COURT OF APPEAL FOR ONTARIO

CITATION: Black v. Owen, 2017 ONCA 397
DATE: 20170518
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2017 ONCA 397 (CanLII)

Feldman, Cronk and Miller JJ.A.

BETWEEN

Richard Black and Scott Lamacroft

Plaintiffs (Respondents)

and

Gerald Owen and Katherine Anderson

Defendants (Appellants)

Scott C. Hutchison and Matthew R. Gourlay, for the appellants

Anne E. Spafford and Shannon M. Gaudet, for the respondents

Heard: April 10, 2017

On appeal from the order of Justice Janet Wilson of the Superior Court of Justice, dated February 4, 2016, with reasons reported at 2016 ONSC 40, 345 O.A.C. 245.

Cronk J.A.:

Introduction

[1] This appeal concerns the alleged obligation of the appellants, Gerald Owen and Katherine Anderson, to pay an annual levy as a contribution to maintenance costs and taxes for certain private property situated in an area of

Toronto known as Wychwood Park. The payment obligation is said to arise under an 1891 trust deed concerning certain common property in the Park (the "Trust Deed").

[2] The appellants deny any liability for the contested levies. They contend that the covenant to pay contained in the Trust Deed offends the well-established common law rule that positive covenants do not run with freehold land, whether in law or in equity. This rule is commonly referred to as the rule in *Austerberry v. Oldham Corpn.* (1885), 29 Ch. D. 750 (C.A.). It has been much discussed in the English case law, including, most notably, in *Rhone v. Stephens*, [1994] 2 All E.R. 65 (H.L.), and has clearly been adopted in Canada: *Parkinson v. Reid*, [1966] S.C.R. 162. See also *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306. The appellants argue that, as no exception to this general rule is recognized under Ontario law, the requirement under the Trust Deed to pay the annual levy is unenforceable as against them (the "Positive Covenants Argument").

[3] To assess the merits of the Positive Covenants Argument, it is necessary to examine the terms of the Trust Deed in light of this court's decision in *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481, leave to appeal to S.C.C. abandoned, [2002] S.C.C.A. No. 208.

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[4] In *Amberwood*, a condominium corporation and the owner of an adjoining property had entered into an agreement to exchange easements on their respective properties and to share expenses concerning a recreational facility. The agreement was registered on title to both parcels of land and the obligations and benefits in the agreement were expressed to run with the land and to bind and benefit the successors in title of the original contracting parties. When the successor in title to one of the original covenantors refused to pay its share of the expenses, litigation ensued.

[5] Justice Charron, writing for the majority of the *Amberwood* court, held that the common law rule that positive covenants do not run with freehold land is settled law in Ontario and that legislative action is required and advisable for any reform of it. The court also considered whether two exceptions to this rule recognized under English law, known as the "benefit and burden exception" and the "conditional grant of easement exception", could and should be adopted in Ontario and, if so, whether either applied on the facts of the case.

[6] For lengthy reasons it explained, including the uncertainties and many frailties of the existing common law in England in this area of the law, the majority in *Amberwood* concluded that it would be inadvisable to adopt the benefit and burden exception to the rule about positive covenants in Ontario. For essentially the same reasons, although perhaps not as explicitly, the majority also declined to import the conditional grant exception as discussed in the English

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jurisprudence into Ontario law, holding, in any event, that it was not available on the facts to assist the defaulting landowner. The dissenting judge in *Amberwood*, MacPherson J.A., would have adopted both exceptions to the positive covenants rule into the law of Ontario and would also have held that both exceptions applied in the particular factual circumstances of that case.

[7] The principles articulated in the majority opinion in *Amberwood* are directly engaged in this appeal. As I will explain, in this case, the Divisional Court judge (the "Appeal Judge") declined to apply the majority decision in *Amberwood* and, based on a recent case in England and a decision of the Ontario Superior Court of Justice, concluded that both the benefit and burden and conditional grant exceptions to the positive covenants rule form part of Ontario law and are applicable on the facts of this case. These rulings are now challenged before this court.

