IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kent v. Panorama Mountain Village Inc.,* 2020 BCSC 812

Date: 20200602
Docket: S216551
Registry: New Westminster

Between:

Duncan Kent and Judy Kent

Petitioners

And

Panorama Mountain Village Inc.

Respondent

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Petitioners:	W.J. McMillan
Counsel for the Respondent:	K. Smiley
Place and Dates of Hearing:	New Westminster, B.C. February 25, 26, 2020
Place and Date of Judgment:	New Westminster, B.C. June 2, 2020

Introduction

[1] The petitioners Mr. and Mrs. Kent are owners of a unit in a strata-titled building at Panorama Mountain Resort. The respondent Panorama Mountain Village Inc. (“PMVI”) is the owner of the lobby unit in the building and runs a centralized rental management system under which units are made available for rent to the public. This rental management system is protected by a restrictive covenant registered against the title to each of the strata units in the building. The restrictive covenant provides that the strata unit owner shall not make the unit available for rental use except through the centralized rental management system.

[2] Mr. and Ms. Kent filed a petition with the court seeking cancellation of the restrictive covenant as a charge against the title to their strata unit. The petitioners say the restrictive covenant is invalid because it is impermissibly uncertain, and alternatively because it imposes positive obligations. The respondent argues that, taking into account the context in which the restrictive covenant operates, it is not impermissibly uncertain and is properly characterized as a negative covenant. It serves only to restrict the manner in which strata unit owners like the petitioners are permitted to make their unit available for rental use.

Facts

[3] The petitioners are the owners of strata unit 33 in a strata titled building at 1000 Peaks Summit, located within the Panorama Mountain Resort. Panorama Mountain Resort is a destination resort built around a ski hill, a golf course, and other infrastructure to facilitate year-round outdoor sport and recreational activities including hiking, mountain biking, and horseback riding.

[4] The building at 1000 Peaks Summit is one of six strata titled complexes at Panorama Mountain Resort constructed and originally owned and managed by Intrawest Corporation (“Intrawest”). Intrawest developed all six strata titled complexes intending to operate them as condominium hotels.

[5] Under the condominium hotel model, strata titled residential units are individually owned, and the entire strata complex is run as a hotel, with centralized services including housekeeping, laundry facilities, and other building amenities. A key part of the condominium hotel model as originally conceived was a centralized, uniform rental management system. Individual owners wanting to rent their units to the public must do so through the rental pool system established and operated by the owner-developer. To this end, a restrictive covenant was registered against title to each residential unit, preventing rentals except through the rental pool system.

[6] Intrawest's intention to operate the six complexes as condominium hotels was clearly laid out in the property disclosure statement produced when the development was marketed to the public, as described in more detail below. At the time, property disclosure statements were mandated and governed by s. 61 of the *Real Estate Act*, R.S.B.C. 1996, c. 397, since replaced by the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*].

[7] The condominium hotel model has also been recognized in the following materials produced or approved by various government agencies:

a) The initial Comprehensive Development Plan for Panorama Mountain Resort, prepared by Intrawest in 1997 and approved by the provincial government in 1999, included a proposal for the construction of six "condominium hotel" developments, including 1000 Peaks Summit.

b) The Regional District of East Kootenay Panorama Mountain Village Official Community Plan, Bylaw No. 1441, 1999 includes as one of its stated goals the provision of commercial development to foster tourist activity and in this regard expressly designates land for use as "condominium hotels". Schedule A3 of the bylaw, dated 5 September 2003, contains a color-coded map of the Panorama Mountain Village site identifying a number of properties in the center of the village as "Commercial Accommodation – Condo Hotel".

c) A British Columbia Ministry of Forests, Lands and Natural Resources Operations publication entitled *All Season Resort Guidelines*, produced in

2006 and amended in 2009, includes a chapter on "Mountain Resorts". This publication sets out the rationale for and importance of the condominium hotel model.

[8] In addressing the importance of the condominium model, the *All Season Resort Guidelines* chapter on "Mountain Resorts" explains that determining the appropriate balance of conventional private ownership units ("cold beds") and units available for the public ("warm beds") can significantly impact on a resort's position in the marketplace and the critical mass of accommodations needed for the resort to succeed. In this regard, a resort developer "can ensure 'warm beds' through title restrictions and ownership mechanisms". Restrictive covenants "may be registered on title of the property with either voluntary or mandatory obligations that require that the units be placed in the rental pool".[1] Such rental pool covenants can be "fundamental" to a successful destination resort.

[9] Returning to the details of the particular case before me, the building at 1000 Peaks Summit was part of Intrawest's original development proposal for the Panorama Mountain Resort. The building at 1000 Peaks Summit has 49 strata titled units. Strata unit 1 is designated as the lobby unit, also referred to as the management unit. The remaining 48 strata units are designated as residential units.

