IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Anoroc Holdings Ltd. v. 585582 B.C. Ltd.,* 2024 BCSC 1632

Date: 20240904
Docket: S231431
Registry: Vancouver

Between:

Anoroc Holdings Ltd., Leslie Alexander Darts, Nadine Donata Darts, Michael John MacDonald, Denise Frances Heck, 0836999 B.C. Ltd., CMG Ventures Inc., George Matic, K-Systems Holdings Ltd., Agnes Froese, Ernest Elburn Froese, Nathan Morden, William John Warrellow, Colleen Kathleen Warrellow, Noor Damji, Dina Louise Kotler, Lane Darcy Jones, 818635 Alberta Ltd., Wesley William Pell, Kim Carol Pell, 1125060 BC Ltd., Danica Sariyski, Danielle Powell and Jeffrey Kotowsky, Kathryn Maria Jones, Daniel Kenneth Jones, David Gregory Krestanovich, Gail Eileen Krestanovich, Dorota Julia Huntley, 0700985 B.C. Ltd., Murray Kenneth Rundle, Steve Hammer, Melissa Hammer, Steve Kitney, Joanne Kitney

Petitioners

And:

585582 B.C. Ltd.

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Petitioners:	J.V. Payne E. Coffin
Counsel for the Respondent:	S.W. You
Place and Dates of Hearing:	Vancouver, B.C. March 25-26, 2024
Place and Date of Judgment:	Vancouver, B.C. September 4, 2024

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INTRODUCTION

[1] Each of the petitioners owns a lot in a strata complex known as the Cove Lakeside Resort (the "Resort") located in West Kelowna, BC. The petitioners seek to have a restrictive covenant registered against each of their strata lots, which establishes a rental management system (the "Restrictive Covenant" or the "Covenant"), cancelled pursuant to s. 35(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*].

[2] The same Restrictive Covenant was registered against another lot in the Resort owned by Tor Anderson and was cancelled on the basis that it lacked certainty: see *585582 B.C. Ltd. v. Anderson*, 2015 BCCA 261 [*Anderson BCCA*]. The petitioners' primary argument is that the Restrictive Covenant should be cancelled on the basis that *Anderson BCCA* is binding on this Court and the Restrictive Covenant is invalid because it lacks certainty and is not negative in substance.

[3] Broadly, the respondent argues that *Anderson BCCA* is not binding in that neither *stare decisis* nor the principle of *res judicata* apply. It submits that the Restrictive Covenant is not void for uncertainty.

Background Facts

[4] The original developer of the Resort was the Okanagan Land Development Corp. ("OLDC"). The Resort is a 154-unit strata corporation consisting of 150 residential units and 4 commercial strata lots. I will refer to individual units in the Resort as "Resort Units".

[5] From its outset, the intention was for the Resort Units to be used for public rental when not being used by their particular owner. A part of the plan was a unified rental management system (the "Rental Pool") that the resort manager would operate. There was no requirement that owners join the Rental Pool, but the practical impact of the Restrictive Covenant is that owners who do not join the Rental Pool cannot rent their units to the public.

[6] At the outset, owners choosing to enter their Resort Unit into the Rental Pool were required to enter into a rental pool management agreement (the "Original Rental Agreement"). Each Resort Unit owner who chose to participate in the Rental Pool signed the same form of Original Rental Agreement.

The Disclosure Statement and Terms of the Original Rental Agreement and Restrictive Covenant

[7] On May 31, 2005, prior to any Resort Units being sold, an amended and reformatted disclosure statement (the "Disclosure Statement") for the Resort was filed with the Ministry of Finance by OLDC.

[8] The Disclosure Statement set out the key terms of the Restrictive Covenant and the Original Rental Agreement. Forms of the Original Rental Agreement and Restrictive Covenant were attached as schedules to the Disclosure Statement.

[9] The form of the Original Rental Agreement provided:

a. The term of the Rental Agreement, being 15 years from the date of the agreement (Article 2);

b. The mechanism by which the Resort Unit owner's share and the manager's share of revenue to be calculated, with the revenue split percentage being 60/40 in favour of the owners (Article 4);

c. The manager's responsibilities under the Rental Agreement, including the requirement to use commercially reasonable efforts to rent participating Resort Units and services to be provided by the manager (Article 5); and

d. The Resort Unit owner's responsibilities under the Agreement, including the requirement to notify proposed purchaser of a Resort Unit of the existence and substance of the Rental Agreement (Article 6).

[10] In addition, Article 2.8 of the Original Rental Agreement provided:

> **2.8 Termination by the Manager**
>
> The Manager may, on or before the date which is 90 days before the end of the initial Term or any of the renewal terms[,] give the Owners written notice that the Manager does not wish to renew all and not less than all of the rental pool management agrees for the Development (including this Agreement) and, in such event, this Agreement and all such rental pool management agreements will terminate at the end of the then current term. The Manager reserves the right to terminate the agreement if fewer than 75 of the Strata Lots are entered in the Rental Pool for a period of more than 90 days consecutively.

[11] On August 4, 2006, while OLDC was the owner of the commercial lots and the residential units, OLDC caused the Restrictive Covenant to be registered against title to the residential units. OLDC, as owner of the residential units, was the transferor, and OLDC, as the owner of Lot 2, one of the commercial lots, was the transferee. The Restrictive Covenant includes the following terms:

> The Transferor and the Transferee have agreed that it is to their mutual benefit to have all residential strata lots comprising the Transferor's Lands be rented to the Public at the option of each owner of a strata lot through a single common rental booking system.
>
> …
>
> **Rental Use**. …the Unit shall not be used as or occupied for Rental Use and that no Registered Owners will permit its Unit to be used as or occupied for Rental Use except in accordance with each of the following:
>
> (a) the Covenant; and
>
> (b) if rented to the Public, the Rental Pool Management Agreement.
>
> **Optional Placement in Rental Booking System**. Registered Owners may place their unit in the Rental Booking System at any time by entering into the Rental Pool Management Agreement and may withdraw from the Rental Booking System upon the notice and under the terms set out in the Rental Pool Management Agreement.
>
> **Exclusive Rental Booking System**. No Unit will be placed in any rental booking system other than the Rental Booking System operated by the Rental Manager, both as defined in this Covenant.
>
> **No Private Rentals**: Registered owners shall not make private rental arrangements whether their Unit is or is not placed in the Rental Booking System.

[12] The Restrictive Covenant contained the following definitions:

> "Rental Booking System" means the rental management system of the Rental Manager, operator or organization chosen by the Transferor for the initial term and thereafter by the Transferee…;
>
> "Rental Pool Management Agreement" means the agreement made between the Registered Owner and the Rental Manager setting out the terms by which the Rental Manager, upon request by the Registered Owner will manage and make the Unit available for Rental Use, as may be amended by mutual agreement from time to time";
>
> "Rental Manager" means the rental manager operating the Rental Booking System;
>
> "Rental Use" means the use of a Unit of rental to the Public and for clarity, without limiting the generality of the foregoing includes any lease, license or similar rental;

[13] The original contracts of purchase and sale required that the purchaser acknowledge receipt of the Disclosure Statement. The record in the *Anderson BCCA* case included the contract of purchase and sale of unit 410, the unit owned by Mr. Anderson, with the initialled acknowledgement that the Disclosure Statement was provided. However, as I will discuss further later in these reasons, the Disclosure Statement (and its attachments) did not form part of the record in the *Anderson* case and no reference was made to it in *Anderson BCCA*.

