COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation, 2019 BCCA 145

Date: 20190507
Docket: CA44250

Between:

The Owners, Strata Plan LMS 3905

Respondent
(Plaintiff)
(Defendant by Counterclaim)

And

Crystal Square Parking Corporation

Appellant
(Defendant)

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 January 17, 2017 (*The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71, Vancouver Registry S134699).

Counsel for the Appellant:	K. McEwan, Q.C., E. Kirkpatrick
Counsel for the Respondent:	G.S. Hamilton
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:

At trial, the respondent claimed it was not bound by the provisions of an agreement entered into between the developer and the respondent's predecessor in title and registered at the Land Title Office before the respondent was incorporated. The appellant counter-claimed that the respondent owed the appellant money on the agreement. The trial judge declared that the respondent was not bound by the provisions and dismissed the appellant's counterclaim. Held: Appeal allowed. The trial judge erred in finding that the respondent was not bound by the obligations in the agreement. While she was correct to find that positive obligations do not run with the land and are not binding to the successors in title in that way, she erred in determining that the respondent did not become bound by the pre-incorporation contract after it was incorporated. A contract established before a party is incorporated can be the basis for a new, and identical, contract that binds that party once it is incorporated if the incorporated party shows an intention to be so bound. In finding that the pre-incorporation contract was not binding on the respondent, the trial judge erred by: considering the irrelevant fact that the respondent had not been privy to the pre-incorporation contract, placing undue weight on the fact that the respondent had not formally adopted the agreement, and looking to the subjective, rather than objective, indicators of the respondent's intention to be bound.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] The respondent obtained a declaration that provisions in an agreement entered into between a developer and its predecessor in title, before it was incorporated, are not binding upon it and are unenforceable. The order was made for reasons indexed as 2017 BCSC 71.

[2] As a consequence of that order, the appellant's counterclaim for amounts that were said to be due and payable under those provisions was dismissed.

[3] The order granting the declaration and dismissing the counterclaim is the subject of this appeal.

[4] This matter was heard together with the appeal from *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988 [*Jameson House*]. Both cases required this Court to consider the effect upon successors in title of agreements imposing positive obligations that purport to run with the title to land.

The reasons in *Jameson House*, indexed as 2019 BCCA 144, address the law on this ground of appeal.

[5] In addition, in this appeal, we must consider whether the parties, by their conduct after the Strata was incorporated, showed an intention to be bound by a contract containing terms identical to those in the contract entered into by their predecessors.

Background

[6] Crystal Square is a mixed-use retail complex, office tower, residential tower and hotel complex in Burnaby, British Columbia. It was constructed as a joint venture of Tyba Crystal Investments Corp. and Dong Ah Canada Development Corp. (“Crystal Square Development Corp.”). The land was divided into seven Air Space Parcels (“ASP”) and a remainder:

a) ASP 1: a two-storey retail complex: now Strata Plan LMS 3863;

b) ASP 2: a four-storey office tower: now Strata Plan LMS 3905 (“Office Tower”);

c) ASP 3: a 25-storey, residential tower and a three storey low-rise residential building: now Strata Plan LMS 3990 (“Residential Complex”);

d) ASP 4: a 283 strata lot hotel with a large convention space (“Hotel”);

e) ASP 5: a four-storey parkade (“Parking Facility”);

f) ASP 6: space owned by the City of Burnaby, which has been used as a police office (“Community Amenity Space”); and

g) ASP 7: a cultural centre owned by Chinese Christian Mission (“Cultural Centre/Retail”).

[7] The appellant, Crystal Square Parking Corporation (“CSPC”), owns ASP 5, the Parking Facility. The respondent is a strata corporation for the owners of Strata Plan LMS 3905 (“the Strata”), the 64 strata lots in the Office Tower.

[8] In March 1999, Crystal Square Development Corp. and the City of Burnaby entered into an agreement containing easements for support, service connections, vehicular access and other uses to and on the Crystal Square property ("ASP Agreement"). On March 17, 1999, the ASP Agreement was registered as an easement at the Land Title Office. This registration pre-dated the Strata's incorporation. CSPC purchased the Parking Facility in 2002.

[9] The following provisions in the ASP Agreement regarding the Parking Facility are relevant:

> 7.5 Parking and Access Rights
>
> …
>
> (a) Vehicular Access. The ASP 5 Owner as registered owner of ASP 5 hereby grants to the Parking Facility Participants[, which includes the registered owners of the other ASPs, except the owner of the remainder,] in perpetuity as the respective registered owner of the Other Parcels (excluding the Remainder) a non-exclusive, full, free and uninterrupted right, liberty, right-of-way and easement at any time and from time to time, in common with the ASP 5 Owner and all other persons now or hereafter having the express or implied permission of the ASP 5 Owner or having a similar right, subject to the terms, conditions, and limitations stated herein, to enter, go, pass and repass in, over and upon all or any part of the Vehicular Access Routes which are situate on ASP 5, by motor vehicle and bicycle for the purpose of obtaining access to and egress from the Parking Facility;
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> (b) Parking. The ASP 5 Owner as registered owner of ASP 5 hereby grants to each Parking Facility Participant the non-exclusive, full, free and uninterrupted right, liberty and right of way, at any time and from time to time, in common with the ASP 5 Owner and all other persons now or hereafter having the express or implied permission of the ASP 5 Owner or having a similar right, subject to the terms, conditions and limitations stated herein, to enter go, pass and repass over the Parking Spaces for the purpose of parking not more than 1 motor vehicle in each of the respective number of Parking Spaces set out below on an unreserved basis as follows: [listing of the number of parking spaces per ASP]
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> ...
>
> (d) Parking Fee. In consideration of the ASP 5 Owner granting the access and parking rights to the Parking Facility Participants pursuant to subsections 7.5(a) and (b), each Parking Facility Participant (excluding the ASP 6 Owner) covenants to pay to the ASP 5 Owner an annual parking fee (the "Parking Fee"), being the sum of the "Annual Base Rate", the pro rata share of Operating Costs and the