Background

(1) The Trust Deed

[8] Wychwood Park is a small community of 60 residential houses in the Bathurst Street and Davenport Road area of Toronto. The properties are subject to the Trust Deed, which was entered into on July 3, 1891 by the original owners of the various parcels of land comprising the Park and registered on title with the registry office of the County of York.

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[9] Under the terms of the Trust Deed, the original covenantors agreed to appoint trustees to hold certain roadways, drives, a park reserve and stipulated land reservations in Wychwood Park (the "Common Property") as private property for the benefit of the original covenantors and "all persons hereinafter claiming through or under them any portion of the said property". For this purpose, the original contracting parties granted their respective interests in the lands comprising the Common Property in Wychwood Park to the trustees, upon several express trusts. Three of the covenantors were appointed under the Trust Deed as the initial trustees of the trust thereby created.

[10] The first trust provision under the Trust Deed charges the trustees "to keep the [Common Property] in good repair and order for the benefit of the owners from time to time being of the remaining portion of the said property". It also authorizes the trustees to require the respective property owners in Wychwood Park to pay an annual levy or charge, in the sum of $500, together with such "sums as may be necessary to pay the taxes of the then current year" in such amount as is proportionate to the value of the lands owned by each affected landowner, exclusive of the buildings thereon and the Common Property. The stated purposes of the annual levy are twofold: i) "maintaining and keeping the [Common Property] in good repair and order"; and ii) "paying the taxes due in respect thereof".

[11] The concluding language of the first trust provision reads as follows:

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> [T]he respective amounts so payable by the respective owners of any portion of said property to the trustees after said demand shall be forthwith payable by them respectively and shall be a charge upon the portion of the said lands held by said owners or his, her or their executors, administrators or assigns or anyone claiming under him, her or them and shall be a first lien and encumbrance thereon and take priority over all incumbrances existing thereon and shall in case of non payment be recoverable from the party in default, his, her or their executors, administrators or assigns.

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[12] The remaining trust provisions of the Trust Deed provide for such matters as: the appointment of new trustees; the maintenance of records by the trustees regarding land holdings in Wychwood Park; an annual written notice to the affected landowners of the levies imposed for the preceding year; meetings of the affected landowners and trustees; the approval by the landowners of any increase in the amount of the annual levy; the potential conveyance of the Common Property to the applicable municipality or the dedication of the Common Property to the public; and certain restrictive covenants regarding the use and occupation of the properties comprising Wychwood Park.

[13] All the covenants contained in the Trust Deed are expressed to bind both the original covenantors and their heirs, executors, administrators or assigns. As set out in paragraph 11 above, the Trust Deed also expressly states that the annual levy contemplated under the first trust provision constitutes a charge upon the lands held by each landowner in the Park or “his, her or their executors,

administrators or assigns or anyone claiming under him, her or them" (emphasis added).

(2) Parties' Positions

[14] The appellants are husband and wife. They currently own and reside at a property that backs onto Wychwood Park. Gerald Owen's family acquired the property from the original owners in 1911. The appellants have lived at the property since 1997 but until 2010 it was owned by Ivon Owen, Gerald Owen's father.

[15] Unlike many of the other properties in Wychwood Park, the appellants' property is accessed and serviced by a public, municipal road (Alcina Avenue). The appellants assert that they derive no benefit from the expenditure of the annual levy imposed under the Trust Deed, they disclaim any benefit from their property's inclusion in Wychwood Park, they maintain that they have never agreed to pay the annual levy contemplated by the Trust Deed and, further, they wish to be excluded from any use of the Common Property. They rely on the Positive Covenants Argument to defeat the respondents' debt action against them.

[16] The respondents are the current trustees of the Wychwood Park trust. They argue that because the appellants are the owners of a property within the boundaries of Wychwood Park, they are beneficiaries under the Trust Deed and,

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consequently, have an obligation to pay their proportionate share of expenses incurred by the trustees in relation to the Common Property.

