the memorandum requirements of ss 48(1) and (2) had been met. Provided the memorandum sufficed upon registration (such as by attaching the instrument), such notice of the registration would be deemed on subsequent purchasers.

[54] There is very limited case law on this issue, but ***Wildman*** seems to support the proposition that the fact that the Instrument was registered against title as something other than a restrictive covenant and then lost does not affect the enforceability of the Caveat per section 48(4) of the *LTA*. It also suggests the wording of this registration was sufficient to satisfy the memorandum requirements of subsection 48(2), even while the underlying instrument was lost.

[55] The party applying for discharge in that case (the developer) acknowledged that this provision deems every transferee to have notice of the restrictive covenant and to be bound by it, but argued that this deemed notice was inoperative when the underlying instrument was lost. Master Hanebury disagreed and found as follows at para 34:

> While it is tempting to find that the loss of the instrument behind a registration results in the loss of the registered interest, in my view such a finding would run contrary to the deemed notice provision which is fundamental to our Torrens system.

[56] While, like that case, the present case involves an instrument that creates a building scheme (discussed further below), there are some notable differences between the facts of ***Wildman*** and those before me. In ***Wildman***, the registered instrument was lost, and in 2000 a Certificate of Lost Instrument was issued for the affected lots. Only three of the original landowners still owned property affected by the restrictive covenant. Subsequent owners had notice only of an easement on the title and were unaware that it was actually a restrictive covenant. The owners' understandings varied, but it was clear that all thought high-density development was prohibited (although for some this understanding was due to other measures taken to protect the common areas). In anticipation of a proposed high-density development on some of the common area by the applicant developer, a copy of the instrument was found by the applicant in 2015 and was restored to title, replacing the section 21 certificate. The applicant subsequently brought an application to discharge the instrument, as the agreement for the proposed development could not close while it was registered. The lot owners opposed.

[57] Given those facts, the Master found at para 43 that loss of the instrument was not an exception to the deemed notice under section 48(4):

> In light of the nature of our Torrens system, the aforementioned deemed notice provisions of the Act, the fact that fraud is not in issue, and the lack of any case law to the effect that the loss of an instrument results in the loss of notice and the underlying rights, I am not persuaded that the facts in this case constitute an exception to the deemed notice provisions.

[58] The Master noted that a restrictive covenant can be registered on title as a caveat or as a separate instrument: they can be part of the registration of other interests, such as within a mortgage: at para 36. The fact it was registered on title as an easement did not defeat the registration. The Master declined to remove the restrictive covenant even just from those lands purchased between when the instrument was lost and when it was reinstated. She found at para 46 that it would make no sense to do so in the context of a building scheme restrictive covenant where the goal is to "facilitate the development of the whole estate according to a definite plan which all purchasers are bound to follow" and for which mutuality is required.

[59] In that case, the party seeking to discharge the registration had prior actual notice of the restrictive covenant (but for a period forgot the terms and even about the registration due to poor record keeping), then restored it to title, yet subsequently sought to discharge it, whereas the respondents, the majority of whom had no actual prior notice of the caveat, sought to enforce the registration. In contrast, the Tejpars did not have actual knowledge of the restrictive covenant prior to purchasing the Property. Nevertheless, given the deeming provision of subsection 48(4), I think it appropriate to adopt the approach in ***Wildman*** and I find that the lost Instrument does not obviate the Tejpars' notice of the Caveat. The Caveat registration on title was sufficient to forewarn the Tejpars that there was a potentially limiting condition on the Property. By choosing to purchase the Property without knowing what underlay the Caveat, the Tejpars accepted the risk of proceeding in the face of the unknown.