[10] The property disclosure statement for 1000 Peaks Summit, dated 7 January 2003, expressly set out Intrawest's intention as the owner-developer to register a restrictive covenant against the title to each residential unit, preventing rental to the public except through the centralized rental management system. The disclosure statement included a draft Rental Management Agreement under which individual strata unit owners would contract with the rental pool manager, originally Intrawest, for participation in the rental pool management system. The disclosure statement was later amended on 10 July 2003, and the amended version included revisions to the form of the Rental Management Agreement. Property disclosure statements

[1] The reference to "voluntary or mandatory" obligations appears to account for the possibility of a covenant that imposes a "positive" obligation to participate in a rental management pool. This form of covenant, though positive in nature, is available to the Crown or municipalities under s. 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250. See footnote 2 for an example of such a covenant.

must be filed with the Superintendent of Real Estate and are available for inspection by the public under what is now s. 14(5) of the *REDMA*.

[11] The construction of the building at 1000 Peaks Summit was competed in 2004. The building's strata plan was filed in the Land Title Office on 11 March 2004. On the same date, Intrawest registered a restrictive covenant against each of the 48 residential units, in favour of the management unit.

[12] The key provision in the restrictive covenant is clause 2, which reads as follows:

> The residential lot owner covenants and agrees, with the intent that this covenant shall run with and burden each of the residential lots for the benefit of the management lots, that the residential lot owner will not occupy, use or permit or cause to be occupied or used, all or any portion of any residential lot for the purposes of rental use except through a rental management system operated and managed by the management lot owner and/or the manager.

[13] The terms "manager", "rental use", and "rental management system" are all defined in clause 1 of the restrictive covenant. The term "rental management system" is defined as "a rental or rental pool management system or arrangement operated by the manager to provide for the orderly, consistent, and uniform management of the rental use of the residential lots". The effect of this restrictive covenant is an arrangement whereby residential unit owners can only make their units available for rental use through the rental management system established and operated by the owner of the management unit.

[14] After completing construction of the building at 1000 Peaks Summit in 2004, Intrawest retained ownership of the management unit and managed the rental pool for a number of years. In 2010, Intrawest sold its interest in 1000 Peaks Summit and the five other condominium hotels at the Panorama Mountain Resort to the respondent PMVI. The respondent now owns the management unit at 1000 Peaks Summit and manages the centralized rental pool.

[15] The petitioners Mr. and Mrs. Kent acquired their unit at 1000 Peaks Summit, strata unit 33, from the original owner-developer, Intrawest, in 2004. Under the terms

of what is now Part 2, Division 4 of *REDMA*, Intrawest was obliged to provide a copy of the property disclosure statement for the 1000 Peaks Summit development to the petitioners prior to the sale. The restrictive covenant described above was registered against the title to unit 33 prior to the transfer of the property to the petitioners, and the covenant has remained on title since then.

[16] Shortly after acquiring strata unit 33, the petitioners entered into a rental management agreement with Intrawest and joined the rental pool. At some point thereafter, the petitioners were not satisfied with the rental management service provided by Intrawest, so they terminated their agreement with Intrawest and began renting out unit 33 privately.

[17] When PMVI purchased Intrawest's interest and took over the centralized rental management arrangement in 2010, the petitioners decided to re-enter the rental pool. They signed a new rental management agreement with PMVI. However, after a certain amount of time in the rental pool, the petitioners were once again dissatisfied with the rental management services and terminated their rental management agreement with PMVI. In late 2014, the petitioners began renting out unit 33 through an online booking platform outside of PMVI's rental pool.

[18] On 6 October 2016, Mr. Paccagnan, President and CEO of PMVI, sent an email notifying the strata council for 1000 Peaks Summit that under the terms of the restrictive covenant registered against the title to each strata unit, owners were not permitted to rent except through the centralized rental management system.

[19] On 4 October 2018, Mr. Paccagnan wrote a letter to the chairperson of the owner's council for all six condominium hotels, including 1000 Peaks Summit, advising of PMVI's position regarding the restrictive covenant. The letter stated PMVI's position that under the terms of the restrictive covenant, rentals were only permitted through the centralized rental management system operated by PMVI. Mr. Paccagnan's stated rationale was that use of "short term rental services such as Airbnb, VRBO, and other like services" negatively impacts on the "lodging business

model". The letter concluded by saying that PMVI will seek to enforce the terms of the restrictive covenant in respect of all rental arrangements after 1 May 2019.

[20] On 3 July 2019, the petitioners Mr. and Mrs. Kent filed the present petition, seeking to have the restrictive covenant cancelled under s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377.

Legal Analysis

[21] Under s. 35(1) of the *Property Law Act*, a person may apply to the court for an order modifying or cancelling a charge or interest registered against the title to real property on the grounds set out in s. 35(2). As explained in *Skene v. Ucluelet (District)*, 2019 BCSC 2051, s. 35 is a "comprehensive code" and "s. 35(2) sets out an exhaustive list of the grounds upon which the court can make such an order".

[22] The full text of s. 35(2) reads as follows:

> 35(2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> > (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
> >
> > (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
> >
> > (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
> >
> > (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
> >
> > (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

[23] In the case at bar, the petitioners rely on s. 35(2)(e). They say the restrictive covenant registered against the title to their unit is "invalid" or "unenforceable" for two reasons. First, the petitioners say the restrictive covenant is impermissibly vague because it prohibits the owner of the burdened land from renting except through the rental management system, but does not set out the essential terms of that rental

management system and provides no mechanism to resolve disputes regarding the terms of the rental management agreement. Second, the petitioners say the restrictive covenant is unenforceable because it is not negative in nature. More specifically, the petitioners say the restrictive covenant imposes a positive obligation on the owner of the benefitting property to establish a rental management system, and unless the owner of the benefitting property does so, it is impossible for the owner of the burdened property to rent in accordance with the terms of the restrictive covenant.

