STATE OF MICHIGAN

COURT OF APPEALS

MARK W. KLOOSTERMAN and TERESA L. KLOOSTERMAN, Plaintiffs-Appellants, v AMY J. GARBER, Defendant-Appellee.	UNPUBLISHED July 1, 2010 No. 291108 Kalamazoo Circuit Court LC No. 07-000270-CH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiffs appeal as of right the February 27, 2009 trial court order granting defendant summary disposition in this dispute over the legal import of language in a deed relative to the position of defendant's newly constructed lakefront home. We affirm.

At issue is the legal character of restrictive language in a 1932 deed from the West Lake Development Company (WLDC) to defendant's predecessors in interest. That deed conveyed lot 35 of the Ames West Lake Park plat:

> subject to the following conditions, restrictions and limitations, which shall run with the land and for a breach of any of which said premises shall revert to first party or its successors;
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> * * *
>
> 4. There shall be maintained a uniform front building line on said premises and no building or part thereof hereafter moved or constructed thereon shall project beyond the front porch line of the dwelling on either side thereof and if said dwellings on either side have no front porch, then beyond the front building line thereof.

WLDC was dissolved in 1945. In 1966, three surviving members of its board of directors executed and recorded a "Waiver of Reverter," which provided that the surviving directors:

> desire to waive their right to declare said titles, or any of them, forfeited and to cause said titles to revert to them as the surviving directors of said dissolved

> corporation in the event any of the restrictions or conditions upon which said conveyances were made have been violated or will be violated.
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> NOW THERFORE, in consideration of the sum of $1.00 and other good and valuable consideration to them in hand duly paid, the above named surviving Directors of [WLDC], do hereby quit-claim and convey onto each of the several Grantees, respectively, unto which said corporation has heretofore conveyed any of the lots or portions thereof within the plats above described, said right of forfeiture and reverter, intending by this conveyance to terminate the said rights of forfeiture of title and the right to cause said title to revert to [WLDC] on account of the violation of any of said conditions or restrictions, reserving, however, and provided always that all the conditions and restrictions upon which any of said lands were so conveyed by said [WLDC] unto any of said Grantees shall remain in full force and effect and merely the right of forfeiture and reverter of title being hereby terminated.

Defendant and her husband (since deceased) purchased lots 34 and 35 in 2003. At that time, there was a house on lot 34, in which defendant and her family lived, and "a small old cottage" on lot 35. Defendant began meeting with city authorities in February 2006 regarding removal of the existing cottage and construction of a new home on lot 35. Defendant worked through issues pertaining to the height of the proposed home and obtained all necessary permits and zoning approvals for construction of her planned home, and construction was completed in 2007.[1]

Plaintiffs filed the instant action alleging, among other things, that the restrictive language quoted above constitutes a restrictive covenant, which defendant violated by constructing her home closer to the lake than is permitted.[2] Defendant moved for summary disposition, asserting that the reversionary clause in the deed was no longer valid, and that the conditions in the deed were not separately enforceable from that reversionary clause. The trial court agreed.

On appeal, plaintiffs first argue that the trial court erred by implicitly concluding that the restrictive language set forth in the deed constitutes a condition, based on the presence of the reversionary interest, and not a restrictive covenant. We disagree.

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[1] Because the facts relating to the size of defendant's house, the methods of construction employed to achieve that size, and defendant's dealings with the city authorities are not pertinent to the issues raised on appeal, they will not be discussed further in this opinion.

[2] Plaintiffs' other claims included that the language was enforceable as a reciprocal negative easement, that defendant's house constituted a public nuisance per se, based on alleged violations of the zoning ordinance, as well as a private nuisance, because it constitutes an unreasonable and substantial interference with plaintiffs' use and enjoyment of their property. The dismissal of these claims is not at issue on appeal.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). The character and scope of a deed restriction is also reviewed de novo. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). See also, *Halpin v Rural Agric School Dist*, 224 Mich 308, 313-316; 194 NW1005 (1923).

