# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Marshall Mountain Telecom Ltd. v. The Owners, Strata Plan EPS 4044,* 2019 BCSC 1180

Date: 20190723
Docket: S206131
Registry: New Westminster

Between:

**Marshall Mountain Telecom Ltd.**

Plaintiff

And

**The Owners, Strata Plan EPS 4044**

Defendant

Before: The Honourable Mr. Justice Riley

## Reasons for Judgment

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| Counsel for the Plaintiff: | G. Stephen Hamilton |
| Counsel for Defendant: | Matthew S. Both |
| Place and Dates of Hearing: | New Westminster, B.C.<br>February 14, 2019<br>April 17, 2019<br>June 27, 2019 |
| Place and Date of Judgment: | New Westminster, B.C.<br>July 23, 2019 |

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## Introduction

[1] This is a summary trial application in an action arising out of attempts to enforce a lease on certain common property at the Delta Rise tower, a 37 storey strata-titled building on 80th Avenue in Surrey. By way of background:

(a) The owner-developer of the Delta Rise property was Marshall Mountain Homes ("Marshall Homes").

(b) The plaintiff, Marshall Mountain Telecom ("Marshall Telecom") is an affiliated company that entered into a lease with Marshall Homes for the installation and operation of telecommunications equipment on the common property of the Delta Rise tower, principally on the rooftop.

(c) At the conclusion of the development, the defendant Owners of Strata Plan EPS 4044 (the "Strata Corporation") became responsible for the common areas of the Delta Rise property.

(d) The lease purports to be binding on all agents and assignees of Marshall Homes, and on this basis Marshall Telecom takes the position that the obligations under the lease are binding on the Strata Corporation.

[2] Against this backdrop, Marshall Telecom commenced the present action seeking to hold the Strata Corporation to certain obligations under the rooftop lease. The Strata Corporation's response is threefold. First, the Strata Corporation says Marshall Homes entered into the rooftop lease in breach of its fiduciary duties as an owner-developer, making the lease invalid. Second, it is argued in the alternative that the rooftop lease is not binding and enforceable against the Strata Corporation, who is not a party to it. Third, the Strata Corporation argues in the further alternative that certain of the remedies sought by Marshall Telecom are unjustified.

## Facts

[3] On 16 October 2013, Marshall Homes filed an initial disclosure statement for the Delta Rise development with the Superintendent of Real Estate as required

under *Real Estate Marketing Development Act*, S.B.C. 2004, c. 41 [*REMDA*]. The disclosure statement listed a number of potential encumbrances against the property. One of the listed potential encumbrances was a long term lease or other charge in favour of the developer or a related or affiliated company with respect to all or a portion of the common property, including the rooftop, for the purpose of installing and operating telecommunications equipment, including cellular telecommunications equipment. Another potential encumbrance was a lease or other charge in favour of the developer or a related or affiliated company with respect to the parkade portion of the common property.



[4] Marshall Homes began to market Delta Rise strata lots for sale shortly after filing the disclosure statement.

[5] Mr. Sharma, the president of both Marshall Homes and Marshall Telecom, states in his affidavit that each of the original purchasers of Delta Rise strata lots received and acknowledged receipt of the disclosure statement from Marshall Homes. In the course of argument on this summary trial application, defendant's counsel pointed out that Marshall Homes had a statutory obligation as owner-developer of the property to obtain written acknowledgments from each original purchaser verifying that the purchaser was given an opportunity to review the disclosure statement. In response, plaintiff's counsel pointed out that the assertion in Mr. Sharma's affidavit is unequivocal and stands unchallenged. The Strata Corporation has not presented any contradictory evidence. For example, there is no affidavit evidence from any of the more than 300 strata unit purchasers challenging Mr. Sharma's assertion, or denying receipt of the disclosure statement.

[6] On 1 April 2017, Marshall Homes entered into a lease agreement with Marshall Telecom. The lease agreement included the following features:

(a) The leased area was a significant proportion of the common area on the rooftop of the Delta Rise property.

(b) The lease allowed for Marshall Telecom, as lessee, to install, maintain, and operate telecommunications equipment, including cellular tower equipment in the leased area.

(c) The term was from the date the lease was signed until the date that the strata corporation for the property was dissolved or wound up under the *Land Title Act*, R.S.B.C. 1996, c. 250.

