In the Court of Appeal of Alberta

Citation: Vallieres v Vozniak, 2014 ABCA 290

Date: 20140912
Docket: 1301-0255-AC
Registry: Calgary

Between:

Real Vallieres and Suzanne Weller

Appellants
(Plaintiffs)

- and -

Charlie R. Vozniak also known as Chuck Vozniak

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice R.J. Hall
Dated the 26th day of June, 2013
(2013 ABQB 251, Docket: 0901-00633)

Memorandum of Judgment

The Court:

[1] The appellant sellers and the respondent buyer entered into a contract for purchase and sale of a residential property, but the transaction did not close. The issue on this appeal is whether the trial judge was correct in concluding that the buyer was entitled to repudiate the contract. The trial judge dismissed the sellers' claim for damages arising out of the failed deal and allowed the buyer's counterclaim for the return of his $30,000 deposit: ***Vallieres v Vozniak***, 2013 ABQB 251, 82 Alta LR (5th) 250.

[2] The central issue is whether a restrictive covenant registered against the property was a "permitted encumbrance" under the residential purchase contract. That restrictive covenant included a proviso that all the buildings on the lot had to be set back 20 feet from the front property line. During closing the parties became aware that the garage encroached on that setback.

Facts

[3] The sellers were the owners of a residential property described as Plan 359 GP, Block 2, Lot 3. That property was subject to a restrictive covenant filed on the property in 1953, which was registered as instrument number 874 GQ. The original memorandum setting out the covenants has been lost (see *infra*, paras. 14ff), but the terms of the restrictive covenant are preserved in a memorandum drafted by a mortgagee's inspector in 1954. As indicated, the issue on this appeal relates to the covenant that the buildings must be set back 20 feet from the front property line.

[4] The parties recorded their agreement in a Residential Real Estate Purchase Contract developed by the Alberta Real Estate Association. It includes a covenant that "title will be free and clear of all encumbrances . . . except . . . non-financial obligations now on title such as easements, utility rights-of-way, covenants and conditions that are normally found registered against property of this nature and which do not affect the saleability of the Property".

[5] The closing of the transaction proceeded in the normal fashion, until the Real Property Report revealed that the garage on the property was only about 10 feet from the property line. The garage had been in that location for at least 12 years, and it had likely existed on the property for many years before that. Correspondence was exchanged between the solicitors about this issue. The buyer's solicitors suggested that the restrictive covenant should be removed or amended. The sellers' solicitors took the position that the breach of the covenant did not affect the saleability of the property, and so was unobjectionable. The buyer's solicitors replied that the restrictive covenant ". . . clearly affects the saleability of the property in that the future owner of the property could be held liable for a violation of the restrictive covenant and could very well elect not to close based on the extreme cost of rectifying the problem."

[6] Given the uncertainty that existed, the parties agreed to extend the closing for two weeks, until September 24, 2008. The trial judge concluded that the parties merely agreed to delay the closing, and that there was no agreement at that time as to whether or not the restrictive covenant had to be removed (reasons, paras. 25, 54). On September 24, the sellers' solicitors concluded the covenant was not properly registered against the sellers' lot, and wrote taking the position that "the restrictive covenant does not relate to the within lands", and that accordingly "we will be insisting on your client closing this transaction forthwith". At this point the buyer decided that he no longer wanted to close the transaction. He refused to agree to any further extensions, and regarded the transaction as terminated. The sellers took the position that the buyer was in breach of contract, that they would be retaining his deposit, and that they would be seeking damages.

[7] The transaction did not close as scheduled. The next day, September 25, the sellers were successful in obtaining a court order removing the restrictive covenant from their title, which order was sent for registration. The sellers offered to extend the closing date for two more weeks to allow the buyer to close, but he refused. The property was resold about nine months later at a loss of about $300,000.

[8] A central issue at trial was whether the restrictive covenant was a "non-financial obligation now on title . . . normally found registered against property of this nature and which do not affect the saleability of the Property". The trial judge found that the restrictive covenant was of the type normally found registered against residential properties in Calgary. The sellers took the position that the provision respecting permitted registrations related only to the bare "registration" of the encumbrance, and not whether it was in good standing. They argued that saleability must be measured by the registration of the restrictive covenant, not by its breach or non-breach. The trial judge agreed with the buyer that the covenant also required that the covenant be in good standing, and that any breach that affected the "saleability" of the property was not a permitted encumbrance.