[17] The respondents do not challenge the majority decision in *Amberwood*. Specifically, they do not seek to have the holdings of the *Amberwood* majority revisited by this court. Rather, their main position is that the Appeal Judge properly interpreted the positive covenants rule and correctly applied the exceptions to that rule in accordance with *Amberwood*.

[18] More particularly, the respondents argue in their factum that both the benefit and burden and the conditional grant exceptions to the positive covenants rule are available in Ontario and apply to the facts of this case. During oral argument, however, the respondents did not contend that the benefit and burden exception forms part of Ontario law, nor did they seek to rely on that exception. Instead, they maintained that there is a direct link under the Trust Deed between the benefits conferred regarding the Common Property and the positive obligation to pay the annual levy and, because the appellants derive benefits under the Trust Deed, the conditional grant exception applies to impose liability on the appellants for the disputed levies.

(3) Litigation History

(i) First Action

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[19] Ivon Owen ceased paying the annual levy in 2008. At that time, the appellants were residing at his property and caring for him. As a result of the non-payment, the then trustees of the trust sued him, together with the appellants, in Small Claims Court for recovery of the outstanding levies for 2008 and 2009.

[20] In 2010, Deputy Judge Kilian held that Ivon Owen was required to pay the disputed annual levies. He held that Ivon Owen and the appellants were aware of and had actual notice of the trust and, on this basis, were bound by the terms of the Trust Deed. He also found that the annual levy was used to maintain and redevelop a private road inside Wychwood Park and, further, to maintain the trees, fences, creek and other features of the Common Property. He held that:

> The purpose of the trust was for the benefit of all of the property owners inside the Wychwood area. Whether or not those owners make use of those benefits is irrelevant. That is up to them.

[21] Deputy Judge Kilian therefore granted judgment in favour of the trustees against Ivon Owen for $4,052.11 – the amount of the annual levies for 2008 and 2009 – plus pre-and postjudgment interest. He dismissed the action against the appellants on the ground that they were merely acting on behalf of Ivon Owen, the then owner of the property.

[22] Importantly, the Positive Covenants Argument was not raised before or considered by Deputy Judge Kilian.

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(ii) First Appeal Decision

[23] The appellants appealed. By the time of the appeal, Ivon Owen had died and the appellants had inherited his property. Consequently, the appellants appealed in their capacity as trustees of his estate.

[24] On January 30, 2012, Swinton J. of the Superior Court of Justice, sitting as a single judge of the Divisional Court, dismissed the appeal. She agreed with Deputy Judge Kilian that Ivon Owen was bound by the obligation to pay the annual levy because, as the registered owner of the property, he had actual notice of the terms of the Trust Deed: *Black v. Owen*, 2012 ONSC 400, 291 O.A.C. 8.

[25] Before Swinton J., the appellants sought to advance the Positive Covenants Argument for the first time. Justice Swinton declined to entertain this argument, stating at paras. 39-40 of her reasons:

> In my view, the interests of justice do not require the resolution of this issue on this appeal. The appellant did not raise this issue at trial, although the case law was readily available. The fact he did not have legal counsel at trial does not permit him to raise the issue now, as the respondents might well have responded in a different manner if the issue had been raised earlier.
>
> 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

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> in the community who are likely to be affected. Therefore, I decline to deal with the positive covenant argument as a ground of appeal.

(iii) Second Action

[26] The appellants did not pay the annual levies for 2010 to 2013. As a result, in June 2012, the respondents commenced a second Small Claims Court action against the appellants to recover the unpaid levies. In response, the appellants relied on the Positive Covenants Argument as a complete answer to any alleged liability for the levies.

