IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rohaly v. The Owners, Strata Plan, EPS 319,* 2019 BCSC 667

Date: 20190430
Docket: S176931
Registry: Vancouver

Between:

Rose Rohaly,
Executrix of the Estate of Jacob Stanley Harris, Deceased

Petitioner

And

The Owners, Strata Plan, EPS 319 and
Auburn Senior Village Holdings Ltd.

Respondents

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Petitioner:	D. Cowper
Counsel for the Respondent, The Owners, Strata Plan, EPS 319:	V. Chahal
Counsel for the Respondent, Auburn Senior Village Holdings Ltd.:	D.F. Hepburn
Place and Date of Hearing:	Vancouver, B.C. October 24-25, 2018
Further Written Submissions:	October 31, 2018
Place and Date of Judgment:	Vancouver, B.C. April 30, 2019

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INTRODUCTION

[1] Jacob Stanley Harris owned a strata unit in a seniors' independent supportive living complex in Chilliwack, called the "Auburn". Before his death last year, Mr. Harris commenced this proceeding, seeking to cancel a restrictive covenant registered against title to his property pursuant to s. 35(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*]. His sister, as executor and personal representative of his estate, continues the proceeding. She argues that the restrictive covenant is invalid because it is patently positive in nature and not for the benefit of any land.

[2] Both respondents oppose the relief sought. As preliminary matters, they also argue that the petitioner has failed to name all of the proper respondents and/or has failed to give adequate notice to other persons whose interests are affected by the relief sought.

[3] I will begin by outlining the facts.

FACTS

[4] Strata Plan EPS 319 is a four-level condominium building known as the Auburn located at 8531 Young Road, Chilliwack, British Columbia. The Auburn is an independent supportive living retirement residence for persons who are 55 years of age or older. It consists of 68 strata lots.

[5] Jacob Harris is the registered owner of one of those 68 strata lots. His property is municipally described as 416 - 8531 Young Road, Chilliwack, British Columbia, and legally described as:

> PID 028-481-453
>
> Strata Lot 67, District Lot 257, GP2, New Westminster District Plan EPS 319
>
> ("SL 67").

[6] The Petition, as originally framed, identified two respondents – The Owners, Strata Plan EPS 319 (the "Strata Corporation") and Auburn Retirement Residence Corporation ("ARRC").

[7] The Strata Corporation is a strata corporation duly subsisting under the laws of British Columbia. All of the owners of the 68 strata lots at the Auburn are members of the Strata Corporation.

[8] ARRC was the owner/developer of the Auburn. It was also in the business of providing services to seniors. The petitioner named ARRC as a respondent in its capacity of providing services to owners (and/or their tenants) at the Auburn.

[9] The restrictive covenant in this proceeding has undergone some changes from when it was originally filed. In order to interpret it and understand its effect, it is necessary for me to review its evolution.

[10] The Auburn was built in early 2011. As part of its marketing in 2010, ARRC prepared and filed a disclosure statement with the Superintendent of Real Estate on November 18, 2010 (the "Disclosure Statement"), which described how supportive living services would be available and delivered to owners at the Auburn. As part of the delivery of these services, ARRC identified potential encumbrances that would be registered against title to each strata lot or common

property. These proposed encumbrances were identified at s. 4.4 of the Disclosure Statement:

> **4.4 Proposed Encumbrances**
>
> The following additional encumbrances may be registered against title to Auburn Retirement Residence property, the Strata Lots, or the Common Property and unless otherwise indicated will remain registered against title to the Strata Lots or the Common Property following completion of any Strata Lot purchases.
>
> (a) the Notice of Different Bylaws described in section 3.4;
>
> (b) the Parking Facility Lease described in section 3.5;
>
> (c) the Service Amenities Lease described in section 3.3;
>
> (d) A Restrictive Covenant against each strata lot in substantially the form and content of the draft covenant attached as Exhibit “H” hereto, that will provide that the Strata Lots will be serviced on a collective basis by the Supportive Living Services Management Agreement (described in section 7.4 of this Disclosure Statement;
>
> (e) any restrictive covenants, rights of way, easements, and rights or restrictions required by the Province of BC, the City of Chilliwack, or any other applicable government authority or public or private utility or determined by the Developer to be necessary or advisable as a result of any on-site or off-site conditions discovered in the course of Auburn Retirement Residence or the location or relocation of any works within the Auburn Retirement Residence property; and
>
> (f) any restrictive covenants, rights of way, easements, or other rights or restrictions required by the Developer, the Province of BC, the City of Chilliwack or any other governmental authority or public or private utility in connection with the approval of Auburn Retirement Residence, the use of the Auburn Retirement Residence property, the provision of utilities and services, or the construction of Auburn Retirement Residence.

[11] The Disclosure Statement also outlined the purchase agreement that each prospective purchaser of a strata lot would be required to sign. Among its many terms, this standard purchase agreement required the purchaser to sign a "Supportive Living Services Agreement," a document found attached to the Disclosure Statement at Schedule "D". At its core, the Supportive Living Services Agreement requires the purchaser of a strata lot to contract with ARRC for supportive living services for a set fee.

[12] In the Disclosure Statement, ARRC described the supply of supportive living services to residents of the Auburn with reference to the proposed bylaws, the Supportive Living Services Agreement and a proposed restrictive covenant. This was described under the heading "Other Material Facts" at s. 7.4 as follows:

> **7.4 Other Material Facts**
>
> (a) Supply of Supportive Living Services
>
> The Bylaws will provide that the Strata Corporation will at all times retain the services of a support services company to provide to the owners, tenants, or occupants of the Strata Lots management of the Residential Service Amenities.
>
> Each purchase of a strata lot will be required to enter into a service management agreement with the Developer or such other service provider as the Developer determines. Under the agreement, the Service Manager will be responsible for the management of the common property that is the hair salon, dining room, and administration office and will provide the following Supportive Living Services to the Strata Lot owners:
>
> (i) 24 hour staff emergency call response;
>
> (ii) menu planning;
>
> (iii) daily preparation of fresh meals;
>
> (iv) housekeeping services;
>
> (v) recreation activities; and
>
> (vi) any further services approved by a resolution passed by a ¾ vote at an annual or special general meeting of the Strata Corporation.
>
> During the first year of operations of the Strata Corporation, every purchaser of a Strata Lot, and each tenant who rents or leases a Strata Lot from the Developer, will be assessed the User Fee described in paragraph 3.8(b) herein at a minimum of $995/month for the first occupant and $599/month for each additional occupant for the basic level of supportive living services (the "Standard Service Package"), in accordance with the proposed Bylaws.

> The Supportive Living Services User Fee which shall be payable includes the Supportive Living Services set forth in paragraph 7.4(a)(i) to (v). An owner of a Strata Lot may, for additional cost, also purchase other services available from the Service Manager from time to time including:
>
> (i) additional meals
>
> (ii) laundry;
>
> (iii) additional housekeeping of Strata Lots;
>
> (iv) portering service (eg. Hand delivering items or services in the owner's Strata Lot).
>
> The restrictive covenant described in paragraph 4.4(d) and Exhibit "H" prohibits an owner, tenant, and occupant of a Strata Lot from using the Strata Lot or the property in any way that is inconsistent with the terms of the Supportive Living Services Management Agreement, or the Service Manager's operations under that agreement.

[13] The proposed restrictive covenant was attached as exhibit "H" to the Disclosure Statement. Its recitals outlined the parties to the agreement, the lands to be encumbered and the intention of the agreement:

> WHEREAS:
>
> A. The Transferor is the required owner of the lands and premises located in the City of Chilliwack, and legally described as follows:
>
> PID: Not Available
> Strata Lot 1, District Lot 257, Group 2
> New Westminster District Plan BCS_____
>
> (the "Lands")
>
> B. Strata Plan BCS____is comprised of 68 supportive seniors strata lots within Strata Plan BCS_____that receive a Supportive Living Services Program described below, pursuant to a Services Management Agreement with Service Co.
>
> C. The Transferee is the registered owner of the lands and premises located in the City of Chilliwack, and legally described as follows"
>
> PID: Not Available
> Strata Lot 2-68, District Lot 257, Group 2
> New Westminster District Plan BCS_____
>
> D. It is desirable for the greater benefit, security and enjoyment of the Lands that certain restrictions be placed on the use of the Lands in order to ensure that the Lands will be serviced by the Supportive Living Services Program, and so that all of the strata lots within Strata Plan BCS___will be serviced by the Supportive Living Services Program on a collective basis.

