

In the Provincial Court of Alberta

Citation: Elbow River Estates Co-Operative Ltd. v Abraham, 2018 ABPC

Date: 20181029

Docket: P1790103651

Registry: Calgary

Between:

Elbow River Estate Co-operative Ltd.

Plaintiff

- and -

Zaia Abraham and Romy Tittel

Defendants

Reasons for Judgment of the Honourable Judge M.A. McCorquodale

Introduction

[1] The plaintiff, Elbow River Estates Co-operative Ltd. (the Co-operative), is a not-for-profit co-operative association which object is to own, operate, maintain and supervise the water supply and distribution system (the water system) to its members who are the owners of lots within the Elbow River Estates community within Rocky View County, Alberta. The Co-operative was originally incorporated under the *Co-operative Associations Act*, RSA 2000, c C-28 (*Co-operative Associations Act*) and continued under the *Rural Utilities Act*, RSA 2000, c R-21 (*Rural Utilities Act*).

[2] The defendants are owners as joint tenants of one of the lots within the Elbow River Estates community and share one membership in the Co-operative.

[3] The Co-operative has sued the defendants for \$4,500.00 representing member fees from June 2016 until the current date.

[4] The issue before the Court is whether the defendants are entitled to unilaterally withdraw from the membership of the Co-operative and, accordingly, are not liable to pay the member fees.

Background

[5] The facts were not in dispute.

[6] In June 1977, the Memorandum of Association of the Co-operative provided that the objects of the Co-operative included provision of the water system to the Elbow River Estates

Community. At the same time, the Co-operative passed its By-laws, which included a provision for a "usage charge for the services" of the Co-operative.

[7] In 1990, the developer of Elbow River Estates community registered a restrictive covenant (the Restrictive Covenant) on the title of the lots within the community, including the defendants' property. The document was called a restrictive covenant and included a provision in which the owners of the lots within the community had to become members of the Co-operative and had to abide by the Articles [Memorandum of Association] and By-laws of the Co-operative. The Restrictive Covenant also provided that the owners shall "pay a fee to the Co-operative for water utilized", failing which the Co-operative may terminate "all water and other services".

[8] In 1999, the defendants purchased a bare lot in the community from a corporate vendor. Sometime after, the defendants built a house on the lot and water services were connected to the defendants' property.

[9] At the Annual General Meetings of the Co-operative in the fall of the years 2015, 2016 and 2017, the Co-operative passed resolutions and approved an annual levy (Annual Levy) for members of the Co-operative in the amount of \$2,000.00 for the water system. Each Annual Levy was for the period of time from October 1 to September 30 of the following year.

[10] Sometime in 2016, the Co-operative assessed a Special Levy of \$11,000.00 against each owner for upgrading the facility, which the defendants eventually paid.

[11] The defendants received water from the Co-operative and paid the Annual Levy until June 2016 when they wrote the Co-operative advising that they were withdrawing their membership effective June 15, 2016. The defendants' letter read:

Pursuant to the Rural Utility [sic] Act, RSA 2000, c. R-21, s 11(1) we withdraw our membership to the association effective June 15, 2016.

[12] Upon request of the defendants to disconnect the water supply, on June 16, 2016, the Co-operative was granted access to the defendants' property and disconnected the water supply. Since that date, the defendants have not been receiving water from the Co-operative and have used water from another source.

[13] The Co-operative claimed that the defendants owe the balance of the Annual Levy of \$500.00 for the 2015-16 Annual Levy; \$2,000.00 for the 2016-17 Annual Levy; and \$2,000.00 for the 2017-18 Annual Levy, for a total of \$4,500.00.

[14] In the minutes of the Annual General Meetings, included was a register of the members, which included the defendants. The defendants attended some of the Annual General meetings. For a period of time, one of the defendants was a Director and Officer of the Co-operative.

[15] The Co-operative maintained that owners can only withdraw their membership by ceasing to be owners in the Elbow River Estates community. The Co-operative submitted that the mere writing of a letter is not sufficient for the defendants to withdraw their membership and it is contrary to the goal of the Co-operative which was to ensure that there are sufficient members to fund the water system.

[16] The defendants maintained that, based on statutory interpretations, they are entitled to withdraw their membership of the Co-operative and, thus, are not obligated to pay the Annual Levies.

