

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PMT XII LLC v. The Owners, Strata Plan
VR 2753, Section 1,*
2010 BCSC 1235

Date: 20100901
Docket: S098683
Registry: Vancouver

Between:

PMT XII LLC

Petitioner

And

The Owners, Strata Plan VR 2753, Section 1

Respondent

Before: The Honourable Mr. Justice Harris

Reasons for Judgment

Counsel for the Petitioner:

Allyson L. Baker

Counsel for the Respondent:

Zachary J. Ansley

Place and Date of Hearing:

Vancouver, B.C.
June 22 and August 20, 2010

Place and Date of Judgment:

Vancouver, B.C.
September 1, 2010

Introduction

[1] The petitioner, PMT XII LLC (“PMT”), applies, pursuant to section 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377, to cancel a restrictive covenant (the “PMT Covenant”) registered in 2003 against two strata lots (the “PMT Strata Lots”) it owns in a condominium hotel property in Whistler known as Le Chamois. The PMT Covenant prevents the PMT Strata Lots from being used for the operation of an undertaking which rents skis, snowboards or related equipment, offers a storage or valet service for such equipment or offers a demonstration service of such equipment if such demonstration service would be akin to renting equipment.

[2] Since PMT acquired ownership of its strata lots they have been leased to Mr. Whistler’s Holdings Inc. which carries on business as “Affinity Sports”. Affinity Sports operates a business that includes a ski and snowboarding rental business. The PMT Covenant and the lease permit these operations to be undertaken until the expiry of the lease. The lease agreement is due to expire on December 10, 2010. The PMT Covenant, therefore, does not yet prohibit Affinity Sports engaging in the rental business. Affinity Sports has advised that it would like to continue leasing the PMT Strata Lots. Unless the PMT Covenant is cancelled, Affinity Sports would not be able to continue its ski and snowboard rental business.

[3] Within Le Chamois there is another business which rents skis and snowboards and provides a storage and valet service to the guests of the hotel. This undertaking, known as Spicy Sports, occupies a strata lot against which a restrictive covenant is filed that mandates the provision of these services for the benefit of the hotel and its guests. The validity of this “positive” covenant is not in issue on this application.

[4] Le Chamois is not owned by a single entity, but rather is owned and financed by individual strata lot owners through a Strata Corporation. It is a condominium hotel. Le Chamois comprises 24 commercial strata lots located on the street, lobby and mezzanine levels (the “Commercial Units”), 51 condominiums on the second,

third and fourth floors, of which 41 are currently rented through a rental pool (the “Rental Pool”), and an additional 11 condominiums on the fifth and sixth floors (collectively, the “Residential Units”).

[5] Prior to the creation of Le Chamois, the Resort Municipality of Whistler registered restrictive covenants against title to the land on which Le Chamois is located. Those covenants are registered against title to the Residential Units and the Commercial Units. The effect of these restrictive covenants is to require that most Residential Units be placed in the Rental Pool. The existence of Le Chamois and the use of the lands created by it are necessarily tied to the use of the lands as a condominium hotel.

[6] Le Chamois operates, therefore, as a condominium hotel comprising in part of the Rental Pool of units that are rented out to members of the general public on a short term basis when not being used by their respective owners.

[7] The Strata Corporation has two sections for the purpose of representing the different interests of owners of residential and non-residential strata lots: the Residential Section and the Commercial Section.

[8] The Residential Section represents the interests of the owners of the Residential Units, the majority of whom rent their units out as hotel rooms, while the Commercial Section represents the owners of the Commercial Units.

[9] The respondent, The Owners, Strata Plan VR 2753, Section 1, is the Residential Section of the Strata Corporation at Le Chamois.

[10] PMT owns two Strata Lots in the Commercial Section: Lots 23 and 24.

[11] Strata Lot 9 (the “Front Desk Lot”) is owned by the Residential Section. It is a common asset as that term is defined by the *Strata Property Act*, R.S.B.C. 1998, c. 43. (the “SPA”). It is not common property. Pursuant to s. 66 of the SPA, each individual owner of a Residential Unit owns a common asset as a tenant in common in a share equal to the owner’s unit entitlement. By operation of the SPA, the

Residential Section owns the Front Desk Lot in its capacity as the representative of all the owners of Residential Units. As a strata corporation, the Residential Section is responsible for managing and maintaining the common assets for the benefit of the owners of Residential Units who are members of the Residential Section.