As previously noted, the 1932 deed conveying lot 35 from WLDC to defendant's predecessors in interest did so

> *subject to* the following conditions, restrictions and limitations, which shall run with the land *and for a breach of any of which* said premises shall revert to first party or its successors;
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> * * *
>
> 4. There shall be maintained a uniform front building line on said premises and no building or part thereof hereafter moved or constructed thereon shall project beyond the front porch line of the dwelling on either side thereof and if said dwellings on either side have no front porch, then beyond the front building line thereof. [Emphasis added.]

As noted in 1 Cameron, Michigan Real Property Law (3rd ed), § 7.9, p 266-268:

> Arguments frequently arise between a grantor and a grantee about whether words in a deed constitute a condition, which will result in the destruction of the estate if it happens (or cause the estate not to vest until it happens), or a covenant, which is in the nature of a promise and is enforceable but will not result in the destruction of the estate conveyed. In *Blanchard* [*v Detroit, Lansing & Lake Mich RR Co*, 31 Mich 43, 50-51 (1875)], the [C]ourt went on to explain this difference:
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> > The author of the Touchstone says: "Conditions annexed to estates are sometimes so placed and confounded amongst covenants, -- sometimes so ambiguously drawn, -- and at all times have in the drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, that for the most part conditions have *conditional words in their frontispiece,* and do begin therewith; and that amongst these words there are three words that are most proper, which, in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as:

> *proviso, ita quod,* and *sub conditione*.[3] And, therefore, if A grant lands to B, to have and to hold to him and his heirs, *provided that,--or so as,--or under this condition,*--that B do pay to A ten pounds at Easter next; this is a good condition, and the estate is conditional without any more words."-- *p. 121.* [. . .] The question whether there is a limitation or a condition, or whether there is a condition precedent or subsequent, or whether what is to be expounded is a condition or covenant, or something capable of operating both ways, frequently becomes very perplexing in consequence of the uncertain, ambiguous, or conflicting terms and circumstances involved; and the books contain a great many cases of the kind, and not a few of which are marked by refinements and distinctions which the sense of the present day would hardly tolerate.
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> Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant. . . .

Generally, "'[a] *covenant* is an assurance that something will be done, while a *condition* provides that the legal relationship of the grantor and the grantee will be affected when an event that may or may not happen takes place.'" *Ditmore v Michalik*, 244 Mich App 569, 582; 625 NW2d 462 (2001), quoting 2 Cameron, Michigan Real Property Law (2d ed), § 22.2, pp 1005-1006. "The basic distinction between a condition subsequent and a covenant in instruments relating to land pertains to the available remedy in the event of a breach. The ordinary remedy for breach of a covenant is by an action at law for damages, although covenants that relate to the land or its mode of use or enjoyment may also be enforced in equity. The usual consequence of the nonfulfillment of a condition is a forfeiture of the estate." Am Jur 2d, Estates § 165, p 192. Thus, "[t]he addition of a clause of forfeiture or re-entry to a condition in an instrument of conveyance is indicative of the character of the condition as a condition subsequent," while "[t]he absence of a clause giving a right of re-entry for breach may signify an intention to create a covenant or a trust rather than a condition." *Id.* at § 167, p 194-195. Accordingly,

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[3] *Sub conditione* means "[u]nder condition" and it "creates a condition in a deed." Black's Law Dictionary 7th ed (1999). The deed here conveyed the property "*subject to* the following conditions, restrictions and limitations. . ." (emphasis added).

> When the language of the deed expresses a condition which is to defeat, not to create, an estate in the grantee, the grantor parts with every interest and estate in the property conveyed, and the act to be performed by the grantee follows the vesting of the estate, a condition and not a covenant is created. A provision that a deed is given and accepted on an express agreement on the part of the grantee to do certain things imports a personal covenant rather than a condition.
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> On the other hand, if such an agreement is accompanied by an express provision for reverter, or if it clearly appears the parties intended that if the grantee failed to do the specified things, he or she would forfeit his or her interest, even though express words of reverter are not used, a condition rather than a covenant is created. [*Id.* at § 170, p 196-197.]