> pro rata share of Taxes (payable in the manner set out in subsection 7.5(e)) as set forth, below:
>
> …
>
> (iii) The "Annual Base Rate" will continue to be paid by the Parking Facility Participants as set out in paragraph (i) above until such time as the ASP 5 Owner has recovered all of the "Parking Space Capital Costs" plus interest thereon at the Prime Rate plus 1.5 %. The Parking Space Capital Costs is $13,500.00 x 986 Parking Spaces. All payments of Annual Base Rate will be applied firstly to recovery of interest as aforesaid and secondly to the recovery of the Parking Space Capital Costs. To the extent any interest is not recovered in any given year, interest will accrue interest [*sic*] at the Prime Rate plus 1.5%. The Annual Base Rate shall be subject to adjustment as provided in section 7.6. Interest on the Parking Space Capital Costs will accrue and be calculated from the date the Project has been substantially completed (as determined by the architect for the Project).
>
> …
>
> (g) Repayment, of Parking Space Capital Costs. As and when the ASP 5 Owner has recovered the aggregate Parking Space Capital Costs (plus interest as set out above in subsection 7.5 (d)) from the amounts attributable thereto paid by the Parking Facility Participants as the Annual Base Rate and from the parking revenue generated by the public from its use of the Parking Facility, the Parking Facility Participants will cease to pay to the ASP 5 Owner the Annual Base Rate as part of the annual Parking Fee for the parking and access rights granted pursuant to this section. …

[10] While the strata corporations did not exist when the ASP agreement was executed, the Crystal Square Development Corp. and City of Burnaby contemplated their existence by specifically referencing them within certain provisions of the ASP Agreement. In particular, clause 7.5(h) provides:

> Subdivision by Strata Plan. Upon subdivision of any Parcel by a Strata Plan, the Strata Corporation so created shall be entitled to give all permissions and consents permitted to be given by the Owner of the Parcel so subdivided, and the Strata Corporation shall be responsible for payment of the Parking Fee and allocating and administering the parking rights amongst the strata lot owners within such Parcel and the provisions of section 16.3 hereby shall apply.

[11] The ASP Agreement included covenants by the parties to have their successors (the contemplated strata corporations) sign assumption agreements, and those contemplated strata corporations had to enter into assumption agreements with the owners of individual parcels, to assume all of the ongoing obligations set out in the ASP Agreement. The ASP Agreement also contained a term by which the burdens imposed would run with the land:

> 17.3 Covenants Run with the Land/Subdivision
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> The covenants and agreements set forth in Articles 2 to 10 inclusive shall be covenants the burden of which 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, in respect of the Other Owners' Easement under or by virtue of this Agreement.

[12] On May 26, 1999, the plan establishing the Strata was deposited at the Land Title Office. The trial judge found that the owners of the Strata did not then or later sign assumption agreements adopting the terms of the ASP Agreement. The trial judge could not determine on the evidence whether the Strata adopted bylaws related to parking at the time it was incorporated or later.

[13] In 2007, the Strata council president noted that 30% of the Strata's budget was used to pay parking expenses and began to take measures to determine how quickly they could pay down the capital costs so that the base rate would no longer be payable and the Strata would share in the general revenue pursuant to clause 7.5(g) of the ASP Agreement.

[14] A property manager hired by the Strata in 2007 identified what he considered to be irregularities pertaining to cost-sharing between the Parking Facility Participants. The Strata asked Impark, the company CSPC had hired to manage the Parking Facility, for a report on parking revenue and a schedule for the repayment of the capital cost using actual revenue figures.

[15] Some Strata owners said they expected the capital cost of the parking structure would be paid down over a term similar to the usual term of a commercial

loan. They said they received a response from Impark in 2008 that led them to understand that, even in the most optimistic circumstances, they would never pay down the capital cost.

[16] Impark, as CSPC's agent, established a "parking membrane reserve fund" in 2010, relying on clause 7.5(d)(vi) of the ASP Agreement. CSPC claims that provision permits it to demand that the Strata pay into a capital reserve established to pay for the repair or replacement of the Parking Facility. Impark demanded payment of the membrane replacement reserve levy from the Strata in January 2012.

[17] The Strata continued to pay the base rent and operating costs for the Parking Facility, but refused to pay in advance into the membrane replacement reserve fund. The Strata communicated its concerns with respect to accounting to CSPC in writing.