[14] At various times, OLDC transferred title to the Resort Units to purchasers.

[15] The respondent 585582 B.C. Ltd. ("5855") is now the registered owner of commercial lots 2 and 4 in the Resort.

[16] 5855 leases commercial lot 2 to the Cove Lakeside Resort Inc. ("CLRI"). CLRI is the current Rental Manager. The Rental Manager provides services, including security, housekeeping, accounting, marketing, maintenance, front desk, and food and beverage provision. It operates a restaurant at the Resort.

[17] The Resort Unit owners who participate in the Rental Pool are treated exactly the same, with the terms of their rental agreements being the same.

The Revised Rental Agreement

[18] The Rental Pool began operations in May 2007. The summer was financially successful but, according to the Rental Manager, the Rental Pool incurred ongoing operating losses, which were unsustainable. In 2008, the Rental Manager proposed that the Rental Pool operation be shut down outside peak season, or that it be operated year-round with an adjusted revenue split of 50/50. Alternatively, they proposed that a new Rental Manager willing to accept the existing 60/40 revenue split could be located in their place. Out of 107 Resort Unit owners who participated in the original Rental Pool under the Original Rental Agreement, 92 of the Resort Unit owners approved of the readjustment of revenue sharing percentage.

[19] In 2008, those participating signed a form of the revised rental agreement that had the following significant terms (the "Revised Rental Agreement"):

> …
>
> C. The parties wish to terminate the Original Rental Pool Management Agreement, and to enter into a new Rental Pool Management Agreement on the terms and conditions herein provided.
>
> …
>
> 1. The Original Rental Pool Management Agreement is hereby terminated effective as of 11:59 pm on February 29, 2008, provided that any payment or reimbursement obligations accruing thereunder to that date continue in effect.
>
> 2. Effective from and after March 1, 2008, the Owner hereby appoints the Manager to manage the rental of the Strata Lot for and on behalf of the Owner, and the Manger hereby accepts such appointment, on the same terms and conditions as are set forth in the Original Rental Pool Management Agreement (including all schedules thereto), which are hereby incorporated herein *mutatis mutandis* and form part of this Agreement, except as follows:
> …

[20] The Revised Rental Agreement proceeds to set out the term of the agreement (March 1, 2008 to September 30, 2021), and the change in the revenue split to 50/50 for the period of July 1, 2008 to December 31, 2010. From January 1, 2011 onwards, the agreement provided that the Rental Manager would receive "such percentage of the Unit Revenue Share as the parties may agree for each month" and that if the parties did not agree prior to September 30, 2010, the percentage would be set at 40 percent. The Revised Rental Agreement also

provided that the Rental Manager could terminate the Revised Rental Agreement any time after September 10, 2010 upon not less than 90 days notice.

[21] With the exception of these changes, the Revised Rental Agreement was substantially similar to the Original Rental Agreement.

[22] The Resort Unit owners who did not sign the Revised Rental Agreement had their Original Rental Agreements terminated pursuant to Article 2.8, as there were less than 75 Resort Unit owners under the original Rental Pool. Without signing the Revised Rental Agreement, those owners were precluded from participating in the Rental Pool.

[23] In September 2010, 91 Resort Unit owners agreed to the continuation of the 50/50 revenue split and the Rental Manager continued to operate the Rental Pool on that basis.

Legal Background

[24] As noted earlier, this case is complicated by the fact that the Court of Appeal analyzed the identical restrictive covenant, registered against another unit in the Resort in 2015, and found it to be invalid. Unsurprisingly, much of the parties' arguments turn on the relevance and applicability of *Anderson BCCA* to the issues and evidentiary record before me. Prior to addressing each of the issues raised in this petition, it is necessary to canvass the relevant legal background, including *Anderson* at both levels of court, and the subsequent cases interpreting and applying *Anderson BCCA*.

The *Anderson* Decisions

[25] Mr. Anderson and his brother began living in their Resort Unit and did not sign a Rental Agreement. In late 2008 or early 2009, Mr. Anderson decided to try and sell his unit. He received no offers so he proceeded to rent his unit privately. In response, 5855 commenced an action against him seeking an injunction to restrain him from renting his unit unless he entered into a Rental Agreement.

[26] Mr. Anderson filed a counterclaim seeking a declaration that the restrictive covenant was void on the basis that it was not negative in substance, lacked certainty, and did not concern the land but simply benefitted a business.

[27] On the factual record in the *Anderson* case, the form of the Original Rental Agreement was in evidence, but the Disclosure Statement was not in evidence. The pleadings in the *Anderson* case made no reference to the Disclosure Statement and the fact that a draft of the Original Rental Agreement was attached as one of the schedules to it. The only reference to the Disclosure Statement was in the contract of purchase and sale signed by Rob Anderson, Mr. Anderson's brother, in which reference to a Disclosure Statement being provided is made.

Anderson BCSC

[28] Mr. Anderson filed a summary trial application seeking dismissal of the claim against him and requesting a declaration that the restrictive covenant was void. The summary trial judge, in reasons indexed at 2014 BCSC 1363 [*Anderson BCSC*], made the following findings:

- The restrictive covenant, when read as a whole, is negative in substance as it prevents owners from engaging in an "otherwise normally-permitted use of privately owned property" (at para. 13);

- The restrictive covenant is certain, as a perspective purchaser would see the covenant as unequivocally prohibiting them from renting the unit privately, and such a person would be alerted to the rental pool management agreement which they would be able to review before deciding whether to opt into the rental pool (at para. 16). The fact that a prospective purchaser would have to look outside the covenant (i.e., at the rental pool management agreement) to understand its terms, did not serve to make the covenant void (at para. 17); and

- The covenant touches and concerns the land since it is imposed for the benefit of the dominant tenement, being the front desk of the Resort. Given

the Resort's operation as a hotel, the front desk is critical to its operation (at paras. 20–24).

[29] The restrictive covenant was upheld and the application dismissed.

Anderson BCCA

[30] Mr. Anderson appealed the dismissal of his application and advanced the same three arguments on appeal.

[31] The appellant's factum makes no reference to the Disclosure Statement nor to the form of the Rental Pool Management Agreement attached to it. The following paragraphs of the factum are of note:

> [6] As at the time of executing and registering the Covenant, a rental pool management agreement did no[t] exist. Unsurprisingly, the Covenant did not contain any additional terms of a rental pool management agreement or indicators of where that agreement may be located.
>
> …
>
> [67] The reference in the Covenant is simply to the "Rental Pool Management Agreement". There are no other facts about that document that would allow an owner or prospective purchaser to determine where it is located and if the agreement provided is, in fact, the agreement referenced in the Covenant. This lack of any identifying marks can, of course, be explained by the fact the document does not exist.
>
> [68] In addition to ensuring a *consensus ad idem*, a requirement that the incorporated document be identified with certainty addresses the mischief that results where one party can simply present as the incorporated document whatever document he or she wishes. That concern is not a far-fetched hypothetical; it is the facts of this case.

[32] The Court of Appeal disagreed with the summary trial judge's finding on the issue of certainty. The Court found that since the form of the Rental Pool Management Agreement was not attached to the covenant and had to be negotiated between the owner and the Rental Manager, and since there was no independent mechanism by which the terms could be established, the covenant lacked the required certainty and the Court ordered it be cancelled. The following paragraphs of *Anderson BCCA* are significant:

[21] One of the requirements of a restrictive covenant is that its terms must be clear. As Mr. Justice Taggart stated in *Newco Investments Corp. v. British Columbia Transit* (1987), 14 B.C.L.R. (2d) 212 at 224 (C.A.):

> Covenants such as these which run with the land must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed upon them.

