Action No.: 1801-16692
E-File Name: CVQ19ELBOW
Appeal No.:_____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

ELBOW RIVER ESTATE CO-OPERATIVE LTD.

Plaintiff

- and –

ZAIA ABRAHAM and ROMY TITTEL

Defendants

PROCEEDINGS

Calgary, Alberta
June 20, 2019

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A.L. Scott	For Elbow River Estate Co-operative Ltd.
C. Jones	For Z. Abraham
C. Jones	For R. Tittel
D. Marion	Court Clerk

Discussion

THE COURT CLERK: Order in court. All rise.

Decision

THE COURT: Thank you. Please be seated.

I'm going to give you my reasons verbally, and if there's a transcript ordered, I reserve the usual right to correct stutters and ums and ahs and that sort of thing, but the substance remains as it is.

Part 1 - Introduction

This is an appeal from the decision of the trial judge, McCorquodale PCJ, dismissing the appellant's claim against the respondents for annual levies payable by members of the appellant for the period June 2016 through September 2018. The trial judge's reasons provide the background and the facts. I will briefly review those.

The appellant is an association under the *Rural Utilities Act*. It provides water service to its members. It claims that its members are all the owners of the lots within the Elbow River Estates community in Rocky View County, Alberta.

In 1999 or thereabouts, the respondents became owners as joint tenants of a residential lot in the Elbow River Estates community. There was and is a restrictive covenant on the lot containing some provisions relating to the appellant, which I will describe later. This covenant was agreed to by a predecessor in title and was registered against title when the

respondents purchased the lot. The respondents also became members of the association in 1999.

The respondents received and paid for water services from the association until June 16, 2016. On June 1, 2016, they gave written notice that they were withdrawing from the membership of the appellant, effective June 15, 2016. The appellant discontinued their water supply on the 16th June by shutting off the curb stop valve, and since that date, the respondents have not received water from the appellant.

The appellant sued the respondents in the Alberta Provincial Court civil division for unpaid annual water levies. In recent years, the annual levy on members of the association was $2,000, and the total claimed at the trial was $4,500.

The appellant advanced two grounds in support of its position at trial. First, members of the appellant cannot withdraw unilaterally from membership. The respondents' purported withdrawal from membership is ineffective, and they remain liable to pay member levies. Second, the obligation to be a member or participate in the operation and maintenance of the water system and pay the levies in the restrictive covenant on the respondents' lot is enforceable against the respondents.

The respondents disputed that they were precluded from withdrawing from the association or that the covenant ran with the land so as to bind successors in title.

The trial judge, in written reasons, held the respondents were entitled to withdraw as members. She found no provisions in the legislation or the corporate documents requiring an individual to remain a member of the association; therefore, they are not prohibited from withdrawing. Her conclusion is expressed in paragraph 35 of her reasons, which are on the file, so I will not quote that in the interests of time. She further held that the appellant accepted the respondents' notice of intention to withdraw when it discontinued their water supply in response to their notice of withdrawal. She rejected the proposition that the relevant portions of the covenant in question bound the respondents. She found that the covenant was a positive obligation, which did not meet the requirements for a covenant to run with the land. She also found in any event that if the restrictive covenant bound the respondents, a levy was only payable for water utilized. The respondents did not utilize the water, and on a strict reading of the covenant, the respondents were not liable to pay the association's annual levy.

Part 2 - Standard of review and issues

The standard of review is the usual appellate standard applicable to civil trials expressed in *Housen* and innumerable cases thereafter. A recent Queen's Bench decision cited in the

appellant's brief at tab 7, *Folkstone Developments*, at paragraph 8, cites authorities of this court in civil appeals to the effect that the standard is as follows: Correctness on questions of law, palpable and overriding error on findings of fact, palpable and overriding error on questions of mixed law and fact unless the trial judge commits an extricable error of law with respect to the characterization of the standard or its application. In such cases, the standard is correctness.

The appellant raises three issues on appeal: (1) The trial judge erred in finding the respondents could withdraw as members of the appellant merely by delivering notice of withdrawal; (2) the trial judge erred in finding that the respondents' notice to withdraw was accepted; and (3) the trial judge erred in her interpretation and characterization of the restrictive covenant as a positive covenant that does not run with the land.

The respondents submit that the *Rural Utilities Act* and regulation thereunder permit them to withdraw as they did, and no provisions of the memorandum of association or bylaws prevent them from withdrawing. Further, the trial judge was correct that the appellant accepted the respondents' withdrawal. Finally, the covenant to pay is not enforceable against them and in any case does not require them to pay if they are not receiving water.

Part 3 - The governing documents of the appellant

Before undertaking the review, it is useful to identify the governing the documents or what the trial judge called the corporate documents of the appellant, which are its memorandum of association and its bylaws.

