IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092486

FAIRFAX COUNTY REDEVELOPMENT AND HOUSING AUTHORITY,

Appellant,

v.

JAMES C. RIEKSE, *et al.*,

Appellees.

Appeal from the Honorable Dennis J. Smith
Circuit Court for Fairfax County, Virginia

BRIEF OF APPELLEES JAMES C. RIEKSE AND WELLS FARGO

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STATEMENT OF THE CASE

Appellant Fairfax County Redevelopment and Housing Authority (the "Housing Authority") asks this Court to rewrite basic property law to cure its fatal pleading defect. The defect related to the relief requested by the Housing Authority for its breach of condition subsequent and real covenant claims. The Housing Authority brought the underlying case seeking, inter alia, a declaration that the 2003 deed to the current homeowner, Appellee James C. Riekse, was "void ab initio" because the Housing Authority claimed to have retained an unexpired option to repurchase that was buried in a 1989 deed of a prior owner.

The Housing Authority claims its option to repurchase deprived any subsequent grantee or person in title from having the "power" (as opposed to the right) to convey the property in derogation of its rights. [A-305, 311]. At trial, despite having advance warning from Mr. Riekse and Appellee Wells Fargo of the fundamental defect in its pleading, i.e., that the declaration it sought was legally incompatible with its causes of action, the Housing Authority ignored such warnings, closed its case-in-chief, and now complains that the trial court struck its defective pleading for the same reason.

The trial court struck the Housing Authority's case even though it had

previously given the Housing Authority a broader interpretation of the option to repurchase than was legally permissible. Notably, in Beeren & Barry Investments, LLC v. AHC, Inc., 277 Va. 32, 37-38, 671 S.E. 2d 147 (2009), this Court determined that a housing authority's reservation of an option to repurchase in a deed that is triggered by the death or election to sell of the grantee, does not contemplate a foreclosure sale of the property, but is merely personal in nature.

Thus, if this Court relieves the Housing Authority of its pleading defect to enable it to strip Mr. Riekse of his property, by way of assignments of cross-error, Appellees Riekse and Wells Fargo ask the Court to reverse the trial court's erroneous interpretation of the subject deed, as applied to the facts of the case. Specifically, Appellees ask that this Court review and reverse the trial court's order overruling Appellees' demurrer (even after reconsideration in light of Beeren) and denying Appellees' motion to strike the condition subsequent and covenant running with the land claims. Under existing Virginia law, the trial court erred in construing the triggering event as applied to the facts of this case, and erred in its determination that any such covenant initially ran with the land or continued to run with the land upon breach.

ASSIGNMENTS OF CROSS-ERROR

1. The trial court erred in overruling Appellees demurrer (and not reconsidering such ruling) and thereafter denying Appellees motion to strike because the trial court failed to strictly construe the putative restrictive covenant and condition subsequent against the Housing Authority and in favor of the free alienability of property.

2. The trial court erred in overruling Appellees demurrer and motion to strike as to both the covenant running with the land count and condition subsequent count because the triggering events of the subject option to repurchase did not contemplate the foreclosure sale of the property and was personal to the original grantee.

3. The trial court erred in overruling Appellees demurrer and motion to strike as the covenant running with the land count because a personal triggering event such as death or determination to sell cannot touch and concern the land.

4. The trial court erred in denying Appellees motion to strike because the Housing Authority's claims are time-barred.

5. The trial court erred in overruling Appellees demurrer and motion to strike the covenant running with the land count because a covenant when breached is personal, and ceases to run with the land.

[A-372-373].

QUESTIONS PRESENTED

I. Whether a breach of a condition subsequent or covenant running with the land renders an offending estate void ab initio.[1]

II. Whether the triggering event for the subject condition subsequent or putative covenant running with the land contemplated the foreclosure sale of the subject property. (Assignment of Cross-Error "ACE" Nos. 1, 2, 3).

III. Whether the putative covenant ran with land or was instead a personal covenant. (ACE Nos. 2 and 3).

IV. Whether the Housing Authority's claims are barred by Virginia Code §8.01-255.1. (ACE No. 4)

V. Whether the putative covenant continued to run with land, after the alleged breach. (ACE Nos. 4 and 5).

STATEMENT OF FACTS

Title to the subject property is currently vested in Appellee James C. Riekse, who has conveyed a purchase-money deed of trust in favor of Appellee Wells Fargo. Working backwards, the chain of title is summarized as follows: (i) On June 2, 2003, Mr. Riekse purchased the property from Appellees Rajesh and Rajinder Kapani (the "Kapanis"). [A-237]. (ii) Seven months earlier, on November 26, 2002, the Kapanis had purchased the property at a foreclosure sale. [A-218]. (iii) The foreclosure

[1] Appellees consolidate the two questions presented by Appellant to facilitate the discussion.

sale was made pursuant to a 1995 deed of trust conveyed by Peter and Christine Tovar (the "Tovars"). [A-206].[2] (iv) In 1989, the Tovars had purchased the property from the Housing Authority. [A-194]

Four years after Mr. Riekse bought the property, on September 19, 2007, the Housing Authority filed the subject lawsuit, asserting that when the Housing Authority sold the property to the Tovars, it had reserved an option to repurchase under the 1989 deed, which it refers to in its pleadings as the "Original Deed". Per the Original Deed, the putative option was triggered upon the death of both of the Tovars or their determination to sell the subject property. Specifically the deed states:

> "[i]n the event that Grantee shall die (both of them if more than one is named as Grantee) or in the event the Grantee shall determine to sell this Property at any time within thirty (30) years from the date of this Deed, then and in either event, the said Grantor, its successors or assigns, shall have the option to repurchase the Property . . . ."

