IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.,* 2017 BCSC 1988

Date: 20171102
Docket: S166047
Registry: Vancouver

Between:

The Owners, Strata Plan BCS 4006

Petitioner

And

Jameson House Ventures Ltd.

Respondent

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Petitioner:	P.G. Mendes A. Chang
Counsel for the Respondent:	G.S. McAlister A. Morrison
Place and Date of Trial/Hearing:	Vancouver, B.C. February 22 and 23, 2017
Further written submissions received:	May 23, June 30 and July 14, 2017
Place and Date of Judgment:	Vancouver, B.C. November 2, 2017

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INTRODUCTION

[1] The petitioner is a strata corporation that represents the owners of residential strata lots in a Vancouver condominium building commonly referred to as Jameson House. The respondent is the developer of Jameson House.

[2] Jameson House is a concrete tower located on a single lot that is divided into five air space parcels and a remainder parcel. In addition to the residential strata lots, Jameson House also includes commercial strata lots and shared facilities. Among the shared facilities is a parkade, located in the remainder parcel.

[3] The dispute arises in this case over the shared expenses for the operation and maintenance of the parkade.

[4] Initially, the respondent owned all of the air space parcels and the remainder parcel. Prior to the creation of the petitioner, the respondent executed an easement agreement with itself and the City of Vancouver (the “Easement Agreement”) in order to structure the legal relationships among the different air space parcels and

the remainder parcel, including parking. Under the terms of the Easement Agreement, the respondent agreed to operate, maintain and insure the parkade as the owner of the remainder parcel. As owner of the air space parcel that would later become the residential strata lots, the respondent also agreed to reimburse itself a percentage of the cost of operating, maintaining and insuring the parkade.

[5] The petitioner, as the successor in title to the air space parcel that later became the residential strata lots, seeks a declaration that the parkade cost-sharing obligation in the Easement Agreement is unenforceable against it because it is a positive covenant that does not run with the land.

ADMISSIBILITY OF THE SECOND AFFIDAVIT OF VICTOR WILLIAM BROWNJOHN

[6] Before turning to the substantive issue, I must first determine a preliminary matter.

[7] In support of its Petition, the petitioner relies upon, among other things, two Affidavits from former strata council member, Victor William Brownjohn. Mr. Brownjohn's second Affidavit, sworn on January 12, 2017 ("Brownjohn Affidavit #2"), mainly discusses payments regarding the parkade and the negotiations between the parties regarding those payments.

[8] The respondent objects to the admissibility of most of Brownjohn Affidavit #2 on the basis that much of its content is irrelevant and/or subject to settlement privilege. As the issue before the Court is narrow, the respondent contends that the parties' negotiation history is irrelevant to decide whether the covenant to share parkade expenses is enforceable against the petitioner. Relying on *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, the respondent further submits that the parties shared a common understanding that their discussions were to resolve a live dispute and shared a common expectation that neither side would use their discussions against the other in a court proceeding.

[9] The petitioner disagrees and argues that the contents of Brownjohn Affidavit #2 are proper reply to the Response Petition and accompanying Affidavits under Rule 16-1(6) of the *Supreme Court Civil Rules*, B.C. Reg. 169/2009 [*Civil Rules*].

[10] The petitioner submits the contents are relevant because the respondent has attacked the *bona fides* of the Petition by suggesting that the petitioner seeks to use the parkade without paying for it, and by speculating about what might happen in the future if the petitioner was not obliged to abide by the cost-sharing covenants. The petitioner contends it should be allowed to tender responsive evidence about its good-faith payments to maintain the parking system and its good-faith attempts to negotiate a cost-sharing agreement. Essentially, the petitioner submits that the respondent is now using settlement privilege as a sword by making disparaging allegations and then seeking to prevent the petitioner from replying.

[11] With respect to settlement privilege, the petitioner first emphasizes that the contractual negotiations between the parties were not "without prejudice" and suggests that this is not a case where the Court ought to find an implied "without prejudice" protection. In any event, the petitioner contends that even if the negotiations between the parties are found to be "without prejudice", the respondent should be found to have waived the privilege when it sent an open letter to all owners at Jameson House regarding the proposed changes to the cost-sharing agreement for the parkade.

[12] The petitioner also submits that settlement privilege does not apply to the contents of Brownjohn Affidavit #2 on the basis of *Blue Line Hockey Acquisition Co. Inc. v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 143, where Madam Justice Wedge held:

> [103] In order to successfully invoke settlement privilege, the party seeking the privilege must establish that a litigious dispute is in existence or within contemplation, and that the communications in question were for the purpose of attempting to effect a settlement of the litigious dispute: *Sinclair v. Roy* (1985), 65 B.C.L.R. 219 at 222 (S.C.).
>
> [104] The mere existence of a dispute or potential dispute does not give rise to the privilege. Only where the dispute has become "litigious" does the privilege arise. A dispute is "litigious" where litigation is commenced or

> contemplated. The person who claims the privilege bears the onus of establishing it: *Cytrynbaum v. Gineaut Holdings Ltd.*, 2006 BCSC 468 at para. 26 [*Cytrynbaum*].

[13] The petitioner submits that the respondent has failed to establish that litigation was ongoing or even contemplated at the time of the negotiations described in Brownjohn Affidavit #2.

[14] In the alternative, if settlement privilege is found to exist in this case, the petitioner submits that a compelling reason exists for disclosure and admissibility – to rebut the allegations and speculation of the respondent. This reason outweighs the policy underpinning the privilege – to promote settlement.

[15] I agree with the respondent on this issue. The central issue to be decided on this Petition is a narrow one – whether the positive covenant in the Easement Agreement for cost-sharing of parkade expenses is binding on the petitioner. The parties' negotiation history cannot help me decide that issue and is, I conclude, irrelevant. I reach this conclusion in light of my similar conclusion about the respondent's characterization that the petitioner is simply using this Petition to use the parkade without paying. This speculation is irrelevant and inadmissible as well.

[16] In the result, I exclude paragraphs 8 through 25 inclusive of Brownjohn Affidavit #2 on the basis that the content of the paragraphs is irrelevant to the issue I must decide.

[17] If necessary, I would also conclude that settlement privilege applies to most of the contents of Brownjohn Affidavit #2.

[18] In *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, the Supreme Court of Canada observed that "Settlement privilege is a common law evidentiary rule that applies to settlement negotiations regardless of whether the parties have expressly invoked it": para. 1.

[19] In *Sable*, the Court discussed the purposes of settlement privilege, including its role in encouraging parties to settle disputes and improving access to justice. The

privilege applies to both successful and unsuccessful settlements, as well as the content of successful negotiations: para. 18.

[20] However, as discussed by Mr. Justice Blok in *Langley (Township) v. Witschel*, 2015 BCSC 123, *Sable* does not really address when settlement privilege begins to apply to the discussions between two persons or entities. In *Witschel*, Blok J. noted that two lines of authority exist on this point in this province. He observed that one test asks whether a "litigious dispute" exists, or the parties at least contemplated such a dispute: para. 26. The petitioner relies on this approach.

[21] In *Witschel*, Blok J. then considered the second line of authority in British Columbia. He reviewed *Belanger v. Gilbert*, 1984 CanLll 355 (BCCA), in which the Court adopted a more expansive test for assessing whether settlement privilege applies. As the Court in *Belanger* set out, this broader test requires "a dispute or negotiation between two or more parties … in which terms are offered": para. 7.

[22] Justice Blok concluded that the "*Belanger* test is more in harmony with the public interest in encouraging the settlement of disputes more generally, not just 'litigious' disputes": para. 38. He applied the *Belanger* test to the facts of the case before him. I agree with Blok J.'s reasoning explaining why the broader test carries greater weight in British Columbia.

[23] Applying the "dispute or negotiation" test, I am of the view that settlement privilege would apply to the contents of Brownjohn Affidavit #2 that detail the history of negotiations between the petitioner and the respondent. I do not view the open letter sent to strata owners as a waiver of that privilege. I would exclude those paragraphs on that basis.

[24] Although not argued, I also observe that portions of Brownjohn Affidavit #2 rely upon hearsay evidence, which is inadmissible to support the petitioner's request for a final order: Rules 22-2(12) and (13) of the *Civil Rules* and *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 33.

[25] In the result, I conclude that paragraphs 8 through 25 inclusive of Brownjohn Affidavit #2 are inadmissible as they are irrelevant to the issue I must decide. If necessary, I would also conclude that settlement privilege applies to at least paragraphs 17 through 25 inclusive and that portions of paragraphs 10 and 15 are also inadmissible on the basis that they rely upon hearsay evidence.

FACTS

[26] The petitioner is a strata corporation representing the owners of residential strata lots located in a high-rise building known as Jameson House, located at 838 West Hastings Street, Vancouver, British Columbia (the "Strata"). The strata plan creating the Strata was registered with the Land Title Office on December 24, 2010 under registration number BB1301828.

[27] The respondent, Jameson House Ventures Ltd., is a British Columbia company that is the developer for Jameson House ("JHV").

[28] Jameson House is a 37-storey office, retail and residential mixed-use concrete high-rise tower. It is constructed on a single lot that is comprised of five air space parcels and a remainder parcel.

[29] Dirk De Vuyst, a lawyer of considerable experience in the area of real property and land development, was counsel for JHV since June 2009. Mr. De Vuyst described two basic alternative models used by developers of "mixed-use developments" such as Jameson House to create some autonomy between the different uses. At paragraph 8 of his first Affidavit, Mr. De Vuyst explains the two models as follows:

> a. The first model involves subdividing the development by way of strata plan pursuant to the *Strata Property Act* and in turn creating separate section (residential and non-residential) under s. 193 of the *Strata Property Act* ("SPA");
>
> b. The second model involves subdividing the development into blocks of three-dimensional space called 'air space parcels' with those portions of the parent parcel of land not so subdivided appropriately called the 'remainder parcel'.