The appellant was incorporated under the *Cooperative Associations Act*. In 1977, that statute, which has since been repealed, provided for incorporation by memorandum of association and permitted an association to register supplemental bylaws modifying the standard bylaws which were prescribed under that statute. There were standard bylaws prescribed by regulation, *Alberta Regulation 132* of 1957, which were amended by regulations made in 1959, 1961, 1972, and 1974, then repealed and substituted by *Alberta Regulation 439* of 1983. The 1957 version contained a provision governing withdrawal from membership. The 1983 version did not.

The incorporators of the co-op submitted both a memorandum of association and supplemental bylaws. The supplemental bylaws state: (as read)

> The standard bylaws subsidiary to the *Cooperative Associations Act* shall apply to Elbow River Estates Co-operative Ltd. except as may hereafter be modified.

Paragraph 7 of the supplemental bylaws provided: (as read)

> The following standard bylaws shall not apply: 3, 9, 11, 14, 15, 16, and 17.

Thus, until 1986, the appellant operated under a combination of the standard bylaws prescribed under the *Cooperative Associations Act* and the supplemental bylaw filed on incorporation and amended periodically by the members.

Among other things, the memorandum of agreement provided for the objects of the Co-operative and, further, that the Co-operative had no share capital and, in lieu thereof, a membership fee of $1 would be charged. The memorandum of association concluded as follows: (as read)

> Apart from the subscribers who shall cease to members --

There should be a "be," I think, before "members."

> -- as permanent members join the Co-operative association, the membership shall be limited to the registered owners, tenants, or occupants of the north half of Section 2 and the south half of Section 11 Township 24 Range 3 West of the 5th Meridian 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.

Section 3 of the supplemental bylaw as amended in paragraph 2 is also important to this appeal. In the interests of time, I won't quote it. It is quoted in the trial judge's reasons at paragraph 24. She did omit the second sentence of the quote, and after the first sentence, which reads, "There shall be no share capital," there is another sentence that says, "In lieu thereof, there shall be a membership fee of $1 per member." Otherwise the quote is accurate. And that's the same provision that's reflected in the memorandum of association about the lack of share capital and the $1 fee.

Section 4 of the supplemental bylaw deals with assessments of the members and authorizes the imposition of levies on them.

The provision of the standard bylaws of 1957 governing withdrawal of membership, that is, section 9 of those bylaws, was expressly excluded by paragraph 7 of the supplemental bylaws.

Then, in 1985, the legislature passed the *Rural Utilities Act*, which is Chapter R-21 of the Statutes of Alberta 1985. This statute was proclaimed in force on July 21, 1986. A set of standard bylaws under the *Rural Utilities Act* was prescribed in *Alberta Regulation 254* of 1986, which was filed July 17, 1986, so when the statute came into force, there was another set of bylaws to go with it. The *Rural Utilities Act* standard bylaws were amended from time to time, and they were replaced by *Alberta Regulation 151* of 2000. The continuation of rural utilities under the *Rural Utilities Act* was compulsory and automatic.

Section 2(1) of the *Rural Utilities Act* provided that the appellant was continued under the *Rural Utilities Act* as if it were incorporated thereunder. In addition to the plain meaning of that section, section 1(a) of the *Rural Utilities Act* defined "association" to mean an association continued under section 2 or incorporated under section 5. Subsection 9(1) provided that: (as read)

> Subject to this section, the standard bylaws prescribed under the *Rural Utilities Act*, as amended from time to time, are the bylaws of each association.

Arguably, the supplemental bylaws ceased to exist and were replaced by the standard bylaws of the *Rural Utilities Act* when the appellant was continued under that *Act* in 1986. However, the case was not argued on that basis before the trial judge, nor was the validity of the supplemental bylaws questioned in the trial court.

The question whether the membership provisions of section 17 of the standard bylaws of the *Rural Utilities Act* applies is of some importance because that provision might support the respondents' submission that a member of a rural utility association may unilaterally withdraw from membership. Section 17(7) was one of the considerations relied on by the trial judge at paragraph 35 of her reasons to conclude that a member was not precluded from unilaterally withdrawing. It provides: (as read)

> 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.

Subsection 20(6) of the 1986 version was to the same effect with minor grammatical changes.

Both parties appear to have assumed at the trial that the supplemental bylaw and the *Rural Utilities Act* bylaw applied to the appellant. They differed over the question whether the supplemental bylaw excluded section 17(7) of the *Rural Utilities Act* standard bylaws. I

will summarize the trial record on that point.

(A) The respondent submitted that the standard bylaws under the *Rural Utilities Act* applied except as modified by the supplemental bylaw and relied in part on section 17 of the year 2000 version of the standard bylaw. See transcript at pages 53 and 64.