(d) The lessee, Marshall Telecom, was required to make a single rent payment of $10 for its use of the leased area.

(e) The lease was expressly limited to the common property and would not "burden the title" of any individual strata lot.

(f) The lease was to "run with and bind" each subdivided parcel within the Delta Rise property and to be "automatically assumed by" the strata corporation.

(g) The lessee, Marshall Telecom, was to have full access to the property for purposes of installing, constructing, maintaining, and operating the telecommunications equipment, including bringing vehicles, machinery, equipment, and tools onto the property for those purposes.

(h) Marshall Telecom was authorized to assign its rights under any part of the lease to an affiliated company or to a third party.

(i) The lease was binding on any successors or assignees of either party.

(j) Each party was obliged, on request of the other, to execute any further documents or instruments and take any further lawful action required "for the better or more perfect and absolute performance" of the lease.

[7] On 13 April 2017, a number of documents pertaining to the Delta Rise property were filed in the Land Title Office, including: (a) Strata Corporation plan EPS 4044, which in effect created a total of 317 strata-titled properties on the Delta Rise lands; (b) the rooftop lease, which was registered on the common property

index for Strata Corporation Plan EPS 4044; and (c) a parking lot lease in favor of Delta Rise Parking Ltd., also registered on the common property index.

[8] On 12 July 2017 the strata council for EPS 4044 held its first annual general meeting. The property manager, Mr. Rae, states in his affidavit that the rooftop lease was not placed before the council for ratification, a step that is required under the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*]. For the sake of completeness, I note that the minutes of the meeting show that no contracts or leases, including the parkade lease, appear to have been placed before the strata council at the first annual general meeting.

[9] On 24 November 2017, Marshall Telecom granted a license to Akash Broadcasting Inc. to construct and operate a rooftop radio tower for FM radio broadcasting within the area leased by Marshall Telecom under the rooftop lease. Marshall Telecom is incorrectly referred to in this license agreement as the "owner" of the Delta Rise property when in fact Marshall Telecom was only the lessee under the rooftop lease.

[10] On 6 June 2018, Marshall Telecom submitted a land use development application to the City of Delta, seeking a development permit for the erection of rooftop antennae in furtherance of its license agreement with Akash Broadcasting. Marshall Telecom is once again referred to incorrectly as the owner of the site.

[11] Some time after 6 June 2018, the City of Delta notified Marshall Telecom that the proposed development would not be considered until the Strata Corporation, as the property owner, either signed the development application or provided a letter confirming that Marshall Telecom was authorized to submit the development application on behalf of the Strata Corporation.

## Analysis

### (1) Suitability for Summary Trial

[12] The first issue to be dealt with is whether this matter is suitable for summary trial under Rule 9-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. When

presented with a summary trial application, the court has the option under Rule 9-11 to (a) adjourn the application, or (b) dismiss it, on the basis that either the issues are not suitable for summary disposition or the summary trial process will not assist in the efficient resolution of the case. Rule 9-1(15) provides that judgment may be granted on a summary trial application unless the court is unable to find the facts necessary to determine the case, or it would otherwise be unjust to decide the matter by way of a summary trial.

[13] When the hearing of this matter began, counsel for the Strata Corporation argued that it would be premature for the Court to decide the matter by way of a summary trial at this stage because examinations for discovery had only recently been completed, and because there was an outstanding request for disclosure of documents.

[14] When asked to particularize the manner in which the recently completed discovery or outstanding document disclosure impacted on the issues on the summary trial, counsel focused his submission on the Strata Corporation's outstanding request for production of documents verifying that Marshall Homes had complied with its obligation under s. 15(1)(c) of *REMDA* to obtain written confirmation that each of the original strata lot purchasers was given an opportunity to read the Delta Rise disclosure statement. Counsel for the Strata Corporation says the results of this production request will assist in determining whether Marshall Homes complied with its fiduciary obligation to provide prospective purchasers with notice of its intent to negotiate contracts for the benefit of Marshall Homes or its affiliates.