[24] Before dealing with each of these arguments it is helpful to review the required elements of a valid and enforceable restrictive covenant, starting with the summary of the law as set out in the leading case of *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268 at para. 16:

> The necessary conditions of covenants which run with land are set out by DeCastri 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 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.

[25] Another requirement of an enforceable restrictive covenant against land is that its terms must be clearly and succinctly stated "so that present and future owners may know with precision what obligations are imposed upon them": *Newco Investments Corp. v. British Columbia Transit* (1987), 14 B.C.L.R. (2d) 212 (C.A.) at p. 224.

Issue 1: Whether the Restrictive Covenant is Impermissibly Uncertain

[26] The petitioners contend that the restrictive covenant is impermissibly uncertain because it provides that unit 33 can only be made available for rental use through the rental management pool run by the owner of the management unit, on unspecified terms. In other words, the terms on which the rental management pool is to operate are not set out in, appended to, or incorporated by reference into the covenant. Nor does the covenant contain any independent mechanism for settling the terms.

[27] The petitioners say the case at bar is materially indistinguishable from *585582 B.C. Ltd. v. Anderson*, 2015 BCCA 261 [*Anderson*]. That case involved a similar condominium hotel arrangement in which individual strata unit owners were not permitted to rent except through the rental pool run by the resort manager. As in the case at bar, this arrangement was effected by way of a restrictive covenant registered against the title to each residential strata unit, in favour of the management unit. The key term in the covenant provided that no registered owner could permit his or her unit to be rented to the public except in accordance with the terms of the covenant and the "Rental Pool Management Agreement". The phrase "Rental Pool Management Agreement" was defined in the covenant as, in essence, an agreement between the residential unit owner and the rental pool manager under which the latter would make the unit available for rental to the public. No such rental pool management agreement was attached to or incorporated by reference into the restrictive covenant.

[28] On a summary trial application, the chambers judge rejected the argument of the strata unit owner that the restrictive covenant was unenforceable on the basis

that it was a positive covenant, and on the basis that it was void for vagueness. The Court of Appeal disagreed and reversed the chambers judge on the latter point, finding that the restrictive covenant was impermissibly uncertain. The Court made an order cancelling the registration of the restrictive covenant against the title to the strata lot.

[29] The crux of the Court's reasoning in finding the restrictive covenant to be impermissibly uncertain was as follows:

> [26] In the present case, the covenant prohibits the rental of a unit to the public unless it is done in accordance with the "Rental Pool Management Agreement", defined as an agreement between the owner of the unit and the rental manager setting out the terms by which the rental manager will manage the unit and make it available for rental use. The form of the agreement is not attached to the covenant, nor is it incorporated by reference into the covenant. Indeed, the agreement did not even exist at the time of the creation of the covenant. Rather, it is an agreement that must be negotiated between each owner of a strata lot and the rental manager.
>
> [27] There is no certainty with respect to the terms of the Rental Pool Management Agreement and, as a result, there is a lack of certainty in the covenant itself. By looking at the covenant registered against a unit, a successor in title to the unit cannot determine the terms by which the unit may be rented to the public.
>
> [28] If an owner of a unit and the rental manager are unable to negotiate the terms of a rental pool management agreement, there is no independent mechanism by which the terms can be established. Similar to *Newco Investments*, the covenant has no provision for arbitration in the event the parties cannot agree. A central aspect of the covenant constitutes an agreement to agree, which is itself unenforceable.
>
> [29] The summary trial judge was of the view the covenant had sufficient certainty because a prospective purchaser of a strata lot would know from the covenant that there is a rental pool management agreement in place and would be able to look elsewhere to see its terms. In my opinion, that does not create certainty because it requires a successor in title to look outside the covenant to determine all of the terms related to the restricted use of the strata lot. In addition, although as a matter of practice the rental manager may offer the same terms of a rental pool management agreement to all the owners of the condominium units, it is under no legal obligation to do so. It could agree to charge different management fees to different owners. There is uncertainty until a successor in title actually enters into a rental pool management agreement with the rental manager.

[30] The petitioner argues that the material facts in the case at bar are indistinguishable from the facts in *Anderson*. I note that the precise terms of the

restrictive covenant in the case at bar differ from the terms of the covenant in that case. In particular, the restrictive covenant in *Anderson* made express reference to a rental management agreement, which was not appended to or incorporated by reference into the covenant, and which indeed "did not even exist at the time". By contrast, in the instant case the restrictive covenant provides that the residential strata unit owner shall not rent the unit "except through a rental management system operated and managed by the management lot owner".

[31] Although the covenant in the case at bar refers to a "rental management system" as opposed to a "rental management agreement", in my view the legal effect is the same. As in *Anderson* at para. 27, the covenant in the case at bar lacks certainty as to the "terms by which the unit may be rented to the public". Moreover, the covenant does not provide any "independent mechanism" by which the terms of the rental management system can be established in the event that the parties cannot reach an agreement, as discussed in *Anderson* at para. 28.