[60] This approach, in my view, is consistent with the findings of our courts regarding the extent of investigation required. In ***Canadian Superior Oil Ltd v World Wide Oil & Gas (Western) Ltd***, [1990] 102 AR 305, the Court of Appeal considered the effect of information contained in a memorandum on title. In that case, a petroleum and natural gas unit agreement covered only a subdivision of land, notwithstanding the terms of the agreement required that production on any part of the unit rendered the leases in effect on all lands included in the unit area. The unit agreement was registered at the Land Titles Office, but the memorandum on title to the full parcel referred only to that part of the land that was subject to the agreement, not the full parcel of land to which the title applied. There was also, however, a caveat filed that described the caveator's interest in the entire parcel of land. The Court held at paragraphs 12 to 15 that the memorandum merely served as a warning, and that the obligation was on the party reviewing the title to look beyond the memorandum to the documents referenced therein for the full expression of the limitations covered. Specifically, as follows at paras 12 - 15, the Court found:

> ... A memorandum states the nature of any instrument affecting the land which is filed at the Land Titles Office which affects the land or it may summarize the claims contained in any caveat filed to protect unregistered interests. The memorandum, however, is a mere summary; it does not purport to state the legal effect of the filed instrument or purport to state in full the claims set forth in a filed caveat. The filed instrument or the caveat, itself, must be searched for that information.

> Upon the registration of any instrument it becomes effective "according to the tenor and intent thereof" ...
>
> It is obvious that the memorandum endorsed on the certificate of title cannot be expected to set out the legal effect of the instrument or the full statement of the claims of the caveator. The "tenor and intent" or "the nature of the interest...", and the legal effect of them, must be determined from the documents themselves. Speaking of a caveat, Mr. Justice Allen said in ***Zeller's (Western) Ltd. and Calford Properties Ltd.*** (1972) 29 D.L.R. (3d) 16 at page 26:
>
> > "A caveat is in fact only a warning of the existence of a claim, the nature of which should be stated therein. Anyone searching the title should immediately be alerted to the fact that the caveator claims an interest under a lease and is thereby put upon inquiry as to the terms and conditions thereof. It taxes one's credulity to assume that anyone purchasing a property subject to a lease of which notice is given by the caveat would complete his purchase without examining the document itself."
>
> Where a title search discloses the existence of a petroleum and natural gas lease, the title searcher will often find it necessary to go past the instrument itself. Where the primary term of the lease has ended, nothing in the Land Titles Office will disclose whether the lease has been continued in force by production of the leased substances. That production may be from the leased land itself or, where a unit agreement affects the land, from land far distant from the leased land.

[61] The relevant portions of Sections 25 and 48 in the prior versions of the *Land Titles Act* were substantially similar. See *Land Titles Act*, RSA 1942, c 205, ss 26, and 51; *Land Titles Act*, RSA 1970, c 198, ss 27, and 52; *Land Titles Act*, RSA 1980, c L-5, ss 27, and 52, for the provisions as they appeared in 1948, 1972 and 1990 respectively.

[62] It is clear from ***World Wide*** that a purchaser faced with a caveat on the desired property may have some obligation to investigate the underlying documents. Further, the memorandum on title cannot necessarily be relied upon as a summary of the registered terms. The question is whether, in the circumstances of this case, the Tejpars' efforts were sufficient to meet that obligation such that they may be considered not to have had notice of the restrictive covenant.

[63] Mr. Ferguson asserts that the Tejpars could have searched the title of each lot in the Survey Plan and, by doing so, would have found other lots against which the Caveat was registered. Such efforts are aided by the current Provincial online search tool (Alberta Registries Spatial Information System (SPIN2)), which enables a party to search the titles of surrounding properties online. He submits that this additional searching can be done with reasonable cost and effort. He notes that this mechanism was employed by another lot owner seeking to notify parties affected by the same Instrument of a different application around the same time. Although that owner did not find the Instrument through the title searches, he was able to identify all affected parties and one of the owners he contacted provided him with a copy of the Purported Instrument.

[64] The Tejpars did make some efforts to ascertain the nature of the interest represented by the Caveat. They made enquiries of the Land Titles Office, CP Rail and the EPRA. Further, after the sale of the Property closed, they participated in EPRA community meetings and searched the

titles of two neighbouring properties that appeared to be subdivided. One such lot is located immediately west of the Property, another across the street from that lot. Those lots were subdivided, and the Instrument was not registered on either property. The Tejpars note that had they searched the lot immediately to the south of the Property, they would not have found the Caveat registered against it either. Instead, it was subject to the City-registered restrictive covenant. Despite these enquiries, the Tejpars did not discover the nature of the Caveat until eight months after they purchased the Property.

