CITATION: Black v. Owen, 2016 ONSC 40
DIVISIONAL COURT FILE NO.: 605/14
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ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

2016 ONSC 40 (CanLII)

BETWEEN:	
RICHARD BLACK AND SCOTT LAMACROFT Plaintiffs (Appellants)	*Anne E. Spafford, Shannon M. Gaudet*, for the Plaintiffs (Appellants)
– and –	
GERALD OWEN and KATHERINE ANDERSON Defendants (Respondents)	*Stephen R. Jackson*, for the Defendants (Respondents)
	HEARD at Toronto: January 7, 2016

J. Wilson J.

REASONS FOR JUDGMENT

The Appeal

[1] The Trustees of Wychwood Park in the City of Toronto appeal from the decision of Deputy Judge Caplan of the Small Claims Court dated December 4, 2012 (the Judgment / Second Decision).

[2] Wychwood Park is a unique, small community in the City of Toronto that is subject to a Trust Deed that was registered with the Registry Office of the County of York on July 3, 1891(the Trust Deed).

[3] The Trust Deed appoints trustees charged with maintaining the roadways, drives and parks as private property for the benefit of the property owners within the boundaries of Wychwood Park. The City of Toronto does not maintain the park property. Since its inception in 1891, the Trust Deed has governed the relationship between the Wychwood Park property owners, and it has stipulated the mechanism for assessing the payment of maintenance fees for

the shared Wychwood Park facilities, including: the private roads, ravine, stream and tennis courts.

[4] Unlike many of the homes in Wychwood Park, the Owen Property is, and always has been accessible by public roads.

[5] The Owen family has owned a home in Wychwood Park since 1911 and has paid the annual maintenance fees in accordance with the Trust Deed until the family contested making the payments beginning in 2008.

[6] In the Judgment, Deputy Judge Caplan concluded that the Respondents, Gerald Owen and Katherine Anderson (Gerald and Katherine), the present owners of the Owen family home in Wychwood Park, did not have to pay annual levies for maintenance fees for the common facilities in Wychwood Park for the years 2010 to 2014 in the total amount of $12,799.81.

[7] The trial judge concluded that the Trust Deed was a positive covenant that did not run with the land, and that the exception to the application of this rule, known as the benefit and burden principle, was not the law in Ontario. He did not consider the conditional grant exception.

Standard of Review

[8] For findings of fact, or mixed fact and law, a trial judge's decision should not to be reversed absent a palpable and overriding error. With respect to a question of law, the standard of review is correctness: see *Housen v. Nikolaisen,* [2002] S.C.R. 235, at para. 36.

The Issues in this Appeal

[9] The Appellants/Trustees raise several arguments in this appeal including:

- The reasons of the trial judge are insufficient and confusing.
- The findings of fact disclose palpable and overriding errors.
- The trial judge erred by concluding that the Trust Deed is not enforceable against Gerald and Katherine, in light of the findings in a prior decision of the Small Claims Court upheld by the Divisional Court that Gerald and Katherine are bound by the Trust Deed.
- The legal analysis is flawed, as the trial judge failed to take into account the burden and benefit and the conditional grant exceptions to the general rule that positive covenants do not run with the land.
- The trial judge exceeded the jurisdiction of the Small Claims Court to make what is, in effect, a declaration affecting third party rights and obligations without jurisdiction, and without adequate notice.

Background

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[10] Presently the owners in Wychwood Park who benefit from the Trust Deed are the owners of the 60 properties within the definition of the park. The Owen family purchased the home at 49 Alcina Avenue in 1911 (the Property). It is conceded that the Property is within the present designation of Wychwood Park.

[11] From 1911 until the recent disputes arose, the Owen family has paid the annual levies pursuant to the Trust Deed for the Property.

[12] This is the second legal proceeding by the Owen family challenging the obligation to pay the maintenance levies in accordance with the Trust Deed.

[13] Gerald and Katherine have lived in the Property since 1997, but only became the registered owners in 2010 after the death of Gerald's father, Ivon Maclean Owen.

[14] The father, with Gerald as his agent, refused to pay the assessed Wychwood Park maintenance fees for 2008 and 2009 for the Property. It is conceded that Ivon had Alzheimer's Disease at the time when the dispute arose in the first proceeding.

[15] The Wychwood Park Trustees sued the father, as well as the Respondents, to recover the maintenance fees assessed for 2008 and 2009. The Respondents acted as agent for the father at the first proceeding in the Small Claims Court and, after the father died, continued to act as his estate trustee in the appeal to the Divisional Court. When the matter proceeded before the Divisional Court, Gerald and Katherine were the registered owners of the Property.

[16] There is no doubt, that Gerald, who is a lawyer, was the driving force in both the first and second proceedings.

