IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NWS 3457 v. The Owners, Strata Plan LMS 1425,* 2017 BCSC 1346

Date: 20170802
Docket: S155213
Registry: Vancouver

Between:

The Owners, Strata Plan NWS 3457

Plaintiff

And

The Owners, Strata Plan LMS 1425

Defendant

Before: The Honourable Mr. Justice Branch

Written Reasons for Judgment

Counsel for the Plaintiff:	G.S. Hamilton
Counsel for the Defendant:	J. Klassen
Place and Date of Trial/Hearing:	Vancouver, B.C. July 4, 2017
Place and Date of Judgment:	Vancouver, B.C. August 2, 2017

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I. INTRODUCTION

[1] Two adjoining strata corporations need to know who is responsible to pay for the upkeep of a recreational facility. This is a summary trial application in which the plaintiff seeks a declaration that the terms of a recreational facilities easement registered at the Land Title Office under registration number AE042247 bind and are enforceable against the defendant, and an order that the defendant pay the plaintiff certain sums owing under that easement.

[2] There is little dispute about the facts. The case largely turns on the legal question as to whether and when a positive obligation in an easement can be enforced against subsequent owners. For the reasons expressed below, I find that such a positive obligation is not enforceable against the defendant.

II. BACKGROUND

[3] The plaintiff is a strata corporation duly subsisting under the provisions of the *Strata Property Act,* S.B.C. 1998, c. 43 and its own bylaws. The plaintiff is comprised of 103 residential townhouse style strata lots and is commonly known as Scottsdale Village ("Scottsdale Village"). Scottsdale Village is civically located at 7955 – 122nd Street, Surrey, British Columbia.

[4] The defendant is also a strata corporation duly subsisting under the provisions of the *Strata Property Act* and its own bylaws and is comprised of 150 residential apartment style strata lots. The defendant is commonly known as La Costa Green ("La Costa Green"). La Costa Green is civically located at 12160 – 80th Avenue, Surrey, British Columbia.

[5] Scottsdale Village and La Costa Green are located next to each other, and their respective residents have shared recreational facilities located on the Scottsdale Village lands (the "Recreational Facilities"). The Recreational Facilities include a community building with a sauna, whirlpool, kitchen, exercise room, amenity room, change room, and meeting room.

[6] Scottsdale Investments Ltd. developed Scottsdale Village between late 1989 to the end of 1991, on a portion of lands legally described as: Lot 2, Section 19, Township 2, New Westminster District Plan 82872 (“Lot 2”).

[7] On or about February 15, 1991, Scottsdale Investments Ltd., the owner of Lot 2 at the time, prepared a disclosure statement in accordance with the requirements of the *Real Estate Act,* R.S.B.C. 1979, c. 356 (as it then was) to provide a general description of the Scottsdale Village strata development.

[8] The disclosure statement stated, amongst other things, that an easement would be registered against the Scottsdale Village lands to permit residents of dwelling units constructed on that part of Lot 2 not included in Scottsdale Village, access to and use of the Recreational Facilities. The proposed easement required persons using the Recreational Facilities to pay a share of the cost of maintenance based on the number of units having the use of the Recreational Facilities. The easement could not be released or amended without the consent of the Corporation of the District of Surrey (the “City”).

[9] Lot 2 was subsequently subdivided into two parcels on March 20, 1991:

> Lot “A” Section 19 Township 2
> New Westminster District Plan NWP 88367
> (“Lot A”)
>
> Lot “B” Section 19 Township 2
> New Westminster District Plan NWP 88367
> (“Lot B”)

[10] Also on March 20, 1991, following the subdivision of Lot 2, the recreational facilities easement contemplated by the disclosure statement was registered against Lot A and Lot B (the “Recreational Facilities Easement”). At the time, Scottsdale Investments Ltd. remained the owner of both lots.

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[11] The Recreational Facilities Easement defined the owner of Lot B (on which Scottsdale Village and the Recreational Facilities would be located) as the Grantor (being the servient tenement) and the owner of Lot A (on which La Costa Green would be located) as the Grantee (being the dominant tenement). It stated in the preamble, amongst other things, that:

> D. It is the intention of the Grantor that the owners and occupiers for the time being of the Grantee's Lands should be entitled to use, occupy and enjoy a portion of the Grantor's Lands, in common with the owners and occupiers for the time being of the Grantor's Lands, to the same extent, and in the same manner as the owners and occupiers for the time being of the Grantor's Lands;
>
> E. The parties hereto have agreed that the Grantor and the Grantee are parties hereto for the principal purpose of creating certain rights and obligations on the part of the owners and occupiers for the time being of the Grantor's Lands and the Grantee's Lands in order to facilitate the use, enjoyment and sharing of costs of recreational facilities on the Grantor's Lands;
>
> F. The Parties hereto have agreed that it is desirable to provide recreational facilities for the Grantee and to decrease the cost to the Grantor of maintaining its recreational facilities.

[12] The terms of the Recreational Facilities Easement granted Lot A the right to enter and have full use of the Recreational Facilities. It also required the owners of Lot A and Lot B to share in the cost of repairing and maintaining the Recreational Facilities including expenditures of a capital nature. The costs were to be shared on a pro rata basis based on the number of strata lots developed on Lot A and Lot B respectively.