[15] In response to this submission, counsel for Marshall Telecom asserted that the Strata Corporation's request for production of 317 separate written acknowledgements was unduly onerous. Counsel says Marshall Homes attempted to satisfy the Strata Corporation's request by providing written confirmations from 11 randomly selected purchasers. Counsel referred to the affidavit of Mr. Sharma, the president of both Marshall Homes and Marshall Telecom, averring that each of the

original purchasers of Delta Rise strata lots received and acknowledged receipt of the disclosure statement. Discovery of Mr. Sharma is now concluded and there is nothing to contradict his affidavit. Nor has the Strata Corporation presented any contradictory evidence, including affidavit evidence from a single one of the more than 300 strata unit purchasers denying receipt of the disclosure statement.

[16] There is case law to support the proposition that where there is a "real possibility" that further discovery or document production will yield evidence to support a party's case, the summary trial should not proceed until those discovery processes are completed: *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350 (S.C.) at para. 7-10; *Finan v. Kowalenko* (1985), 68 B.C.L.R. 1 (C.A.) at para. 24. However, this proposition has its limits. There is certainly no rule precluding a chambers judge from deciding a summary trial application on the mere assertion that further discovery processes may turn up evidence of assistance to one of the parties.

[17] In *Tassone v. Cardinal*, 2014 BCCA 149, the Court rejected an argument that the chambers judge erred in deciding a summary trial application where one of the parties asserted that the discovery process had not yet run its course. In doing so, the Court discussed three important points of law relevant to the question of suitability. First, an argument that further resort to discovery processes might "turn up" something useful is "insufficient to defeat a summary trial application": *Tassone* at para. 38, citing *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115 (C.A.). Second, where a matter is set down for summary trial, the parties are obligated to take every reasonable step to put themselves in the best position possible in the presentation of their respective cases: *Tassone* at para. 38, citing *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34. Third, at the end of the day, "[w]hat matters is whether a judge can find the facts necessary to decide the issues of fact or law, and whether it would be unjust to do so in the circumstances": *Tassone* at para. 39, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at para. 47.

[18] In the case at bar, the Strata Corporation has not shown that further document discovery is likely to produce evidence that will advance its case or undermine the opponent's case. The most counsel can say is that further document production from Marshall Homes might assist. The assertion in Mr. Sharma's affidavit that each of the Delta Rise strata unit purchasers was provided with and acknowledged receipt of the disclosure statement stands unchallenged. The summary trial application began on 14 February 2019, and continued on two subsequent dates over the span of the next four months. Over that time, the Strata Corporation has not put forward any other evidence on this issue, and has not applied to cross-examine Mr. Sharma on his affidavit.

[19] I conclude that the Court is in a position to find the facts necessary to decide the issues in this case. The circumstances pertaining to the marketing and sale of the Delta Rise strata units, the extent of the owner-developer's disclosure concerning the potential for a rooftop lease, the terms of the rooftop lease, the filing of all relevant documents in the Land Title Office, and the subsequent steps taken by Marshall Homes to act under the lease are all before the Court. Moreover, there are no conflicts in the affidavit evidence.

[20] I am also satisfied that it would not be unjust to decide this matter by way of a summary trial. The matter is not factually complex. And although the legal issues are not simple, they are by no means novel. There are many decided cases dealing with similar situations involving the fiduciary obligations of owner-developers toward prospective purchasers, and the enforceability of contracts made for the benefit of the owner-developer. Any further delay would prejudice all parties, in that the enforceability of the obligations under the rooftop lease has yet to be determined, Marshall Telecom's application for municipal approval is stalled, and its licensing agreement with Akash Broadcasting is in limbo.

**(2) Merits of the Summary Trial Application**

**(2)(i) Whether the Lease is Invalid Due to Breach of Fiduciary Duty**

[21] The Strata Corporation argues that the lease is invalid because the owner-developer entered into that contract in breach of its fiduciary duty. Counsel cites *The Owners, Strata Plan 1261 v. 360204 B.C. Ltd.* (1995), 50 R.P.R. (2d) 62 (B.C.S.C.) [*Strata Plan 1261*] at para. 37 for the proposition that a contract entered into in breach of fiduciary duty is invalid on public policy grounds.