[17] Deputy Judge Kilian of the Small Claims Court ruled that the father was required to pay the assessed maintenance fees for 2008 and 2009 (the First Decision). He dismissed the claim against Gerald and Katherine, as they were not at the time of the first trial, the registered owners of the Property. He made findings of fact applicable to all parties.

[18] The decision of Deputy Judge Kilian was appealed to the Divisional Court.

[19] Justice Swinton dismissed the appeal and confirmed the legal and factual conclusions in the First Decision.

[20] Swinton, J. declined to consider several new legal issues raised for the first time on appeal. The Trustees argued that they would be prejudiced if the new argument proceeded without adequate notice and without an adequate record.

[21] One of these new legal issues is at the heart of this appeal: whether the annual maintenance levy, pursuant to the Trust Deed, is a positive covenant that does not run with the land, given the conditional grant and benefit burden exemption.

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[22] She decided that the narrow legal issue of positive covenants could be raised in another proceeding, with proper notice. She stated, at paras. 39-40:

> In my view, the interests of justice do not require the resolution of this issue on this appeal.
>
> …
>
> Moreover, this issue, if resolved as the appellant argues, would call into question the binding nature of the Trust Deed not only for the Owen property, but for the other properties in the Park as well. If this issue is to be litigated, it should be done in a manner that gives clear notice to the Trustees, and through them, to others in the community who are likely to be affected…

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[23] She made a similar ruling on another new legal issue raised in the first appeal about the rule against perpetuities, which was not argued in this second proceeding.

[24] When Gerald and Katherine became owners of the Property in 2010 after the death of Ivon, they refused to pay the Wychwood Park maintenance levies.

[25] Hence the second Small Claims Court proceeding brought by the Trustees to enforce payment of the outstanding maintenance levies for the years 2010 to 2013 (the Second Proceeding).

The Decision of Deputy Judge Caplan

[26] The core issue in the Second Proceeding was the legal impact of the law of positive covenants, and whether the conditional grants or burden and benefit exceptions apply in this case.

[27] Deputy Judge Caplan in the Second Proceeding dismissed the claim by the Trustees for the outstanding maintenance fees.

[28] The Trustees challenge the adequacy of the reasons, the accuracy of the findings of fact, as well as the correctness of the legal analysis.

[29] Written submissions and legal argument were submitted by the parties. The analysis of Judge Caplan is sparse. His reasons on the positive covenant argument and the exceptions are as follows, at p. 5:

> With all due respect to Deputy Judge Kilian, it does not appear that the positive covenant defence was argued in the prior matter. The caselaw with regard to the enforceability of positive covenants has been argued at length but I find that the present status of the law is that positive covenants do not run with the land. The Plaintiffs, in their submissions, admit that the Court of Appeal in Durham Condominium Corporation Number 123 versus [*sic*] Amberwood Investments

> Limited, 2002 CanLit4493 [*sic*] (ONCA) did not apply the principle of benefit and burden as an exception to the rule against positive covenants running with the land and have brought forth no clear evidence that the Ontario Courts have recognized the principle of benefit and burden as an exception to the principle of positive covenants not running with the land.

[30] There are two potential exceptions to the general rule: the conditional grant or the benefit and burden principle. The trial judge briefly considered the benefit burden exemption, and did not consider the conditional grant exemption.

[31] The Appellants argue that the reasons of the trial judge, considered as a whole, are confusing and difficult to follow. They allege factual errors that are serious, and they argue that it appears the trial judge conflates these inaccurate factual findings with legal analysis.

[32] I conclude that the reasons of the judge are confusing. I had difficulty following them. It is difficult to ascertain how and why he reached the conclusions he did. It is very difficult for the losing party in this case to understand why they lost, and how to formulate grounds for this appeal.

[33] Sufficiency of reasons is dependent upon context. It must be remembered that this is a decision of a Deputy Judge of the Smalls Claim Court. However, this is not a typical hearing with a limited issue between two parties, findings of credibility and no significant question of law.

[34] In my view, given the importance of this decision not only to the parties, but to the property owners of Wychwood Park, I find that the reasons in the Judgment are insufficient when applying the test in *Randall v. Lakeridge Health Oshawa,* 2010 ONCA 537, 270 O.A.C. 371, at para 77, and *R. v. R.E.M.,* [2008] 3 S.C.R. 3, at para 29.

[35] The Trustees raise other issues.

[36] During the argument before me in the appeal, counsel for Gerald and Katherine, was attempting to reargue binding, facts that were determined in the First Decision.

[37] In particular, Gerald and Katherine attempted before me, as well as before the trial judge, to reargue the question whether they have a benefit flowing from the Trust Deed.

[38] The First Decision confirms that the Owens were beneficiaries of the Trust Deed with benefits, whether or not they chose to use the benefits of Wychwood Park. The benefits were more than use of the private roadway, and includes access to a private park and a tennis court.

