COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: The Owners, Strata Plan BCS 4006 v.
Jameson House Ventures Ltd.,
2019 BCCA 144

Date: 20190507
Docket: CA44904

Between:

The Owners, Strata Plan BCS 4006

Respondent
(Petitioner)

And

Jameson House Ventures Ltd.

Appellant
(Respondent)

Before: The Honourable Madam Justice Garson
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated November 2, 2017 (*The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988, Vancouver Registry S166047).

Counsel for the Appellant:	G.S. McAlister and A. Morrison
Counsel for the Respondent:	P. Mendes, A. Chang
Place and Date of Hearing:	Vancouver, British Columbia November 26 & 27, 2018
Place and Date of Judgment:	Vancouver, British Columbia May 7, 2019

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Garson
The Honourable Madam Justice Fisher

Summary:

The appellant and the respondent's predecessor in title entered into an easement agreement. The respondent obtained a declaration at trial that it was not bound by any of the positive obligations under that easement agreement. At trial and on appeal from this declaration, the appellant asserted that the courts should recognize an exception to the rule that positive obligations do not run with the land to bind successors in title. Held: Appeal dismissed. The rule that free-standing positive obligations do not run with the land to bind successors in title is long-standing. Although some exceptions to the rule have been recognized in England, these exceptions have not yet been adopted in Canada. While there are compelling reasons to allow exceptions, the legislature is in a better position to make such modifications to the rule as may be considered desirable. The rule, however, does not preclude truly conditional easements. The pleadings in this case do not squarely raise the issue whether continued exercise of the easement by the dominant tenant is conditional on the fulfilment of corresponding burdens.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

I. INTRODUCTION

[1] This appeal, together with an appeal heard on the same date from the judgment in *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71 [*Crystal Square*] (CA44250), requires us to consider the effect upon successors in title of agreements imposing positive obligations that purport to run with the title to land.

[2] The appellants in both cases argued we should recognize exceptions to the rule that positive obligations cannot run with land to bind successors in title to those who first assume the obligations. For reasons set out below, I am of the view we should not recognize exceptions to the well-settled rule that parties to a covenant cannot create free-standing positive obligations that run with title to land. That rule, in my view, does not preclude parties from creating easements that can only be exercised conditionally. Whether the easement in this case was such a conditional easement is not a question arising out of the respondent's petition for a declaration certain positive obligations are unenforceable and do not run with the land.

A. The Rule in *Austerberry*

[3] At the heart of this appeal is the rule, stated in *Austerberry v. Corporation of Oldham*, [1885] 29 Ch. D. 750 (C.A.) and sometimes referred to as the rule in *Austerberry*, that positive covenants do not run with land. There is some support in the jurisprudence for the recognition of exceptions to the rule that will permit some positive covenants to run with land. The argument for exceptions to the rule is intended to make room in the common law for the creation of freestanding and enforceable positive obligations binding upon successors in title.

B. Exceptions to the Rule

[4] First, some have called for the recognition of a broad exception to the rule whereby an easement is created as part of a covenant that imposes mutual benefits and burdens upon the parties ("the benefit/burden exception"). In such cases, it is argued, both the benefits and burdens should run with the land. This broad exception is now largely rejected.

[5] Second, there is support for the recognition of a more narrow exception to the rule whereby burdens that are reciprocal to the benefits of an easement or establish an obligation, which must be fulfilled in order for an easement to be exercised, can run with the land as a free-standing exception to the rule in *Austerberry* ("the conditional grant exception"). The argument in support of such an exception is cogently set out in the dissenting opinion of MacPherson J.A. in *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited* (2002), 58 O.R. (3d) 481 at paras. 143-152 (C.A.). Although this narrow exception appears to have won wide acceptance in England, it has not yet been recognized in Canada.

C. Conditional Easements Generally

[6] The rule in *Austerberry* does not preclude parties from creating conditional easements, where the owner of the dominant tenement cannot exercise the rights under the easement unless they have fulfilled a corresponding condition. The requirement to fulfill such a condition is not a freestanding obligation the owner of

the servient tenement can enforce. However, the consequence of non-performance may be that the owner of the dominant tenement cannot exercise, or loses rights under, the easement. In that sense, the positive obligation of a conditional easement cannot be said to run with the land as a free-standing obligation, despite the fact it is an incident of the use of the easement.

[7] The respondent, as petitioner below, sought a declaration that an obligation to pay certain fees in the relevant covenant is unenforceable against it because it is a positive covenant that does not run with the land. For reasons set out below, I would not recognize the exceptions to the rule in *Austerberry* urged upon us by the appellants. In my view, the freestanding positive covenant in question does not run with the land. That is not to say, however, that the easement granted by the servient tenement in this case is unconditional, nor does it determine whether the respondent may continue to enjoy the easement if it does not pay the fees charged by the appellant.

II. BACKGROUND

[8] The appellant is the developer of a 37-storey office, retail and residential mixed-use building, Jameson House, located at 838 West Hastings Street in Vancouver. The respondent is a strata corporation representing the owners of residential strata lots in the building.

[9] Jameson House is constructed on a single lot subdivided into five air space parcels and a remainder:

- Air Space Parcel #1: 138 residential strata units and common property on floors 14 - 37;
- Air Space Parcel #2: 8 commercial strata lots used as offices on floors 5 - 12;
- Air Space Parcel #3: retail space on floor 1;
- Air Space Parcel #4: commercial and office space on floor 3;
- Air Space Parcel #5: retail space in the heritage buildings; and
- Remainder Parcel: shared facilities, such as electrical, mechanical and fire suppression systems, in the basement and on floor 13, and the

> parkade in the basement, in which there is an automated, driverless parking and storage system ("APSS") which can accommodate up to 238 vehicles.

[10] On October 1, 2010, before the air space parcels were subdivided and stratified, the appellant, still the owner of all the parcels, and the City of Vancouver executed an agreement (the "Easement Agreement") which provided, in part:

> 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 [sic] 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.

[11] The trial judge summarized further provisions of the Easement Agreement as follows:

> [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 [Remainder] 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.

[12] When the Easement Agreement was executed, the Strata did not exist but its existence was contemplated by the provisions of the Easement Agreement, which made specific reference to it (as in clause 5.3, cited above).

[13] The agreement purported to create mutual obligations that would run with the land:

> 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.