[13] The City was also a party to the Recreational Facilities Easement pursuant to s. 215 of the *Land Title Act,* R.S.B.C. 1979, c. 219 (as it then was; now, s. 219 of the *Land Title Act,* R.S.B.C. 1996, c. 250). The Recreational Facility Easement included the following terms concerning the "s. 215 covenants":

> 9. It is mutually understood and agreed by and between the parties hereto that this Agreement and the covenants herein contained shall be construed as running with the land. None of the covenants herein contained shall be binding on a party, except during that party's ownership of an interest in any part of the lands affected by this Agreement.
>
> …

> 11. The parties hereto covenant and agree that they will do and execute such further acts and deeds and give such further assurances as may be reasonably necessary to implement the true intent and meaning of this Covenant.
>
> …
>
> 13. The Grantor and Grantee acknowledge that the specifications and capacity for the recreation facilities to be constructed and maintained by the parties under the provisions of this Agreement meet the requirements of the Municipality for the Grantor's Lands and the Grantee's Lands, and that the Parties have received certain consideration from each other for entering into this Agreement with the Municipality.
>
> 14. The Municipality is a party to this Agreement solely for the purpose of consenting to any variation, amendment or discharge of this Agreement and has no other liability with respect thereto. It is expressly agreed and understood between the parties hereto that this Agreement and rights herein granted cannot be varied, amended, released or surrendered without the prior written consent of the Municipality first had and obtained, such consent not to be unreasonably withheld.

[14] The circumstances surrounding the City's involvement in this issue is explained in part through a letter provided by the City in response to a Freedom of Information Request. A letter prepared by West World Developments Inc. dated May 28, 1992 stated the following about the history of the development and the Recreational Facilities:

> I thought some history of the site may help the Owners understand how the situation arose. The land was originally created as one comprehensive residential development comprising townhouses, lowrise apartments and highrise apartments together with one Recreation Centre. For construction purposes, the land was divided into four townhouse phases and one apartment phase.
>
> There would have been one Strata Corporation had the land remained as one title. The Developer was sensitive to the differences between the needs of townhouse owners and apartment owners on the question of managing the affairs of the Scottsdale site through one common strata corporation. The Developer recognized the need to redesign the individual highrise units to a smaller scale to make them more saleable. The Developer approached Surrey to modify the Development Permit to accomplish two goals: First, to decrease the sizes of the highrise units and, second, to split off the apartment lands from the townhouse lands in order to provide for separate strata corporations and to give the Developer flexibility to deal with the lands in a market which was very uncertain for some time in the future. Surrey approved the modification of the Development Permit with the condition of an Easement to ensure the Apartment Phase Owners would continue to have access to the Recreation Centre.

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[15] The common signatories between West World Developments Inc. and the other developer entities suggest a relationship of some sort, although that relationship was not precisely defined before me.

[16] On March 21, 1991, Lot B was further subdivided by deposit of Strata Plan NWS 3457 and the Recreational Facilities Easement charged the title of the common property and each of the strata lots of Scottsdale Village.

[17] La Costa Green was developed on Lot A following the completion of Scottsdale Village. The developer's disclosure statement for La Costa Green included the following language at paragraph 6 (c):

> The strata lot owners have access to and the use of the recreation facilities located in the Scottsdale Village townhouse complex at 7955 – 122nd Street in Surrey, B.C., under an easement which requires the strata corporation to contribute to the cost of maintaining the facilities. The facilities consist of: Whirlpool, exercise room, kitchen, amenity room, meeting room, saunas and change rooms.

[18] On June 1, 1994, Lot A was also subdivided by deposit of Strata Plan LMS 1425.

[19] By letters dated June 15 and July 4, 1994, the property manager for La Costa Green requested access cards for the Recreational Facilities and stated that "all Owners in La Costa Green must be provided access to the recreation center as they will be contributing to it (sic) upkeep and operation per the cost sharing formula and the yearly operating budget".

[20] Following the development of La Costa Green and for the next 20 years, the residents of Scottsdale Village and La Costa Green enjoyed access to and use of the Recreational Facilities. La Costa Green paid annually, on a pro rata basis and in accordance with the terms of the Recreational Facilities Easement, a share of the cost to repair and maintain the Recreational Facilities. Based on the number of strata lots in each development and the pro rata calculation, Scottsdale Village was responsible for 41% of the costs and La Costa Green was responsible for 59%. Generally speaking, Scottsdale Village established a budget and paid the expenses

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each fiscal year and La Costa Green reimbursed Scottsdale Village upon receiving a monthly invoice for payment with supporting documents.

[21] The strata council or property manager for La Costa Green participated in the governance of the Recreational Facilities including on the following occasions, as set out in the plaintiff's written argument:

i. La Costa Green worked cooperatively with Scottsdale Village in early 1998 to help circulate a survey regarding the Recreational Facilities to its owners at the request of Scottsdale Village;

ii. La Costa Green participated in a strategy to restrict access to the Recreational Facilities to residents in arrears of strata fees;

iii. By letters dated April 24, 2008 and May 9, 2011, La Costa Green criticised the condition of the exercise room and equipment; and

iv. By letter dated April 25, 2012, legal counsel for La Costa Green sent a letter to Scottsdale Village regarding fees being charged to the owners of La Costa Green for access to the Recreational Facilities. The April 25th letter noted that access to the Recreational Facilities for owners of La Costa Green was governed by the terms of the Recreational Facilities Easement.