In *Blanchard*, 31 Mich 43 at 49-50 (1875), our Supreme Court was faced with the question of the proper legal characterization of a conveyance of property "in consideration of five hundred dollars *and the covenant to build* a depot hereinafter mentioned," and "made upon the *express condition* that said railroad company shall build, erect and maintain a depot or station house on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot." *Id*. at 44. The plaintiff grantor asserted that the language created a covenant, while the defendant grantee asserted that the language created a condition subsequent, which it admittedly, "decided not to observe . . . and had therefore refused to abide by." *Id*. at 44-45. The Court concluded that the language constituted a condition and not a covenant, explaining that:

> An estate upon condition is one which has a qualification annexed, by which, on the happening of a particular event, it may be created, enlarged or destroyed. If set forth, the condition is express; and if it allows the estate to vest, and then to be defeated in consequence of non-observance of the requirement, it is a condition subsequent. [*Id.* at 49-50.]

The Court noted further that:

> And it is believed that no considered case can be shown, that assumes to decide that a writing which, like that before the court, precisely answers, in verbiage, position, and relative facts, to all the requirements for an express condition subsequent, and stands without any thing except the hasty opinion of the grantor to gainsay its apparent legal nature, is either a covenant, or susceptible of being proceeded on as a covenant, in opposition to a claim by the grantee that it is a bare condition, and which by his non-observance has entitled the grantor to forfeiture.
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> The result, upon the whole, is, that the provision relied on by complainant as a covenant to be specifically enforced against the defendants, must be

> considered an express condition subsequent, and not a covenant, and not specifically enforceable against defendants as one. [*Id.* at 52.][4]

Similarly, in *Langley v Ross*, 55 Mich 163, 165-166; 20 NW 886 (1884), the Court observed that "[a] condition is a qualification annexed to an estate by the grantor, whereby it may be enlarged, defeated, or created upon an uncertain event; and it differs from a covenant in this: that a condition is in the words of and binding upon both parties, while a covenant is in the words of the covenantor only." See also, *Clark v City of Grand Rapids*, 334 Mich 646, 654-655; 55 NW2d 137 (1952) (restrictive language subject to a reverter clause constituted a condition); and *Quinn v Pere Marquette RR Co*, 256 Mich 143, 152; 239 NW 376 (1931) (a conditional conveyance containing a reverter clause creates a determinable fee upon condition subsequent).

More recently, this Court, in *Ditmore*, 244 Mich App at 582, reiterated that language in a deed that creates for the grantor a right of reversion, or a right of entry, is in the nature of a condition, not a covenant. In that case, the deed in question provided:

> Said parcel of land is subject to all State and Federal laws regarding shore lines of inland lakes and also subject to any commitments which may have previously been made by Portage Lake Land Company.
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> This conveyance is given upon the express condition that no buildings or structures of any kind shall ever be erected or permitted to remain upon the above described property or in the water adjacent thereto, excepting unenclosed temporary docks. Violation of this condition shall cause the title to the property hereby conveyed to revert to the grantor, its successors and assigns. [*Id.* at 572.]

After reiterating that "'[a] *covenant* is an assurance that something will be done, while a *condition* provides that the legal relationship of the grantor and the grantee will be affected when an event that may or may not happen takes place,'" *Id.* at 582 quoting 2 Cameron, Michigan Real Property Law (2d ed.), § 22.2, pp. 1005-1006, the Court explained that "the deed did not require the grantee to do anything or refrain from doing anything. Instead, it provided that the property

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[4] The *Blanchard* Court observed that, as is also true here, relative to the interests of the parties and their respective legal theories,

> [a] peculiar feature of this cause is, that it is the grantee, and not the grantor, as is almost invariably the case, who maintains that the important clause in the grant which the grantor relies upon as a covenant, is a condition, and one, too, which the grantee has distinctly violated. This is the more noticeable since one of the settled rules for deciding in doubtful cases that the writing is a covenant, and not a condition, is based on the idea that a condition, as tending to destroy the estate, would be less favorable to the grantee.
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> The position of these parties confounds the reason of this rule . . . [*Id* at 45 (citations omitted).]

would revert back to Portage Lake Land Company in the event that the grantee violated the express condition." *Id.*[5]

Similarly, in *Huntington Woods v Detroit*, 279 Mich App 603, 622; 761 NW2d 127 (2008), this Court determined that language in a deed, "provided always," that the conveyance was subject to "several express conditions and limitations," the violation of which were to result in forfeiture of the estate, which would revert to the grantor, created a condition subsequent. The Court explained that,