[39] They argued in the Second Proceeding, and in this appeal, that as they are not required to use the roadway within Wychwood Park to access their Property, unlike some of the owners in Wychwood Park, they receive no benefit flowing from the Trust Deed. They suggest that they are prepared in the future to be barred from the park.

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[40] A review of the reasons in the Second Decision confirms that the trial judge has largely ignored the earlier findings of fact, as well as legal determinations that are binding upon Gerald and Katherine. It is clear that the benefits to Wychwood Park property owners go beyond access to the private roadways.

[41] The Second Decision appears to consider the legal issue of positive covenants in a vacuum. The trial judge failed to consider the context of the binding findings of fact in the First Decision, when considering the applicability of the potential exceptions.

[42] There are other specific factual errors in the Second Decision including:

- The trial judge appears to challenge the factual finding of Deputy Judge Kilian that the Trust Deed was for the benefit of all property owners, including Gerald and Katherine.

- The trial judge appears to find that as Gerald and Katherine were acting solely as agent for Ivon, the father in the first proceeding, and did not understand that they were bound by the findings of facts made by of Kilian, J. This factual understanding is clearly wrong. Gerald and Katherine acted not only as agents for Ivon Owen, but they were also parties to the proceeding who gave evidence. They had been living in the Property for years. They were not found to be liable for the payment as they were not owners at the time of the first trial. They were owners of the Property when the appeal was argued before Swinton, J.

- He finds that the Trustees have not provided evidence to justify the levies charged to the Respondents. The annual levy is calculated in accordance with the Trust Deed by multiplying the land assessment value by a mill rate approved at each annual general meeting. Recently, annual levies range between $1000 to $3000 per year.

- There are two errors in the trial judge's factual finding on this point. First, he does not consider the concession made by counsel for Gerald and Katherine that they were not disputing the calculation of the levies, but rather disputing liability to pay based upon the legal arguments raised.

- Second, in any event, apart from the concession by counsel, he applies the incorrect onus of proof. He finds that the Trustees have not justified their procedure used at the annual meeting to calculate the quantum of the maintenance fees charged. This issue was raised unsuccessfully in the First Proceeding. In her reasons, Swinton, J., at para. 34, makes it clear that the onus was upon the appellant, father, "to prove that the procedure used at the annual meetings did not comply with the Trust Deed". Applying this reasoning to the Second Decision, it is clear that the onus is upon Gerald and Katherine to provide cogent evidence of irregularities. The onus is not upon the Trustees to prove compliance. The onus upon Gerald and Katherine was not met, and the findings of the trial judge on this important factual issue cannot stand.

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[43] I accept the submissions of the Appellants that there were legal errors, or errors of mixed fact and law, made by the trial judge including:

- He considers the new argument of positive covenants, without any regard to the factual and legal analysis of Deputy Judge Kilian and Swinton, J. and the findings that Gerald and Katherine are bound by the findings in the First Decision as they were parties to that proceeding.

- He purports to make a decision affecting the rights of numerous third parties, without any proof that the third parties have adequate notice of this case.

- His decision is, in effect, a declaration that the Trust Deed cannot be enforced. The Small Claims Court is without jurisdiction to grant declaratory relief.

- He dismisses the burden and benefit principle in one line, without any consideration of the case law. His reasons are inadequate. He does not consider the other exception raised and argued of a conditional grant.

[44] For these reasons, I conclude that the Judgment must be set aside. As I have outlined, I find that there are numerous errors of fact, which cumulatively constitute palpable and overriding errors, and several errors of law.

Remedies Sought

[45] The Appellants seek an Order setting aside the Judgment, and an order declaring that the Respondents are liable to pay the outstanding levies in accordance with the Trust Deed.

[46] In the alternative, the Appellants seek a new trial.

[47] To grant the relief sought declaring the outstanding levies are payable, I must consider the issue of positive covenants, in the context of the potential exceptions of benefit and burden and conditional grants, all in light of the binding factual and legal analysis in the First Decision.

[48] As this is a pure question of law that has been fully argued, and as the facts are established, I decline to send this matter back for a third trial.

Binding Factual and Legal Determinations from the First Decision

[49] The Respondents, as parties to the prior proceedings, are bound by the findings of fact of Deputy Judge Kilian, although the monetary judgment was not made against them. They are also bound by the legal analysis of Deputy Judge Kilian, adopted and amplified by Swinton, J. in the first appeal.

[50] I start the analysis of the positive covenant argument with an outline of the factual and legal determinations made in the First Decision, and then upheld by Swinton, J.