[A-194]. Under both the condition subsequent and real covenant counts, the Housing Authority requested that the trial court determine that the remedy under both theories was to declare the deed from the Kapanis to

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[2] Two years after the Tovars conveyed the Deed of Trust, on October 28, 1997, the Tovars separated, and they conveyed the Property to Christine Tovar, for her sole and separate estate. [A-214].

Riekse "void ab initio," and determine the repurchase price as of the date of that conveyance.

Appellees demurred to the complaint asserting that the triggering events did not contemplate the foreclosure sale, and that the Housing Authority failed to assert that the Tovars had died or determined to sell. Moreover, Appellees asserted that the covenants claimed by the Housing Authority were personal to the Tovars and did not run with the land, and that in any event, even if they were real covenants initially, they became personal upon breach. Pursuant to a written letter opinion, the trial court overruled the demurrer. [A-142]. Because the Beeren decision issued the day after the trial court rendered its decision, Appellees filed a motion for reconsideration, which was also denied. [A-164].

At trial, at the close of the Housing Authority's case-in-chief, Appellees moved to strike on two separate grounds. The first motion to strike reiterated the demurrer, i.e., the Tovars were not dead, they did not determine to sell, that the putative covenant did not run with the land, and further, that upon breach, it became a personal covenant by the breaching party, and that if breached, the Housing Authority's suit would nevertheless be barred by Va. Code §8.01-255.1. [A-292-300]. The second motion to

strike addressed the Housing Authority's defective pleading, namely that under neither a condition subsequent theory nor a real covenant theory, was the remedy against Appellees to declare the Kapanis-Riekse deed void ab initio. [A-295].

Following argument, after denying Appellees' first motion to strike as to the issues on demurrer, the trial court struck the Housing Authority's case determining that the remedy under a condition subsequent theory was not to seek a declaration that the Kapanis-Riekse conveyance was void ab initio, but to assert an action for ejectment and reentry on land. [A-320-321]. The Housing Authority moved for reconsideration asserting that the trial court's ruling only addressed the condition subsequent count, and that it was entitled to a declaration that the Kapanis-Riekse deed was void ab initio under its real covenant count.

According to the Housing Authority, it was entitled to specific performance against Riekse and Wells Fargo which required the conveyances to those parties to be declared void ab initio, have title revert to the Kapanis, and order specific performance against the Kapanis to surrender the property to the Housing Authority for the alleged repurchase price. Recognizing that the Housing Authority failed to even plead specific

performance against Mr. Riekse or Wells Fargo, the trial court reaffirmed its grant of the motion to strike.

DISCUSSION

I. The alleged breach of a condition subsequent or a real covenant does not render Mr. Riekse's estate "void ab initio".

The trial court properly struck the Housing Authority's case because neither a breach of a condition subsequent, nor real covenant renders Mr. Riekse's estate, or the deed into him, void ab initio. As explained in Sanford v. Sims, 192 Va. 644, 649, 66 S.E.2d 495, 497-98 (1951), even upon a breach of a condition subsequent, the estate in the grantee remains unimpaired until entry, which in modern practice is an action at law for ejectment and reentry. See id.; see also Va. Code §8.01-255.1 ("No person shall commence an action for the recovery of lands, nor make an entry thereon, by reason of a breach of a condition subsequent, or by reason of the termination of an estate of fee simple determinable, unless the action is commenced or entry is made within ten years after breach of the condition or within ten years from the time when the estate of fee simple determinable has been terminated. . . .").

Although the trial court suggested that the Housing Authority could assert its claim through an action for ejectment, contrary to the Housing

Authority's characterizations, the court never claimed that this was the only remedy. Indeed, here, assuming arguendo that the condition was in fact triggered, an action for ejectment alone, would require the Housing Authority to pay the current fee owner the repurchase price. Thus, the transaction was voidable upon proper entry, which included the required payment; not void ab initio.

Likewise, the real covenant count, as any other contract claim, does not render the transaction "void ab initio," but requires an appropriate contract remedy, including an action for damages or specific performance against a breaching party, or rescission and restoration to the status quo as to a non-breaching party.[3] Although the Housing Authority claims that the proper remedy for breach of a real covenant is the equitable remedy of specific performance,[4] it never asked for such relief against Mr. Riekse. [A-

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[3] Like a contract, a covenant is a promise to do or to refrain from doing a specified thing, but which must be under seal. See Moynihan, Cornelius J., Introduction to the Law of Real Property, 2d. at 114 (1988). If the covenant is broken, the remedy is to sue for damages, but the breach of the covenant neither automatically terminates the estate nor gives the covenanted a power to terminate. See id. Thus, a covenant is not a fee interest in land, but rather an agreement.

