
The Cases of the Unenforceable Positive Covenants

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Is an obligation to pay money contained in an easement binding on a subsequent owner? This was the legal question considered in two recent decisions of the BC Supreme Court. In both cases, the court concluded that such an obligation was a positive covenant and was not binding on subsequent owners.

In the case of *LMS 3905 v. Crystal Square Parking Corporation*¹, the strata corporation, which was a subdivision of one of seven air space parcels, challenged certain covenants in the air space parcel agreement which required the strata corporation to pay a percentage of operating expenses and certain other costs in respect of a parking garage located in a different air space parcel. In exchange for the payment, the strata corporation was provided with a number of parking passes.

The air space parcel agreement was registered as an easement on the title to the land that was subsequently subdivided by the filing of the air space parcel plan. The easement was registered prior to the filing of the strata plan which subdivided one of the air space parcels and created the strata corporation. However, the air space parcel agreement did contemplate the filing of the strata plan in the future. Once the strata corporation was created, the strata corporation did not sign an assumption agreement adopting the terms of the air space parcel agreement.

When considering an obligation to act or to pay money the court confirmed that such obligations can only be

imposed by a positive covenant and that such covenants will not run with the land. The court noted that this rule is founded on the principle that at common law a person cannot be made liable upon a contract unless he or she is a party to it. Thus, in order to be obligated to pay money, the party being expected to pay must have entered into the agreement. It is not sufficient for the obligation to be included in an easement registered on the title to land owned by the party if the party being expected to pay was not a signatory to the registered agreement.

In *Crystal Square* the court noted that the positive covenants were created before the strata corporation existed. Although the positive covenants bind the parties who were signatories to the air space parcel agreement, the strata corporation was not a signatory as it did not exist at the time the air space parcel agreement was entered into and registered on the title of the land. Nor was there a contract between the developer which was a signatory of the air space parcel agreement and the strata corporation in which the strata corporation formally assumed the obligations.

The court concluded that the positive covenants do not run with the land and that the strata corporation was therefore not bound by them. The court also refused to find that the air space parcel agreement should be interpreted as a pre-incorporation contract which would be binding on the successors in title. The court noted that in order for a pre-incorporation contract to

¹ *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71

be enforceable the parties' conduct must establish an intention to be bound through a new contract containing identical terms. The court noted that the requirements for a pre-incorporation contract had not been met as there was no subsequent conduct evidencing that the strata corporation had entered into a new contract containing terms identical to those in the air space parcel agreement.

In *NWS 3457 v. LMS 1425*², the court was required to determine whether LMS 1425 was required to continue to contribute to the upkeep of a recreational facility. LMS 1425 was permitted to use recreational facilities located on the common property of NWS 3457 as a result of an easement. The easement required the strata corporations to share the cost of repairing and maintaining the recreational facilities including expenditures of a capital nature on a pro rata basis based on the number of strata lots in each development.

LMS 1425 enjoyed access to and the use of the recreational facilities for approximately 20 years. During that time it paid its share of expenses in accordance with the terms of the easement. However, in November 2013, LMS 1425 advised NWS 3457 that it wished to withdraw from the easement. LMS 1425 then sent a letter to NWS 3457 advising that it had surrendered its rights under the easement.

NWS 3457 applied to court for a declaration that the terms of the easement were binding against LMS 1425 and that LMS 1425 pay NWS 3457 the amount owed for repair and maintenance. LMS 1425 argued that the requirement to pay for maintenance for the recreational facilities was a positive covenant. LMS 1425 argued that the law was clear that positive covenants are not binding on subsequent owners.

The court in *NWS 3457* followed *Crystal Square* and agreed that the general rule was that a positive covenant did not run with the land. The court then

considered whether there were any exceptions to the general rule in order to obligate LMS 1425 to comply with the terms of the easement.

As in *Crystal Square*, the court in *NWS 3457* refused to find that LMS 1425 was bound by a post incorporation contract. Notwithstanding that LMS 1425 had utilized the recreational facility for over 20 years the court found that there was no evidence that LMS 1425 would have agreed to an agreement that ran in perpetuity.

The court concluded that the positive covenant was no longer enforceable against LMS 1425 in light of its surrender of any rights under the Recreational Facilities Easement.

Crystal Square and *NWS 3457* confirm the law relating to positive covenants. Many agreements including air space parcel and recreational facility agreements impose positive covenants. By confirming that positive covenants do not bind subsequent owners, the decisions open the door for strata corporations that no longer wish to be bound by a positive covenant and that were not parties to the agreement to surrender their rights under the agreement provided there was no assumption of the contractual obligation. Before taking steps to surrender rights under an easement, a strata corporation should obtain legal advice to determine that the strata corporation's circumstances fall within the facts contemplated by *Crystal Square* and *NWS 3457*.

² *The Owners, Strata Plan NWS 3457 v. The Owners, Strata Plan LMS 1425*, 2017 BCSC 1346