…

[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] There is not even true certainty when an owner enters into a rental pool management agreement with the rental manager because, as demonstrated by the change of the management fee from 40% to 50% of the room rental revenues, the rental manager effectively has the ability to unilaterally change the terms on which the units can be rented to the public. This is similar to *Sekretov* in the sense that the use of an owner's unit can be affected by the whim of the rental manager expressed at some future time.

> [31] The respondents argue there is certainty because a successor in title will know that the unit cannot be rented to the public unless the owner participates in the rental pool and that the essence of the certainty is the bar on private rentals. In my opinion, that does not create certainty. 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.
>
> [Emphasis added.]

[33] In light of the Court of Appeal's finding that the covenant was void for uncertainty, the respondent agreed to discharge the covenant registered against 17 Resort Units upon the request of the respective owners. However, the identical restrictive covenant remains registered against 132 Resort Units, including those belonging to the petitioners, which the respondent now refuses to discharge.

[34] Neither the summary trial judge nor the Court of Appeal made any reference to the Disclosure Statement, and the fact that the form of the Rental Pool Management Agreement was attached to it.

Subsequent Interpretation of *Anderson BCCA*

[35] *Anderson BCCA* has been interpreted and applied in the intervening years. I discuss those cases which I find to be relevant below.

Zhang v. Davies

[36] *Zhang v. Davies*, 2017 BCSC 1180 [*Zhang BCSC*], aff'd 2018 BCCA 99 [*Zhang BCCA*] concerned the validity of a restrictive covenant registered against the defendants' property. Among other things, the covenant required that building plans for a potential home on the Davies' property be approved in writing by the registered owner of the neighbouring property, which was purchased by Ms. Zhang. The Court found Ms. Zhang, the purchaser, had been told of the restrictive covenant registered against the Davies' property by her conveyancing solicitor. The Davies relied on *Anderson BCCA* in support of their argument that the restrictive covenant was invalid and unenforceable. Justice Adair noted that in *Anderson BCCA*:

> [62] …The covenant prohibited rental of the strata lot to the public except in accordance with a rental pool management agreement setting out the terms under which the resort's rental manager would rent the unit. However, no form of rental pool management agreement was attached to the restrictive covenant, and an agreement had to be individually negotiated between the owner of the strata lot and the rental manager.

[37] The defendants argued that *Anderson BCCA* changed the law respecting the validity of restrictive covenants by establishing that if one has to go outside the restrictive covenant in order to know what is or is not permitted, then the restrictive covenant is void and unenforceable. Justice Adair disagreed that *Anderson BCCA* changed the law in this way, but found that the terms of the restrictive covenant in *Anderson BCCA* were unlike the restrictive covenant she was considering: *Zhang BCSC* at para. 67; *Zhang BCCA* at para. 22. She characterized a "central aspect" of the restrictive covenant in *Anderson BCCA* as an "agreement to agree, which is unenforceable": *Zhang BCSC* at para. 72. She distinguished *Anderson BCCA* on this basis and ultimately found the terms of the restrictive covenant in *Zhang* to be enforceable.

The *Whistler* Decisions

[38] In *1114829 B.C. Ltd. v. Whistler (Municipality)*, 2019 BCSC 752 [*Whistler BCSC*], aff'd *1120732 B.C. Ltd. v. Whistler (Resort Municipality),* 2020 BCCA 101 [*Whistler BCCA*], the restrictive covenant at issue was a rental pool covenant registered on title to the strata units in Cascade Lodge Hotel. The covenant required hotels on properties in the area of Whistler Village North to be consistent with Whistler's "warm beds" policy, which existed to guarantee an adequate supply of tourist accommodations. Specifically, the covenant required owners of strata units have their unit placed into a rental pool approved by the municipality, and limited their personal use of the unit. A company, ResortQuest, had entered into rental management agreements with a number of unit owners and was fulfilling the role of rental pool manager. The petitioners, companies that owned numerous strata lots in the Cascade Lodge Hotel, sought to operate rental pool arrangements separate from the pool managed by ResortQuest, but this arrangement was not approved by the municipality. They subsequently brought a petition arguing that the rental pool

covenant (and associated Whistler bylaws) were invalid for, *inter alia*, being *ultra vires* their enabling legislation, and that the covenant was void for uncertainty.

Whistler BCSC

[39] The petitioners relied on *Anderson BCCA* and *Re Sekretov v. City of Toronto*, [1973] 2 O.R. 161, 1973 CanLII 712 (C.A.) to support their argument that:

> [97] … the covenant is uncertain because it does not provide any document that is a form of rental pool agreement or arrangement; it does not have a mechanism to determine the terms of a rental pool agreement or arrangement; and there is no mechanism to resolve disputes regarding rental pool arrangements. Although ResortQuest has rental management agreements with the owners of strata units in Cascade Lodge, these agreements have varied over the years and lack certainty. The covenant does not provide for the commercial terms of the rental pool agreement and the individual agreements do not create a rental pool amongst the owners.

[40] Relying on *Zhang BCCA*, the chambers judge emphasized that the court should treat the background and purpose of the covenant, being the preservation of the warm beds policy and a positive experience for Whistler visitors, as guides to the covenant's interpretation: at paras. 103–104.

[41] The chambers judge described the covenant in *Anderson BCCA* as similar to that in the case at bar, but noted that in *Anderson BCCA*, the covenant was silent regarding the terms and conditions of the rental pool management agreement, and the rental manager could and did unilaterally change the terms and conditions of the rental pool arrangement at will, which was fatal to its enforceability: *Whistler BCSC* at paras. 106–107. The chambers judge found that unlike in *Anderson BCCA*, there was no evidence of "arbitrary management" and the covenant clearly expressed in detail the requirements for a rental management agreement: *Whistler BCSC* at paras. 108, 112. Further, the judge noted that the form of the rental pool agreement had been attached to the disclosure statement:

> [114] The disclosure statement, which is public, outlines how the property will be used when not booked for owner use. It provides details on the proposed business model for Cascade Lodge. It sets out many terms including what expenses relate to the ownership of strata lots and includes the rental pool arrangement. It also states that the Developer had entered into a rental pool management agreement with ResortQuest. The form of the

rental pool agreement is attached to the disclosure statement. A number of amendments have been made to the disclosure statement over the years. All the amendments reiterate the nature of the investment save for one from 1997.

[115] The developer files the disclosure statement to protect consumers. It puts potential purchasers on notice of covenants, bylaws, and other such restrictions that affect title. This disclosure statement put potential purchasers of units in Cascade Lodge on notice that their unit is subject to the rental pool covenant.

[116] I find that, like *Anderson*, the rental pool covenant requires the rental of strata units only in accordance with the terms of an external agreement which is not incorporated or attached to the covenant. The rental manager could unilaterally change the terms of that agreement, and the covenant lacks any mechanism for dispute resolution.

[117] Like *Anderson*, there is a need to look beyond the covenant to know exactly what is or what is not permitted. The details will need to be ascertained by reviewing the covenant, and by requesting a copy of the rental management agreement and the disclosure statement prior to purchase.

