Ontario
Ministry of Consumer and Commercial Relations
Ministère de la Consommation et du Commerce
Registration Division
Division de l'enregistrement
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EM199204

March 11, 1992

MEMORANDUM TO: KEN DOAN, LAND REGISTRAR, L.R.O. #25
CARSON WILMOT, LAND REGISTRAR, L.R.O. #44

FROM: KATE MURRAY
DIRECTOR OF TITLES

RE: 'Save Harmless' Agreements Used by Some Conservation Authorities

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Attached is a memorandum from Nancy Sills which I think is self-explanatory. As these agreements relate to use of land rather than title, they may be refused registration.

If you have any questions please feel free to contact me.

KM/fs

Encl.

cc: Wayne Giles
Arnie Warner

Kate

Ontario Ministry of Consumer and Commercial Relations | Ministère de la Consommation et du Commerce | Registration Division | Division de l'enregistrement

Legal Services
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MEMORANDUM

TO: Kate Murray
Director of Titles

FROM: Nancy Sills
Counsel

DATE: February 6, 1992

SUBJECT: "Save Harmless" Agreements Used by Some Conservation Authorities

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In the past year, the Ausable-Bayfield Conservation Authority and the Upper Thames River Conservation Authority, have tendered "save harmless" agreements for registration. The land registrars in Sarnia and Stratford have requested an opinion on the registrability of these agreements. Ken Doan specifically questioned whether other registry offices were affected and indicated that a consistent approach across the province should be established.

There is no statutory provision under the Conservation Authorities Act permitting registration of these agreements. I contacted Pamela Hunter of the Ausable-Bayfield Conservation Authority and verified with her that they were not relying on a special statutory provision for registration. In the absence of specific authority for registration, we have to consider whether these documents may be registered under the Registry Act and the Land Titles Act.

The agreement with the Ausable-Bayfield Conservation Authority provides that the owner consents to the registration of the agreement upon title to the lands and that the covenants, etc. shall bind and run with the lands of the owner. There is a common misconception that if people enter into a written agreement stating that something will bind and run with the land, it will. In fact, the parties cannot by agreement make something title-related, if by its very nature it does not affect title. In addition, although the parties may consent to registration of the agreement, it must meet the requirements of our registration statutes and, in particular, the land registrar still retains the authority under section 21a of the Registry Act and section 83a of the Land Titles Act to refuse the agreement for registration if it contains or has attached to it material that does not, in the land registrar's opinion, affect or relate to an interest in land.

In my view the Ausable-Bayfield Conservation Authority agreement does not affect title and is therefore not an instrument and may not be registered under the Registry Act or the Land Titles Act. The agreement with the Upper Thames River Conservation Authority is likely an instrument and may be registered as it includes a charging provision. However, even if both conservation authorities were able to successfully argue that the agreements are instruments, the land registrar may exercise his or her discretion and refuse to register them, as they contain material that is not title-related. The covenants in the agreements that are negative in nature do not appear to meet the requirements applied by the courts for valid restrictive covenants that can bind and run with the land. Neither one of the agreements describes benefitting lands. For the land registrars' general information, I am enclosing copies of pages 110 to 112 of Donahue and Quinn, Real Estate Practice in Ontario and a copy of the headnote from a recent decision of the Ontario Court (General Division), Board of Regents of Victoria University v. Heritage Properties Ltd. et al. (1991) 4 O.R. (3d) 655, dealing with restrictive covenants. In addition to negative covenants, the agreements also contain positive obligations, which cannot affect title. On balance, the agreements relate to the use of land rather than title, and I recommend that the land registrars refuse to register them.

For your information, I spoke with Phyllis Miller, Manager, Conservation Authorities Section, Ministry of Natural Resources, to determine if there is widespread use of these types of agreements. She advised me that they were unaware that any conservation authority, other than Ausable-Bayfield, was still requiring these agreements. In their view these types of agreements are inappropriate and they actively discourage the authorities from using them. They have obtained legal advice that these agreements may not be legally enforceable.

Counsel

the hydro and telephone workers' right to enter onto the property to repair their lines. And certainly he cannot build on it.