(B) The appellant's response to the respondents' reliance on subsection 17(7), as the trial judge reflected in paragraph 33 of her reasons, was that section 7 of the supplemental bylaw excluded section 17 of the standard bylaw. See transcript at pages 59 through 62. Indeed, the appellant's trial counsel even highlighted the specific reference to section 17 in this provision during the witness's testimony. See transcript at page 14. Counsel's position therefore must have presupposed that the *Rural Utilities Act* standard bylaws otherwise would apply. The respondents' counsel then submitted in response that the exclusion in section 7 of the supplemental bylaw applied to section 17 of the standard bylaws under the *Cooperative Associations Act*, not section 17 of the *Rural Utilities Act* bylaw. See transcript page 65.

(C) As to the evidence before the trial judge, the appellant approved 2014 AGM minutes, which recite that the meeting of members was advised there were currently no bylaws on file for the appellant, and an extraordinary resolution to create a supplemental bylaw was proposed and passed. The sole witness at the trial, an officer of the appellant, testified that these minutes were accurate and had been submitted to a regulatory board. See page 31 of the transcript. The evidence indicated that the government rejected the bylaw because it contained provisions contrary to the *Act*, but the particulars of that were not explained in evidence. See pages 32 and 33 of the transcript. The same witness also testified about which bylaws were in force. That testimony is not evidence; it is a legal opinion. The witness said the statement in the 2014 minutes was not accurate because the original bylaws were still in place. See page 33 of the transcript. On the following page, the witness agreed that the standard bylaws under the *Rural Utilities Act* also applied to the appellant. See page 34 of the transcript. A few pages later, he said that the original standard bylaws under the *Cooperative Associations Act* still apply. See page 38 of the transcript.

(D) Generally, having read the entire transcript, the plaintiff did not clearly contend at trial that the *Rural Utilities Act* bylaws did not apply.

The trial judge did not explain the path of reasoning to her conclusion that subsection 17(7) applied as referenced in paragraph 35 of her reasons. However, it was reasonably open to the trial judge to conclude that the supplemental bylaw and section 17(7) of the *Rural Utilities Act* standard bylaw applied given counsel's framing of the issues and the evidence before her.

Section 3 of the supplemental bylaw is not expressly inconsistent with subsection 17(7) of the *Rural Utilities Act* standard bylaws, and the appellant's counsel did not argue that section 3 of the supplemental bylaw somehow occupied the field and that no other membership provisions could apply pursuant to section 9 of the *Rural Utilities Act*. The only argument from the appellant was that paragraph 7 of the 1977 bylaw excluded section 17 of the 2001 bylaw. This argument had no merit, and the trial judge was correct not to accept it.

On appeal, the appellant contends that the governing documents of the appellant are the memorandum of association, the standard bylaws under the *Cooperative Associations Act*, and the supplemental bylaw as amended. See appellant's written brief at paragraph 10. That represents a partial reframing of its case because it excludes the notion that the *Rural Utilities Act* bylaw also applies.

The respondents' counsel adopted the appellant's definition of the governing documents of the appellant. In its brief at paragraph 6, it says that it did so for ease of reference. In oral argument the respondents' counsel submitted that section 17(7) of the standard bylaws of the *Rural Utilities Act* also applied. I do not read the respondents' brief to mean that they conceded that the *Rural Utilities Act* bylaw does not apply. Their brief says they adopted the appellant's definition for ease of reference, and I doubt they intended to concede the point.

I will consider this appeal on the assumption, without deciding, that the *Cooperative Associations Act* bylaws, both standard and supplemental, apply because the parties did not challenge the applicability or validity of the supplemental bylaw at the trial and conducted the case as if the supplemental bylaw applied. As mentioned, the supplemental bylaw incorporates, by reference, most of the old standard bylaws under the *Cooperative Associations Act*, and that is why I will assume those also apply. I reiterate that this is an assumption on my part, and I don't make a finding as to whether those bylaws are valid or not. And when I say "those bylaws," I mean the supplemental ones.

I do not need to consider whether the 1957 version or the 1983 version of the *Cooperative Associations Act* bylaws would apply because the membership provisions of the 1957 version were excluded and the 1983 version does not contain membership provisions, so it does not matter which version applies.

Assuming then that the supplemental bylaw is effective under the *Rural Utilities Act* -- and as I say, I've just made that assumption based on the parties' conduct of the case before the trial judge -- the next question is whether that bylaw excludes section 17(7) of the standard bylaws of the *Rural Utilities Act*. That would depend on whether, as a matter of interpretation, the bylaws are intended to be a complete code or exhaustive of the

circumstances in which a membership may terminate. I will deal with this in the next part of my reasons.