[22] It is common ground between the plaintiff and the defendant that Marshall Homes, as the owner-developer of the Delta Rise project, owed a fiduciary duty to prospective strata unit purchasers. This duty is reflected in the common law and in the provisions of the *SPA*. It seems to me that prior to the coming into existence of the strata corporation the fiduciary duty arises at common law, whereas after the strata corporation comes into existence the owner-developer's duties can be traced directly to the provisions of the *SPA*. Section 5 of the *SPA* provides that the owner-developer must exercise the powers and perform the duties of the strata council from the time of establishment of the strata corporation until the point when the strata council holds its first annual general meeting. Section 6 provides that an owner-developer, while acting on behalf of the strata council, must: (a) "act honestly and in good faith with a view to the best interests of the strata corporation", and (b) "exercise the care, diligence and skill of a reasonably prudent person".

[23] There are many cases describing the scope of the owner-developer's fiduciary duty to strata unit purchasers. See, for example, *Strata Plan 1261* at para. 103-104; *Matthias v. Strata Plan VR 2135*, 2000 BCSC 2000 [*Matthias*] at para. 22; *The Owners, Strata Plan VIS 2968 v. K.R.C. Enterprises Inc.*, 2007 BCSC 774 [*K.R.C. Enterprises*] at para. 27-30, rev'd on other grounds by *The Owners, Strata Plan VIS268 v. K.R.C. Enterprises Ltd.*, 2009 BCCA 36; *Zaidi v. The Owners, Strata Plan LMS 3464*, 2016 BCSC 731 [*Zaidi*] at para. 24-29.

[24] Although the *Strata Plan 1261* case was decided under the statutory predecessor to the *SPA*, the Court's discussion of the scope of the owner-

developer's fiduciary is of enduring utility. Mr. Justice Thackray (as he then was) stated at para. 103 that "the developer is under an obligation to the individual buyers not to allow its self-interest to interfere with the interests of those present and future purchasers", and at para. 104 that the developer is "prevented from entering into transactions with itself for its benefit as developer but to its detriment as owner". There are comments to the same effect in *Matthias* at para. 22.

[25] However, the jurisprudence also recognizes that an owner-developer is not necessarily in breach of its fiduciary duty by engaging in transactions for its own benefit, provided that the owner-developer acts in adherence to the development plans described in the disclosure statement, and prospective purchasers have notice of the owner-developer's intentions: *K.R.C. Enterprises* at para. 22-29; *Zaidi* at para. 25, 28.

[26] In *K.R.C. Enterprises*, Madam Justice Gerow noted at para. 22 that in some cases transactions for the benefit of the owner-developer have been upheld, while in other cases they have not. One of the relevant factors to be considered is "what notice was given to purchasers", by way of the disclosure statement under *REMDA* or registration of encumbrances on title under the *Land Title Act*. After reviewing a number of cases decided in British Columbia and in Ontario, Gerow J. concluded at para. 29 that owner-developers have been found to be in breach of their fiduciary duty in cases where property limitations have "not been included in the disclosure statements", nor "registered against the title to the property so that the prospective purchaser can determine the extent of any restrictions on the common property by searching the title".

[27] There is no breach of fiduciary duty where the owner-developer has merely "organized the affairs of the strata corporation in a manner anticipated by the disclosure statement and agreed to by the purchasers": *Zaidi* at para. 28. See also *K.R.C. Enterprises* at para. 30, 26 citing *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257 (C.A.). Thus, an owner-developer who fairly

discloses its intention to enter into transactions for its own benefit would not for that reason alone be found to have breached its fiduciary duty to strata unit purchasers.

[28] In the case at bar, the Strata Corporation says Marshall Homes acted in breach of its fiduciary duty by entering into the rooftop lease with an affiliated company, Marshall Telecom, while failing to fairly disclose its self-interest and the extent of the anticipated encumbrance on the property to prospective purchasers. There are a number of facets to this argument.

[29] First, while the disclosure statement sets out a potential encumbrance in the form of a telecommunications lease on common property, the Strata Corporation questions whether Marshall Homes provided a copy of the disclosure statement to each of the initial purchasers in compliance with s. 15 of *REMDA*. On this point, I agree with counsel for Marshall Telecom that there is nothing contradicting the affidavit evidence of Mr. Sharma, averring that each of the purchasers received and acknowledged receipt of the disclosure statement. I thus accept that the original purchasers were provided with a copy of the disclosure statement expressly stating that the common property may be encumbered by a telecommunications lease in favour of Marshall Homes or an affiliated company.