[27] On December 4, 2014, Deputy Judge Caplan accepted the Positive Covenants Argument. He held that: i) the appellants were not precluded by reason of the first action and the first appeal decision from defending the second action brought by the trustees; ii) as the Positive Covenants Argument had not been argued in the first action and, in his view, the appellants had met the pre-conditions for raising this argument outlined by Swinton J., it was open to the appellants to advance the Positive Covenants Argument before him; iii) on the authority of *Amberwood*, the applicable principle of law in Ontario is that positive covenants do not run with the land; and iv) the respondents had failed to demonstrate that the benefit and burden exception to this principle – discussed further below – had been recognized under Ontario law.

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[28] Deputy Judge Caplan therefore concluded that the respondents had failed to prove their claim, and he dismissed their action. He did not address the conditional grant exception to the positive covenants rule.

(iv) Second Appeal Decision

[29] The respondents appealed. On February 4, 2016, the Appeal Judge ruled that Deputy Judge Caplan's reasons were legally insufficient and that they were tainted by several factual and legal errors. These errors, in her view, included consideration of the Positive Covenants Argument "without any regard to the factual and legal analyses" of Deputy Judge Kilian and Swinton J. The Appeal Judge held, at paras. 49 and 52, that these analyses were binding on the appellants, as parties to the first action, under the principle of *res judicata*. As a result, she ruled that any challenge by them to Deputy Judge Kilian's factual findings in the first action would constitute "a collateral attack and an abuse of process".

[30] In light of the errors she found had been made by Deputy Judge Caplan, the Appeal Judge conducted her own analysis of the Positive Covenants Argument. Citing *Amberwood* and *Parkinson*, she recognized that, under Ontario law, positive covenants generally do not run with freehold land. She framed the questions before her, at para. 65, as "whether the exceptions to this rule are the law in Ontario, and whether the exceptions apply to the facts of this case". She

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elaborated, at para. 69, that the application of the benefit and burden and conditional grant exceptions to the positive covenants rule, as discussed in *Amberwood*, were at issue.

[31] *Amberwood* was thus central to the Appeal Judge's analysis. She undertook a detailed review of it and of the subsequent decisions of the English Court of Appeal in *Wilkinson v. Kerdene Ltd.*, [2013] E.W.C.A. Civ. 44 and the Ontario Superior Court of Justice in *Wentworth Condominium Corp. No. 12 v. Wentworth Condominium Corp. No. 59*, [2007] O.J. No. 2741. Based on her interpretation of these cases, she held as follows:

> (1) the majority of the *Amberwood* court rejected the application of the benefit and burden exception in Ontario, concluding that the adoption of such an exception to the positive covenants rule is a matter best left to the legislature (at para. 80, citing *Amberwood*, at para. 75);
>
> (2) the majority in *Amberwood* accepted the availability of the conditional grant exception to the positive covenants rule under Ontario law, but concluded that it did not apply on the facts of that case (at para. 96);
>
> (3) in light of post-*Amberwood* developments in the law, specifically, *Wilkinson* in England and *Wentworth Condominium Corp.* in Ontario, the reasons of the dissenting judge in *Amberwood* "reflect[ed] the current status of the law in Ontario". As a result, the benefit and burden and the conditional grant exceptions were "appropriately part of the common law in Ontario" (at paras. 99 and 101);

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> (4) even if the benefit and burden exception did not form part of the common law in Ontario, the conditional grant exception, at least, did, and it applied to the facts of this case (at paras. 101 and 104); and
>
> (5) the benefit and burden exception also applied in this case (at para. 107).

[32] The Appeal Judge summarized her conclusions, at paras. 108-109 of her reasons, in this fashion:

> [T]he 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 grant 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.
>
> 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.

[33] Accordingly, the Appeal Judge allowed the appeal, set aside Deputy Judge Caplan's judgment dated December 4, 2014, ordered the appellants to pay the unpaid levies for 2010 to 2013 in the amount of $12,799.81, and granted an unqualified declaration that they are liable to pay the annual levies assessed against their property in accordance with the Trust Deed.

[34] The appellants appeal, with leave, to this court.