However, some easements granted to Bell Canada and Ontario Hydro may be void because no consents to the grants of easement were obtained as then required under the Planning Act. While no consent is required for a conveyance to Her Majesty in right of Canada or Ontario or to a municipal government, transfers to Bell Canada, which is a privately owned company, do not fall within these exceptions. When the Planning Act was re-enacted in 1983, Ontario Hydro was added to the list of exempt bodies under s. 49 (3)(*c*). However prior tranfers that contravened the Act were not forgiven. This invalidity may not, however, be of much practical consequence. Most of your clients will require electrical and telephone service and will not, therefore, wish to force the issue.

Easements for underground sewer and water lines can be very troublesome. They are one more reason to examine a survey carefully. From searching the title you can find out where the easement is. Then you must satisfy yourself from looking at the survey that the building or the garage has not been erected over the easement.

Party wall agreements are common in older parts of our cities. Often whole rows of commercial buildings were constructed with common walls between them built right on the property line. Sometimes you will find reference to them on the title. It is essential that you report to your client the precise terms of such agreement. Remember that it effectively sterilizes that strip of his land on which the wall stands. Although he owns the land, he cannot use or sell that strip because his neighbour has a right to maintain the wall.

RESTRICTIVE COVENANTS

A restrictive covenant bears some resemblance to an easement. Again there must be a dominant and a servient tenement, *i.e.*, one parcel of land which carries with it the benefit of the covenant and the other which carries the burden. A restrictive covenant has been defined as a contract between two neighbouring landowners by which the covenantee, anxious to maintain the saleable value of his own property, acquires the right to restrain the covenantor from putting his land to certain specified uses.

Restrictive covenants were developed in the days before zoning by-laws. If Smith had a large parcel of land and sold off part to Jones, he would require Jones to covenant not to use the land for industry. It is clear that, as between the two of them, there was a contract which the courts would enforce. It was not until the landmark case of *Tulk v. Moxhay*, [1848] 2 Ph. 774, that the courts recognized the doctrine that both the benefit and the burden of that covenant would run with the land, *i.e.*, that Smith's purchaser could sue Jones' purchaser if the latter erected a factory on the land.

In order to successfully apply to court to enforce a restrictive covenant, there are certain requirements which must be kept in mind:

1. A restrictive covenant must be negative in nature. The courts will not force you to do a certain thing with you land, *i.e.*, paint your house pink. But a covanant that you will *not* paint your house blue might be enforceable. So in setting up covenants you must be careful to put them in the negative. For example:
   —shall not use for a glue factory
   —shall not build a fence over four feet high
   —shall not construct a frame house
   —shall not carry on any business.
2. The person suing to enforce a covenant must own the dominant tenement: *London County Council v. Allen*, [1914] 3 K.B. 642.
3. He must establish that the benefit has in fact passed to him.

There are three ways that the benefit of restrictive covenants run with the land:

1. *Express annexation of the covenants to the dominant land.* A properly drafted restrictive covenant will clearly set out the restrictions and will clearly state that they are to be for the benefit of and appurtenant to specifically described land. Indeed, the dominant tenement must be described in the deed creating a restrictive covenant: *Re Sekretov and City of Toronto*, [1972] 3 O.R. 534. The covenant should appear in a schedule to the transfer.

   > The transferee hereby covenants for himself, his heirs, successors and assigns, that he will not use the lands described herein for any purposes other than residential, which covenant is for the benefit of and shall run with the lands adjacent to the lands described herein and described in Schedule A.

   Then anyone purchasing the servient tenement will have notice of the covenant simply by searching the title. Anyone purchasing the dominant tenement will also have notice by searching the title. And the benefit of the covenant will accrue to him because it runs with the land.