[17] The only witness at trial was Michael Zubkow, who is a Board Member, Treasurer and Water Commissioner of the Co-operative.

Legislation

[18] The Co-operative was incorporated as an association under the *Co-operative Associations Act* on June 30, 1977. Pursuant to s 2(1) of the *Rural Utilities Act*, the Co-operative is continued as an association under that *Act*.

Rural Utilities Act

[19] Sections 9(1), 10(2), 10(4), 11(1) and 18 of the *Rural Utilities Act* provides:

Bylaws

9(1) Subject to this section, the standard bylaws, as amended from time to time, are the bylaws of each association.

Membership

10(2) The rights and conditions of membership in an association may be prescribed in the memorandum of association or the bylaws or partly in one and partly in the other.

...

10(4) An association shall keep a register of members which shall be admitted in evidence as proof, in the absence of evidence to the contrary, of any of the particulars entered in it relating to [name, address, date on which a member was registered as a member and date on which a person ceased to be a member]

...

Withdrawal from membership

11(1) When a person withdraws from membership in an association, the association is not required to refund any contribution for construction and extension line costs, for a reserve account or for a levy paid by the member pursuant to this Act.

...

Levies on members

18(1) Notwithstanding anything in this Act, an association may by resolution impose an annual levy on its members on the basis of the number of utility service contracts held and the amount of the levy shall be set each year by resolution at the annual meeting.

(2) Notwithstanding anything in this Act, an association, by resolution at an annual meeting or at a special general meeting called for the purpose, may set

- (a) a special levy to be imposed on members for the purpose specified in the resolution;

- (b) a monthly levy to be imposed on members to whom electric power, natural gas, water or sewage service has been made available but not used.

(3) A levy made pursuant to this section may be collected by whatever means the directors consider advisable.

(4) A member refusing to pay a levy made pursuant to this section in the manner prescribed by the directors is liable to have the provision to the member of electricity, natural gas, water or sewage service discontinued on order of the directors after the notice to the member that the directors prescribe.

[emphasis added]

Rural Utilities Regulation Reg 151/2000

[20] Section 13 of the *Rural Utilities Regulation*, AR 151/2000 reads:

13(1) When an association

- (a) ceases to provide utility service to a member because of a change in the member's service status, and

...

13(5) In this section, "member" includes a person who ceases to be a member of the association because of the change in the member's service status.

(emphasis added)

[21] Section 17 and 18 of Schedule 3 of the *Regulation* (Standard By-Laws) reads:

Membership

17(1) On the approval of the board, a person may become a member of the association if that person

- (a) owns or has an interest in land,
 (b) enters into a contract with the association for the provision of utility service to that land and for the payment of the required contribution to construction and extension of works costs, if any, and
 (c) pays the membership fee.

...

17(7) A member withdrawing from the association is entitled to be repaid the member's membership fee, but any contribution by the member toward construction and extension of works costs becomes and remains the sole property of the association.

...

Expulsion of members

18(1) The board may expel any member from the association for actions that in the board's opinion are harmful to the association or failing to patronize the business of the association to a minimal amount.

Memorandum of Association

[22] Sections 3 and 4 of the Co-operative's Memorandum Of Association, registered on June 30, 1977, read:

3. To establish and maintain a fund sufficient, in the opinion of the co-operative Association for the proper administration, operation, maintenance, care and upkeep of the water system and other services, and for such purpose or purposes to assess the members of the Co-operative Association and to collect from the said members such sum or sums as may from time to time be required to establish and maintain the said fund.

4. To take whatever steps may be necessary to enforce payment of any fee or fees assessed against the membership.

...

Apart from the subscribers, who shall cease to [sic] members as permanent members join the co-operative Association, the membership shall be limited to the registered, owners, tenants or occupants... at the rate of one membership per lot and membership in the Co-operative Association shall be a condition to any such person obtaining service from the Co-operative Association.

[emphasis added]

By-Laws

[23] Sections 3, 4, 7 and 9 of the Co-operative's Supplemental By-Laws to the Standard By-Laws, registered on June 30, 1977, read:

3. Membership

There shall be no share capital...Only persons who are the owner, lessee or an occupier of a lot in the Elbow River Subdivision or such other lands in the vicinity thereof as the Association may agree to service shall be eligible for membership, and not more than one person shall be a member at any one time in respect of a lot. In case of joint ownership of a lot there may be joint membership by such joint owners of the lot. If more than one person claims the right to vote the membership in respect of the same lot, the person whose name appears first in the register of members shall be entitled to vote. Upon proof satisfactory to the Association that a member has ceased to be the owner, lessee or occupant of a lot, it shall revoke such membership.