[12] The Front Desk Lot is used for and in connection with the hotel operations at Le Chamois.

[13] The PMT Covenant is registered against the titles to the PMT Strata Lots in respect of the Front Desk Lot only. The PMT Covenant is not registered against the titles of the individual Residential Units.

[14] The PMT Covenant states, in part, as follows:

C. The Front Desk Strata Lot [defined as Strata Lot 9] and the Commercial Strata Lots [defined as the PMT Strata Lots] are located in the Le Chamois hotel (the “Hotel”) which is intended to be operated and maintained to a standard consistent with hotels **of a similar size and design located in Whistler, B.C. and which is not less than the standard of the Hotel on the day that this restrictive covenant is registered (the “Standard”).**

D. It is desirable for the greater benefit and enjoyment of the Hotel **that certain restrictions be placed on the use of the Commercial Strata Lots** so as to ensure that the type of business, quality of product and overall appearance and operation of the business operated in and from the Commercial Strata Lots are consistent with the Standard and do not duplicate the services and business currently being offered.

...

2. The Grantor hereby covenants and agrees with the grantee, by way of a restrictive covenant, that upon the earlier of the expiry of the term of the [Mr. Whistler’s Holdings Inc.] Lease, including the Last Renewal Term, of either or both of the Commercial Strata Lots, or the Tenant vacating either or both of the Commercial Strata Lots, the Commercial Strata Lots shall not be used or occupied at any time for the operation of an undertaking which rents skis, snowboards or related equipment, offers a storage or valet service for skis, snowboards or related equipment or which offers a demonstration service for skis, snowboards or related equipment if such demonstration service is akin to renting any of the equipment.

[emphasis added]

[15] The PMT Covenant is not the only restriction that controls the use of commercial property at Le Chamois.

[16] Restrictive Covenant No. BV274811 (the “General Restrictive Covenant”) is registered against title to Commercial Units 7, 8, 12-16, 87 and 88. The General Restrictive Covenant is registered in favour of the Front Desk Lot but is not registered against either Strata Lot 89 or the PMT Lots.

[17] The General Restrictive Covenant prohibits the owners and tenants of Commercial Units 7, 8, 12-16, 87 and 88 from renting skis, snowboards or related equipment, offering a storage or valet service for such equipment, or offering a demonstration service for such equipment if such demonstration service would be akin to offering the equipment for rental.

[18] At material times, as noted above, Spicy Sports has operated from Strata Lot 89 (the “Spicy Lot”). The following covenant, registered in favour of the Front Desk Lot against the Spicy Lot, states in part that:

2. The Grantor [Chamois Inc.] hereby covenants and agrees with the Grantee [Chamois Inc.], by way of restrictive covenant, that the use or occupancy of the Commercial Strata Lot [defined as Strata Lot 89] as a place of business offering for rental to Guests of the Hotel skis, snowboards, and related equipment and complimentary ski storage and valet service will not be changed, altered or varied in any manner that would cause a lesser level of service provided to Guests of the Hotel [being strata lots 25 to 86] than exists as at the date of registration of this restrictive covenant.

(the “Spicy Covenant”)

[19] Not all of the Commercial Units are subject to a covenant regarding the rental, storage and valet of ski and other related equipment (the “Rental Business”). Strata Lots 5, 6, 20, 21, 22 and 23 (the “La Rua Lots”) are not subject to any of the PMT Covenant, the General Restrictive Covenant or the Spicy Covenant (collectively the “Covenants”). As a result, there is nothing preventing the La Rua Lots from being used for the Rental Business, although in fact they are used as restaurants.