[4] Any covenant created under the Original Deed was nested (and part of the condition) under the language creating the purported condition subsequent. Enforcement of such a covenant would then require an ejectment action, in addition to pleading contract remedies.

8, 9, 346-363].

Moreover, the remedy of specific performance must be asserted against the party who breached the covenant or who has actual knowledge of such breach. Because Mr. Riekse did not breach the covenant, and because there was no evidence that he had actual knowledge of any alleged breach, specific performance is not available. See Lee Road Ltd. v. Markey Bus. Cr. Vl Bd., 23 Va Cir. 386, 1991 WL 834917, *1 (Fairfax 1991). In Markey, the Circuit Court explained:

> Under the reasoning in Willis, it is clear that the [covenant], once breached, became a mere personal covenant which is only effective against the party who breached. . . . [I]n order to impose liability on a party under such a breached covenant, it is necessary to allege that he was the one who breached it, for otherwise no duty would be owed to plaintiff. In the absence of an allegation that this defendant is the one who breached the covenant agreement, plaintiff cannot maintain the present suit for specific performance . . . .

Id. (citing Chesapeake & O. Ry. Co. v. Willis, 200 Va. 299, 304, 40 S.E. 904 (1959); emphasis added). Thus, a court may refuse to grant specific performance of a contract "which the defendant has entered into under a mistake, although the plaintiff was not privy to the mistake or implicated in its origin. A man who seeks to take advantage of the plain mistake of another cannot come to a court of equity to assist him in doing so, but

must rest satisfied with the remedies which a court of law will give him." Halsey v. Monteiro, 92 Va. 581, 24 S.E. 258 (1896).[5]

Indeed, "[t]he decision whether to award specific performance of a contract rests in the sound discretion of a trial court; it is not a matter of right." Cangiano v. LSH Bldg. Co., L.L.C., 271 Va. 171, 179, 623 S.E. 2d 889 (2006). Consequently, this Court must reject the Housing Authority's claim that its putative right to repurchase deprives the Tovars, the substitute trustees, or the Kapanis of the "power" to convey the property which renders the conveyance "void ab initio".

In an attempt to backpedal from its "void ab initio" request, the Housing Authority erroneously contends that "this Court has ruled in

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[5] The Housing Authority contends that the Kapanis breached the putative covenant when they sold the property to Mr. Riekse, as opposed to the Tovars or the foreclosure trustee. Appellees argued that a foreclosure sale was not an event that triggered any rights of the Housing Authority, and that its rights were triggered only in the event of a determination to sell by the original "Grantee" or the death of the original "Grantee" (both of them, because more than one was named). Although the Housing Authority admitted that the "determination to sell" was not ambiguous, the Court determined that it was. The only parole evidence offered by the Housing Authority in their case in chief was that the language which the Court found ambiguous – "determination to sell" – meant any transfer of title to the property, [A-289 line 12] which would include the conveyance of the deed of trust, and the sale by the substitute trustees to the Kapanis. The Housing Authority could sue those parties or their privies for damages, and has an adequate remedy at law.

numerous cases that conveyances were void, invalid, null and void, and/or must be set aside where applicable contractual terms were violated." App. Opening Brief at 24-25. Not only does this contention ignore the difference between a contract that is "void ab initio" and one which is merely voidable, but the Housing Authority's argument in the trial court, [A-311], and the cases it relies upon in its brief confirm that it confuses the lack of power arising from a lack of authority of an agent, such as a foreclosure trustee, (not applicable here), with a lack of right to convey.

For example, in Turk v. Clark, 193 Va. 744, 749, 71 S.E. 2d 172, 176 (1952), this Court explained that "[t]he [foreclosure] trustee in selling, acts under a power [the power of sale] and must conform to the terms of the deed, in respect to the time and manner of giving notice, and the time and manner of sale, as well as in all other particulars." Id. (emphasis added). Accordingly, absent compliance with provisions authorizing such power, the trustee's actions were wholly void, as to the purchaser (who was also the secured party with knowledge of the defects). See id. at 749-750, 71 S.E. 2d at 176; Cf. Deep v. Rose, 234 Va. 631, 637 364 S.E.2d 228, 232 (1988) ("In view of the manifest legislative purpose underlying the increasing stringency of the advertisement requirements which culminated

in Code § 55-59.2 [advertising requirements for foreclosure sales under deeds of trusts securing real property], and in light of its language, we conclude that sales made in violation of its mandatory time periods are void, not merely voidable. The result is to render the sale ineffectual. No title, legal or equitable, passes to the purchaser.").