…

[123] The rental pool covenant requires that any prospective purchaser of a Cascade Lodge strata unit be put on notice that there is a rental pool arrangement in place. A prudent purchaser would investigate the terms and conditions of the arrangement prior to purchasing. Conveyancing lawyers typically review title matters, including the existence of any restrictive covenants, with a prospective purchaser prior to a purchase of real estate completing. A review of the documents at the Land Title Office will reveal the essential facts of which a purchaser should be aware prior to purchasing a unit.

[124] While potential owners would have to look beyond the covenant to determine the terms and conditions of the rental pool arrangement, and an owner must agree to the terms of the rental pool agreement, this does not render the covenant vague or uncertain. The terms of the rental management agreement are largely described in the covenant and the form is attached to the disclosure statement.

…

[131] Moreover, when a prudent strata unit owner purchased their units, they would be aware they were entering into a rental management agreement, based on the concept of a unified hotel business, with ResortQuest. When the individual owners purchased their units they bought into an agreed rental pool. They were not compelled to purchase units that were subject to a rental pool covenant. Purchasers, such as the petitioners, were well aware that Cascade Lodge was being operated as a hotel with a single rental pool.

[132] In these circumstances, I do not find the covenant invalid due to vagueness or uncertainty. After reviewing the covenant, a prospective purchaser would understand that he or she must abide by the restrictions

> therein including renting the unit through a rental pool manager. They could govern themselves accordingly.
>
> [Emphasis added.]

[42] As summarized by the Court of Appeal in *Whistler BCCA* at para. 23, the judge held that:

> … *Anderson* turned on its specific facts (para. 121) and that a review of the documents registered in the land title office would have revealed to a prospective purchaser the essential facts of which they should be aware prior to purchasing a unit (para. 123). As a prospective purchaser would understand from reviewing the Covenant that they would have to abide by a requirement to rent the unit through a rental pool manager, the judge did not find the Covenant to be invalid due to vagueness or uncertainty (para. 132).

[43] In reaching this decision, the chambers judge noted that when considering cancelling a restrictive covenant, consideration must be given to all of the resulting consequences of cancellation, not just those that arise in a particular situation, and to the entire scheme and the objectives that the covenant was intended to achieve: *Whistler BCSC* at para. 127, citing *Paterson v. Burgess*, 2017 BCCA 298 at paras. 22, 29, 31. Heeding this caution, the chambers judge found that the covenant's invalidation would disrupt the business operation of the hotels which were central to the warm beds policy and tourist industry: *Whistler BCSC* at para. 128–130.

Whistler BCCA

[44] One of numerous grounds raised on appeal was that, relying on *Anderson BCCA*, the covenant was unenforceable by reason of vagueness or uncertainty: *Whistler BCCA* at paras. 100, 104–111. The Court's analysis on the matter of certainty is as follows:

> [107] The appellants say *Anderson* stands for the proposition that the absence of terms of a rental pool renders a rental pool covenant uncertain. They submit that, as the Covenant does not contain the commercial terms of a rental pool, the Covenant is uncertain and should be set aside.
>
> [108] In my opinion, the appellants' submission is based on an overly broad interpretation of *Anderson*. <u>It does not stand for the proposition that, unless the covenant sets out all of the terms of a rental pool arrangement, it is vague or uncertain. Instead, it stands for the proposition that a covenant will be</u>

> 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.
>
> [109] In this case, the Covenant does not require the owner of a unit in the Cascade Lodge to enter into an agreement. It simply requires the unit to be placed in a rental pool approved by the Municipality for rental to the public for the days on which the owner is not permitted to it. As illustrated by the last new subsection added by the Zoning Amendment Bylaw, it was open to the strata corporation, either directly or indirectly, to operate the rental pool without the owners having to enter into agreements with a third party to manage the Cascade Lodge. The initial owners of the two units may have entered into individual rental management agreements with ResortQuest's predecessor, but it was not required by the Covenant.
>
> [110] The chambers judge distinguished *Anderson* as turning on its specific facts. She noted that the absence of the terms of a rental management agreement did not create uncertainty in the Covenant (para. 122), and I agree with her because the Covenant does not require such an agreement to be entered into. I also agree with her that there is no ambiguity (or vagueness) as to the restrictions imposed by the Covenant (para. 122), and that the Covenant provided a mechanism for the Municipality to monitor and enforce the substantive terms of the Covenant (para. 125). The fact that the Municipality may not have approved the rental pool arrangement in effect at the Cascade Lodge, or may have a current policy against approving such arrangements generally, does not make the Covenant vague or uncertain. The consequences of the Municipality's failure in that regard, if any, are not before the court in this proceeding.
>
> [111] The Covenant is not vague or uncertain simply because it requires the unit in question to be placed in a rental pool. The provisions of the Covenant are clear and they do not require the owner of the unit to enter into an agreement with unknown terms. In my opinion, the Covenant is not invalid due to vagueness or uncertainty. I would not give effect to this ground of appeal.

Kent v. Panorama Mountain Village

[45] *Kent v. Panorama Mountain Village Inc.*, 2021 BCCA 332 [*Kent BCCA*], rev'g 2020 BCSC 812 [*Kent BCSC*] concerned the validity of a restrictive covenant registered as a charge against strata lots in a strata-titled building at the Panorama Mountain resort, which provided that strata lots cannot be rented to the public except through a rental management system operated and managed by the manger of the system: at para. 1. The Court of Appeal found that the chambers judge, who found that the restrictive covenant lacked certainty and should be cancelled, had erred in principle when he misapprehended the legal holding of *Anderson BCCA*, as

elaborated on in *Whistler BCCA*. As a result, the appeal was granted and the petition dismissed.

[46] Commenting on the facts in *Anderson BCCA*, the Court of Appeal noted:

> [29] The evidence established that when the covenant was first filed in the Land Title Office, no form of Rental Pool Management Agreement existed. Furthermore, in 2008, the respondent rental manager had unilaterally terminated the initial agreement that it had entered with the unit owners and produced a new form of Rental Pool Management Agreement that it required they sign.

[47] The Court of Appeal further noted:

> [48] *Anderson* has been distinguished in several decisions on the basis that the covenant in *Anderson* had required owners to execute a rental agreement whose terms had not in any fashion been established and were thus necessarily uncertain: *Whistler* at para. 110; *1530 Foster Street* at para. 30; *Pierce v. Kingsbridge Management Ltd.*, 2021 BCSC 781 at paras. 83–84, 91; *Zhang SC* at para. 72.
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> …
>
> [57] Furthermore, as a matter of "commercial reality", and unlike in *Anderson*, the respondents and all other initial purchasers of units in the 1000 Peaks Summit development knew, with a degree of commercial certainty, what the detailed terms and conditions of the rental pool management agreement that they were to sign, if they wished to rent out their units, would be.
>
> [Emphasis added.]

[48] In *Kent BCSC,* the evidentiary record was that when the strata units were marketed to the public, the developer had prepared and filed a disclosure statement. The amended disclosure statement was provided to prospective purchasers. The disclosure statement referenced to the intention to operate the residential units as condominium hotels. The initial disclosure statement included the intended form of the restrictive covenant and the rental pool management agreement. The disclosure statement represented that the documents would be "substantially in the form attached" as exhibits in the disclosure statement: *Kent BCCA* at paras. 58–60.

[49] As a result of these findings, the Court of Appeal concluded:

> [66] To be clear, the disclosure statement and its attachments, as part of the factual matrix, directly inform the interpretation of the Covenant.