[30] At paragraphs 9 and 10, Mr. De Vuyst explains why some developers prefer the second, air space parcel, model. He deposes:

> 9. While separate sections under the SPA do provide some degree of autonomy as between the different users, the fact that all strata lots are within a single strata plan and subject to the authority of the owners enables the one group of users to potentially dominate the other.
>
> 10. As such, this separate section model has largely given away to the "air space" model which provides complete autonomy as between the different users subject, of course, to the terms of the governing agreement known as an "air space agreement" or "ASP agreement". The legal relationship between residential and non-residential strata lots is governed by the SPA while the legal relationship between the mixed use air space parcels is governed not by statute, but by the terms of the ASP agreement hence underscoring the critical importance of the terms of the ASP agreement.

[31] It was decided that Jameson House would be subdivided, once built, by way of the air space parcel model. The parcels were eventually structured as follows:

- Air Space Parcel #1 contains 158 residential strata units and common property located on floors 14 through 37 ("ASP1");
- Air Space Parcel #2 contains eight commercial strata lots used as offices located on floors 5 through 12 ("ASP2");
- Air Space Parcel #3 contains the lobby and retail space located on floor 1 ("ASP3");
- Air Space Parcel #4 contains commercial and office space located on floor 3 ("ASP4");
- Air Space Parcel #5 contains retail space located in the heritage building ("ASP5"); and
- Remainder Parcel is used for shared facilities such as electrical, mechanical and fire suppression systems, as well as the parkade and is located in the basement and on floor 13 ("Remainder").

[32] The Jameson House parkade is unique. It is an automated parking and storage system ("APSS") which can accommodate up to 238 vehicles. The APSS is a "driverless system" whereby users drive their vehicles into an elevator, disembark the vehicle, exit the elevator and the APSS parks their vehicle in the parkade. When ready to be retrieved, the user simply requests retrieval of the vehicle from his or her unit, descends by elevator to the parking level and finds the vehicle waiting. The cost of operating and maintaining this parkade is not insignificant.

[33] The design of Jameson House requires the occupants of the air space parcels to use and access the shared facilities, including the parkade.

[34] On October 1, 2010, at a time before JHV subdivided ASP1 to create the Strata, JHV executed the Easement Agreement with itself and the City of Vancouver. JHV owned all of the parcels at the time.

[35] The relevant parts of the Easement Agreement state:

> 5.3 Easement (Parkade) over Remainder for the benefit of ASP 1. The Remainder Owner, as registered owner of the Remainder, hereby grants to the Air Space Parcel 1 Owner and its Strata Corporation (collectively, the "Residential Parkade Users"), in perpetuity, the non-exclusive, full, free and uninterrupted right, liberty and easement, in, over, within and through the Remainder at all times and from time to time, in common with the Remainder Owner and its Users, and all other persons now or hereafter having the express or implied permission of the Remainder Owner or having a similar right, subject to the following terms, conditions and limitations:
>
> (a) subject to the terms, conditions and limitations herein contained, with or without motor vehicles or other vehicles, laden or unladen, or on foot, with or without hand carts, shopping carts or wheelchairs, to enter, go, pass and repass in, over, upon and through the Remainder Drive Aisle Volumetric Easement Area for the purpose of obtaining access and the use of the Remainder A.P.S.S. Parkade.
>
> (b) to enter, go, pass and repass in, over and upon all or any part of the Parking Facility situate within the Remainder as the Residential Parkade Users may reasonably require with Acceptable Automobiles only and for the purpose of parking up to 183 Acceptable Automobiles within the APSS located within the Parkade forming part of the Parking Facility within the

> Remainder and for the purpose of gaining access to, storing in and retrieving Acceptable Automobiles from the APSS, all subject to the limitations and constraints discussed in Sections 5.3.2 and 5.3.4 hereof.
>
> 5.3.1 Benefit, Burden and Allocation of Parking Rights to Strata Unit Owners. The easement granted in Section 5.3 will be appurtenant to and for the benefit of ASP 1 and when ASP 1 is subdivided into Strata Units, the benefit of and the right to park one or more than one Acceptable Automobiles will be allocated by the Developer, in its sole discretion, to the individual Strata Unit Owners and any consideration received by the Developer from a Strata Unit Owner for the allocation of such rights will be the sole property of the Developer.
>
> 5.3.2 Restricted Areas. No rights to park in an Accessible Parking Stall are conferred or granted to the Air Space Parcel 1 Owner by virtue of the easement granted in Section 5.3 or otherwise. Notwithstanding the easement for parking granted pursuant to Section 5.3 hereof or any other provision herein, the Air Space Parcel 1 Owner acknowledges and agrees with the Remainder Owner that for safety reasons, the APSS is not intended to be accessed by persons other than the qualified service and maintenance employees of the Remainder Owner and persons are not allowed to accompany their Acceptable Automobiles when such automobiles are being parked, stored or retrieved from storage in the APSS and the said access easement shall not be interpreted to permit any person, physical access to the APSS.

[36] Article 5.3.3. of the Easement Agreement sets out the reservations and limitations on the grant of easement.

[37] Article 5.3.5 imposes some covenants on the ASP1 Owner regarding the use of the parking rights, including an indemnity in favour of the Remainder Owner and waiver of liability for any loss or damage related to the use of the parkade or the Remainder.

[38] Article 5.3.6 deals with “Reimbursement of Parkade Operating Costs”. It specifies what expenses are included as “Parkade Operating Costs” and defines the “Residential Share of the Parkade Operating Costs” as “80% of the Parkade Operating Costs”.

[39] Article 5.3.7 requires the Remainder Owner to prepare an “Annual Estimated Parkade Operating Costs Budget” for the APSS for the upcoming fiscal period which shall run from January 1 to December 31 in each year.

[40] Article 5.3.8 obliges the "Residential Parkade Users" to reimburse the Remainder Owner one-twelfth of the "Annual Estimated Parkade Operating Costs Budget" each month. It further provides for interest to be paid on outstanding payments.

[41] Article 5.3.9 requires the Remander Owner to prepare an annual "Budget Reconciliation", where it is to provide particulars of actual parkade operating costs incurred for the preceding fiscal period in order to permit the Residential Parkade User to determine that the expenditures were reasonably incurred and to provide the basis for a reconciliation between the monthly installments already paid and the actual annual parkade operating costs. It further provides for interest to be paid on any outstanding payments.

[42] Article 5.3.10 obliges the Remainder Owner to keep accurate records of all parkade operating costs and make them available for inspection or audit by the Residential Parkade User. It also provides a dispute resolution mechanism in the event of disagreement concerning the amount of the parkade operating costs.

[43] Articles 5.4 through 5.9 of the Easement Agreement deal with the owners of the other air space parcels who also use the parkade and have been allocated parking for a further 59 vehicles.

[44] When the Easement Agreement was executed, the Strata did not exist. However, its existence was contemplated by the provisions of the Easement Agreement. For example, Article 9.2 states:

> 9.2 Subdivision by Strata Plan
>
> Upon subdivision of a Parcel by a Strata Plan:
>
> (a) the Strata Corporation so created shall:
>
> (i) perform and observe the Owner's covenants herein at the expense of the Strata Corporation and the Strata Unit Owners;
>
> (ii) upon the registration of the Strata Plan, enter into an assumption agreement with the Other Owner in a form

satisfactory to the Other Owner, acting reasonably, to assume all of the then ongoing obligations hereunder and benefit from all of the rights as provided herein, whereby the Owner of the stratified Parcel will be released from all of its obligations hereunder;

(iii) take into consideration the content of this Agreement when creating, amending or rescinding the bylaws, rules and regulations of the Strata Corporation applicable to Strata Unit Owners, and shall cause the Strata Unit Owners to comply with the obligations, restrictions and limitations as provided herein;

(iv) be responsible for any breach arising from any action or omission of any and all of the Strata Unit Owners of the obligations, restrictions and limitations as provided herein; and

(v) be entitled to give all permissions and consents permitted to be given by the Owner; and

(b) the liability of each Strata Unit Owner to pay any costs and expenses of the Owner of the stratified Parcel, as provided herein, shall be in proportion to the unit entitlement of his, her or its Strata Unit as established in accordance with the *Strata Property Act* or any successor legislation enacted from time to time.

[45] In an effort to bind successors in title, the Easement Agreement included Articles 13.1 and 13.8, which provide:

13.1 Enurement

Subject to the provisions set out herein, this Agreement will enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, and all of the covenants herein are made by each Owner, for itself and its successors and assigns and the Owner or Owners from time to time of an interest in all or any portion of the Parcels, except that the covenants of each of the Owners herein will be personal and binding upon each of them only during their ownership of any interest in the respective Parcel.

…

> 13.8 Covenants Run with the Land; No Vesting of Fee
>
> The burden of the covenants, charges and agreements set forth herein shall run with each Parcel, as applicable, and shall bind each Parcel, as applicable, and shall attach thereto and run with each and every part into which the same may be subdivided or consolidated, but no part of the fee or soil of any Parcel will pass to or be vested in the Other Owner under or by virtue of this Agreement.

[46] Article 13.6 interprets certain terms in the Easement Agreement including:

> 13.6 Interpretation
>
> In this Agreement:
>
> (a) Party. Any reference to a party herein will be deemed to include the heirs, executors, administrators, successors, assigns, employees, servants, agents, officers, contractors, licensees and invitees of such parties wherever the context so permits or requires.
>
> …
>
> (d) References. References to the or this "Agreement" and the words "hereof", "herein" and similar words refer to this Agreement as a whole and not to any section or subsection or other subdivision hereof and any reference in this Agreement to a designated section, subsection or other subdivision is a reference to the designated section, subsection or subdivision hereof.

[47] JHV subdivided ASP1 to create the Strata. JHV registered the strata plans establishing the Strata on December 24, 2010. JHV also filed custom bylaws at the same time (see Exhibit "A" to the Affidavit of Randy Bock sworn January 9, 2017). The Strata and the owners of its residential lots became the owners of ASP1.

[48] The Easement Agreement was registered on title to each of the residential strata lots and common property of the Strata.

[49] Any prospective purchaser of a residential strata unit had notice of the terms of the Easement Agreement through the following means: by reviewing the Easement Agreement registered in the Land Title Office, by reviewing the disclosure statement (and amendments thereto) and/or by reviewing the Strata bylaws filed in the Land Title Office.

[50] The Strata was never a party to the Easement Agreement and has never signed an assumption agreement contemplated in Article 9.2. However, it has been paying its share of the costs associated with maintaining the parkade since 2010, something Mr. Brownjohn deposes was in error.