[14] The plan establishing the Strata was filed on December 24, 2010. The Easement Agreement was registered on title to each of the residential strata lots and common property of the Strata. The trial judge found purchasers of residential strata units had notice of the terms of the Easement Agreement 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. The Strata was not a party to the Easement Agreement and did not sign an assumption agreement, but from 2010 onward, it did pay its share of the costs of maintaining the parkade as outlined in the Easement Agreement.

III. JUDGMENT APPEALED FROM

[15] The issue below, as it is on appeal, was whether the Strata is bound by any of the positive covenants in the Easement Agreement, particularly the parkade cost-sharing provisions. The trial judge, for reasons indexed as 2017 BCSC 1988, held the petitioner to be entitled to a declaration “that it is not bound by any of the positive covenants of easement registered with the Land Title Office”.

[16] The parties at bar agree the parkade cost-sharing provisions are positive covenants and the Strata, as a stranger to the agreement, is not bound by them unless they run with the land or have otherwise been assumed.

[17] The trial judge was asked to consider whether exceptions to the rule in *Austerberry* described in English law, the benefit/burden exception or the conditional grant exception, should be recognized as part of our law. Further, the appellant contended that if the covenant did not run with the land, the respondent was nevertheless required to discharge the obligation if it desired to take the benefit of the easement, a principle said to have been recognized by the Ontario Court of Appeal in *Amberwood* and *Black v. Owen*, 2017 ONCA 397.

[18] The judge held, first, comity compelled her to follow trial decisions in this province, particularly the decisions in *Crystal Square* and *The Owners, Strata Plan NWS 3457 v. The Owners, Strata Plan LMS 1425*, 2017 BCSC 1346 [*Scottsdale*], that had rejected the exceptions to the rule in *Austerberry*:

> [168] In my view, the respondent [Jameson House] 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.

[19] Although not bound to do so, because the relief sought in the petition was limited, the judge then addressed whether the easement in issue could be characterized as one that could only be exercised on payment of the parkade operating costs, so the positive obligation to pay could be regarded as an incident of the exercise of the easement. She considered that argument to hinge upon adoption of what she referred to as the “Ontario conditional grant principle”. She rejected that principle, considering it to be contrary to established law in this province.

[20] She went on to conclude if she had considered the “conditional grant principle” to be consonant with our law, she would not have found the easement in

this case to have been conditional upon payment of a share of parkade expenses, for the following reasons:

> [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.

IV. GROUNDS OF APPEAL

[21] The appellant says the law relating to positive covenants has not been settled at the appellate level in this province and urges upon us the adoption of the

exceptions to the rule in *Austerberry*, or, in the alternative, a finding, as a matter of construction of the Easement Agreement, that the grant of easement is conditional upon the Residential Parkade Users reimbursing the Remainder Owner one-twelfth of the Annual Estimated Parkade Operating Costs Budget each month.

[22] The appellant says the trial judge erred by:

> (a) concluding that the decision of the Supreme Court of Canada in *Heritage Capital Corp. v. Equitable Trust Co*., 2016 SCC 19 [*Heritage Capital*], is authority for the proposition that the only circumstance in which a positive covenant will be binding on successors in title is when a statute provides for the covenant to run with the land;
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> (b) concluding that the provisions of the Easement Agreement which require the Strata Corporation to pay a share of the parkade expenses were not enforceable because the obligation to pay a share of the Parkade Expenses is a positive covenant that does not run with the land, [a conclusion] based on the erroneous premise that the rule in *Austerberry* is an absolute rule that has not been modified and does not permit exceptions;
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> (c) not recognizing and applying the conditional grant [exception] which has been accepted by both the English courts and the Ontario courts and the benefit and burden [exception] which has been accepted by the English courts; and
>
> (d) failing to consider the surrounding circumstances in which the Easement Agreement was made and the objective intentions and commercial purposes of the Easement Agreement at the time it was made in determining that the Strata Corporation's right to use the Parkade was not conditional on the payment of the Parkade Expenses.

[23] The first three errors alleged go to the question raised by the petition: whether the positive obligation to pay parkade expenses runs with the land. The fourth does not. It concerns the question whether the exercise of the right conferred upon the dominant tenement, to park in the easement area, is conditional upon the payment of a fee. In my view, in order to determine whether the order under appeal ought to have been made, it is not necessary or appropriate in this case to answer that question.

V. ANALYSIS

[24] As petitioner in the court below, the respondent sought: "A declaration that the Petitioner is not bound by any of the positive covenants of easement registered

with the Land Title Office on December 24, 2010 under registration numbers BB1301520 and BB1301710". The question they framed did not call for a declaration with respect to the consequence of a ruling that the positive covenants do not run with the land. In its response, the appellant argued:

a) as a servient owner, it was not obliged to incur the cost of maintaining the easement;

b) the right to use the easement is conditional upon the payment of the parkade fee and "the conditional grant exception applies"; and

c) the right of the respondent to use the parkade was "implicitly or necessarily connected to their obligation to pay the Residential Share of the Parkade Operating Costs and therefore the benefit and burden exemption [from the rule in *Austerberry*] applies."

[25] The petition only addresses the question whether the respondent is bound by any of the positive covenants in the easement. The petition did not ask, and the trial judge rightly did not address, whether the appellant had the positive obligation of paying the cost of maintaining the parkade. Nor did the petition require the judge to determine whether the respondent's access to the parking facility is conditional upon payment of the parkade operating costs.

A. Development of the Rule in *Austerberry* in England

[26] The dispute in *Austerberry* arose when the Corporation of Oldham acquired title to a toll road constructed by the previous owners for the benefit of neighbouring properties. Upon doing so, the Corporation took the position the road became a highway repairable by the inhabitants of the properties neighbouring the road. The owners of the properties neighbouring the road argued Oldham had purchased the road with notice of and subject to the provisions of a trust deed requiring the owner of the road to maintain it at the owner's expense. The plaintiffs argued the trustees of the road had been bound to repair the road and Oldham, as purchaser, could be in no better position. This was said to be a principle established in *Tulk v. Moxhay*,

[1848] 41 E.R. 1143, which decided equity would not permit a purchaser to avoid obligations he was aware of at the time of the conveyance. Oldham argued the burden of a positive covenant cannot run with the land and, because it called for expenditure of money, the covenant in issue could not be enforced.