[65] In my view, the Tejpars' efforts were not sufficient. Given the nature of certain registrations (such as easements and rights of way, in addition to restrictive covenants that are part of a building scheme), I find that prudence required at a minimum searching the title of every lot in a circle surrounding the Property, including across streets or where the only point of contact is at the corner of intersecting property lines. Depending on whether the search identified properties with similar registrations, prudence may have required the Tejpars to search additional neighbouring properties. They could then contact owners of other properties subject to the same Caveat, one or more of whom might have been able to supply them with a copy of the Purported Instrument, or at a minimum, ensure those affected parties were notified of any discharge application. In these circumstances, where the Tejpars purchased the Property with the specific intention of subdividing and developing it, the Caveat was a serious red flag and their efforts to investigate it should have been more exhaustive.

[66] If an instrument is destroyed, lost or cannot be found, the underlying purpose and objectives of the Torrens system are still met without invalidating the registration. First, the registration provides the prospective purchasers a warning, informing them there is a risk in purchasing the land. Second, the current legislation provides a mechanism to remove such registrations provided the party seeking a discharge takes reasonable steps to ensure all affected parties are given notice of such application. What those reasonable steps are will be dependent on the facts of each case, but notice must be given to all parties claiming an interest of which the party seeking a discharge is aware.

[67] Although the legal analysis favors deeming that the Tejpars had notice of the Instrument in this case, the equitable factors in favor of granting an exemption to the Tejpars are worth noting. Prior to the purchase, the Tejpars observed one property immediately adjacent to the Property and a second nearby which appeared to be subdivided. Subsequently, a search revealed the Instrument was not registered on either of those properties, and they had been subdivided. Further, they made several enquiries, including with the Land Titles Office, the original caveator (CP Rail) and the EPRA. Subsequent to the purchase, they made further inquiries with the EPRA and certain members of the community, who initially did not contest their development application with the City on this basis. It is unfortunate in this case that, despite the Tejpars' efforts, it was not until Mr. Ferguson returned to Calgary in August that the issue of the Caveat was raised, some eight months after the purchase of the Property.

[68] Even where affected individuals forgot about the terms of the restrictive covenant, however, that was not a sufficient basis for non-enforcement of a lost restrictive covenant; it runs with the land: ***Wildman*** at para 18. Further, the EPRA is a volunteer association and, as Mr. Ferguson correctly notes, the association representatives do not speak for his legal rights. Further, the Tejpars acknowledge that the relevant period to determine what measures were taken to investigate the Caveat is limited to prior to the completion of their purchase of the Property.

Steps taken after that point are more relevant in determining the reasonableness of their inquiry for the purpose of providing notice of a discharge application. On balance in these circumstances, from an equitable perspective, it is not reasonable to favor the Tejpars over the other lot owners who would lose their right to enforce the restrictive covenant in respect of the Property.

[69] Accordingly, I find that the Tejpars are not *bona fide* purchasers for value without notice and I decline to discharge the Caveat against the Property.

B. Restoration of the Instrument

[70] The remaining issue before me is whether the Purported Instrument should be restored to the title of the Property, and all other properties against which the Caveat is registered. As discussed above, the Instrument is an agreement pursuant to which CP Rail originally had an interest in various lots listed in the agreement. The Purported Instrument pertains to Mr. Engbloom's property and sets out the description of that property in the recitals and in clause 3(a). Paragraph 3 contains the restrictive covenants, including the "one residence, one lot" covenant. The Purported Instrument provides that its restrictions are enforceable by or against the owners of any of the lots listed therein and that the owner of any of those lots is bound to include covenants similar to those set out in the Purported Instrument in all agreements for sale of the lands. The back page of the Purported Instrument lists the lands to which it applies, including the Property.

[71] The parties are in agreement that the terms of the Purported Instrument meet the requirements for a valid and enforceable restrictive covenant. The covenants are negative in nature, are for the protection of the land retained by the covenantees or their assignees and are intended to run with the covenator's land: ***Crump v Kernahan***, [1995] 173 AR 123 (QB) at paras 10 and 16.