THE ISSUE

[51] The parties agree that the parkade cost-sharing provisions in the Easement Agreement are positive covenants. They also agree that the plaintiff was not a party to the Easement Agreement and stands in the position of a subsequent owner.

[52] At common law, positive covenants do not run with the land since a person cannot be liable to perform an obligation under a contract unless he or she is a party to the contract. This common law rule emanates from *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D 750 (the "*Austerberry* Rule"). The issue in this case is whether any of the positive covenants contained in the Easement Agreement bind the petitioner, particularly the parkade cost-sharing provisions.

[53] The petitioner submits it is not bound by the positive covenants in the Easement Agreement because in Canada the only exceptions to the *Austerberry* Rule exist in statute, not the common law. The petitioner contends that this prevails over any express intention to the contrary by the parties to an agreement.

[54] The respondent submits the cost-sharing covenant is binding on the petitioner. Relying primarily upon English jurisprudence, the respondent contends that two common law exceptions to the *Austerberry* Rule exist and should apply in this case. Relying on Ontario jurisprudence, it also submits the covenant is binding because the grant of easement (the right to use the parkade) is conditional on the users assuming the positive obligation to pay to maintain it. In other words, the obligation to pay is binding because, as a matter of construction, it is part of and limits the scope of the grant.

[55] I will further detail the parties' positions as I consider the law and its application to the facts of this case.

[56] Counsel focussed much of their submissions on English and Ontario common law. They disagree on the current state of the law in those jurisdictions. They also disagree with how the law ought to be interpreted and applied in British Columbia. To facilitate a better understanding of their positions, I will structure my analysis of the applicable legal principles under the following headings:

1. Easements and the *Austerberry* Rule Generally;
2. The Role of *Stare Decisis* When Considering Decisions From Outside British Columbia;
3. Judicial Comity;
4. The *Austerberry* Rule in England;
5. The *Austerberry* Rule in Ontario;
6. The *Austerberry* Rule in British Columbia; and
7. Should any English or Ontario Exceptions or Principles be Available in British Columbia?

THE LAW

1. Easements and the *Austerberry* Rule Generally

[57] In *Nordin v. Faridi*, 1996 Can Lll 3321 (BCCA), the British Columbia Court of Appeal set out the definition of and requirements for an easement:

> [31] An easement is a right which one person may exercise with respect to the land of another. The four requirements for an easement were set out in *Re Ellenborough Park*, [1956] Ch. 131, and have been accepted in Canada in *Dukart* v. *District of Surrey*, 1978 CanLII 214 (SCC), [1978] 2 S.C.R. 1039 at 1050.
>
> 1. There must be a dominant and a servient tenement.
> 2. The easement must accommodate the dominant tenement.
> 3. The dominant and servient tenement owners must be different persons.
> 4. The right granted must be capable of forming the subject-matter of the grant.
>
> [32] As noted in S.G. Maurice, ed., *Gale on Easements*, 15th ed. (London: Sweet & Maxwell, 1986) at p. 3, the law recognizes three situations in which an easement may arise:

> 1. where natural right of the servient tenement owner to exclude others from his land is curtailed in favour of giving the corresponding right to the dominant tenement owner to encroach or invade the servient tenement.
> 2. where the dominant tenement owner receives a special right in respect of use of the dominant tenement which curtails the natural right of the servient tenement in some way.
> 3. where the natural limited right of the servient owner to use his land as he pleases may be curtailed by an increase in the ordinary rights of the dominant tenement holder.

[58] The Court went on to explain that a central feature of an easement is that it does not place the owner of the servient tenement with any obligation to act. Obligations to act can only be imposed by a positive covenant, which will not run with the land. The Court explained:

> [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.
>
> [35] Similarly, an easement is described in *Halsbury's Laws of England*, *supra*, at para. 23, as follows:
>
> > A true easement is either a right to do something or a right to prevent something; a right to have something done is not an easement, nor is it an incident to an easement. An easement merely imposes an obligation to submit to the commission of some act upon the servient tenement by the dominant owner, or an obligation upon the servient owner to refrain from the commission of some act upon his own land. Accordingly an easement does not cast any burden upon the owner of the servient tenement to commit any act upon that or any other tenement. The owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement, but he must not deal with his tenement so as to render the easement over it

> incapable of being enjoyed or more difficult of enjoyment by the dominant owner.

[59] In *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, the Supreme Court of Canada clearly accepted the *Austerberry* Rule that positive covenants cannot run with the land at common law and explained that its only exceptions arise from statute:

> [25] The idea of a payment obligation running with land is by its nature unusual. In fact, it is undisputed that at common law, positive covenants cannot run with the land (*Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750). This 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 (*Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.)). The rule against positive covenants running with the land applies even if an agreement contains an express intention to the contrary (*Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481 (C.A.)). **As a result, 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**" (V. Di Castri, *Registration of Title to Land* (loose-leaf), vol. 1, at p. 10-4 (emphasis added), quoted in *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, 155 B.C.A.C. 1, at para. 16). The issue in the instant case is whether and to what extent s. 29 of the *HRA* displaces the common law rule by permitting positive covenants to run with the land.
>
> [My emphasis]

2. The Role of *Stare Decisis* When Considering Decisions from Courts Outside of British Columbia

[60] As the parties rely heavily on English and Ontario jurisprudence, I will first address the role of *stare decisis* in relation to such decisions.

[61] In *R. v. Vu*, 2004 BCCA 230, Donald J.A., writing for the majority, discussed the principle of *stare decisis* vis-à-vis decisions from appellate courts in other provinces. I consider that the following discussion applies at least equally to the decisions of appellate courts in other countries. Justice Donald stated:

> [26] A most useful treatise on the subject of stare decisis is that published by William F. Ehrcke (now Mr. Justice Ehrcke of the British Columbia Supreme Court) entitled "Stare Decisis" (1995) 53 The Advocate 847. At 850 he wrote:
>
> > There can be no doubt that trial judges are bound to accept as binding the law as pronounced by appellate courts above them in their judicial

hierarchy. Thus, Chief Justice Rinfret was led to say in *Woods Manufacturing Co. Ltd. v. The King*, [1951] S.C.R. 504 at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it is undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of the relationship between the courts.

The learned author had reference to the Wolf decision in addressing the topic of stare decisis in relation to courts in other provinces:

> No court at any level in one province is bound to follow a decision of a court in another province. The principle as it applies to the Court of Appeal of any province was articulated by the Supreme Court of Canada in *Wolf v. The Queen*, [1975] 2 S.C.R. 107, at p. 109:
>
> > A provincial appellate court is not obliged, as a matter of either law or practice, to follow a decision of the appellate court of another province unless it is persuaded that it should do so on its merits or for other independent reasons.
>
> The same rule applies to lower courts. The principle of stare decisis cannot bind a court in one province to follow a court in another province since, apart from the Supreme Court of Canada, no court outside a given province has the power to overturn a decision within the province. The point was elegantly expressed by Matheson, Co. Ct. J. in *Regina v. Beaney*, [1970] 1 C.C.C. 48 (Ont. Co. Ct.) at pp. 53-54:
>
> > The Court of Appeal of Manitoba stands outside the hierarchy of Courts of this Province and, while there are many compelling reasons why a Judge of first instance in this Province ought to try to conform with the decisions of other provincial appellate Courts, in my respectful submission he is not bound by them. The point at issue here is underscored by the undoubted consequence that if, in the opinion of the Court of Appeal of Ontario, I should be correct in the substantive point of law in question, that Court surely would not reverse my judgment simply because I failed to follow an extra-provincial appellate decision with which it, too (ex hypothesi) disagreed.
>
> The British Columbia Court of Appeal came to a similar conclusion in *Regina v. Active Trading Ltd. et al*. (1975), 26 C.C.C. (2d) 412 (B.C.C.A.) at p. 414.

[27] In a nutshell, the rule of stare decisis is based on hierarchy. Lower courts are bound to follow decisions rendered by the courts that have the

> power to reverse them. Since an appellate court out of province has no such power, their decisions have no binding force within this province.

[62] From the foregoing, it is clear that I am bound to follow decisions rendered by the British Columbia Court of Appeal and the Supreme Court of Canada, but I am not bound to follow a court in another province or country. However, I may find those authorities persuasive.

3. Judicial Comity

[63] I am bound to follow decisions rendered by courts that have the power to reverse my decision. With respect to decisions of other judges of my own court, the principle of judicial comity applies.

[64] In *R. v. Blackmore*, 2017 BCSC 1288, I considered the principle of judicial comity as set out in *Re Hansard Spruce Mills Ltd.* [1954] 4 D.L.R. 590 (B.C.S.C.) at paras. 222-225:

> [222] Determining the precedential value of the legal conclusions in the *Polygamy Reference* to the issues I am to decide in determining what the Crown must prove beyond a reasonable doubt in the case at bar involves a consideration of the nature of reference cases and the principle of judicial comity set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590.
>
> [223] In *Re Hansard Spruce Mills Ltd.*, Mr. Justice Wilson (as he then was) explained the duty of a trial judge to follow the decision of another judge of the same court, except in certain limited circumstances. In this regard, he held at 592:
>
> > ...I think...the proper discretionary duty of a trial judge, is more limited...I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight. This is a state of affairs which cannot develop in the Court of Appeal.
> >
> > Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another Judge of this Court if:
> >
> > > (a)[s]ubsequent decisions have affected the validity of the impugned judgment;

> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consent authority.

[224] Judges of this Court have consistently applied this principle of judicial comity ever since. This principle is a "guide for one trial court judge examining an issue which had already been considered and decided by another judge of the same court": *John Carten Personal Law Corp. v. British Columbia (Attorney General)*, 1997 CanLII 2008 (B.C.C.A.) at para. 7.