   One would assume that in order to properly establish a restrictive covenant which is to run with the land, the convenantor (being the transferee in the transfer) should execute the transfer and that the covenant specifically be said to bind the heirs and assigns of the covenantor. However, in *Re Rowan and Eaton* (1927), 60 O.L.R. 245, the registration of the deed by the grantee was deemed to be acceptance of the covenants by him and notwithstanding the fact that the grantee did not execute the deed, the covenants were held to be binding upon the grantee and his heirs and assigns.
2. *Express assignment of the covenant.* The original covenantee can expressly assign the benefit of the covenant when he conveys the land.
3. *Building scheme.* This is the most common of the three to be found

in most new housing subdivisions. This type of restrictive covenant, which affects every lot in a subdivision, is actually a private scheme of town planning. The common interest of all parties living in that subdivision is to preserve the character and value of all the land in the subdivision. In a building scheme each purchaser of a lot in the scheme, or his assignee, can sue, or be sued, by every other purchaser in the subdivision, or his assignee. It is enforceable by all owners, not just the original grantor. This is different from the situation where a landowner imposes a restrictive covenant on a parcel he sells; there only one parcel of land is benefited.

Five requisites of a building scheme were established by the English case of *Elliston v. Reacher*, [1908] 2 Ch. 374, 385:

(a) Both plaintiff and defendant must have derived title from a common owner. Obviously, neighbours in a subdivision derived title from the original subdivider. See *Re Lakhani et al. and Weinstein* (1981), 31 O.R. (2d) 65.

(b) The land must have been laid out in lots, subject to these restrictions, in a way consistent only with some general scheme of development.

(c) The restrictions were intended by the original subdivider to pass to the benefit of each purchaser.

(d) The purchasers must have bought land with notice of the scheme. Remember s. 69(1) of the Registry Act: "The registration of an instrument under this or any former Act constitutes notice of the instrument to all persons claiming any interest in the land, subsequent to such registration...." See *White v. Lauder Developments Ltd. et al.* (1975), 9 O.R. (2d) 363.

(e) The geographic area to which the scheme extends must be well defined.

In most building schemes employed in Ontario, the original vendor reserves the right to waive or modify any of the restrictions as to one or more lots included in the scheme. There is authority to suggest that the reservation and exercise of a right such as this, as well as a failure to clearly define the extent of a scheme, invalidates the whole building scheme. In *Re Lankin*, [1951] O.W.N. 821, Aylen J. held:

> It is my view that since The Canada Permanent Trust Company reserved the right to waive the restrictions with respect to any particular lot, the restrictions in question never constituted a building scheme which is now enforceable.... There was no common scheme as a result of which these building restrictions were imposed for the simple reason that the Trust Company could, at any time, waive the restrictions with respect to any particular lot.

See also *Re Zieler* (1957), 8 D.L.R. (2d) 189 and *Osborne v. Bradley* (1903), 2 Ch. 446.

REFERENCE TO RESTRICTIVE COVENANTS IN AGREEMENT OF PURCHASE AND SALE

There is a dangerous clause in the standard printed form of agreement of purchase and sale. "Provided title is free from all encumbrances *except as to any registered restrictions or covenants that run with the land providing that such are complied with*" (emphasis added). But suppose your client proposed to buy a house in Bramalea intending to:

(a) put in a swimming pool with a six foot fence of solid board;
(b) park his camp trailer beside the house;
(c) rent one room to his brother-in-law; and
(d) carry on a real estate business in the basement.

Every one of these proposed uses is forbidden under the restrictive covenants affecting every lot in Bramalea. Yet, if your client has signed the standard agreement of purchase and sale containing the above clause, he has agreed to accept title subject to any restrictions that are being complied with. Obviously, the person he is buying from is complying. It is, therefore, recommended that the words in italics above be deleted from all agreements. One should agree to buy only a title which is free from encumbrances.

In the usual situation where your client has signed the agreement *before* asking your advice and has agreed to accept covenants, all you can do to assist him is send him a copy of the restrictions immediately after you have completed your search of title so that they do not come later as a great surprise.

Like easements, restrictive covenants merge if the dominant and servient tenements are purchased by the same person.

DISCHARGE OR MODIFICATION OF A COVENANT

At one time, there was nothing to prevent a restrictive covenant from running forever as long as each purchaser of the servient tenement had notice. This tended to cause hardship because, through the years, the character of a particular district might have changed.

So the legislature stepped in with relief under sub-ss. 61(1) and (5) of the Conveyancing and Law of Property Act:

> 61.-(1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant *may be modified or discharged* by order of a judge of the Supreme Court....
>
> (5) Before making any such order, the judge shall cause notice of the application to be given to such persons as appear to him to be interested in the relief sought, either by personal service, advertisement or by registered mail as he directs.

