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Real Estate

Enforcement of positive covenants on subsequent owners

By **Ray Mikkola**

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(January 25, 2018, 8:53 AM EST) -- Ontario real estate lawyers will be familiar with the seminal case regarding the rule that positive covenants, that is, the obligation to expend money or do some positive act, will not bind subsequent owners despite any provisions in the creating document to the effect that such subsequent owners are bound.

The case is *Amberwood Investments Limited v. Durham Condominium Corporation No. 123* [2002] O.J. No. 1023, which was decided by the Court of Appeal in 2002. In *Amberwood*, the court considered various reasons as to whether, in the circumstances of that case (a condominium reciprocal agreement executed between a developer and the newly created condominium corporation on the first phase of the development, regarding, among other matters, the payment of money) the rule should be strictly applied despite the urging of counsel for the condominium corporation that certain exceptions to the rule applied to enable the enforcement of the obligations on the subsequent owner of the developer's lands. These included the "benefit and burden" and the "conditional grant" exceptions.

Briefly put, the benefit and burden exception holds that the positive covenants rule would not apply (that is, the positive obligation would be binding on a subsequent owner) where it would be inequitable for a subsequent owner to enjoy the benefits of an arrangement such as an easement without assuming the burden imposed by the original document. A closely related exception that was likewise considered and discarded in *Amberwood* is the conditional grant exception which holds that where the underlying grant was made expressly conditional on the assumption of the obligation, then in that case the obligation could not be separated from the grant such that the two would flow together to bind subsequent owners. Each of these exceptions to the general rule has been recognized and applied at least to a degree in England.

In 2017, the Ontario Court of Appeal in *Black v. Owen* 2017 ONCA 397 confirmed that the rule against positive covenants running with title continues to be good law, and that neither of the exceptions described above are good law in Ontario.

But it is important to put the findings in these cases into proper context. In each case, the issue concerned the obligation of a subsequent owner who was not bound as a party to the arrangement to pay money; they were subsequent owners of the property which was subject to the arrangement executed by their predecessors in title, but in both cases the subsequent owner did not obtain any tangible benefit from the original arrangement. For example in *Black*, which involved the purported obligation of a subsequent owner of property which abuts Wychwood Park in Toronto to pay expenses for, among other matters, access through the Park under a trust arrangement dating from the late 1800s, the owner had no interest in exercising its rights under the trust agreement because the owner enjoyed alternative direct access to what was now a municipal road.

Happily, it appears that an easement which terminates at a particular date, or upon the occurrence of a specific event, is not invalidated by either of these decisions. Such limited or conditional easements have commercial usefulness. It is not unusual for an access and servicing easement which is reserved in a transfer to a municipality, for example, to terminate upon the declaration of the land so conveyed as a public highway, and these cases are not authority for the proposition that such

easements do not terminate in accordance with their terms.

So where a subsequent owner of dominant tenement lands which enjoys and relies upon, for example, an access easement pursuant to an arrangement which expressly sets out that the easement terminates upon the failure of the owner to contribute to the cost of maintenance, repair and insurance, it appears that the easement will legally terminate upon such failure and that the prospect of such termination can be used by the servient tenement owner as leverage to enforce the payment obligation.

To be clear, the subsequent owner would have no direct obligation to pay the costs (such payment obligation constituting a positive obligation entered into by a prior owner only) and he would win any action brought against him to compel him to pay. But it seems that the victorious owner should balance his victory against the costs of his loss of legal access, perhaps in the context of rapidly rising helicopter bills incurred and to be incurred to access his property. Put another way, there appears nothing in the *Amberwood* or *Black* cases that would invalidate any mechanism that operates to terminate an easement where the termination is clear from the easement itself.

The first *Condominium Act*, enacted in 1967, was motivated in large measure to address the problem of positive covenants not running with title. Common expenses and other positive obligations imposed by the declaration and the *Condominium Act* are not collectable against unit owners for any common law reasons. They are enforceable because the statute says so.

In 1989, the Ontario Law Reform Commission concluded that perhaps it was time for the rule to be re-examined, but, aside from isolated statutory provisions, such as those respecting the enforcement directly against subsequent owners of subdivision and various similar agreements executed under the authority of the *Planning Act*, the rule is alive and well in Ontario.

But real estate lawyers should consider that for practical purposes positive obligations may be enforced against subsequent owners despite the rule by using the prospect of the termination of easements and other rights and which a subsequent owner requires, and which termination provisions have been carefully drafted in such documents.

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