[9] The trial judge came to the conclusion that the breach of the covenant, namely that the garage was only 10 feet from the property line, affected "saleability":

> 52 With greatest deference to the learned Provincial Court Judge [in *Friio v Simmons*, 2009 ABPC 250], I do not agree. While the restrictive covenant, at the time it was registered, was intended to enhance the value of the properties affected by it, once a non-conforming building was placed on the property the effect of the restrictive covenant was to negatively affect the saleability of the property, regardless of its original intended purpose. Prospective purchasers of the property would not wish to acquire such property if it was in contravention of the restrictive covenant. To do so would expose a prospective purchaser to claims by anyone in a position to enforce the restrictive covenant. Whether or not those claims were successful, the intending purchaser would be put to the risk and expense of having to defend such claims. Intending purchasers wish to buy the property, but not buy the risk of potential law suits against them. Any reasonable

> purchaser, armed with the fact that the restrictive covenant was registered against title and that the building was not in conformity with the terms of the restrictive covenant would be affected by such knowledge in making his decision as to whether to purchase the property. As such, I am satisfied that the existence of the registration of the restrictive covenant affected saleability of the property.

Whether this is the proper interpretation of the contract is the central issue in this appeal.

[10] The trial judge concluded that the sellers were not ready, willing and able to convey title in accordance with contract on the extended closing date of September 24. Further, he found that time remained of the essence on this extended date (reasons, para. 82), and the removal of the restrictive covenant the next day was too late. He accordingly dismissed the sellers' claim, and directed that the buyer receive back his deposit.

Standard of Review

[11] The standard of review for questions of law is correctness. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error: ***Housen v Nikolaisen***, 2002 SCC 33 at paras. 8, 10, 25, [2002] 2 SCR 235. Deciding if a particular set of facts meets a legal standard calls for the drawing of a legal inference from those facts, which in turn calls for a "higher standard" of review. Setting that standard is a nuanced process, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** at paras. 26, 28. If a legal test or standard can be isolated from the question of mixed fact and law, referred to as an "extricable error of law", then findings on that issue are reviewed for correctness: ***Housen*** at para. 34.

[12] The Supreme Court recently considered the standard of review for the interpretation of contracts in ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53. ***Sattva*** was an appeal from the decision of a commercial arbitrator, and the Court concluded:

(a) Evidence of the circumstances surrounding the formation of the contract can be considered in interpreting the contract. Such evidence will not conflict with the parole evidence rule so long as it is ". . . used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words": para. 60.

(b) Because the ultimate objective of contractual interpretation is to determine the intention of the parties, and because evidence of surrounding circumstances can be considered, the interpretation of a contract is a mixed question of fact and law: para. 50.

(c) Since appeals from an arbitrator were only allowed on a question of law, and since no extricable question of law had been shown, no appeal was possible respecting the arbitrator's decision on the interpretation of the ***Sattva*** contract: para. 66. That was sufficient to dispose of the ***Sattva*** appeal.

(d) Characterization of the interpretation of contracts as a question of mixed fact and law also has an impact on the standard of review. Deference was appropriate, particularly on the factual component of the analysis. Extricable questions of law are still reviewed for correctness: paras. 51-4. A number of factors were listed as indicating when appellate intervention was warranted:

(i) the intervention of appellate courts is appropriate in "cases where the results can be expected to have an impact beyond the parties to the particular dispute": para. 51.

(ii) a key difference between a question of law and a question of mixed fact and law is "the degree of generality (or "precedential value")": para. 51.

(iii) other errors of law arise from "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": para. 53. Failure to construe the contract as a whole is such an error: para. 64.

Sattva was decided under the British Columbia *Arbitration Act*, RSBC 1996, c. 55, which limits appeals to questions of law. The reasons in ***Sattva*** must be read having regard to the context in which it was decided. Appeals from the Court of Queen's Bench of Alberta to the Alberta Court of Appeal can be brought on any basis. While all appeals must be decided within the context of the appropriate standard of review, appeals are available on questions of law, mixed questions of fact and law, and questions of fact. Some of the restrictive language in ***Sattva*** does not apply to ordinary appeals in Alberta.