[22] In about November 2013, La Costa Green advised Scottsdale Village that it wished to withdraw from the terms of the Recreational Facilities Easement. Subsequently, by letter dated May 21, 2014, La Costa Green purported to "surrender" its rights under the Recreational Facilities Easement effective July 1, 2014. On June 16, 2014, Scottsdale Village advised La Costa Green that it did not accept the surrender.

[23] According to an accounting ledger prepared by or on behalf of La Costa Green, it appears that La Costa Green paid the sum of $122,360.80 towards Recreational Facilities expenses for the period October 30, 2006 to July 1, 2014. La Costa Green has not paid its share of expenses under the Recreational Facilities Easement since July 1, 2014. Scottsdale Village alleges that La Costa Green owe the sum of $24,202.40 as of January 19, 2017. There was also evidence that the Recreational Facilities will require future repairs.

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III. ISSUE

[24] This application raises the question as to whether an obligation to pay certain expenses contained in an agreement registered against title to parcels of land can bind subsequent owners of the land.

IV. DISCUSSION AND ANALYSIS

[25] The plaintiff concedes that it is settled that, at common law, positive covenants do not run with the land and that positive covenants have been defined to include obligations requiring the expenditure of money: *Heritage Capital Corp. Equitable Trust Co.*, 2016 SCC 19 at para. 25. The plaintiff also agrees that the defendant stands in the position of a subsequent owner.

[26] However, the plaintiff proposes three alternative means that it says avoids the operation of this general rule on the facts of this case. These are:

1. an exception to the rule as described by the Ontario Court of Appeal in *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481 (C.A.);

2. the existence of a pre-incorporation contract; or

3. the operation of statute.

[27] I will analyze these three purported exceptions to the rule separately.

Easement with Conditions

[28] When is an easement a conditional grant, and when is it a grant with conditions? This question framed the essence of the plaintiff's primary argument. The plaintiff candidly agreed that this argument was "subtle", and that there was no decision in B.C. that had specifically adopted such a distinction. For the reasons expressed below, I find that the distinction is too subtle to merit adoption of an exception for the latter situation in B.C., absent binding B.C. authority at the appellate level.

[29] The general common law rule that positive covenants do not run with the land is often described as the "Rule in *Austerberry*", flowing from an 1885 decision of the British courts in *Austerberry v. Oldham Corpn*. (1885), 29 Ch. D. 750.

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[30] British courts have developed two exceptions to the Rule in *Austerberry* — the "conditional grant exception" and the "benefit and burden exception". Even the distinction between these two exceptions is, as the plaintiff admitted, "subtle and sometimes blurred". In *Black v. Owen*, 2016 ONSC 40, rev'd 2017 ONCA 397, the lower court sought to distinguish between the two British exceptions as follows:

> [74] By way of synthesis, I make the following observations as to the meaning of the two exemptions:
>
> > Conditional Grant Exemption. When being asked to enforce a positive obligation, the courts will first look at the transaction between the parties to see if a benefit was clearly made on the conditional acceptance of a positive obligation. If such an intention can be made out on the face of the transaction, the conditional grants exemption is engaged.
> >
> > Benefit and Burden Exemption: If a conditional connection between the obligation and the benefit is not clear, the courts will then consider whether the benefit and burden exemption applies. By looking at the circumstances of the transaction, the intentions and relationship of the parties, and the nature of the benefits and burdens at issue, the courts will determine if there is an implicit and necessary connection between formally separate obligations and advantages. Or, to repeat the words of Professor Ziff, this second exemption looks to whether the courts should "tether previously separate promises".

[31] Importantly however, Canadian courts have not adopted either British exception: see *Amberwood*; *Black v. Owen*, 2017 ONCA 397; and *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71.

[32] The plaintiff seeks to find some residual room for its argument relying upon a passage from *Amberwood*. In that case, the Ontario Court of Appeal rejected the two British exceptions. Specifically, in *Amberwood*, the majority concluded at paras. 75-76, that "it would be inadvisable to adopt [the benefit and burden principle] in Ontario" given "the uncertainties and the many frailties of the existing common law in

England in this area of the law" and that any reform to the rule should be left to the legislature. The majority also stated the following at para. 19:

> …the adoption of [the benefit and burden] doctrine as a recognized exception to the [positive covenants] rule in the common law of this province, in much the same way as the abolition of the rule itself, would have complex, far-reaching and uncertain ramifications that cannot be adequately addressed on a case-by-case basis.

[33] The court also rejected the British form of the conditional grant exception, or at least the plaintiff's characterization of the exception in that case, "for essentially the same reasons" as those they used to rejected the benefit and burden exception: *Amberwood* at para. 84; see also *Black*.