Here, the Original Deed is not a deed of trust. As a deed it conveys the fee to its grantee. To the extent it is a fee simple subject to a condition subsequent, the fee interest in the grantee is preserved until the holder of the future interest makes a proper entry. A conveyance by the grantee, or by successor grantees is not "void ab initio," but requires entry. See Va. Code §8.01-255.1.[6]

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[6] As explained at trial, [A-348-349], the Housing Authority seeks to change the character of the subject estate from a condition subsequent, which they sued upon, into a fee simple determinable. In Talbot v. Norfolk, 152 Va. 851, 860, 148 S.E. 865 (1929), this Court explained the distinction, noting that a condition subsequent "requires a re-entry by the grantor in order to revest him with his original estate, . . ." Id. In contrast, "a base, or terminable, or qualified fee, . . . also called a determinable fee . . . . is an estate which may last forever, but whose duration is circumscribed by something collateral to it, which may never happen; but, if it does happen, the estate is, immediately and ipso facto, at an end. The estate is a fee, but limited to and upon an event which may never take place. The event is in the nature of a limitation of the estate, and not an express condition, whereby to defeat it." Id. Thus, unlike a condition subsequent, which would include an option to repurchase, see Trailsend, 228 Va. at 323, 321 S.E.2d at 669 ("An option to repurchase is a condition subsequent."), the determinable fee does not require reentry.

Rather than being "void from the beginning" – as asserted by the Housing Authority [A-302, ln. 9-10, A-305 ln.14], the conveyances are valid, unless the Housing Authority timely brings suit for specific performance against the breaching party and demonstrates to the satisfaction of the trial court's conscience that specific performance is available and equitable.

Not only is specific performance not available against a non-breaching party such as Riekse, it cannot be granted against one of Mr. Riekse's predecessor's until title is rescinded from Riekse and Wells Fargo back through the chain of title to that breaching party. However, it would be inequitable for a court to rescind Mr. Riekse's deed or Wells Fargo's deed of trust, and grant specific performance against some other breaching party unless, at minimum, Mr. Riekse and Wells Fargo are returned to the status quo ante. See McLeskey v. Ocean Park Investors, Ltd., 242 Va. 51, 54, 405 S.E. 2d 846 (1991). Thus, Mr. Riekse would be entitled to the return of the $214,900 he paid for the Property, which the Housing Authority has not plead or otherwise offered.

Moreover, where specific performance is sought, the requesting party must make a prompt election. See id. Here, the Housing Authority's

election was not prompt, as it waited years to bring the present action. Nor has the Housing Authority ever asked for specific performance in its pleadings, or offered to perform under the terms of the alleged covenant.[7] Further, based on the evidence offered by the Housing Authority, see note 5 supra [A-289], the putative covenant was not breached when the Kapanis sold the Property to Mr. Riekse, but earlier when the foreclosed upon deed of trust was conveyed in 1995, when the Tovars encumbered the property. At the latest, it would be when the substitute trustees sold the property to the Kapanis. Therefore, not only would the sale to Riekse have to be rescinded, but, at minimum, the sale to the Kapanis must be rescinded as well.

Consequently, not only has specific performance not been plead, it is not warranted. The Housing Authority's remedy is to sue the party that breached the putative covenant for damages. See Trailsend Land Co. v.

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[7] A party who seeks specific performance "must show that he has been able, ready, prompt, eager and willing to perform the contract on his part." Hinkell v. Adams, 237 Va. 635, 638, 378 S.E. 621(1989). The Housing Authority's willingness is undermined by its allegation that the repurchase price be calculated as of June 2, 2003, the date of the Riekse deed, for $102,488, rather than the date it filed its lawsuit. See generally School Board v. Payne, 151 Va. 240, 251, 144 S.E. 444 (1928). Although the Housing Authority's trial exhibits calculate the repurchase price to the date of filing, at minimum an oral motion should have been made to conform its pleading to the evidence. [A-256].

Virginia Holding Corp. 228 Va. 319, 325 n.1, 321 S.E.2d 667,670 n.1 (1984) ("Typically, where a covenant is breached, the offending party must respond in damages, . . .").

Moreover, "[i]t is equally well settled that a covenant of the nature of a covenant running with land, when broken ceases to pass with the land and becomes a mere personal covenant or chose in action." Willis, 200 Va. at 304; accord Gibbons v. Tenneco, Inc., 710 F.Supp. 643, 648 (E.D.Ky. 1988). Thus, because neither Riekse nor Wells Fargo breached any covenant, the Housing Authority cannot maintain a suit for specific performance against them. If the alleged real covenant was breached by a predecessor, then upon breach, the covenant no longer ran with the land, but became a mere personal right.

The Housing Authority's reliance on Landa v. Century 21 Simmons & Co., Inc., 237 Va. 374, 377, 377 S.E.2d 416, 418 (1989) is misplaced. That case confirms that the remedy for breach of a right of first refusal may include the remedy of specific performance, when sought against the breaching party. In Landas, the remedy of specific performance was available, as the grantor of the right of first refusal was still in title. In that case, two prospective purchasers filed suits against the seller, Peterson, to

compel specific performance. The Landas claimed a right of first refusal, Davis asserted a right under a contract for the sale of realty. Both suits were heard together, see Landas, 237 Va. at 374, and the relief of specific performance was prayed for by both Landas and Davis. Thus, in addition to being plead, the equitable remedy of specific performance was available, and would not prejudice the putative buyers because they had not paid any value for the property. The situation changes drastically when the property is conveyed to a third-, fourth-, or fifth-party, such as the substitute trustee, the Kapanis, or Riekse (who paid $214,900). See Halsey, supra. Unlike Landas, Mr. Riekse is not a party (or agent of a party) to the Original Deed, and therefore, any rights created by the deed that restrict alienability must be strictly construed. See Trailsend, infra.