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[51] Gerald and Katherine fully participated as parties in the First Decision. They were living in the Property at the time. The father had Alzheimer's Disease when the challenge was brought against the enforceability of the Wychwood Park Trust Deed. Although the father as owner was responsible to pay the outstanding levies for 2008 and 2009 as owner of the Property, it was Gerald who had carriage of the First Proceeding.

[52] The principles of *res judicata* apply. To allow the findings of fact in the First Decision to be challenged would be a collateral attack and an abuse of process.

[53] Two facts that have been previously determined in the First Decision, and confirmed by Swinton, J., are important in considering the new legal issue raised.

[54] First, Deputy Judge Kilian found that all of the Defendants in the first proceeding (including the Respondents in this proceeding) "were aware of the trust, had actual notice of the Trust Deed, and they were bound by the terms of the trust" based upon the principle of actual notice. Swinton, J. confirmed this factual finding of the trial judge.

[55] Second, Swinton J. confirmed the factual finding of Kilian, J. that Gerald and Katherine received a benefit from the trust. She stated: "The Deputy Judge also rejected an argument that the Owens received no benefit from the trust. He found that the trust was for the benefit of all of the property owners in the Park, and it was irrelevant whether they made use of the benefits."

[56] Swinton, J. accepted the legal analysis of the trial judge, based upon the arguments raised in the First Decision. She concluded, in accordance with the decision of *United Trust v. Dominion Stores Ltd.,* [1977] 2 S.C.R. 915, that the *Land Titles Act*, R.S.O. 1990, c. L.5 (L.T.A.) did not abolish the common law doctrine that allows a registered owner's estate to be encumbered, if the owner had actual notice of the encumbrance.

[57] She concluded at paragraphs 28 to 30 that, as the Appellant had actual notice of the Trust Deed, he was bound by its terms:

> In accordance with the Supreme Court decision in *United Trust,* the appellant was bound by the obligation to pay the annual levies, even though the Trust Deed is not registered on title, because he had actual notice.
>
> Moreover, s. 72(1) of the Land Titles Act does not eliminate the common law doctrine of actual notice. All it states is that a person is not *deemed* to have notice of an unregistered document.
>
> Therefore, the trial judge did not err in law in finding that the appellant was bound to pay the annual levies imposed under the Trust Deed because of actual notice of the Trust Deed [emphasis in original].

[58] Swinton, J. confirmed the viability of the law of actual notice in Ontario in relation to the L.T.A. and rejected the arguments advanced by the Appellant.

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[59] She left open the question of the law of positive covenants, and the exceptions to the rule.

The Positive Covenant Argument

[60] The Trust Deed contains both positive and negative covenants.

[61] The Respondents acknowledge that they are bound by the negative covenants in the Trust Deed, but challenge their obligation with respect to the positive covenants.

[62] The negative covenants include historic limits on the choice of building material, the minimal value of a home constructed in Wychwood Park, and prohibitions for the sale of liquor.

[63] The Respondents challenge the enforceability of the positive covenants contained in the Trust Deed, arguing that the law in Ontario is clear that positive covenants do not run with the land.

[64] It is not disputed that the law in Ontario is that positive covenants generally do not run with the land. The Supreme Court of Canada and the Court of Appeal for Ontario have both affirmed that positive covenants do not run with freehold land in either law or equity: see *Parkinson et al. v. Reid*, [1966] S.C.R. 162; *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 211 D.L.R. (4th) 1 (Ont. C.A.). This rule is sometimes referred to as the *Austerberry* rule, due to its roots in the British case, *Austerberry v. Oldham Corpn.* (1885), 29 Ch. D. 750.

[65] The questions in this appeal are whether the exceptions to this rule are the law in Ontario, and whether the exceptions apply to the facts of this case.

[66] The Court of Appeal in *Amberwood* recognized certain statutory exceptions to the general rule. To name a few, these statutory exceptions include: positive covenants granted by public authorities (*Planning Act*, R.S.O. 1990, c. P.13); positive covenants concerning condominiums (*Condominium Act, 1998*, S.O. 1998, c. 19); and positive covenants between the Crown and private landowners concerning the installation of survey monuments (*Surveys Act*, R.S.O. 1990, c. S.30, s. 61(1)).

[67] The Court also discussed three potential common law exceptions confirmed in the English law, including: (i) a chain of covenants; (ii) the doctrine of benefit and burden; and, (iii) conditional grants.

[68] The Court of Appeal in *Amberwood* recognized that a chain of covenants is the easiest way to exempt the *Austerberry* rule, because these chains maintain privity of contract between successors in title. That is, by having each successive owner agree to the same covenant, the positive obligations continue to exist.

[69] However, this exception is not relied upon by the Appellants. The Trustees instead argue that the other two exceptions of benefit and burden and conditional grants apply to the facts of this case.