> Furthermore, the Covenant and its terms are clear. Finally, as a practical matter or as a matter of "commercial reality", the original purchasers of strata units would have come to understand the commitments they were undertaking if they purchased a strata unit and if they then wished to rent out that unit.
>
> [67] Similar commercial considerations pertain to the successors or subsequent purchasers of strata units in the 1000 Peaks Summit. The amended draft Rental Pool Management Agreement that was attached to the disclosure statement, in clause 6.4(b) and under the heading "Sale of the Unit", required, *inter alia*, that the owner "notify any proposed purchaser or lessee of the Unit of … the existence and substance of this Agreement". That same draft agreement provided, in clause 6.4(c)(ii), that if the new purchaser wished to participate in the rental pool, they would enter "into a new agreement with the Manager on the same terms and conditions as this Agreement". Accordingly, new purchasers would understand the contractual commitments that were expected of them if they wished to rent their units.
>
> [68] Those same provisions were included in the Rental Pool Management Agreement that the respondents signed when they purchased their strata unit in 2004. The form of agreement they signed in 2010 does not appear to be in the record before us. The latest form of the 1000 Peaks Summit Management Agreement has been somewhat modified in that new purchasers are no longer required to sign "a new agreement … on the same terms and conditions as this Agreement". Instead new purchasers are now required, in clause 6.4 and under the heading "Sale of the Unit", to "assume all of [the] Owner's rights and duties hereunder and continue this Agreement in effect for at least sixty (60) days after receiving a signed purchase agreement."
>
> [69] Similarly, there is no indication that the language in the provision of the strata's amended bylaws, which was included with the disclosure statement and which I have quoted, has been changed. Indeed, a comparison of the language of the draft Rental Pool Management Agreement that was originally attached to the disclosure statement nearly 20 years ago and the form of that agreement that is in effect today reveals that the changes that have been made are, for the most part, modest and cosmetic in nature.
>
> [70] Once again, successors in title would understand the unambiguous requirement in the Covenant that they could only rent out their strata unit through the strata's Rental Management System. They would also, as a matter of "commercial reality" and through their enquiries, come to understand the bylaws, the Rental Pool Management Agreement, and any other contractual commitments they might have to undertake when purchasing a strata unit at 1000 Peaks Summit.

Issue 1: Is *Anderson BCCA* binding and, if so, does it mandate that the relief sought be granted?

Position of the Parties

[50] The petitioners argue that *Anderson BCCA* is a binding precedent, given the identical material facts. They assert that the same facts are in the evidentiary record

in *Anderson* as in the case at bar, and that the only difference is that the petitioners own different units. They rely on the decision in *Re Hansard Spruce Mills,* [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.) [*Spruce Mills*] for the proposition that the BC Supreme Court is bound to follow previous Court of Appeal decisions unless the case at bar can be differentiated on the facts from the previous Court of Appeal's decision: see also *R. v. Sullivan*, 2022 SCC 19 at para. 6. Since *Anderson BCCA* was based on identical facts which cannot be significantly differentiated, the doctrine of *stare decisis* applies and requires that this court apply the law as set out in *Anderson BCCA*.

[51] Specifically, the petitioners submit that the facts set out at para. 26 of *Anderson BCCA* apply to the properties owned by the petitioners in this case, being that the form of the agreement was not attached to the Restrictive Covenant, the agreement did not exist at the time the Restrictive Covenant was registered, and it had to be negotiated between the owners and the Rental Manager.

[52] The respondent submits that the principle of *stare decisis* only applies to determinations of law and not to the application of findings of fact: *International Fiduciary Corp., S.A. v. Bryson*, 2014 BCCA 433 at para. 10. The respondent also relies on *Spruce Mills* for the principle that superior courts may not be bound if the prior decision is distinguishable on the facts, or when subsequent decisions have affected the validity of the decision. The respondent argues that *stare decisis* does not apply here since the decision as to whether the Restrictive Covenant is valid is a question of mixed law and fact, or a question of fact. It also asserts that the present proceeding is distinguishable from the factual basis of the *Anderson* case, as the Rental Agreement *did* exist at the time of the registration of the Restrictive Covenant and the Rental Manager did not and does not have the ability to unilaterally change the terms of the Rental Agreement.

Analysis

[53] I disagree that the facts of *Anderson* and this case are identical. It is clear that the evidentiary record in the case before me differs from the evidentiary record in

Anderson in a substantial manner: the existence of the Disclosure Statement and the attachment of the form of the Covenant and Rental Agreement as schedules to it were not before the chambers judge or the Court of Appeal in *Anderson*. As the Court of Appeal found, "the agreement did not even exist at the time of the creation of the covenant" and "it was an agreement that must be negotiated between each owner of a strata lot and the rental management". This was not the evidence before me.

[54] The evidence before me is that the Disclosure Statement attached both a draft of the Covenant and the form of the Rental Management Agreement. The Disclosure Statement predated the registration of the Restrictive Covenants against the strata units; the Disclosure Statement being dated May 30, 2005 and the Restrictive Covenant being registered on August 4, 2006. The Rental Management Agreement, with all of its specific wording, was available to each of the strata owners before they purchased a strata unit. The terms were set and the evidence supports that each strata owner entered into the same agreement.

[55] In addition, the evidence in the *Anderson* case was that Mr. Anderson had never signed a Rental Agreement. In the case at bar, the evidence supports that some of the petitioners signed Rental Agreements, whereas some had not.

[56] Since the factual record is different, I am not persuaded that *stare decisis* applies to mandate the same result in this case.

Issue 2: Do the doctrines of issue estoppel and abuse of process prevent the respondent from advancing any argument as to the validity of the Restrictive Covenant?

Position of the Parties

[57] The petitioners argue that issue estoppel bars the respondent from challenging the validity of the Restrictive Covenant in this case or in any other proceeding. The petitioners submit that Mr. Anderson and they are privies, insofar as they are parties to the same agreement and have identical rights and obligations under that agreement, and they had the same interest in the previous proceedings.

They argue the issue in the *Anderson* case, being the validity of the Restrictive Covenant, is the same as in the case at bar. Their position is that the Court of Appeal's decision was final and thus, issue estoppel prevents the respondent from relitigating this point.

[58] In the alternative, the petitioners submit that to allow the issue to be relitigated would be an abuse of process.

[59] The respondent submits that issue estoppel is not applicable in this case since the question to be decided is whether the Restrictive Covenant registered against the petitioners' Resort Units should be cancelled based on the factual basis in the present proceedings. The respondent submits that the petitioners were not parties to the *Anderson* case, nor were they privies. There is no evidence that supports that the petitioners conducted that proceeding, nor that they were even aware of it. *Anderson BCCA* does not refer to any of the petitioners or their Resort Units, and does not require them to comply with the decision.

[60] The respondent argues that the doctrine of abuse of process is not engaged since the respondent is not relitigating the same matter. The present proceedings concern identical Restrictive Covenants, but, with a different factual basis and different parties.

[61] Alternatively, the respondent submits that even if the doctrine of issue estoppel or abuse of process applies, the Court should exercise its discretion to allow this case to be decided on its merits since fairness dictates that the administration of justice would be better served by permitting the present proceeding to go forward.