[225] Mr. Justice Smart described the approach outlined in *Re Hansard Spruce Mills Ltd*. this way in *R. v. Sipes*, 2009 BCSC 285 at paras. 10-15:

> [10] The approach advocated in *Re Hansard Spruce Mills* is not a rule of law; rather, it is a wise and prudent prescription for the exercise of judicial discretion. It will almost always be in the interests of justice for a judge to follow the decision of another judge of the same court on a question of law. Consistency, certainty, and judicial comity are all sound reasons why this is so. It is for the Court of Appeal to decide whether a judge of this Court has erred, not another judge of the Court.
>
> [11] In my view, both the rule in *Re Hansard Spruce Mills* and the exceptions to it are based on common sense and a consideration of the interests of justice. At all times, the application of the rule should advance the interests of justice, not undermine them. It is for this reason that I am also of the view that the determination as to whether to follow a decision of another judge of the same court should not begin and end with a rote application of *Re Hansard Spruce Mills*; instead, that determination should also be informed by all relevant factors that bear upon whether it is in the best interests of justice in the context of the particular case at hand to do so. I refer to the circumstances of the present case by way of example.
>
> [12] The present application arises in the context of a trial with five accused, all in custody, facing charges of first and second degree murder arising out of three separate transactions. There are approximately 10 Crown counsel and a greater number of defence counsel engaged in this trial. The pre-trial applications will likely exceed 12 months in duration. The trial before a jury will likely exceed six months. Many witnesses, police and civilian, will be required to testify. The expenditure of public funds to complete this trial will be enormous. There is, of course, no offence more serious than murder. A fair and

> just determination of these charges is of critical importance to the accused, the Crown and the public.
>
> [13] Would it be in the interests of justice for a trial judge in proceedings of this nature to follow the decision of another judge of the same court on a pivotal issue that could result in a successful appeal and an order for a new trial if he or she were firmly of the view that the decision had been incorrectly decided? Would doing so enhance public confidence in the administration of justice or would it have the contrary effect?
>
> [14] Surely blind adherence to another judge's decision would not be warranted in such circumstances, and I do not believe that Wilson J. ever intended his decision in *Re Hansard Spruce Mills* to be applied in such rigid fashion.
>
> [15] I do not suggest that adhering to the rule in *Re Hansard Spruce Mills* will not usually be the correct course of action. It will be, because it will almost always be in the interests of justice for judges to follow the applicable decisions of other judges of the same court. What I do suggest, however, is that judges should always be mindful of the interests of justice and ensure that applying *Re Hansard Spruce Mills* will advance those interests in the particular circumstances. This will necessarily entail having regard to the broader context of the case.

[65] I agree with and adopt the approach of Justice Smart.

4. The *Austerberry* Rule in England

[66] The respondent submits that since the *Austerberry* Rule has been accepted in Canadian law and Canadian courts have looked to English cases when considering the state of the law, I should find the English common law most persuasive.

[67] The respondent contends that English courts have recognized that strict application of the *Austerberry* Rule could cause injustice in situations where a person could enjoy the benefit of an easement without having to pay the obligations imposed by that same easement. In order to prevent that potential injustice, English courts have developed two exceptions to the general rule that positive covenants do not run with the land – the conditional grant exception and the benefit and burden exception.

[68] The respondent acknowledges that the distinction between these two "exceptions" can be subtle and sometimes blurred, but submits the conditional grant exception applies when the benefit is granted on the conditional acceptance of a positive obligation by the recipient of the benefit. The benefit and burden exception applies if the benefit is not conditional on the acceptance of a positive obligation, but there exists an implicit and necessary connection between formally separate obligations and advantages.

[69] The respondent recognizes that English courts have moved away from a "pure principle of burden and benefit exception (which required no link between the benefit and the burden)", but contends that English courts have "emphatically accepted and applied both the conditional grant exception and the benefit and burden exception".

[70] The respondent points to *Wilkinson v. Kerdene Limited*, [2013] E.W.C.A. Civ. 44 as confirmation that the benefit and burden exception to the *Austerberry* Rule forms part of the English common law. It also points to *Goodman v. Elwood*, [2013] E.W.C.A. Civ. 1103 as an example where the England and Wales Court of Appeal applied the benefit and burden exception to the *Austerberry* Rule to compel a party who received a benefit from an easement to pay the cost associated with that benefit.

[71] With these persuasive decisions, the respondent contends that any "frailties or uncertainties" concerning the benefit and burden exception referred to in Canadian jurisprudence: (see *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited*, 2002 CanLll 44913 (ONCA)) have been eliminated.

[72] The petitioner disputes the notion that the law in England is settled as outlined by the respondent, but, in any event, submits that English common law does not represent Canadian law, has not been accepted or recognized in Canada in any decision that is binding upon this Court and should not be persuasive in this case.

[73] To more fully convey the current state of the law in England, as well as in Canada, I begin with the decision of Upjohn J. of the High Court in *Halsall v. Brizell,* [1957] 1 All E.R. 371, [1957] Ch. 169. This decision was referred to extensively by the Ontario Court of Appeal in *Amberwood* – a case I will fully consider later in these reasons.

[74] Both the majority and dissent in *Amberwood* set out the facts and legal conclusions in *Halsall* in very similar terms. The dissenting judge in *Amberwood,* MacPherson J.A., discussed the facts in *Halsall* as follows:

> ... the purchasers of lots in a subdivision were entitled under a trust deed to use private roads and other amenities. Each purchaser covenanted to pay a share of the costs to maintain the amenities. This is a classic positive covenant squarely within the rule in *Austerberry*.

[75] The High Court in *Halsall* ultimately held that the successors to the original covenantors were liable to pay their share of the costs. Upjohn J. was aware that he was dealing with positive covenants that do not run with the land, but he nevertheless concluded they were enforceable in this case. He observed at p. 377 All E.R.:

> It is, however, conceded to be ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I refer to one sentence during the argument in *Elliston v. Reacher*, [1908] 2 Ch. 665, where Sir Herbert Cozens-Hardy, M.R., said, at p. 669:
>
> > It is laid down in Coke on Littleton, 230b, that a man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it.
>
> If the defendants did not desire to take the benefit of this deed, for the reasons that I have given they could not be under any liability to pay the obligations thereunder. They do desire, however, to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road ... Therefore, it seems to me that the defendants here cannot, if they desire to use their house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. On that principle it seems to me that they are bound by this deed, if they desire to take its benefits.

[76] Both the majority and the dissent in *Amberwood* discussed the immediate reaction to *Halsall,* but with very different emphases. Writing for the majority, Charron J.A., as she then was, wrote that "it is noteworthy that the decision in Halsall v. Brizell has been the subject of much debate and criticism": at para. 66. Conversely, MacPherson J.A. held that "[t]he analysis and result in Halsall were almost immediately acclaimed in important quarters": at para. 104. Both judges supported their opposing positions by referring to a case comment that R.E. Megarry, as he then was, wrote, either to observe that Mr. Megarry "pointed out the frail underpinnings of Halsall": at para. 66, or that he had written a "favourable case comment on Halsall": at para. 107.

[77] Notably, Mr. Megarry later became Megarry V.C. and wrote the decision in *Tito v. Waddell (No. 2),* [1977] 3 All E.R. 129, [1977] Ch. 106, in which he applied *Halsall* 20 years later.

[78] Ten years after *Halsall,* the English Court of Appeal in *E.R. Ives Investments Ltd. v. High,* [1967] 1 All E.R. 504, [1967] 2 Q.B. 379 extended the doctrine to parole agreements. All three judges delivered reasons and cited *Halsall* with approval. The House of Lords refused leave to appeal.

[79] In *Amberwood*, MacPherson J.A. set out the facts of *E.R. Ives Investments Ltd*.:

> [105] ...the plaintiffs' predecessor in title, Mr. Westgate, and the defendant, Mr. High, bought adjacent building sites. The foundations of Westgate's building trespassed under High's land. Because Westgate and High were, in Danckwerts L.J.'s words, "sensible and reasonable neighbours" (p. 509 All E.R.), they discussed the situation and reached an agreement -- Westgate's foundation could stay in place and High would have access across Westgate's yard to a side street. High used Westgate's yard for his car, built a garage on his property which could only be accessed from Westgate's yard, and even paid a portion of the costs of resurfacing Westgate's yard. Eventually, Westgate's property passed into the hands of E.R. Ives Investments Ltd., which challenged High's right of way and sought an injunction restraining High from exercising his right of way across the passage. The trial judge refused the injunction.

[80] In the English Court of Appeal, Lord Denning held at p. 507 All E.R.:

> When adjoining owners of land make an agreement to secure continuing rights and benefits for each of them in or over the land of the other, neither of them can take the benefit of the agreement and throw over the burden of it. This applies not only to the original parties, but also to their successors. The successor who takes the continuing benefit must take it subject to the continuing burden. This principle has been applied ... to purchasers of houses on a building estate who had the benefit of using the roads and were subject to the burden of contributing to the upkeep (see *Halsall v. Brizell*...). The principle clearly applies in the present case. The owners of the block of flats have the benefit of having their foundations in the defendant's land. So long as they take that benefit, they must shoulder the burden. They must observe the condition on which the benefit was granted, namely, they must allow the defendant and his successors to have access over their yard ... Conversely, so long as the defendant takes the benefit of the access, he must permit the block of flats to keep their foundations in his land.

[81] *Tito* appeared another decade later and was seen to be "without question, the leading English case applying the benefit-burden principle": *Amberwood* per MacPherson J.A., at para. 107.

[82] *Tito* was a long and complicated case that addressed numerous issues. The basic facts are that a British company received a licence to mine phosphate on an island in Oceania and as part of this agreed to later replant the land with coconut and other food-bearing trees. The governments of the United Kingdom, Australia and New Zealand later purchased the mining company's undertakings and the rights over the mining operations vested in commissioners from those countries. The island inhabitants later sued for performance of the replanting obligations.

[83] In *Tito*, Megarry V.-C. considered the doctrine in *Halsall* and held at p. 281 All E.R.:

> Conditional benefits and independent obligations. One of the most important distinctions is between what for brevity may be called conditional benefits, on the one hand, and on the other hand independent obligations. An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right; you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden; his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit. In the other class of

> case the right and the burden, although arising under the same instrument, are independent of each other: X grants a right to Y, and by the same instrument Y independently covenants with X to do some act. In such cases, although Y is of course bound by his covenant, questions may arise whether successors in title to Y's right can take it free from the obligations of Y's covenant, or whether they are bound by them under what for want of a better name I shall call the pure principle of benefit and burden.

[84] In this case, Vice-Chancellor Megarry applied the "pure principle" of benefit and burden (which required no link between the benefit and burden) to hold that since the commissioners had received and exercised the benefit of substantial mining rights they also had to fulfill the replanting obligation: *Amberwood,* per MacPherson J.A. at para. 114.

