Do servitudes bind third parties?

BY STEVEN CHAIMBERG, MONTREAL GAZETTE FEBRUARY 18, 2011

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"When I use a word," Humpty Dumpty said, in a rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all."

– Lewis Carroll, Through the Looking-Glass

In Quebec, the concept of a servitude is normally taken to mean a registered right on the title of a parcel of land – the servient land – for the benefit of another parcel of land – the dominant land – belonging to a different owner.

In the real estate field, the ability to prevent or enable certain uses of the servient land is beneficial for the owner of the dominant land. Why? Because a servitude, being a real right, is opposable against all parties, and not merely the owner of the servient land – the person who has agreed to have his rights so limited.

For the past decade, a servitude of restrictive use is not, under Quebec law, a valid restriction that "runs with the land," and therefore cannot affect third parties who are carrying on business on the land that the servitude is purportedly charging.

This view is based upon the 2001 decision of the Quebec Court of Appeal in Épiciers unis Métro-Richelieu inc. v. Standard Life Assurance Co.([1]), where the court was obliged to deal with the nature of a "no food" agreement that was called a servitude and which had been published on title.

In that case, a covenant restricting grocery stores had been enacted between neighbouring parcels of land, and was set to end at the moment Métro-Richelieu stopped operating its supermarket on the dominant land.

The Court saw this arrangement, and especially the “sunset clause,” as indicative of a temporary personal right and not a permanent real right. Accordingly, the court held that while such a restriction could be a valid contractual covenant between the parties, it would not bind third parties merely by virtue of it having been registered on title.

In the common law provinces, such restrictions – known as restrictive use easements – can be enforced against third party tenants and subsequent purchasers of the servient land.

The Standard Life decision resulted in Quebec lawyers attempting to achieve the same end by publishing exclusivity rights in notices of lease, although the enforceability of these notices against other tenants is not a certainty.

Lawyers also are requiring that in the case a sale of the servient land, the seller of the servient land must include a provision by which the buyer agrees to be bound by the original restrictIon limiting what he can do with the servient land.

However, the 2011 Superior Court decision in the case of Demik Properties (Sorel) Inc. v. Canadian Austin Group Co.([2]), has once again put the issue of restricted use servitudes into question.

In the Demik case, the court held that a perpetual servitude restricting the use of the servient land to that of a one-storey gasoline station was a valid and binding servitude.

The judge did say that the building could be enlarged, and that within the building, services commonly found in service stations, such as the sale of food or a food counter, could be conducted, but that a distinct business with direct frontage and access could not be allowed.

Although the Court in Demik referred in its judgment to the Standard Life case, it came to the conclusion that the particular facts of Demik were sufficiently different from those provided for in Standard Life.

While the case is presently under appeal, it cannot be said that the issue of restrictive use servitudes Quebec, is settled law.

If the Court of Appeal were to rule in favour of the validity of the servitude in Demik, the effect of such a decision would depend upon whether the court will rule narrowly on the specific facts of the case, and thus leave standing the principles underlying its decision in Standard Life, or whether the court will take a broader view as to what constitutes a servitude, and provide property owners and tenants with the same flexibility in protecting their economic interests as presently exists elsewhere in Canada.

In other words, as Alice said: “The question is whether you can make words mean so many different things.” And, as Humpty replied: “The question is … which is to be master – that’s all.”

Time will tell.

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