4. Assessments

All assessments, however calculated, shall be made against the member. If any member shall default for more than thirty (30) days in paying any such assessment, the Association may, at its discretion, take such steps to enforce

payment as it deems necessary and, without restricting any other rights it may have, shall be entitled to suspend or cancel services to the defaulting member.

7. Standard By-Laws not to Apply

The following standard by-laws shall not apply: 3, 9, 11, 14, 15, 16, and 17.

9. Non-Profit Organization

The objective of the Association is to keep current revenues in balance with current expenditures (as far as is reasonably possible)...the Association is a non-profit organization.

[emphasis added]

[24] There was an amendment to the By-Laws made at a Special Meeting of the Shareholders of the Co-operative on June 24, 1982. The By-Laws were amended in s 3 of the June 30, 1977 By-laws by changing the issue of joint ownership and voting rights of any lots. The remaining portions of s 3 were not changed. Thus, the amended s 3 read:

There shall be no share capital...Only persons who are the owner, lessee or an occupier of a lot in the Elbow River Subdivision or such other lands in the vicinity thereof as the Association may agree to service shall be eligible for membership, and not more than any two persons shall be a member at any one time in respect of a lot. If more than two persons claim the right to vote the membership in respect of the same lot, the persons whose names appear first in the register of members shall be entitled to vote. If there is only one owner of a lot, that owner may cast two votes if present in person at a meeting. Upon proof satisfactory to the Association that a member has ceased to be the owner, lessee or occupant of a lot, it shall revoke such membership.

[25] A Resolution of the Co-operative passed at the Annual General Meeting on November 14, 1984 and filed on June 4, 1985 provided that the fiscal year end of the Co-operative shall be September 30 in each year.

Restrictive Covenant

[26] The Restrictive Covenant, filed on March 22, 1990 by the developer of the defendants' property, provided that:

...covenant and agree to observe and be bound by the hereinafter covenants, which covenants shall be construed to be and shall be covenants running with the lands, and shall be appurtenant to all the lands for the benefit of all of the respective owners, and every transferee and every other person deriving title shall be deemed to be affected with notice of the conditions and covenants, and be bound thereby...

[emphasis added]

[27] Article III of the Restrictive Covenant included the following:

A. The registered owners of all of the above described lots are to comply with the By-Laws of the Elbow River Estates Co-operative Ltd. (Hereinafter referred to as "the Co-Op as interpreted by the Board of Directors of "the Co-Op" and shall become members of the said "Co-Op."

B. The registered owners of all of the above described lots agree to abide by the Articles and Supplemental By-Laws and amendments thereto of "the Co-Op" which are in force and effect from time to time and which have been duly and properly filed with the Department of Transportation and Utilities, Province of Alberta.

...

H. The registered owners of all of the above described lots agree to pay a fee to "the Co-Op" for water utilized, such fee to be paid at a frequency and in accordance with a fee schedule to be authorized by the Board of Directors of "the Co-Op" from time to time."

I. The registered owners of all of the above described lots agree that, should the owner fail to comply with the terms of this Agreement, "the Co-Op" may, in the sole discretion of the board of Directors of "the Co-Op" terminate all water and other services provided by "the Co-Op" upon giving the owner fourteen (14) days written notice....

[emphasis added]

Defendants' Position

[28] The defendants argued that the Annual Levies are not enforceable against the defendants on three grounds. Firstly, the Restrictive Covenant, the Memorandum of Association and the By-Laws do not prohibit withdrawal by a member. Secondly, if there is a prohibition, the prohibition is incompatible with the *Rural Utilities Act* and, therefore, is unenforceable. Alternatively, if the Restrictive Covenant does prohibit withdrawal, it is not permissible because the obligation to pay the Levy is an unenforceable positive obligation that cannot run with the land.

[29] The defendants referred to the cases of *Sunshine Valley Developments Ltd. v Hendrichs*, 2006 BCSC 319; *Russell v Ryan*, 2016 ABQB 526; and *Lebeau v Low*, 2002 BCSC 687.

[30] Lastly, the defendants submitted that the fact that the defendants were registered as members in the Minutes of the Annual General Meetings does not mean they were members of the Co-operative.