[18] In response to the Strata's refusal to pay the membrane reserve levy, on July 4, 2012, CSPC revoked the Strata owners' parking privileges. The Strata pointed out that it had paid all of the base rate and 88% of its share of operating costs and that it was withholding 12% of operating costs pending clarification and adjustments that it had been seeking.

[19] The Strata's requests for information with respect to parking revenue and expenses met with little success. On November 8, 2012, CSPC responded to repeated requests by advising the Strata "operating costs and membrane repairs are paid by the ASP Participants in accordance with the terms and conditions (but not limited to the conditions set out in the article 7 easements over ASP five and schedule a) in the ASP agreement to maintain, repair and replace the parking facility." A schedule using actual revenue figures was first provided to the Strata on April 29, 2013.

[20] In its Further Amended Notice of Civil Claim filed on May 26, 2016, the Strata alleged that "[c]ontrary to the terms of the ASP Agreement the original opening Parking Space Capital Cost balance has not been reduced from 1999 and has in

fact increased." It further alleged that "the formula established by the Developer in section 7.5 of the ASP Agreement to repay the Parking Space Capital Costs … is deficient." It alleged that the developer of Crystal Square owed fiduciary and statutory duties to the Strata including a duty not to enter into contracts or other agreements which were contrary to the best interests of the Strata. It alleged at para. 41:

> The Developer breached the duties owed to the Plaintiff by:
>
> (a) entering into the ASP Agreement on terms that were unfair to the Plaintiff;
>
> (b) binding the Plaintiff into the ASP Agreement with no expiry date;
>
> (c) failing to include a reasonable Formula in the ASP Agreement to repay the Parking Space Capital Cost;
>
> (d) failing to protect the Plaintiff's interests by not including a provision in the ASP Agreement that allowed the Plaintiff to renegotiate or have input regarding the maintenance or operation of the Parking Facility...

[21] It sought a declaration that the ASP agreement is void as it is unconscionable. It alleged at para. 42: "The Plaintiff was bound by this Agreement prior to the Plaintiff coming into existence."

[22] This Further Amended Notice of Civil Claim included an allegation that the ASP Agreement had been frustrated and an allegation that it had been entered into under a mutual mistake of fact including the following allegations:

> 44. … [S]ection 7.5 of the ASP Agreement was entered into under a mutual mistake of fact that the Formula would result in the eventual pay down of the Capital Cost. The repayment of the Parking Space Capital Cost is a fundamental term to section 7.5 of the ASP Agreement.
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> 45. … c. … [A]t the time the Plaintiff and Developer entered into section 7.5 of the ASP Agreement, both parties believed that the Parking Space Capital Costs would eventually be paid down.
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> 46. … [S]ection 7.5 of the ASP Agreement was entered into under a unilateral mistake of fact by the Plaintiff that the Formula would result in the eventual pay down of the Capital Cost, and which mistake the Developer knew or ought to have known was a mistake.

[23] Unlike the original Notice of Civil Claim, in this last iteration the Strata sought the declaratory relief that is the subject of this appeal. For the first time the pleadings included the following allegations:

> 53. Further or in the alternative, the Plaintiff is not bound by section 7.5 of the ASP Agreement, which was brought into existence prior to the Plaintiff's incorporation, and to which the Plaintiff was not a party.
>
> 54. Further, or in the alternative, the following sections of the ASP Agreement impose positive obligations on the Plaintiff and they do not run with the land:
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> a. paragraph 7.5(d) which imposes on the Plaintiff an obligation to pay the Parking Fee;
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> b. paragraph 7.5(e) which imposes on the Plaintiff an obligation to pay to the ASP 5 owner the Estimated Monthly Parking Fee in advance, and to provide post-dated cheques or the like to the ASP 5 owner upon request; and
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> c. paragraph 7.5(g) which imposes on the Plaintiff an obligation to continue to pay to the ASP 5 owner the Plaintiff's respective pro rata share of Operating Costs and Taxes once the ASP 5 owner has recovered its Parking Space Capital Costs.

Judgment Under Appeal

[24] The trial judge concluded that the positive obligations in the ASP Agreement did not run with the land so as to bind the respondent, citing the judgments in *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited et al.* (2002), 58 O.R. (3d) 481 (C.A.); *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19; and *Parkinson et al. v. Reid*, [1966] S.C.R. 162. In summary, she concluded that the nature of an easement as regards the servient owner is always negative, the obligation being either to suffer or not do something, and an affirmative covenant to pay money could not run with the land either at law or in equity. She rejected the submission that the positive obligations in clause 7.5 of the ASP Agreement should run with title to the Strata's ASP as an exception to that rule.

[25] She then turned to the question whether the parties had entered into a new contract, on the Strata's incorporation, with the same terms as the pre-incorporation ASP Agreement. She addressed that question in light of the proposition adopted by

McLachlin J.A. (as she then was) in *Heinhuis v. Blacksheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239 at 242-243 (C.A.), as follows:

> In *Massey Prod. Ltd. v. Rocky Mountain Soc. for Pub. Art.*, [[1984] B.C.J. No. 1952 (C.A.)], this court, per Nemetz C.J.B.C., accepted the proposition that "a pre-incorporation contract is enforceable if the parties, by their conduct, show an intention to be bound by a new post-incorporation contract containing terms identical to those in the pre-incorporation contract".