[27] Lord Justice Cotton in the Court of Appeal held at 773-774:

> In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation or the trustees from using the land in any particular way, at least so far as this case is concerned. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is, from its being used as a road or street, that would be a very different question; then one would have to consider this–how far… the equitable right would travel; because, undoubtedly, where there is a restrictive covenant, the burden and benefit of which do not run at law, Courts of Equity restrain anyone who takes the property with notice of that covenant from using it in a way inconsistent with the covenant. But here the covenant which is attempted to be insisted upon on this appeal is a covenant to lay out money in doing certain work upon this land; and, that being so, in my opinion—and the Court of Appeal has already expressed a similar opinion in a case which was before it—that is not a covenant which a Court of Equity will enforce: it will not enforce a covenant not running at law when it is sought to enforce the covenant in such a way as to require the successors in title of the covenantor, to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted: but in my opinion a Court of Equity does not and ought not to enforce a covenant binding only in equity in such a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do.

[28] In coming to this conclusion, he relied upon the Court of Appeal's prior decision in *Haywood v. Brunswick Permanent Benefit Building Society* (1881), [1881-82] 8 Q.B.D. 403 (C.A.). In that case, Brett L.J. held the obligation in question did not run with the land at law and the question is "reduced to an equitable one". He said at 407-408:

> Now the equitable doctrine was brought to a focus in *Tulk v. Moxhay*, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can

> be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any Court has gone farther than this, and yet if the Court would have been prepared to go farther, such a case would have arisen. … [If] we enlarged the rule as it is contended, we should be making a new equity, which we cannot do.

[29] Lord Justice Cotton, himself, in *Haywood* had written at 409:

> Let us consider the examples in which a Court of Equity has enforced covenants affecting land. We find that they have been invariably enforced if they have been restrictive, and that with the exception of the covenants in *Cooke v. Chilcott,* only restrictive covenants have been enforced. In *Tulk v. Moxhay*, the earliest of the cases, Lord Cottenham says, "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using it in a particular way, is what I never knew disputed." In that case the covenant was to use in a particular manner, from which was implied a covenant not to use in any other manner, and the plaintiff obtained an injunction restraining the defendant from using in any other manner, although the covenant was in terms affirmative. At p. 778, Lord Cottenham says, "If an equity is attached to property by the owner no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." This lays down the real principle that an equity attaches to the owner of the land. It is possible that the doctrine might be extended to cases where there is an equitable charge which might be enforced against the land, but it is not necessary to decide that now; it is enough to say that with that sole exception the doctrine could not be farther extended. The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length.

[30] The court in *Austerberry* found cases describing exceptions to the rule to be either wrongly decided or instances of independent legal, as opposed to equitable, obligations to fulfil covenants described in a deed. Each of the judges expressly concluded *Tulk v. Moxhay* could not be extended to covenants requiring the outlay of money.

B. Exceptions to the Rule in *Austerberry*

[31] The appellant asks this Court to recognize exceptions to the rule in *Austerberry* since described by U.K. courts. First, some cases stand for the recognition of the broad benefit/burden exception to the rule where a party elects to enjoy the benefit of an easement that imposes positive obligations upon him, even

where the mutual obligations are independent. This benefit/burden exception would narrowly confine the application of the rule in *Austerberry* and would make positive obligations run with the land where they previously had not.

[32] In *Halsall and others v. Brizell and others* (1956), [1957] Ch. 169, Upjohn J. considered a provision in conveyances entered into at the time a building scheme was carried out. The scheme required the owners of properties sharing a road and sewer system to contribute to the maintenance of those systems. At issue was the validity of a resolution calling upon one owner to pay a larger share of common expenses than other owners, intended to reflect the additional use made of amenities by his tenants. The Court, at 182-183, described two questions with respect to the validity of the resolution, only the first of which is important for our purposes:

> First, in so far as the deed of 1851 purports to make the successors of the original contracting parties liable to pay calls [to contribute to the expense of upkeep of amenities], is it valid and enforceable at all? I think that this much is plain: that the defendants could not be sued on the covenants contained in the deed for at least three reasons [including that] a positive covenant … does not run with the land. … 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.… [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.
>
> [Emphasis added.]

[33] The Court did not make an order compelling the defendants to pay the calls made upon them to pay a larger share of the common expenses because the plaintiff had no authority to make disproportionate calls; the resolution was held to be invalid. The description of the effect of the positive covenant in *Halsall* is, therefore*, obiter dicta*. The case, however, has been cited as authority for the benefit/burden exception to the rule in *Austerberry*.

[34] The simple rule expressed in *Halsall* that a party cannot take advantage of the trusts contained in the deed and the other benefits created by it without undertaking the obligations thereunder is referred to by Megarry V.C. in *Tito v. Waddell (No. 2)* (1976), [1977] 1 Ch. 106 at 301 as "the pure principle of benefit and burden". It is distinguished in *Tito*, from the second, narrower conditional grant exception to the rule in *Austerberry* where a benefit conferred by a conveyance is "conditional on or reciprocal to" a burden imposed by the same covenant and the person on whom the burden is imposed had the opportunity of disclaiming the benefit. Vice Chancellor Megarry said at 290:

> … 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.
>
> [Emphasis added.]

[35] The rule in *Austerberry* and the extent of the exception described in *Halsall* were revisited in *Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.). The mutual covenants in question in that case required the owner of Walford Cottage to maintain its walls, which supported the adjacent Walford House, and the owner of Walford House to maintain the common roof over the house and cottage. Neither the plaintiff nor the defendant were owners of the properties at the time the covenants were created. Templeman L.J., for the court, held at 317:

> When freehold land is conveyed without restriction, the conveyance confers on the purchaser the right to do with the land as he pleases provided that he does not interfere with the rights of others or infringe statutory restrictions. The conveyance may however impose restrictions which, in favour of the covenantee, deprive the purchaser of some of the rights inherent in the ownership of unrestricted land.

[36] He concluded the rule in *Austerberry* should not be overturned at 321:

> To do so would destroy the distinction between law and equity and to convert the rule of equity into a rule of notice. It is plain from the articles, reports and papers to which we were referred that judicial legislation to overrule the *Austerberry* case would create a number of difficulties, anomalies and uncertainties and affect the rights and liabilities of people who have for over 100 years bought and sold land in the knowledge, imparted at an elementary stage to every student of the law of real property, that positive covenants affecting freehold land are not directly enforceable except against the original covenantor. Parliamentary legislation to deal with the decision in the *Austerberry* case would require careful consideration of the consequences.