You must prove to the judge that the benefit to the applicant greatly exceeds any possible detriment to the dominant tenement.

> the contrary, the statute does not apply; and that the same principle has been applied to promises in terms of unlimited duration made by or to a corporation when performance of the promise is by the nature thereof limited to the life of the corporation or to the life of the individual . . .

(Emphasis added)

In a statute such as the *Planning Act* which is restrictive of common law rights, subject to the golden rule, a similar approach is appropriate.

This agreement might possibly extend for more than 21 years. It is equally possible that "the whole may possibly be performed" in less than 21 years, if, within that time, the pit is exhausted or GRM should surrender its rights.

In the result, that portion of this application which seeks to set aside the agreement between Kinsley and GRM on the basis of its alleged breach of s. 29(3) of the *Planning Act* is dismissed with costs. The balance of the application which requires fact-finding may proceed to trial and should do so in accordance with the rules of practice [Rules of Civil Procedure, O. Reg. 560/84]. There has already been extensive cross-examination on affidavits. If either party should feel that examination for discovery is appropriate in addition to the cross-examination already held, such examination ought not to duplicate the cross-examinations and should be concluded no later than October 31 next unless the parties otherwise agree.

If any further directions are necessary I may be spoken to.

Order accordingly.

Board of Regents of Victoria University v. Heritage Prope Ltd., Crazy Horse Developments Ltd., Upper Canada La Corp., One St. Thomas Ltd. and Jasmac Canada Ltd.

[Indexed as: Victoria University v. Heritage Properties Ltd.]

Ontario Court (General Division), Sutherland J. *August 27, 1991*

Real property — Restrictive covenants — Validity — Restrictive cov not running with transferred lands where no benefited lands are identif deed — Covenant possibly still having validity under law of contract.

The plaintiff leased land to the defendant Heritage in 1981. The deed Victoria Deed) contained a covenant that the grantee would not erect, on sp lots (which were more extensive than the transferred lands) any building ha height in excess of 20 metres and would secure and register a similar cov from any purchaser or assignee of the grantee. No dominant tenement or ben land was described or referred to in the covenant or elsewhere in the Heritage conveyed the Covenant Lands to the defendant Crazy Horse in 198 Crazy Horse conveyed the lands to the defendant Upper Canada in 1985. deeds or transfers contained covenants substantially the same as that i Victoria Deed. In 1987, Upper Canada conveyed the Covenant Lands t defendant One St. Thomas; the deed did not contain a covenant like the one i Victoria Deed. The defendant Jasmac (the beneficial owner of the land) fi development application with the City of Toronto seeking approval of an 11-s hotel development which would exceed the 20-metre height limit. The pl brought an action seeking a declaration that none of the defendants be permitt erect any building over 20 metres on the covenant land and for a perm injunction restraining the defendants from erecting any such building. The pl claimed that Upper Canada was holding the lands as trustee for One St. Thom the time it conveyed the lands to the latter and that the latter was bound b covenants given by its trustee Upper Canada in the deed from Crazy Hor Upper Canada. One St. Thomas and Jasmac denied that the first covenant v valid covenant which ran with the land and bound all subsequent transferees. also pleaded that if the covenant was binding upon them, the plaintiff wa entitled to the relief sought because, by a May 1987 agreement with U Canada, the plaintiff consented to the erection of a condominium on the land agreed to delete the height restriction in exchange for a $300,000 donation. On Thomas and Jasmac moved for the determination under Rule 21 of the Rul Civil Procedure of the question of law whether the plaintiff could enforc restrictive covenant where the deed containing the restrictive covenant did explicitly refer to the lands to be benefited, and for judgment under Rule 20 fo dismissal of the plaintiff's claim.

Held, the motion should be granted in part.

For the purposes of Rule 21, it was desirable to reframe the question and is for separate treatment the question that was most clearly a question of law ar upon the pleadings of the plaintiff and the admitted facts: whether a restri covenant will run as to burden with the purportedly servient lands where the or other instrument containing the covenant does not identify the lands o grantor that are intended to be benefited by the covenant. That question had t answered in the negative. The defendants were entitled to a declaration tha covenant here in question did not run with the lands of the covenantor so make them subject to the covenant in the Victoria Deed.