[72] Further, the Purported Instrument is a "building scheme" as that term is applied in ***Restrictive Covenant Instrument 213AT (Re),*** 2021 ABCA 138 ("***New Casa***") at para 15. Mr. Ferguson argues that both his land and the Property are located within the original plan to which the Instrument applies. Consequently, each property is both a dominant and a servient tenement. A dominant tenement is entitled to enforce a restrictive covenant against a servient tenement. For purposes of this proceeding, this means that Mr. Ferguson would be entitled to enforce the restrictive covenant against the Property.

[73] On a plain reading of the Purported Instrument, it appears that each of the listed lots would have been subject to a substantially similar agreement, apart from the description of each individual lot set out in paragraph 3(a). The lands listed in the Purported Instrument establish the clearly defined area of land to which the restrictive covenants apply: ***Crump*** at para 14; ***New Casa*** at para 15 and 16. There is only one Instrument registered against the properties listed in the building scheme (in each case, bearing the registration number 7648FT). If the Purported Instrument is the document underlying the Caveat, it applies to all affected lots in the building scheme, including Mr. Ferguson's and the Property.

[74] As noted above, the Purported Instrument refers specifically to Mr. Engbloom's property. Mr. Ferguson attested that when he bought his property, he saw a version of the Purported Instrument that referred to his lot. He also stated that he saw a version of the Purported

Instrument held by the former owner of the Property that referred to the Property. Those versions have not been provided to the Court and there is no suggestion that they are currently available. The Tejpars argue that the Instrument may have differed in terms from the Purported Instrument. In my view, however, apart from the lot description in clause 3(a), it is unlikely that the document registered against the Property was substantively different in terms. Even if each lot in the building scheme initially was subject to a separate agreement with substantively similar provisions, only one instrument had been registered with the Land Titles Registry under the same instrument number against the lots in this building scheme. Further, both Mr. Engbloom and Mr. Johnson, another lot holder in the same area, have copies of the Purported Instrument that was registered against their lands bearing the Land Titles stamp on the back page. Those copies of the Purported Instrument have identical terms and section 3(a) refers to Mr. Engbloom's lot in both.

[75] Our Court of Appeal addressed a similar situation in ***Vallieres***. In that case, the original memorandum of a restrictive covenant registered on title to a residential property was lost. The only record of it was a written copy made in 1954 by a mortgagee's inspector, who had examined the title and the memorandum of the restrictive covenant registered on a different lot. The Registrar of the Land Titles Office registered the mortgagee's inspector's record as a substitute for the lost memorandum for all lots within the same building scheme pursuant to a predecessor of the process under ss 20-21 of the *LTA*. In response to the assertion that the restrictive covenant was wrongly registered, the Court of Appeal stated at paras 19 and 20:

> … At some time thereafter, the sellers' solicitors noted that the mortgagee's inspector's notes referred to block 4, lot 3, whereas the present litigants were involved in the purchase and sale of block 2, lot 3. Those solicitors came to the conclusion that the covenant was "wrongly registered" against their clients' title. There was, in fact, nothing wrong with the registration.
>
> The nature of a restrictive covenant of this type is that it is registered against all of the lots in a particular subdivision. It accrues to the benefit of, and binds all of the registered owners of all of the 187 lots. The fact that the mortgagee's inspector's notes referred to a different lot was of no consequence; it simply reflected the fact that the mortgagee was interested in that lot, and not any other lot. Since there was one, and only one, instrument 874 GQ, his notes related to every lot encumbered by the covenants. …

[76] The Court affirmed the registration of that recording of the instrument, even though the instrument pertained only to one specific lot within the building scheme. The circumstances of this case are similar. While clause 3(a) of the Purported Instrument refers to lots other than the Property, the terms thereof form part of the same building scheme. The Purported Instrument expressly states that each lot owner agrees to insert similar restrictive covenants in any agreement for sale of any of those lands. The lots in question all have the same instrument number registered against title. Since all lots were registered under one instrument, its covenants were essentially the same for all lots under the building scheme.

[77] From that perspective, there is no impediment to the Court directing that the Purported Instrument be restored on title to the Property as instrument 7648FT to which the Caveat refers. The Purported Instrument is capable of being restored to the Caveat against all affected properties subject to the equitable issues discussed below.

[78] The Land Titles Office and the owners of the other lands named in the Caveat (as dominant and servient tenements) have been notified of the present application, as affirmed by Order of Master Prowse dated July 13, 2021. Since the time of this application, they have been given ample time to come forward if there were reasons to not enforce the Purported Instrument.