Part 4 - Whether the trial judge erred in finding the governing documents permitted the respondents to unilaterally withdraw from membership while remaining owners of their lot

The appellant submits in its written materials that the *Rural Utilities Act* and regulations under it do not address the manner in which a person becomes or ceases to be a member of an association under the legislation. The appellant says, however, that the memorandum of agreement and bylaws contemplate that members are permanent and cannot withdraw except under limited circumstances, which do not include unilateral withdrawal by letter. In oral submissions, the appellant submitted the memorandum of agreement and bylaws must be interpreted in the context of the scheme, object, and intention of the *Rural Utilities Act*, which the appellant submitted requires members to remain in the association. The appellant submitted that the trial judge erred in ignoring the plain meaning of the statute and the memorandum of agreement and came to an unreasonable conclusion, which did not take into the scheme, object, and intention of the *Act*.

The traditional view of a company incorporated by memorandum of agreement is that the memorandum and bylaws are interpreted as if a contract among the members. In my opinion, the proper approach to interpretation of the memorandum and bylaws is the approach in the Supreme Court of Canada decision of *Sattva*, 2014 SCC 53, which requires a Court to seek out the objective intention of the parties in the context of the surrounding circumstances. The memorandum and the bylaws must also be interpreted in the context of the statute. In turn, the statute must be interpreted in the context of its object and purpose. In *Rizzo & Rizzo Shoes Ltd.*, 1998, CanLII 837, [1998] 1 SCR 27 at paragraph 21, the Court endorsed the modern principle of statutory interpretation as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The appellant says there's no appreciable difference between interpreting the corporate documents and the statute because the same contextual circumstances must be considered for both interpretation exercises. The appellant asserts two contextual circumstances in support of its position. They are interrelated.

First, the appellant submits that it is necessary to require each lot owner to remain as members and subject to its levies in order to provide an adequate market and revenue base to enable the association to continue as a viable business. Erosion of its membership would

increase the proportion of capital and operating costs, which would have to be allocated to remaining members in the association. At some point, the cost for each remaining member may become prohibitive.

Second, the appellant submits that the regulatory scheme for water licences must be taken into account. The association has a licence to divert groundwater in its operations and will provide water to anyone living in its service area. Section 8 of the applicable regulation under the *Water Act*, which is relied on by the appellant, prohibits a landowner from diverting water without a licence, which would otherwise be permitted under section 21 of the *Water Act*, from an adjacent natural water body or underlying aquifer if they can receive from water from a licence holder for a community water supply. The appellant submits that if residents of the co-op are allowed to refuse service, the statutory licensing regime would be rendered inoperable.

The respondent says the Court should not entertain the applicant's arguments concerning contextual circumstances because they were not made before the trial judge. I do not agree with that. The economic viability argument was raised before the trial judge, and the appellant is not seeking to add evidence. It's merely reiterating an argument which it made to the trial judge. See transcript page 47, line 36 to page 48, line 2. The water licensing argument was not made to the trial judge, but the licensing regime on which the appellant relies is a question of law, and additional evidence would not be required in order to consider it. I have discretion to consider that argument, and I will do so.

The appellant's position on economic considerations was not established before the trial judge. There was no meaningful evidence of economic considerations, which would assist a Court in concluding that it was necessary to require every member of the Elbow River Estates to use the co-operative water service or that such a requirement would be necessary or even desirable for rural utility associations generally. With respect to the association specifically, there was no evidence of the required membership to maintain viable operations or the point at which the per member cost would become unreasonable or unjust as the appellant submits in paragraph 55 of its written brief. There is no evidence of surrounding circumstances when the co-operative documents were created that would suggest anybody contemplated that forced membership was necessary or desirable to maintain the viability of the co-op, fairness among lot members, or any other aspect of the relationships among lot owners. There was no evidence of the anticipated capital or operating costs of the system or anticipated future capital costs or necessary reserves, if any, to cover such costs in the context of the required number of members to maintain the system's viability from an economic perspective. There was no evidence of a reasonable annual fee for water services in rural residential subdivisions in Rocky View County's rural subdivisions west of Calgary or elsewhere.

There are other serious gaps in the evidence. The respondent points that according to the minutes of one AGM, only a few lots were subject to a restrictive covenant that explicitly mentioned the water co-operative. The restrictive covenant in question purports to require the lot owner to join the co-operative, but the other restrictive covenants are not in evidence, and there was testimony at the trial that not all the restrictive covenants contained the same terms. The respondents question how it could be argued that forced membership was thought necessary if the developer did not see fit to impose an obligation on all lot owners to join the co-operative.

The appellant responds that the minutes do not describe the precise terms of the other restrictive covenants. In my view, that simply reinforces the respondents' point that the evidentiary record is not adequate to establish the importance of forced membership from the perspective of economic viability as asserted by the appellant. The appellant bore the onus to prove its economic argument at the trial. It did not put sufficient evidence before the trial judge to establish any economic necessity for forced membership in this association or rural utility operations generally. The trial judge does not mention the matter in her reasons. In my view, that's not a failure. It simply reflects that there was no sufficient evidence for consideration, and she is not required to mention every point which a party makes in their submissions.