[85] In *Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.), the House of Lords considered whether a positive covenant was enforceable against the successor in title of a freehold estate.

[86] *Rhone* involved a house and an adjoining cottage which shared the same roof. In 1960, the owner sold the cottage but retained the house. In clause 2 of the conveyance, the seller and purchaser agreed to continue all easements existing between the house and cottage. This clause had the effect of confirming that the cottage and the house each had the right to be supported by the other. In clause 3, the seller covenanted for himself and his successors in title to maintain the portion of the roof that covered the cottage in wind and watertight condition to the reasonable satisfaction of the purchasers and their successors in title. This clause appeared to grant the owners of the cottage the right to sue the owners of the house for damages if the roof was not kept wind and watertight. Both properties were subsequently sold to the parties in *Rhone.* In the mid-1980s, the plaintiff, the owner of the cottage, sued the defendant, the owner of the house, for damages due to a leaking roof.

[87] In *Amberwood*, the majority reviewed *Rhone a*t length and summarized the decision at para. 22:

> Lord Templeman, in his reasons delivered on behalf of the court, set out a useful and succinct review of the law related to covenants, including the different rules governing restrictive and positive covenants, its historical

> development, and its underlying rationale. Lord Templeman also acknowledged the severe criticism of the present state of the law on positive covenants and the call for legislative reform made by the Law Commission in England. He also considered, and declined, the invitation to abolish the rule in *Austerberry*, finding that any need for reform was a matter for Parliament. Finally, he considered and rejected the argument that the rule in *Austerberry* had been blunted by the benefit and burden principle.

[88] The discussion in *Rhone* of the benefit and burden principle is particularly relevant to the case at bar. Lord Templeman held at 8-9:

> [Counsel for the cottage owners] also sought to persuade your Lordships that the effect of the decision in the *Austerberry* case had been blunted by the "pure principle of benefit and burden" distilled by Sir Robert Megarry V.-C. from the authorities in *Tito v. Waddell (No.2)* [1977] 1 Ch. 106, at 301 et seq. I am not prepared to recognise the "pure principle" that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Sir Robert Megarry relied on the decision of Upjohn J. in *Halsall v. Brizell* [1957] Ch. 169. In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implication. *Halsall v. Brizell* was just such a case and I have no difficulty in whole-heartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In *Halsall v. Brizell* there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers. In the present case Clause 2 of the 1960 Conveyance imposes reciprocal benefits and burdens of support but Clause 3 which imposed an obligation to repair the roof is an independent provision. In *Halsall v. Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof.
>
> [Emphasis in original]

[89] Almost 20 years after *Rhone,* Patten L.J. wrote for a unanimous court in *Wilkinson* and explained at para. 14 that after *Halsall:*

> *...* subsequent decisions of this Court and the House of Lords have stressed the need for there to be a sufficient degree of correlation between the covenant to pay and the grant of relevant property rights (usually easements) before equity will allow the burden of the payment covenant to be enforced

against successors in title with whom there is neither privity of contract nor privity of estate. The defendant must also be theoretically at liberty to disavow any use of the benefit of the property rights as a condition of renouncing the burden of payment.

[90] In *Wilkinson*, Patten L.J. later expanded on this point:

> [27] What Lord Templeman emphasised in *Rhone v Stephens* was that a successor in title to the original covenantor did not incur a liability to perform a positive covenant such as the covenant to repair in that case unless it had some real relation to a right granted in his favour under the conveyance which he did wish to exercise. The reference in his speech to the exercise of those rights being conditional upon the performance of the positive obligation is not, as he made clear, limited to cases in which it is expressly so conditional. In *Halsall v Brizell* the owners of houses on an estate covenanted to pay a due proportion of the cost of maintaining and keeping in good repair the roads, sewers, promenade and sea wall serving the estate. There was nothing in the conveyance itself which in terms made the enjoyment of these facilities conditional upon the payment of the maintenance charge and the charge was payable under the terms of the conveyance for their maintenance and not for the exercise of the right to enjoy and make use of them. But Upjohn J said of the owners of the houses who were successors in title to the original covenantors:
>
> > "If the defendants did not desire to take the benefit of this deed, for the reasons I have given, they could not be under any liability to pay the obligations thereunder. But, of course, they do desire to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road. The defendants cannot rely on any way of necessity or on any right by prescription, for the simple reason that when the house was originally sold in 1931 to their predecessor in title he took the house on the terms of the deed of 1851 which contractually bound him to contribute a proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to me that the defendants here cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. Upon that principle it seems to me that they are bound by this deed, if they desire to take its benefits."
>
> [28] What this recognises ... was that, in substance, the payment of an annual charge for the maintenance of facilities which the defendants are only entitled to use by virtue of rights granted under the deed is relevant to the continued exercise of those rights even though it is in fact (and in terms) a

> contribution to the cost of their maintenance. The two are not inconsistent. Quite the contrary.

[91] In *Goodman*, Patten L.J. also wrote the unanimous decision. Referring to an earlier decision, the Court summarized the applicable test for the benefit and burden principle:

> [24] In *Davies v Jones* [2009] EWCA Civ 1164 at [27] the Chancellor, Sir Andrew Morritt, identified from the authorities three conditions which need to be satisfied in order for the burden of a positive covenant such as the one in this case to be enforceable against the covenantor's successors in title. They are, he said:
>
> > (1) The benefit and burden must be conferred in or by the same transaction. In the case of benefits and burdens in relation to land it is almost inevitable that the transaction in question will be effected by one or more deeds or other documents.
> >
> > (2) The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter. Whether that requirement is satisfied is a question of construction of the deeds or other documents where the question arises in the case of land or the terms of the transaction, if not reduced to writing, in other cases. In each case it will depend on the express terms of the transaction and any implications to be derived from them.
> >
> > (3) The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit.

[92] On the basis of this overview, I think the respondent is incorrect to say that English courts have emphatically accepted both the conditional grant exception and the benefit and burden exception to the *Austerberry* Rule. Various courts and commentators at various times have referred to two different exceptions, or used different terms to describe them, which can create confusion. The distinction between the two seems to come from *Tito.*

[93] Crucially, the House of Lords in *Rhone* rejected the "pure principle" of benefit and burden from *Tito,* in which no link was necessary between the benefit and burden. The House of Lords did affirm that a positive obligation may run with the

land when a sufficient connection exists between the benefit and burden. This latter concept is what Megarry V.-C. in *Tito* called a "conditional benefit". Subsequent cases, such as *Wilkinson* and *Goodman,* have set out the elements of this principle, applied it, and referred to it as “the benefit and burden principle.” I note that neither the House of Lords nor the England and Wales Court of Appeal refers to this as an "exception" to the *Austerberry* Rule. For the sake of clarity, I will refer to this as the “English benefit and burden principle.”

[94] In its reply submissions, the petitioner seems to suggest that the subsequent decisions of *Wilkinson* and *Goodman* are inconsistent with *Rhone* and thus of dubious worth. If I have accurately characterized the petitioner's position, I think it is incorrect to say that *Wilkinson* and *Goodman* represent departures from *Rhone.* Both cases show the Court applied *Rhone* and the subsequent jurisprudence. I also find support in this conclusion from Preston & Newsom, *Restrictive Covenants Affecting Freehold Land,* 10th ed, (London: Sweet & Maxwell, 2013), in which the author cites *Wilkinson* as an example of the court applying *Rhone* at p. 105, ff 40.

[95] To summarize then, the principles espoused in *Rhone, Wilkinson* and *Goodman* reflect the current state of the law in England. The *Austerberry* Rule continues to apply. However, the burden of a positive covenant will be enforceable against the covenantor's successor-in-title if three conditions are met: the benefit and burden must be conferred in or by the same transaction, the benefit must be conditional on or reciprocal to the burden, and the bearer of the burden must be able to reject or disclaim the benefit, not merely the right to receive it.

5. The *Austerberry* Rule in Ontario

[96] Relying mainly upon Ontario jurisprudence, the respondent argued at the Petition hearing that both the conditional grant exception and the benefit and burden exception to the *Austerberry* Rule derived from the English common law form part of the law in Canada.

[97] Following the Petition hearing, the Ontario Court of Appeal released *Black v. Owen*, 2017 ONCA 397 [*Black* CA], which overturned *Black v. Owen*, 2016 ONSC

40 [*Black SC*], a trial-level decision relied upon heavily by the respondent. As a result, I invited further written submissions and both parties took the opportunity to do so.

[98] The respondent submits that the Ontario Court of Appeal in *Parkinson v. Reid*, 1964 Can Lll 38 considered and applied an exception to the *Austerberry* Rule and that the Supreme Court of Canada, in the same litigation (1996 S.C.R. 162) "discussed and appeared to accept the benefit and burden exception, but decided that it did not apply" on the facts of the case. However, the respondent now concedes that following *Black* CA, neither the benefit and burden exception, nor the conditional grant exception exists in Ontario law as free-standing exceptions to the *Austerberry* Rule. The respondent maintains, however, that both the conditional grant exception and the benefit and burden exception have a place in Canadian law.

[99] The respondent argues that the Ontario Court of Appeal in *Black* CA did not preclude the incorporation of the benefit and burden exception to the *Austerberry* Rule in Canadian law, but rather recognized that it could not revisit that conclusion from *Amberwood* and incorporate such an exception without a five-person panel.

[100] The respondent also submits that the Court in *Black* CA made clear that a conditional grant is enforceable in Ontario law if it falls within the following description from *Halsbury's Laws of England,* 4th Ed., Vol. 14 at p. 79, a description previously accepted by the Ontario Court of Appeal in *Amberwood* at para. 85. That description from *Halsbury*'s reads:

> 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.

[101] The respondent refers to Charron J.A.'s explanation in *Amberwood* of this description from *Halsbury's* at para. 86:

> [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.

[102] The respondent submits that this approach should apply to the Easement Agreement in this case.

[103] The petitioner submits that *Black* CA clearly precludes the respondent from suggesting that the law in Ontario (and Canada) is shifting in favour of recognizing any common law exceptions to the *Austerberry* Rule. In fact, the petitioner says the opposite is true and emphasizes the absence of any binding authority in Canada that supports the recognition of any common law exceptions to the *Austerberry* Rule.