[32] Thus, despite the differences in the wording of the covenants, I find the following passage from *Anderson* at para. 31 to be entirely apt and binding on me in the case at bar:

> If there are to be restrictions on the use of a strata lot, a successor in title is entitled to know the specifics of the restrictions, and it is not sufficient for the covenant to refer in general terms to a rental pool without any reference to the terms and conditions applicable to it and without an independent mechanism for the terms and conditions to be established in the event the successor in title and the rental manager are unable to agree on them.

[33] The respondent PMVI argues that *Anderson* is distinguishable because in that case there was no rental management agreement in existence when the restrictive covenant was created. By contrast, in the case at bar, a standard form rental management agreement had been appended to the property disclosure statement produced by Intrawest when the 1000 Peaks Summit development was marketed. The disclosure statement had to be (i) filed with the Superintendent of Real Estate and (ii) delivered to prospective purchasers, and thereafter has been available to the public under what is now Part 2, Division 4 of *REDMA*.

[34] In support of this position, the respondent relies on the following passage from *Gubbels v. Anderson* (1995), 61 B.C.A.C. 195 (C.A.) [*Gubbels*] at para. 15:

> Counsel for the appellants said that someone ought to be able to go into the Land Titles Office, look immediately at the land registry records and know right away exactly what effect the documents pertaining to title had. But that is not the nature of the land registry system. The nature of the system is to provide notice of any matters that affect title. The restrictive covenant is referred to and the restrictive covenant must be given the interpretation it requires as a contractual document and not an interpretation that would be given to it by a layman coming into the Land Titles Office. Sometimes some skill is required in the process of interpretation, but the most rudimentary tool of interpretation is that a document should be interpreted in the context of its own factual matrix. It must be looked at as the conditions existed at the time it was created. While purpose is not the only guidance of what it meant, its purpose at that time may be one of the guides.

[35] Respondent's counsel says that a restrictive covenant is an agreement or contract governed by ordinary rules of contractual interpretation. In interpreting the covenant, the court is not limited to the wording of the document on its own. The court may, as explained in *Gubbels*, interpret the covenant "in the context of its own factual matrix". The definition of the phrase "Rental Management System" in the restrictive covenant expressly states that the purpose of the system is "to provide for the orderly, consistent and uniform management" of unit rentals. Interpreted in light of the "factual matrix" in which the restrictive covenant was entered into, the respondent says the intention of the parties was that the rental management system would be operated under a contract with terms mirroring or substantially similar to those found in the draft Rental Management Agreement appended to the property disclosure statement.

[36] Respondent's counsel further submits that absence of all details of a particular restriction on the use of land in the covenant itself does not necessarily render the covenant void for uncertainty. As explained in *Gubbels*, the nature of the land registry system is "to provide notice of any matters that may affect title". The restrictive covenant is registered against the title to each strata unit. Any prospective successor in title would be in a position to understand the nature of the rental restrictions in the covenant and, if more information were required, make further

inquiries by accessing and examining the draft Rental Management Agreement that accompanied the disclosure statement. The disclosure statement is available to the public through the Superintendent of Real Estate under s. 14(5) of *REDMA*.

[37] The respondent's submission, though both logical and elegantly constructed, is not without its weaknesses. I have two specific concerns. The first may or may not be insurmountable, but the second is fatal to the respondent's position.

[38] My first concern with the respondent's argument is that it tests the limits of the extent to which the court can go outside the terms of the document itself when "interpreting" a contract. As explained in *Hofer v. Guitonni*, 2011 BCCA 393 at para. 1, "[t]he precise words used must be looked at in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as guides to interpretation." [emphasis added] The surrounding circumstances may be relied upon "as part of the interpretive process", but cannot be used to deviate from the text so as to create a new agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57. In the case at bar, the respondent seeks to rely on the "factual matrix" not just as a part of an interpretive aid – that is, to give meaning to the terms in the covenant itself – but rather to set material terms of the restriction on use which are not spelled out in the covenant itself. This point causes me some concern, but I need not resolve it because the other problem with the respondent's argument is in my view more fundamental.

[39] The second concern with the respondent's position is that the Court in *Anderson* considered and rejected more or less the same argument. As explained in para. 26 of the Court of Appeal's decision in *Anderson*, the summary trial judge in that case reasoned that a successor in title would "know from the covenant that there was a rental pool management agreement in place and would be able to look elsewhere to see its terms". The Court of Appeal disagreed. Writing for the Court, Tysoe J.A. reasoned that the restrictive covenant was impermissibly uncertain for two inter-related reasons, one being that the terms of the rental pool arrangement

were not set out in the covenant, and the other being the absence of an independent mechanism for settling terms where agreement could not be reached. The net result was nothing more than an "agreement to agree", which was unenforceable.

[40] I am reinforced in my interpretation of *Anderson* by the more recent decision in *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 [*Whistler*]. Tysoe J.A., once again writing for the Court, explained at para. 108 that *Anderson* "stands for the proposition that a covenant will be unenforceable if it requires an owner of property wishing to rent out their unit to first enter into an agreement with a third party having unknown terms and if there is no mechanism for settling the terms of the agreement". The same two features are present in the case at bar.

