COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *585582 B.C. Ltd. v. Anderson,*
2015 BCCA 261

Date: 20150609
Docket: CA42086

Between:

585582 B.C. Ltd. and
Cove Lakeside Resort Inc.

Respondents
(Plaintiffs)

And

Tor Anderson

Appellant
(Defendant)

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia,
dated July 21, 2014 (*585582 B.C. Ltd. v. Anderson*,
2014 BCSC 1363, Vancouver Docket S126945).

Counsel for the Appellant:	W.J. McMillan
Counsel for the Respondents:	W.A. McLachlan
Place and Date of Hearing:	Vancouver, British Columbia May 15, 2015
Place and Date of Judgment:	Vancouver, British Columbia June 9, 2015

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Stromberg-Stein

Summary:

The appellant challenged the validity of a restrictive covenant registered against his strata lot in a building operated as a resort hotel. The covenant prohibits rental of the strata lot to the public except in accordance with a rental pool management agreement setting out the terms under which the resort's rental manager will rent the unit. The form of the agreement is not attached to the covenant and must be negotiated between the owner of the strata lot and the rental manager. At the conclusion of a summary trial, the judge dismissed the appellant's application for a declaration that the covenant was void. Held: Appeal allowed and covenant declared to be void. There is no certainty with respect to the terms of the rental pool management agreement and there is no independent mechanism by which the terms can be established. As a result, there is uncertainty with respect to the specifics of the restricted use of the strata lot, and the covenant lacks the required certainty.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This appeal concerns the validity of a covenant registered in the land title office as a restrictive covenant against strata lots that make up the Cove Lakeside Resort, located on Lake Okanagan (the "Resort"). It provides that no strata lot may be rented to the public except in accordance with a rental pool management agreement setting out terms by which the Resort's rental manager will rent out the lots.

[2] The appellant owns one of the strata lots. After living in the unit for several years, he began renting it privately. He did not enter into a rental pool management agreement.

[3] The strata lot that benefits from the covenant is the lot in which the front desk for the Resort is located. It is owned by the respondent, 585582 B.C. Ltd., and leased to the respondent, Cove Lakeside Resort Inc., which operates the Resort as the rental manager.

[4] The respondents commenced an action against the appellant seeking an injunction to restrain him from renting his unit unless he enters into a rental pool

management agreement with Cove Lakeside Resort Inc. and the rentals are booked through its booking system.

[5] The appellant filed a counterclaim seeking a declaration that the covenant was void as a restrictive covenant. He then filed a summary trial application requesting an order dismissing the respondents' claims and a declaration that the covenant is void.

[6] At the summary trial, the appellant argued the covenant is void as a restrictive covenant because it is not negative in substance, it lacks certainty and it does not concern the land but simply benefits a business. The summary trial judge rejected each of these arguments and dismissed the appellant's application.

[7] The appellant appeals the dismissal of his application and advances the same three arguments on appeal. For the reasons that follow, I am of the view that the covenant lacks certainty and that its registration should be cancelled. In light of this conclusion, it is not necessary to deal with the other two arguments.

Background

[8] When the Resort was developed, it was intended that it would be operated as a hotel to the extent that the owners of the strata lots did not occupy the units themselves. A total of 150 condominium units were constructed. At the time of the summary trial, 95 were rented out as hotel rooms, 14 were occupied as permanent residences and 41 were used only by their owners as vacation properties.

[9] A hotel provides numerous services, including security, housekeeping, accounting, marketing, maintenance, front desk, food and beverage provision, and doormen. These services cost money and are funded from the revenues generated from the room rentals.

[10] In order to provide a mechanism to share the room rental revenues between the owners of the strata lots and the operator of the hotel (who would be paying for the services), the developer of the Resort contemplated that they would enter into

rental pool management agreements. As a way to ensure the owners would only rent out their units through the rental pool, the developer entered into the covenant with itself when it was the owner of the front-desk strata lot and all of the 150 condominium units. It subsequently transferred the strata lot containing the front desk to 585582 B.C. Ltd. and the condominium units to individual purchasers.