[104] The petitioner submits that the Supreme Court of Canada in *Parkinson* did not rely on the benefit and burden exception as the respondent argues. Emphasizing several other cases, including *Westbank*, *Amberwood* and *Heritage Capital*, the petitioner contends that the Courts in these cases considered *Parkinson* and concluded that the only exceptions to the *Austerberry* Rule can stem from statute.

[105] The petitioner argues that I am bound to follow the decisions in *Westbank* and *Heritage Capital* that hold that a positive covenant may run with the land only under a statutory exception and that *Black* CA should only serve to reinforce its position that no common law exceptions to the *Austerberry* Rule exist.

[106] Much time was spent by the parties on *Amberwood*. Justice Branch conveniently summarized the facts of *Amberwood* in *The Owners, Strata Plan NWS 3457 v. The Owners, Strata Plan LMS 1425*, 2017 BCSC 1346:

> [37] … 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.

[107] In *Black* CA, the Ontario Court of Appeal revisited and provided clarity to *Amberwood*. Writing for a unanimous court, Cronk J.A., who was part of the majority in *Amberwood*, affirmed that the majority position in *Amberwood* remains the law in Ontario: para. 36.

[108] In *Black* CA, the Court addressed three issues, namely whether the Court in *Black* SC had erred by failing to follow the majority decision in *Amberwood* and by finding that both the benefit and burden exception and the conditional grant exception exist in Ontario and applied in that case. The Ontario Court of Appeal held that the court below had erred in law in all three respects.

[109] *Black* CA also casts doubt on another Ontario trial level decision relied upon by the respondent, *Wentworth Condominium Corporation No. 12 v. Wentworth Condominium Corporation No. 59*, 2007 CanLII 2703. The Ontario Court of Appeal has now clearly held that in light of *Amberwood*, it could not ground a conclusion that the benefit and burden principle forms part of the law of Ontario: para. 50.

[110] The Court in *Black* CA explained the majority and dissent positions in *Amberwood*:

> [6] For lengthy reasons it explained, including the uncertainties and many frailties of the existing common law in England in this area of the law, the majority in *Amberwood* concluded that it would be inadvisable to adopt the benefit and burden exception to the rule about positive covenants in Ontario. For essentially the same reasons, although perhaps not as explicitly, the majority also declined to import the conditional grant exception as discussed in the English jurisprudence into Ontario law, holding, in any event, that it was not available on the facts to assist the defaulting landowner. The dissenting judge in *Amberwood*, MacPherson J.A., would have adopted both exceptions to the positive covenants rule into the law of Ontario and would also have held that both exceptions applied in the particular factual circumstances of that case.

[111] Of the benefit and burden exception, the Court in *Black* CA stated:

> [48] The benefit and burden exception to the positive covenants rule does not form part of Ontario law at the present time. In *Amberwood*, the majority unequivocally held that the principle of benefit and burden, often referred to as the doctrine in *Halsall v. Brizell*, [1957] 1 All E.R. 371, has not been and should not be imported into Ontario law absent legislative reform in this area of the law.
>
> [49] 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 further, that any reform to the positive covenants rule "is best left to the legislature". The majority also stated, at para. 19:
>
> > [T]he 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.

[112] Of the conditional grant exception, the Court in *Black* CA stated that “the majority [in *Amberwood*] did not accept that a conditional grant exception should be recognized under Ontario law as a separate and distinct exception to the positive covenants rule”: para. 63.

[113] What the majority in *Amberwood* did accept was that the description of the conditional grant exception from *Halsbury’s Law of England* accords with the *Austerberry* Rule: para. 85. For convenience sake, I will set out the description from *Halsbury’s* and Charron J.A.’s interpretation of it again. The description reads:

> If the facts establish that the granting of a benefit or easement was conditional on assuming the 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.

[114] The majority in *Amberwood* explained this description:

> [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.

[115] What is clear from the decision in *Black* CA is that neither of the exceptions to the *Austerberry* Rule seen in the English common law are part of Ontario law. It is also equally clear that the Ontario Court of Appeal has decided that, concerning conditional grants, while not an exception to the *Austerberry* Rule, they are enforceable:

> …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.

[116] For clarity, I will refer to this as the "Ontario conditional grant principle". The Court in *Black* CA emphasized that the Ontario conditional grant principle requires a strict reading of the text of the deed itself and ultimately rejected the notion that the principle applied in that case, holding at paras. 69-70:

> [69] The reasons below also fail to explain the basis for the statement that "a benefit was clearly granted to the Owen family, conditional on the acceptance of the positive obligation to pay their share of the annual levies." In my view, the language of the Trust Deed does not support this assertion.
>
> [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.

6. The *Austerberry* Rule in British Columbia

[117] The British Columbia Court of Appeal has not yet had occasion to consider these issues. However, recently two trial courts have.

[118] In the *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71, Young J. was called upon to consider the enforcement of certain positive covenants contained in an easement registered against land in regard to the parking facility in a large multi-use complex in Burnaby.

[119] The petitioner urges me to follow this decision and reach the same conclusions. The respondent, for reasons I will explain, urges me not to follow this decision.

[120] In *Crystal Square*, the developer of a multi-use complex had entered into an easement agreement prior to the incorporation of the strata which dealt with, among other things, parking. The plaintiff strata corporation challenged the enforcement of the positive covenants contained in the easement agreement which purported to require the strata to pay an annual base rate, plus a percentage of all operating expenses for the use of the parking facility invoiced by or on behalf of the defendant. In exchange for payments required under the easement agreement, the plaintiff received the use of 76 parking passes. One of the clauses in the easement agreement at issue – 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 ASP5 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 ASP6 Owner) covenants to pay to the ASP5 Owner an annual parking fee …

[121] In deciding whether the obligation to pay under the easement agreement was binding upon the plaintiff, Young J. was called upon to consider the *Austerberry* Rule and whether any exceptions to it are recognized in Canadian law. In so doing, she considered many of the authorities that I have canvassed, such as *Nordin*, *Heritage Capital*, *Parkinson*, *Amberwood*, *Halsall* and others, and ultimately concluded that Canadian law has not recognized any common law exceptions to the *Austerberry* Rule. Young J. ultimately held that the positive obligations in the *Crystal Square* easement agreement do not run with the land and were, therefore, not enforceable against the plaintiff, who was not a party to the easement agreement.

[122] The respondent argues that *Crystal Square* should not be followed.

[123] First, the respondent submits that the facts in *Crystal Square* are distinguishable from those in the case at bar for a number of reasons. These differences revolve around the nature of the payment scheme for the parkade, whereby the benefit of parking did not correlate with the payment burden. The respondent also emphasizes the egregious behaviour of at least one of the parties in *Crystal Square* as a distinguishing feature.

[124] Second, the respondent submits that *Crystal Square* is a *per incuriam* decision, for two reasons: failing to consider relevant authority and making a blatant error by concluding that the Court in *Amberwood* decided that the conditional grant exception to the *Austerberry* Rule was not a part of Canadian law. The respondent submits that the interests of justice require that I not follow *Crystal Square*.

[125] With respect to the failure to consider relevant case authorities, the respondent points to *Oddguys Holdings Ltd. v. S.C.Y. Chow Enterprises Co. Ltd.*, 2009 BSCS 1867, aff'd 2010 BCCA 176, *Silver Butte Resources Ltd. v. Esso Resources Canada Ltd.* 1994 CanLll 625 (BCSC) and the developments in the English jurisprudence since *Amberwood*.

[126] The respondent contends that the Court's analysis in *Crystal Square* would have been materially different if the Court had recognized that the majority in *Amberwood* accepted that the conditional grant principle formed part of Ontario law. Also, if the Court had considered *Oddguys*, the respondent says the Court would have been bound to find that the benefit and burden exception exists in British Columbia.

[127] The petitioner, on the other hand, submits that the facts in *Crystal Square* bear "remarkable similarities" to the case at bar, that the reasoning of Young J. is compelling and her conclusions are sound.

[128] The petitioner submits that the context in *Silver Butte* is "entirely different" from the case at bar in that in *Silver Butte* the Court was considering the rights of an

assignee to mining agreements. The Court did not consider the *Austerberry* Rule or any exceptions to it, nor would the Rule apply because the Court was not considering the obligations of successors in title.

[129] The petitioner further submits that, contrary to the respondent's view, the Court in *Oddguys* did not clearly accept the benefit and burden principle. The Court dismissed the claim on the basis that the principle would not apply in any event. The petitioner says the Court in *Oddguys* did not recognize the principle as good law, declined to rule on the issue and expressly questioned whether the positive covenants could be enforced in the absence of a statutory exception.

[130] Finally, the petitioner contends that the Court in *Crystal Square* correctly interpreted the majority decision in *Amberwood* to hold that neither the benefit and burden exception, nor the conditional grant exception to the *Austerberry* Rule exists in Ontario law. The petitioner says the reasoning in *Crystal Square* is not vulnerable because Young J. did not have potentially contradictory non-binding authorities before her. *Crystal Square* is a reasoned and correct judgment, particularly now in light of *Black* CA.

[131] Before turning to consider this issue, I will pause to discuss the concept of a *per incuriam* decision.

[132] In *R. v. Pereira*, 2007 BCSC 472, Romilly J. summarized the central hallmarks of a *per incuriam* decision after extensively reviewing the case law on the subject:

> [47] In summary, the central hallmarks of a *per incuriam* decision are the following:
>
> 1. The decision was made in ignorance or forgetfulness of a relevant statute or binding authority which is inconsistent with the decision; and
> 2. Had the court considered the relevant statute or authority, its decision would have been different.
>
> Findings that a previous decision was made *per incuriam* should be rare.

[133] In *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board*, 2006 BCCA 364, the British Columbia Court of Appeal adopted the following description of *per incuriam*:

> [25] The *per incuriam* rule is another example of circumstances in which the Court may decline to follow a previous decision. The rule is described as follows in ***Black's Law Dictionary***, 8th ed., *s.v.* "*per incuriam*":
>
> > "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam*, must in our judgment, consistently with the *stare decisis* rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W. Harris, *Precedent in English Law* 149 (4th ed. 1991).