[41] Thus, even if it were permissible to go "outside the covenant" by consulting the draft Rental Management Agreement that accompanied the disclosure statement, this would not resolve the other deficiencies identified in *Anderson*. There is an absence of any actual agreement as to the terms of the rental management system, coupled with an absence of any "independent mechanism" for settling the terms. The bottom line is that draft agreement appended to the property disclosure statement was just that, a draft. As in *Anderson*, there was nothing more than "an agreement to agree", and no independent mechanism for resolving any failure to do so. This makes the restrictive covenant impermissibly uncertain.

[42] My conclusion is that the restrictive covenant in the case at bar suffers from substantially the same fatal deficiencies identified in *Anderson*. I will go on to address some of the other arguments advanced by the respondent.

[43] The respondent relies on *Zhang v. Davies*, 2018 BCCA 99 [*Zhang*]. In my view, *Zhang* is distinguishable as a case involving a restrictive covenant found to be clear and unambiguous. The covenant in issue in *Zhang* prohibited any new construction on the burdened property unless the plans were approved in writing by the owner of the benefitting property. The covenant, though onerous in effect, was unambiguous in stating that no construction could occur on the burdened property without the express written approval of the plans by the owner of the benefitting

property. There was no lack of certainty as to the limits imposed by the covenant, and no "agreement to agree". In upholding the trial judge's decision, the Court of Appeal found the terms of the restrictive covenant to be "explicit and clear" and "plain and unambiguous": *Zhang* at para. 37, 41.

[44] The respondent also relies on *Whistler*, in which a restrictive covenant intended to give effect to a rental pool arrangement was found to be valid and enforceable. The covenant in *Whistler* was registered against individual strata units in favour of the municipality as the benefitting party. The covenant provided that all individual strata units had to be placed or listed in a rental pool approved of by the municipality, with such approval not to be unreasonably withheld. The net effect was that all strata unit owners were required to participate in a rental pool.[2] However, the covenant did not require that the unit owner enter into an agreement with any particular or specified third party, and the municipality was given authority to approve of the rental pool arrangement.

[45] The trial judge in *Whistler* held that the restrictive covenant was similar to the one in *Anderson* in that the terms of the rental pool agreement were not incorporated into or attached to the covenant. Thus, it was necessary to "look beyond the covenant" to ascertain the terms of the rental pool arrangement. Nonetheless, the judge held that the restrictive covenant was not impermissibly vague. The terms of the covenant were clear, and the provision for the municipality to approve the rental pool arrangement provided an independent mechanism to resolve any uncertainty, by a party with no commercial interest in the operation of the rental pool: *114829 B.C. Ltd. v. Whistler (Municipality)*, 2019 BCSC 752 at para. 122-132.

[46] The Court of Appeal upheld the conclusion of the trial judge that the restrictive covenant was valid, but for somewhat different reasons. Writing for the Court, Tysoe J.A. reasoned that the covenant in issue in *Whistler* did not require the

[2] This covenant imposed a positive obligation in that the strata unit owners were required to participate in the rental pool. However, this did not offend the common law principle that a restrictive covenant must be "negative in substance", since the covenant in issue in *Whistler* was as an instrument for the benefit of a municipal government under s. 219 of the *Land Title Act*, R.S.B.C. 1996 c. 250, and s. 219(2) provides that such a covenant may be "negative or positive".

residential unit owner to enter into any particular agreement. Rather, the covenant simply required the strata unit owner to make the unit available for rental use through a rental pool system approved of by the municipality. Indeed, it would have been open for the strata corporation itself to establish and run the rental pool, provided that the arrangement was approved of by the municipality. Furthermore, the requirement for approval by the municipality provided "a mechanism for the [m]unicipality to manage and enforce the terms of the [c]ovenant". In the result, Tysoe J.A. concluded that the covenant was not "vague or uncertain simply because it require[d] the unit in question to be placed in the rental pool". The provisions of the covenant were "clear" because they did not require the unit owner to "enter into an agreement with unknown terms": *Whistler* at para. 109-111.

[47] The Court of Appeal released its decision in *Whistler* after the hearing in the instant case. Consequently, the parties provided supplementary written submissions on the implications of the Court of Appeal decision. Not surprisingly, each party says *Whistler* is supportive of its position.

[48] On the one hand, the petitioners say *Whistler* reinforces the point that each covenant challenged for uncertainty must be carefully scrutinized to determine what restrictions it actually imposes. The petitioners highlight that in *Whistler*, (i) the absence of the terms of a rental management agreement in the covenant did not create uncertainty, because the covenant did not require the covenantor to enter into such an agreement, and (ii) the provision in the covenant for the municipality to approve of the rental management arrangement provided an independent mechanism to monitor and enforce the covenant.

[49] The petitioners say that *Whistler* confirms, consistent with *Anderson*, that a rental pool covenant will be void for uncertainty if it requires the covenantor to enter into an agreement without specifying the terms of that agreement, and without providing any independent mechanism to settle those terms. The petitioners maintain that the covenant in issue in the case at bar has these features, and is therefore impermissibly uncertain.