[26] The trial judge summarized the rule at para. 63: "[I]n order for [a] pre-incorporation contract to be enforceable, the parties' conduct must establish an intention to be bound through a new contract containing identical terms."

[27] The trial judge noted that, while it appeared the appellant met the test described in *Heinhuis,* the parties were not bound by the ASP agreement. She found that the Strata had benefitted from the easement, because its members parked in the parking structure, and it did not deny the burden, because its members paid for parking for many years and considered themselves bound to do so.

[28] Nonetheless, she held at para. 67 the Strata "did not willingly contract to adopt the terms of the ASP Agreement" because the contract had not been expressly adopted post-incorporation, there was no privity between the parties, and their conduct did not speak to an intention to be bound by the ASP Agreement. She determined:

> [64] The requirement set out in *Heinhuis* has not been met on the facts of this case. The plaintiff did not enter into the ASP Agreement. Registering it as an easement did not make the ASP Agreement into a new contract on the same terms to which the parties showed, through their conduct, an intention to be bound. There is no privity of contract and so the plaintiff cannot be bound by the obligations contained in the ASP Agreement. There is also no subsequent conduct evidencing that the plaintiff entered into a new contract containing identical terms to those contained in the ASP Agreement.

[29] When she considered the Strata's post-incorporation conduct, she placed significant weight upon the Strata disputing the pay down of capital costs from 2007 onward, withholding membrane repair costs from 2010 onward, and failing to resort

to the auditing provisions under the ASP Agreement (again, presumably after demanding financial information in 2008).

[30] The trial judge expanded upon the bases for her conclusion that there was no post-incorporation contract at paras. 68-72, referencing the following factors:

a) Absence of privity

The case does not involve a party who had agreed to be bound by the ASP Agreement once it was incorporated; there was no evidence any party belonging to the strata corporation agreed to the ASP Agreement terms and then refused to enter into a post-incorporation agreement.

b) Misplaced reliance on the benefit/burden exception

CSPC's argument confuses contractual principles with easement principles. The *Amberwood* decision made it clear that the benefit/burden exception to the rule that positive covenants on easements are not enforceable has not taken hold in Canada and is not the law with respect to easements.

c) Non-adoption of the Contract

i. The ASP Agreement drafters also prepared the draft bylaws dated September 30, 1997 and intended them to be adopted by the Strata council, but there is no evidence that they actually were adopted.

ii. The Strata council did not execute any documents to give full effect to the Parking Facility easement.

iii. The Strata council did not pass resolutions to accept the Parking Facility easement.

Grounds of Appeal

[31] CSPC argues the trial judge erred in law in holding that a positive covenant can never run with the land. It urges upon us the adoption of the exceptions to the rule stated in *Austerberry v. Corporation of Oldham*, [1885] 29 Ch. D. 750 (C.A.)

("rule in *Austerberry*"). I have stated the law on this ground of appeal in the Court's judgment in the companion appeal in *Jameson House*. The trial judge did not err in holding that the positive covenants at issue in this case do not run with the land. Accordingly, this ground of appeal is dismissed.

[32] Further, CSPC argues the trial judge erred in the manner in which she applied the test for determining whether a pre-incorporation contract has been adopted by a corporation subsequently created.

Analysis

[33] CSPC says a contract established before a party is incorporated ("pre-incorporation contract") can be the basis for a new, and identical, contract that binds that party once it is incorporated ("post-incorporation contract"), where the party shows an intention to be so bound. The critical question is whether: (a) the benefits and burdens of the agreement are contemplated pre-incorporation, and (b) the benefits and burdens are acted upon exactly as contemplated post-incorporation. This is the test described and applied twice by this Court, in *Heinhuis* and in *Phelps Holdings Ltd. v. Owners Strata Plan VIS 3430*, 2010 BCCA 196.

[34] In *Phelps Holdings*, Huddart J.A., for the Court, held:

> [19] I am satisfied the trial judge correctly interpreted *Heinhuis …* to the effect that, where a party shows an intention to be bound by a new, and identical, post-incorporation contract, that party cannot take the benefit of the agreement without accepting the burden. When the benefit … and burden … are contemplated pre-incorporation, and are then acted upon exactly as contemplated post-incorporation, there will be found to be a new post-incorporation contract on the same terms.

[35] The appellant says the trial judge erred in law in three respects:

a) By relying on evidence of the subjective intention of the respondent, whereas the parties' intentions must be inferred objectively from their conduct;

b) By placing some weight on the absence of privity between the parties, whereas absence of privity is the reason the rule for adopting pre-incorporation contracts exists; and

c) By finding that the absence of formal adoption of the ASP Agreement was material, whereas the law places little weight upon formal adoption and the lack of formal adoption is a common fact in many pre-incorporation contract cases.

[36] The Strata says that the law of pre-incorporation contracts does not apply to the enforcement of the positive covenants in paragraphs 7.5(d) to 7.5(i) of the ASP Agreement because this would permit the CSPC to "step around the Rule in *Austerberry"*. The Strata says that, insofar as the cases establish any principles that are applicable in the case, the trial judge properly considered and applied those principles to the facts of this case.