To the extent that the Housing Authority relies upon Bond, et al. v. Crawford, et al., 193 Va. 437, 69 S.E.2d 470 (1952), for the proposition that specific performance is granted as a matter of course in connection with a suit for breach of contract to sell realty, that case is factually distinguishable as it, like Landas, involved a dispute between two "dueling" purchasers, i.e., contemporaneously entered purchase contracts for the same property, where the subsequent purchaser had actual notice of the

prior contract, and there was little or no prejudice to the parties.

In that case, the Bonds contracted to purchase real property from the Crawfords. A dispute between those parties arose as to whether the Crawfords would furnish a general warranty deed, versus a special warranty deed, and the Crawfords claimed that the Bonds repudiated the contract. On the same day of the claimed repudiation, the Crawfords contracted to sell the property to the Londons. However, as observed by the Court, the Londons were specifically advised of the Bonds claim to the property:

> [I]t appears from other evidence that the Londons had actual notice of [the Bonds] transaction. John C. Wood, an associate of Rust [the attorney-title agent of Bond], testified that the Londons inquired at the Rust office as to the status of the title to the property and were informed of the Crawford-Bond contract and told that 'settlement would have to be made in some manner with Mr. Bond before they could take title.' There is no denial of this.

Id. at 443, 69 S.E.2d at 474.

Nevertheless, days later, on September 20, 1949, the Londons proceeded to settlement, whereupon, given the extent of proceedings in the trial court and based upon the date of this Court's opinion (March 10, 1952), it appears that Bonds promptly sued for specific performance. In

determining that the grant of specific performance would not be inequitable, this Court observed that based upon the facts of the case:

> [A] denial of specific performance will not restore the property to the Crawfords or enable them to dispose of it at a higher price than that at which they agreed to sell it to the Bonds. By their deed to the Londons, the Crawfords have parted with their interest in the land. Thus, the real beneficiaries of a denial of specific performance would be the Londons who consummated the purchase of the property after they had actual knowledge of the Bonds' claim to it.

Id.

Here, in contrast, there is no evidence that Mr. Riekse, his lender, or even the Kapanis had actual knowledge of any claim of the Housing Authority.[8] In addition, whereas in Bond, there was little or no inequity of specific performance, here, given the sizable forfeiture that the Housing Authority seeks to impose on Mr. Riekse, such inequity is readily apparent, and further magnified by the Authority's four-year delay in bringing suit.

Moreover, the Housing Authority did not ask for specific performance against Mr. Riekse or Wells Fargo, it only asked for a declaration that the

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[8] The Housing Authority reliance upon the land records is not actual knowledge, but mere constructive notice. Further, as discussed, herein, the Original Deed does not support the expansive interpretation relied upon by the Authority, nor did any putative covenant continue to exist after its much earlier breach.

Kapani-Riekse deed was void ab initio. As recognized by the Housing Authority, [T.42-48] a declaration of "void ab initio" is a legal determination of the power to convey. However, specific performance is an equitable remedy to satisfy the conscience of the Court. See Cangiano, supra. Moreover, the Housing Authority would not be entitled to specific performance, as it would have been inequitable to impose this remedy against such parties, since neither Mr. Riekse nor Wells Fargo breached any covenant, and particularly as the Housing Authority has not offered to return them to the status quo ante.

II. The triggering event must be strictly construed against the Housing Authority, and does not contemplate the foreclosure sale of the subject property.

The subject deed (referred to in the Complaint as the "Original Deed") by which the Housing Authority claims its putative right to repurchase must be strictly construed against it. In interpreting a deed, any ambiguity is most strongly resolved against the grantor, which is the Housing Authority. See Bostic v. Bostic, 199 Va. 348, 355, 99 S.E.2d 591, 597 (1957) ("[W]here the language of a deed is ambiguous its provisions should be construed most strongly against the grantor and in favor of the grantee."); cf. Walker v. Va. Electric & Power, 25 Va. Cir. 388, 1991 WL

835267, *3 (Richmond 1991) ("[I]t is a canon of construction that reservations are construed most strongly against the grantor.").

Regardless of whether the option to repurchase is a condition subsequent or real covenant, it constitutes a restraint against alienability, and is strictly construed. See Trailsend, 228 Va. at 324-25, 321 S.E.2d at 669-70. As explained in Trailsend, both are disfavored:

> They are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions.

Id.[9] Under that standard, even where a condition subsequent is found, the Court should be disinclined to give it a more expansive interpretation than that supported by the terms of the deed; any ambiguity should be construed against forfeiture. See id.; accord Keener v. Keener, 278 Va. 435, 443, 682 S.E.2d 545, 549 (2009) ("[P]rovisions that work a forfeiture are not favored in the law generally and will not be enforced except according to their clear terms.").

Here, the Deed provides that "[i]n the event that Grantee shall die

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[9] In Trailsend, the Court explained that "there is no reason for the burden to be less upon one attempting to secure the benefit of a condition subsequent [than a restrictive covenant]." Trailsend, 228 Va. at 324-25.