The second set of surrounding circumstances suggested by the appellants is that unlicenced water diversion operations cannot be conducted for a rural community serviced by a rural water co-operative as outlined at paragraph 49 of the appellant's brief. The appellant did not address whether an individual living in a serviced subdivision can or cannot obtain a licence to divert their own water, such as by drilling a well. I will assume for the purposes of argument that the respondents probably cannot get a licence to drill a private well because the community water service, which has a licence to draw from the aquifer, is available. However, there is no evidence or submissions that the regulatory resource regime relied on by the appellant would preclude anybody from purchasing water or arranging truck delivery into a cistern.

In my opinion, the licensing limitation mentioned by the appellant has no bearing on the interpretation of the corporate documents or the statutory scheme. There is nothing in the evidence or arguments to suggest that a resident's decision not to buy water from an existing utility would jeopardize the licence of the utility or interfere in some way with the development and conservation of aquifers or water resources generally.

As to the object and purpose of the statute, I see no basis to conclude that the legislature contemplated forced participation in water utilities. It might be desirable to force participation on all residents in a defined area to fund the creation or operation of a rural water utility, but it is obvious from the statute that the Legislature did not adopt that course.

There is simply nothing in the *Rural Utilities Act* that purports to force any rural resident to participate in the creation or operation of a rural utility.

The question then arises whether it's plausible that the Legislature contemplated that a utilities consumer could not withdraw from a utility when it did not force every resident in a service area to join the utility in the first place. There are obvious economic consequences to an association in losing its customer base in some circumstances, for example, if it had earlier expended costs with the assurance of serving a larger customer base.

The Legislature contemplated the issue of economic risk arising from membership withdrawal, and it provided protection against it, but it did not choose forced membership as the default position under the statute. There's nothing in the language of the statute suggesting that solution, nor is it plausible that the Legislature would do so because one solution may not fit the circumstances of all rural utility associations, and it is open to those utility associations to design their bylaws under section 9 to address their specific circumstances. Rather, the legislative solution is two pronged. First, the *Rural Utilities Act* permits an association to restrict membership termination in its bylaws if it can get those bylaws approved by the director under subsection 9(6) of the *Act*. Second, section 11 of the *Act* protects from any liability to refund any contribution for construction and extension line costs, for a reserve account, or for a levy paid by the member pursuant to the *Act*.

As to the language of the statute itself, section 5(3) might on first blush suggest that a member cannot withdraw because he or she has become part of the corporation. Yet there are numerous provisions for: withdrawal, see section 11; expulsion, see subsection 10(7); and termination in the event works on any land are no longer used to provide the utility service, see section 22.

The respondents also rely on subsection 17(7) of the standard bylaw under the *Rural Utilities Act* as indicative of the intention of the statutory scheme to permit members to withdraw. I do not think it is appropriate to use a regulation to interpret a statute.

I see nothing in the legislation to force the public to participate and nothing which persuades me to think that the Legislature intended those joining an association in order to receive services to become perpetually committed to the service. Modern utility customers would not reasonably expect to be deprived of their consumer choices concerning quality of product, including the product in question here, being primarily potable water, or choices concerning value for money or to be forced to incur long-term commitments for a private utility service unless the statute otherwise provides. A rural municipality might well provide a utility service and levy ratepayers for it, but the *Rural Utilities Act* does not provide a scheme of forced participation for private utilities. Having regard to section 11 of the *Rural Utilities Act*, the Legislature contemplated the default to be that a utility

consumer may withdraw from membership and cannot require the association to refund any contribution for the matters described in subsection 11(1) unless the bylaws provide otherwise.

I turn to the interpretation of the governing documents.

The appellant submits that the memorandum of association contemplates the members are permanent.

The trial judge, in paragraph 35(2) of her reasons, construed the memorandum of association to prescribe eligibility requirements and concluded it did not deal with withdrawal from membership. I am not persuaded that she erred in that interpretation.

It is common commercial practice that initial incorporators are sometimes involved in creating a company without intending to remain, and the company is later given over to the contemplated end users. The reference to permanent members in contrast to subscribers in the memorandum in this case obviously refers to the temporary role of initial incorporators and the contemplation that they would resign. The substance of the provision is directed at eligibility requirements, not cessation of membership. The incidental use of the term "permanent" was not intended to reflect a lifetime commitment by purchasers of utility service to the co-op except to the extent prescribed in bylaws.

The appellant further submits that the bylaw exhausts all matters relating to membership, including the manner in which membership is ended, and does not permit unilateral withdrawal.