Pre-Incorporation Contracts and Positive Covenants

[37] The Strata says there has not been a single case decided in Canada in which the court has enforced a positive covenant in an easement by finding a post-incorporation contract on the same terms as the pre-incorporation contract. It refers to a passage in *The Owners, Strata Plan NWS 3457 v. The Owners, Strata Plan LMS 1425*, 2017 BCSC 1346 [*Scottsdale*], as authority for the proposition that the court should be cautious to find a pre-incorporation contract that simply steps around the rule in *Austerberry*. Curiously, the passage cites the trial judgment in this case, making it of questionable value to us:

> [58] As noted in [*The Owners, Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71], a court should be cautious to find a pre-incorporation contract that simply steps around the Rule in *Austerberry*. Aspects of the plaintiff's submission on this point suggested that the unfairness of the Rule in *Austerberry* should encourage the court to find that there was an enforceable pre-incorporation contract. In my view, the opposite is true. The fact that the Rule in *Austerberry* stands means that a court must be scrupulous to ensure that the requirements for any exception are met, so that the avenue is not simply used as a means to avoid the implications of this long-standing legal principle…

[38] The Strata says, further, that the authorities CSPC relied on, particularly *Heinhuis* and *Phelps Holdings*, do not involve the enforcement of positive covenants in easements. The Strata argues:

> 36. Unlike the parties in *Heinhuis*, the case at bar is not a commercial case whereby the principals of companies are standing in the place of the unincorporated companies. The [Strata] (or its owners) did not agree to the terms of the ASP Agreement prior to coming into existence as a strata corporation. The Developer established the ASP Agreement, in part, to comply with zoning and in an effort to recover the capital costs to build the parking facility.

[39] I would not accede to the Strata's argument that the law of pre-incorporation contracts that CSPC relied upon is inapplicable in this case. Nor would I be hesitant to apply the law with respect to pre-incorporation contracts in this case on the ground that this might be a novel application of the principles.

[40] In my view, insofar as the law with respect to pre-incorporation contracts is concerned, this case cannot be distinguished from *Phelps Holdings*. In that case, an agreement to subdivide lots and create a strata corporation included an easement that the strata corporation would enjoy over adjacent property and granted an option for one of the parties to purchase part of the land back from the strata corporation once certain conditions were met. The positive obligations from the pre-incorporation contract were enforced because the court found that the parties adopted that contract post-incorporation. *Phelps Holdings* does not suggest that *Heinhuis* has limited application; it states a general rule that is applicable in all cases where a newly incorporated entity shows an intention to be bound by a new, post-incorporation contract identical to that entered into by its predecessor before it was incorporated.

[41] In my view, we should not be hesitant to find that the *Heinhuis* test applies to a pre-incorporation contract simply because it would bind a party to a positive obligation that, as a result of the rule in *Austerberry*, does not run with the land. The rule in *Austerberry* can have harsh results. It is anomalous and, as we have noted in *Jameson House*, many have called for it to be discarded. It is well recognized that

parties are and should be free to avoid the impact of the rule by, among other means, establishing a chain of contractual obligations. In its discussion of methods of circumventing the rule in *Austerberry* the British Columbia Law Institute noted, in its *Report on Restrictive Covenants*, BCLI Report No. 67, February 2012 at page 9:

> One method would be to maintain privity of contract by a chain of personal covenants and indemnity agreements. Land may be sold subject to a positive covenant accompanied by wording requiring the covenantor to require anyone purchasing from him or her to also perform the covenant and indemnify the covenantor against liability for its breach, and to extract the same terms from any subsequent purchaser. This would tend to ensure performance of the obligation as long as the chain remains intact, but it is … unlikely to last through more than a few transfers of the burdened land. Once the promise to perform and the indemnity have been omitted from the terms of a sale of the burdened land, the chain is broken.

[42] There is no reason why we should be predisposed to an interpretation of the parties' conduct that will bring an end to a chain of contractual obligations that is established with a view toward avoiding the rule in *Austerberry.*

Privity

[43] CSPC's argument with respect to the absence of privity is simple. It says the trial judge considered the absence of privity to be important in the analysis when she held at para. 64:

> …The plaintiff did not enter into the ASP Agreement. Registering it as an easement did not make the ASP Agreement into a new contract on the same terms to which the parties showed, through their conduct, an intention to be bound. There is no privity of contract and so the plaintiff cannot be bound by the obligations contained in the ASP Agreement.

CSPC, at para. 78 of its factum, says this cannot be the law because:

> By definition, a corporation cannot be a party to a pre-incorporation contract. Privity will always be absent. However, as the law in *Phelps*, and others sets out, a post-incorporation contract *among new parties* arises where the new parties are contemplated pre-incorporation, and where the new parties' [*sic*] objectively manifest the intention to be bound by the terms of the pre-incorporation contract. Privity is no barrier because it is not the pre-incorporation contract, *per se*, that is being enforced, but a new contract (into which the new parties enter) on the same terms.
>
> [Emphasis in original.]

[44] I agree that absence of privity is not a relevant factor when determining whether a pre-incorporation contract is embodied in a new contract following incorporation. This was the exact question in *Heinhuis*: whether the defendant, although not privy to the bill of sale and chattel mortgage because the defendant was not incorporated when these initial contracts were executed, had nevertheless adopted them once incorporated. The absence of privity between the parties to the bill of sale and chattel mortgage was not a factor that assisted in determining whether the parties were bound to the contractual obligations by their post-incorporation conduct. The court in *Heinhuis* established its approach to the question of whether parties have adopted pre-incorporation contracts precisely because of the lack of privity between the parties.