Legal Principles

[62] The doctrine of issue estoppel forms a part of the doctrine of *res judicata*. Issue estoppel arises and precludes prelitigation where: (a) the first decision was final; (b) the first decision involved a determination of the same question sought to be controverted in the second proceeding; and (c) the parties to the decision, or their

privies, were the same persons as the parties to the proceeding in which estoppel is raised: *University of British Columbia v. Moscipan*, 2024 BCSC 307; see also *Angle v. M.N.R.,* [1975] 2 S.C.R. 248 at 267–268; 1974 CanLII 168; *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 at paras. 53–61. In other words, “A litigant … is only entitled to one bite at the cherry… Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided”: *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52 at para. 27 [*Figliola*], citing *Danyluk* at para. 18; *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 31.

[63] Even if the elements of issue estoppel are established, the judge retains a discretion not to apply the doctrine on the basis that it would be an injustice to do so: *Danyluk* at para. 62.

[64] The privity requirement exists to ensure mutuality so that strangers to earlier litigation, who become party to subsequent litigation, are not improperly bound by an earlier decision: *Danyluk* at para. 59. On its scope, the Supreme Court of Canada made the following comments in *Danyluk*:

> [60] The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S.N. Lederman and A.W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis…

[65] “Privies” are those “privy to the party in estate or interest”, established where there is “community or privity of interest between them”. Privity of interest might arise where there is “some kind of interest in the previous litigation or its subject-matter”: *Canam Enterprises Inc. v. Coles* (2000), 194 D.L.R. (4th) 648 (Ont. CA) at para. 23, rev’d on other grounds, 2002 SCC 63 at para. 2.

[66] Privies include persons who have control over the action. They are bound by the judgment as if they were a party if they have a financial or proprietary interest in the judgment: *Tharani v. LifeLabs Inc*., 2020 BCSC 1670 at para. 29.

[67] In *XY, LLC v. Canadian Topsires Selection Inc.,* 2014 BCSC 2017, the Court held:

> [89] Many cases, such as those discussed below, refer to earlier editions of the leading text, Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed (Toronto: Butterworths, 2010). In the most recent edition, the author discusses the issue of privies at 83-85:
>
> > A privy of a party has been variously defined in issue estoppel cases. Privity can be one of blood, title, or interest. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. The privy must have notice of the previous proceeding to be bound by it. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome… To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privy requires parallel interest in the merits of the proceeding, not simply a financial interest in the result. However, a non-party who enters into a formal agreement with the party in a proceeding for disposing of the proceeds is a privy of that party and bound by the first proceeding. To establish privy, it is not enough that the non-party have control over the first proceeding. The non-party must be taken into the confidence of the party in the first proceeding. A non-party in an earlier proceeding is a privy on the basis of being involved in the first proceeding by being present and by giving evidence. The term "parties" includes those who are named in the proceeding and those who have an opportunity to attend the proceeding.
> >
> > …
> >
> > Factors which have been considered in … establish[ing] a privy of a party [include], namely, having knowledge of the previous proceeding, a clear interest in the proceeding, the ability to intervene as a participant but choosing to stand by and watch, active participation in the previous proceedings by giving evidence, and being part of the litigation team.
> >
> > [Emphasis added].
>
> […]
>
> [91] In *Bank of Montreal v. Mitchell* (1997), 1997 CanLII 12306 (ON SC), 143 D.L.R. (4th) 697 (Ont. Gen. Div.), Mr. Justice Farley stated:
>
> > [66] For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding, as discussed above, where that non-litigant party has sufficient interest in those original

> proceedings to intervene but instead chooses to stand by and have the battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-litigant abide by that previous decision: see *ATL* [*Industries Inc. (c.o.b. ATL Industries) v. Han Eol Ind. Co.,* [1995] 36 C.P.C. (3d) 288 at 312-14 (Ont. Gen. Div.)]; [*House of*] *Spring Garden* [*Ltd. v. Waite*, [1990] 2 All E.R. 990 at 998-1000].

[68] The doctrines of issue estoppel and abuse of process are closely related and they share common underlying principles, such as judicial economy, consistency, finality, and the integrity of the administration of justice: *Danyluk* at para. 63; *Figliola* at paras. 33–34. The doctrine of abuse of process may be triggered to protect the fairness and integrity of the administration of justice even where *res judicata* is not strictly available.

Analysis

[69] I am not persuaded that the doctrines of issue estoppel or abuse of process should apply in the circumstances of this case.

[70] I find that issue estoppel does not bar this proceeding as two of the requirements are not met. First, I do not find that the petitioners in this proceeding come within the definition of “privies”. The petitioners had no control over the *Anderson* litigation. They had no financial or proprietary interest in the decision. The *Anderson* proceedings did not impact the liability of the petitioners. In my view, had any of the petitioners sought to participate in the *Anderson* proceeding, they would not have standing to do so. Second, I find that the question to be answered was not the same. In *Anderson*, the issue was whether the Restrictive Covenant could be enforced against Mr. Anderson’s particular unit based on the factual matrix before the Court in that proceeding. The factual matrixes are not the same in this case as I have already explained.

[71] I am not convinced that to allow this case to be litigated would constitute an abuse of process by undermining the underlying principles of the doctrine.

[72] If I am incorrect in my analysis, I would exercise my residual discretion to not apply either doctrine. It is not in the interest of justice to prevent this proceeding to be considered on its merits in light of the fact that there existed evidence that was not before the chambers judge and the Court of Appeal in *Anderson*. Those facts are significant and may have an impact on whether the Restrictive Covenant is enforceable as against the petitioners. It is not entirely clear to me why the Disclosure Statement was not part of the evidentiary record in *Anderson*. The only explanation provided is at para. 37 of the Affidavit #1 of Samuel Tretheway, the current director of 5855, his evidence is that at the time of the *Anderson* proceeding, his father, the former director of 5855, was undergoing cancer therapy and did not have much time to devote to the legal proceedings.

[73] The Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, sets out the parameters of the residual discretion:

> [53] The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

[74] I note that the *Anderson* proceeding was commenced by 5855 to enforce the requirement that Mr. Anderson enter into a Rental Agreement in order to rent his unit. The issue of the enforceability of the Restrictive Covenant was raised in a counterclaim. I accept that the consequence of one Resort Unit not participating in the Rental Pool is vastly different from having 27 Resort Units seeking to withdraw from the Rental Pool. The evidence of the respondent is that if that number were to withdraw, the impact could include: insufficient funding to pay for hotel staff and provide services such as security, mail distribution, housekeeping, and parcel

deliveries; the closing of the spa and restaurant; the inability to vet guests through a centralized booking platform; and the need to obtain new contracted services, likely at higher costs.

Issue 3: Does s. 35(5) of the *PLA* make the *Anderson* order binding on the petitioners?

[75] Section 35(5) of the *PLA* provides: "[a]n order binds all persons, whether or not parties to the proceedings or served with notice".

[76] The petitioners argue that while the order in *Anderson BCCA* is made with specific reference to Mr. Anderson's unit, it is the same Restrictive Covenant, and the validity and enforceability of the Restrictive Covenant turns on the same facts and law in respect to the petitioners' units. If the order is binding on the petitioners, they conversely must be entitled to the benefit of the order.

[77] The respondent argues that the order made in *Anderson BCCA* was that the restrictive covenant was void against the particular Resort Unit belonging to Mr. Anderson. That decision did not render the Restrictive Covenant void against all the Resort Units.

[78] The petitioners' argument is premised on the basis that the enforceability of the Restrictive Covenant turns on the same facts and law as *Anderson BCCA*. I have found that the facts are not the same. There is no basis for arguing that s. 35(5) of the *PLA* impacts the validity of the other Restrictive Covenants and that "all persons" would include non-parties or non-privies. In my view, this provision can only logically be read to apply to parties or their privies, and serves to dispense with the notice requirement that would otherwise apply.