Explanation of the Benefit and Burden and Conditional Grants Exceptions

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[70] Prior to considering the majority and the dissenting opinions in *Amberwood,* I pause to review the meaning of these two exceptions, as the differences between them are subtle.

[71] In *Tito v. Waddell (No. 2)*, [1977] 1 Ch. 106, the famous British case on the benefit and burden principle, Vice-Chancellor Megarry explained the differences between the exceptions as follows, at p. 302:

> I emerge from a consideration of the authorities put before me with a number of conclusions and a number of uncertainties. First… I think that there is ample authority for holding that there has become established in the law what I have called the pure principle of benefit and burden. Second, I also think that this principle is distinct from the conditional benefit cases, and cases of burdens annexed to property. Although language speaking of benefit and burden is sometimes used in the latter classes of case, I do not think it is really apt, and it is liable to confuse. In such cases the rule is really a rule of "all or none," an inelegant but convenient expression that may be used for brevity. A burden that has been made a condition of the benefit, or is annexed to property, simply passes with it: if you take the benefit or the property you must take it as it stands, with all its appendages, good or bad. It is only where the benefit and the burden are independent that the pure principle of benefit and burden can apply.
> Third, it is a question of construction of the instrument or transaction, depending on the intention that has been manifested in it, whether or not it has created a conditional benefit or a burden annexed to property. If it has, that is an end of the matter: if it has not, and the benefit and burden are independent, questions of the pure principle of benefit and burden may arise.
>
> …
>
> Fourth, the application of the benefit and burden principle will normally come later than the question of construction. If the initial transaction has created benefits and burdens which, on its true construction, are distinct, the question whether a person who is not an original party can take one without the other will *prima facie* depend upon the circumstances in which he comes into the transaction… [Emphasis added]

[72] In summarizing this section of *Tito*, British Professor Christine Davis writes:

> Under the pure principle of benefit and burden, as defined by Megarry V.-C. in *Tito v. Waddell (No. 2)*, an obligation imposed by a deed or other arrangement that also grants a benefit may bind a person taking the benefit. According to Megarry V.-C. the pure principle deals with cases where it is not possible to construe the burden as a condition of the benefit.

See C. Davis, "The Principle of Benefit and Burden" (1998) 57 Cambridge L.J. 522, at p. 537.

[73] Canadian Professor Bruce Ziff has also addressed Vice-Chancellor Megarry's reasoning in *Tito*, though he uses the case's alternative name, *Ocean Island*:

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> The central rationale of the pure principle can be found in several venerable playground adages: 'you can't have it both ways'; 'you can't have your cake and eat it too'; and 'you can't blow hot and cold'. Generally speaking, these notions have received recognition interstitially throughout the law, but the significant contribution of the *Ocean Island* case is that it draws together and builds on this earlier authority…
>
> The principle of benefit and burden applies where, as a matter of construction, the benefits and burdens are created as independent obligations, for a central feature of the doctrine is to tether previously separate promises. Where, by contrast, conditional benefits are involved, the matter is more easily resolved. In that instance, the benefit and the burden are so intimately intertwined that a taking or approbation of the benefit ineluctably means that the burden has also been assumed… [Emphasis added]

See B. Ziff, "Positive Covenants Running With Land: A Castaway on *Ocean Island*?" (1988-1989) 27 Alta. L. Rev. 354, at pp. 356-357.

[74] By way of synthesis, I make the following observations as to the meaning of the two exemptions:

- Conditional Grant Exemption. When being asked to enforce a positive obligation, the courts will first look at the transaction between the parties to see if a benefit was clearly made on the conditional acceptance of a positive obligation. If such an intention can be made out on the face of the transaction, the conditional grants exception is engaged.

- Benefit and Burden Exemption: If a conditional connection between the obligation and the benefit is not clear, the courts will then consider whether the benefit and burden exception applies. By looking at the circumstances of the transaction, the intentions and relationship of the parties, and the nature of the benefits and burdens at issue, the courts will determine if there is an implicit and necessary connection between formally separate obligations and advantages. Or, to repeat the words of Professor Ziff, this second exception looks to whether the courts should "tether previously separate promises".

Analysis of the Case Law

[75] A primary focus in this appeal is the meaning and current import of the Court of Appeal's 2002 decision in *Amberwood.*

[76] The majority decision was written by Justice Charron (as she then was). A strong, dissent was written by Justice MacPherson.

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[77] Briefly, the situation in *Amberwood* involved neighbouring properties that a developer, WHDC Harbour Development Corporation (WHDC), intended to develop into two, joint condominium projects. While each site would have its own building, WHDC intended them to share certain facilities and expenses, and so reciprocal easements were drafted and registered against each property.