[13] The findings of fact in the decision presently under appeal are entitled to deference. In this case, the appropriate standard of review on the interpretation of the contract is correctness. It is a "standard form" contract developed by the Alberta Real Estate Association. It is used continuously by vendors, purchasers, and realtors in Alberta. Its interpretation is of general importance beyond this dispute, any decision on its proper interpretation has great precedential value, and the primary objective should be certainty. It is untenable for this contract to be given one interpretation by one trial judge, and another by a different one. The standard of review analysis in ***Housen*** does not anticipate or require that kind of uncertainty or variability. Attempting to inject the circumstances surrounding the formation of the contract into the analysis, or any attempt to identify the intention of the parties, is nothing but a legal fiction. These parties were content to adopt the standard form agreement prepared by the Association, and essentially it is the intention of the committee that drafted it that prevails.

The Validity of the Restrictive Covenant

[14] A preliminary issue concerns the validity of the registration of the restrictive covenant. The buyer took the view that he did not have to close the transaction, because there was evidence that the garage was constructed in breach of the covenant. The sellers had two responses: 1) the restrictive covenant did not affect saleability and the buyer was obliged to close despite the breach, and 2) in any event, the restrictive covenant was wrongly registered on the title. In fact,

during the dispute over the closing the sellers were successful in having the restrictive covenant removed from the title.

[15] The preliminary issues raised are whether the restrictive covenant was in fact improperly registered, whether that is relevant in law, and whether that made any difference to the obligations of the two parties to the agreement of purchase and sale.

[16] Restrictive covenant 874 GQ was registered in 1953. Land Titles instrument 874 GQ is actually a transfer of land of approximately 187 lots from Campbell and Brown to the English Investment Co. Ltd. The bottom of the transfer notes "Memo of Encumbrances", but there is no such memorandum attached to the transfer filed at the Land Titles Office. Since the Registrar recorded the restrictive covenants on the 187 titles in 1953, the memorandum must have been attached to the transfer at the time that it was tendered for registration. That was a common conveyancing practice at the time, although today the restrictive covenants would more likely be in a separate document that would be registered as a separate instrument.

[17] In any event, it would appear that the memorandum was lost at some point. The only record of it was a notation made in 1954 by a mortgagee's inspector, who had apparently examined the title (including the restrictive covenant) with respect to block 4, lot 3:

> PARTICULARS OF COVENANTS AND CONDITIONS
> contained in Transfer registered as No. 874 G.Q.
> affecting Lot 3, Block 4, Plan "Calgary 359 G.P."
>
> 1. Only one single family dwelling house and a private garage, attached or unattached to such dwelling house may be erected on each lot. Such private garage shall, in either case, conform to the style and exterior finish to the dwelling house on the same lot.
>
> 2. Each such dwelling house shall occupy a ground area of at least (a) 1,100 square feet when of a single storey construction (b) 800 square feet when of one and one-half or two storey construction. The dimensions of any garage, attached or unattached, porch, verandah, sun-room or other appurtenant structure shall be excluded in computing such ground area.
>
> 3. Each such building on the said lot shall be set back from the front property line at distance of not less than 20 feet. Measurements shall be made in the same manner as similar measurements are made pursuant to the Building by-laws of the City of Calgary.
>
> 4. No lot or any other building erected thereon shall be used for any trade or business or otherwise than for private residential purposes.

This note has been treated in this litigation as an accurate summary of the covenant.

[18] In 1965 the Registrar placed the mortgagee's inspector's notes in the Register for all 187 lots as a substitute for the memorandum that was originally registered as restrictive covenant 874 GQ, under a predecessor of the process now recognized by the *Land Titles Act*, RSA 2000, c. L-4, secs. 20-21. A notation by the Deputy Registrar on the filed copy of the mortgagee's inspector's notes states:

> Attached to 874 GQ . . . Covenants and conditions filed with transfer have apparently been detached and lost. This is a copy of a report prepared by an inspector for Mutual Life Insurance Co.

Anyone who thereafter searched the Register for a copy of instrument 874 GQ would be given a copy of the mortgagee's inspector's notes.