[50] On the other hand, the respondent emphasizes that the covenant in issue in *Whistler* clearly mandated strata unit owners to participate in a rental pool, and the commercial terms of the rental pool arrangement were not specified in or incorporated by reference into the covenant. Despite this, the Court of Appeal held that the covenant was not void for uncertainty. The respondent says that under the approach in *Whistler*, all that is required for the covenant to be sufficiently certain is that the terms of the rental pool arrangement must be known or knowable, or alternatively there must be a mechanism for settling them.

[51] The respondent submits that the covenant in issue in the case at bar satisfies these requirements. The covenant spells out that the rental management system must be “consistent” and “orderly”, and prospective purchasers would be able to ascertain the terms by consulting the form of the rental management agreement referenced in the disclosure statement produced by the original owner-developer. The respondent submits that any attempt by the rental pool manager to depart substantially from the material terms of the draft rental management agreement could be “challenged by the unit owner”, thus affording the required mechanism for settling the terms of the rental pool arrangement.

[52] The first and most basic message that I take from *Whistler* is the statement at para. 108, explaining the result in *Anderson*, that “a covenant will be unenforceable if it requires an owner of property wishing to rent out their unit to first enter into an agreement with a third party having unknown terms and if there is no mechanism for settling the terms of the agreement”. The covenant in *Whistler* did not run afoul of this reasoning because it did not require the unit owner to enter into an agreement with a third party, and because there was in fact an independent mechanism for settling the terms of the rental pool arrangement.

[53] The Court of Appeal decision in *Whistler* does not alter my conclusion that the restrictive covenant in issue here is impermissibly uncertain. I acknowledge that the covenant does not expressly require the strata unit owner to enter into a rental pool management agreement. However, it does expressly provide that the unit owner

may only make the unit available for rental use through the rental pool management system operated by the owner of the management unit. The commercial reality is that this can only occur by way of a rental management agreement between the residential strata unit owner and the management unit owner. In any event, the fact is that the restrictive covenant only permits use of strata units for rental purposes through a rental pool arrangement operated by a specified party, and the terms of that arrangement are not set out in, or incorporated by reference into the covenant. This, coupled with the absence of an "independent mechanism" for settling the terms of the rental pool arrangement, makes the covenant impermissibly uncertain.

[54] The respondent argues that the strata owner and prospective successors in title can readily ascertain the terms of the rental pool arrangement by consulting the draft rental pool management agreement accompanying the disclosure statement produced by the original owner-developer. Although this might give the strata unit owner or prospective successors in title a sense of the rental pool arrangement that the original owner-developer had in mind, it does not provide sufficient certainty to make the restrictive covenant valid. There is nothing in the text of the restrictive covenant that would stop the original owner-developer, or any successor in title to management unit, from altering the terms of the rental pool arrangement. Furthermore, unlike the situation in *Whistler*, there is no independent mechanism for settling the terms of the rental pool arrangement, by a party with no commercial interest in the operation of the rental pool.

[55] As a means of filling these gaps, the respondent posits that the term in the restrictive covenant providing that the rental pool arrangement is intended to provide for "orderly, consistent, and uniform" rental use could be interpreted to prevent the owner of the management unit from materially changing the terms of the draft rental management agreement. With respect, I do not think the text of the restrictive covenant can reasonably bear that interpretation. The operative term provides that the rental pool management system is intended "to provide for the orderly, consistent, and uniform management of the rental use of the residential lots". This term speaks to the objective of maintaining an orderly, consistent, and uniform rental

management system of the sort that rental customers would expect at a condominium hotel. It does not speak to the commercial terms of the rental management arrangement. The commercial terms are not set out in, appended to, or incorporated by reference into the restrictive covenant. And unlike the situation in *Whistler*, the restrictive covenant does not provide any "independent mechanism" for settling those terms.

[56] I conclude that the case at bar is akin to *Anderson*, and none of the key distinguishing features identified in *Whistler* are present. The covenant in issue in this case runs afoul of the common law requirement that the terms must be set out with sufficient precision to allow present and future owners to ascertain what restrictions have been placed on the use of the property.

[57] It remains to be considered what remedy if any should flow from this finding. As discussed in more detail below, the power to cancel or modify an interest under s. 35(1) of the *Property Law Act* is discretionary. Before addressing this point, I must consider the second basis on which the petitioners say the covenant is invalid.

Issue 2: Whether the Covenant Impermissibly Imposes Positive Obligations

[58] The petitioners say the restrictive covenant should be held invalid and unenforceable because it imposes positive obligations. In particular, the petitioners contend that the covenant is invalid because it imposes a positive obligation on the management unit owner to establish and operate a rental pool management system.

[59] This is a novel argument, focused on the nature of the so-called "obligation" imposed on the owner of the benefitting land. In my view, this argument misconstrues the original common law principle, which focuses on the nature of the restrictions that can be imposed on the burdened land. The common law principle is that "the covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement", such 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": *Westbank Holdings Ltd.* at para. 16, citing *Canada Safeway Ltd.* at p. 8, para. (a).

