Positive Covenants: Enforceability and Registration

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THE CASE:

Atco Lumber Ltd. v.

Kootenay Boundary (Regional District),

2014 BCSC 524

BACKGROUND

- This story begins as a spat between a landowner and employees of the unincorporated community of Fruitvale.

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BACKGROUND

- The owner (Atco Lumber Ltd.) was upset that the workers from the Regional District of Kootenay Boundary (RDKB) were crossing his property to get to Fruitvale's water treatment plant and, in the process, would leave his gate open - thus allowing others onto his property.

BACKGROUND

- The owner wanted the workers to go through the gate, stop, get out, close and lock the gate, and then (and only then) carry on to the water treatment plant.

- The workers complained that the gate was heavy and difficult to operate and that it would be unsafe for them to work behind a locked gate in the event of an accident.

THE EXPROPRIATION

- The RDKB sought to end the debate by expropriating a statutory right of way across Atco's property which expressly provided that Atco:

> [S]hall not … maintain any … gate … or permit the existence of any obstruction on the Right of Way Areas;

THE JUDICIAL REVIEW

- Atco challenged the validity of the expropriation and commenced a Judicial Review proceeding in the British Columbia Supreme Court. The Petition for judicial review was heard by Madam Justice Donegan on November 17, 2013.

- At the hearing of the petition, Atco argued that the prohibition against having a gate on the Right of Way Area was a positive covenant – which could not be extracted from the owner by way of expropriation.

THE JUDICIAL REVIEW

- In addition to that provision, Atco also argued that there were a number of other problematic provisions:

THE JUDICIAL REVIEW

- clause 4(c) purported to extract a promise by Atco to indemnify and save the RDKB harmless;

- the combined effect of the RDKB's right to use Atco's road and the lack of any obligation on the RDKB to maintain or repair the road placed a positive obligation on Atco to repair wear and tear to the road done by the RDKB in order to exercise its own right to use the road;

- clause 6(b) allowed the RDKB to perform acts and then demand repayment of its costs from Atco and, if not paid, add that amount to the taxes payable by Atco;

THE JUDICIAL REVIEW

- clause 6(c) has Atco acknowledging the RDKB's entitlement to certain remedies in order to enforce its rights under the right of way;

- clause 6(f) purported to bind Atco to personal covenants as long as it held an interest in the Land; and

- clause 6(h) required Atco to accept a different version of the right of ways in the event that some portion of the instrument is found to be unenforceable

THE QUESTION

- Does the *Local Government Act* empower a Regional District such as the RDKB to expropriate an SRW in the format used?

ATCO'S ARGUMENT

- Atco argued that it was trite law that a right of way must concern rights which are capable of forming the substance of a grant of an interest in land.

- Positive covenants, such as the obligation to spend money, do not and cannot run with the land and do not create an interest in land.

ATCO'S ARGUMENT

…Equity can thus prevent or punish the breach of a negative covenant which restricts the user of land or the exercise of other rights in connection with land. Restrictive covenants deprive an owner of a right which he could otherwise exercise. Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it….

Tulk v. Moxhay, 2 Ph 774 at 777-778, [1843-60] All ER Rep 9 at 11

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NEGATIVE COVENANTS

- When thinking about negative covenants, the basic notion is this: If I have a piece of property that is encumbered with a negative covenant, then I am *restricted* from doing something that I would otherwise be able to do. But I can always satisfy the covenant by doing *nothing*.

- For example, if the restrictive covenant says that I cannot build higher than 100 feet, I can always satisfy that covenant by not building anything at all.

Negative Covenants

- Sometimes, people refer to “positive covenants” when they actually mean negative covenants.
- A good example of this is the covenant that the smelter in Trail BC registered on properties near the smelter before selling the land.
- The covenant requires the (new) owner to put up with the smells and dust associated with a smelter and thus allow the smelter to cause what would otherwise constitute a nuisance.

NEGATIVE COVENANTS

- Such a covenant ***is*** a true negative covenant and runs with the land – because it does not require the owner to ***do*** anything – it only requires them to accept or “suffer” the actions of others.

NEGATIVE COVENANTS – CASE LAW

- *Cloutier v. Ball*, [1995] BCJ No. 1301:
  - Plaintiffs attempted to enforce a covenant that required trees to be kept to a maximum height of 20 feet.
  - The plaintiffs wanted the defendants to trim four trees that were between 60 – 70 feet tall. The plaintiffs' motive was their view.
  - The court found that compliance with the covenant would require the defendants to spend money – so it was a positive covenant which could not run with the land so as to bind subsequent owners such as the defendants – even though the plaintiffs had offered to pick up the bill.

NEGATIVE COVENANTS – CASE LAW

- *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd. et al.*, 2009 BCCA 5:

  - Aquadel sought to cancel a charge against its property that provided that a third of it had to be used as a golf course.

  - Aquadel was losing money on the golf course and wanted to redevelop the property or sell to someone who would.