[79] If, however, I am incorrect in finding the Tejpars are not *bona fide* purchasers for value without notice, and any of the following apply:

> a) the deemed notice provision is defeated by the failure of the title to include better particulars of the condition on title (such as "restrictive covenant"),
>
> b) the deemed notice provision does not apply because of the difficulty in ascertaining the content of the instrument from the land titles registry, or
>
> c) while the deemed notice provision normally would apply, due to the facts of this case, including the inquires made with the community association, CP Rail, and searches of the two neighboring titles, equity prevails to defeat the registration, or at a minimum, the "one residence, one lot" component of the caveat;

then, the Caveat (or such defeated components of the Purported Instrument) shall not be binding against the Property. Of course, if it is not registered against title to the Property, then the Respondents do not get the advantage of being able to enforce the Caveat against other lots. If defeated under circumstance (a) above, this may also impact the Court's ability to register the Purported Instrument on other titles against which the Caveat is registered. Relying on my finding that the Tejpars are not *bona fide* purchasers for value without notice, I consider other grounds raised for denying the Applicant's claim.

C. Equitable Bars to Relief

[80] The Tejpars argue that the Court should deny Mr. Ferguson's requested relief on equitable grounds falling into two categories: 1) Mr. Ferguson's breach of the restrictive covenant and 2) general community breach of the restrictive covenant.

[81] In addition to the "one residence, one lot" rule, the Instrument dictates the following:

> no house or other building shall be located or placed on the said lot within twenty-five (25) feet of the street or avenue and any dwelling house shall not be less than twenty-five (25) feet from the rear of said lot.

[82] Each side provided a surveyor's report as evidence of the level of compliance in the neighborhood with the setback terms of the restrictive covenant. Each side's report included a certified survey plan, but neither copy of the surveyor's plan submitted to the Court was large enough to see the measurements. The Tejpars' surveyor's report indicated that 25 lots were non-compliant, but did not specify whether they were non-compliant with the front or rear setback (or both) or by how much. As Mr. Ferguson's surveyor pointed out, it is unclear what part of the dwelling the Tejpars' surveyor used to take measurements. The Tejpars point out that their surveyor assessed all properties subject to the Caveat, while Mr. Ferguson's surveyor surveyed only 21 of such properties. Those properties were , however, 21 of the 25 lots identified in the Tejpars' survey as being in contravention of the restrictive covenants and the four lots not surveyed do not have the Caveat registered against them.

[83] I prefer Mr. Ferguson's surveyor's report over the Tejpars' surveyor's report for two reasons. First, it was properly put before the Court as sworn evidence of the surveyor. By contrast, the Tejpars' surveyor's report was an attachment to Ms. Tejpar's affidavit. Second, and more importantly, Mr. Ferguson's surveyor's measurement methodology is preferable. The front setback measurements were taken to the street or avenue in accordance with the wording of the Purported Instrument, while the Tejpars' surveyor measured to the property line, which I acknowledge is the current practice set out in the Manual for Standard Practice for Alberta, but is not how the restrictive covenant in the Purported Instrument is worded. There was no evidence that the street or avenue overlapped the property line of any of the lots. Further, Mr. Ferguson's surveyor's measurements are from the dwelling foundation in accordance Manual for Standard Practice for Alberta requirements. The Tejpars' surveyor's report did not specify from where on the dwelling the measurements were taken, though it appears they also were taken from the foundation. While Mr. Ferguson's surveyor did not comment on the rear setback, a visual review of that surveyor's certified block plan sketch reflects most houses are located closer to the front than the back of the lot. It is not clear which of the lots identified in the Tejpars' surveyor's report failed the rear set-back requirement (though Ms. Tejpar says nine were identified), nor does the surveyor indicate where on the dwelling the measurements were taken.

1. Mr. Ferguson's Breach of the Restrictive Covenant

[84] The Tejpars assert that Mr. Ferguson's home does not comply with these setback requirements and is situated almost 15 feet over the limit. Their position is that Mr. Ferguson therefore comes to the Court with unclean hands and is disentitled from equitable relief.