[30] Second, the Strata Corporation argues that the disclosure statement did not fairly disclose the full extent of the encumbrance. Although the disclosure statement made reference to a possible long-term lease for telecommunications equipment on the common property, the lease itself was not included. The Strata Corporation says the lease terms are considerably more burdensome than the general description given in the disclosure statement. In particular:

i. while the disclosure statement contemplates a “long term lease”, the lease itself is for a term spanning the entire life of the strata corporation (the Strata Corporation does not say that the term is indefinite so as to make the lease invalid for this reason alone, but rather that the lease term is one of a number of factors which, taken together, make the

actual lease much more burdensome than the potential encumbrance described in the disclosure statement;

ii. the disclosure statement did not specify the consideration, whereas the lease provides only for a single payment of $10;

iii. the disclosure statement does not describe the nature of telecommunications equipment;

iv. the lease allows for significant intrusions on the property, including the use of machinery and vehicles to install and service telecommunications equipment;

v. the lease purports to run with each subdivided parcel of land on the property (although the lease expressly states that it only binds the common property and not the strata units themselves); and

vi. the lease imposes positive obligations on the strata corporation to take steps necessary to give effect to its terms.

[31] Taking all of this together, the Strata Corporation says that strata unit purchasers reading the disclosure statement would not have anticipated the full extent of the intrusion upon their interests as ultimately reflected in the lease. I do not find this submission convincing. In broad strokes the disclosure statement provided fair notice to purchasers that the owner-developer reserved the right to enter into a telecommunications lease on the common property. The disclosure statement indicated that the lease would be for the benefit of the owner-developer or an affiliated company. The terms of the lease negotiated between Marshall Homes and Marshall Telecom are entirely consistent with the description contained in the disclosure statement. Moreover, the lease itself was filed in the Land Title Office and registered against the title to the Delta Rise property on the very same day that the strata plan was filed and registered. Thus, each strata title purchaser was at liberty to search the title in the course of the conveyancing process, prior to completion.

[32] The Strata Corporation also contends that Marshall Homes breached its fiduciary duty by failing to place the rooftop lease before the strata council at the first annual general meeting as required under s. 20 of the *SPA*. The effect of non-compliance with s. 20 was dealt with in *299 Burrard Management Ltd. v. The Owners, Strata Plan BCS 3699*, 2014 BCSC 390. In that case, Mr. Justice Kent found that the owner-developer failed to table a contract for electronic concierge services at the first annual general meeting, but went on to explain at para. 63 that "there is nothing in the *Act* which stipulates that non compliance with s. 20 of the *Act* renders such contracts unenforceable as a matter of law".

[33] In the case at bar, I accept that there was non-compliance with s. 20 of the *SPA* in that the rooftop lease was not placed before the strata council at the first annual general meeting of EPS 4044. However, I do not find that the failure was a breach of fiduciary duty. The minutes of the first annual general meeting reflect that no contracts were tabled, including either the parking lot lease or the rooftop lease. The failure to table these contracts was an irregularity that may have contributed to the uncertainty about the status of the rooftop lease, in the sense that the strata council was not given the opportunity to immediately ratify it. However, this irregularity did not amount to a breach of the owner-developer's fiduciary duty or otherwise render the rooftop lease invalid.

**(2)(ii) Whether the Lease is Unenforceable Due to Absence of Privity**

[34] It is submitted that even if the lease is valid, it is not enforceable against the Strata Corporation, who was not a party to it. Thus, the Strata Corporation says it is not bound by the terms of the lease because there was no privity of contract. The Strata Corporation relies on *Phelps Holdings Ltd. v. Strata Plan VIS 3430*, 2010 BCCA 196 at para. 23 [*Phelps Holdings*] in which the Court stated at para. 16 that, "a contract entered into on behalf of a non-existent corporation is not binding on the corporation".

[35] There is case law holding that the effect of the rule against enforceability of pre-incorporation contracts can be avoided or superseded, "where 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": *Heinhuis v. Blacksheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239 (C.A.) at p. 242-243 [*Heinhuis*]. The underlying principle is that a party who shows an intention to be bound by a new, identical, post-incorporation contract "cannot take the benefit of the agreement without accepting the burden": *Phelps Holdings* at para. 19.