[11] The covenant was registered in the land title office as a restrictive covenant in August 2006 when the strata plan was accepted for filing. The relevant provisions of the covenant are as follows:

> **ARTICLE 1**
>
> 1.1 **Defined terms**. In this Covenant:
>
> ...
>
> (c) "Public" means all persons other than the Unit Owner;
>
> (d) "Registered Owner" means the person registered in the Land Title Office as the owner in fee simple of the Unit …
>
> (e) "Rental Booking System" means the rental management system of the Rental Manager, operator or organization chosen by the Transferor for an initial term and thereafter by the Transferee, which must be a bona fide rental management system whereby a Unit is made available for rental to the public at the option of a registered owner;
>
> (f) "Rental Pool Management Agreement" means the agreement made between the Registered Owner and the Rental Manager setting out the terms by which the Rental Manager, upon request by the Registered Owner will manage and make the Unit available for Rental Use, as may be amended by mutual agreement from time to time;
>
> (g) "Rental Manager" means the rental manager operating the Rental Booking System;
>
> (h) "Rental Use" means the use of a Unit for rental to the Public and for clarity, without limiting the generality of the foregoing, includes any lease, license or similar rental;
>
> (i) "Unit" means one of the strata lots comprising the Transferor's Lands;
>
> …
>
> **ARTICLE 2**
>
> 2.1 **Rental Use**. The Transferor, for itself and its successors and assigns, covenants and agrees with the Transferee that the Unit shall not be used as or occupied for Rental Use and that no Registered Owner will

> permit its Unit to be used as or occupied for Rental Use except in accordance with each of the following:
>
> (a) this Covenant; and
>
> (b) if rented to the Public, the Rental Pool Management Agreement.
>
> 2.2 **Optional Placement in Rental Booking System**. Registered Owners may place their Unit in the Rental Booking System at any time by entering into the Rental Pool Management Agreement and may withdraw from the Rental Booking System upon the notice and under the terms set out in the Rental Pool Management Agreement.
>
> 2.3 **Exclusive Rental Booking System**. No Unit will be placed in any rental booking system other than the Rental Booking System operated by the Rental Manager, both as defined in this Covenant.

[12] The appellant's brother had signed a pre-purchase contract in August 2005 for one of the 150 condominium units. After the strata plan was filed, the purchase was completed in November 2006 with the unit being registered in the name of the appellant. He was advised of the rental pool but did not join it because he and his brother began living in the unit. The covenant was, of course, registered against the unit before the purchase was completed.

[13] It appears from the materials filed at the summary trial that there was an original form of rental pool management agreement. Each of the owners of strata lots wishing to rent their units entered into separate rental pool management agreements with the hotel manager. The original form of the agreement provided that the manager would be paid a management fee for its services in an amount equal to 40% of room rental revenues.

[14] A representative of the respondents deposed that the Resort experienced significant losses between 2006 and 2009. As a result, the initial day-to-day manager was removed and the revenue split percentage for the room rentals was changed from 60/40 in favour of the owners to an even 50/50. In 2008, Cove Lakeside Resort Inc. produced a new form of rental pool management agreement terminating the initial agreement and providing that the management fee would be changed from 40% to 50% effective July 1, 2008. Owners wishing to rent their units were required to sign the new form of rental pool management agreement reflecting this change.

[15] Some owners who had signed a rental pool management agreement in its original form failed or refused to sign the new form of agreement. Cove Lakeside Resort Inc. terminated their rental pool management agreements and thereby precluded them from participating in the rental pool (unless they subsequently signed the new form of rental pool management agreement).

[16] The appellant attempted to sell his unit in late 2008 or early 2009, but received no offers. He proceeded to rent his unit privately, which led to the commencement of the underlying action.

Decision of the Summary Trial Judge

[17] In his reasons for judgment (indexed as 2014 BCSC 1363), the summary trial judge first held that the covenant, when read as whole, was negative in substance. He stated at para. 13: "The fact that 54 of the 150 unit owners do not rent their units serves to demonstrate that the covenant is not a positive covenant at its core."

[18] The judge next dealt with the requirement the covenant be certain. He concluded that the fact a prospective purchaser would have to look outside the covenant (i.e., at the rental pool management agreement) to see the terms for renting did not serve to make the covenant void for lack of certainty.

[19] Finally, the judge adopted the reasoning in *PMT XII LLC v. Strata Plan VR 2753*, 2010 BCSC 1235, and held that, as the front desk is critical to the operation of the Resort, the covenant met the requirement that it touch and concern the land in the sense that it was for the benefit of or the enhancement of the value of the benefitted land.

Discussion

[20] The appellant's counterclaim was made pursuant to s. 35(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377, which provides that the court may cancel the registration of a restrictive covenant on any one of five grounds. One of those

grounds is that "(e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled".

[21] One of the requirements of a restrictive covenant is that its terms must be clear. As Mr. Justice Taggart stated in *Newco Investments Corp. v. British Columbia Transit* (1987), 14 B.C.L.R. (2d) 212 at 224 (C.A.):

> Covenants such as these which run with the land must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed upon them.

[22] In *Newco Investments*, the owners of two parcels of land were proposing to construct a hotel and a station for a rapid transit system on their respective parcels. The restrictive covenant provided for, among other things, the construction of "improvements for the public good". The owner of the parcel upon which the hotel was to be constructed was made responsible to pay for these improvements in accordance with a formula set out in the covenant. Construction of the station commenced and the owner of the land upon which it was being constructed purported to designate that certain improvements were for the public good, the payment for which the owner of the other parcel would be responsible.