It may have been that when the appellant was created, the intention was not confer a right to unilaterally withdraw. Although the bylaws were created under the *Cooperative Associations Act*, neither party addressed that statute in their submissions before the trial judge or on the appeal. The statute drew a distinction between withdrawal and expulsion. Withdrawal was regulated as early as 1955, while specific requirements governing expulsion were added in 1961. As regards withdrawal, that statute provided: (as read)

> A member with may withdraw from membership in an association
> as prescribed by bylaw and subject to the following conditions.

It's followed by a number of conditions. I am not aware of cases interpreting that section. Arguably, although it is not necessary for me to find, the statutory presumption under that old statute was in favour of perpetual membership unless otherwise provided. However, at the time the respondents joined the association, it was governed by the *Rural Utilities Act*, and as I've said, there is no presumption that a member cannot withdraw.

I am mindful that obligations of perpetual duration are not unusual or contrary to public policy. The question whether a contract is perpetual is a question of interpretation, and the presumption of perpetual duration may in some cases be easily displaced, even where the contract partially addresses termination. There are many examples of this. They're gathered together in the book, Hall, *Canadian Contractual Interpretation Law*, 3rd Edition, 2016 at section 3.20, and they include in there a decision of the Alberta Court of Appeal in a case called *Rapatax*, 1997 ABCA 86.

The parties did not address the requirements to imply a term in the bylaws. Contractual rules limit the circumstances in which terms may be implied, and they may only be cautiously be implied. Typically, they are only implied where the matter is so obvious that it was not thought necessary to mention it or was something that was truly necessary to make the contract work.

I cannot think that the supplemental bylaws in this case, when they were made, impliedly permitted unilateral withdrawal. Those bylaws explicitly excluded the standard provision permitting withdrawal on application to the board of directors. That exclusion is not an invitation to imply some other method of withdrawal. That would simply be making some alternative contract for the parties.

That does not end the matter. In 1986, the association came under a new statutory regime which does contemplate withdrawal in section 11, and as I have said, it does not contemplate forced participation. If the supplemental bylaws survived continuance under the *Rural Utilities Act* as I have assumed in favour of the appellant without deciding, they should be interpreted in accordance with the *Rural Utilities Act* because that's the governing statute. In my opinion, it was implied under the new statutory regime, particularly in view of section 11, that members may withdraw unless the bylaws provide otherwise. If the bylaws do not provide otherwise, then the association would have had to update its bylaws and obtain the required membership and governmental approvals under section 9 of the *Act*.

That leads me then to the interpretation of the bylaws. In my opinion, they do not expressly prohibit, expressly or impliedly, unilateral withdrawal from membership by a member. The appellant is a utility service provider. It is not a commercial corporation. It does not have share capital. Indeed, the member fee is $1. It is not at risk of losing capital through withdrawal. It is protected under section 11(1) of the *Rural Utilities Act* from liability to make refunds to members for costs, levies, or the like. The pipes and equipment belong to the appellant under subsection 22(1) of the *Act*, so it does not have to pay a withdrawing member for those works.

As stated earlier, the reasonable expectation of a modern consumer joining a co-operative to obtain goods or services, absent surrounding circumstances which would suggest a more committed relationship was objectively intended by the parties, is that they may withdraw if they no longer wish to receive such goods or services. As I have said earlier, no surrounding circumstances were proved in evidence or established in argument which would lead one to think that a more enduring commitment was objectively contemplated in this case. The fact the bylaw prescribes eligibility requirements and provides for expulsion of defaulting members does not mean that the parties intended to preclude voluntary termination of service by eligible customers.

The trial judge assumed the respondents could withdraw unless something precluded that. She did not explain the basis for that assumption. In my opinion, the respondents either had a statutory right to withdraw or that right should be implied in the bylaws in view of the statutory regime. I think both rights exist because they are complementary to each other. The trial judge's ultimate conclusion that the respondents' resignation was effective is not incorrect, although, as I've said, I think there's a gap in her reasoning, and I would not disturb it.

Part 5 - Whether the trial judge erred in finding that the appellant accepted the respondents' withdrawal by shutting off the water

The appellant argues that this defence was not pled and was not an issue. They say the trial judge's decision came as a surprise, and had they known this matter was in issue, additional evidence and explanation would have been provided. In reply, counsel for the respondents acknowledged that the offer of withdrawal and acceptance were not before the trial judge.

On that basis, I would set aside the trial judge's finding of an accepted offer. Moreover, if the bylaws did not permit withdrawal, then a representative of the utility would not be authorized to purport to accept the so-called offer, and the respondents, as members, should be taken as knowing of the lack of the authority as they, too, were subject to the same bylaws.