[34] However, the court in *Amberwood* also stated:

> [85] I note at the outset that the principle from Halsbury's Laws of England relied upon by the applications judge [at p. 678 O.R.] seems to me to be consonant with the rule in Austerberry. I repeat it here for convenience:
>
> > "If the facts establish that the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding. Where the obligation is framed so as to constitute a continuing obligation upon which the grant of the easement was conditional, the obligation can be imposed as an incident of the easement itself and not merely a liability purporting to run with the land. . ."
>
> [86] Hence, as a matter of construction of the creating instrument itself, if a grant of benefit or easement is framed as conditional upon the continuing performance of a positive obligation, the positive obligation may well be enforceable, not because it would run with the land, but because the condition would serve to limit the scope of the grant itself. In effect, the law would simply be giving effect to the grant. Indeed, as discussed earlier in this judgment at paras. 30 and 31, much the same reasoning underlies the law of restrictive covenants.
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> [Emphasis added.]

[35] Relying on this passage from Halsbury's and its adoption in *Amberwood*, the plaintiff here contends that when a benefit is granted on the conditional acceptance of a positive obligation by the recipient of the benefit, the positive obligation may be said, as a matter of construction, to be a condition which limits the scope of the grant. As such, the plaintiff seeks to have the positive obligation in this case

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enforced against the successor in title given that the grant of the easement was conditional on the payment obligation.

[36] I confess that I find it difficult to derive a principled distinction between the rejected "conditional grant exception", and an exception that is said to exist if "the granting of a benefit or easement was conditional on assuming the positive obligation" (which I refer to for the balance of this judgment as the "*Amberwood* exception"). I am comforted that both counsel before me also struggled with this point. The Ontario Court of Appeal did not provide examples of situations in which they felt the "*Amberwood* exception" would in fact apply.

[37] Notwithstanding this interpretive difficulty, the actual facts and outcome of the *Amberwood* case provide some support for the result I have reached here. In *Amberwood*, a parcel of land was subdivided to create a two-phase condominium development. Phase 1 was completed, and it included recreational facilities. The developer intended that the owners of units in Phase 2 would be able to use those facilities. An easement agreement was made by which the owner of the Phase 2 property would have the right to access the Phase 1 property to use the recreation facilities. The easement agreement included cost-sharing provisions. The developer ran into financial difficulties and was forced to sell the Phase 2 property. Its successor did not use the recreational facilities and stopped sharing the cost of maintaining those facilities. The Court of Appeal found that the benefits in the easement agreement were not conditional on the performance of the positive covenants in a manner that would require enforcement of the positive obligation: *Amberwood* at paras. 87 and 88.

[38] The Ontario Court of Appeal had an opportunity to revisit this issue recently in *Black*. There the lower court had interpreted the passage from *Amberwood* above as creating some room for the argument that the positive covenant continued to run. The Ontario Court of Appeal found that the lower court decision was in error, and concluded that the obligation did not govern the relationship with subsequent purchasers.

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[39] The court in *Black* re-emphasized at paras. 48-49 and 65 that the British exceptions were not to be adopted into Ontario law. The court noted that they were sitting as a three justice panel, so were not in a position to overrule *Amberwood*: para. 39. The court also confirmed that neither accepting a benefit nor having notice of an easement was sufficient to trigger liability under a positive covenant: paras. 57, 60 and 68. The court also concluded that the facts before them did not support a finding that the *Amberwood* exception applied. The court stated:

> [70] Simply put, nowhere does the Trust Deed provide that the right to the use and enjoyment of the Common Property conferred under the Trust Deed is conditional upon the acceptance of the burdens contained in any of the positive covenants, including the first trust provision that contemplates payment of the annual levy. To the contrary, the grants of benefit contained in the Trust Deed are not framed as conditional upon the continuing performance of a positive obligation to pay the annual levy or the performance of any other positive obligation under the Trust Deed. And the first trust provision itself does not state that compliance with it is a pre-condition to the use and enjoyment of any benefit conferred under the Trust Deed. Consequently, the grants of benefit under the Trust Deed are not limited in the manner discussed by the *Amberwood* majority.

[40] The court in *Black* reached this conclusion even though one of the stated purposes of the positive obligation to pay the annual levy in the trust deed was said to be "maintaining and keeping the [Common Property] in good repair and order": para. 10. The trust deed also expressly stated that the annual levy constituted a charge upon the lands held by each landowner in the park or "his, her or their executors, administrators or assigns or anyone claiming under him, her or them".

[41] The approach of the Ontario Court of Appeal to the *Amberwood* exception, although treated as persuasive authority, is not binding upon me. While the Ontario Court of Appeal has apparently sought to preserve some room for interpreting the grant of a positive easement in a way that sustains it, if the grant is sufficiently tied to the positive condition, I find that the adoption of this approach into B.C. law is not justified, and would introduce too much uncertainty into the law. The struggles that experienced counsel had before me drawing a distinction between the rejection of the conditional grant exception and accepting an exception when the grant is sufficiently conditional, only highlights the uncertainty that would be created if the

Amberwood exception were adopted as proposed. Plaintiff's counsel conceded that he was not aware of any case where a party had successfully applied the *Amberwood* exception for the benefit of the party owed obligations under a positive grant. This lack of authority makes it even more difficult to accept the proposed exception, given the lack of established principles as to how and when it could be applied.