[134] In *Pereira*, Romilly J. also referred to *R. v. Neves*, 2005 MBCA 112, in which a five-member panel of the Manitoba Court of Appeal reviewed the "three instances generally considered to be rare and exceptional, when decisions of the highest provincial court may be departed from by that court": *Neves* at para. 76. The Manitoba Court of Appeal in *Neves* continued:

> [78] A second instance, sometimes regarded as a subset of the first, occurs if the earlier decision, although not per incuriam, was based on "manifest slip or error." See Morelle, Ltd. v. Wakeling, [1955] 1 All E.R. 708 (C.A.). This means something much more than mere disagreement by the later court with the earlier decision, although it is not always clear exactly what is meant. Lord Scarman said in Farrell v. Alexander, [1976] 1 All E.R. 129 (C.A.) (at p. 145):
>
> > ... [W]e must be prepared to say not merely that we prefer another construction to that favoured by the court whose decision is under challenge; we must be able to demonstrate that the words of the statute are capable of only one meaning and that the meaning attributed to them by the previous decision is an impossibility. Mistake, not a difference of opinion, is the criterion.
>
> [underlining in original]
>
> [79] In his judgment in *Firdale Farms*, Twaddle J.A. referred to Lord Scarman's above comment, and he then said (at para. 32):

> It is a fundamental rule of binding precedent that, where a court has given its opinion on an issue, that opinion is followed by the court in subsequent cases. If it were otherwise, the law might seesaw back and forth depending upon the opinion of the judges who constitute the court in a particular case. That rule has no application, however, where the court inadvertently has attributed to the words of a statute a meaning which they cannot possibly bear. Then, it is our duty to restore the statutory intent.

[underlining in original]

[80] He and Philp J.A. found that a previous decision of this court was in error and that when it had formed its view, the court had not had before it all the information properly required for its decision. Thus, based on the complete materials in the case before them, the court could now say that its prior decision was "one of the rare and exceptional cases ... in which it can be said: error is demonstrated" (at para. 40).

[81] But the scope for reconsideration on the basis of "manifest slip or error" has never been regarded as very wide. See, for example, Scott L.J. in Secretary of State for Trade and Industry v. Desai, [1991] E.W.J. No. 176 (C.A.) (at para. 34):

> The first question in the present case is whether the decision in Tasbian Ltd. (No. 2) [[1990] B.C.C. 322 (C.A.)] involves a "manifest slip or error". This yardstick requires something more than merely showing that the decision was wrong. It requires, I would think, an error so obvious and clear that, as soon as pointed out, it is beyond any argument.

[underlining in original]

[135] I will first review the decisions in *Silver Butte* and *Oddguys* before turning to consider *Crystal Square*.

[136] In *Silver Butte*, the plaintiff and defendant entered into a contract to explore three mineral claims that were registered in the plaintiff's name. The defendant eventually assigned its entire interest in the agreement to a third party. The plaintiff objected. The plaintiff argued that the defendant could not assign its rights under the agreement and that the defendant's actions had terminated the agreement.

[137] Justice Spencer set out the general rule "that the burden of a contract cannot be assigned without the beneficiary's consent unless the contract is of a class where the beneficiary did not rely upon the original contractor's ability to perform it": para. 17. The Court then considered whether the contracted issue was one of the six types of contracts that cannot be assigned without the consent of the other party of

the contract. The Court concluded that the defendant could assign the burden of the contract to a third party without the plaintiff's consent: para. 23.

[138] Justice Spencer, at para. 24, then referred to *Tito* for two principles. The first was the:

> …conditional benefit and burden principle, that where an assignee takes the benefit of a contract and that benefit is conditioned directly upon the performance of some obligation, the assignee must as a matter of law accept the burden also.

[139] The second principle was the:

> …pure benefit and burden principle, that even though a benefit may be independent of a burden, the circumstances under which the assignee came to obtain the benefit may result at law in his being saddled with the burden.

[140] Applying both of these principles, the Court held that the burden of the defendant's obligations to the plaintiff under the contract were binding on the assignees even though no privity of contract existed between the plaintiff and the assignees: para. 25.

[141] Without referring to the *Austerberry* Rule itself, the Court in *Silver Butte* did discuss the principle underlying the rule, namely that a person cannot be liable to perform an obligation under a contract unless he or she is a party to that contract. However, I do not think this advances the respondent's position. At its highest, *Silver Butte* shows that this Court, in 1994, recognized the two principles from *Tito* in a context different from the case at bar. I also observe that the strength of the Court's reliance on *Tito* may be questionable given the House of Lords' decision in *Rhone* (released two months before *Silver Butte*) and by subsequent English decisions such as *Wilkinson* and *Goodman*.

[142] In *Oddguys*, two adjacent commercial property owners shared a common "party wall". This wall was a load-bearing structural element that provided lateral support for both buildings. A party wall agreement, signed on March 8, 1898, was registered against the title to each lot.

[143] A fire destroyed the building in 2004 on one of the lots and also damaged the party wall, rendering the party wall structurally unsound. The defendant, the owner of the lot whose building had burned, decided to use the lot as a parking lot instead of rebuilding. The plaintiff, the owner of the other lot, was required to spend money to repair the party wall. The plaintiff then sought an equal contribution from the defendant, relying both on the party wall agreement and the principle of unjust enrichment.

[144] The plaintiff in *Oddguys* acknowledged that positive covenants are generally not enforceable against a successor in title, but argued that benefit and burden exception to the *Austerberry* Rule applied in the circumstances, requiring the defendant to share the repair cost. Justice Martinson set out the plaintiff's submissions at paras. 9-10 as follows:

> [9] The plaintiff argues that both English and British Columbia courts have recognized that where the benefits of a contract or agreement are relevant or reciprocal to the burdens imposed by the contract or agreement, successors or assignees to the contract or agreement are bound by and must perform the burdens and obligations.
>
> [10] As a result, the plaintiff says that the defendant is legally bound by its obligations in the Agreement, including the obligation to repair and maintain the party wall. It says that the defendant, prior to the fire, clearly reaped the benefit conferred by the party wall. It also says that since the fire, the defendant has benefited from the Agreement because it can now safely operate a parking lot and can use the party wall for any future development.

[145] The dispute in *Oddguys* revolved around Article 4 of the party wall agreement, which the defendant accepted was enforceable against it for the purposes of the dispute. The Court interpreted Article 4 in the wider context of the party wall agreement and agreed with the defendant that, given its wording, the defendant had no liability if it did not use the wall: paras. 25-26. The Court held that Article 4 would require the defendant "to pay for its portion of the repair if it decided to rebuild using the party wall": para. 27.

[146] Justice Martinson continued:

> [28] I have reached this conclusion assuming, without deciding, that Article 4 is, in fact, enforceable against the defendant. It is arguable that, in the

> absence of legislation (found in some other Canadian jurisdictions but not British Columbia), the burdens found in the party wall agreement do not run with the land: *Anger & Honsberger* at §17:20.40(a) and §16.20.10(d).
>
> [29] The benefit/burden principle would not apply because there is no benefit. The defendant is not using the party wall and is, therefore, not receiving the benefit of the Agreement: ***Parkinson v. Reid***, [1966] S.C.R. 162, 56 D.L.R. (2d) 315; and ***Halsall***. The fact that the defendant is able to safely operate its parking lot is not a benefit under the Agreement.
>
> [My emphasis]

[147] Importantly, in *Oddguys*, both parties accepted for the purpose of their dispute that the party wall agreement was enforceable. The dispute hinged on the interpretation of that agreement. The Court accepted this approach and expressly stated that it was not deciding whether the agreement was actually enforceable. Martinson J. noted the view that the only exceptions to the *Austerberry* Rule exist in statute. Given her conclusion that the agreement did not make the defendant liable, it was unnecessary for her to decide whether the benefit and burden exception to the *Austerberry* Rule actually exists in British Columbia.

[148] In the result, I disagree with the respondent that if Young J. in *Crystal Square* had considered *Silver Butte* and *Oddguys* that she would have been bound to find that the benefit and burden exception to the *Austerberry* Rule exists in British Columbia.

[149] Turning now to *Crystal Square*. Young J. referred to both the benefit and burden exception and the conditional grant exception to the *Austerberry* Rule and suggested that the majority in *Amberwood* had concluded that neither exception had taken hold in Canadian law. More specifically, Young J. interpreted *Amberwood* to mean that the description from *Halsbury's* of the conditional grant exception did not form part of Ontario law. Justice Young did not, of course, have the benefit of the Ontario Court of Appeal's clarification of *Amberwood* in *Black* CA*,* but still found that neither exception to the *Austerberry* Rule had taken hold in Canadian law. What the Ontario Court of Appeal has now clarified is that the principle of a conditional grant, in line with the description from *Halsbury's*, is theoretically available in Ontario law.

[150] Justice Young referred to binding authority, noting that the Supreme Court of Canada in *Heritage Capital* did not discuss either the benefit and burden exception or the conditional grant exception. The Court also referred to *Parkinson* for the proposition that positive covenants do not run with the land, either at law or in equity.

[151] In its argument that *Crystal Square* is *per incuriam*, the respondent has not pointed to any binding authority or relevant statute that Young J. failed to consider. Non-binding decisions from other provinces or countries do not meet this criterion. Accordingly, I disagree with the respondent that *Crystal Square* is *per incuriam* on that basis.

[152] I also disagree with the proposition that *Crystal Square* is *per incuriam* on the basis of a manifest slip or error. The respondent submits the decision is *per incuriam* due to Young J's conclusion that "it is plainly the law of Ontario that successors in title are not bound to perform positive covenants": para. 54. I agree with the parties that the Ontario Court of Appeal in *Black* CA has since clarified that it is prepared to enforce a positive obligation when an agreement frames a grant of benefit or easement as conditional on the continuing performance of the positive obligation. Young J. did not have the benefit of *Black* CA. Again, however, despite this, it is important to remember that Young J. was interpreting a non-binding decision from another province (*Amberwood*). With the benefit of the clarification of *Amberwood* in *Black* CA she may have reached a slightly different conclusion about the state of the law in Ontario, but I find the respondent has failed to meet its onus to show that Young J. would have necessarily reached a different result in *Crystal Square*.