Issues

[35] As raised by the appellants, there are several issues on appeal:

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(1) Did the Appeal Judge err by:

(a) failing to follow binding appellate precedent, namely, the majority decision in *Amberwood*;

(b) finding that the benefit and burden exception forms part of the law of Ontario and applies on the facts of this case;

(c) finding that the conditional grant exception forms part of the law of Ontario and applies on the facts of this case;

(d) finding that the principle of *res judicata* operates to prevent the appellants from arguing that they receive no benefit under the Trust Deed; and

(e) granting declaratory relief requiring the appellants to pay the annual levies under the Trust Deed in perpetuity?

(2) Are the reasons of Deputy Judge Caplan in the second action legally insufficient?

Analysis

[36] In my view, it is unnecessary for the disposition of this appeal to address all the grounds of appeal raised by the appellants. For the reasons that follow, I conclude that the Appeal Judge erred in law by failing to follow binding appellate precedent, namely, this court's majority decision in *Amberwood*, and by holding that the benefit and burden and conditional grant exceptions to the positive

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covenants rule apply in this case. In light of these errors, I would allow the appeal and restore the judgment of Deputy Judge Caplan.

(1) Failure to Follow Binding Precedent

[37] The appellants argue that the Appeal Judge erred in law by failing to follow the binding majority judgment of this court in *Amberwood*. They submit that the Appeal Judge was not entitled to adopt, as she did, the minority opinion in *Amberwood* as reflecting current Ontario law, either on the basis of an alleged evolution in the English jurisprudence concerning the positive covenants rule or in reliance on her interpretation of the decision of another Superior Court judge in another case.

[38] I agree with these submissions.

[39] The respondents expressly declined to request reconsideration of the majority decision in *Amberwood* by a five-judge panel of this court. Having so elected, they quite properly did not seek to challenge the *Amberwood* majority decision in oral argument at the appeal hearing. To the contrary, before this court, the parties accept that the principles of law articulated by the *Amberwood* majority apply in this case.

[40] The majority decision in *Amberwood* remains good law in Ontario. Recently, in *Heritage Capital*, the Supreme Court cited *Amberwood*, at para. 25, for the proposition that the positive covenants rule applies "even if an agreement

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contains an express intention to the contrary". The Court went on to state: "As a result, the common law rule is that '[n]o personal or affirmative covenant, requiring the expenditure of money or the doing of some act can, apart from statute, be made to run with the land'" (emphasis in original; citations omitted).

[41] *Amberwood* was directly relevant to the matters in issue before the Appeal Judge. It was also a precedent binding on her. Absent reconsideration by this court of its decision in *Amberwood*, (which is not requested by the parties), or an authoritative pronouncement by the Supreme Court of Canada that displaces the majority's holdings in *Amberwood* (which not only has not occurred, but would run contrary to *Heritage Capital*), it was not open to the Appeal Judge to disregard the binding majority opinion in *Amberwood* and, instead, to adopt and follow the minority opinion in that case. She erred in law in so doing.

[42] As the Supreme Court emphasized in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 38: "Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies." Failure to adhere to this core principle is inconsistent with the principle of *stare decisis*, the need for certainty and stability in the administration of justice, and the orderly development of the law.

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[43] Consistent with this principle, the Supreme Court has held that a trial judge's authority to depart from binding precedent is limited. *Bedford* instructs, at para. 42:

> [A] trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

See also *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44. Further, the Supreme Court has rejected the notion of the anticipatory overruling by a lower court of a binding authority by a higher court: *Canada v. Craig*, 2012 SCC 43, [2012] S.C.R. 489.

[44] In this case, the respondents do not contend that either of the *Bedford* conditions, set out above, were satisfied so as to justify departure from the majority opinion in *Amberwood*.