[19] As a part of the conveyancing process, the sellers' solicitors obtained a copy of instrument 874 GQ. 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.

[20] 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. As his notes reveal, they related to "Transfer registered as No. 874 G.Q.", which meant that they applied to all of the lots conveyed by that Transfer. Just because he had recorded on his notes the particular lot he was interested in, did not mean that the restrictive covenant was wrongly registered against the other 186 lots. Based on the evidence on this record, the sellers' assertion that the restrictive covenant was "wrongly registered" was incorrect.

[21] In any event, it is not possible to assert under the land titles system that any registered instrument is "wrongly registered". That is a *non sequitur*, because under the land titles system the Register conclusively determines the status of the title, and all of the encumbrances. The only exception is "in the case of fraud", and no fraud is alleged here: *Land Titles Act*, secs. 60, 62, 203(2). If the Register says that the title is subject to instrument 874 GQ, and that the mortgagee's inspector's notes are a true reflection of that instrument, that is, in law, the true state of the title and the encumbrance. It is one of the particular strengths and features of the land titles system that it precludes any assertion of "wrong registration", except in the case of fraud: ***White Resource Management Ltd. v Durish***, [1995] 1 SCR 633 at para. 20.

[22] It follows that the sellers were not entitled to assert that the restrictive covenant was "wrongly registered". They could, of course, undertake to discharge that encumbrance, just as

they could undertake to discharge any other encumbrance. That would be a risky undertaking to give, unless the encumbrance was under the control of the persons giving the undertaking. There is, however, a distinct difference under the land titles system between undertaking to discharge an encumbrance, and asserting that it is wrongly registered.

[23] The final curve in this bumpy road was that the sellers were actually successful in having the restrictive covenant removed by court order. In the circumstances, that is not conclusive of anything. One must assume that they asserted (in good faith) to the Master who granted the order that the restrictive covenant was "wrongly registered". As previously discussed, that was not an accurate representation, and if the Master had known the true circumstances the order should have been refused. Secondly, 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.

[24] 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.

The Rights of the Parties on Closing

[25] The result in this appeal ultimately comes down to deciding the status of the two parties as of the extended closing date of September 24, 2008. On that date the title was subject to the restrictive covenant, the garage was located on the property in breach of that covenant, and the sellers had properly tendered closing documents on the buyer. The buyer had refused to close on the basis that the breach of the covenant affected the saleability of the property, entitling him to repudiate the agreement. Which of the two parties was in breach of the contract on that date?

[26] The result of this appeal turns ultimately on the proper interpretation of the contract. Since a contract must be read and interpreted as a whole, in order to identify the proper interpretation based on the intention of the parties as reflected in the words of the contract, the exact wording is key. The relevant covenants (with underlining added) are:

> RESIDENTIAL REAL ESTATE PURCHASE CONTRACT
>
> This form was developed by the Alberta Real Estate Association for the use of its members and may not be altered electronically by any person. Others who use this document do so at their own risk.
>
> . . .

1.5 Unless otherwise agreed in writing, title will be free and clear of all encumbrances, registrations and obligations except the following: ...

> (b) non-financial obligations now on title such as easements, utility rights-of-way, covenants and conditions that are normally found registered against property of this nature and which do not affect the saleability of the Property;

The Buyer and Seller agree to act cooperatively, reasonably, diligently and in good faith.

. . .

4.4 The Seller and the Seller's lawyer will deliver normal closing documents including, where applicable, a real property report pursuant to clause 4.11, to the Buyer or the Buyer's lawyer upon reasonable conditions consistent with the terms of this Contract. The Buyer or the Buyer's lawyer must have an opportunity to review the real property report, where applicable, prior to submitting the transfer documents to the Land Titles Office and a reasonable period of time before the Completion Day to confirm registration of documents at the Land Titles Office and to obtain the advance of proceeds for any New Financing and Other Value.

. . .

4.11 At least ten (10) Business Days prior to the Completion Day, the Seller will provide the Buyer, regarding the matters described in clause 6.1, a real property report reflecting the current state of improvement on the Property, according to the Alberta Land Surveyors' Manual of Standard Practice, with evidence of municipal compliance or non-compliance. This obligation will not apply to condominium units that do not create a lot nor to any transaction where there are no structures on the land.

. . .