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[78] When WHDC completed the first condominium project, it registered the property with Durham Condominium Corporation No. 123 (DCC 123). It never completed the second condominium project, as WHDC would eventually fall into financial difficulty. The incomplete condominium project was transferred to Amberwood Investments Limited, and this new owner subsequently refused to comply with the easement's provisions requiring payments to maintain shared facilities. DCC 123 sought to enforce this positive obligation to pay by appealing to the benefit and burden exception or the conditional grants exception.

[79] The majority decision in *Amberwood* appears to endorse Ontario adopting the exception for conditional grants in paragraphs 85 and 86, but found that the exception did not apply to the facts at hand:

> [85] I note at the outset that the principle from Halsbury's Laws of England relied upon by the applications judge… seems to me to be consonant with the rule in Austerberry. I repeat it here for convenience:
>
> > If the facts establish that the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding. Where the obligation is framed as so to constitute a continuing obligation upon which the grant of the easement was conditional, *the obligation can be imposed as an incident of the easement itself, and not merely a liability purporting to run with the land*. [Emphasis in original.]
>
> [86] Hence, as a matter of construction of the creating instrument itself, if a grant of benefit or easement is framed as conditional upon the continuing performance of a positive obligation, the positive obligation may well be enforceable, not because it would run with the land, but because the condition would serve to limit the scope of the grant itself. In effect the law would simply be giving effect to the grant…much the same reasoning underlies the law of restrictive covenants.

[80] The majority in *Amberwood* rejected the application of the burden and benefit excemption in Ontario. Based on its review of English case law, the majority found that the doctrine has many "frailties and uncertainties", and instead concluded that the adoption of such an exemption to the positive covenant principle is best left to the Legislature (*Amberwood*, at para. 75).

[81] Before reviewing the dissent of MacPherson, J.A. and by way of foreshadowing my conclusions on the law, I note that the English Court of Appeal has recently accepted and further clarified the benefit and burden exception: see *Wilkinson v. Kerdene Ltd.*, [2013] E.W.C.A. Civ. 44 in a case very similar to this one.

[82] In his dissenting judgment, MacPherson J.A. concluded that the concern about usurping the role of the Legislature when considering the benefit and burden exemption was not borne out. He suggested the majority's hesitancy was a retreat from the important role that courts play when creating exceptions to common law rules "where the strict application of the rule would lead to injustice." (*Amberwood*, at para. 99). Citing law reform reports and academic scholarship about the "inflexible" nature of this common law rule, MacPherson J.A. found the *Austerberry* rule to be one that is "simply too harsh if it is applied in all cases." (*Amberwood*, at para. 96).

[83] MacPherson J.A. then canvassed case law from the United Kingdom (most notably, the aforementioned case of *Tito*) to conclude that the two possible exceptions at issue in this case are available to the courts in Ontario: the benefit and burden principle and conditional grants.

[84] After conceding that the judicial treatment of cases like *Tito* has been mixed over the years, he contrasted this jurisprudence with the positive treatment the exceptions have received in academic commentary. For instance, he cited the aforementioned paper from Professor Davis, at para. 123 citing pp. 552-553:

> It is arguable that "benefit and burden" is a principle, reasonably clear in its application, that promotes fairness and, consequently, far greater use should be made of it. It seems only fair that a right or benefit originally granted subject to a condition or linked with a reciprocal right or obligation should remain conditional or linked. In recent years the courts have been keen to make use of other principles that can be seen to achieve fairness in the circumstances and in the light of the conduct of the parties, such as constructive trusts and proprietary estoppel. For example, a purchaser of land may be bound by means of a constructive trust by a contractual licence or unregistered registrable [*sic*] interest where his conscience is affected because of the circumstances surrounding the assignment. Why should his conscience not also be affected by the circumstances of the grant, at least where he has knowledge of them, combined with his later conduct in taking the benefit? Perhaps the only justifiable distinction between the principle of benefit and burden on the one hand and the constructive trust and doctrine of proprietary estoppel on the other hand is that the latter are discretionary in their application or effects whereas the former is not. Nevertheless, provided that the courts reach a satisfactory conclusion in relation to issues such as the need for knowledge so as to ensure that the principle of benefit and burden is fair to all concerned, it is arguable that the principle of benefit and burden is a useful doctrine which should be invoked by the courts whenever the circumstances permit. [Emphasis added]

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[85] In light of this support among the academic community and his view that cases like *Tito* signal an appropriate development of the common law, MacPherson J.A. endorsed the benefit and burden exception in Ontario. He concluded that since Amberwood had "clear notice of the burdens which it would be required to assume" (*Amberwood*, at para. 135), it was reasonable to conclude that the benefit and burden exception applied.

[86] His Honour confirmed that since the conditional grants exception is an accepted articulation of English law, the case for allowing it in Ontario was even stronger.