[37] He declined to give effect to the benefit/burden exception by expanding the type of obligations running with the land in equity to include all mutual obligations arising out of the covenant creating an easement. In doing so, however, he noted at 322 *Austerberry* did not preclude parties from granting conditional easements:

> [Appellants' counsel]…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)*… 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. … 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 wholeheartedly 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.
>
> [Emphasis added.]

[38] In the years following the decision in *Rhone*, a number of cases refined the description of the conditional or reciprocal obligations that may run with land. In *Davies & Ors v. Jones & Anor*, [2009] EWCA Civ. 1164, the Court of Appeal summarized the jurisprudence as follows:

> 27. *Rhone v Stephens* and *Thamesmead Town Ltd v Allotey* are binding on us. They establish a number of propositions the application of which are exemplified in the other cases to which I have referred, namely *Halsall v Brizell*, that part of *Tito v Waddell* which was not disapproved in *Rhone v*

> *Stephens*, *Jenkins v Young Bros Transport Ltd* and *Baybut v Eccle Riggs Country Park Ltd.* In my view those propositions are:
>
> > (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.

[39] In subsequent cases, the nature of the conditional grant exemption has been restated. The benefit of the easement need not be expressly stated to be conditional upon the positive obligation, but the obligations must be clearly related. For example, in *Wilkinson & Ors v. Kerdene Ltd.*, [2013] EWCA Civ. 44, Patten L.J. held:

> 33. … Although the continued exercise of [the benefit enjoyed by the appellants under] the Schedule 1 rights is not made expressly conditional upon payment (any more than it was in *Halsall v Brizell* or in *Thamesmead Town Ltd v Allotey*) the payment is intended to ensure that the rights remain capable of being exercised. The authorities require one to look beyond the express terms of the conveyance and consider what in substance the covenantor is paying for. Here, as in *Halsall v Brizell*, the payment, at least in substantial part, is intended to provide a contribution to the cost of maintaining the roads and other facilities over which the owners of the bungalows are granted rights. None of them has ceased to use the roads nor wishes to do so.

[40] The state of the law in England now appears to be that *Austerberry* is not subject to the benefit/burden exception, derived from the "pure principle of benefit and burden". However, it appears the rule in *Austerberry* is subject to the conditional grant exception in England, so that where a benefit conferred by a conveyance is "conditional on or reciprocal to" a burden imposed by the same covenant, and the person on whom the burden is imposed had the opportunity of disclaiming the benefit, the conditional or reciprocal positive obligation may run with the land.

[41] In my view, the trial judge correctly described the circumstances in which a positive obligation may run with title to land in England:

> [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.

[42] That is consistent with the passage in *Gale on Easements*, 20th ed. (London: Sweet & Maxwell, 2017) at 58, referred to by the appellant:

> It is now settled that that there are two requirements for the enforceability of a positive covenant against a successor in title to the covenantor under this doctrine: first, the condition of discharging the burden must be relevant to the exercise of the rights that enable the benefit to be obtained; secondly, the successor must have the opportunity to choose whether to take or renounce the benefit and thereby escape the burden. So a successor does not have to contribute to the cost of a facility which he is either not entitled to or chooses not to enjoy.

[43] The question on the appeal before us is whether the law goes so far in Canada and, if not, whether it should do so.

C. Canadian Jurisprudence

[44] In *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd*., 2001 BCCA 268, the plaintiff sought to enforce a covenant that the plaintiff had entered into with the previous owner against the purchaser of the property. The covenant required the owner to pay certain fees to the plaintiff. The action against the new owner was dismissed on the ground the payment clause in question did not create a covenant which ran with the land. The appeal was dismissed. The Court, clearly applying the rule in *Austerberry*, held:

> [16] The necessary conditions of covenants which run with land are set out by [Di Castri] in his text, *Registration of Title to Land* (Carswell 1987). They were stated by Clearwater, J. in *Canada Safeway Ltd. v. Thompson (City),* [1996] M.J. No. 393, August 15, 1996, at page 8, as follows:

> (a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement. 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.
>
> (b) The covenant must be one that touches and concerns the land; i.e., it must be imposed for the benefit or to enhance the value of the benefited land. Further that land must be capable of being benefited by the covenant at the time it is imposed. …
>
> (c) The benefited as well as the burdened land must be defined with precision [in] the instrument creating the restrictive covenant…
>
> (d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee
>
> (e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered…
>
> (f) Apart from statute the covenantee must be a person other than the covenantor.
>
> [Emphasis added.]

[45] That general description of the conditions necessary for a covenant to run with the land, drawn from Victor Di Castri, *Registration of Title to Land* (Toronto: Carswell, 1987), has been frequently and recently adopted in British Columbia: see, e.g., *1530 Foster Street Ltd. v. Newmark Projects Ltd.,* 2018 BCCA 198.

[46] The Ontario Court of Appeal considered this issue in *Amberwood*. In that case, the majority described the question on appeal, at para. 1, as "whether a covenant to pay certain interim expenses contained in a reciprocal easement and cost sharing agreement … between owners of adjoining parcels of land is enforceable against the successor in title to the covenantor."

[47] The application judge had concluded the positive obligation in question arose as an incident of a conditional easement, as described in *Re Ellenborough Park* (1955), [1956] 1 Ch. 153 (C.A.); and *Halsbury's Laws of England*, vol 14, 4th ed. (London, UK: Butterworths, 1980) at 79. *Halsbury's*, as it then stood, provided "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".

[48] The issue on appeal was whether exceptions to the rule in *Austerberry* should be recognized and, if so, whether they had any application in the case. Justice Charron began by noting, at para. 33, it is the settled law in Ontario that positive covenants do not run with freehold land, either at law or in equity.

[49] After canvassing law reform initiatives in England and Ontario, which arose out of discontent with the rule in *Austerberry*, and comparing views on judicial reform of the rule, she held:

> [50] … [A]ny modification to the rule that positive covenants do not run with the land should be made by the legislature, and not by this court. Hence, Amberwood is not bound by the positive covenant to pay the interim expenses under the Reciprocal Agreement solely by virtue of having acquired the Phase 2 lands with notice of its terms.