[14] The proposed restrictive covenant's restriction on use was found in section 2:

> **2. USE OF RESIDENTIAL STRATA LOTS**
>
> **2.1 Use**
>
> The Transferor covenants and agrees with the intent that this Agreement shall run with and burden each of the Lands with the intent that this Agreement shall be for the benefit of the Strata Corporation, that:
>
> (a) the Transferor shall not occupy, use or permit or cause to be occupied or used all or any portion of the Lands [defined earlier as Strata Lot 1] other than pursuant to the Service Management Agreement [defined earlier as the agreement between ARRC and itself to administer the Supportive Living Services Program provided to the owners] administered by Service Co. [defined earlier as ARRC, its assignees and/or successors]; and
>
> (b) the Transferor shall not rent all or any portion of the Lands unless the tenant is subject to the Supportive Services Living Program administered by Service Co., pursuant to the Service Management Agreement.
>
> [My additions]

[15] Construction on the Auburn completed in or around January 2011.

[16] On or about January 25, 2011, Strata Plan EPS 319 was deposited with the New Westminster Land Title Office, creating SL 67 and the other strata lots of the Auburn. On or about that same day, the Strata Corporation filed its bylaws (the "Bylaws").

[17] On or about February 15, 2011, a restrictive covenant was registered against all strata lots at the Auburn, including SL 67 (the "Restrictive Covenant"). Some changes had been made from the proposed restrictive covenant found in the Disclosure Statement. The covenant was still between ARRC as transferor and ARRC as transferee, but now the transferor was described as the owner of all 68 strata lots (rather than just Strata Lot 1) and all 68 strata lots were now identified as the "Lands". The transferee remained ARRC and was also described as the owner of all 68 strata lots. Additional recitals were included, but the intent of the Restrictive Covenant and the use restriction remained the same. The Strata Corporation remained identified as the beneficiary of the agreement.

[18] By way of a corrective declaration filed with the New Westminster Land Title Office on or about April 11, 2011, ARRC made a number of corrections to the Restrictive Covenant.

[19] First, two prior corrective declarations were cancelled. Those corrective declarations are not in evidence. Second, an entity called Higgs Ventures (2008) Ltd. ("Higgs Ventures") was added as both a transferor and a transferee. Third, one of the strata lots (PID: 028-481-291) ("SL 51") was removed from the list of strata lots owned by the transferors. In this way, all strata lots (except SL 51) were now the servient tenement. Fourth, all the strata lots (except SL 51) were removed from the list of strata lots owned by the transferees. In this way, SL 51 was now the dominant tenement. Fifth, the words "Strata Corporation" were to be removed from the restriction on use section (s. 2.1) and replaced with "Strata Lot 51". In this way, SL 51 was to be identified as the beneficiary of the restriction on use.

[20] Other than its smaller size, SL 51 is like any other strata lot at the Auburn. Like all other units, it has a bedroom, bathroom, living room and kitchen. It has the same unit entitlement (one) and pays the same monthly strata fee of $231.40 as all other units pay.

[21] All but the last of the corrections on the corrective declaration described above appear on the copy of the Restrictive Covenant before the court. In other words, the Restrictive Covenant still identifies that it is for the benefit of the Strata Corporation.

[22] In April 2011, title to SL 67 was transferred to Peter and Helen Hamm.

[23] The Auburn is zoned CD-20 (Comprehensive Development) under the City of Chilliwack's Zoning Bylaw 2800, as amended. "Congregate Living Housing" is a permitted use within this zone.

[24] On August 1, 2011, Mr. and Mrs. Hamm, like all other owners of strata lots at the Auburn at the time, entered into an agreement with the City of Chilliwack (the "City") to grant a covenant to the City under s. 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] to restrict the use, subdivision, alteration, development, building or occupancy of their property to "Congregate Living

Housing" (the "219 Covenant"). The 219 Covenant defines "Congregate Living Housing" as:

> D. …a building with four or more sleeping units where permanent residential accommodation is provided and must have a common living area; kitchen and dining area where meals are provided; and, where health care, cultural and social services may be provided.

[25] The 219 Covenant was registered against title to SL 67 on or about September 14, 2011.

[26] ARRC and Higgs Ventures filed an amended Disclosure Statement with the Superintendent of Real Estate on October 3, 2011. Among other things, it attached the Restrictive Covenant, again reflecting all but the last of the corrections identified in the final corrective declaration. It also attached the 219 Covenant, as between the City and ARRC (and Higgs Ventures), relating to various strata lots that had not yet been sold to third parties.

[27] In October 2011, ARRC and Higgs Ventures sold their entire interest in the Auburn, including title to all remaining strata lots, to Auburn Seniors Village Holdings Ltd. ("ASVH"), operating and doing business as "Auburn Retirement Residences", under the "Retirement Concepts" trademark and banner. I will refer to all of these entities as ASVH.

[28] ASVH currently owns 54 of the 68 strata lots at the Auburn. It is also the service provider under the Supportive Living Services Agreement signed by owners and/or tenants of all of the strata units.

[29] The petitioner and ARRC agreed to substitute ASVH for ARRC as the proper respondent in this proceeding. Leave is granted for that substitution, and the related minor amendments identified in the petitioner's Amended Petition, to be made.

[30] In December 2011, Mr. Harris purchased SL 67. He also entered into the Supportive Living Services Agreement with ASVH, as required by the contract of purchase and sale, the Bylaws and the Restrictive Covenant.

[31] Mr. Harris lived in his home at the Auburn from December 2011 until March 2014, when he was required to leave for health reasons. During the time he lived

there, Mr. Harris paid for and received supportive living services in accordance with the Supportive Living Services Agreement. When he was required to leave the Auburn, Ms. Rohaly became responsible for managing her brother's affairs. Mr. Harris died in 2018, before this Petition was heard.

[32] The petitioner seeks leave to substitute Ms. Rohaly, as executor for the estate of Mr. Harris, as the petitioner in this proceeding. The Strata Corporation consents and ASVH takes no position. Leave is granted for that substitution, and the related minor amendments identified in the petitioner's Amended Petition, to be made.

[33] Following his removal from the Auburn, Mr. Harris continued to be charged service fees under the Supportive Living Services Agreement in the amount of approximately $1,000.00 per month, in addition to monthly strata fees, property taxes and other costs of ownership of his unit. As Mr. Harris could not reside in his home any longer, Ms. Rohaly attempted to market his unit for sale. She did not receive any offers. Believing that buyers might be reluctant to assume permanent responsibility for the service fees that accompanied the unit, she approached the Strata Council of the Strata Corporation.

[34] In 2015, on Ms. Rohaly's motion, the Strata Council passed a resolution to commission a real estate appraisal to assess the extent to which the Supportive Living Services Agreement depressed the market value of the strata lots at the Auburn.

[35] The Strata Council did not follow through with this resolution. ASVH, as owner of the majority of the strata lots, would not support it. Nor would the managing agent of the Strata Corporation. Don Nichol, a strata agent employed by the managing agent of the Strata Corporation, emailed Strata Council on November 4, 2015 to explain his company's view of the matter. He wrote that "it would be futile and a waste of funds to have an appraiser do a study of the effects of the Service Agreement, as the Service Agreement is mandated by the zoning." He did not explain precisely what zoning mandated that ASVH provide the services, but he did attach to his email correspondence a written "explanation of the Zoning and Service Agreement" prepared by ASVH. He observed that this was the same written explanation that had been distributed at the last meeting of the Strata Council.