Adoption of ASP Agreement

[45] I agree with CSPC's submission that it was an error for the trial judge in this case to place weight upon the fact that the parties did not formally adopt the ASP Agreement. CSPC argues:

> 81. By its very nature, a post-incorporation contract evidenced through conduct to be entered into on the terms of a pre-incorporation contract need not be formally adopted, nor do any post-incorporation documents necessarily need be executed. *Heinhuis*, paras. 13-15, 19.
>
> 82. …If the trial judge's imposition of this requirement were accepted, it would effectively nullify the existing jurisprudence built up to address circumstances – precisely such as those at hand – in which parties by their conduct evince an intention to be bound by the terms of an agreement executed prior to their existence but contemplating the same.

[46] This Court addressed the issue of formal adoption in *Heinhuis* at 244-245:

> I do not find it necessary to engage in an analysis of the formation of the post-incorporation contract in the traditional terms of offer and acceptance or mutual promises, although I think such an analysis could be made by regarding Heinhuis' conduct following the pre-incorporation contract as constituting a continuing offer to convey the vessel to the company on the terms set out in that agreement, and the company's conduct in taking the vessel and treating it as its own as constituting acceptance of that offer. Mutual written or oral promises may not be the only way in which a contract can arise: see Waddams, The Law of Contracts, 2nd ed. (1984), p. 12; Treitel, The Law of Contract, 4th ed. (1975), p. 7. As Treitel puts it, the first requisite of a contract is that the parties have made an agreement which is

> certain and final. When such an agreement, whether deduced from words or conduct, is found, together with consideration to support it, a contract exists. In the case at bar, the conduct of Mr. Heinhuis and Blacksheep demonstrates clearly that they intended to be bound by the pre-incorporation contract. Heinhuis intended to surrender and did in fact surrender possession and title to the vessel, in return for which the company intended to assume and did in fact assume the obligation under the chattel mortgage. The only reasonable inference is that Blacksheep and Heinhuis contractually agreed to accept these mutual obligations.

[47] Courts have made similar declarations when considering statutory provisions for the adoption of pre-incorporation contracts. Section 20 of the *Business Corporations Act*, S.B.C. 2002, c. 57, sets out how and when a company is bound by a contract entered into in the name of or on behalf of that company before it is incorporated. In interpreting this section, the BC Supreme Court reiterated the view that there is no principled basis for imposing "a stringent requirement of formality" regarding the manner of adoption of a pre-incorporation contract, despite the absence of any specific direction in the legislation to do so: see, e.g., *Gurdev Holdings Ltd. v. Schmidt,* 2009 BCSC 551 at para. 20, citing Abella J.A. (as she then was) in *Sherwood Design Services Inc. v. 872935 Ontario Ltd.* (1998), 39 O.R. (3d) 576 (C.A.).

[48] As such, while it may be possible to find offer and acceptance of the pre-incorporation contract in this case, where CSPC's conduct following the pre-incorporation contract constitutes a continuing offer to afford an easement to the Strata on the terms and conditions set out in the ASP Agreement and the Strata's conduct in taking advantage of the easement and paying the parking fees constitutes acceptance of that offer, this is unnecessary. As the CSPC submits, a contract simply requires (1) objectively discernible essential terms; (2) consideration; and (3) outward expression of the intention of the parties to be bound by the terms as expressed, whether through execution of a written document, verbal offer and acceptance, conduct, or otherwise: *Whistler Mountain Ski Corp. v. Projex Management Ltd.* (1994), 90 B.C.L.R. (2d) 283 (C.A.) at para. 41.

[49] While there is some merit in the CSPC's submission that the Strata's 2008 amendment to its bylaws expressly acknowledged the "terms and obligations" of the Parking Facility Easement, no such formal acknowledgement is necessary. In light of my conclusions below on the Strata's implied agreement to be bound by the terms of the ASP Agreement, it is not necessary to address the argument that the trial judge misinterpreted the bylaw amendment.

Subjective Intention

[50] To the extent that the judgment below hinges upon the lack of privity or the lack of a formal agreement between the parties, I am of the view that these considerations are erroneous. However, in my view, the trial judge's reliance on subjective intentions in her assessment of whether the parties had adopted the post-incorporation contract is an error in principle.

[51] Again, the three requirements to find a contract are (1) objectively discernible essential terms; (2) consideration; and (3) outward expression of the intention of the parties to be bound by the terms as expressed. The first two requirements are easily met in this case. There is no real dispute between the parties that the pre-incorporation ASP Agreement is a valid and enforceable contract since the Strata's initial pleadings were premised on the existence and validity of the ASP Agreement (with the exception of the disputed payment provisions). There was also, quite clearly, consideration because the Strata received parking passes and used the parking facility.

[52] The critical question that remains is whether the trial judge was correct to find the parties' conduct did not establish an intention to be bound by a new contract containing identical terms. Although this is a mixed question of fact and law, the finding was undermined by errors in principle and should be set aside.