[50] The question remained: whether the court should recognize an exception to the rule that would make the respondent, Amberwood, liable to pay the expenses called for by the cost-sharing agreement.

[51] The appellant sought to establish the positive obligation it was seeking to enforce ran with the land, by the adoption or application of either the benefit/burden exception or the conditional grant exception. The appellant asserted the grant at issue would fall within either exception, if adopted.

[52] The majority rejected the proposition that the benefit/burden exception should be recognized in Ontario because it had been rejected in England, for cogent reasons, in *Rhone v. Stephens* and later in *Thamesmead (Town) v. Allotey* (1998), 37 E.G. 161.

[53] The majority also rejected the appellant's particular argument for a conditional grant exception. As advanced in that case, it amounted to an argument that because cost sharing was an obligation relevant to the exercise of the right conferred by the

easement, rather than an independent burden, it was enforceable as a covenant running with the land. For that reason, Charron J.A. concluded:

> [84] … [T]he applications judge's observation that the "conditional grant" exception "is essentially a form of the benefit/burden doctrine" accurately describes the position taken by [the appellant] in this case and, in turn, leads me to the conclusion that this second argument must fail, essentially for the same reasons that I have rejected the first exception.

[54] However, the Court did not expressly reject the proposition some easements may be conditional on the discharge of a positive obligation by the owner of the dominant tenement. That is clear in the following passages:

> [86] … [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. ...
>
> [87] However, none of the grants of benefit or easement contained in the Reciprocal Agreement are framed in this way. … At its highest, it can be said that the parties to the Reciprocal Agreement have attempted to write in, as a term of their agreement, essentially the same general benefit and burden principle … The attempt to create a contractual exception to the rule in *Austerberry*, while binding on the original parties to the Reciprocal Agreement, cannot displace the rule that positive covenants do not bind successors-in-title. It is undisputed in English and Canadian law that the rule that positive covenants do not run with the land governs despite any express intention to the contrary contained in the agreement. Indeed, if the applications judge was correct in his conclusion that [the relevant clause] effectively created an exception to the rule, it would be open to anyone to simply abolish the rule at the stroke of a pen. 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.
>
> [Emphasis added.]

[55] For that reason, the appellant says while *Amberwood* clearly rejects the argument for exceptions to the rule in *Austerberry*, it recognizes if a grant of benefit or easement is framed as conditional upon the continuing performance of a positive obligation, the positive obligation may be enforceable.

[56] Further, however, the appellant urges us to adopt the approach taken by MacPherson J.A. in dissent in *Amberwood.* Justice MacPherson concludes his forceful criticism of the rule in *Austerberry* with an argument for adoption of both the benefit/burden and the conditional grant exceptions. He notes Canadian society and property ownership is different now than it was at the time the rule was created and, at para. 159, the Legislature has acknowledged this through laws "mitigating the rigours of the rule in *Austerberry* – on 12 occasions." He argues this is an incremental change that would mitigate hardships in appropriate cases, such as the one before him:

> [160] In my view, the benefit-burden and conditional grant exceptions to the rule in *Austerberry* can perform a similar role if introduced into the common law of Ontario. As I have tried to explain the exceptions, their adoption would, as required by Bastarache J. in *Friedmann Equity* [*Developments Inc. v. Final Note Ltd*., 2000 SCC 34], result in incremental change with consequences capable of assessment. They would also meet Justice Cardozo's important objective of mitigating hardships or wrongs in appropriate cases. This is one of those cases. The intentions of the original contracting parties and the wording in the agreement they signed are both crystal clear: a regime of reciprocal easements and other benefits and cost sharing was established. Amberwood, a successor in title to one of the contracting parties, chose, with full knowledge of the clear terms of the original agreement, to accept and utilize the benefits of the agreement. In my view, it would be unjust to permit Amberwood to ignore the reciprocal burdens which the agreement so clearly imposes on it.

[57] In *Heritage Capital*, the Supreme Court of Canada referred to the *Westbank* and *Amberwood* decisions. The issue in that case was whether the City of Calgary's obligation to pay an annual subsidy to the owner of a building designated as a heritage property, arising out of an Incentive Agreement between the City and the prior owners of the property under the *Historical Resources Act*, R.S.A. 2000, c. H-9 [*HRA*], ran with the land when the property was sold pursuant to a court order. That question was primarily one of statutory interpretation: whether the City was required to make the payments to the new owner pursuant to the provisions of the *HRA*. Although not critical to the outcome in the case, the Supreme Court's description of the underlying common law obligations suggests that the law is settled:

> [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.

[58] In my view, these comments in *Heritage Capital* address the enforceability of free-standing positive obligations. They do not preclude landowners from creating conditional easements, even where the condition is the payment of a fee.

[59] The appellants say, further, the Supreme Court in *Heritage Capital* did not overrule its prior decision in *Parkinson et al. v. Reid*, [1966] S.C.R. 162, and that prior decision implicitly accepted the benefit/burden exception by referring to *Halsall*. In *Parkinson*, the parties' properties were subject to a covenant entered into by their predecessors in title. The appellants' predecessor had built a stairway that led to buildings on both properties and signed a covenant under which the respondent's predecessor was permitted to use the stairway and the appellants' predecessor agreed to repair and reconstruct the stairway if damaged. When a fire destroyed the appellants' property, including the stairway, the appellants refused to reconstruct the stairway. The trial judge found that the positive obligation to repair the stairway could be enforced against the successor in title to the original covenantor because the successor had enjoyed a benefit under the mutual agreements when they relied on the party wall on the respondent's property for support for the stairway. On appeal, Cartwright J., for the majority, held at 168-169:

> Assuming that so long as the appellants made use of the last-mentioned wall as a party-wall they were bound to keep the stairway in repair, they ceased to be under any such obligation when they no longer made use of the respondent's wall. It is not suggested that the appellants have made any use of that wall since their building was destroyed by fire. A case in which this

> principle was applied is *Halsall v. Brizell* which was discussed in the reasons of Kelly J.A.
>
> [Emphasis added.]