[36] In short, ASVH took the position that the Supportive Living Services Agreement was part of the overall scheme in place at the Auburn and that the question raised by Strata Council was rendered moot by the existence of the Restrictive Covenant. It described its view of the Restrictive Covenant as follows:

> 3. Each strata lot at the Auburn is also subject to a restrictive covenant registered on title by the Developer, which provides that each strata lot must receive supportive living services through a Service Management Agreement between the support services company and the strata lot owner (or his/her tenant). The support services are consistent with the congregate living housing model.
>
> …
>
> Given the foregoing, Retirement Concepts is not prepared to vote in favour of the Strata Corporation incurring any further legal fees in connection with this matter. As such, the motion will not pass. However, the other owners are within their rights to seek out legal advice at their own cost.

[37] The petitioner now applies to have the Restrictive Covenant registered against title to SL 67 cancelled as creating a positive obligation to hire and pay ASVH for services.

[38] This is a convenient place to set out the relevant provisions of the Restrictive Covenant, the Bylaws and the Supportive Living Services Agreement. I have previously discussed the 219 Covenant.

The Restrictive Covenant

[39] The Restrictive Covenant recitals identify the transferors (ARRC and Higgs Ventures) as the owners of all strata lots at the Auburn (except SL 51). These strata lots are defined as the “Lands”, the servient tenement. The transferees (ARRC and Higgs Ventures) are identified as the owners of SL 51, the dominant tenement. The other recitals include:

> …
>
> B. Strata Plan EPS319 is comprised of 68 supportive seniors strata lots within Strata Plan EPS319 that receive a Supportive Living Services Program described below, pursuant to a Services Management Agreement with Auburn Retirement Residence Corporation.
>
> C. Pursuant to a Services Amenities Lease, a copy of which has been provided to the Strata Corporation, certain portions of the common property of Strata Plan EPS319 has been leased to Auburn Retirement Residence Corporation.

…

E. It is desirable for the greater benefit, security and enjoyment of the Lands that certain restrictions be placed on the use of the Lands in order to ensure that the Lands will be serviced by the Supportive Living Services Program, and so that all of the strata lots within Strata Plan EPS 319 will be serviced by Supportive Living Services Program on a collective basis.

[40] Section 1.1 of the Restrictive Covenant defines certain terms:

1.1 Definitions

(a) "**Agreement**" means the restrictive covenant instrument;

(b) "**Owner**" means the person registered in the Land Title Office as the owner in fee simple of a Strata Lot;

(c)" "**Service Co.**" means Auburn Retirement Residence Corporation or its assignee under the Service Management Agreement and includes any successor of that company;

(d) "**Service Management Agreement**" means the agreement between Service Co. and the Transferor as such agreement may be entered, modified, amended, [superseded] or replaced from time to time, pursuant to which Service Co. shall administer the Supportive Living Services Program provided to the owners of the Residential Strata Lots from the common property of the Strata Corporation;

…

(g) "**Supportive Living Services Program**" means:

i. the management of parts (the "**Residential Service Amenities**") of the common property of the Strata Corporation and the common assets located on the common property of the Strata Corporation, including the hair salon, kitchen, dining hall, administrative office, and other amenity areas; and

ii. provision of certain support services from the Residential Service Amenities, including 24 hour staff emergency call response, menu planning, daily preparation of fresh meals, housekeeping services and recreational activities.

[41] Section 2 contains the restriction on use:

2. USE OF RESIDENTIAL STRATA LOTS

2.1 Use

The Transferor covenants and agrees with the intent that this Agreement shall run with and burden each of the Lands with the intent that this

Agreement shall be for the benefit of the Strata Corporation, that:

a) the Transferor shall not occupy, use or permit or cause to be occupied or used all or any portion of the Lands other than pursuant to the Service Management Agreement administered by Service Co.; and

b) the Transferor shall not rent all or any portion of the Lands unless the tenant is subject to the Supportive Services Living Program administered by Service Co., pursuant to the Service Management Agreement.

[42] Section 4 deals with "General Matters", including:

4.1. Sale, Transfer or Assignment

Each of the parties shall do and cause to be done all such things and execute and cause to be executed all plans, documents and other instruments which may be necessary to give the proper effect to the intention of this Agreement. Without limitation, the Transferor who is party to the Service Management Agreement will, prior to and as a condition of the sale, transfer, or assignment of the Lands or any interest therein of which the Transferor is the owner, require the purchaser, transferee or assignee to execute and deliver to Service Co. an agreement whereby such purchaser, transferee or assignee agrees to assume the Transferor's responsibilities under the Service Management Agreement or, if required by Service Co., a new service management agreement in Service Co.'s standard form from time to time.

4.2 Amendments to this Agreement

No amendment to this Agreement is valid unless in writing and executed by the parties. It is understood and agreed that the Service Management Agreement may be modified, amended, [superseded] or replaced from time to time as may be permitted or required pursuant to the terms of the Service Management Agreement. In the event that the Service Management Agreement is so modified, amended, [superseded] or replaced, each of the parties will, as and if requested by Service Co. from time to time, properly execute an amendment to this Agreement in registerable form to reflect any such amendment or modification to the Service Management Agreement.

…

4.6 Covenants shall Run with the Lands

This Agreement shall charge the Lands and the burden of all the covenants in this Agreement shall run with the Lands and every part into which they may be divided or subdivided.

[43] Since the Restrictive Covenant requires compliance with the Service Management Agreement, its effect cannot be understood without reference to that agreement.

The Supportive Living Services Agreement

[44] The Supportive Living Services Agreement is the Service Management Agreement required by the Restrictive Covenant. In this regard, Recital D of the Supportive Living Services Agreement provides:

> D. Pursuant to the Bylaws of the Strata Corporation which govern the Residence, and Restrictive Covenant# __ which is registered against title to all of the strata lots contained within the Residence, the Resident is obligated to enter into a Service Management Agreement with the Service Provider for the provision of a Supportive Living Services Program, and this Agreement is the Service Management Agreement which is referred to therein.

[45] Mr. Harris signed the Supportive Living Services Agreement requiring ASVH to provide services to him in exchange for a fee. It contains 35 terms.

[46] The first term defines the "basic services" that ASVH is to provide for the resident's monthly fee. These services are identified as a 24 hour emergency response system, meal services, housekeeping services, social and recreational opportunities and use of the common areas, including the main dining room.

[47] The second term defines the "basic fee" that is to be paid for the above "basic services". Among other things, it provides that the resident must pay $1,045 per month for the first occupant of any suite and $630 per month for each additional occupant. This amount does not include applicable taxes or any fees for supplemental services a resident may also purchase.

[48] The monthly "basic fee" must be paid even if the suite is unoccupied. Section 2(f) provides:

> 2. **Fee for Basic Services**
>
> …
>
> (f) The Basic Fee shall be payable for each month, or a portion thereof, which the Resident is the registered owner of a Suite in the Residence, regardless of whether the Suite is occupied and regardless of whether the Resident received or makes use of the Basic Service of any of them.

[49] ASVH can increase the "basic fee" once per year at its own discretion. In this regard, section 4 provides:

> **4. Changes to Basic Fee.** The Resident acknowledges that over time the cost to the Service Provider of providing the Basic Services is likely to increase. The Service Provider shall be entitled, once during each year of the term and only after the expiration of the first year of the term, to increase the Basic Fee to take account of any

> increase in the cost incurred by the Service Provider in providing the Basic Services.

[50] That a resident must continue to pay the monthly basic fee even if the suite is not occupied or basic services are not used is reinforced in section 12, which provides:

> **12. Term of Agreement.** The terms of this Agreement shall remain in place for such period of time as the Resident is the registered owner of a Suite in the Residence. The Resident shall not be obligated to obtain or use any of the Basic Services, or to obtain or use any Supplementary/Optional Service, however, the Resident's obligations hereunder, including without limitation payment of the Basic Fee, shall not be altered or cancelled by any such non-use. The Resident shall not be entitled to terminate or cancel this Agreement for such time as they remain a registered owner of, or the holder of a lease or license to use, a Suite in the Residence.