[153] I also observe that the jurisprudential developments referred to by the respondent in England do not necessarily mean that a trial court in British Columbia should automatically follow suit. I do not think that *Crystal Square* is flawed because Young J. did not have recent English authorities brought to her attention.

[154] Very recently, this Court released *The Owners, Strata Plan NWS 3457* in which Branch J. followed *Crystal Square* in circumstances very similar to those found in *Amberwood*. Justice Branch reviewed *Amberwood*, *Black* CA and *Crystal*

Square and concluded, after a review of all of the authorities, that he was prepared to follow *Crystal Square*. Justice Branch had the benefit of *Black* CA and was fully alive to the Ontario conditional grant principles' status in the law of that province. Justice Branch rejected its adoption in our province on a principled basis.

[155] Recalling the comments of our Court of Appeal in *Vu*, a judge of this Court is not obliged to follow the decision of an appellate court in another province. Such decisions are persuasive, but not binding. Though the Ontario Court of Appeal has recently re-affirmed that a conditional grant in line with the description from *Halsbury's* is enforceable in that province, two decisions from the British Columbia Supreme Court have recently concluded otherwise. I note that *Crystal Square* is currently under appeal, so our Court of Appeal may reach its own decision on the matter.

[156] Until that happens, I find it to be in the interests of justice that I follow the decisions of Young J. and Branch J. The alternative would be to issue a contradictory decision that would create uncertainty in the law in British Columbia. There are no exceptional circumstances here where it would be appropriate in the interests of justice for me to decline to follow these decisions.

[157] Despite this conclusion, I will go on to consider the respondent's additional arguments.

7. Should any English or Ontario Exceptions or Principles be Available in British Columbia?

[158] The respondent argues that despite the decisions to the contrary, both the English benefit and burden principle and the Ontario conditional grant principle have a place in the law of this province. The respondent emphasizes that *Black* CA does not preclude the recognition of the English benefit and burden principle as the Ontario Court of Appeal in *Black* CA recognized that it would need a five-member panel to overturn *Amberwood*. The respondent also emphasizes that the Supreme Court of Canada has never directly considered whether common law exceptions to

the *Austerberry* Rule exist or should exist. It says that *Heritage Capital* does not preclude the possibility of such exceptions.

[159] The respondent contends that an inconsistency exists between *Heritage Capital* on the one hand and *Amberwood* and *Black* CA on the other. In *Heritage Capital*, the Court affirmed that "no 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": para. 25. In *Amberwood* and *Black* CA, however, the Ontario Court of Appeal has held that a positive obligation in an easement agreement is enforceable if the right to use and enjoy the easement is conditional on the performance of the positive covenant. The respondent also notes that the Court in *Heritage Capital* expressly referred to and approved of *Amberwood*.

[160] The petitioner argues against any reform to the *Austerberry* Rule in British Columbia to recognize either the English benefit and burden principle, a conditional grant "exception" or the Ontario conditional grant principle.

[161] The petitioner submits that to suddenly create common law exceptions to the *Austerberry* Rule in British Columbia would cause significant uncertainty and create problems. Most notably, it argues that to do so would be "springing liabilities" on land owners, who would suddenly become liable for any obligations assumed by their predecessors in title.

[162] The petitioner submits that the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] already offers certain exceptions to the rule that positive covenants do not run with the land. The petitioner observes that democratic processes apply to these exceptions, giving strata owners a voice in what expenses and obligations they incur. The petitioner argues that the *SPA*'s model of cost allocation and governance was open to the respondent to use when it created the legal framework for Jameson House. By creating a common law exception to the *Austerberry* Rule in these circumstances, powerful developers would be allowed to do an end run around the consumer protection provisions in the *SPA*.

[163] The petitioner also emphasizes that the respondent could have attempted to have the strata owners assume the positive covenants through an assumption agreement, a common practice in British Columbia and one contemplated in the Easement Agreement. The petitioner speculates on several possible explanations for why the respondent failed to do so, but submits that none of them is a compelling reason for this Court to create common law exceptions to the well-entrenched *Austerberry* Rule.

[164] The petitioner highlights *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842 for the proposition that any change to the common law should be incremental, have consequences that are capable of assessment, and serve at least one of three ends "to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve an inconsistency": para. 42.

[165] The petitioner submits that in Canada, the *Austerberry* Rule and its limited statutory exceptions are clearly defined such that it is unnecessary for me to clarify a legal principle or resolve an inconsistency.

[166] As for changes to reflect society's evolution, the petitioner cites the caution in *Friedmann* that a common law rule may appear anachronistic vis à vis our broader society, yet serve an important commercial purpose: para. 46. The petitioner submits that no commercial necessity exists for altering the common law in the manner in which the respondent proposes, particularly in the strata context.

[167] With respect to the benefit and burden exception to the *Austerberry* Rule, the petitioner submits that this exception is not a part of the common law in Canada, citing *Crystal Square* and others. The petitioner further submits that this exception should not be the law in British Columbia, citing the reasons the majority identified in *Amberwood*. With respect to the "conditional grant" exception, the petitioner submits that the Court in *Crystal Square* concluded that the conditional grant principle does not create an exception to the *Austerberry* Rule. The petitioner submits that the Court in *Amberwood* accepted the conditional grant principle in a form consistent

with the *Austerberry* Rule and that this approach would create privity of contract, but would not make the positive covenant run with the land.

[168] In my view, the respondent is swimming against a strong current of precedent and policy. Though the courts in England recognize a benefit and burden principle and the Ontario Court of Appeal recognizes a conditional grant principle, trial courts in British Columbia have thus far refused to follow suit. Until our Court of Appeal holds otherwise, this is a compelling enough reason to decline to recognize some type of modification to the *Austerberry* Rule in this case, whether characterized as an exception or a principle.

[169] As well, I think this is a poor case in which to argue for a major change to the common law in British Columbia. The petitioner correctly points out the surrounding context of the consumer protection provisions in the *SPA*. The respondent could have used the *SPA's* separate sections model, but chose not to because it did not want the residential strata owners to overwhelm the others owners in a mixed-use building. The respondent made this choice, presumably with legal advice and knowledge that positive covenants are not enforceable against a successor in title. The respondent has now encountered difficulties as a result of its approach and asks this Court to intervene, not only on its behalf, but in a manner that could disrupt commercial relations in British Columbia more broadly.

[170] Another important feature of this case is that it does not concern a positive covenant contained in an agreement originally entered into by two arms-length entities. Rather, JHV entered into an Easement Agreement with itself, created the successor in title to that agreement and now asks the Court to declare that the successor in title is bound by the agreement's positive covenants. The cases the respondent cites to support its positions are distinguishable on this basis. The potential pointed to by the respondent that by not enforcing the positive covenant, the Court would be permitting the petitioner to use the parkade without paying for it is speculation and does not, in my view, form a sufficient basis to recognize some form of exception to the *Austerberry* Rule fundamentally changing the common law.

As many other courts have held, if there is to be some reform to the *Austerberry* Rule, it must come from the legislature, not the courts.

DECISION

[171] These conclusions are sufficient to resolve this matter in the petitioner's favour. However, even if I were to adopt the Ontario conditional grant principle from *Black* CA, I would reach the same conclusion.

[172] Turning to the construction of the instrument itself, I find I cannot agree with the respondent's position that the positive covenant requiring the petitioner to pay a share of the parkade expenses found in Article 5.8 of the Easement Agreement is part of and limits the scope of the grant, rendering it binding upon the petitioner.

[173] The respondent accepts that the grant of easement to the residential strata owners in Article 5.3 is "subject to the following terms, conditions and limitations" contained in sub-articles 5.3(a) and 5.3(b). In turn, sub-article 5.3(a) includes the phrase "subject to the terms, conditions and limitations herein contained." Under sub-article 13.6(d), the word "herein" is defined to refer to the entire Easement Agreement, not any specific part of it. The respondent suggests that the word "herein" is a crucial link between the benefit and burden, or clear evidence of a conditional grant, because the word "herein" is defined to refer to the Easement Agreement as a whole, rather than a particular provision.

[174] I cannot agree. Rather, I agree with the petitioner's position that the use of the word "herein" in Article 5.3(a) does not mean the grant is conditional on all terms in the Easement Agreement. Such an interpretation would run contrary to the decision in *Amberwood* that an easement cannot simply make a grant conditional on every positive covenant in an agreement so as to negate the *Austerberry* Rule: para. 20, but it also seems to me that to interpret it as the respondent suggests would be to impose a form of the "pure principle" of benefit and burden, which even the English courts have rejected for positive covenants.

[175] Nowhere does the Easement Agreement provide that the right to use the parkade is conditional upon the acceptance of the burden contained in the positive covenant that contemplates the cost-sharing of expenses to operate the parkade. The grant of the right is expressly set out in the main part of Article 5.3 and is not subject to the whole agreement. It is "subject to the following terms and conditions and limitations," referring to 5.3(a) and 5.3(b). Sub-article 5.3(a) is the only part that uses the "herein" language, but I conclude that language only applies to that one sub-article and not the grant as a whole. Sub-article 5.3(a) sets out how a grantee may go through the "Remainder Drive Aisle Volumetric Easement Area." The "Remainder Drive Aisle Volumetric Easement Area" is distinct from the APSS itself and is not referred to in Articles 5.3.6 to 5.3.8 which deal with the APSS cost. Sub-article 5.3(b) is only "subject to the limitations and constraints discussed in sections 5.3.2 and 5.3.4 hereof." Articles 5.3.2 and 5.3.4 do not deal with parkade expenses.

[176] Finally, I note that the language used in the Easement Agreement purporting to have any positive covenants in it run with the land highlights the caution of the majority in *Amberwood* that parties cannot abolish the *Austerberry* Rule by simply stating their intention that a positive covenant runs with the land, otherwise:

> …All that would be required would be a general statement of intent that the continuing right to the use and enjoyment of all the benefits in an agreement was conditional upon the acceptance of the burden contained in any of the covenants. The recognition of such a wide exception would constitute a profound change in the law.

[177] In the end, I conclude the petitioner is entitled to a declaration that it is not bound by any of the positive covenants of easement registered with the Land Titles Office on December 24, 2010 under registration numbers BB1301520 and BB1301701. The parties are at liberty to speak to costs if necessary.

"S.A. Donegan J."

DONEGAN J.