(both of them if more than one is named as Grantee) or in the event the Grantee shall determine to sell this Property at any time within thirty (30) years from the date of this Deed, then and in either event, the said Grantor, its successors or assigns, shall have the option to repurchase the Property . . . ." One of two triggering events: Either in the event of death (of both Grantees) or in the event the Grantee determines to sell.

In contrast, the Original Deed does not provide that the option to repurchase applies in the event of the death of the Grantee's successors or assigns, or in the event of the determination to sell by the Grantee's successors or assigns. The deed only provides that the repurchase option becomes effective if the "Grantee shall die . . . or in the event the Grantee shall determine to sell this property." Id. (emphasis added). Only the defined Grantee's determination to sell the Property; no mention of successors in interest with respect to the triggering event. To the extent that the Housing Authority now suggests that the deed is ambiguous, such ambiguity must be resolved against it, and in favor of the free alienability of property.

In Beeren, 277 Va. at 37-38, 671 S.E. 2d 147 (2009), this Court recognized that a housing authority's reservation of a repurchase option

that is triggered by the grantee's death or election to sell, does not contemplate a foreclosure sale, as the two triggering events are personal to the grantee. At issue in Beeren was an option to repurchase that was triggered upon the grantees death or an election to sell. Id. at 38-39. The Court determined that the triggering events were personal in nature, did not run with the land, and did not contemplate a foreclosure sale:

> This option language, however, makes no provision for the option to take effect in the event that a purchaser acquires the property as a result of a foreclosure sale.

Id.[10]

Thus, the interpretation of purported covenants that run with the land remain consistent with the familiar rule, which requires restraints on the alienation of land (including covenants that run with the land and conditions subsequent) "to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions." Trailsend Land, 228 Va. at 324-25, 321 S.E.2d at 670.

Like the Beeren deed, the Original Deed makes no provision for the

[10] The Beeren deed also contained language similar to the Housing Authority's Original Deed regarding waiver and repurchase from prospective purchasers (who acquire title as a result of such waiver).

option to repurchase to take effect in the event that a purchaser acquires the property as a result of a foreclosure sale. [A-194]. It does not contemplate a foreclosure sale, and is not triggered by a foreclosure sale. The triggering events must be strictly construed, against restraints on alienation. See Trailsend, supra. Neither event has been alleged nor proven.

III. A personal triggering event such as death or determination to sell cannot touch and concern the land, and therefore cannot run with the land.

Although the Beeren Court determined that the subject option could not have been intended to run with the land, the Court's decision reinforces that such a personal triggering event cannot touch and concern the land. Because the provisions in the Original Deed do not touch and concern the land, they are not covenants that run with the land. As explained by Beeren, a distinct element of a real covenant is that it "must 'touch and concern' the land." Beeren, 277 Va. at 37-38, 671 S.E.2d at 150 (citations omitted).[11]

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[11] Although the Original Deed recites that it runs with the land, that statement may be relevant to intent, but is not determinative as to whether such covenant actually does run with the land. "The language of the deed, which here recites that the restrictions are to run with the land, is evidence of intent but may not be dispositive of the question." Leeman v. Troutman Builds, Inc., 260 Va. 202, 208, 530 S.E.2d 909, 912-13 (2000). Moreover,

Here, the provisions of the Original Deed do not touch and concern the land. Notably, the "touch and concern" requirement requires that the covenant relate to the physical or natural use and enjoyment of the land. See RESTATEMENT (FIRST) PROPERTY §537, comment f ("For a promise to run with the land of the promisor it is not enough that the performance of the promise operates to benefit either the promisor or the beneficiary of the promise in the use of his land but it must operate to benefit him in the physical use of his land. It must in some way make the use or enjoyment more satisfactory to his physical senses." (emphasis added)).

Thus, in Oliver v. Hewitt, 191 Va. 163, 166-67, 60 S.E.2d 1, 2 (1950), cited by the Beeren Court, this Court determined that a non-competition restriction prohibiting the grantee's sale of groceries and soft drinks existed to protect the business interests of the grantor by restricting the commercial use of the property, as opposed to a restriction upon the "natural use and enjoyment" of the land retained by the grantor:

> We have no difficulty in concluding that the restriction imposed upon the use of the land is a personal covenant for appellant's sole benefit as distinguished from a covenant that runs with the

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the party seeking to enforce a putative "restrictive covenant," bears the burden of proving the elements of a real covenant, including the touch and concern element. Prospect Dev. Co., Inc. v. Bershader, 258 Va. 75, 96, 515 S.E.2d 291 (1999).

> land. . . . It is not for the natural use and enjoyment of the land retained by the grantor but is merely a restriction imposed upon the use of the land conveyed which is simply for the purpose of protecting from injurious competition the business operated by the grantor. It is therefore a mere personal covenant that does not run with the land in equity.

Id. Consequently, the Court held that the restriction constituted a personal covenant for the benefit of the grantor regarding the use of the land, rather than a covenant that "touches and concerns" the land, which must affect its natural use and enjoyment. Id. at 67; 60 S.E.2d at 2. Because no provision of the Original Deed affects the physical or "natural use and enjoyment" of the property, it cannot run with the land.