Part 6 - Whether the trial judge erred in her conclusion concerning the restrictive covenant

The appellant argued at trial that the restrictive covenant bound the respondents to comply with the articles and bylaws and become members of the association. See restrictive covenant Article 3(a) and (b). The appellants also referenced Article 3(h), which purports to require the landowner to pay a fee for water utilized. Counsel advised the trial judge at page 50 of the transcript that the plaintiff was not relying on that provision but later said it constituted a rent charge. See page 64 of the transcript.

The trial judge distinguished between the obligation to become a member of the association and an obligation to remain a member, but it is not clear from her reasons whether she concluded that the respondents were not precluded from withdrawing for that reason. She then described the law of restrictive covenants, and then she turned to a case from British Columbia called *Lebeau v. Low*, 2002 BCSC 687. In that case, a covenant required an owner to connect to a water system and pay connection fees and water rates. The Court held the obligation to connect can be viewed as a negative covenant because it provides in effect than an owner shall not build or maintain a dwelling that is not connected to the water supply. However, the payment obligations were found to be positive in nature.

The trial judge then concluded that while some of the restrictive covenants may be negative in nature, the obligation to pay annual levies is a positive obligation and was not enforceable. She observed that even if the covenant in Article 3(g) were a negative obligation, it was limited to payment for water utilized. None was utilized, so no payment obligation arose.

On appeal, the case was again supplemented with arguments that were not made to the trial judge. In addition to its argument at trial that the restrictive covenant created an obligation on the respondents to be members of the co-op -- see the written brief on appeal at paragraph 63 -- it added that the restrictive covenant prohibited the landowners from maintaining a home which does not use the association's water supply -- see their written brief at paragraph 62 -- and, in oral submissions, added that the trial judge failed to consider the entire restrictive covenant. On this last point, the appellant noted that the restrictive covenant also requires the respondents to be responsible for operation and maintenance of the water system. See the restrictive covenant Article 3(c). Counsel submitted that owners are required to be connected to the water system.

Neither side disputed the accuracy of the law cited by the trial judge at paragraphs 43 and 44 of her reasons. The conditions for enforcement include those set out by the leading author in the area, Mr. DiCastri, and at paragraph 43 of the trial judge's reasons, she cites from the Alberta case *Russell v. Ryan*, 2016 ABQB 526, which in turn at paragraph 21 speaks to the requirements described by DiCastri 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. The *Russell* case makes the point that DiCastri's list of conditions have been adopted in subsequent case law.

The trial judge then at paragraph 44 quotes a similar authority from British Columbia, *Aquadel Golf Course*, 2009 BCCA 5, where, at paragraph 9, the Court quoted from one of its previous decisions, *Westbank*, 2001 BCCA 268. And again, the covenant or the

condition which I referred to earlier to the effect that the covenant must be negative in substance and constitute a burden analogous to an easement and that 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 is approved in that case.

The substance of these rules was recently and authoritatively addressed by the Supreme Court of Canada. The Court observed that positive covenants cannot run with the land on the principle that a person cannot be made liable on a contract unless he or she was a party to it. The rule applies even if an agreement contains an express intention to the contrary. And the Supreme Court of Canada continues and observes that, as a result, the common law rule is that no personal or affirmative covenant requiring the expenditure of money or the doing of some act can, apart from the statute, be made to run with the land. That comes from *Heritage Capital Corporation v. Equitable Trust Co.*, 2016 SCC 19, at paragraph 25, and I mention it although it wasn't cited by counsel because it seems to me to be an authoritative case which affirms the conditions in DiCastri.

The trial judge's reasoning essentially was that the various requirements of the restrictive covenants, which she identified in her reasons, were all directed at forcing the respondents to fund the operations of the water utility and that on the authority of the *Russell* case at paragraph 21, the *Aquadel* case at paragraph 44, and the *Lebeau* case at paragraph 46, these provisions were in substance a positive obligation which does not run with the land.

As mentioned, the appellant submits the respondents are required by the restrictive covenant to remain members of the association, and as I said, the trial judge identified a distinction between an obligation to become a member and an obligation to remain a member, but it's not clear if that played a role in her reasoning. In that regard, there are two potential paths to concluding that the restrictive covenant would require a landowner to remain a member of the association.

The first would be that the obligation to become a member in Article 3(a) should be equated with an obligation to remain a member. I'm not persuaded by that. The restrictive covenant provides both that an owner must comply with the bylaws and must become a member. The bylaws permit a member to resign. If the drafter of the covenant had intended to preclude a landowner from exercising their rights under the bylaws, they would have had to say so more clearly, and again, no surrounding circumstances were proved or established which must justify any other meanings. See Part 4 above.