6.1 The Seller represents and warrants to the Buyer that: ...

> (d) the current use of the Land and Buildings complies with the existing municipal land use bylaw;
>
> (e) the Buildings and other improvements on the Land are not placed partly or wholly on any easement or utility right-of-way and are entirely on the Land and do not encroach on neighbouring lands, except where an encroachment agreement is in place;
>
> (f) the location of Buildings and other improvements on the Land complies with all relevant municipal bylaws, regulations and relaxations

> granted by the appropriate municipality prior to the Completion Day, or the Buildings and other improvements on the Land are "non-conforming buildings" as that term is defined in the Municipal Government Act (Alberta);
>
> . . .
>
> 6.4 The Seller and the Buyer each acknowledge that, except as otherwise described in this Contact, there are no other warranties, representations or collateral agreements made by or with the other party, the Seller's brokerage and the Buyer's brokerage about the Property, any neighbouring lands, and this transaction, including any warranty, representation or collateral agreement relating to the size/measurements of the Land and Buildings or the existence or non-existence of any environmental condition or problem.

The key provisions are that non-financial encumbrances which do not affect the saleability of the property are permitted, and that there are no collateral agreements or representations. Also important is what is not to be found in the contract: while there are several covenants to the effect that there is compliance with municipal bylaws, there is no covenant that any permitted encumbrances are in good standing.

[27] The first question is whether clause 1.5(b) permitting "registrations which do not affect the saleability of the property" relates to the registration of the covenants in the abstract, or whether it also relates to any performance (or breach) of those covenants. The second issue is whether any breach affected saleability in this case.

Permitted Encumbrances

[28] The first issue can be answered by the particular wording of the contract:

> 1.5 Unless otherwise agreed in writing, title will be free and clear of all encumbrances, registrations and obligations except the following:
>
> (a) those implied by law;
>
> (b) non-financial obligations now on title such as easements, utility rights-of-way, covenants and conditions that are normally found registered against property of this nature and which do not affect the saleability of the Property;
>
> (c) homeowners association caveats, encumbrances and similar registrations; and
>
> (d) those items which the Buyer agreed to assume in this Contract.

Read as a whole, this clause is intended to refer only to the state of the title, not to the status of the registered encumbrances.

[29] This clause specifically refers to the "title" which is to be "free and clear of all encumbrances". The state of the title, and specifically which encumbrances are recorded against it, does not relate to the status or breach of any of those encumbrances. Under the land titles system, registration says nothing about whether an encumbrance is in good standing. There might, for example, be an outstanding balance owed to the homeowners' association. That would mean that the sellers are technically in breach of the encumbrance, but the corresponding caveat or encumbrance would still be a permitted encumbrance: ***Friio v Simmons***, 2009 ABPC 250 at para. 20. The covenants implied by law are set out in s. 62 of the *Land Titles Act*. Those are "permitted encumbrances", and they would not become prohibited encumbrances simply because they might not be in good standing.

[30] This conclusion is specifically supported by the wording of clause 1.5(b). It refers to "covenants and conditions that are normally found registered against property". That too is a specific reference to registration, not the status of the underlying covenants and conditions. Clause 1.5(c) also refers to "registrations".

[31] The agreement must be read as a whole, and this interpretation of clause 1.5(b) is supported by other provisions. There are, for example, several covenants by the sellers regarding compliance with municipal bylaws and requirements (clauses 4.11, 6.1(d) and (f)). In marked distinction, there is no covenant by the sellers respecting compliance with any of the permitted encumbrances. Clause 6.1(e) contains a warranty by the sellers that the buildings are not located on any easement or utility right-of-way, and do not encroach on neighboring properties. There is no covenant that the buildings do not encroach on any setback in the restrictive covenants: ***Friio*** at para. 29.

[32] The sellers' position is further supported by clause 6.4, the "whole agreement" clause. It states that there are no collateral warranties or agreements. In effect, the buyer seeks to read into clause 6.1 of the contract a warranty by the sellers that the buildings comply with the restrictive covenant.