[85] Mr. Ferguson purchased his property in 1977. There is no evidence or suggestion that there have been any changes to the setbacks of that residence during his ownership. Such historical non-compliance is not attributed to him: see ***Crump*** at para 27. This non-compliance might have been harder to overlook if Mr. Ferguson was asserting the Tejpars' non-compliance with setback requirements, but that is not his argument. Moreover, non-compliance with a restrictive covenant by one party does not alter the obligation of others to comply with it, though I would have found that argument far less compelling had the non-compliance been attributable to Mr. Ferguson.

[86] Further, ***Crump*** states at para 27 that "in the context of a building scheme all lot owners have standing to enforce a covenant". Accordingly, if I were to deny Mr. Ferguson's request for equitable relief, the same request could be brought by another lot holder. As noted above, on September 7, 2020, a letter was sent to the City on behalf of 41 neighbors opposed to subdivision of the Property, which suggests that another owner may bring a similar application if this one is not granted.

2. Community Breaches of the Restrictive Covenant

[87] The Tejpars also assert that relief should not be granted because the character of the community has changed due to other non-compliances with the restrictive covenant. As such, they assert that it is no longer appropriate to treat all lots as part of a building scheme.

[88] First, the Tejpars assert that nine properties fail to comply with the rear setbacks and some number of them fail to comply with the front setbacks. As addressed above, I prefer the evidence of Mr. Ferguson's surveyor, who indicates that only two properties fail to meet the front setback requirements and this by less than 2 feet.

[89] Additionally, the Tejpars point to three subdivisions that have occurred since 1948 contrary to the terms of the Instrument. Mr. Ferguson suggests that all three subdivisions resulted from applications made to the Court on an *ex parte* basis, but the only evidence before me is from Mr. Ferguson and one other owner, both of whom swear that they were not notified of these applications. Two of the applications were brought in the 1980's prior to this Court's finding in ***Potts v McCann*** at para 12 that it is improper to apply for discharge *ex parte*; the third application was brought only one year later. Based on the dates of these applications and Mr. Ferguson's assertion that he was not notified, it is reasonable to assume that these discharges were granted on an *ex parte* basis: ***New Casa*** at para 63.

[90] There are also at least four other properties within the building scheme for which the Instrument has been removed from title, though a City caveat imposing some of the same requirements has been placed on some of them and none of these properties meets the City's subdivision bylaw requirements (meaning they could not currently be subdivided as they are too narrow). The Instrument was removed from these titles with the consent of Mr. Ferguson and the other lot holders, but the lots have not been subdivided and remain subject to a "one residence, one lot" rule. I acknowledge that the City could change its requirements with respect to this and other bylaws that impose setback and other limitations that are currently consistent with the Instrument.

[91] The Tejpars note that Mr. Ferguson and other lot owners recently consented to discharge of the Caveat from another neighboring lot and argue that they are selectively choosing whether to enforce the restrictive covenant. The lot in question, however, is subject to the "one residence, one lot" rule pursuant to a restrictive covenant registered by the City and the owners of that lot are building a large home on it, reducing the likelihood that it will be subdivided in the future.

[92] Apart from the above, I have not been made aware of any issues of non-compliance with the restrictive covenants contained within the Instrument, including minimum residence size, bylaw compliance, and restrictions on land use.

[93] The essence of a building scheme is the common obligation of lot owners diligently to maintain the restrictive covenant; see ***Crump*** at para 18. Where the owners are not vigilant in doing so, they may lose the right to enforce the restrictive covenant. As the Court stated in ***Potts*** 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.

[94] The Court must assess whether the conduct of the lot owners has varied the original intent of the restrictive covenant; if so, it may no longer be enforceable. The Court may ask, as did the Ontario Court (General Division) in ***Lafortune v Puccini***, (1991) 2 OR (3d) 689 at para 30, "Have there have been significant and substantial changes in the character of the neighbourhood so as to warrant the covenants not being enforceable?".

[95] The Tejpars point to ***Westwood Community League v Swish One Infill General Partner Inc,*** 2020 ABQB 299, where the Court considered the equities of upholding an agreement to limit development of a four-plex when similar developments were permitted on other lots in the plan: see paras 128-134. In that case, however, there was no registration on title preventing such development and the issue was breach of contract.