[60] As I interpret this principle, it is concerned with the proper scope of limitations that a restrictive covenant can impose on the burdened land. The covenant must "run with" the burdened land and for this reason alone a positive obligation is not enforceable as part of a restrictive covenant, at least at common law. Any positive obligation, to the extent that it exists, would be a personal obligation assumed by the covenantor, not part of the restrictive covenant enforceable against the land itself. It makes no sense, in my respectful view, to apply this principle when considering the effect of the covenant on the benefitting land.

[61] The petitioners say that if, as owners of the burdened land, they wish to rent out their unit, then the respondent as owner of the benefitting land would effectively have a positive obligation to set up and operate a rental management pool. If the respondent fails to meet this obligation, then the petitioners would be barred from renting out their unit. The petitioners say all of this goes to show why the restrictive covenant is unenforceable because it creates a positive obligation.

[62] I do not see the matter that way. If the situation described above were to unfold, wherein the petitioners wished to rent their unit but the respondent failed to establish or maintain any rental pool management system whatsoever, the petitioners could have recourse to s. 35(2)(a) or (b) of the *Property Law Act*. In particular, it would be open to the petitioners to argue in such circumstances that the restrictive covenant had become "obsolete" due to some change in circumstance as contemplated in s. 35(2)(a), namely the absence of a rental pool management system. Alternatively, the petitioners could argue in such circumstances that a restriction on rental use coupled with a failure by the owner of the benefitting land to establish a rental pool management system represents an impediment to reasonable use of the land as contemplated in s. 35(2)(b). In either case, the objection would be based on the effect of the restrictive covenant on the burdened land, not its effect on the benefitting land.

[63] For all of these reasons, I do not accept the submission of the petitioners that the restrictive covenant is invalid because it is not "negative in substance". I find that the covenant is "negative in substance", in that it places restrictions on the manner in which the burdened land can be made available for rental use. If the owner of the burdened land wishes to rent, he or she must do so by the means specified in the covenant, namely, through the centralized rental pool established and run by the owner of the benefitting land. I agree with the analysis of the chambers judge in *585582 B.C. Ltd. v. Anderson*, 2014 BCSC 1363 at para. 10-14, in which a similarly-worded covenant to the one in the case at bar was found to be negative. The rental pool was found to ease the burden of the covenant without creating a positive obligation. The chambers judge's decision was later overturned on appeal, but without addressing this point.

[64] I also agree with the respondent that the case at bar can be distinguished from *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5. In *Aquadel*, the restrictive covenant provided that the lands in issue could not be used for any purpose other than a golf course, and went on to require various things in connection with the operation of a golf course, thus undermining the argument that the restrictive covenant did not impose any positive obligations.

Issue 3: Remedy

[65] Having found the restrictive covenant to be invalid on the basis that it is impermissibly uncertain, I must now decide whether it is appropriate to "modify or cancel" the restrictive covenant under s. 35(1) of the *Property Law Act*. The parties both acknowledge that s. 35(1) is discretionary, but disagree as to whether the court should exercise its discretion to cancel the restrictive covenant in this case.

[66] The petitioners say that in deciding whether to exercise the authority to cancel an instrument under s. 35(1), the court should have regard to the nature of its findings under s. 35(2). Counsel submits that where the court has found an instrument "invalid" or "unenforceable" per s. 35(2)(e), it makes little sense to do anything other than cancel it. Counsel says it is hard to conceive of a situation where

the court would find an instrument “invalid” or “unenforceable” and yet allow it to remain as a registered charge against title. Applying that reasoning to the case at bar, having found the restrictive covenant invalid or unenforceable due to impermissible uncertainty under s. 35(2)(e), the court should have no difficulty cancelling it under s. 35(1).

[67] The respondent says the court has a broad discretion under s. 35(1) to either grant or dismiss the moving party’s application, even if one or more of the criteria in s. 35(2) are satisfied. The respondent also points to the text of s. 35(2)(e), which provides that in addition to finding the impugned charge to be “invalid, unenforceable, or has expired”, the court must also conclude that the registration “should” be cancelled. This demonstrates that even where the grounds in s. 35(2)(e) are made out, the court has a discretion in deciding whether to cancel the instrument. Respondent’s counsel says the court should decline to cancel the restrictive covenant in this case because it would be inequitable and unjust to do so for several reasons.

[68] The respondent says it would be inequitable to cancel the covenant in circumstances where the petitioners can be taken to have had full knowledge of the covenant when purchasing strata unit 33. As noted above, the original owner-developer, Intrawest, was obligated under what is now s. 15 of *REDMA* to provide the petitioners with a copy of the disclosure statement prior to their purchase of unit 33. The disclosure statement described Intrawest’s intention to operate the strata complex as a condominium hotel with a centralized rental management system, and enclosed a draft Rental Management Agreement. Thus, the respondent argues, the petitioners purchased unit 33 with full knowledge of the covenant and the key terms of the rental management agreement, and the market price for the unit would have been informed by the existence of the covenant.

[69] The respondent also cites *Paterson v. Burgess*, 2017 BCCA 298 at para. 29, wherein Groberman J.A. stated that, “[p]articularly where a judge is considering cancelling a covenant rather than modifying it, consideration must be given to all of

the consequences of cancelling the covenant, not just those that arise in one particular situation". The respondent submits that in the case at bar the court must consider the broader consequences of cancelling the covenant, not just the consequences for the parties concerned with strata unit 33.