Under Beeren, not only does Virginia law continue to require real covenants to "touch and concern" the land, but the decision clarifies that restrictions like an option to repurchase upon death or determination to sell does not touch and concern the subject property. In determining that the Beeren option is personal in nature, this Court cited three cases – Carneal, Oliver, and Allison – all involving "use" restrictions that were determined to be personal covenants:

> [t]he option is merely personal in nature. See, e.g., Carneal v. Kendig, 196 Va. 605, 611, 85 S.E.2d 235, 238 (1955) (concluding that restriction on use of land for conducting certain business is personal covenant

> that binds only original parties, as distinguished from covenant running with land); Oliver v. Hewitt, 191 Va. 163, 166-67, 60 S.E.2d 1, 2 (1950) (same); Allison v. Greear, 188 Va. 64, 67, 49 S.E.2d 279, 280 (1948) (same).

Beeren, 277 Va. at 38-39, 671 S.E.2d at 151.

In each case, the respective restriction on the use of land did not constitute a real covenant because the Court determined that the restriction did not affect the natural use and enjoyment of the land, i.e., it did not touch and concern the land. See Carneal v. Kendig, 196 Va. 605, 612, 85 S.E.2d 235, 238 (1955) ("It is not for the natural use and enjoyment of the land retained by the grantor but is merely a restriction imposed upon the use of the land conveyed which is simply for the purpose of protecting from injurious competition the business operated by the grantor. It is therefore a mere personal covenant that does not run with the land in equity.") (emphasis added); Oliver v. Hewitt, 191 Va. 163, 166-67, 60 S.E.2d 1, 2 (1950) (same); Allison v. Greear, 188 Va. 64, 67, 49 S.E.2d 279, 280 (1948) ("the conclusion is inescapable that, [the restriction] if valid, it is not a covenant running with the land. At most, as we have already stated, it is only a personal restriction which can be released at the will of the grantors, or their children, or their grandchildren, at any time. It

being a personal restriction for the sole purpose of restraining competition in their mercantile business. . . ."). Likewise, the subject option, virtually identical to Beeren, is personal because it does not touch and concern the land. Indeed, at best the putative covenant/condition would be enforceable if it were triggered by its terms, upon the death of the Tovars or the Tovars' determination to sell. Like Beeren, death and the determination to sell remain personal.

Again, neither event has happened or has been alleged to have happened. Although the Original Deed refers to the Housing Authority's successors and assigns in other parts, there is no reference to the grantees successors and assigns in the triggering event. Rather the deed contemplates that before contracting to sell the Property, the named Grantee would present a bona-fide offer to the Housing Authority, much like the procedure provided for in the Beeren deed, which then could be waived. It did not contemplate foreclosure sale of the subject property, was not triggered by such foreclosure sale, and neither the substitute trustees of that sale, nor the Kapanis have agreed to be bound by such provision.

IV. The condition subsequent claim is time-barred.

To the extent that an option to repurchase constitutes a condition subsequent, see Trailsend, 228 Va. at 323, 321 S.E.2d at 669 ("An option to repurchase is a condition subsequent."), it is barred by Virginia Code §8.01-255.1, which constitutes a statute of repose. That section prohibits a person from bringing an action to recover lands by reason of breach of a condition subsequent, unless brought within ten years of the breach. See Va. Code. §8.01-255.1.[12]

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[12] Often characterized as a type of statute of limitation, a statute of repose "involves a legislatively mandated limitation which reflects a policy determination that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." School Bd. of the City of Norfolk v. United States Gypsum Co., 234 Va. 32, 37, 360 S.E.2d 325, 327-28 (1987)." Friends of Clark Mountain Foundation, Inc. v. Board of Sup'rs of Orange County, 242 Va. 16, 20, 406 S.E.2d 19, 21 (1991); see also Commonwealth v. Owens-Corning Fiberglas Corp., 238 Va. 595, 599, 385 S.E.2d 865, 867 (1989). Thus, in Gysum, this Court explained that while an ordinary statute of limitation is a procedural limitation, the limitations afforded by a statute of repose is a substantive constitutional right. Here, Virginia Code §8.01-255.1 bars not only the action, but expressly prohibits a person from commencing an action, within ten years of a breach of a condition. Thus, upon elapse of such limitations period, Appellees accrue constitutionally protected substantive rights of repose. See Owens, 238 Va. at 601, 385 S.E.2d at 868.

Further, even if this Court were inclined to determine that the bar under Virginia Code §8.01-255.1 is a procedural, rather than a substantive limitation, this Court has expressly held that housing authorities, such as Plaintiff, even though defined as a "political subdivision of the Commonwealth" are subject to the procedural statute of limitations. See

If the condition subsequent was triggered, then based on the evidence adduced by the Housing Authority, it was triggered upon any transfer of title to the property [A.289 line 10-13], which would include the Tovars' conveyance of the deed of trust in 1995 to the trustee. See Larchmont Homes, Inc. v. Annandale Water Co., 201 Va. 178, 182, 110 S.E.2d 249, 252 (1959) ("A deed of trust is a conveyance and that legal title to the property conveyed is vested in the trustee or trustees named therein."); Ransome v. Watson's Adm'r, 145 Va. 669, 676, 134 S.E. 707, 709 (1926) (holding that a creditor under a mortgage or deed of trust, "in equity, regarded as a purchaser for value to the extent of his debt. And rightly so, since to the extent of his debt he is the owner, and has legal title." (Emphasis added)).