Co-operative's Position

[31] The Co-operative submitted that this is not a breach of contract claim, but rather a claim brought under the legislation. The Co-operative submitted that although s 10 or 11 of the *Rural Utilities Act* do not provide how a member can withdraw from the Co-operative, the legislation is intended to protect the Co-operatives from members withdrawing. The Memorandum of Association and the By-Laws do provide that information. The Memorandum of Association reads in part, "Apart from the subscribers, who shall cease to [sic] members as permanent members join the co-operative Association, the membership shall be limited to the registered, owners, tenants or occupants..." This is who is intended to be permanent members. Further, the By-Laws read in part, "Upon proof satisfactory to the Association that a member has ceased to be the owner, lessee, or occupant of a lot, it shall revoke such membership". Therefore, owners

are required to be members and cannot withdraw unilaterally. The defendants continue to be owners of the lot and, therefore, are members of the Co-operative.

[32] The Co-operative submitted that the *Rural Utilities Act*, the Memorandum of Association and the By-Laws all provide for the way in which members may withdraw from the Co-operative and although the Co-operative submitted that the Restrictive Covenant is enforceable, it is not necessary to rely on it. The Restrictive Covenant is equivalent to a rent charge, which is an exception to a positive covenant or unenforceable rule [Melodie Hope: *Rent Charges in Canada: Enforcing Positive Covenants*, 25 RPR (4th) 163].

[33] Although the defendants referred to s 17 of Schedule 3 (Standard By-Laws) of the *Rural Utilities Regulation*, AR 151/2000, s 9(1) of the *Rural Utilities Act* provides that the Standard By-Laws may be amended, which is just what the Co-operative did in its Supplemental Bylaws. Accordingly, the Standard Bylaws are not applicable.

Analysis

[34] After consideration of the evidence, the law and the submissions, I find that the plaintiff's claim for payment of the Annual Levies is dismissed. My reasons are set out below.

[35] In looking at the legislation and the corporate documents (the Memorandum of Association and the Bylaws), I find there are no provisions prohibiting a member from withdrawing from the membership of the Co-operative. The legislation and the corporate documents are all silent as to the circumstances on which a member may withdraw, how a member is to withdraw and the consequences relating to the Annual Levies after which a member withdraws. The legislation and the corporate documents only contain provisions dealing with eligibility for membership; one such requirement is that members must be owners of lots in the community. This is separate and apart from the ability to withdraw. As the legislation and the corporate documents are silent on this, I find that the members are not prohibited from withdrawing.

1. Section 11(1) of the *Rural Utilities Act* reads, "When a person withdraws from membership in an association..." This section speaks to "when a person withdraws from membership", it does not state that when a person ceases to be a member. A person would presumably cease to be a member when a person is no longer an owner. In my view, the wording is significant in that the legislation contemplated circumstances in which a member may withdraw, as opposed to ceasing to be a member or by expelling a member. Therefore, although the legislation is silent on how, when and under what circumstances a member may withdraw, it is contemplated that a member may withdraw. I find there is no prohibition in withdrawing in the legislation or the regulation.
2. The Memorandum of Association of the Co-operative provides that the Co-operative could establish and maintain a fund to the "proper administration, operation, maintenance, care and upkeep of the water system and other services" and to collect money to establish and maintain the fund. Also, the Memorandum of Association provides that membership was limited to owners, tenants or occupants and was a condition for such person to obtain services from the Co-operative. The Co-operative submitted that the provisions of the Memorandum of Association means that the only way a person can withdraw membership is to cease being an owner, tenant or

occupier. The Memorandum of Association contains no provision setting out the circumstances in which the members are able to withdraw as members. It only provides that in order to be a member, such person must be an owner, tenant or occupant. In my view, the reading of the Memorandum of Association means that one has to be an owner to obtain the services of the Co-operative. It only deals with eligibility to obtain services. One does not get services unless one is an owner, tenant or occupier. I find there is no prohibition to withdraw in the Memorandum of Association.