[51] The Supportive Living Services Agreement also requires an owner who sells his unit to continue to pay the monthly basic fee until such time as the purchaser enters into the Supportive Living Services Agreement with ASVH. In this regard, section 15 provides:

> **15. Obligation Upon Sale of Suite.** Upon the sale of transfer of a Suite, the Resident shall notify the Purchase of the Purchaser's obligation to enter into a Supportive Living Services Agreement with the service Provider. The Resident shall continue to be obligated to pay the Basic Fee until such time as the Purchaser has executed a Supportive Living Services Agreement with the Service Provider.

[52] The Supportive Living Services Agreement also requires an owner to continue paying the basic fee if his unit is leased or rented. In this regard, section 16 provides:

> **16. Resident's Obligations Not Impacted by Resident Leasing or Renting.** The Resident's obligations pursuant to this Agreement, including without limitation the obligation to pay the Basic Fee, shall not be affected by any lease or rental by the Resident of their Suite, and all of the Resident's obligations hereunder shall continue in full force and effect notwithstanding such lease or rental by the Resident.

[53] The monthly basic fees required under the Supportive Living Services Agreement are separate from the monthly strata fees collected by the Strata Corporation. Each strata lot at the Auburn, including SL 51, has the same unit

entitlement (one). Each unit, including SL 51, is required to pay the same monthly strata fee of $231.40.

Bylaws

[54] Part I of the Bylaws defines certain terms, including:

> …
>
> (b) **"Residential Service Amenities"** means certain of the common property and common assets of the Strata Corporation, including the hair salon, kitchen, dining hall, and administrative offices;
>
> …
>
> (d) **"Service Manager"** means the manager that manages and provides services under the Supportive Living Services Agreement;
>
> (e) **"Supportive Living Services Agreement"** means the agreement between the Strata Corporation and a support services provider for the provision of Supportive Living Services;
>
> …
>
> (h) **"Supportive Living Services"** are those services described in Bylaw 4(b);

[55] Part 2 outlines the requirements of the Strata Corporation and owners of the strata lots in regard to retaining the services of a support services company for the provision of Supportive Living Services. These provisions provide:

> **PART 2 – SUPPORTIVE LIVING SERVICES**
>
> 4.(a) The Strata Corporation will at all times retain the services of a support services company to provide management of the portion of the Common Property designated as Residential Service Amenities for the benefit of the owners, tenants or occupants of the Strata Lots.
>
> (b) The owners will at all times retain the services of a support services company to provide to the owners, tenants or occupants of the Strata Lots the supportive Living Services from the Residential Services Amenities, including:
>
> (i) 24-hour staff emergency call response;
>
> (ii) menu planning;
>
> (iii) daily preparation of fresh meals;
>
> (iv) housekeeping services;
>
> (v) recreational services;
>
> (vi) any further services approved by a resolution passed by a three-quarters

vote and an annual or special general meeting of the Strata Corporation.

5. The Services Manager may make any agreement with an owner, tenant or other occupant of a Strata Lot for the provision of other or additional amenities or services provided to it by the Strata Lot or to the owner, tenant or occupant of the Strata Lot.

6. The strata fees payable by the owners will not include the fees owing by an owner in respect of services provided to the owner in accordance with paragraph 4(b) or paragraph 5 of these Bylaws. The strata fees payable by the owners will include the fees owing by the Strata Corporation in respect of the services provided pursuant to paragraph 4(a) of these Bylaws.

[56] Part 3 outlines the duties of owners, tenants, occupants and visitors, including complying with certain restrictions on the use of the property. Compliance with the Service Management Agreement (i.e. the Supportive Living Services Agreement) is mandated at section 8.(f):

(f) **Compliance with Service Management Agreements.** An owner, tenant, occupant, employee or visitor must not use a Strata Lot, the Common Property or Common Assets in a way that:

(i) inconsistent with any Restrictive Covenants registered over the Strata Lots including those that restrict the use of the Strata Lots to the terms of the Service Management Agreements;

(ii) impairs, interferes with or limits the ability of the Manager under the Supportive Living Services Management Agreement to operate in accordance with that Agreement;

[57] Section 21 of the Bylaws deals with “user fees”, which appear to be the same (albeit in a lesser amount) as the “basic fees” required in the Supportive Living Services Agreement. It provides:

21. User Fees

(a) An owner, tenant or occupant must pay user fees on or before the first day of the month to which the user fees relate;

(b) Every owner, tenant or occupant of an occupied residential strata lot must pay a user fee for the Basic Service Package under the Supportive Living Services Management Agreement.

(c) The user fee for the Standard Service Package will be $995/month for the first occupant and $599/month for each additional occupant or such other amount for that user fee as may be set out in the Rules from time to time.

(d) The Strata Corporation will be entitled, but not obligated, to collect from the owners, occupants or tenants of the Residential Strata Lots all amounts payable to the Service Manager for services purchased from or managed by the Service Manager, and the Strata Corporation will remit all amounts collected as required on behalf of the owners, occupants or tenants.

(e) Notwithstanding section 21(c) of these Bylaws, or anything else herein, the owner developer shall not be obligated to pay the user fee in respect of any strata lots unless such strata lot is sold or is occupied pursuant to a Lease or otherwise.

[58] Having set out the factual background, I turn now to consider the preliminary issue raised.

THE PRELIMINARY ISSUE

Positions of the Parties

[59] ASVH submits that the petitioner should be barred from having this Petition determined on its merits until such time as she has taken steps to provide notice to all interested parties to the proceeding. Specifically, ASVH argues that the petitioner is obliged to serve all of the individual strata lot owners with the Petition. Although originally framed as a submission that each strata lot owner ought to be named as a respondent at the hearing, ASVH focussed primarily on the provision of notice.

[60] Although not raised in its Response, the Strata Corporation now adopts the position taken by ASVH that this application should not be decided until each individual owner of each strata lot is served personally with the Petition. It takes this position even though it does not deny that it has met its statutorily imposed duty to notify these owners of this proceeding.

[61] The petitioner submits that she has properly identified the two respondents in this proceeding – the Strata Corporation, representative of all owners, and ASVH, as the service provider whose interest can be affected by the relief sought. She emphasizes that she is entitled to rely upon the Strata Corporation fulfilling its duty under the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] to provide notice of this proceeding to all owners. She argues that all owners are fully aware of this proceeding and that ASVH's position that all owners must be named as respondents and/or be served personally with this Petition, is really an argument advanced for only one purpose – to drive up the cost to Mr. Harris' estate and

further delay this matter. The petitioner points out that the Strata Corporation did not raise any such issue in its Response and that it does not now deny having met its statutory obligations.

Legal Framework

[62] Counsel referred me to s. 35(4) of the *PLA*, s. 167 of the *SPA* and Rule 16-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Civil Rules*] and ASVH referred me to *Alexander (Guardian ad litem of) v. Luke*, 1991 CarswellBC 664 (S.C.), aff'd 1994 CarswellBC 2181 (C.A.) [*Alexander*], but the parties did not present any authorities that dealt directly with the intersection of the above provisions/rules. I will outline each provision/rule and discuss any applicable authorities, starting with the *PLA*.

[63] Section 35(4) of the *PLA* provides:

> (4) The court must, as it believes advisable and before making an order under subsection (2), direct
>
> > (a) inquiries to a municipality or other public authority, and
> >
> > (b) notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled.

[64] *Hertzberg v. Claxton*, 1999 CarswellBC 1314 (S.C.) involved consideration of s. 35(4)(b). This case concerned the modification of a number of restrictive covenants. Initially, the petitioners applied *ex parte* to a master who granted an order that restricted the necessity of providing notice to those individuals who had a legal benefit to the charge or interest to be modified or cancelled. Later, the parties argued the merits of the application and it was ordered that a number of individuals who may not have the legal benefit of the covenant, but who may be affected by a removal or modification of it, should be notified. The matter later proceeded after these persons – most of them neighbours – had been notified. Many of them elected to attend, speak and file written submissions on the matter.

[65] In *Alexander,* the court declined to consider a motion to modify or cancel a restrictive covenant because the court had not had the opportunity to hear from all other parties whose rights could be extinguished.