The motion for summary judgment under Rule 20 dismissing the whole of the plaintiff's action should be dismissed. Parties to a Rule 20 motion must "put their best foot forward" on such a motion and not hang back waiting for trial. Here, the plaintiff sought to have questions left for trial when it had not put its best foot forward on the motion, but it was saved by the fact that the moving party defendants had not addressed certain important questions raised by the plaintiff.

The moving parties were not estopped by the May 1987 agreement from asserting that the covenant was not binding on them as the plaintiff had not altered its position to its detriment. The building contemplated by the agreement was not proceeded with and the conditions were not met.

By entering into the May 1987 agreement, the plaintiff did not waive the covenant in such a way as to prevent it from now seeking to enforce it.

Although the covenant was not valid and enforceable as a restrictive covenant running with the land, it could still have validity under the law of contract and give the original covenantee (the plaintiff) a right of action against the original covenantor.

The plaintiff's argument that there was a "chaining effect" whereby the successive transferees, when they in turn transferred the lands, were required to obtain, as agents of the plaintiff, an identical covenant from their respective transferees, and that by virtue of such agency there was privity of contract between the plaintiff and the successive transferees, was a genuine issue for trial. The question whether, even where the burden of a covenant does not run with the subject land, a purchaser of that covenantor may be held liable for a breach of the covenant was also a genuine issue for trial.

Barnes v. Kaladar, Anglesea and Effingham (Townships) (1985), 52 O.R. (2d) 283, 6 C.P.C. (2d) 75 (H.C.J.); *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.); *209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce* (1988), 39 B.L.R. 44, 24 C.P.C. (2d) 248, 8 P.P.S.A.C. 135 (Ont. H.C.J.), **apld**

Esso Petroleum Co. Ltd. v. Kingswood Motors (Addlestone) Ltd., [1974] Q.B. 142, [1973] 3 All E.R. 1057, [1973] 3 W.L.R. 780, [1973] C.M.L.R. 665, 117 Sol. Jo. 852 (D.C.); *Russo v. Field*, [1970] 3 O.R. 229, 12 D.L.R. (3d) 665 (C.A.), revd in part [1973] S.C.R. 466, 34 D.L.R. (3d) 704, **consd**

Galbraith v. Madawaska Club Ltd., [1961] S.C.R. 639, 29 D.L.R. (2d) 153; *Sekretov v. Toronto (City)*, [1973] 2 O.R. 161, 33 D.L.R. (3d) 257 (C.A.), **folld**

Besinnett v. White (1925), 58 O.L.R. 125, [1926] 1 D.L.R. 95 (C.A.), **not folld**

Other cases referred to

Arnoldson y Serpa v. Confederation Life Association (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641, [1974] I.L.R. ¶1-606 (C.A.); *British United Automobiles Ltd. v. Volvo Canada Ltd.* (1980), 29 O.R. (2d) 725, 114 D.L.R. (3d) 488, 15 R.P.R. 211 (H.C.J.); *Byrne v. Goodyear Canada Inc.* (1981), 33 O.R. (2d) 800, 125 D.L.R. (3d) 695 (H.C.J.); *Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd.*, [1955] S.C.R. 682, [1955] 3 D.L.R. 502; *City National Leasing Ltd. v. General Motors of Canada Ltd.* (1984), 47 O.R. (2d) 653, 28 B.L.R. 41, 45 C.P.C. 174, 3 C.P.R. (3d) 262, 12 D.L.R. (4th) 273 (H.C.J.), revd in part on other grounds (1986), 54 O.R. (2d) 626, 9 C.P.R. (3d) 134, 28 D.L.R. (4th) 158, 93 N.R. 326 at 386, 32 O.A.C. 332 at 392 (C.A.), affd [1989] 1 S.C.R. 641, 68 O.R. (2d) 512 (note), 43 B.L.R. 225, 24