[96] In this case, the developments proposed on the lots against which the Caveat was discharged are for larger single dwellings, rather than subdivision. In respect of the three previously subdivided lots, on the evidence before me, the other lot holders cannot be said to have acquiesced and, indeed, may not even have had notice. On the evidence before me, I find that there has not been a significant and substantial change in the character of the neighbourhood; the lot owners have not varied the original intent of the restrictive covenant. To the contrary, there has been substantial compliance with the restrictive covenant over the 70-plus years since the Caveat was registered. Even for those properties for which the Caveat was removed, at this time compliance appears to have been largely maintained, at least with respect to the "one residence, one lot" rule.

[97] In light of the foregoing, I am not persuaded that there are grounds for denying equitable relief to Mr. Ferguson.

D. Injunction to enforce the restrictive covenant

[98] Mr. Ferguson seeks a permanent injunction. He takes the position that this remedy is appropriate because this proceeding is akin to a post-trial application with the substantive merits having been adjudicated.

[99] The Tejpars argue that Mr. Ferguson is not entitled to such relief as he has not come to Court with clean hands. I have addressed those equitable arguments above, with the exception of Mr. Ferguson's delay in bringing the injunction application. Five months elapsed between when Mr. Ferguson became aware of the Tejpars' subdivision plans and when he served them with this application. I note that, in the interim, both parties pursued other applications before the Court, and Mr. Ferguson and other neighbors attempted to stop the subdivision through the development appeal board. In these circumstances, I do not think that Mr. Ferguson's delay is such as to disentitle him to equitable relief.

[100] Mr. Ferguson seeks to prevent the Tejpars from taking a number of steps, including subdividing the Property, conditionally selling the westerly portion of the Property, and securing a development permit. The Tejpars correctly point out that none of those steps is prohibited by the Instrument. These steps, however, are harbingers of anticipated actions that could violate the restrictive covenant set out in the Instrument.

[101] The case law supports the proposition that a permanent injunction is the presumptive remedy to enforce a restrictive covenant. In ***McDonald's Restaurants of Canada Ltd v West Edmonton Mall Ltd***, [1994] 159 AR 120, the Court made these comments at paras 72 and 73:

> The starting point in any consideration of permanent injunctive relief issued to restrict breach of negative covenants is the seminal case of ***Doherty v. Allman*** (1878) 3 App. Cas. 709 (H.L.). Lord Cairns, at pp. 719-720, states:
>
> > "My Lords, if there had been a negative covenant, apprehend, according to well-settled practice, a Court of Equity would have

> had no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. If is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."
>
> ...
>
> In my opinion, the dictum of Lord Cairns, to the extent that it requires an automatic granting of injunctive relief and deprives a court of any discretion, ought not to be applied as a rigid, inflexible rule. Instead, where there is a breach of a negative covenant, *prima facie* or presumptively, the appropriate remedy, after a full trial, is a permanent injunction. This, in my view, allows a court its requisite discretion when exercising its equitable jurisdiction to prevent injustice. Also, it allows for application of the principle in ***Doherty**, supra*, that permanent injunctive relief is the appropriate remedy in the case of a clear breach of a negative covenant.

[102] The Court in ***Crump*** took a similarly cautious approach to Doherty, saying at para 25:

> In my mind, the key to answering this question is understanding the nature of obligation that a restrictive covenant represents. In *The Law of Real Property, supra*, Megarry and Wade put it well (p. 771): "The value of a covenant affecting land is generally of a 'real' character; that is to say, it lies in continued observance rather than in monetary compensation for a breach." The *prima facie* remedy for breach of a restrictive covenant must therefore be an injunction. I do not by this wish to be understood as adopting, pell-mell, the often cited dictum of Lord Cairns in ***Doherty***... Such a premise is unworkable. There will be circumstances in which a court will have to take a more sensitive approach, weighing the burden to be imposed by an injunction against the benefit to be reaped. ...