By executing the Deed of Trust, the Tovars put legal title in the trustees of that instrument, who are purchasers for value as to the extent of the debt. If the foreclosure of the property is held to be a determination to sell, then the conveyance of the Property to the trustees at the time of the

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Richmond Redevelopment & Housing Authority v. Laburnum Const. Corp., 195 Va. 827, 843, 80 S.E.2d 574, 583 (1954); see also VEPCO v. Hampton Redevelopment and Housing Authority, 217 Va. 30, 36, 225 S.E.2d 364, 369 (1976) (holding that a housing authority's management of apartment complex not immune to tort liability).

loan, would constituted a sale, and therefore constituted an event triggering the putative option to repurchase. Because the Housing Authority failed to initiate its lawsuit within ten years of that event, its claims are barred under Virginia Code §8.01-255.1.[13]

V. Upon breach, a real covenant ceases running with land.

The Housing Authority's real covenant claims are likewise unenforceable against Mr. Riekse and Wells Fargo. A real covenant, "when broken ceases to pass with the land and becomes a mere personal covenant or chose in action." Chesapeake & O. R. Co. v. Willis, 200 Va. 299, 304, 105 S.E.2d 833, 837 (1958) (citing Minor on Real Property, 2d Ed., Vol. 1, § 408, p. 547; 14 Am. Jur., Covenants, etc., § 40, p. 514; 21 C.J.S., Covenants, § 74, p. 933); Markey, 23 Va. Cir. at 387; St. Paul Fire & Marine Ins. Co. v. W. S. Pinchbeck, Inc., 15 Va. Cir. 132, 133 (Chesterfield 1988) ("When the covenants were breached, the covenant ceased to 'run with the land' and became personal actions possessed by the grantee. . . ." (citing Willis, supra.)); accord Gibbons, 710 F.Supp. at 648; cf. Montgomery County v. May Dep't Stores Co., 352 Md. 183, 203,

[13] As discussed below, because a covenant is personal upon breach, the Housing Authority's covenant claims are barred by the five-year statute of limitations. See Va. Code §8.01-246(2).

721 A.2d 249, 259 (1998) ("County's interest in having [grantee] pay her obligation under the declaration of covenants [for affordable dwelling units] is not a right or estate in land, but it is a chose in action.").

Thus, whether the alleged covenants running with the land are binding on Mr. Riekse or Wells Fargo depends upon whether they were broken by their predecessors in title, or one of them. See Willis, 200 Va. at 304, 105 S.E.2d at 304 ("Whether the covenants here involved, although of the nature of covenants running with the land, are binding on the defendants depends upon whether they were broken by their predecessors in title, or one of them."); accord Markey, supra.

Here, if there was a covenant, then based on the Housing Authority's allegations, it would have only been breached by the Tovars. In addition, because, in any event, the covenants were personal upon such breach, the instant action is also barred by the five-year statute of limitations. See Virginia Code §8.01-246(2).

CONCLUSION

Fundamental property law jurisprudence rejects the Housing Authority's characterization of the legal effect and remedy for a condition subsequent and breach of covenant: A grantee's fee interest is not automatically divested. Such breaches do not render a conveyance "void ab initio." Rather, the Housing Authority could have brought an action for ejectment on the condition subsequent. To the extent the Housing Authority claims it sought specific performance of a covenant, it was never pled against Mr. Riekse, and neither Mr. Riekse nor his immediate predecessor, the Kapanis, had contracted with the Housing Authority so as to warrant the discretionary remedy. In sum, the Housing Authority's complaint was not well pled, and failed to request a proper remedy.

Moreover, assuming the Housing Authority had brought a proper lawsuit, the triggering event under the subject deed should not be expanded beyond its terms. Here, the Housing Authority drafted an "Original Deed" that reserved to itself an option to repurchase in the event of the death of the Grantee (both of them, if more than one) or in the event of the Grantee's determination to sell. Not only has neither event occurred, but this Court's recent decision in Beeren recognizes that these two events

are personal. Thus, the putative covenant that the Housing Authority claims cannot run with land. Even if it ever did, upon breach it became a personal covenant that ceased to run with the land, and is in any event, time-barred. In sum, there is no legal or equitable basis to divest Mr. Riekse of his property.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 5:26(d)

I HEREBY CERTIFY that on this 4th day of June, 2010, that I have complied with Virginia Rule 5:26(d), including filing fifteen copies of this brief with the Clerk of this Court, via hand delivery, with an electronic copy emailed to scvbriefs@courts.state.va.us, and mailing three copies, first-class, postage prepaid to both:

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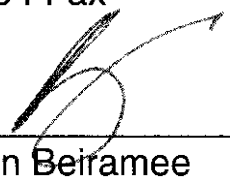

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