[66] In that case, the developer of a subdivision (Beach Estates Ltd.) registered a restrictive covenant against 87 lots, many of which had a view over Departure Bay in Nanaimo. The restrictive covenant prevented the owner of each lot from building until the plans were approved by Beach Estates Ltd. Many years later, the respondent applied to the City of Nanaimo for a building permit to add to his home, increasing its size and height. The petitioner, his neighbour, applied for an injunction to restrain the respondent from proceeding. As part of his response, the respondent applied to modify or cancel the restrictive covenant pursuant to s. 31 of the *PLA* (now s. 35). Although not parties to the injunction application, 27 other property owners in the subdivision signed a document expressing support for the petitioner's injunction.

[67] It was within this context that Hutchinson J. declined to decide the issue of cancellation or modification of the charge and dismissed the respondent's motion, with leave to re-apply. The court held:

> The only parties properly before the Court at this stage are the petitioner and the respondents. If I were to hear the motion and make a decision to cancel the charge, I would not have heard from the other parties who would be affected, and their rights could be extinguished without submissions or evidence being presented on their behalf. The principles that are to be applied in making a decision under s. 31 of the Property Law Act differ in many respects to those raised in the petition. I am satisfied that the only appropriate way to invoke s. 31 would be to commence proceedings by way of petition and serve all the owners with that process. Respondent's counsel argued that in Armitage v. Moretto, [1986] B.C.J. No. 2550, Kelowna Registry 85/312, 29 May 1986, Hutchison, L.J.S.C. (as he then was) relied on s. 31 in declining to grant a mandatory injunction based on a restrictive covenant. I have reviewed his reasons and it is clear that he did not make his decision on s. 31, but referred to it as a reason for exercising his discretion in the way he did. I dismiss the respondent's motion to cancel the charge, with leave to commence separate proceedings, if he deems desirable, by way of petition.

[68] Section 167 of the *SPA* provides:

> **Defending suits**
>
> **167** (1) The strata corporation must inform owners as soon as feasible if it is sued.
>
> (2) The expense of defending a suit brought against the strata corporation is shared by the owners in the same manner as a judgment is shared under section 166, except that an owner who is suing the strata corporation is not required to contribute.

[69] Rule 16-1(3) of the *Civil Rules* provides:

> **Service**
>
> (3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.

[70] Justice Weatherill considered this subrule in *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2016 BCSC 898, a case that involved a group of truck companies that challenged provisions of the *Container Trucking Act*, S.B.C. 2014, c. 28 [*CTA*] that retroactively imposed minimum rates of pay for truck drivers. The petitioners indicated that, if successful, they would seek reimbursement of pay from the truckers. The issue was whether the petitioner was obliged under Rule 16-1(3) to ensure personal service on every truck driver who had worked under the *CTA.*

[71] In these circumstances, Weatherill J. held that service was not necessary because it would be extremely procedurally difficult to identify and serve all of the truckers, the cost of personal service would be prohibitive, and a union that represented many (though not all) truckers was involved as a party so truckers' interests would be heard and represented. However, the petitioner conceded that the truckers may be indirectly affected, so Weatherill J. agreed that the truckers required some type of notice and ordered that the petitioner email a copy of the Petition and Responses to the office of the agency for the non-unionized truckers, and that notice otherwise be given through centralized methods of communication.

Discussion

[72] In my view, under both the *PLA* and the *Civil Rules*, the petitioner is obliged to provide notice to the other strata lot owners in the circumstances of this case. While the petitioner is only seeking to cancel the covenant registered against title to SL 67, any findings about the validity of the Restrictive Covenant could impact on the other owners' properties. In other words, the other owners are persons whose interests may be affected by this proceeding. The real question here is whether the notice provided by the Strata Corporation under s. 167 of the *SPA* was sufficient to give them the opportunity to be informed and heard, if they desired.

[73] I think it is sufficient. The petitioner named the Owners, Strata Plan EPS319 as a respondent to this Petition. All strata lot owners are members of the Strata Corporation. The petitioner served the Strata Corporation with the Petition in accordance with the *Civil Rules* in July 2017. The Strata Corporation, on behalf of the owners, filed a Response and made submissions at the hearing.

[74] While the Strata Corporation offered no evidence about how precisely it notified the owners, it confirms that it met its obligation under s. 167 of the *SPA*. The Strata Corporation argued the merits of this Petition, including advancing a broader perspective applicable to all owners, of the potential ramifications of cancelling the Restrictive Covenant. In these circumstances, I conclude that the purpose of s. 35(4)(b) of the *PLA* and Rule 16-1 has been fulfilled through the Strata Corporation's notification of all owners under the provision of the *SPA*. The owners have been notified. To require the petitioner to also serve each owner personally in a situation where the Strata Corporation has adduced evidence and made submissions on behalf of all owners would be redundant and serve no purpose other than to increase cost and further delay a matter which has been before Strata Council since at least 2015.

[75] Unlike *Alexander* where the respondent was trying to cancel or modify a charge registered against title to his property without bringing a Petition proceeding and without serving the other affected owners, the petitioner in the case at bar has brought her application through the proper process and has served all other interested parties – all of the other strata lot owners, as represented by the Strata Corporation, and ASVH. Although ASVH is also an owner of most of the strata lots at the Auburn (including the dominant tenement, SL 51), the petitioner named ASVH as a respondent in this proceeding in its capacity as the service provider mandated by the terms of the Restrictive Covenant. Its interests, as the service provider, are clearly affected by this proceeding. The situation in the case at bar is very unlike *Alexander*.

[76] I also find some support in my determination of this preliminary issue in a decision relied upon by ASVH in arguing the merits of this case – *PMT XII LLC v. The Owners, Strata Plan VR 2753, Section 1*, 2010 BCSC 1235 [*PMT*]. I will discuss *PMT* in more detail later, but will say here that it involved a situation where an owner of two strata lots in a condominium hotel complex in Whistler sought to

cancel a restrictive covenant registered against title to its properties. That petitioner named the Strata Corporation as the respondent. It did not name each individual strata lot owner. The Strata Corporation represented the interests of the owners in arguing against the petitioner's application. There was no suggestion in the decision that the petitioner ought to have either named each individual owner as a respondent and/or provided notice to each individual owner.

[77] I turn now to consider the merits of the petitioner's application.

THE CENTRAL ISSUE

Positions of the Parties

The Petitioner

[78] The petitioner submits that the Restrictive Covenant is invalid and should be cancelled. She says this for two reasons.

[79] First, the petitioner submits that the Restrictive Covenant is patently positive in substance. Although negative language is used, she argues that the effect of the Restrictive Covenant is to make a Supportive Living Services Agreement with ASVH run with the land in perpetuity. It requires the petitioner and future owners of SL 67 to hire ASVH at a rate unilaterally set (and subject to increase) by ASVH to perform services to be determined by ASVH. It also requires that if the land is to be sold, it can only be sold subject to the purchaser agreeing to enter into this contract with ASVH.

[80] The petitioner frames her argument here in the form of the following question:

> The broad question raised on this Petition is whether an obligation to hire a service provider can run with the land as a "Restrictive Covenant" registered against title?

[81] The petitioner asks the court to answer this question with a clear "no". She says that a restrictive covenant that requires an owner to hire and pay a specific service provider in perpetuity was never eligible for registration as it is patently positive in substance. The monthly fee is triggered not by any form of use of the land, but by mere ownership of the land.

[82] Second, the petitioner submits the Restrictive Covenant does not benefit other land and is, instead, clearly and singularly for the benefit of ASVH, as the service provider. She points out that neither of the respondents have identified the land that is benefited by the Restrictive Covenant and, if SL 51 is indeed the dominant tenement (which remains unclear), no explanation has been offered as to how SL 51 benefits from the Restrictive Covenant, as opposed to SL 67 or any other strata lot. In other words, the petitioner submits that it is a restrictive covenant that is for the benefit of only ASVH, as a business, and it allows this business to perpetuate a monopoly over the provision of services to seniors at the Auburn. It does not benefit the artificially identified dominant tenement, SL 51. In the end, the petitioner argues that the Restrictive Covenant is invalid and must be cancelled.