[36] In the case at bar, Marshall Telecom did not advance any argument that the Strata was bound by a post-incorporation contract as contemplated in *Heinhuis* and *Phelps Holdings*. This position is understandable, since a binding post-incorporation contract requires: (i) objectively discernible essential terms, (ii) consideration, and (iii) an outward expression of an intention to be bound by the terms as expressed, by execution of a document, oral agreement, or conduct: *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2019 BCCA 145 [*Crystal Square*] at para. 48, 51. In the case at bar, there is no evidence that the Strata Corporation received any form of consideration in connection with the rooftop lease, nor is there any evidence that the Strata Corporation said or did anything reflecting an objective intention to be bound by it.

[37] Finding no support for its position under the law of contract, Marshall Telecom argues that the obligations under the lease amount to a usage covenant that "runs with the land" as contemplated in *Nylar Foods v. Roman Catholic Episcopal Corporation of Prince Rupert*, 1988 CanLII 3355 (B.C.C.A.) [*Nylar Foods*]. In that case, the Court found a restrictive covenant to be invalid and unenforceable because, on a strict construction of the instrument in question, it was properly characterized as a personal covenant and not a charge on the land. McLachlin J.A., (as she then was) reasoned at para. 13 that even where a covenant "may affect the use to which land may be put", this in itself is "insufficient to make the covenant a valid restrictive covenant running with the land".

[38] However, McLachlin J.A. also stated at para. 16 of *Nylar Foods* that a covenant may by its words "clearly establish that the parties intended to create a

restriction that runs with the land". Marshall Telecom says this particular proposition is apposite in the case at bar, because the rooftop lease expressly provided that the covenants and obligations created by it would continue to run with and bind each subdivided parcel of the property, and further that these covenants and obligations would be "automatically assumed" by the Strata Corporation. The net result, says counsel, is that the obligations created by the rooftop lease "run with the land" and are binding on the Strata Corporation as the successor in title to Marshall Homes.

[39] Marshall Telecom also made reference to the rule in *Spencer's Case* (1583), 5 Co. Rep. 16a, [1558-1774] All E.R. 68. By way of background, the English common law included a strict rule that positive covenants could not be enforced by or against successors in title. *Spencer's Case* involved a relaxation of that rule as between landlord and tenant, by providing that "both the burden and the benefit of a covenant, which touches or concerns the land demised and is not merely collateral, run at law with the reversion and the term of the lease whether the covenant be positive or restrictive": *Durham Condominium Corporation No.123 v. Amberwood Investments Limited* (2002), 58 O.R. (3d) 481 (C.A.) [*Amberwood*] at para. 26.

[40] I take guidance from *Williams & Rhodes, Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988) [*Williams & Rhodes*] at p. 15-77, in which the authors state that "[i]n reading the cases on covenants running with the land, it is necessary to note that those cases which relate to covenants as between parties holding the relationship of landlord and tenant stand generally in a class apart from other decisions on the same question". Landlord-tenant arrangements are in a class of their own because the obligations under a lease only encumber the very property that is the subject of the lease, and only during the term of the lease. Thus, in the case of leaseholds, it is "not at all inconsistent with the nature of property that positive covenants affecting the land bind those who take the term of the leasehold by assignment": *Amberwood* at para. 27. This distinguishes the case at bar from other recent decisions holding that by virtue of the so-called "rule in *Austerberry*", positive obligations under an easement cannot run with and bind the land: *The*

*Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2019 BCCA 144 at para. 2, 74-76, 79-80, 81; *Crystal Square* at para. 4, 31.

[41] I return then to the issue of enforceability of covenants said to "run with the land" in the landlord-tenant context. Applying the rule in *Spencer's Case* as summarized in *Amberwood*, the key question is whether the burdens and benefits under the rooftop lease "touch or concern the land" and are not "merely collateral": *Williams & Rhodes* at p. 15-77. To qualify as an obligation touching or concerning the land, a covenant "must either affect the land as regards mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land": *Rogers v. Hosegood*, [1900] 2 Ch. 388 at p. 395, cited with approval in *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639 at p. 652.