Issue 4: Is the Restrictive Covenant invalid and should it be cancelled under s. 35(2) of the *PLA*?

Position of the Petitioners

[79] The petitioners argue that the Restrictive Covenant should be cancelled pursuant to s. 35(2)(e) of the *PLA*. They say the Covenant is uncertain since the

phrase "*bona fide* rental management system" offers no indication of what the terms of the rental management agreements will be, what remuneration will be provided to owners, what services the Rental Manager will provide, and for how long these agreements will be in effect. They argue that, in essence, the Restrictive Covenant is an unenforceable "agreement to agree" with the effect that the Rental Manager can dictate the terms of the agreements and offer them as a "take it or leave it" proposition.

[80] The petitioners also submit that the Restrictive Covenant is positive in substance when it is interpreted as a whole.

[81] The petitioners finally submit that the respondent has expressly or impliedly agreed to cancel the Restrictive Covenant and it should therefore be cancelled pursuant to s. 35(2)(c) of the *PLA*. They submit that in light of the respondent's decision to voluntarily discharge the Restrictive Covenant from title for some of the unit holders following *Anderson BCCA*, there is no reason why the Restrictive Covenant should not be discharged as against those unit holders who are now seeking its discharge. They argue that cancelling the Restrictive Covenant would not have a broader effect on the underlying development and that the Court should exercise its discretion to cancel it.

Position of the Respondent

[82] The respondent argues that the Restrictive Covenant is clear and unambiguous and is akin to the covenant that the Court of Appeal found to be enforceable in *Kent BCCA*. As in *Kent BCCA*, the form of the Rental Agreement did exist and was attached as a schedule to the Disclosure Statement prior to the registration of the Restrictive Covenant. Further, the Disclosure Statement, by virtue of the attached Rental Agreement, set out the key terms including the term of the agreement and revenue split percentage. As a result, the Restrictive Covenant does not require an owner of a Resort Unit to enter into an agreement having unknown terms.

[83] The respondent submits that the absence of a form of the rental pool agreement being attached to the Restrictive Covenant does not render the covenant void for uncertainty based on the decisions of *Zhang* and *Whistler*. The original purchasers of strata units would have understood the commitments they were undertaking if they purchased a Resort Unit and if they wished to rent the unit. Any subsequent purchasers would be aware of the existence of substance of the Rental Agreement since the owner of a Resort Unit was required to disclose this information.

[84] The respondent argues that the Restrictive Covenant prohibits a particular use of the Resort Unit unless particular requirements are met, and that such covenants are properly characterized as negative in substance, and can run with the land.

[85] The respondent also submits that there has been no implied or express waiver, such that s. 35(2)(e) is satisfied in the circumstances. They point to the "No Waiver" provision at Article 3.2 of the Restrictive Covenant.

[86] Finally, the respondent submits that even if one or more of the criteria enumerated in s. 35(2) is met, the Court should exercise its discretion to refuse to cancel the Restrictive Covenant under s. 35(1) of the *PLA* as its cancellation would be unjust or inequitable in the circumstances. The respondent's position is that the impacts of cancelling the Restrictive Covenant would be widespread and cause turmoil and confusion at the Resort, amongst employees, owners, and prospective buyers and sellers, and that it would negatively impact the ability of the respondent to provide the services it currently does.

Legal Principles

[87] Section 35(1) of the *PLA* provides:

> **Court may modify or cancel charges**
>
> **35** (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

> …
>
> (e) a restrictive or other covenant burdening the land or the owner;
>
> …
>
> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> …
>
> (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,
>
> …
>
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

[88] As set out above, the petitioners invoke both ss. 35(2)(c) and (e) as the basis for cancelling the Restrictive Covenant under s. 35(1). With respect to the issue of enforceability in subsection (e), the BC Court of Appeal summarized the requisite elements of a valid and enforceable restrictive covenant as follows:

> [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.

Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd., 2001 BCCA 268.

[89] To be enforceable, the terms of a restrictive covenant must also be clearly and succinctly stated "so that present and future owners may know with precision what obligations are imposed upon them": *Newco Invt. Corp. v. B.C. Transit* (1987), 14 B.C.L.R. (2d) 212, 1987 CanLII 2662 (C.A.) at 224; *Kent BCCA* at para. 17.

[90] Restrictive covenants are largely interpreted according to the ordinary rules of contractual interpretation, which involves giving effect to the parties' intentions, considering both the actual language of the covenant and the context in which those words are used: *Kent BCCA* at paras. 21, 24. While the surrounding circumstances of the agreement are relevant in the interpretation exercise to deepen the decision maker's understanding of the mutual and objective intention of the parties, they must be allowed to overwhelm the words of the covenant: *Kent BCCA* at para. 22, citing *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 57.

Analysis

Is the Restrictive Covenant sufficiently certain?

[91] In my view, this case is more akin to the *Kent BCCA* decision than to *Anderson BCCA*. The Original Rental Agreement *did* exist at the time and was publicly available to prospective buyers; it was attached as a schedule to the Disclosure Statement. Furthermore, key terms, including the term of the agreement and the revenue split percentage, were set out in the Disclosure Statement itself. As was the case in *Kent*, the Disclosure Statement and its attachments form part of the factual matrix that informs the interpretation of the Restrictive Covenant. The mere fact that the form of the Rental Agreement was not attached to the Restrictive Covenant itself does not render it void for uncertainty: *Zhang BCSC* at paras. 66–67; *Whistler BCSC* at para. 122.

[92] On the complete factual record before me in these proceedings, I am not satisfied that buyers were entering into an "agreement to agree" and that terms had to be negotiated between purchasers and the Rental Manager, and it is my view that

the Covenant does not have unknown terms. Given that this was not an agreement to agree, and the terms were clearly available to prospective purchasers, I am not convinced that the absence of an independent mechanism for resolving terms is fatal to its enforceability.

[93] I note that in the affidavit of Nathan Morden, one of the petitioners, he states at paras. 4–5, that at the time he purchased his Resort Unit in 2017, he was not aware of the Restrictive Covenant and that he intended to rent his unit, presumably privately. In my view, this unawareness is not a result of uncertainty of terms, but rather of either a lack of prudency and due diligence on the part of a prospective purchaser, or a failure on the part of the seller. The Restrictive Covenant is registered against title for the Resort Units and the Disclosure Statement would have been available to him, with the attached Rental Form Agreement. It would have been clear to him that the intention was to have rentals managed in a unified rental pool. Further, Article 6.3 of the Original Rental Agreement, and the Revised Rental Agreement by incorporation, require Resort Unit owners to notify proposed successors or subsequent purchasers of the substance of the Rental Agreement.

[94] Further, I do not find that the Rental Manager has the ability to unilaterally change the terms of the agreement in the manner characterized by the petitioners, or at all. The Rental Manager has the ability to propose new terms, or to terminate the agreement with notice. The petitioners say that this allows them to effectively force Resort Unit owners into signing a new agreement by essentially giving an ultimatum – agree or we walk. They say this gives the Resort the ability to unilaterally change the terms of the agreement. I do not see it this way. The attached Agreement sets out the terms, including the revenue split, and there are mutual termination rights. The petitioners too have recourse to collectively act to terminate the agreement (by a two-thirds majority) and find a new rental manager who could agree to existing terms, or to new ones. When the Revised Rental Agreement was entered into, signing was not their only option. It was open to them to try to find a new management company that would accept the existing 60/40 split.