[23] This Court held that these provisions of the restrictive covenant were unenforceable for two related reasons. The first was that the term "improvements for the public good" was vague and uncertain, and lacked the required definition and precision. The second was that there was no provision for a resolution of disputes under the restrictive covenant in the event the parties could not reach agreement as to what improvements were for the public good.

[24] Another instructive case is *Sekretov and City of Toronto (Re)*, [1973] 2 O.R. 161, 33 D.L.R. (3d) 257 (C.A.). The restrictive covenant in that case provided that the owner of the land burdened by the covenant "shall not use the lands herein for any other purpose than that provided by resolution of [the Municipal] Council". The Ontario Court of Appeal upheld the ruling of the trial judge that the restrictive

covenant was invalid on the ground the covenant did not specify the land intended to be benefitted by it.

[25] In addition, the Court held that the covenant lacked certainty. The reasoning of Mr. Justice Schroeder on behalf of the Court was as follows at 168:

> … The covenant as expressed in the transfer is thus susceptible of the interpretation that the use to which the land may or may not be put must depend upon the whim of Council to be expressed in a resolution or resolutions to be passed at some future time or times as occasion may require. I cannot think of anything more uncertain and more indefinite than such a provision… Where such vagueness and uncertainty exists in a restrictive covenant imposed on a servient tenement the covenant cannot be enforced. I cannot avoid coming to the conclusion that the covenant sought to be imposed in this form is altogether too vague and indefinite to be enforceable against a successor in title to the purchaser of the lands in question.

[26] In the present case, the covenant prohibits the rental of a unit to the public unless it is done in accordance with the "Rental Pool Management Agreement", defined as an agreement between the owner of the unit and the rental manager setting out the terms by which the rental manager will manage the unit and make it available for rental use. The form of the agreement is not attached to the covenant, nor is it incorporated by reference into the covenant. Indeed, the agreement did not even exist at the time of the creation of the covenant. Rather, it is an agreement that must be negotiated between each owner of a strata lot and the rental manager.

[27] There is no certainty with respect to the terms of the Rental Pool Management Agreement and, as a result, there is a lack of certainty in the covenant itself. By looking at the covenant registered against a unit, a successor in title to the unit cannot determine the terms by which the unit may be rented to the public.

[28] If an owner of a unit and the rental manager are unable to negotiate the terms of a rental pool management agreement, there is no independent mechanism by which the terms can be established. Similar to *Newco Investments*, the covenant has no provision for arbitration in the event the parties cannot agree. A central aspect of the covenant constitutes an agreement to agree, which is itself unenforceable.

[29] The summary trial judge was of the view the covenant had sufficient certainty because a prospective purchaser of a strata lot would know from the covenant that there is a rental pool management agreement in place and would be able to look elsewhere to see its terms. In my opinion, that does not create certainty because it requires a successor in title to look outside the covenant to determine all of the terms related to the restricted use of the strata lot. In addition, although as a matter of practice the rental manager may offer the same terms of a rental pool management agreement to all the owners of the condominium units, it is under no legal obligation to do so. It could agree to charge different management fees to different owners. There is uncertainty until a successor in title actually enters into a rental pool management agreement with the rental manager.

[30] There is not even true certainty when an owner enters into a rental pool management agreement with the rental manager because, as demonstrated by the change of the management fee from 40% to 50% of the room rental revenues, the rental manager effectively has the ability to unilaterally change the terms on which the units can be rented to the public. This is similar to *Sekretov* in the sense that the use of an owner's unit can be affected by the whim of the rental manager expressed at some future time.

[31] The respondents argue there is certainty because a successor in title will know that the unit cannot be rented to the public unless the owner participates in the rental pool and that the essence of the certainty is the bar on private rentals. In my opinion, that does not create certainty. If there are to be restrictions on the use of a strata lot, a successor in title is entitled to know the specifics of the restrictions, and it is not sufficient for the covenant to refer in general terms to a rental pool without any reference to the terms and conditions applicable to it and without an independent mechanism for the terms and conditions to be established in the event the successor in title and the rental manager are unable to agree on them.

Conclusion

[32] I would allow the appeal and grant the relief sought in the appellant's counterclaim (namely, a declaration that the covenant is void as against the appellant's strata lot and an order directing the registrar of land titles to cancel the registration of the covenant against the appellant's strata lot). I would also dismiss the respondents' claim against the appellant and order that the appellant is entitled to the costs of the underlying action and this appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Stromberg-Stein"