[42] I conclude that all of the burdens and obligations under the rooftop lease which Marshall Telecom seeks to enforce against the Strata Corporation as the successor in title to Marshall Homes run with the land. The rooftop lease expressly states that the burdens and obligations would "run with and bind" each subdivided parcel within the Delta Rise property, that the lease would be automatically assumed by the Strata Corporation, and that it would be binding on any successors or assigns of either party. Furthermore, in my view all of the burdens and obligations sought to be enforced by Marshall Telecom under the rooftop lease "affect the land as regards mode of occupation". Absent the Strata Corporation's compliance with the covenants in the rooftop lease, the leased lands cannot be used in the manner contemplated in the lease.

[43] I will deal specifically with the enforceability of the obligation to execute any further documents or instruments and take any further lawful action required "for the better or more perfect and absolute performance" of the lease. At first blush, one might be tempted to regard this as a personal covenant between Marshall Homes as the original landlord and Marshall Telecom as the original tenant. However, the obligation to execute further documents or take further steps is expressly tied to the performance of the rooftop lease, the very essence of which is to allow the leased

area to be used for the erection and operation of telecommunications equipment. The facts of the case show how such a covenant may be necessary in order to allow the lessee to use the leased area in the manner contemplated in the lease, in that Marshall Telecom is unable to proceed with its application for municipal approval of the Akash Broadcasting radio telecommunications facility unless and until the Strata Corporation either signs the application or issues a letter authorizing Marshall Telecom to do so on its behalf.

**(2)(iii) Relief Sought**

[44] The relief sought by Marshall Telecom includes: (i) a declaration that the rooftop lease is binding and enforceable against the Strata Corporation, (ii) various orders compelling the Strata Corporation to comply with the terms of the rooftop lease, some of which are framed as injunctive relief, (iii) an order requiring the Strata Corporation to sign the City of Delta land use development application in connection with the Akash Broadcasting radio telecommunications facility, (v) an order that Marshall Telecom's claim for damages be adjourned generally, and (vi) costs.

[45] The Strata Corporation's position is that even if the Court accepts that the rooftop lease is binding and enforceable, the only relief that should be granted is a declaration to that effect. The Strata Corporation says injunctive relief is unnecessarily onerous, and unwarranted here because Marshall Telecom has presented no evidence that the Strata Corporation will disregard a declaratory judgment and no evidence that damages would be inadequate compensation.

[46] In *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para. 28, the Court held that in order to obtain "final injunctive relief", a party must not only establish its rights, but must also satisfy the court that injunctive relief is an "appropriate remedy". Balance of convenience and irreparable harm are not pre-requisites for final injunctive release, but these are still matters that may be taken into account in deciding whether an injunction is appropriate. Such relief may be declined where other remedies are adequate in giving effect to rights of the successful party.

[47] In property law cases, final injunctive relief may be entirely appropriate where there is evidence that one of the parties has interfered with the property rights of the other as declared or otherwise found by the court: *Vandenberg v. Olson*, 2009 BCSC 1302 at para. 35(b), aff'd 2010 BCCA 204 at para. 19. However, in my view this may be distinguished from cases where there has been nothing more than a failure to act in the face of uncertainty concerning one's legal obligations. In such cases, declaratory judgment may suffice and the added step of injunctive relief is sometimes unnecessary.

[48] Applying these principles in the case at bar, my conclusions are as follows.

[49] First, Marshall Telecom is entitled to a declaration that the obligations imposed upon the lessor in the rooftop lease run with the land and are therefore binding on the Strata Corporation. The declaration will have the effect of clarifying the uncertainty of the parties as to the enforceability of the terms of the lease. Marshall Telecom has not provided any evidence that the Strata Corporation will disregard its obligations as set out in such a declaration and, with one exception stated below, has not shown that the added measure of injunctive relief is necessary to give effect to the judgment.

[50] Second, the sole exception pertains to the Strata Corporation's obligation to sign or execute any documents required by the City of Delta in connection with the application for municipal approval of the Akash Broadcasting radio telecommunications facility. The evidence indicates that the approval process has been on hold pending receipt of either an application signed by the Strata Corporation, or a letter from the Strata Corporation authorizing Marshall Telecom to proceed with the application on the Strata Corporation's behalf. I am satisfied that the interests of certainty and avoidance of further delay warrant a mandatory injunction compelling the Strata Corporation to sign or execute the necessary documents and deliver them as soon as is practicable.

[51] Third, Marshall Telecom's claim for damages is adjourned generally.

[52] Fourth and finally, Marshall Telecom, as the successful party, is entitled to its costs.

"Riley J."