[42] In any event, even if I were to seek to apply the *Amberwood* exception, I would find that it was not applicable here such that the positive obligation could be said to be a sufficiently necessary incident of the easement itself. I say this for the following reasons:

1. the initial grant in clause 1 does not expressly refer to the concept of payment, although it does refer generally to the grant being "SUBJECT NEVERTHELESS AT ALL TIMES to the provisos, reservations, restrictions and limitations hereinafter set forth";

2. the particulars of payment do not arise until three pages later, under a separate clause entitled "Grantee's Declarations" at clause 5(b)(i);

3. the easement contemplates an election by the grantee, which again unties the automatic conditional nature of the respective obligations (see clause 5(a)(i)); and

4. the easement contemplates the potential for surrender, which would be inconsistent with an expectation that both the positive and negative covenants would run for all time (although it is contemplated that such surrender would require municipal approval which apparently did not occur here) (see clause 14).

[43] Statements from the Supreme Court of Canada are binding on this Court. In this regard, I note that the Supreme Court of Canada put the Rule in *Austerberry* bluntly and clearly in the *Heritage* decision, stating at para. 25: "[n]o personal or affirmative covenant, requiring the expenditure of money or the doing of some act

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can, apart from statute, be made to run with the land" (citations omitted). Although the Supreme Court of Canada referred to *Amberwood*, it did not adopt or discuss the proposed *Amberwood* exception. Rather, *Amberwood* was cited in the context of establishing the broader rule that the Rule in *Austerberry* applies "even if an agreement contains an express intention to the contrary". It is difficult to understand how the *Amberwood* exception is anything other than a hunt in the deed for an "express intention to the contrary".

[44] Previous decisions of this Court should be followed, subject to the application of the principles in *Hansard Spruce Mills Ltd., Re,* [1954] B.C.J. No. 136 (S.C.). In this regard, I am prepared to follow *Crystal Square*.

[45] The decision in *Crystal Square* concerned the proposed enforcement of certain positive covenants contained in an easement in regard to the parking facility in a multi-use complex. The parkade was managed by Impark and the easement purported to require a strata to pay an annual base rate, plus a percentage of all the operating expenses for the use of the parking facility, billed by the defendant. The "base rate" included the capital cost of the parkade, and the strata was paying 30% of its annual budget for parking expenses. The strata was told that once it paid down the capital costs, its payments would be significantly reduced and it would then share in the general revenue from the parkade which could be used to cover some of the operating expenses for which it was responsible. However, the evidence at trial was that, far from the capital cost being paid down, the outstanding capital costs and interest would reach several billion dollars by 2099.

[46] An issue arose in or about 2010 in connection with a parking membrane reserve fund. As the court summarized the issue:

> [35] Impark implemented a parking membrane reserve fund and demanded advance payment from all ASP Participants to pay for the replacement of the membrane in the Parking Facility. Impark demanded $30,381 from the plaintiff in 2010 when the plaintiff's portion of the actual cost would have been $8,102.54. The plaintiff resisted paying in advance for parking membrane repair. It did not trust Impark's use and management of its money.

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> [36] The plaintiff continued to pay the base rent and operating costs for the Parking Facility but refused to pay in advance into the membrane replacement reserve fund. Counsel wanted to see quotes and actual invoices before it paid for repair costs. These concerns were communicated to CSPC in writing.
>
> [37] Impark demanded payment of the membrane replacement reserve levy in January 2012. The plaintiff denied it owed that money. In June 2012, Impark's lawyer sent demand letters to the plaintiff but received no response. CSPC relied on the exhaustive definition of operating expenses in clause 7.5(d)(vi) to authorize it to demand payment of expenses made or incurred in connection with the Parking Facility which included the cost of all repair and replacement of the Parking Facility. The definition does include reserves for capital expenditures.
>
> [38] In response to the plaintiff's refusal to pay the membrane reserve levy, on July 4, 2012, Impark revoked the plaintiff's parking privileges and threatened to tow any vehicle found in the Parking Facility displaying a green decal. The plaintiff responded by pointing out that it had paid all of the base rate and 88% of its share of operating costs and that it was withholding 12% of operating costs pending clarification and adjustments that it had been seeking for two years.

[47] It should be noted that the easement in *Crystal Square* did include language which one could certainly argue was "conditional" for the purposes of the application of either the conditional grant exception or the *Amberwood* exception. Clause 7.5(d), entitled "Parking and Access Rights", contained both the right to use the parking facilities, as well as a provision stating:

> "…In consideration of the ASP 5 Owner granting the access and parking rights to the Parking Facility Participants pursuant to subsections 7.5(a) and (b), each Parking Facility Participant (excluding the ASP 6 Owner) covenants to pay to the ASP 5 Owner an annual parking fee…"
>
> [Emphasis added.]

It is difficult to see the term "in consideration of" as anything other than a direct conditional linkage between use and payment.

[48] Nonetheless, the court in *Crystal Square* found that the Rule in *Austerberry* governed, and that the positive condition could not be enforced. The court stated:

> [44] As was also explained in [*Nordin v Faridi* (1996), 17 B.C.L.R. (3d) 366 (B.C.C.A.)], it is an essential characteristic of an easement that it does not place on the owner of the servient tenement any obligation to act. Obligations to act or to pay can only be imposed by a positive covenant, which will not

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run with the land. Notably, the Court of Appeal states the following at para. 34 in *Nordin*:

> 34 Neither class of easement, however, involves the imposition of a positive obligation upon the servient tenement holder. As Sara states in *Boundaries and Easements, supra*, at pp. 160-161:
>
> > It is an essential characteristic of an easement that it does not place on the owner of the servient tenement any obligation to act. Such an obligation can only be imposed by a positive covenant, the burden of which will not pass with the land. As a result the owner of the servient tenement has no obligation to maintain a right of way or, as the law is generally understood, to keep in repair a building in respect of which there is an easement of support
> >
> > …
> >
> > Apart from the anomalous position of fencing easement, if a person wishes to place a positive burden on the owner or occupier of neighbouring land, he must do so by covenant which (as it is not a restrictive covenant) will not run with the land. Since the abolition of manorial incidents, therefore, it is impossible to burden land (as opposed to the landowner) with any positive obligations owed towards the neighbouring land.
> >
> > [Emphasis added in *Crystal Square*.]