[87] Several years later, Justice Crane in *Wentworth Condominium Corp. No. 12 v. Wentworth Condominium Corp. No. 59*, [2007] O.J. No. 2741 also applied these exceptions when assessing the merits of a claim for an unregistered easement.

[88] *Wentworth* involved a property dispute between two neighbouring condominium projects: No. 12 and No. 59. In the mid-1970s, No. 12 allowed an easement on its property to build a storm drain system that was intended to service both properties. The costs were to be shared, as the benefits were also anticipated to be shared. No. 59 was built, but No. 12 was not. When No. 59 was sold, the new owner stated that it was not responsible for repairing the storm drain system located on the adjoining property of No. 12. Crane, J. found that since No. 59 derived all the benefits from this easement, the sale of No. 59 to a new owner meant the owners of No. 59 had to pay for the necessary repairs to the storm drain system located on the property owned by No. 12:

> [32] I find on the interpretation of the agreement, that the provision for No. 59 to enter onto the easement lands of No. 12 to effect maintenance and repairs was to provide the means to do what the creator of the easement intended, namely that No. 59, as the beneficiary of a storm water system, controls the process of dealing with the Hamilton Conservation Authority and other public bodies. The grant of easement and rights was in law conditional on the owners of the dominant lands keeping its storm water system maintained and in repair.
>
> [33] The facts of this case are clearly within the benefit– burden exception to the rule in *Austerberry v. Oldham Corp.* (1885), 29 Ch. D. 750(C.A.). Under the analysis in *Halsall vs. Brizell* [1957], All ER 371, *Ives Investments Ltd. v. High* [1967], All ER 504 and *Tito v. Waddell* (No. 2) [1977], Ch. 106 as recognized in law by the Ontario Court of Appeal in *Durham Condominium Corp. No. 123 v. Amberwood Investments Ltd*. 2002 CanLII 44913 (ON CA), 58 O.R (3d) 481 at para. 126 (although distinguished on its facts from the case at bar).
>
> [34] The defendant's storm waters continue to flow into the covenanted sewer – the benefit-burden exception is inextricably linked.

[89] Although Crane, J. refers to the conditional grants exception as applying when referring to *Amberwood*, he appears to have adopted the benefit and burden as well as a conditional grant exemptions. It appears that he has applied the dissenting decision of MacPherson, J.A., with respect to the benefit burden exemption, as opposed to the majority decision.

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[90] In support of the viability of the benefit and burden exception, the Appellants cite the previously mentioned English Court of Appeal case of *Wilkinson*. Released in 2013, this case was heard well after *Amberwood*. The facts and issues in *Wilkinson* are similar to the present case. The benefit burden is explained and applied.

[91] In *Wilkinson*, a series of vacation bungalows shared common features, including: walkways, roads, tennis courts, etc. Some of the tenants argued that due to several sequential sales of land, the obligation to pay levies to maintain these common features had ceased.

[92] The Court of Appeal disagreed with this defense, and instead stated that: "… unless they can show that the payment covenant has no relation whatever to the Schedule 1 rights [i.e., usage of common roads, lawns, etc.]", the tenants had to continue paying the fees (at para. 33).

[93] Further, the court noted at paragraph 33:

> … [a]lthough the continued exercise of Schedule 1 rights is not made expressly conditional upon payment… the payment is intended to ensure that the rights remain capable of being exercised. The authorities require one to look beyond the express terms of the conveyance and consider what in substance the covenantor is paying for. Here, as in *Halsall v Brizell*, the payment, at least in substantial part, is intended to provide a contribution to the cost of maintaining the roads and other facilities over which the owners are granted rights. None of them have ceased to use the roads nor wishes to do so. In this case (unlike in the two authorities referred to) there is also a covenant by the original site owner (in clause 4) to carry out the repairs. But I am not persuaded that this is sufficient in itself to sever any link between the payment covenant and the Schedule 1 rights. It merely provides the covenantor with the added assurance that (at least while the site remains the property of the original covenantee) the work will be carried out. But the performance (or not) of that covenant is not the determinant of liability. That remains the subsistence of the Schedule 1 rights. [Emphasis added]

[94] In a fulsome, pragmatic approach, as confirmed in *Wilkinson,* the courts must look to the substance of the relationship between the benefit and the burden to determine if the positive covenant continues to apply. As noted by Vice-Chancellor Megarry in *Tito*, when there is a sufficient degree of correlation between the obligation to pay and the grant of benefits, the burden and benefits exception applies.

[95] There is a paucity of cases applying the benefit and burden principle or the conditional grants exception. This rare application of the exceptions makes sense, considering there are so few communities sharing facilities like the holiday park in *Wilkinson* or Toronto's Wychwood Park.

Conclusions

[96] The majority in *Amberwood* did accept that the conditional grant exception could apply, but found that it did not apply in the facts of that case.