NEGATIVE COVENANTS – CASE LAW

- There were three covenants at issue:
  - not to use the land for any purpose but a golf course;
  - to maintain the golf course to a certain standard; and
  - to offer certain persons preferential rates at the golf course

NEGATIVE COVENANTS – CASE LAW

- The Court of Appeal found that although the words used in the covenant were negative, the covenant was positive in substance in light of the other provisions.

- The Court concluded that, as the covenant was not negative in substance, it could not be enforced against successors in title and ordered the cancellation of the agreement as a charge on the land.

NEGATIVE COVENANTS – CASE LAW

- The fact that the Courts will look to the *substance* of the covenant is important, because there is always a certain temptation to use negative language to describe a positive obligation - so that the covenant appears to be negative.

- This is a risky practice at the best of times, but especially so when used in an expropriation context - as we can see from the decision in *Atco*.

THE DECISION IN *ATCO*

- In the *Atco* case, Madam Justice Donegan found that the covenants that the RDKB was seeking to impose on the owner were positive in nature – they were incapable of forming an interest in land.

- As a result, she found that the RDKN had "exceeded its power" in expropriating them.

S. 218 AND S. 219 OF THE LAND TITLE ACT

- Madam Justice Donegan supported her decision by highlighting the difference between a s. 218 covenant (the section being used by the RDKB), and the language of s. 219, which specifically allows for the creation of a positive covenant without a dominant tenement and permits such positive covenants to run with the land.

- Since section 219 deals specifically with positive covenants, general principles of statutory interpretation say that s. 218 should not be read to allow positive covenants as well, as that would make s. 219 unnecessary.

WORRIED? DON'T BE.

- First, Madam Justice Donegan's analysis only applies in the context of expropriation.

- Where the acquisition is by means other than an expropriation, there is no concern that the entire SRW will be set aside, because there would be a voluntary contract between the parties that could contain both positive and negative covenants.

WORRIED? DON'T BE.

- Second, in those cases where there has been an acquisition by way of expropriation, the time limit for challenging the expropriation is brutally short (from the owner's perspective).

- Pursuant to s. 51 of the *Act,* once the land "vests" under s. 23 of the *Act*, no court challenge can be mounted.

- In *Atco*, the owner had to make a very novel and complex argument to avoid the application of that section and only succeeded due to a very unique set of circumstances.

WORRIED? DON'T BE.

- Third, the time limit imposed by s. 51 of the *Act* might not protect a SRW if it were truly void, rather than just voidable.

- In an effort to avoid s. 51, Atco argued that the expropriation was void, but on that point, Atco lost.

- Apparently, only s. 4 of the *Act* creates a condition precedent to a valid expropriation. Any other deficiency merely makes the expropriation voidable and is therefore protected by s. 51 of the *Act*.

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WORRIED? DON'T BE.

- Fourth, if and to the extent a right of way instrument contains positive covenants, that simply means that once the original owner no longer owns the property, those covenants are no longer enforceable.

- This should not come as any shock or surprise to governments or public utility companies.

- Fifth, the standard form of an SRW used by utility companies for decades does not contain any positive covenants as was the case in *Atco*.

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WHAT CAN WE LEARN FROM *ATCO*?

- Expropriating authorities looking to expropriate an SRW should take a good look at their SRW Agreement templates before proceeding with the expropriation.
- For example, the “further assurances” clause found at paragraph 4(d) is found in many “standard” SRW Agreements.
- Not being able to rely on that clause puts additional pressure on the expropriating authority to make sure they “get it right” the first time, because they won’t be able to compel the landowner to sign any correcting or modifying documents later on.

WHAT ABOUT S. 3 OF THE EXPROPRIATION ACT?

- We think an SRW acquired under s. 3 of the *Expropriation Act* would be safe (i.e. it could contain positive covenants that would bind the existing landowners).

- But using a s. 3 agreement presents an interesting problem from a compensation perspective: The grantor's right to compensation is defined and limited by the *Expropriation Act* – so the grantor might not be able to obtain compensation for those covenants under one of the established heads of damages set out in the *Expropriation Act*.

EXPROPRIATION POWERS ARE NOT UNLIMITED

- The result in *Atco* serves as an important reminder to everyone involved in the expropriation process that expropriation powers are not unlimited.

- Expropriation can be used to take away property rights, but it cannot be used to impose positive obligations on affected landowners without their consent (except perhaps in the case of an instrument authorized under s. 219 of the *Land Title Act*).

OTHER QUESTIONS

- Would the RDKB have been better off expropriating the area around the gate in fee simple? Would that solve the problem?

- Could the RDKB enter the property under s. 310 of the *Local Government Act* to "break up" or "alter" the gate?

- Was there an opportunity at some point in the process for RDKB to recognize that the existence of the gate would cause a significant problem?

Positive Covenants

- Positive covenants can and do run with the land in some circumstances.

- The difference is whether the positive obligation falls on the servient or on the dominant tenement. It is common and acceptable that positive obligations are placed on the benefiting party.

POSITIVE COVENANTS

- Such obligations may concern:
  - duties to repair;
  - duties to take steps to prevent unauthorized access;
  - duties to insure;
  - duties to indemnify; and
  - duties to compensate.

THANK YOU!

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