3. Section 17(7) of the Standard By-Laws, which are Schedule 3 to the *Rural Utilities Regulation* provides that a member who withdraws from the association can be repaid the membership fee (\$1.00), but not for contribution towards construction and extension of works. This does not mean that an owner cannot withdraw; it only refers to non-repayment of construction and extension works, not the Annual Levies. This, in fact, supports the position that withdrawal is possible because it sets out what happens upon withdrawal.
4. Section 18 of Schedule 3 of the Regulation (the Standard By-Laws) provides for an expulsion of a member. Expulsion is distinguishable from withdrawal. Withdrawal is a positive act of the owner, not an act by the Co-operative. This interpretation is supported by the fact that the wording "withdrawal" is used in s 17 of the *Rural Utilities Act* and the wording "expulsion" is used in s 18 of the *Rural Utilities Regulation*. At para 38, the Supreme Court of Canada wrote in *Canada (Attorney General) v Mowat* 2011 SCC 53:

...As Professor Sullivan notes, at p. 210 of her text, [Statutory Interpretation] "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 (S.C.C.), at para. 28, "[i]t is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage." See also *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.), at p. 838.

5. Section 3 of the Supplemental By-laws provides that, "Only persons who are the owner, lessee or an occupier of a lot in the Elbow River Subdivision...may agree to service shall be eligible for membership..." This provision speaks to eligibility. I find there is no prohibition to withdraw in the By-laws.

[36] There was no evidence of a contract between the Co-operative and the defendants. Thus, there were no contractual provisions allowing for withdrawal and no contractual obligation to pay the Annual Levies. Therefore, any obligation to pay the Annual Levies must derive from the legislation, corporate documents and (according to the defendants) from the enforceability of the Restrictive Covenant. The Co-operative's position is that by virtue of being an owner, one becomes a member and the only way of divesting oneself of membership is to cease being an owner. However, I find the legislation and the corporate documents do not support that premise.

[37] In any event, the defendants wrote the Co-operative advising that they were withdrawing their membership and by the Co-operative's act of disconnecting the water supply, I find that the

Co-operative accepted the defendants' withdrawal. The defendants gave notice of their intention to withdraw and the Co-operative accepted it.

[38] The Co-operative referred to the Minutes of the Annual Meeting, which listed the members of the Co-operative. However, the fact that the defendants were registered as members in the Minutes of the Annual General Meetings does not mean they were, in fact, members of the Co-operative.

[39] Lastly, the provisions in the legislation and the corporate documents dealing with expulsion of a member by the Co-operative are not applicable to circumstances in which a member voluntarily withdraws.

Restrictive Covenant

[40] The Co-operative submitted that I need not look at the Restrictive Covenant to determine the matter and that I can decide this matter based only on the legislation and the corporate documents, whereas the defendants submitted, on an alternate basis, that the Restrictive Covenant is invalid and unenforceable. I agree with the submissions of the Co-operative, that is, this matter can be decided on the basis of interpretation of the legislation and corporate documents. As noted above, I have found that there is no prohibition of withdrawal based on the legislation and corporate documents. Notwithstanding that both parties made submissions regarding the Restrictive Covenant and, therefore, on an alternate basis, I find that the Restrictive Covenant does not support enforcement of the Annual Levies for the reasons below.

[41] Article III A of the Restrictive Covenant provides that the registered owners of the lots are to comply with the By-Laws of the Co-operative and "shall become members of the said "Co-op [the Co-operative]". Although that provision provides an obligation to become a member, it is silent on the obligation to remain a member.

[42] The defendants submitted that the Restrictive Covenant is invalid or unenforceable by virtue of the fact that the covenant to pay is a positive obligation, which does not meet the requirements of a Restrictive Covenant.

[43] The case of *Russell v Ryan*, 2016 ABQB 526 stands for the principle that a restrictive covenant must be negative in substance. Although the facts are distinguishable, the principles are applicable, especially at paras 21, 23 to 25, and 44, which read:

21. V DiCatri, in *Registration of Title to Land* (Carswell, 1987) at 10-3 to 10-5, lists the conditions required for a covenant to run with land as enunciated in various cases. One of those conditions is that the covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement; no personal or affirmative covenant requiring the expenditure of money or the doing of some act runs with the land.

...

23. DiCatri's list of conditions has been adopted in subsequent case law: *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, [2001] B.C.J. No. 852 (B.C.C.A.) at para 16, and *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5, [2009] B.C.J. No. 22 (B.C.C.A.) at para 11.

24. A restrictive covenant is to be construed strictly and the parties' intention to create one must be shown in clear and unambiguous language...The Court will not extend it on the ground of presumed intention...