[45] In *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 at para. 25, the Supreme Court of Canada confirmed that positive covenants such as an obligation to pay cannot run with the land. It noted that rule is founded on the principle that at common law a person cannot be made liable upon a contract unless he or she was party to it. It applies even if the agreement includes an express intention to the contrary. As such, the court confirmed that the common law rule is that "[n]o personal or affirmative covenant, requiring the expenditure of money or the doing of some act, can, apart from statute, be made to run with the land" (emphasis in original).

[46] The payment obligations created by clause 7.5 are positive covenants created before the plaintiff existed. They purport to bind the Developer, the City of Burnaby and the Bank of Nova Scotia who were the signatories of the ASP Agreement. There is no contract between the Developer and the plaintiff wherein the plaintiff formally adopted any obligations contained in the ASP Agreement. According to the common law rule, this covenant does not run with the land and the plaintiff is not bound by it.

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[49] In *Crystal Square,* Young J., at para. 48, specifically referred to the decision in *Amberwood,* and also concluded that the English exceptions had not taken hold in Canadian law. She also specifically cited the extract upon which the plaintiff seeks to ground the *Amberwood* exception at para. 53, although she did not characterize it as a separate exception from the (rejected) conditional grant exception. Counsel for the plaintiff suggested that the *Amberwood* exception was not fully argued before the court in *Crystal Square*. However, it is clear that *Amberwood* was before the court and considered. Although the court did not have the benefit of the subsequent appellate decision in *Black* before it, that should not have altered the analysis, given that it simply re-emphasized *Amberwood*. I do not find any basis upon which I could refuse to follow *Crystal Square*, nor do I conclude that it should be disregarded, even if it were in my power to do so.

[50] I am advised that the *Crystal Square* decision is under appeal, so perhaps we will receive some clarity from our own Court of Appeal whether they are prepared to adopt the *Amberwood* exception into B.C. law. However, absent such direction, I am not prepared to do so. Further, as noted above, my opinion is that adoption of the *Amberwood* exception would not alter the result here.

[51] Absent further appellate clarification, if the results driven by the Rule in *Austerberry* are perceived as inequitable, in my view, the answer to that must come from the legislature, and not from the courts.

Pre-incorporation Contract

[52] The second proposed route around the Rule in *Austerberry* was the suggestion that the defendant may be bound by a pre- or post- incorporation contract. Generally, pre-incorporation contracts are enforceable where “the company and the other party to the contract make a new contract after incorporation on the same terms as the pre-incorporation contract”: *Heinhuis v. Blacksheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239 at 242. Essentially, the plaintiff argues that the obligations in the Recreational Facilities Easement should be binding on the defendant as being part of a contract adopted by the strata.

[53] This argument was also advanced in *Crystal Square*, and rejected. I do likewise, for similar reasons.

[54] The court in *Crystal Square* held:

> [63] Accordingly, in order for pre-incorporation contract to be enforceable, the parties' conduct must establish an intention to be bound through a new contract containing identical terms.
>
> [64] The requirement set out in *Heinhuis* has not been met on the facts of this case. The plaintiff did not enter into the ASP Agreement. Registering it as an easement did not make the ASP Agreement into a new contract on the same terms to which the parties showed, through their conduct, an intention to be bound. There is no privity of contract and so the plaintiff cannot be bound by the obligations contained in the ASP Agreement. There is also no subsequent conduct evidencing that the plaintiff entered into a new contract containing identical terms to those contained in the ASP Agreement.
>
> [65] CSPC goes on to make a benefit burden argument relying on *Phelps Holdings Ltd. v. Owners Strata Plan VIS 3430*, 2010 BCCA 196 [*Phelps*], where the court discusses the proper interpretation of *Heinus* by stating in para. 19:
>
>> [19] I am satisfied the trial judge correctly interpreted *Heinhuis v. Blacksheep Charters Ltd.* (1987), 46 D.L.R. (4th) 67 (B.C. C.A.) *per* McLachlin J.A. (as she then was), to the effect that, where a party shows an intention to be bound by a new, and identical, post-incorporation contract, that party cannot take the benefit of the agreement without accepting the burden. When the benefit (here, the transfer of Lot B) and burden (here, the Option) are contemplated pre-incorporation, and are then acted upon exactly as contemplated post-incorporation, there will be found to be a new post-incorporation contract on the same terms.
>
> [66] The *Phelps* decision dealt with the payment of an option to sell a parcel of land and the *Heinus* case deals with a party who took possession of a vessel but did not want to pay the mortgage registered against it. In both cases, the parties had the benefit of possession and were trying to deny the burden of payment.
>
> [67] At first glance, it appears that the plaintiff meets the test set out from *Heinus*. The plaintiff benefitted from the easement, as its members parked in the parking structure. The plaintiff did not deny the burden. Its members paid for parking for many years because they thought they were bound to do so. Nonetheless, the plaintiff did not willingly contract to adopt the terms of the ASP Agreement. More importantly, its conduct post-incorporation did not exactly act upon the contact as contemplated pre-incorporation, as evidenced by its conduct related to the pay down of capital costs, its withholding of membrane repair costs and its failure to use the auditing provisions under the ASP Agreement. I will discuss this conduct in further detail below.
>
> [68] I find that the present case does not involve a party who agreed to be bound by the ASP Agreement once it was incorporated. There is no evidence