[33] There is very little case law on this topic, and several of the cases that do exist are distinguishable on their facts. ***McAleer v Desjardine***, [1948] 4 DLR 40, [1948] OR 557 (CA) concerned a covenant requiring the construction by June 1947 of a substantial house on a masonry foundation. Instead, the vendors had built a frame house, which they proposed to live in for up to five years while building the more substantial house, at which time the frame house would be turned into a garage. It appears that the covenant had only recently been put on the property, and the original developer was already threatening litigation over the frame house. The terms of the contract are not set out in the reasons, excepting that it included a covenant to take the property subject to the "covenants that run with the land". The decision is not authority for the proposition that an agreement to accept covenants running with the land includes an implied representation that there are no breaches of those covenants. Having regard to the surrounding

circumstances, including the discussions between the parties, the advertisement for the property, the value placed on the frame building itself, and the threatened litigation by the developer, the court implied a representation by the vendors that the frame building complied with the restrictive covenant. ***McAleer*** is interesting, but not strong authority.

[34] ***Hamilton v Julien***, [1983] BCJ No 473, 1983 CarswellBC 886 concerned a covenant that required a 25 foot setback, whereas the house had been constructed with only an 18 foot setback. The purchasers did not dispute that they had agreed to buy the property subject to the restrictive covenant, but argued that the breach of the covenant meant that they were not getting a good and marketable title. This decision essentially follows ***McAleer***, and does not provide any independent analysis. The wording of the agreement of purchase and sale is not given, and it is therefore unclear exactly what warranties were made by the vendors. While it would appear that the restrictive covenant had been on the property for some time, the reasons suggest that the house had only recently been constructed. There was no analysis of the reality of any risk that anyone would try to enforce the covenant.

[35] ***Friio v Simmons*** concerned a contract with the same wording at issue in this appeal: it permitted encumbrances normally found registered against property of this nature and which do not affect the saleability of the property. The covenant in question had been registered in 1912, and it required a 20 foot setback. Both the house and the garage were situated within the setback. The purchasers agreed to close, but they claimed back (as damages) interest they had paid during the period that the solicitors were attempting to resolve the issue about the covenant. Their entitlement to that interest depended on whether the encroachment on the setback was a breach of the warranties in the agreement: ***Friio*** at para. 10. On a proper interpretation, the trial judge held that clause 1.5(b) only applied to the registration of the encumbrance, not whether it was in good standing:

> 28 In my view, if the restrictions were not complied with, it would not be the restrictions which were adversely affecting the saleability of either the property out of compliance or the neighbouring properties. It would be the non-conforming erections which would be adversely affecting the saleability of the properties. . . .

Friio is directly on point, and its reasoning is convincing.

[36] In conclusion, on a proper interpretation, the agreement of purchase and sale allowed the registration of restrictive covenant 874 GQ. There was no representation or warranty that the covenant had been complied with. As such, the buyer was in breach of the contract when he failed to close on the extended closing date.

Saleability of the Property

[37] The conclusion that the breach of the restrictive covenant was not a breach of clause 1.5(b) of the agreement of purchase and sale is sufficient to resolve this appeal. In the alternative,

did the apparent breach of the restrictive covenant affect the "saleability of the property"? If not, then on either interpretation the sellers are entitled to succeed.

[38] The concept of "saleability" is not defined in the contract, and it must be considered in context. Clause 1.5(b) clearly permits some encumbrances. Unless the encumbrance was totally moribund and meaningless, it would likely have some effect on the marketability of the property, if only because it would affect the price. The clause should not be interpreted as if it only allows meaningless encumbrances. The phrase "affect the saleability" must mean that:

(a) on an objective standard, the encumbrance on the title is such that it would materially affect the marketability of the property in the mind of a reasonable and informed purchaser, either in terms of the time it would take to sell the property, or the price that could be realized, and

(b) any such material impact on the saleability of the property was unreasonable given the nature of the property.

Where, as here, the type of covenant in question is quite common on properties of this sort (as found by the trial judge), it cannot have had an effect on the saleability of the property in that sense. This property would be just as marketable as other similar properties, because the covenant in question is so common. For example, the covenant here restricts the property to residential uses, and prohibits commercial uses. In one sense, that affects saleability, but because this is a residential property, and these covenants are common, it does not violate the agreement.