Justice Kelly, in the Court of Appeal, (1964), [1965] 1 O.R. 117, had referred to *Halsall* in the following terms at 122:

> In *Halsall v. Brizell*, [1957] Ch. 169, the burden of a positive covenant was sought to be enforced against the successor in title of the covenantor. … The Court held that *prima facie* the covenants contained in the deed were unenforceable in that a positive covenant in the terms contained in the deed did not run with the land. But the Court further held that the defendants were not entitled to take advantage of the trusts granting them the use of the road and other benefits created without undertaking the obligations which were attached thereto. The defendants were free to abandon the use of the roads and remain free from the onus of repairing, but if they chose to avail themselves of the use of the roads, they must assume the burden of repairing.

[60] The Court appears to have referred to *Halsall* for the purpose of establishing the positive obligation imposed by a conditional easement ceases when the easement is abandoned; and, in any event, the Court simply said the claim should be dismissed even <u>if it were to be assumed</u> the appellants were bound by positive obligation as a result of the exercise of the easement in question. It seems to me, in *Amberwood*, Charron J.A. came to the same conclusion with respect to the precedential value of *Parkinson*. This court, in *Nordin v. Faridi*, [1996] 17 B.C.L.R. (3d) 366 (C.A.), described the ratio of *Parkinson* as follows:

> 39 The Supreme Court of Canada held that there was no privity of contract or privity of estate between the parties and that the covenant to repair and reconstruct the stairway did not run with the land. At p. 167, Cartwright J. referred to the following passage from D.H. McMullen, *Gale on Easements*, 12th ed. (London: Sweet & Maxwell, 1950) at p. 77:
>
> > The rule in *Tulk v. Moxhay* does not extend to affirmative covenants requiring the expenditure of money or the doing of some act. Such covenants do not run with the land either at law or in equity. The doctrine only applies to covenants which are negative in substance though they may be positive in form.

[61] The nature of the positive obligations that might arise as an incident of the exercise of the easement itself was expressly considered in *Black*, a case that worked its way to the Ontario Court of Appeal from the Small Claims Court. At the

Court of Appeal, the respondents relied solely upon the argument the appellants were obliged to pay for the maintenance of a park over which they enjoyed an easement. Justice Cronk, writing for the Court, expressed the view *Amberwood* stands for the proposition a positive obligation may be assumed when a successor in title exercises an easement framed as conditional upon the continuing performance of the positive obligation, without endorsing an exception to the rule in *Austerberry*. However, she found the trust deed in that case did not create such a conditional easement.

D. Recent British Columbia Cases

[62] As noted above, the trial judge held she was bound by comity to reject the argument a conditional grant exception to the rule in *Austerberry* should be recognized, that question having been addressed in *Crystal Square* and *Scottsdale*.

[63] In *Crystal Square*, Young J. held the payment obligations in question were positive covenants, created before the plaintiff existed. There was no contract between the parties to the covenant and the plaintiff had not formally adopted any obligations contained in the agreements containing the covenant. She concluded at para. 46: “According to the common law rule, this covenant does not run with the land and the plaintiff is not bound by it.”

[64] Addressing *Amberwood*, she noted the Ontario Court of Appeal had considered the English exceptions to the rule in *Austerberry*, but had not adopted them and, at para. 54, “it is plainly the law of Ontario that successors in title are not bound to perform positive covenants.”

[65] In *Scottsdale*, the question was whether the defendant was required to pay the plaintiff certain sums owing under an easement providing for the use of recreational facilities. The agreement between the grantor and grantee provided the mutual obligations created by the covenant would run with the land. The trial judge in that case, Branch J., concluded Canadian courts had adopted neither the broad

benefit/burden exemption to the rule in *Austerberry*, nor the narrower conditional grant exemption.

[66] After discussing *Crystal Square, Amberwood,* and *Black*, Branch J. held:

> [41] The approach of the Ontario Court of Appeal to the *Amberwood* exception, although treated as persuasive authority, is not binding upon me. While the Ontario Court of Appeal has apparently sought to preserve some room for interpreting the grant of a positive easement in a way that sustains it, if the grant is sufficiently tied to the positive condition, I find that the adoption of this approach into B.C. law is not justified, and would introduce too much uncertainty into the law. The struggles that experienced counsel had before me drawing a distinction between the rejection of the conditional grant exception and accepting an exception when the grant is sufficiently conditional, only highlights the uncertainty that would be created if the *Amberwood* exception were adopted as proposed. Plaintiff's counsel conceded that he was not aware of any case where a party had successfully applied the *Amberwood* exception for the benefit of the party owed obligations under a positive grant. This lack of authority makes it even more difficult to accept the proposed exception, given the lack of established principles as to how and when it could be applied.

[67] He concluded:

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

E. Law Reform

[68] As the English court noted in *Rhone* and the Ontario Court of Appeal noted in *Amberwood*, the rule in *Austerberry* has been frequently criticized. Recommendations for statutory reform have been made in England and in Canada. The British Columbia Law Institute's *Report on Restrictive Covenants*, BCLI Report No. 67, February 2012 ("BCLI Report"), makes this recommendation, summarized as follows (pages ix-x):

> This report proposes that two kinds of positive covenants be allowed to run with land. The first category would be cost-sharing covenants calling for payment of or contribution towards expenditures for work, provision of materials, or operations on particular land belonging either to the covenantor or covenantee, or on land in which they both hold an interest such as

> co-owned common facilities. The second category would be covenants requiring work or operations on the land, including maintenance, repair or replacement of anything in whole or in part. "On the land" in this context means in, on, above or under land, in order to cover underground and airspace works and operations as well as those located on the surface.
>
> Apart from the statutory positive covenants that are now enforceable against subsequent owners of the burdened land, such as those contemplated by section 219 of the *Land Title Act*, the change would only apply to positive covenants entered into after the enactment of legislation implementing this proposal. In this way, landowners who do not bear any liability now under positive covenants made in the past by their predecessors in title would not become instantly subject to springing liabilities.
>
> Positive covenants capable of running with land under this proposal should be enforceable only against the holders of certain interests having a substantial and durable connection with the burdened land.

[69] Two significant aspects of the recommendation deserve our attention. First, the Institute observed there are some legislative provisions permitting positive covenants to run with the land and, second, the Institute concluded a change in the judge-made law may create "springing liabilities". The BCLI Report noted, at 39:

> If the change under Recommendation 1 [to permit a covenant that imposes a positive obligation on the covenantor to run with the land and be binding upon successors] were applied to registered covenants in existence when it is implemented, the effect would be that covenants meeting the description in the recommendation that were not previously enforceable would suddenly become enforceable against some current and possibly previous owners who were not previously bound by them. This would be an unfair and unjust result. In some cases, this would bring about liability for breaches that occurred before the current owner of burdened land had any control over the land.
>
> Jurisdictions that have made the burden of positive covenants run with freehold land have generally made the change on an expressly prospective basis, so that it applies only to covenants created after the effective date of the change.