> Our starting point in this analysis is the language of the [] deed . . .
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> As with any instrument a deed must be read as a whole in order to ascertain the grantor's intent. . . .
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> The [] deed clearly and unambiguously delineates "express conditions and limitations" pertaining to use of the land conveyed to defendant. In addition, following a listing of those conditions, the deed affirmatively provides that the property "shall revert" upon the breach of "any of the foregoing conditions . . . ." . . . The intent of the [grantor] to create a condition subsequent is clearly and definitively demonstrated by the language contained in the deed. Although "conditions subsequent are not favored in law," in this instance the presence of a reverter clause specifically requiring forfeiture upon breach of any of the delineated conditions requires us to find that the interest conveyed by the [] deed is a fee simple subject to a condition subsequent. [*Id.* at 621-622 (citations omitted).]

Applying these principles, here, the 1932 deed from WLDC to defendant's predecessors in interest plainly contained a condition subsequent, subject to a reversionary interest, and not a covenant. The deed conveyed the property, in fee simple, to the grantees subject to certain conditions, upon the happening of any of which, the property was to automatically revert to WLDC. Plaintiffs insist that the language constitutes a restrictive covenant, focusing on the fact that the deed provides that the "conditions, restrictions and limitations. . . shall run with the land," as well as on the purpose of building restrictions, and asserting further that the waiver of the reversionary interest, more than 30 years after its creation, means that the front line building restriction "is *not* a condition, as a matter of law." However, plaintiffs do not offer any authority suggesting that the language "shall run with the land," without regard to the presence of the reversionary clause or the "conditional words in the[] frontispiece," *Blanchard*, 31 Mich at 50, means that the restriction is a covenant and not a condition.[6] Nor do plaintiffs offer any authority

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[5] As discussed further below, and as is dispositive here, this Court went on to hold that, because the right of reversion had expired the possibility of reverter was unenforceable and, consequently, the condition itself was also unenforceable. *Ditmore*, 244 Mich App at 581-582.

[6] We note that, if a reversionary interest survived, that might be imposed against defendant because of the "run with the land" language in the deed. We do not decide this issue because, as discussed *infra*, no reversionary interest survived.

to indicate that the 1966 waiver of WLDC's reversionary interest – a unilateral action of the grantor's purported successors in interest – was sufficient to transform what was, until that time, plainly a condition subsequent subject to reverter into a restrictive covenant.[7] To reiterate, as our Supreme Court explained in *Blanchard*, 31 Mich at 50-51.

> Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant. . .

Further, as our Supreme Court explained in *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212-213; 737 NW2d 670 (2007):

> A deed restriction represents a contract between the buyer and the seller of property. *Uday v City of Dearborn*, 356 Mich 542, 546; 96 NW2d 775 (1959). "Undergirding this right to restrict uses of property is, of course, the central vehicle for that restriction: the freedom of contract, which is . . . deeply entrenched in the common law of Michigan." *Terrien* [*v Zwit*, 467 Mich 56,] 71 n 19; [648 NW2d 602 (2002),] citing *McMillan v Mich S & N I R Co*, 16 Mich 79 (1867). The United States Supreme Court has listed the "right to make and enforce contracts" among "those fundamental rights which are the essence of civil freedom." *United States v Stanley*, 109 US 3, 22; 3 S Ct 18; 27 L Ed 835 (1883). We "respect[] the freedom of individuals freely to arrange their affairs via contract" by upholding the "fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*," unless a contractual provision "would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 468, 470; 703 NW2d 23 (2005) (emphasis in original). As one court has stated:

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[7] Plaintiffs cite a number of cases, including *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002); *Oosterhouse v Brummel*, 343 Mich 283, 286; 72 NW2d 6 (1955); *Koffman v Schrieber*, 219 Mich 1; 118 NW 333 (1922); *Rice v Ruddiman*, 10 Mich 125 (1862); *Huntington Woods v Detroit*, 279 Mich App 603, 622; 761 NW2d 127 (2008); *Webb v Smith (Aft Second Rem)*, 224 Mich App 203; 568 NW2d 378 (1997) and *Craig v Bossenberry*, 134 Mich App 543; 351 NW2d 596 (1984), regarding the purposes of building line restrictions, the value of lake lots as impacted by their views and the legal worth and enforceability of restrictive covenants. However, the courts in the cited cases were not faced with any dispute as to the character of the restrictive language at issue, and thus the cases cited by plaintiffs are inapposite to the determination whether the restrictive language at issue constitutes a condition or a covenant.