[39] In a residential neighborhood there is nothing undesirable about having a covenant against commercial uses. Indeed, such a covenant might well enhance saleability. Even if there are some potential purchasers who would not be interested in the property because they have a commercial purpose in mind, that would not mean that the registration of the restrictive covenant is a breach of the agreement of purchase and sale. Likewise, there is nothing undesirable or objectionable about having a 20 foot setback, even though that might exclude some purchasers who want to build a residence bigger than the lot will accommodate.

[40] The presence of these restrictive covenants is not objectionable; their mere presence did not affect saleability in the sense just discussed. What is really of concern here is the fact that there was a prior breach of the covenant. Assuming that clause 1.5(b) requires compliance with the restrictive covenant, the argument that the restrictive covenant affected the saleability of the property depends to a substantial degree on whether any of the other 186 property owners could or would attempt to enforce it. There are three significant factors that undermine that argument:

(a) the garage had been in place for at least 12 years, and likely much longer. During that time no other owner had come forward to enforce the covenant. Presumably that may be because the location of the garage did not bother anybody, it was perhaps consistent with the way other garages had been built in the neighborhood, or no other owner felt

sufficiently aggrieved to enforce it. The suggestion that there were property owners anxious to come forward and enforce the covenant is artificial.

(b) since the garage had been in place for 12 years, many other owners seeking to enforce it now would face a significant limitation problem: ***McAleer*** at p. 43. The ultimate 10 year limitation period in the *Limitations Act*, RSA 2000, c. L-12 had long since expired, and enforceability would be problematic.

(c) the argument that there would be "extreme cost of rectifying the problem" assumes that the Court would grant a mandatory injunction requiring the relocation of the garage. Injunctions are equitable remedies, and the long acquiescence of the other 186 property owners would likely preclude that sort of relief. In any event, an injunction would not be granted if the cost of remedying the breach would be disproportionate to the damage suffered by the other 186 owners. Since they had all tolerated the location of the garage for decades, it is highly unlikely that they would have been able to persuade the Court to grant an injunction, rather than merely nominal damages: ***Allard v Shaw Communications Inc***., 2010 ABCA 316 at para. 29, 493 AR 182; ***Lim v Titov*** (1998), 56 Alta LR (3d) 174 at paras. 17-8, 21, 208 AR 338; ***Durell v Pritchard***, [1866] 1 Ch App 244; ***Haggerty v Latreille*** (1913), 29 OLR 300, 14 DLR 532 (OSC App Div); ***Ruxley Electronics and Construction Ltd. v Forsyth***, [1996] AC 344.

The prospect of anyone coming forward at this time to enforce the setback clause in the covenant seems remote, and the success of any such attempt speculative.

[41] The trial judge concluded at paragraph 52:

> 52. . . . Intending purchasers wish to buy the property, but not buy the risk of potential law suits against them. Any reasonable purchaser, armed with the fact that the restrictive covenant was registered against title and that the building was not in conformity with the terms of the restrictive covenant would be affected by such knowledge in making his decision as to whether to purchase the property.

This reasoning appears to assume that the purchasers of the property are entitled to a "risk-free" transaction. Any purchase of a residential property has certain risks inherent in it, relating to the condition of the property, market conditions affecting the price and value of the property, the quality of the neighborhood, etc. The covenants in the agreement should assume a reasonable purchaser who is informed of the risks, and should assume that such a reasonable purchaser would accept reasonable risks. From a reasonable and objective point of view, and having regard to the actual history of the property, the breach of the setback covenant could not realistically affect the saleability of the property in the minds of any fully informed reasonable purchaser.

[42] In summary, even if clause 1.5(b) does cover breaches of the permitted encumbrances, the conclusion of the trial judge that the encroachment on the setback affected saleability of the property was unreasonable, and reflects reviewable error.

Conclusion

[43] In conclusion, the appeal is allowed, the judgment below is set aside, and the appellant sellers are awarded judgment against the respondent buyer in the sum of $310,373.43. The appellants are entitled to the assessed costs of the trial and the appeal.

Appeal heard on May 7, 2014

Memorandum filed at Calgary, Alberta
this 12th day of September, 2014

Slatter J.A.

O'Ferrall J.A.

Authorized to sign for: Veldhuis J.A.

Appearances:

J.G. Oppenheim and B. Randhawa (student-at-law)
for the Appellant

N.D. Anderson and C. Jones
for the Respondent