C.P.R. (3d) 417, 58 D.L.R. (4th) 255, 93 N.R. 326, 32 O.A.C. 332; *Fisher v. A* (1921), 50 O.L.R. 68, 64 D.L.R. 153 (S.C.); *Formby v. Barker*, [1903] 2 Ch. [1900-3] All E.R. Rep. 445, 72 L.J. Ch. 716, 89 L.T. 249, 51 W.R. 646, 47 Sol 690 (C.A.); *London County Council v. Allen*, [1914] 3 K.B. 642, [1914-15] All Rep. 1008, 83 L.J.K.B. 1695, 111 L.T. 610, 78 J.P. 449, 12 L.G.R. 1003 (C *Marten v. Flight Refuelling Ltd.*, [1962] Ch. 115, [1961] 2 All E.R. 696, [19 W.L.R. 1018, 105 Sol. Jo. 442 (Ch. D.); *McGregor v. Boyd Builders Ltd.*, [19 O.R. 424, 54 D.L.R. (2d) 112 (H.C.J.); *Mensah v. Robinson*, Ont. H.C.J., Wat February 22, 1989 [summarized at 14 A.C.W.S. (2d) 53, 15 W.D.C.P. 228]; *Pir Toronto (Board of Education)* (1974), 6 O.R. (2d) 172 (H.C.J.); *Pollon v. Amer Home Assurance Co.* (1991), 3 O.R. (3d) 59, 79 D.L.R. (4th) 178, [1991] I.I ¶1-2719, 44 O.A.C. 153 (C.A.); *R. v. York (Township)*, [1960] O.R. 238, 23 D.I (2d) 465 *sub nom. 125 Varsity Rd. Ltd. v. York Township* (C.A.); *Rei Bickerstaff*, [1909] 2 Ch. 305, 78 L.J. Ch. 753, 100 L.T. 952 (C.A.); *Seede v. Ca Inc.* (1985), 50 O.R. (2d) 218, 50 C.P.C. 78 (H.C.J.), affd (1986), 55 O.R. (2d) (C.A.) [leave to appeal to S.C.C. refused (1986), 55 O.R. (2d) 352*n*, 71 N.R. 17 O.A.C. 399*n*]; *Topham Ltd. v. Sefton (Earl)*, [1967] 1 A.C. 50, [1966] 1 E.R. 1039, [1966] 2 W.L.R. 814, 110 Sol. Jo. 271 (H.L.); *Tudale Explorations v. Bruce* (1978), 20 O.R. (2d) 593, 88 D.L.R. (3d) 584 (Div. Ct.); *Tulk v. Mox* (1848), 41 E.R. 1143, [1843-60] All E.R. Rep. 9, 2 Ph. 774, 1 H. & Tw. 105, 18 I Ch. 83, 13 L.T.O.S. 21, 13 Jur. 89 (L.C.); *Vaughan v. Warner Communicati Inc.* (1986), 56 O.R. (2d) 242, 10 C.P.C. (2d) 205, 10 C.P.R. (3d) 492 (H.C.J.)

Statutes referred to

Corporations Tax Act, R.S.O. 1980, c. 97
Land Titles Act, R.S.O. 1980, c. 230, s. 118(4)
Registry Act, R.S.O. 1980, c. 445, s. 22(1)
Victoria University Act, 1951, S.O. 1951, c. 119

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, Rules 20, 21, rules 20.01, 21.01, 21.01((1)(*a*), (2)(*a*)
Rules of Practice, R.R.O. 1980, Reg. 540, Rule 124

Authorities referred to

Report on Covenants Affecting Freehold Lands (Toronto: Ontario Law Refo Commission, 1989), pp. 26, 27, 28, 29, 30
Snell's Principles of Equity, 27th ed. (London: Sweet & Maxwell, 1973), p. 563

MOTIONS by the defendants (applicants) for a determination of question of law and for an order dismissing the plaintiff's action.

Richard Storrey, for plaintiff (respondent).
P. David McCutcheon, for defendants (applicants).

SUTHERLAND J.:—These motions are brought by the defendant Jasmac Canada Inc. and One St. Thomas Limited, under rule 21.01(1) and 20.01 of the Rules of Civil Procedure, O. Reg. 560/8 in the plaintiff's action to enforce a covenant relating to, an purporting to restrict the use of, a valuable parcel of land in th City of Toronto.