However, the appellant also relies in this appeal on Article 3(c). That provision was not relied on in argument before the trial judge. Arguably, it requires ongoing membership, and I will assume that to be the case for the purposes of this appeal. Reading the restrictive covenant, there is not an explicit obligation in the nature of an easement to permit a water

connection on lands. Rather, it is framed as a positive obligation to become a member and be responsible for the operation or maintenance of the waterworks supply system through the board of directors of the association. Although a covenant need not be explicitly framed in the negative to qualify as a negative covenant, the requirements of the present restrictive covenant, particularly given the contract language that owners be responsible for the operation and maintenance of the waterworks system through the board of the co-operative, are clearly and substantially directed at imposing positive financial and management obligations on lot owners.

I conclude that the various provisions of the restrictive covenant are in substance positive obligations. Essentially, this restrictive covenant is an attempt to establish a building scheme providing for reciprocal benefits and cost sharing. To construe the covenant in this case as a negative one would deprive the law that positive covenants do not ordinarily run with the land of any meaningful content. If it is desirable to impose on a community as a whole the burden of funding and operating a water utility for the benefit of all the landowners, that is a matter for the Legislature, and it goes beyond the law of negative covenants.

Accordingly, the trial judge did not err in concluding that the provisions cited to her were in substance positive obligations, which did not bind the respondents as subsequent purchasers of the lot. The additional provisions of the restrictive covenant cited for the first time on the appeal do not change that result.

The appellant submitted at trial that the annual levy is a rent charge. Rent charges are an exception to the rule that positive covenants do not bind subsequent landowners. They are recognized in Alberta law. See the *Land Titles Act* section 102(b) and the forms regulation under the *Land Titles Act*, Form 16. The trial judge did not explicitly deal with the appellant's rent charge argument. The appellant confirmed during oral argument on the appeal that it does not assert that the restrictive covenant constitutes a rent charge. Nevertheless, I considered whether this aspect of the trial judge's reasons, that is, in not addressing the argument which she recognized was made in the course of her reasons, indicates any misunderstanding of the issues or the law.

The elements of a rent charge are illustrated by the wording of the form under the *Land Titles Act*, and it is well understood that a rent charge is an encumbrance on land to secure the payment of an amount for the benefit of another party. The restrictive covenant in question is not expressed as an encumbrance, and it obviously is not a rent charge. The trial judge was not required to address arguments that so clearly lacked merit, so I didn't take her failure to deal with that issue as indicative of any way that she misunderstood what the live issues were in the case or failed to deal with them.

For those reasons, the appeal is dismissed.

Is there anything else that we need to deal with today?

Submissions by Mr. Jones (Costs)

MR. JONES: Costs, Sir. I'm assuming that the default rules will apply but thought I should mention that.

THE COURT: I don't have the *Rules* with me. They normally follow the event, but I think there might be some provision in there that does govern the amount because it's an appeal of a small claims matter. I don't know what the position of the appellant is on costs, whether you think some other disposition is required or whether you agree that they should follow the event but that you need to figure out what the amount is, see if -- whether there's some kind of limitation in the *Rules*.

MR. JONES: My recollection is, Sir, that any matter heard in Queen's Bench that is within the financial jurisdiction of Provincial Court is Column 1 but 50 percent of that amount. Then, at the Provincial Court level, the Provincial Court's ordinary rules would presumably apply.

Submissions by Ms. Scott (Costs)

MS. SCOTT: Our position would dispute that the standard costs would apply, but -- sorry.

MR. JONES: The --

MS. SCOTT: No. Sorry.

THE COURT: So --

MS. SCOTT: No. As set out by the legislation and as you've just indicated, so...

Ruling (Costs)

THE COURT: So I think the costs should follow the event, but if you want to check, my recollection is that the schedule says that for Provincial Court matters that end up in Queen's Bench, it's one-half of Column 1, but I don't have the rule in front of me. So you can either look at that and agree and then just insert it into the

judgment, or if you can't agree on what the actual quantification is, you can get a hold of me and either arrange to see me or, if you both agree to do it by letter, do it by letter.

MS. SCOTT: That's fine by me.

MR. JONES: Yeah. Thank you, Sir.

THE COURT: Okay. But if you need the judgment soon, then you can just prepare a judgment that says the appeal is dismissed and the matter of costs is reserved for further directions if it looks like there's some disagreement and you're not going to figure it out soon. I'll leave that in your hands.

MS. SCOTT: Sounds good.

MR. JONES: Yeah. That's fine, Sir.

THE COURT: All right? All right then. Is there anything else that we need to address? No? All right. Then we'll stand adjourned on that.

PROCEEDINGS CONCLUDED

Certificate of Record

I, David Marion, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench, held in courtroom 1602, at Calgary, Alberta, on June 20th of 2019, and that I was the court official in charge of the sound-recording machine during proceedings.

Certificate of Transcript

I, Sandy Voga, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Sandy Voga, Transcriber
Order Number: AL-JO-1003-4661
Dated: July 9, 2019