[70] Other problems might arise from wholesale abandonment of the rule in *Austerberry*. Some of these resulted in the BCLI Report recommendation that the nature of the positive covenants capable of running with land be carefully defined.

[71] Professor Bruce Ziff, in "Restrictive Covenants: The Basic Ingredients" in *The Law Society of Upper Canada Special Lectures 2002: Real Property Law* (Toronto: Irwin Law, 2003) at 293, suggests the pitfalls to court-led reform are overstated. He

argues, at 323, "[a]dopting the English position would not entail a radical departure given the non-statutory exceptions that already exist." He says at 323-324:

> The argument based on the complexities of reform is convincing only if one can identify problems associated with positive obligations that do not equally pertain to negative ones. One such difference concerns the allocation or division of positive obligations.
>
> ...
>
> Perhaps the benefits/burdens analysis can provide a partial solution. So long as the interest-holder can elect whether or not to accept the benefit, and can in theory exercise that choice, the subsequent owner can control potential liability. This reasoning also responds to another potential problem, namely, that a given positive covenant might give rise to unforeseen and potentially astronomical liability. Were that to occur, the burdened party may at some point opt out of the benefit. This may seem to confer a luxury on the new owner. Normally one cannot unilaterally back out of an obligation. Certainly the original covenantor would not be entitled to do so. However, recognizing such a right is surely better than the current position under which the new owner can fully enjoy the benefit without contributing a penny to its upkeep. In addition, if the election is made to refuse a benefit owing, it remains possible for a new agreement to be reached that re-establishes the rights and obligations.

[72] In my view, the problem is, as Professor Ziff notes, the benefits/burdens analysis can only provide "a partial solution".

[73] Insofar as the potential for adverse consequences retrospective change may entail, Professor Ziff argues there has been uncertainty in the law for some time and there ought not to have been "a true expectation" positive covenants can never run. He suggests the problem of retrospectively can be resolved in part by the election element of the benefit/burden exception. He says at 326:

> So long as a party is able to reject the benefit, the burden need not be imposed. I suspect that most people would regard that as fair. Other doctrines, such as acquiescence, laches, and limitations, can also affect the enforceability of pre-existing obligations.

[74] These are not sufficient answers to the concerns identified by the Law Institute. It is certainly the case, in my view, judicial reform is likely to be far more problematic than legislative reform.

[75] In my view, it is important to bear in mind while the rule in *Austerberry* is judge-made law, it has been incorporated in our legislation in British Columbia. Section 221 of the *Land Title Act*, R.S.B.C. 1996, c. 250, provides:

> (1) The registrar must not register a restrictive covenant unless
>
> (a) the obligation that the covenant purports to create is, in the registrar's opinion, negative or restrictive,
>
> (b) the land to which the benefit of the covenant is annexed and the land subject to the burden of the covenant are both satisfactorily described in the instrument creating the covenant, and
>
> (c) the title to the land affected is registered under this Act.
>
> [Emphasis added.]

[76] That provision is some indication of a legislative intent to preserve the rule in *Austerberry*. The fact the Easement Agreement in this case was registered is immaterial to the question whether the positive covenant is enforceable. Section 26(2) of the *Act* provides:

> Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

[77] Not only has the Legislature incorporated the rule in legislation but it has described exceptions. For example, s. 219 provides covenants of a positive nature in favour of the Crown and certain other entities prescribed by regulation are enforceable.

[78] The Ontario Legislature has provided for the creation of positive covenants that run with the land through statute, described in *Amberwood* at para. 51. However, neither the *Registry Act*, R.S.O. 1990, c. R.20, nor the *Land Titles Act*, R.S.O. 1990, c. L.5, which provide for the registration of easements generally, contain provisions, such as s. 221(a) of our *Land Title Act,* precluding the registration of easements that in substance impose positive obligations.

[79] Therefore, the argument the rule in *Austerberry* is judge-made law, amenable to modification or elimination by the courts, is less persuasive in British Columbia,

where the Legislature has expressly determined the rule should be enforced by the Registrar of Land Titles. Nevertheless, the Ontario Court of Appeal in *Amberwood* also considered legislative reform preferable to judicial reform.

[80] I am of the view there has been such consistent and long-standing reliance upon the rule and such incorporation of the rule in our legislation that, if it is to be modified or abandoned, it should be modified or amended by legislation.

F. Conclusion in Relation to Exceptions to the Rule

[81] The appellant submits it is time to recognize the common law exceptions to the rule in *Austerberry* that have been recognized by the English courts and, on an application of either the conditional grant exception or the benefit/burden exception, the Strata Corporation remains obligated to pay the parkade expenses pursuant to the Easement Agreement. While I am of the view the Law Institute and others have made a compelling case for reform, in my opinion the reform suggested may only be fairly effected by the Legislature.

[82] This does not leave property owners without any means of ensuring the ongoing costs of shared facilities are borne by successors in title to the original participants in a building scheme. The legislature has specifically provided one means of doing so, in the statutory regime created by the *Strata Corporations Act.* Where the development of a multi-use project makes the air space parcel model more attractive, the parties can fall back upon the chain of contracts approach the parties intended to use in this case but did not carry into effect. Further, as I discuss below, while the law is not without its complications, the rule in *Austerberry* does not preclude parties from creating conditional easements.

[83] For those reasons, in my view, this Court should not adopt either of the proposed exceptions to the rule in *Austerberry*.

G. Is the Respondent Bound, Nevertheless, by its Conduct?

[84] Where does that leave us in the case at bar? As noted above, the court in *Amberwood* acknowledged it is possible to create and give effect to easements that can be exercised only when the owner of the dominant tenement satisfies a condition.

[85] The appellant says the Easement Agreement grants an easement conditional upon the payment of parking expenses and the obligation is binding, not as an exception to the rule in *Austerberry*, but because it is part of and limits the scope of the grant of easement.