ASVH

[83] ASVH submits that the Restrictive Covenant is valid and enforceable and should not be cancelled. It argues that it is not positive in substance as the petitioner asserts, and simply involves a negative obligation that the petitioner will not use, occupy, or rent SL 67 in any manner that conflicts with the Supportive Living Services Agreement and will not sell to anyone who does not agree to enter into the Supportive Living Services Agreement.

[84] ASVH further submits that the Restrictive Covenant does touch or concern benefited land because it affects the nature, quality or value of the land. It emphasizes that the Auburn is located on land that must be used for the operation of a “Congregate Living Facility” as required by the City of Chilliwack. The use of the common facilities and the strata lots, as part of the overall operation, is an integral piece in the overall use of the land and cannot be viewed, as the petitioner argues, as a business being conducted on the land.

[85] ASVH emphasizes that, along with the 219 Covenant and the Bylaws, the Restrictive Covenant was part of the overall development scheme of the Auburn and intended use of the lands. The Restrictive Covenant is integral for “the continuity and effective management and control of the provision of Support Living Services.” To cancel it would have far reaching consequences and completely undermine the model and scheme of the Auburn.

The Strata Corporation

[86] The Strata Corporation, representing all owners, is opposed to the relief sought by the petitioner. Broadening the position taken originally in its Response, the Strata Corporation now largely adopts the position taken by ASVH. The Strata Corporation argues that the Restrictive Covenant is not positive in substance and does benefit all units at the Auburn, including SL 51. It argues that the value of SL 51 is affected by having the Supportive Living Services Agreement continue in accordance with the Restrictive Covenant and that its cancellation could have consequences that are not readily foreseeable, such as the necessity of amendments to the Bylaws.

[87] The Strata Corporation also adds that to the extent the petitioner may be challenging the Bylaws, it says that it has the authority to enact bylaws relating to the provision of supportive living services at the Auburn and to enter into contracts that relate to its powers and duties under the Bylaws and under the *SPA*. If the Bylaws had the effect of making SL 67 more difficult to sell, this does not invalidate the Bylaws relating to the provision of supportive living services.

Legal Framework

[88] Section 35(2) of the *PLA* gives the court authority to modify or cancel certain charges or interests against land identified in s. 35(1), including restrictive covenants, upon being satisfied that the application to do so is not premature 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.

[89] Section 35 of the *PLA* is a comprehensive and complete code in the sense that the authority of the court to cancel or modify a charge identified in s. 35(1) is

constrained by the specific grounds enumerated above as set out in s. 35(2): *Lafontaine v. University of British Columbia*, 2018 BCCA 307 at para. 51. Consequently, the petitioner must bring herself within s. 35(2) if she is to obtain any relief: *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23.

[90] Subparagraphs 35(2)(a) through (e) are disjunctive. The petitioner only needs to satisfy the court under one of them to permit the court to make the order sought: *PMT* at para. 33.

[91] Restrictive covenants are to be construed according to the ordinary rules of contractual interpretation. The words used must be viewed 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: *Hofer v. Guitonni*, 2011 BCCA 393 at para. 14.

[92] While the surrounding circumstances are to be considered, they must never be allowed to overwhelm the words of the agreement. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada explained this at para. 57:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[93] The British Columbia Court of Appeal also cautioned that particularly where a court is considering cancelling a restrictive covenant that "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 at para. 29.

[94] The *LTA* prohibits the registration of a restrictive covenant against title unless certain conditions are met. These are outlined at s. 221(1) as follows:

> **Requirements of registrable restrictive covenant**

> **221** (1) The registrar must not register a restrictive covenant unless
>
> (a) the obligation that the covenant purports to create is, in the registrar's opinion, negative or restrictive,
>
> (b) the land to which the benefit of the covenant is annexed and the land subject to the burden of the covenant are both satisfactorily described in the instrument creating the covenant, and
>
> (c) the title to the land affected is registered under this Act.

[95] Our Court of Appeal confirmed what conditions are necessary to create a valid restrictive covenant in *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5:

> [9] The law as to what is necessary to create a restrictive covenant is not in dispute, and was correctly stated by the trial judge at para. 30:
>
> > [30] In *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268; 42 R.P.R. (3d) 53, the court reviewed the elements of a restrictive covenant 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 beneficial 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.

[96] Absent an enabling statute, if a restrictive covenant does not comply with these requirements, it does not run with the land and is not a valid charge against title.

[97] The two issues raised in this Petition relate to the first two conditions above – whether the covenant is negative in substance and whether it touches and concerns the benefitted land.

Analysis

[98] Before turning to these two issues, I must first be satisfied that the petitioner's application is not premature.

Is the Application Premature?

[99] In *Newco Investments Corp. v. British Columbia Transit* (1987),14 B.C.L.R. (2d) 212 (C.A.), the Court of Appeal considered the issue of prematurity in this context and held at pp. 222-223:

> When Transit began construction of the Main Street station without complying with the provisions of covenants 3 and 4, Newco became entitled to apply under s. 31(2)(e) of the Act for an order cancelling covenants 3 to 6. On such an application s. 31(2) requires the judge to first determine whether the application is premature. If it is he should dismiss it even if it might otherwise succeed on one or more of the grounds set out in s. 31(2)(a) to (e). Thus where it appears that considerations, material to a determination whether grounds exist under sub-clauses (a) to (e), have not yet materialized or where, for other reasons, it would be better to defer to a later date consideration of whether the covenant should be struck out the application should be dismissed. For example, an application under s. 31(2)(e) on the ground the covenants are unenforceable for uncertainty might be premature if it was shown that future events such as a pending agreement or a decision on arbitration could resolve the uncertainty. However in this case it is my opinion the application was not premature. The future events referred to by the trial judge in support of his conclusion of prematurity are not such as will offer clarification of the essential ambiguity of the covenants under consideration. Nor is there any reason to defer to a later date determination of the issues raised by the application.

[100] I find the petitioner's application is not premature. No arguments have been advanced that the application is premature and I have no reason to believe that all necessary information is not before the court to decide this application. I see no

considerations that are yet to materialize that could resolve any uncertainties or that are relevant to this application. I have already addressed the notification of the individual strata lot owners earlier in these reasons.

[101] Upon finding the application is not premature, I turn now to consider the issues raised.

Is the Covenant Negative in Substance?

[102] For reasons I will now develop, I agree with the position taken by the petitioner and conclude the covenant, read as a whole, is positive in substance. Although it is framed in the negative ("shall not occupy, use … the Lands other than pursuant to the Service Management Agreement administered by [ASVH]" and "shall not rent … unless the tenant is subject to the Supportive Services Living Plan administration by [ASVH] pursuant to the Service Management Agreement"), I find that section 2.1 of the Restrictive Covenant creates a positive obligation on the covenantor.

[103] Other, inter-related provisions in the covenant use more overtly positive language. Section 4.1 requires the petitioner to "as a condition of the sale…of the Lands require the purchaser …to assume [the petitioner's] responsibilities under the Service Management Agreement or if required by [ASVH], a new Service Management Agreement in [ASVH's] standard form…". Section 4.2 of the Restrictive Covenant also requires the petitioner to consent to any amendments to the Restrictive Covenant as requested by ASVH from time to time.

[104] The Restrictive Covenant, read as a whole, requires the petitioner, her tenants and/or prospective future owners to comply with the Supportive Living Services Agreement with ASVH. The Supportive Living Services Agreement requires the petitioner to pay a monthly fee for services to ASVH (subject to unilateral increases by ASVH) regardless of whether the petitioner's suite is in use or whether any services are used. Overall then, the Restrictive Covenant, in substance, requires the petitioner to hire and pay a specific service provider (ASVH) in perpetuity. Its overall effect is to make the Supportive Living Services Agreement with ASVH run with the land, requiring the petitioner, her tenants and any future purchasers to hire ASVH to provide services (partly determined by ASVH) for a fee (determined by ASVH) forever. An obligation to hire and pay a

specific service provider is not negative in substance and, in my view, cannot be a valid restrictive covenant said to run with the land.