[103] The Court then weighed the relevant factors at para 27:

> Are there any factors which militate against ordering a permanent injunction? Three observations should be made. First, no substantial construction has been undertaken which cannot be easily undone; although the west side yard has been excavated, the footings have not yet been poured. An injunction would not require a structure to be torn down. This speaks in favour of injunctive relief. Second, the "clean hands" doctrine advanced by Mr. Crump's counsel seems to me to be inapplicable here. Although it is true that Mr. Jircik's property does not comply with the 10% side yard requirement, it was established in oral argument that Mr. Jircik purchased the property in this state. He did not defy the covenant. More importantly, however, in the context of a building scheme all lot owners have

> standing to enforce a covenant. There was no evidence that the properties of any of the other respondents did not comply with the restriction in issue. Finally, there was some suggestion by Mr. Crump that the respondents' real motivation in seeking an injunction was not to preserve the character of the neighbourhood, but rather to advance the community's ability to successfully obtain a direct control zoning by-law for Britannia. The respondents strongly disagreed with this claim and there was insufficient evidence to support this assertion.

[104] In other cases, the courts have drawn a distinction between prohibitory and mandatory injunctions. In ***GA Developments Ltd v Girard***, 1999 ABQB 719, the Court at para 55 agreed with the finding in ***Crump*** that a permanent injunction is the *prima facie* remedy for breach of a restrictive covenant, but made these comments at para 45:

> Often, as the Applicant suggests, a prohibitory injunction will be granted to restrain a breach of a restrictive covenant... Mandatory injunctions, as in this case, to tear down a fence, are given out less readily. Both remedies re 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.

[105] Similarly, though the issue before it was an interim injunction, the Court of Appeal held as follows in ***May v 1986855 Alberta Ltd***, 2018 ABCA 94 at para 16:

> As the appellant states, the presumptive remedy for a breach of a restrictive covenant is a permanent injunction. And yet, the reality is that a court will be less likely to award that remedy in circumstances where substantial construction has been completed that would have to be undone.

[106] I am satisfied that the presumptive remedy of a permanent injunction is appropriate in this case. As discussed above, there are no equitable grounds that militate against granting it. Further, while the Tejpars have taken some steps toward developing the Property, including seeking subdivision approval and entering into a tentative agreement for sale of half of the Property, there is no evidence before me that any significant construction of the kind contemplated in Girard and May has been undertaken. It appears that the steps taken by the Tejpars to this point can be readily undone or abandoned.

VI. Disposition

[107] Pursuant to R 9.15, both the Discharge Order and the Restoration Order are set aside as notice ought to have been provided to all affected parties in both applications.

[108] The Tejpars' request for declaratory relief confirming that the Caveat and associated Instrument are not enforceable against the Property, and therefore do not prevent their proposed subdivision and development of the Property, is denied.

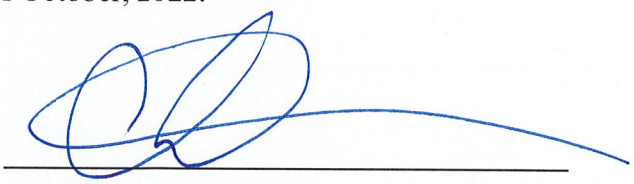
[109] The request that the Purported Instrument be deemed the lost Instrument and that it be restored to the title to the Property is granted.

[110] Mr. Ferguson's application for a permanent injunction requiring the Tejpars to comply with the Caveat, including halting any subdivision and prohibiting construction of more than one private residence and one private garage in connection therewith on the Property, is granted.

[111] As I have not heard submissions on this issue, the parties may apply before me with in 45 days if they are unable to agree to costs. If such application is made, I ask that they address the considerations set out in ***Crump*** at para 29, in addition to the other factors relevant to this case. In respect of costs, I note that the party actually in breach of its contractual commitments in this case is the vendor, being the estate of the prior owner, which inherits the deceased's obligations. As the vendor is not a party to this action, however, costs cannot be awarded against him.

[112] I would like to thank counsel for their very thoughtful and organized submission materials and their interesting arguments on the points in issue.

Dated at the City of Calgary, Alberta this 04th day of October, 2022.



C. Dario
J.C.K.B.A.

Appearances:

Curtis Marble and Lauren Garvie, Carbert Waite LLP
for the Applicant

Renee Reichelt and Sophie Mansfield, Blake, Cassels & Graydon LLP
for the Respondents (excluding the Registrar of Land Titles)

No one appearing for the Registrar of Land Titles