[53] We are, of course, obliged to afford deference to the trial judge's findings of fact. However, failing to consider factors that ought to have been considered in answering the question or considering irrelevant factors may amount to an extricable

error of law, reviewable on the correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 34-36; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 53. In my opinion, for the following reasons, by looking inappropriately at the subjective intentions of the contracting parties and addressing conduct that should have been irrelevant to the analysis, the trial judge made errors of law and we should set aside her conclusion on the question of whether the parties' conduct established an intention to be bound by the contract.

[54] CSPC says the Strata expressed its intention to be bound in several ways: the Strata accepted the parking provided and paid the fees without complaint for years when there was no other basis, outside the ASP Agreement, to do so; the Strata exercised its right under the ASP Agreement to demand documents and information from CSPC; the Strata formally adopted at least a portion of the ASP Agreement into its bylaws; members of the Strata said that the ASP Agreement must be complied with; and, in this matter before the courts, the Strata sued on the ASP Agreement as a contract they were entitled to enforce and sought damages for alleged breaches by CSPC.

[55] CSPC says that, rather than look at the parties' objective conduct, the trial judge relied on the subjective intentions of the Strata and its individual owners to reach her conclusion that no post-incorporation contract existed. CSPC indicates the following examples, found at paras. 67 and 77-79 of the reasons for judgment:

a) the Strata paid for parking "because they thought they were bound to do so";

b) "... the plaintiff did not willingly contract to adopt the terms of the ASP Agreement";

c) it was "unlikely" that the Strata would have agreed to a post-incorporation contract on the basis of the ASP Agreement "if they understood all the terms";

d) "the plaintiff did not completely understand the ASP Agreement"; and

e) "had the plaintiff understood that the capital costs would never be paid down and they would never receive a reduction in parking fees, I do not believe they would have entered into an agreement where they were paying 30% of their annual budget on parking indefinitely."

[56] In particular, CSPC says the trial judge erred in placing weight on evidence of the Strata's principals' views in 2007 when they turned their attention to the significant expenses they were incurring. Not only are the subjective intentions of individual owners irrelevant as the question is about the Strata corporation's intentions, but by the time the Strata owners turned their attention to the terms of the ASP Agreement the Strata had been abiding by its terms for eight years. Their subjective views at that time were irrelevant when the court should have been inquiring into the objective intentions of the parties when the Strata was first incorporated.

[57] If we are to use the conduct of the newly-formed company to infer its intention to be bound by the obligations of a pre-incorporation contract, we must look to the act or conduct that followed closely upon incorporation.

[58] While the parties do not rely on the provisions of the *Business Corporations Act*, the statutory emphasis on the conduct of the new corporation at or about the time of incorporation is consistent with the common-law contract cases. The *Business Corporations Act* reflects this approach in s. 20:

> (3) If, after a pre-incorporation contract is entered into, the company in the name of which or on behalf of which the pre-incorporation contract was purportedly entered into by the facilitator is incorporated, the new company may, within a reasonable time after its incorporation, adopt that pre-incorporation contract by any act or conduct signifying its intention to be bound by it.
>
> [Emphasis added.]

[59] It was an error, in my view, to look to post-2007 conduct to determine whether the Strata entered into an agreement with CSPC in the terms of the ASP Agreement

when the Strata came into existence in May 1999 and the dispute with respect to the terms of the agreement arose in 2007.

[60] Further, in my opinion, the Strata's post-2007 conduct does not suggest the Strata had disavowed the ASP Agreement. As CSPC points out, the Strata conducted itself as if it were bound by the ASP Agreement, even after a dispute arose. It also exercised its right under the ASP Agreement to demand documents and information from CSPC, insisted on compliance with the ASP Agreement, and initially sought relief from the courts on the ASP Agreement as a contract it was entitled to enforce and to receive damages for any breaches from.

[61] Thus, by 2007, not only had the Strata long taken the benefit of the ASP Agreement, it had borne the burden as well. This is a relevant consideration in determining the parties' intentions to be bound by the contract. As McLachlin J.A. set out in *Heinhuis* at 244: "Blacksheep could not take the part of the contract that benefits it, while rejecting the part that required it to pay for the benefit. If, after its incorporation, it took part of the contract, it must be considered to have taken it all." The Strata had, similarly, taken advantage of all of the terms of the ASP Agreement for many years after its incorporation.

[62] The trial judge erred by misinterpreting the relevance of the Strata's accepting the benefits and burdens of the ASP Agreement. She wrote:

> [69] … CSPC's argument confuses contractual principles with easement principles. The *Amberwood* decision made it clear that the benefit burden exception to the rule that positive covenants on easements are not enforceable has not taken hold in Canada and is not the law with respect to easements.

With respect, CSPC's argument did not confuse contractual principles with easement principles. *Heinhuis* affirmed that a party cannot take the benefit of an agreement without accepting the burden. This assertion was not related to the benefit/burden exception from the rule in *Austerberry* because the rule in *Austerberry* was not at issue in that case.