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> that any party belonging to what is now the plaintiff's strata corporation agreed to the ASP Agreement terms and then refused to enter into a post-incorporation agreement. The ASP Agreement was entered into by completely different parties who are attempting to impose obligations on non-existent successors in title who have not agreed.
>
> [69] Furthermore, CSPC's argument confuses contractual principles with easement principles. The *Amberwood* decision made it clear that the benefit burden exception to the rule that positive covenants on easements are not enforceable has not taken hold in Canada and is not the law with respect to easements.

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[55] I find that similar considerations are relevant here. Although the defendant certainly took the benefit of the easement, this is an insufficient basis upon which to derive the terms of a contract that extend beyond the date of surrender. The defendant was fully "paid up" up to the date of surrender. The plaintiff had control over the budgeting process and, if they were concerned about future capital expenses, they could have embedded these in the price charged up to that date to ensure the future health of the Recreational Facilities — it was within their rights to do so and they chose not to. As such, the evidence before me is that the defendant did everything asked of it by the plaintiff up to the date of surrender. The only question then is whether a contract should be inferred that contains terms that extend beyond a surrender date.

[56] There is no evidence that the defendant did or would have negotiated access to the easement on the "same terms" as those sought to be imposed within the easement. Specifically, there is no evidence that the defendant would have agreed to an agreement that ran in perpetuity. Making payments during the period they were using the property is not evidence of an intention to be bound after they advised that they no longer wished to use the Recreational Facilities.

[57] While there was more protest during the term of the alleged contract from the grantee in *Crystal Square* than was the case here, I do not see this factor alone as having been determinative in *Crystal Square*. Furthermore, there was evidence here of the defendant being dissatisfied with the conditions of the facilities, which one might reasonably infer eventually led to the surrender. There were also no

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documents executed by the defendant to give effect to the terms of the easement, or adopting the easement: see *Crystal Square*, paras. 71-72.

[58] As noted in *Crystal Square*, a court should be cautious to find a pre-incorporation contract that simply steps around the Rule in *Austerberry*. Aspects of the plaintiff's submission on this point suggested that the unfairness of the Rule in *Austerberry* should encourage the court to find that there was an enforceable pre-incorporation contract. In my view, the opposite is true. The fact that the Rule in *Austerberry* stands means that a court must be scrupulous to ensure that the requirements for any exception are met, so that the avenue is not simply used as a means to avoid the implications of this long-standing legal principle. In any event, I find that the necessary requirements are not met.

Statutory Covenants

[59] A local government may request or require that a developer provide what is now known as a "s. 219 covenant" in a variety of situations, including as a pre-condition to a building permit: *British Columbia Real Estate Development Practice Manual* (British Columbia: The Continuing Legal Education Society of British Columbia, 2017), sections §6.85 – §6.100A. Section 219 of the *Land Title Act* states:

> 219 (1) A covenant described in subsection (2) in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under the Islands Trust Act, as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.
>
> (2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:
>
> (a) provisions in respect of
>
> (i) the use of land, or
>
> (ii) the use of a building on or to be erected on land;
>
> (b) that land
>
> (i) is to be built on in accordance with the covenant,

(ii) is not to be built on except in accordance with the covenant, or

(iii) is not to be built on;

(c) that land

(i) is not to be subdivided except in accordance with the covenant, or

(ii) is not to be subdivided;

(d) that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately.

(3) A covenant described in subsection (4) in favour of

(a) the Crown or a Crown corporation or agency,

(b) a municipality, a regional district, the South Coast British Columbia Transportation Authority or a local trust committee under the *Islands Trust Act* or

(c) any person designated by the minister on terms and conditions he or she thinks proper,

as covenantee, may be registered against the title to the land subject to the covenant and, subject to subsections (11) and (12), is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.

(4) A covenant registrable under subsection (3) may be of a negative or positive nature and may include one or more of the following provisions:

(a) any of the provisions under subsection (2);

(b) that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant.

(5) For the purpose of subsection (4) (b), "amenity" includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant.

(6) A covenant registrable under this section may include, as an integral part,

(a) an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee and provision for the just and equitable apportionment of the obligations under the covenant as between the owners of the land affected, and

(b) a rent charge charging the land affected and payable by the covenantor and the covenantor's successors in title.

(7) If an instrument contains a covenant registrable under this section, the covenant is binding on the covenantor and the covenantor's successors in title, even though the instrument or other disposition has not been signed by the covenantee.

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(8) No person who enters into a covenant under this section is liable for a breach of the covenant occurring after the person has ceased to be the owner of the land.