[86] Arguably, this is the issue the Ontario Court of Appeal left open for determination in *Amberwood*. As noted by Professor Ziff at 320:

> … Madame Justice Charron acknowledged that a conditional grant can be employed so as to allow for the indirect enforcement of a positive covenant in a way that is consonant with the general rule. She recognized that if a grant is framed to be conditional upon the continuing performance of a positive obligation, that obligation may be enforceable "not because it would run with the land, but because the condition would serve to limit the scope of the grant itself." At the same time, it would not be open to anyone to avoid the general rule "at the stroke of a pen" by reciting simply that the agreement was conditional on the acceptance of the burdens.

[87] As Professor Ziff noted in his analysis of the decision, at 321-322, there is some confusion in the authorities regarding the concept of "conditional grants":

> Some of this confusion arises because the term "conditional grant" is ambiguous. I believe it has two connotations. Under one, the failure to meet the condition serves as a ground for the termination or loss of an interest …. Charron J.A. may well have been referring to these types of conditional grants when she spoke of a condition that serves "to limit the scope of the grant itself." …
>
> Hence, one important feature of such a grant is that the effect of non-compliance is the loss of the interest. Conversely, … there is no direct obligation to perform a positive act. One is not liable in damages if the obligation is not met because there is no directly enforceable promise to do that act.
>
> The second type of conditional grant is that exemplified by *Halsall.* It is a grant that can be enjoyed if those holding the benefit promise to do something in return. Under such an arrangement a benefit can be taken if

> and only if a burden is *directly* adopted. If that burden is not met an action for breach can be brought, and an injunction should lie to prevent further use of the benefit. It does not necessarily follow that the right would be lost forever. The word "conditional" in this setting means that the benefit and burden are interdependent promises. One cannot have one without the other. It is in relation to this type of grant that the approach in *Rhone* (as modified in *Thamesmead*) was directed. It is this type of approach that is explicitly rejected by the majority in *Amberwood* as a matter of principle.

[88] There are two obstacles the appellant must overcome in order to establish the respondent is bound to pay the parkade expenses as a condition of using the easement. The first is the trial judge's rejection of that reading of the Easement Agreement. The Supreme Court of Canada was clear in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, in stating that a trial judge's interpretation of a contract involves mixed questions of fact and law and is entitled to deference. However, as Rothstein J., for the Court observed:

> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[89] The appellant says it can meet this test. It says the judge failed to consider the whole of the Easement Agreement, the surrounding circumstances and business efficacy.

[90] The appellant argued the grant of easement in clause 5.3(a) includes the phrase "subject to the terms, conditions and limitations herein contained", and clause 13.6(d) defines the word "herein" as a reference to the entire Easement Agreement. The trial judge rejected that argument, holding:

> [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.

[91] With respect, that is confusing the agreement between the original parties and the question of its binding effect on successors. The parties to the original agreement could have made the exercise of the easement conditional upon the performance of all positive obligations. Which, if any, of the positive obligations the original parties agreed to might bind successors in title is a different question. The answer hinges upon the proper construction of the agreement read as a whole.

[92] The original parties did, in fact, seek to bind successors to obligations that might not run with the land by seeking to effect a chain of contracts. Under s. 7.2(c) of the Easement Agreement, the parties agreed not to transfer their air space parcel "unless, as a condition thereof and prior thereto, the Owner causes the purchaser or transferee to enter into an assumption agreement pursuant to which the purchaser or transferee agrees to assume, be bound by and observe all of the obligations, positive or negative, of the Owner" under the Easement Agreement. If adhered to, this would bind the subsequent owners to the positive obligations in the Easement Agreement, not because those obligations would run with the land but because the subsequent owners would become privy to the contract in which they agree to be bound by those obligations. While these assumption agreements were not entered into in practice, the fact this section was included in the Easement Agreement demonstrates the parties did not intend to simply rely on an exception to the rule in *Austerberry* to enforce the positive obligations.

[93] However, the trial judge read the Easement Agreement such that the rule in *Austerberry* informed her assessment of the intentions of the parties with regard to whether or not the parties intended to create reciprocal obligations in the Easement Agreement. The rule in *Austerberry* does not apply to covenants and obligations expressed in a contract between parties privy to that contract. Since the trial judge had already determined the positive obligations from the original contract did not run with the land to bind the successors in title, it was an error in principle to use the rule

in *Austerberry* as determinative of her analysis of the intentions of the parties where there were indications the parties had intended to have the obligations carry on to successors in title by means other than easements. This error in principle resulted in an erroneous interpretation of clause 5 of the agreement.

[94] The second hurdle, however, in my view is insurmountable. The issue of the effect of non-payment of the Parkade Operating Costs was not before the trial judge. As I have noted, the parties did not ask the court below or this Court to address how a finding the respondent is not bound by the covenant to pay the parking expenses would impact the other obligations under the Easement Agreement. For that reason, while I have concluded the trial judge erred in principle in her interpretation of the contract, I am of the view we should not attempt to resolve the question of whether the Parking Easement was conditional upon the fulfilment of the positive obligation to pay the Parkade Operating Costs. This finding by the trial judge had no impact on her final order, and therefore is not a ground on which to allow the appeal.

[95] In my view, there may be negative easements that are conditional upon the fulfilment of positive obligations. In such a situation, the successor in title to the dominant tenement is not bound by any free-standing positive obligations as they do not run with the land, but the servient tenement may not be obliged to afford the benefit of an easement for a dominant tenement no longer bearing the corresponding burden.

VI. CONCLUSION

[96] The original parties to this agreement appear to have intended to grant an easement conditional upon the performance of an obligation. The obligation does not run with the land despite the parties' intentions that it would be binding on subsequent owners. As a result, the covenant to pay the Parkade Operating Costs is unenforceable against non-parties to the Easement Agreement. As we are only called upon to determine whether the Strata is bound by the positive obligations in the Easement Agreement, we make no final determination of whether the Strata's

failure to meet the obligation may serve as a ground for the appellant to refuse to permit the Strata to exercise the Parking Easement.

[97] The trial judge made an order declaring the respondent is not bound by any of the positive covenants of easement registered with the Land Title Office and for costs. The appellant seeks an order setting aside the decision of the trial judge, dismissing the petition, declaring the Strata Corporation remains bound to pay the parkade expenses pursuant to the Easement Agreement, and requiring the Strata Corporation to pay the costs of the Supreme Court proceeding and of this appeal. I would dismiss the appeal and confirm the trial judge's order.

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Madam Justice Fisher"