[105] While not determinative, I observe that ASVH appears to take a similar view of the Restrictive Covenant. When the Strata Council passed a resolution to assess whether the Supportive Living Services Agreement represents good value to all of the owners, ASVH cancelled the resolution (as majority owner) on the basis that the question was rendered moot by the existence of the Restrictive Covenant requiring the owners to receive supportive living services through an agreement with ASVH. In submissions at this hearing, ASVH argued that the purpose of the Restrictive Covenant was to act as a mechanism to ensure "the continuity of the Agreement" so that any future owner would assume the obligations under the Supportive Living Services Agreement with ASVH. I agree with the petitioner here that this seems to be an acknowledgement that the intent of the Restrictive Covenant was to have the Supportive Living Services Agreement with ASVH run with the land in perpetuity.

[106] This conclusion would be sufficient to allow me to consider exercising my discretion to make the order sought, but I will go on to consider the second issue raised because I think it also provides a basis upon which relief can be granted.

Does the Restrictive Covenant "Touch and Concern" the Benefitted Land?

[107] An enforceable restrictive covenant must touch and concern the benefitted land in the sense that it must be connected with the enjoyment of the dominant tenement and it must be for its benefit. As Justice Harris, as he then was, noted in *PMT* at para. 25, the authors of *Cheshire and Burn's Modern Law of Real Property* (London: Butterworths, 1994) discussed this at 520-521:

> ... We may expand the statement of principle thus: a right enjoyed by one over the land of another does not possess the status of an easement/restrictive covenant unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement/restrictive covenant at all ...
>
> Whether the necessary nexus exists depends greatly upon the nature of the dominant tenement and the nature of the right alleged ... the fact that the right enhances the value of

> the dominant tenement is a relevant, but not a decisive consideration.

[108] A restrictive covenant touches or concerns benefitted land if it affects the nature, quality or value of the demised land: *Canada Safeway Ltd. v. Thompson (City),* 10 W.W.R. 252 (M.B.Q.B.) at para. 27; aff'd 7 W.W.R. 565 (M.B.C.A.).

[109] Although the Restrictive Covenant tendered in evidence is less than perfectly clear and the parties themselves did not seem to realize that SL 51 was identified as the dominant tenement until closer to the hearing of this Petition, I am prepared to accept that SL 51 is the dominant tenement here.

[110] ASVH, now supported in submissions by the Strata Corporation, argues that I must have regard to the overall scheme of the development at the Auburn to appreciate the nature of the benefits said to enhance the value of the benefitted land. Although ASVH does not identify a benefit to SL 51 specifically, it says that the Restrictive Covenant was part of the overall scheme of the development and intended use of the lands at the Auburn. The Restrictive Covenant, it argues, is integral for the continuity and effective management and control of the provision of supportive living services there. Overall, ASVH says that the global scheme of the Restrictive Covenant, the 219 Covenant and the Bylaws all have the effect on the use and operation of the burdened lands (and proportionate share of the common property), as lands integrated into the operations of an independent retirement residence. In these circumstances, it argues that the Restrictive Covenant touches or concerns the benefitted land.

[111] ASVH seeks to draw an analogy with the *PMT* case, where the court denied an owner's application to cancel a restrictive covenant registered against title to two strata lots at a condominium hotel property in Whistler, known as Le Chamois. As I will explain, I find the facts in that case are distinguishable and no analogy can be drawn.

[112] In *PMT*, the restrictive covenant prevented the petitioner's two strata lots (the "PMT Lots") from being used for the operation of an undertaking renting ski equipment and providing related services. Le Chamois, a condominium hotel, was owned and financed by individual strata lot owners through a strata corporation. It was comprised of 24 commercial strata lots located on the street, lobby and

mezzanine levels (the “Commercial Units”) and 51 condominiums on the higher floors (the “Residential Units”). Some of the Residential Units were rented periodically through a rental pool. Le Chamois operated, therefore, as a condominium hotel comprised in part of the rental pool of units rented out occasionally to members of the public.

[113] Le Chamois’ strata corporation was divided into two sections for the purpose of representing the different interests of owners of the residential and non-residential strata lots (respectively, the “Residential Section” and the “Commercial Section”). The petition respondent was the Residential Section of the strata corporation. The PMT Lots were in the Commercial Section of the strata corporation.

[114] Strata Lot 9 (the “Front Desk Lot”) was owned by the Residential Section. The Front Desk Lot was not common property. Rather, it was a common asset by which each owner of a Residential Unit owned a share (equal to the owner’s unit entitlement) in it as a tenant-in-common. The Front Desk Lot was, as its name implies, used for and in connection with the hotel operations at Le Chamois. The restrictive covenant at issue was registered against the PMT Lots in respect of the Front Desk Lot only. The covenant at issue was not the only restrictive covenant that controlled the use of commercial property at Le Chamois.

[115] PMT took the position that the restrictive covenant was unenforceable because it did not comply with the requirement that the covenant be one that touches and concerns the benefitted land, in this case, the Front Desk Lot. Rather, PMT argued that the covenant was intended to benefit a business venture, the operation of the hotel and the Residential Units.

[116] The respondent Residential Section of the strata corporation argued that the court should have regard to the scheme of restrictive covenants and bylaws in place to appreciate the nature of the benefits contemplated to advance the value of the Front Desk Lot. It argued that the scheme was designed to allow Le Chamois to promote itself as a boutique hotel capable of offering a diverse shopping experience to its guests and to avoid being seen as a discount shopping centre. To achieve that aim, competition restrictions had to be imposed and diversity of commercial undertakings enhanced. The Residential Section’s ability to restrict direct competition for ski rental business in the Commercial Units added

value to all of the owners and the PMT covenants were imposed to enhance that value in the owners' interests in the hotel, as represented by the Front Desk Lot. The strata corporation further argued that the Front Desk Lot, a common asset, was administered in connection with the hotel operation for the benefit of the Residential Units and that this was sufficient to satisfy the requirement that the restrictive covenant touched and concerned the benefitted land.

[117] The court identified the Front Desk Lot as the dominant tenement. By its nature as a common asset of all of the Residential Section strata lot owners, Harris J. found it necessary to analyze the nature of that tenement and its relationship to the Residential Units in order to understand whether the PMT covenant touched and concerned the land. He concluded that it did, for the following reasons:

> [40] I have concluded that the PMT Covenant does touch and concern the land. It is not merely incidental or collateral to the land. The Front Desk Lot is a strata lot within a strata corporation that is legally established as a condominium hotel. The entire ownership structure of both commercial and residential strata lots is predicated on the operation of Le Chamois as a hotel. The Rental Pool consists of Residential Units. They are the rooms that constitute an intrinsic element of the hotel. The Resort Municipality of Whistler had registered restrictive covenants against the title to the land on which Le Chamois is situated. Those covenants are now registered against title to both Residential and Commercial Units.
>
> [41] The municipal covenants underlie the existence of the strata lots. The lands in issue would not exist unless their use was consistent with those covenants. The use of the lots in connection with a hotel cannot be seen as merely a business that happens to be operated on the land. It is inherent in the existence of the lots that their use be tied to supporting the operation of a hotel. The use of Strata Lot 9 is inextricably tied and connected to the hotel, whether it be used as a front desk or for some other purpose.
>
> [42] The Front Desk Lot is a common asset of the Residential Section and owners of the Residential Units have an interest in it as tenants in common. The use of Residential Units as part of the hotel is a use of land as such and cannot be viewed merely as a business being conduct on land.
>
> [43] The Front Desk Lot similarly is an integral element of the use of land as contemplated by the structure of the ownership of the land. "Le Chamois" is land that must be used for a particular purpose: the operation of a hotel. The use of the Front Desk Lot as part of that operation is an integral element in the overall use of the land. Its use as the front desk and for purposes of hotel administration spring from the very nature of the land in issue. The Front Desk Lot plays a critical role in the use of the lands as a hotel. It is identified on the plans as "Office Administrative" and is used for that purpose. I therefore reject the proposition that the use of the lot as a

front desk is merely collateral to or incidental to the land or that its use should be seen merely as a place to conduct a business rather than being the use of the land as such. There is in my view an inextricable connection between the Front Desk Lot, the Residential Section, the Residential Units and the use of the lands for the purpose of a hotel. That use is a required use that underlies the very existence of the parcels of land.