[45] The *Bedford* conditions are not met here. First, unlike *Bedford* and *Carter*, this is not a case involving s. 7 of the *Charter of Rights and Freedoms*. Second, no new legal issue concerning the positive covenants rule or the possible exceptions to that rule, that were not addressed in *Amberwood*, was raised in this case. Third, no significant post-*Amberwood* developments in the law of Ontario had occurred. I note, in particular, that the extent to which the decision of the

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English Court of Appeal in *Wilkinson* warrants importation of the benefit and burden exception into Ontario law, if at all, was a matter for determination by this court. Neither *Wilkinson* in England nor *Wentworth Condominium Corporation* in Ontario permits a lower court judge to prefer the minority, over the majority, opinion of this court in *Amberwood*.

[46] To summarize, in a case like this one, a judge of a lower court may not decline to follow a binding precedent of a higher court on the ground that he or she disagrees with it or because, in his or her view, it appears to have been overtaken by subsequent decisions of a lower court in the same jurisdiction, or by jurisprudential developments in another jurisdiction. In this case, what the Appeal Judge should have done was follow and apply the majority decision in *Amberwood* and provide reasons why she viewed it as problematic, rather than decline to follow it: see, for example, in the constitutional context, *Craig*, at para. 21.

(2) Benefit and Burden

[47] Nor are the holdings below that the benefit and burden exception to the positive covenants rule "reflect[s] the current law in Ontario", and that it applies in this case to render the appellants liable to pay the annual levy contemplated by the Trust Deed, sustainable. As I have said, the respondents do not argue to the contrary on this appeal.

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[48] The benefit and burden exception to the positive covenants rule does not form part of Ontario law at the present time. In *Amberwood*, the majority unequivocally held that the principle of benefit and burden, often referred to as the doctrine in *Halsall v. Brizell*, [1957] 1 All E.R. 371, has not been and should not be imported into Ontario law absent legislative reform in this area of the law.

[49] Specifically, in *Amberwood*, the majority concluded, at paras. 75-76, that "it would be inadvisable to adopt [the benefit and burden principle] in Ontario" given "the uncertainties and the many frailties of the existing common law in England in this area of the law" and further, that any reform to the positive covenants rule "is best left to the legislature". The majority also stated, at para. 19:

> [T]he adoption of [the benefit and burden] doctrine as a recognized exception to the [positive covenants] rule in the common law of this province, in much the same way as the abolition of the rule itself, would have complex, far-reaching and uncertain ramifications that cannot be adequately addressed on a case-by-case basis.

[50] Thus, the benefit and burden principle does not "reflect the current law in Ontario". As I have already explained, neither *Wilkinson* nor *Wentworth Condominium Corp.* could anchor a different conclusion.

[51] The Appeal Judge also held that the appellants were bound by Deputy Judge Kilian's factual findings in the first action, as later referenced by Swinton J. in the first appeal decision. This included Deputy Judge Kilian's finding that the purpose of the trust created by the Trust Deed was to benefit all the property

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owners within Wychwood Park, including, therefore, the appellants, and that a landowner's actual use of the benefits conferred by the Trust Deed was immaterial.

[52] I disagree. I would reject the proposition, on the facts of this case, that the appellants must be taken to benefit from the Trust Deed by reason of the factual findings in the first action.

[53] While it is true that the appellants were parties to the first action, and thus are bound by its outcome, Deputy Judge Kilian's factual findings in that action must be understood in light of the critical fact that the Positive Covenants Argument was neither raised nor considered by him. As a result, his factual findings were made in a legal context that did not take account of the positive covenants rule or any exceptions to that rule that may apply in this case. The relevant legal context has now changed and the Positive Covenants Argument is now squarely before this court, as it was at trial in the second action. During oral argument of this appeal, the respondents essentially conceded this point and did not press any *res judicata* or estoppel argument.

[54] It is also significant that Swinton J. did not adjudicate on these issues in the first appeal decision. Her ruling, as I have said, expressly left these issues open for future determination in a proper case. Before this court, the respondents do not argue that the conditions identified by Swinton J. for the

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advancement of the Positive Covenants Argument in a future case have not been satisfied.

[55] In these circumstances, as I see it, it cannot be said that the appellants are precluded by reason of the factual findings in the first action from asserting that they neither derive nor seek any benefit under the Trust Deed.