[95] In addition, with respect to s. 35(2)(c), I do not accept the petitioners' argument that the respondent expressly or impliedly agreed to cancel the Covenant by voluntarily discharging it from title for some other unit holders following *Anderson BCCA*.

Is the Restrictive Covenant negative in substance?

[96] The petitioners also argue that when it is interpreted as a whole, the Restrictive Covenant is positive in substance. They argue that the benefit to the covenantee's land arises only from the covenantor taking positive action. I understand the thrust of their position to be that since the benefit to the commercial lots only arises where enough owners opt to enter their Resort Units into the Rental Pool by signing an agreement, the Covenant is properly characterized as positive in substance. In support, the petitioners rely on *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5 [*Aquadel*].

[97] The respondent's position is that the Restrictive Covenant prohibits owners from using their Resort Units in a certain way, unless requirements are met. It says that there is no positive obligation to enter into the Rental Pool, and thus it is not positive in substance. In support of its position, the respondent relies on *Anderson BCSC*.

[98] I am alive to the Court of Appeal's instructions in *Aquadel* not to interpret certain provisions in restrictive covenants in isolation and their finding that the nature of a covenant may be positive, despite being framed in negative language. However, I am not convinced that the Restrictive Covenant before me offends this requirement as it did in *Aquadel*. In reaching this conclusion, I will discuss the findings in the cases discussed earlier in these reasons, in addition to *Aquadel*.

[99] Beginning with *Anderson BCSC*, which dealt with the identical Restrictive Covenant, the chambers judge found that the Covenant was negative in substance as it prevented Mr. Anderson from renting his property privately and keeping the profits from doing so. In other words, it restricted the owner from using his private

property in a manner that would otherwise be permitted: at para. 13. In reaching this determination, the Court found:

> [13] …The covenant goes on to lessen the burden of that restriction by providing another basis for renting, albeit one which is, at present, only half as profitable. However, the fact that the covenant mitigates in this way the burden of the restriction on use does not eliminate the restriction. The fact that 54 of the 150 unit owners do not rent their units serves to demonstrate that the covenant is not a positive covenant at its core.
>
> [14] In summary, the covenant stops unit owners from renting their property on their own, and the fact that it leaves room for more limited rental rights does not eliminate the restriction against private rentals.

[100] While the Court of Appeal overturned *Anderson BCSC* on the basis of uncertainty of terms, as discussed above, the Court did not comment on the judge's determination that the covenant is negative in substance.

[101] In my view, the *Whistler* decisions are not of assistance as this issue was not before the Court; however, I would note two key points of distinction, the first factual, and the second legal. First, unlike in *Whistler*, the Restrictive Covenant does not require owners of Resort Units to enter into the Rental Agreement; they are free to use their Units as private residences. Second, in *Whistler*, a determination that the covenant was positive in nature would not have been fatal to its enforceability since s. 219(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250 provides that covenants that are for the benefit of a municipality may be either negative or positive.

[102] *Kent BCSC* is of more assistance. In that case, the petitioners raised a "novel argument" that the covenant was invalid and unenforceable since it imposed a positive obligation on the owner of the *benefiting* land to set up and operate a rental management pool: *Kent BCSC* at paras. 59–61. The Court rejected this position and ultimately found the covenant was negative in substance, relying on *Anderson BCSC*:

> [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.

[103] The judge's determination that the covenant was negative in substance was not appealed and the Court of Appeal did not address the issue: *Kent BCCA* at para. 15.

[104] The Restrictive Covenant is identical to the covenant before the chambers judge in *Anderson BCSC* and is highly similar to that at issue in *Kent BCSC*. On this issue, I see no reason to depart from the reasoning and determination in those cases. While, as I have noted, the factual record before me differs from that before the Court of Appeal in *Anderson BCCA*, I do not find it bears on the issue of the positive or negative substance of the Covenant. The Restrictive Covenant, read as a whole and in light of the intention underpinning the Covenant, restricts owners from privately renting their Resort Units, a use that would otherwise be available as private owners. The fact that this limitation can mitigated if the owner enters into the Rental Pool does not render it positive in substance.

[105] The chambers judge in *Anderson BCSC* relied on *Aquadel* as setting out the guiding legal principles, as the petitioners do in this case, but reached a different outcome based on the wording of the convent: at paras. 12–13. Similarly, in *Kent BCSC*, the chambers judge distinguished *Aquadel,* finding that there, "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": *Kent BCSC* at para. 64.

Would it be inequitable to void the Restrictive Covenant?

[106] Even if the requirements of s. 35(2) are met, s. 35 of the *PLA* grants the court broad discretion to refuse to cancel a charge where its cancellation would be unjust

or inequitable: *Britannia Oceanfront Developments Corporation v. Adriatic Investments Canada Ltd.,* 2022 BCSC 1547 at para. 47 [*Britannia*], citing *Canitalia Estates Ltd. v. The Old Carriage House Parking Ltd.,* 2010 BCSC 1324 at paras. 20–21. This determination involves balancing the interests between the parties: *Britannia* at para. 48. As reiterated in *Whistler BCSC* at para. 127, it also requires looking beyond the particular circumstances of the parties, at the broader impacts of cancellation:

> The Court of Appeal has recently cautioned chambers judges that where they are considering cancelling a restrictive covenant, "consideration must be given to all of the consequences of cancelling the covenant, not just those that arise in one particular situation": *Paterson v. Burgess*, 2017 BCCA 298 [*Paterson*] at para. 29. The court also directed chambers judges to examine the entire scheme, not focus on individual terms, and consider the objectives that the restrictions were meant to achieve: *Paterson* at paras. 22, 29, 31.

[107] In the event that I am incorrect in my analysis of the criteria under s. 35(2), I have considered the balancing of interests between the petitioners and the Resort. Considering first the impact to the petitioners, clearly, if I decline to cancel the Covenant, the petitioners will remain restricted to renting their unit (if they choose to do so) through the Rental Pool. They will not be able to rent their units privately and retain all of the profits from doing so. While their profits will necessarily be shared with the Rental Manager, their guests will continue to enjoy the benefits of the common property and hotel services. However, on the other side, I am concerned about the practical consequences and corresponding operational challenges that would precipitate from the cancellation of the Covenant. The Resort was always intended to operate as a strata-hotel, with guest services such as the spa, restaurant, 24-hour security, and front desk, and on the evidentiary record before me, this is something that prospective buyers would have been aware of, or could have been through reasonable due diligence and prudency. It seems to me that cancelling the Covenant, thereby allowing the petitioners to rent their units privately to avoid profit-sharing, despite their decision to invest in a development of this hotel-strata structure, would be unjust and have broader negative consequences on the underlying development. I accept the evidence of the respondent that having such a

large number of Resort Units withdraw from the Rental Pool would likely prevent the respondent from being financially able to provide most, if not all, of the hotel services. I also accept that it would cause an injustice to other Rental Unit owners who bought into the development on the understanding that it would function with a single rental pool system. As such, even if one of the criteria under s. 35(2) is met, I decline to cancel the Covenant.

Conclusion

[108] The petition is dismissed. Subject to receiving and considering any submissions the parties may wish to make on costs, I award costs to the respondent. Should any party wish to make submissions on costs they should advise me, through a request to appear, within 30 days of these reasons being pronounced. I will then issue a memorandum on a timeline for submissions.

"Forth J."