[70] The record indicates that there are a total of six condominium hotel complexes at Panorama Mountain Resort, with a total of 302 residential units. Each of these units has a similar restrictive covenant registered against title, in furtherance of the condominium hotel model. The respondent cites the provincial government's *All Season Resort Guidelines*, in which it is asserted that rental pool covenants can be "fundamental" to a successful destination resort, by ensuring a critical mass of professionally managed rental accommodation.

[71] Respondent's counsel also cites a passage from *Whistler* describing recent changes in the tourist accommodation industry. In the trial judgment in *Whistler* at para. 30, MacDonald J. described the emergence of online booking services like Airbnb which operate "contrary to the intent" of the condominium hotel model. This observation is consistent with evidence of declining rates of participation in the rental pool at the six condominium hotels at Panorama Mountain Resort. According to Mr. Paccagnan, the participation rate between 2004 and 2010 was 79%. By 2019, the participation rate had dropped to 54%.

[72] I accept the respondent's submission that in deciding how to exercise the discretion reposed in the court under s. 35(1), it is necessary to consider both the equities of the situation as between these particular petitioners and the respondent, and the broader consequences of the court's decision.

[73] It seems to me that one option available to a court faced with a situation where a covenant is found to be impermissibly uncertain would be to explore ways to remedy it by "modifying" the covenant rather than simply cancelling it. Recall that I did not accept the respondent's argument that the text of the covenant could be reasonably interpreted to somehow bar the management unit owner from substantially departing from the material terms of the draft rental management

agreement. However, when it comes to the issue of remedy under s. 35(1), a court might be asked to remedy the impermissible uncertainty in the covenant by "modifying" it to provide that the rental pool management system must be run on terms that are substantially similar to those found in the draft rental management agreement.

[74] Nevertheless, I am persuaded by the submission of the petitioners that the court should not delve into the question of whether and in what manner the covenant registered against unit 33 might be modified, since the respondent did not plead that relief in this case. Even when the matter was raised by the court in submissions, the respondent did not argue for this remedy. As a result, the petitioner did not have the opportunity to develop a proper response, both factually and legally. Deciding the matter in that way risks taking the litigation out of the hands of the parties in a manner that could be unfair or produce unintended consequences.

[75] I have taken into account all the factors cited by the respondent – the case-specific equities and the more general implications – in deciding whether to order cancellation of the restrictive covenant as sought by the petitioners. At the end of the day, balancing all of the considerations and in light of the nature of the court's finding under s. 35(2)(e), I see no option but to cancel the restrictive covenant registered against the title to unit 33. Having concluded that the covenant is impermissibly vague and thus unenforceable, I find it hard to conceive how it could be allowed to remain. Among other things, the absence of an arbitration mechanism would effectively bar the petitioners from renting their unit unless they are prepared to agree to the terms of any rental management agreement insisted upon by the respondent.

[76] With regard to the equities of the situation as between the petitioners and the respondent, there is some merit in the respondent's submission that the petitioners can be taken to have had full knowledge of the restrictive covenant and its effects when they acquired unit 33. Common sense suggests the petitioners may have paid a lower market price for unit 33 than they would have if the restrictive covenant had

not been in place at the time of purchase. However, it seems to me that any corresponding detriment to the respondent arising from cancellation of the charge could to some extent be accounted for in a subsequent application by the respondent for compensation under s. 35(3) of the *Property Law Act*. The respondent pled s. 35(3) in its response to the petition, and the parties agree that if the court orders cancellation of the restrictive covenant, the respondent should be given leave to bring a further application for compensation.

[77] With regard to the broader implications, again I find some merit in the respondent's concern about the consequences of a decision cancelling the restrictive covenant registered against the title to unit 33. A ruling to that effect would call into question the enforceability of similar covenants on the other 301 condominium hotel units at Panorama Mountain Resort. This in turn could pose a threat to the continued viability of the rental pool arrangement. If PMVI is unable to retain a critical mass in its rental pool, this could undermine the ability to deliver the kind of standardized, high quality, properly funded services expected from a conventional condominium hotel.

[78] However, the law requires that restrictive covenants be sufficiently precise for present and future owners to be able to ascertain the restrictions on the use of their property, and I have found based on binding authority that the covenant in issue here is deficient in that regard. And of course, the outcome in this case may not be dispositive insofar as the question of remedy is concerned, since another party in another case may argue for modification of the covenant rather than removal. The respondent did not plead or pursue that form of remedy before me. To the extent that there are in fact broader implications, PMVI may have to find ways to adapt its business model to operate without reliance on a restrictive covenant determined by the courts to be impermissibly uncertain and thus unenforceable.

Conclusion

[79] My conclusions are as follows. First, the restrictive covenant registered against the title to strata unit 33 is impermissibly vague and thus invalid and

unenforceable as contemplated in s. 35(2)(e) of the *Property Law Act*. Second, an order should issue under s. 35(1) removing the restrictive covenant from the title to strata unit 33. Third, the respondent is granted leave to bring a further application for compensation under s. 35(3).

Costs

[80] The petitioners are entitled to costs in respect of the hearing. Since the proceedings are not concluded, no broader disposition as to costs is appropriate at this point.

"Riley J."