[56] I find additional support for this conclusion in *Amberwood* itself. The majority in *Amberwood* cautioned that care must be taken not to overstate the scope of the benefit and burden principle. Justice Charron emphasized, at para. 65, that the doctrine "cannot simply be defined by reference to the underlying general principle that a person who claims the benefit of a deed must also take it subject to the burdens". As she explained, at para. 65, "if the doctrine were so wide as to obligate a successor in title to all the burdens contained in the deed simply by reason of his acceptance of the benefit of the deed, it would swallow the rule."

[57] Thus, the acceptance of a benefit under a deed, by itself, will not trigger liability under a positive covenant set out in the same deed. Based on her extensive review of the English authorities, Charron J.A. concluded in *Amberwood*, at para. 73: "The simple fact that Amberwood received certain benefits upon obtaining title to the Phase 2 lands is clearly not sufficient, without more, under the English common law to render it liable under the positive

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covenant contained in the same instrument." Rather, to trigger liability under the positive covenant, there must be a correlation, evident in the deed itself, between the benefits received and the burden of the positive covenant.

[58] I make this final point. Both Deputy Judge Kilian in the first action, and Swinton J. in the first appeal decision, held that Ivon Owen was liable for the annual levies then in question because, as the owner of the affected property, he had actual notice of the Trust Deed and, consequently, was bound by its terms.

[59] I again emphasize, however, that those findings were made without regard to the positive covenants rule. The operation of the rule is not defeated merely by reason of a successor landowner's having acquired the lands in question with notice of the positive covenant. In *Rhone*, at p. 71, Lord Templeman explained that to enforce a positive covenant against a successor in title of freehold land "would be to enforce a personal obligation against a person who has not covenanted".

[60] Accordingly, some other recognized legal principle, other than acquisition of the property in question with notice of the term under the Trust Deed providing for payment of the annual levy, must apply in order to conclude that the appellants are bound under the Trust Deed to pay the annual levy: see *Amberwood*, at paras. 33, 50 and 73.

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[61] I turn now to the respondents' reliance on what the Appeal Judge refers to as the conditional grant exception to the positive covenants rule to ground their claim against the appellants for payment of the outstanding levies.

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(3) Conditional Grant

[62] In *Amberwood*, the application judge had held that there is a conditional grant exception to the positive covenants rule, which is essentially a form of the benefit and burden principle: *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2000), 50 O.R. (3d) 670 (S.C.), rev'd (2002), 58 O.R. (3d) 481 (C.A.), at para. 37. In so holding, the application judge relied on this description of the conditional grant exception in *Halsbury's Laws of England*, 4th ed. vol. 14, at p. 79:

> 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 so as 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.

[63] The majority in *Amberwood* confirmed, at para. 85, that the above-quoted description of the exception is consonant with the positive covenants rule set out in *Austerberry*. That said, the majority did not accept that a conditional grant exception should be recognized under Ontario law as a separate and distinct exception to the positive covenants rule. The majority stated, at para. 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. Indeed, as discussed earlier in this judgment at paras. 30 and 31, much the same reasoning underlies the law of restrictive covenants. [Emphasis added.]

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[64] The majority went on to conclude that none of the grants of benefit or easement in the agreement at issue in *Amberwood* was framed in a manner that limited the scope of the grants themselves. At its highest, all that the agreement did was reflect the parties' intention to write in, as a term of their contractual bargain, the benefit and burden principle. This attempt to create a contractual exception to the positive covenants rule, while binding on the original contracting parties, could not displace the rule that positive covenants do not bind successors-in-title.

[65] Against this backdrop, I turn to the Appeal Judge's treatment of the conditional grant principle. I note, first, that she appears to have accepted the holding of Vice-Chancellor Megarry in *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129, at p. 291, that both the benefit and burden and the conditional grant exceptions form part of English law and that the former is distinct "from the conditional benefit cases, and cases of burdens annexed to property". As I read her reasons, the Appeal Judge relied on this holding in *Tito* to conclude that,

under Ontario law, the conditional grant principle applies as a free-standing exception to the positive covenants rule, separate and apart from the benefit and burden principle. As I have already said, I do not read *Amberwood* as endorsing this proposition.