[63] The contractual principle is, perhaps, best set out in *Heinhuis*, where McLachlin J.A. set out the foundation of the pre-incorporation contract rules at 243-244:

> [15] The authorities establish that an intention to be bound by the pre-incorporation contract may be inferred where the pre-incorporation contract has been partly performed by the transfer of assets to and acceptance of those assets by the company. This appears to have been accepted as early as 1866 when, in *Kelner v. Baxter* (1866), L.R. 2 C.P. 174 at 179-80, the following exchange occurred between Byles J. and counsel:
>
> > Byles, J. If the company, when formed, had taken to the wines and spirits in question, and had allowed them to be consumed by their customers, might they not have been liable as for goods sold and delivered?
> >
> > [Counsel]: Doubtless they might.
>
> [16] In 1888 the same view was expressed in *Howard v. Patent Ivory Mfg. Co.,* supra. At p. 163, Kay J. stated:
>
> > There is authority for saying that in the eye of this Court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it. That is a very distinct decision which, so far as I know, has never been departed from, that the rule of equity that part performance will take a case out of the *Statute of Frauds* applies to an incorporated company, and that an incorporated company which comes within that doctrine of part performance is just as much bound by it as if it were an individual. In the same case there is a summary of another part of the law to which I have often had occasion to refer: "Where possession has been given upon the faith of an agreement, it is I think the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement and to give effect to it."
>
> Similarly, at p. 168 Kay J. commented:
>
> > After the winding-up the liquidator took an assignment of all the rest of the property of which he could possibly get an assignment, in pursuance of the very same arrangement. Now he comes to the Court and asks the Court to say that there never was a contract between the company and Mr. *Jordan.* He says, "True, I have taken from Mr. *Jordan* everything I could possibly get from him: the company took an assignment of the leasehold premises which they have held ever since; I have treated all these as assets of the company, and I now turn round and say that there never was such an agreement." Such a course of conduct would be, as I have characterized it during the argument, the most flagrant dishonesty. It is saying "you shall not be paid for the property at all." I should not hold that unless I were bound by authorities very much more stringent than those which have been cited. Nor do I think that any branch of the Court would hold anything of that kind.

> [17] The same view has been taken in Canada. In *Re Red Deer Mill & Elevator Co.; Stratford Mill Bldg. Co.'s Claim* (1907), 7 W.L.R. 284, 1 Alta. L.R. 237 (S.C.), Beck J. stated [p. 241], obiter, that had it been necessary he would have held "that the company became bound by the agreement on the grounds that the agreement was made in the name of the company, that it accepted the goods comprised in it, and gave promissory notes for a portion of the price". Similarly, the views of Kay J. in *Howard* on the effect of part performance referred to above were cited with approval in *adp Computer Ltd. v. Franklin,* B.C.S.C., Vancouver No. C762525, 9th March 1977.

It did not do justice to the appellant's argument that the Strata had, similarly, taken advantage of all of the terms of the ASP Agreement for many years after its incorporation, by saying that in *Amberwood* the Ontario Court of Appeal had rejected the argument for a benefit/burden exception to the rule in *Austerberry*.

[64] The trial judge considered three aspects of the Strata owners' post-incorporation conduct to be inconsistent with the appellant's case (at para. 67): the pay down of capital costs, the withholding of membrane repair costs, and the failure to use the auditing provisions under the ASP Agreement. In my view, all of these acts are consistent with the view that the Strata, while bound by the ASP Agreement, was involved in a dispute with the appellant with respect to its interpretation and implementation many years into its operation.

[65] I agree with the appellant that the balance of the factors considered by the trial judge (referred to at para. 55 above) relate to the Strata owners' subjective understanding of their obligations and ought not to have played a role in the trial judge's analysis.

[66] In my view, the evidence in this case clearly establishes that it was contemplated that the Strata would enjoy the benefit and discharge the burden of the ASP Agreement before the incorporation of the Strata. The benefit and burden were acted upon by the Strata exactly as contemplated post-incorporation. In the circumstances, the ASP Agreement is binding upon the Strata and its terms are enforceable.

Order on Appeal

[67] In the proceedings below, the respondent sought:

a) a Declaration that section 7.5 of the ASP Agreement is null and void or unenforceable;

b) an Order that section 7.5 of the ASP Agreement be rectified or varied to state that the Parking Space Capital Costs had been fully recovered or, in the alternative, to permit repayment on commercially reasonable terms and time frames; or on such terms as the Court deems just and proper;

c) further, or in the alternative, a declaration that the Parking Space Capital Costs had been fully recovered; and

d) damages for breach of contract and an accounting.

[68] The appellant sought:

a) judgment in the amount of $188,087.47 as of September 30, 2013 [outstanding base rent, operating expenses, membrane repair, and contractual interest];

b) damages for breach of contract after September 30, 2013 in an amount to be assessed; and

c) contractual interest or interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[69] The trial judge made orders:

a) declaring the payment provisions of the ASP Agreement are not binding and Clauses 7.5(d), (e), (f), (g), (h) and (i) of the ASP Agreement are unenforceable; and

b) dismissing Crystal Square Parking Corporation’s counterclaim.

Conclusion

[70] For the foregoing reasons, I would allow the appeal, and set aside the order declaring the ASP agreement to be unenforceable and dismissing the counterclaim. I would remit the claim and counterclaim to the trial court for determination of the contractual issues that have not been addressed: whether a claim for rectification, unconscionability or frustration has been made out and, if not, consideration of the counterclaim and an assessment of the amount owing, if any.

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Madam Justice Fisher"