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[97] The reluctance of Charron J.A. to apply the benefit and burden exception in 2002 was caused, in part, by legal ambiguity in the English cases. This ambiguity has been clarified by the recent decision in *Wilkinson*. That case is strikingly similar to the circumstances and the facts of this case. There is also no doubt that both the benefit and burden and the conditional grants exceptions are now part of the English common law.

[98] I also note that these principles have been applied by Crane, J. in in *Wentworth Condominium* to ensure fairness in that fact situation.

[99] The common law of positive covenants is in evolution, and is capable of adapting to new factual and contextual situations. I adopt the reasons of MacPherson, J. A. in *Amberwood* as reflecting the current status of the law in Ontario, taking into account recent clarification and confirmation of the benefit and burden exemption in England. I conclude therefore that both the conditional grant and the benefit and burden exceptions reflect the current law in Ontario.

[100] Furthermore, it does not make practical sense to adopt one exemption, and deny the other as the circumstances when each would arise are often intertwined, as in this case.

[101] In light of these conclusions, I find that both exceptions are appropriately part of the common law in Ontario. If I am wrong in my conclusion that both exemptions apply in Ontario, then I agree with the Appellants that at least the conditional grant exemption is part of Ontario law and may apply.

[102] As suggested in *Tito*, the courts should engage in a two-step analysis to see if either exemption applies.

[103] When being asked to enforce a positive obligation, the courts will first look at the transaction to see if the conditional grant exemption applies. Was a benefit granted that was clearly made on the conditional acceptance of a positive obligation? If such an intention can be made out on the face of the transaction, the conditional grants exception is engaged.

[104] I conclude that the conditional grant exception applies. Wychwood Park is a unique community governed by the Trust Deed. Since 1911, the Owen family has had knowledge of the Trust Deed, have complied with the Trust Deed, and, as confirmed in the First Decision, the Respondents are beneficiaries of the trust. The facts confirm a benefit was clearly granted to the Owen family, conditional on the acceptance of the positive obligation to pay their share of the annual levies.

[105] If a conditional connection between the obligation and the benefit is not clear, the courts will then consider whether the benefit and burden exception applies. As I have confirmed that the conditional grant exemption applies, the following analysis is not necessary to support the outcome in this case, and is relevant only if a higher court concludes that the conditional grant exemption does not apply to the facts of this case.

[106] Even if the connection between the benefits and burdens of living in Wychwood Park was not laid out explicitly in the Trust Deed (which is not my conclusion), I find that the benefit of living

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in Wychwood Park—with its private facilities and roads available only to Wychwood Park residents—must necessarily be connected to the burden of paying levies for these privileges. If I had not found a formal connection in the Trust Deed to the benefits and obligations, then I would have found an implicit, yet necessary connection in the nature of the benefit and the burden. To find otherwise would run counter to the history and common understanding of the community, and it would render the unique nature of Wychwood Park untenable.

[107] In other words, even if I had not found the benefits of the community conditional on the payment of levies, it would be apparent that this benefit and burden are, to use the language of Professor Ziff, sufficiently "tethered". Therefore the benefit burden exception also applies in the facts of this case.

[108] For these reasons, I conclude that the Respondents are bound by the Trust Deed and are obliged to pay their annual levies for the benefits received. I accept the arguments of the Appellants that both the conditional grants and the benefit and burden exceptions apply to the unique facts and circumstances of this case to modify the general rule that positive covenants do not run with the land.

[109] Alternatively, if only the conditional grant principle applies in Ontario, I find that it is engaged by the facts of this case, and the Respondents are obliged to pay the annual levies.

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Relief Granted

[110] For the reasons given, I grant the relief sought by the Appellants for:

(1) an Order setting aside the Judgment of Deputy Judge Caplan dated December 4, 2014; and,

(2) an Order declaring that the Respondents are liable to pay the annual levies assessed against the Property in accordance with the Trust Deed.

(3) Judgment in the amount of $12,799.81 for the unpaid levies for the years 2010 to 2013.

Costs

[111] The parties have agreed that the losing party in this appeal should pay the successful party's costs in the amount of $2500.00 inclusive of costs and HST and disbursements. The Respondents shall therefore pay this sum to the Appellants, payable forthwith.

J. Wilson, J.

Released: February 4, 2016

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CITATION: Black v. Owen, 2016 ONSC 40
DIVISIONAL COURT FILE NO.: 605/14
DATE: 20160204

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

RICHARD BLACK AND SCOTT LAMACROFT

Plaintiffs (Appellants)

– and –

GERALD OWEN and KATHERINE ANDERSON

Defendants (Respondents)

REASONS FOR JUDGMENT

J. Wilson, J.

Released: February 4, 2016

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