[66] The Appeal Judge recognized that the question whether a conditional benefit or burden annexed to property has been created turns on the construction of the instrument or transaction at issue. However, when considering this issue under the rubric of the conditional grant principle, she failed to undertake any analysis of the specific terms of the Trust Deed. Instead, she reasoned, at paras. 103-104:

> When being asked to enforce a positive obligation, the courts will first look at the transaction to see if the conditional grant exemption [*sic*] 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 grant exception is engaged.
>
> 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.

[67] She then concluded, at para. 106, that the Trust Deed contains an "explicit" and "formal" connection "between the benefits and burdens of living in

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Wychwood Park" and "an implicit, yet necessary connection in the nature of the benefit and the burden". On these bases, she held that both the benefit and burden and conditional grant exceptions to the positive covenants rule apply in this case to render the appellants liable for the payment of assessed annual levies under the Trust Deed.

[68] With respect, this reasoning is flawed. As I have indicated, the fact that the appellants had knowledge of the Trust Deed is no bar to the operation of the positive covenants rule. And, although their predecessors in title did so for a lengthy period, the appellants have not complied with the Trust Deed since the date of their acquisition of Ivon Owen's property. They have not paid the annual levies for 2010 to 2013, indeed, they have never agreed to pay the levies, and they disclaim any benefits under the Trust Deed. Further, there has been no binding judicial finding that the appellants are beneficiaries of the trust or that, in fact, they have derived benefits from it.

[69] The reasons below also fail to explain the basis for the statement that "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." In my view, the language of the Trust Deed does not support this assertion.

[70] Simply put, nowhere does the Trust Deed provide that the right to the use and enjoyment of the Common Property conferred under the Trust Deed is

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conditional upon the acceptance of the burdens contained in any of the positive covenants, including the first trust provision that contemplates payment of the annual levy. To the contrary, the grants of benefit contained in the Trust Deed are not framed as conditional upon the continuing performance of a positive obligation to pay the annual levy or the performance of any other positive obligation under the Trust Deed. And the first trust provision itself does not state that compliance with it is a pre-condition to the use and enjoyment of any benefit conferred under the Trust Deed. Consequently, the grants of benefit under the Trust Deed are not limited in the manner discussed by the *Amberwood* majority.

[71] In light of this conclusion, I do not reach the appellants' additional argument that, if the language of the Trust Deed creates a limited or conditional grant, the obligation to pay the annual levy is nonetheless unenforceable as against them because they have derived no past benefit, and are entitled to disclaim, as they have done, any present or future benefit under the Trust Deed.

[72] To summarize, on proper application of the authoritative majority decision in *Amberwood*, no exception to the operation of the positive covenants rule recognized under Ontario law applies in this case. Consequently, the obligation under the Trust Deed to pay the annual levy is unenforceable as against the appellants. While this conclusion may have implications for the rights and obligations of the trustees and other landowners in Wychwood Park under the

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Trust Deed, the assessment of those rights and obligations is not before this court.

(4) Other Issues

[73] For the reasons given, I have concluded that the appellants are not bound to pay the annual levy on the basis of the positive covenant contained in the first trust provision of the Trust Deed. It is therefore unnecessary to address the other grounds of appeal advanced by the appellants.

Disposition

[74] Accordingly, I would allow the appeal, set aside the February 4, 2016 order of the Appeal Judge and restore the December 4, 2014 judgment of Deputy Judge Caplan of the Small Claims Court. I would allow the appellants their costs of the appeal, fixed in the agreed amount of $10,000, inclusive of disbursements and all applicable taxes.

Released:

"KF"
"MAY 18 2017"

"E.A. Cronk J.A."
"I agree K. Feldman J.A."
"I agree B.W. Miller J.A."

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