25. A restrictive covenant is an agreement or contract. Courts are to take a practical, common-sense approach to the interpretation of a contract to determine the intent of the parties and the scope of their understanding; to do so, a court must read it as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 47, [2014] 2S.C.R. 633 (S.C.C.).

...

44. The fact that the Restrictive Covenant states that it will run with the land is of no consequence. Pursuant to s. 48(5) of the *Land Titles Act*, the entry on the register of a condition or covenant as running with or annexed to land does not make it run with the land.

[44] In *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5 at para 9, the Court quoted from para 16 of *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268:

16. The necessary conditions of covenants which run with land are set out by DeCatri in his text, *Registration of Title to Land* (Carswell 1987). They were stated by Clearwater, J. in *Canada Safeway Ltd. v. Thompson (City)*, [1996] M.J. No. 393, August 15, 1996, at page 8, as follows:

(a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement. No 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.

(b) The covenant must be one that touches and concerns the land; i.e., it must be imposed for the benefit or to enhance the value of the beneficial land. Further that land must be capable of being benefited by the covenant at the time it is imposed

(c) The benefited as well as the burdened land must be defined with precision the instrument creating the restrictive covenant.

(d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee.

(e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered.

(f) Apart from statute the covenantee must be a person other than the covenantor.

[45] There is a paucity of case law dealing with a member's ability to withdraw its membership under these circumstances. In the case of *Sunshine Valley Developments Ltd. v Hendrichs*, 2006 BCSC 319, residents who acquired property in a community were required to pay recreation dues and become members of association. Some members resigned from the association and refused to pay the dues. The Court found that there was no contractual provision requiring former members to pay recreation dues to the association. In a related case, at *Hendrichs v Sunshine Community Co-operative Club*, 2006 BCSC 320, the Court held that the association was required to permit withdrawal of the members in accordance with the *BC Cooperative Association Act*, SBC 1999, c 28, which differs from the Alberta legislation and, thus, is distinguishable.

[46] In *Lebeau v Low*, 2002 BCSC 687, the homeowners acquired a lot in a development covered by a building scheme registered as restrictive covenants. Part of the restrictive covenant required the owner to connect to a water system and pay connection fees. The Court held that the requirement to connect was a valid negative covenant, but the payment obligation was positive in nature, which did not run with the land. However, the Court did state that the payment became a matter of contract. In the case before me, there was no contract between the Co-operative and the defendants.

[47] The Restrictive Covenant contained a number of covenants, including building restrictions on the size of family homes, removal of trees and restrictions on owning certain livestock. While some of these covenants may meet the requirements to be restrictive covenants, pursuant to *Lebeau v Low*, the obligation to pay the Annual Levies is a positive obligation and, thus, does not meet the requirement to be a restrictive covenant; therefore, the obligation to pay the Annual Levies is not valid or enforceable. Furthermore, even if the covenant is one of a negative obligation, as the Co-operative submits, in Article III H, the wording is that the owners "agree to pay a fee to 'the Co-Op' for water utilized..." The evidence was that the defendants are not using any of the Co-operative's water and, thus, on a strict reading of this covenant, the defendants would not be liable to pay the fee.

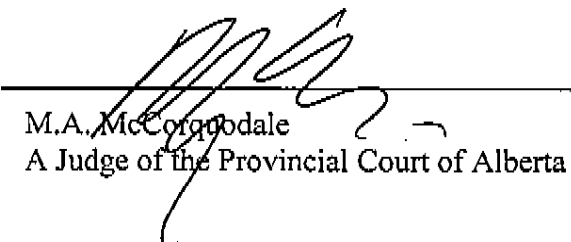
Decision

[48] The claim of the Co-operative is dismissed.

[49] Should either party wish to make any submissions on costs, I will consider brief written submissions no later than 30 days from the date of this judgment, failing which I will award party party costs and disbursements pursuant to the *Guidelines for Costs in Provincial Court Civil Division*. Pursuant to those *Guidelines*, the defendants are entitled to \$450.00 in costs.

Heard on the 28th day of September, 2018.

Dated at the City of Calgary, Alberta this 29th day of October, 2018.


M.A. McCordale
A Judge of the Provincial Court of Alberta

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Appearances:

Counsel, Paul G. Chiswell
for the Plaintiff

Counsel, Chris Jones
for the Defendants