[44] It is in my opinion artificial to distinguish between benefits of the PMT Covenant flowing to the hotel or the Residential Units on the one hand and the Front Desk Lot on the other. By benefiting and enhancing the value of the hotel and the Residential Units, the Front Desk Lot, as an integral component of hotel operation, is also benefited. The Front Desk Lot is used for purposes that are integral to the management and control of the Residential Units in the rental pool comprising the hotel. The overall scheme of covenants is intended to affect the nature and character of the hotel, the clientele the hotel attracts and generally the type of people who would come to the premises. A hotel that meets the standard contemplated by the covenants would be a different place to a hotel that does not. These are all factors that affect use and operation of the Front Desk Lot as land integrated into the operations of a hotel. As such they seem to me to benefit the operation of the front desk as a front desk and to enhance its value as an integral component of the hotel. If that is so, I conclude that there is a benefit to the Front Desk Lot arising from its use as land and its value is enhanced. This is not a merely incidental or ancillary benefit. I am not aware of any principle of law that a benefit or value must be of a certain magnitude before a covenant is enforceable.

[45] It is also artificial to view the benefit and value to the Front Desk Lot of the PMT Covenant in isolation from the integration of the use of that lot in the hotel operation. The identification of the Front Desk Lot as the dominant tenement and the registration of the PMT Covenant against its title permits effective control and management of enforceability of the covenant or its modification or discharge without unanimity of all Residential Unit owners. Furthermore, registration of the charge against one lot that is ultimately controlled by the Residential Section does constitute that lot as representative of the interests of the other lots. Benefits they receive from the PMT and other Covenants flow or are transmitted through the Front Desk Lot. The commercial reality seems to me to benefit or enhance the value of the Front Desk Lot within the integrated ownership structure and to be a value or benefit that inheres in the use of land as such and is not merely incidental to it.

[46] If the scheme of covenants in place at Le Chamois, including the PMT Covenant, is intended to enhance the overall value of the Residential Units operated within the context of a hotel, then, assuming the intention is realised, the effect of enhanced value would also enhance the value of those parts of the hotel, such as the Front Desk Lot, that are common assets and integral to the operation of the lands as a hotel. This benefit is one which, in my opinion, touches and concerns the Front Desk Lot as land.

[118] The distinctions between *PMT* and the case at bar are apparent. Unlike the Front Desk Lot in *PMT*, SL 51 at the Auburn is not a common asset, owned by the

other owners as tenants-in-common. There is no evidence to suggest that SL 51 is an integral element of the land used for the purpose of the operation of a supportive living seniors' residence. Unlike the Front Desk Lot in *PMT*, SL 51 plays no role in the use of the lands as a supportive seniors' residence; rather, it appears to have been an arbitrarily nominated and artificially designated dominant tenement.

[119] Even if the provision of supportive living services by ASVH could be said to enhance the value of SL 51 (if one accepts that ASVH's services and rates are good value), it is not an enhanced value or benefit to SL 51 arising from its use of land. Unlike the use of the Front Desk Lot at Le Chamois, there is no benefit or enhancement to the value of SL 51 within the structure of the Auburn that inheres in the use of land as such.

[120] I cannot conclude that the Restrictive Covenant in the case at bar touches and concerns the land of SL 51. SL 51 is simply another strata unit, albeit smaller than the others, with the same unit entitlement and the same monthly strata fees as the other units. No reason has been offered for its designation as the dominant tenement and no explanation has been offered as to how it specifically benefits from the Restrictive Covenant registered against SL 67 or any of the other units. Unlike the Restrictive Covenant in favour of the Front Desk Lot at Le Chamois in *PMT,* SL 51 is not inextricably tied and connected to the operation of the independent seniors' facility at the Auburn.

[121] Even when I consider the broader context of the overall scheme of the Auburn and that it was a purpose-built facility as a supportive independent seniors' residence, I struggle to see how the use of SL 51 is tied and connected to the operation of such a residence. There is no evidence that ASVH operates out of SL 51. There is no evidence that SL 51 plays any role in the use of the lands as a seniors' residence at all. If the Restrictive Covenant requiring all other units to hire and pay ASVH for services is providing good value, then perhaps it does enhance, arguably, the value of SL 51, but if ASVH is not competitive, then perhaps it does not.

[122] The purpose of the Restrictive Covenant, when considered as a whole in the broader context of the overall scheme in place at the Auburn, is to ensure that each owner and any future owner is required to hire and pay ASVH to provide

services. This cannot be said to benefit SL 51 or any other unit. I conclude that rather than benefitting the dominant tenement, the true beneficiary of the Restrictive Covenant is ASVH, not in its capacity as owner, but in its capacity as the service provider.

RELIEF

[123] For all of these reasons, I am satisfied that the petitioner has met the criteria in s. 35(2)(e) of the *PLA* and established that the Restrictive Covenant is invalid.

[124] The relief under s. 35(2) is discretionary and consequently, even if a petitioner has met one of the s. 35(2) criteria, I must still examine all of the circumstances to decide if I should exercise my discretion in the petitioner's favour. As the petitioner seeks cancellation of the covenant, I must give consideration to all of the consequences of doing so, not just those that arise in one particular situation: *Paterson* at para. 29.

[125] ASVH submits that cancellation of the Restrictive Covenant registered against title to the petitioner's property would disrupt the overall scheme at the Auburn as a supportive living retirement residence capable of offering an integrated service model to all residents. It would undermine or run counter to the provisions of the 219 Covenant and/or Bylaws. The Strata Corporation alludes to potential ramifications in that regard as well, but neither respondent identified a specific problem or difficulty.

[126] The 219 Covenant is not strict. For ease of reference, I will again outline that it requires that the Auburn include multiple units of housing and certain common areas specified as follows:

> D. …a building with four or more sleeping units where permanent residential accommodation is provided and must have a common living area; kitchen and dining area where meals are provided; and, where health care, cultural and social services may be provided.

[127] The 219 Covenant does not imply or require the terms of the Restrictive Covenant and/or the terms of the Supportive Living Services Agreement. It does not require that a particular service provider be engaged in perpetuity. It does not require any services to be provided, except the provision of meals. I cannot

envision a circumstance where cancellation of the Restrictive Covenant would affect the continued provision of meals at the Auburn or otherwise undermine or conflict with the 219 Covenant.

[128] Nor do I see a circumstance where cancellation of the Restrictive Covenant would undermine or conflict with the Bylaws.

[129] The petitioner does not challenge the Bylaws. The Bylaws require the Strata Corporation to retain the services of a support services company to provide management of the area of the common property designated as Residential Service Amenities for the benefit of the owners, tenants or occupants of the strata lots. The Bylaws also require individual owners to, at all times, retain the services of a support services company to provide supportive living services, as defined by the Bylaws. Cancelling a restrictive covenant that requires an owner to pay for and receive supportive living services from a particular business does not affect or undermine the Bylaws. The Strata Corporation retains the power to hire ASVH, or any other service provider, to manage the provision of services at the Auburn. Cancellation of the Restrictive Covenant does not change that. That a strata corporation has the power and ability to organize the kind of collective action that is necessary for the provision of collective support living services is not at issue: *The Owners, Strata Plan VIS4686 v.* Craig, 2016 BCSC 90. It has the power to amend its Bylaws, if determined to be necessary.

[130] Overall, I am of the view that cancellation of the Restrictive Covenant will not undermine the Auburn remaining a supportive living retirement residence capable of offering an integrated service model to all of its residents. I conclude that the consequences of cancelling the Restrictive Covenant registered against title to SL 67 do not weigh against doing so.

[131] I am satisfied that I should exercise my discretion in favour of granting the relief sought. The Restrictive Covenant is positive in substance and does not touch and concern the benefitted land. Having found that the Restrictive Covenant is invalid pursuant to s. 35(2) of the *PLA*, I make an order under s. 35(1) of the *PLA* that the Restrictive Covenant registered against title to SL 67 is cancelled.

[132] The petitioner is entitled to her costs, on the ordinary scale.

DONEGAN J.