(9) A covenant registrable under this section may be

(a) modified by the holder of the charge and the owner of the land charged, or

(b) discharged by the holder of the charge

by an agreement or instrument in writing the execution of which is witnessed or proved in accordance with this Act.

(9.1) A covenant that was required as a condition of subdivision under section 82 and registered under this section before the coming into force of the repeal of section 82 may be

(a) modified by the approving officer and the owner of the land charged, or

(b) discharged by the approving officer.

(9.2) For the purpose of determining whether to modify or discharge a covenant under subsection (9.1), an approving officer may exercise the powers provided under section 86 (1) (d), whether or not the modification or discharge is related to an application for subdivision approval.

(10) The registration of a covenant under this section is not a determination by the registrar of its enforceability.

(11) On the death or dissolution of an owner of a covenant registrable under subsection (3) (c), the covenant ceases to be enforceable by any person, including the Crown, other than

(a) another covenantee named in the instrument creating the covenant, or

(b) an assignee of a covenantee if the assignment has been approved in writing by the minister.

(12) If a covenantee or assignee referred to in subsection (11) is a corporation that has been dissolved and subsequently restored into existence under an enactment of British Columbia, the covenant continues to be enforceable by the restored corporation from the date of its restoration.

(13) A recital in a covenant that a person "has been designated by the minister under section 219 (3) (c) of the *Land Title Act*", or a statement to that effect in the application to register the covenant, is sufficient proof to a registrar of that fact.

(14) The minister may delegate to the Surveyor General the minister's powers under subsections (3) (c) and (11) (b).

[60] I note that when the City became part of the Recreational Facilities Easement, the relevant provision was found in s. 215 but the sections in the easement were subject to the future amendments of the provision. The plaintiff

argues that the fact that the City is a signatory to the Recreational Facilities Easement engages s. 219 and that this allows the plaintiff to rely on ss. 219(2) and (4)'s statutory exemption to the Rule in *Austerberry*.

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[61] The plaintiff candidly admitted that it was aware of no decision in which this section had been invoked by a third party to avoid the operation of the standard rule against positive covenants running with the land.

[62] In my opinion, this section was clearly designed to protect and enhance a municipality's rights, and was not intended to confer rights on third parties beyond those otherwise available at common law, nor was this petition arranged procedurally so as to allow such an interpretation to flow. I say this for the following reasons:

1. Subsection (1) of the *Land Title Act* refers only to covenants "in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under the *Islands Trust Act*…". This suggests that the provision and the subsequent provisions, in particular subsection (4) regarding the enforceability of positive covenants, govern the relationship of the Crown and other listed entities with the party providing a covenant. I see no basis to suggest that is was intended to grant rights to other third parties.

2. The covenants in favour of the City are separately listed in their own section (clauses 8-14) entitled "CONVENANTS IN FAVOUR OF THE MUNICIPALITY PURSUANT TO SECTION 215 OF THE LAND TITLE ACT, R.S.B.C. 1979 AND AMENDMENTS THERETO". Nothing in these clauses specifically commits the grantee to making the payments, which is dealt with in earlier clauses.

3. Clause 14 states specifically that "The Municipality is a party to this Agreement solely for the purpose of consenting to any variation,

amendment or discharge of this Agreement and has no other liability with respect thereto".

4. Section 219(10) of the *Land Title Act* states that the registration of a covenant under the section is not a determination by the registrar of its enforceability.

5. The City was not made a party to this action. There was no indication that it was given notice of the pending application. There was no evidence that the City objected to the surrender. I conclude that it would be inappropriate to opine on the quality and nature of its rights without the City being before me.

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[63] The plaintiff referred to the case of *Nancy Green's Olympic Lodge Ltd. Partnership v. Blackcomb Development Ltd.,* [1986] B.C.J. No. 1479. In my view, this decision does not assist the plaintiff. In the *Nancy Green* decision, the court found that a petitioner who was not a party to the s. 215 agreement could not seek to enforce it: para. 9. It did not address the issue before this Court, being whether a non-Crown entity who is a signatory can rely on this provision to make a covenant in an agreement signed by a Crown entity run to subsequent purchasers.

[64] The plaintiff admitted that there was a s. 215 covenant in place in *Crystal Square* as well, but advises that it spoke only to ensuring access to the parking, and did not refer to the positive payment obligation. However, this highlights the problem with the argument to some extent. The municipality may have an interest in ensuring that a service is made available, but has less interest in the mechanics of who pays to ensure that the service is provided. The plaintiff's interest here is ensuring that a particular positive payment obligation is enforced.

[65] The plaintiff says that there is no evidence before the Court that the defendant has sought or received any agreement from the City to be released from the obligations under the Recreational Facility Easement. Again, while true, this highlights the procedural problem raised above. If the plaintiff is alleging that the

defendant is breaching obligations or commitments owed to the City, then it is really the City that should be enforcing those obligations, or at a minimum it should be a party to any proceedings opining on its rights.

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V. CONCLUSION

[66] Given that the positive covenant is no longer enforceable against the defendant in light of the surrender of any rights under the Recreational Facilities Easement, the action is dismissed.

[67] The defendant is entitled to costs.

"Branch J."

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The Honourable Mr. Justice Branch