> Courts do not make contracts for parties. Parties have great freedom to choose to contract with each other, to choose not to do so, or to choose an intermediate course that binds them in some ways and leaves each free in other ways. [*Rarities Group, Inc v Karp*, 98 F Supp 2d 96, 106 (D Mass, 2000).]
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> " 'Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains . . . .' " *Fed Deposit Ins Corp v Aetna Cas & Surety Co*, 903 F2d 1073, 1077 (CA 6, 1990), quoting *S. Paul Mercury Ins Co v Duke Univ*, 849 F2d 133, 135 (CA 4, 1988). Because the parties have freely set forth their rights and obligations toward each other in their contract, when resolving a contractual dispute, "society is not motivated to do what is fair or just in some abstract sense, but rather seeks to divine and enforce the justifiable expectations of the parties as determined from the language of their contract."

Thus, "[r]ather than attempt to apply an abstract notion of 'justice' to each particular case arising out of a contract," Michigan Courts will enforce the contract as written, for it is the refusal to do so that "is 'contrary to the real justice as between [the parties].'" *Id.* at 213.

The intent of the WLDC to create a condition subsequent subject to a reversionary interest "is clearly and definitively demonstrated by the language contained in the deed." *Huntington Woods*, 279 Mich App at 622. The plain language of the deed created such a condition and "the parties cannot be heard to say . . . that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant." *Blanchard*, 31 Mich at 51. Therefore, the trial court did not err by treating the restrictive language as a condition and not a restrictive covenant. That determination alone defeated plaintiffs' claims here.

The trial court further correctly concluded that the absence of the reversionary interest rendered the conditions set forth in the deed unenforceable against defendant.[8] As this Court explained in *Ditmore*, 244 Mich App at 582, it constitutes legal error for a court to conclude that deed restrictions in the nature of a condition subsequent remain enforceable notwithstanding that the reversionary interest itself is no longer enforceable. That is, in the absence of an enforceable reversion, the underlying conditions are no longer enforceable against the current property owner. *Id.*[9] And this is so regardless whether the reversionary interest is waived by the grantor, as it seemingly was here, or extinguished by operation of MCL 554.62, as it was in *Ditmore*.

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[8] This Court is not presented with the question, and need not decide whether, assuming that there was a surviving reversionary interest, plaintiffs could enforce its terms against defendant.

[9] This is consistent with long-standing principles of common law, which provided that such conditions were no longer enforceable once the right of reversion was lost through an invalid attempt at conveyance. See, e.g., *Schoolcraft Community Sch Dist No 50 v Burson*, 357 Mich 682, 687-688; 99 NW2d 353 (1959); *Halpin v Rural Agric Sch Dist*, 224 Mich 308, 314-316;
(continued…)

While plaintiffs cite a number of cases indicating that judicially fashioned injunctive relief is appropriate to enforce a *restrictive covenant*, plaintiffs offer no authority supporting an assertion that a condition subsequent, for which the possibility of reversion has been waived or otherwise lost, may be enforced by judicial remedy. Instead, such conditions are rendered unenforceable by the absence of an enforceable reversionary interest. *Ditmore*, 244 Mich App at 582. See also, *Schoolcraft Community Sch Dist No 50 v Burson*, 357 Mich 682, 687-688; 99 NW2d 353 (1959); *Halpin v Rural Agric Sch Dist*, 224 Mich 308, 314-316; 194 NW 1005 (1923). Thus, regardless whether WLDC's reversionary interest was extinguished upon the dissolution of WLDC in 1945, was waived by virtue of the 1966 Waiver of Reverter, or was lost by operation of MCL 554.62, it is undisputed, and indisputable, that there was no longer any enforceable reversionary interest at the time defendant constructed her new home on lot 35. In the absence of any enforceable reversionary interest, the trial court correctly concluded that the underlying condition was itself no longer enforceable.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

(…continued)

194 NW 1005 (1923).