[20] Finally, use of the commercial lots is also regulated by bylaw. On or about July 24, 2003, the Strata Corporation filed amended bylaws in the Land Title Office under No. BV283460, which provide in part that:

Bylaw 6 - Use of Commercial Strata Lots

(7) An owner, tenant or occupant of a Commercial Strata Lot that offers ski, snowboard or other related equipment for rental must enter into a mutually agreeable contract with the Residential Section for the provision of a complimentary, overnight storage and valet service for the skis, snowboards and other similar equipment for the residents and guests of the Residential Strata Lots. If the parties are unable to agree on the terms of a contract for the provision of a complimentary overnight storage area and valet service any party may, by written notice to the other, submit for conclusive determination by arbitration of a complimentary overnight storage area and valet service to the Residential Strata Lots.

(8) Subsection (7) does not apply to strata lots 23 and 24 as long as strata lots 23 and 24 are tenanted by Mr. Whistler’s Holdings Inc. operating as Affinity Sports and is carrying on the business of offering for sale or rental ski, snowboard and other snow related equipment.

- (9) Subsection (7) does not apply to strata lots 20, 21 and 22.
- (10) Without limiting the generality of the foregoing, the following businesses may not be operated from a Commercial Strata lot:
 - (a) video arcade;
 - (b) adult video;
 - (c) adult entertainment; and
 - (d) gambling or gaming operations.

[21] There is no restrictive covenant or any bylaw of the Strata Corporation that prevents the duplication of any type of business at Le Chamois other than the Rental Business.

[22] Excess Sport, a business operating out of Strata Lots 12–15, has also started to sell ski equipment and provide related services. There is a dispute in the evidence about whether Excess Sport is engaged in the Rental Business from these lots. If it were doing so, it would be in breach of the General Restrictive Covenant. I am unable to conclude on the affidavit evidence that Excess Sport is in breach of the General Restrictive Covenant, but the evidence is that the Owners intend to enforce all applicable restrictive covenants.

Issues

[23] Is the Petitioner entitled to an order cancelling the PMT Covenant under section 35 of the *Property Law Act* on any of the following grounds:

- (a) the restrictive covenant is unenforceable in that it does not touch and concern the Front Desk Lot (subsection 35(2)(e));
- (b) the reasonable use of the PMT Lots will be impeded, without practical benefit to others, if the registered charge or interest is not cancelled (subsection 35(2)(b));
- (c) cancellation of the covenant will not injure the person entitled to the benefit of the registered charge or interest (subsection 35(2)(d)); or
- (d) the covenant is obsolete?

Positions of the parties respecting whether the PMT restrictive covenant touches and concerns the Front Desk Lot.

[24] PMT relies on each of paragraphs 35(2)(a), (b), (d) and (e) of the *Property Law Act* in support of its application for cancellation of the PMT Covenant. Its primary position, however, is that the PMT Covenant is unenforceable because it does not comply with the requirement that the covenant be one that “*touches and concerns the benefited land*”, namely the Front Desk Lot.

[25] PMT relies on the law that requires an enforceable restrictive covenant to touch and concern the benefited land in the sense that the restrictive covenant must be connected with the enjoyment of the dominant tenement and must be for its benefit. As stated by *Cheshire and Burn’s Modern Law of Real Property* (London: Butterworths, 1994) 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.

[26] The key distinction relied on by PMT is between a direct benefit to the dominant tenement connected to its use as land and a benefit to a business undertaken on, or related to, the land which is a collateral or incidental benefit to the use of the land.

[27] The argument is that the PMT Covenant is intended to benefit the operation of the hotel and the Residential Units. The hotel is, however, merely a business and the PMT Covenant is not registered in favour of the Residential Units. The hotel and the Residential Units or the Residential Section are not one and the same. The wording of the PMT Covenant specifically states that the covenant is intended to benefit the Le Chamois Hotel, which is a business venture associated with some of

the Residential Units. Recital C, for example, refers to managing the “Le Chamois Hotel” to a certain standard, while Recital D sets out the desirability for the “greater benefit and enjoyment of the Hotel” that certain restrictions be placed on the use of the commercial strata lots. However, the hotel itself does not own the Front Desk Lot and does not own any Residential Units. At best, the hotel business is collateral or incidental to the use of the Front Desk Lot.

[28] PMT buttresses its argument that the PMT Covenant does not touch and concern the Front Desk Lot by noting that the Front Desk Lot has never been used for the Rental Business. In brief, the PMT Covenant is not for the benefit of the Front Desk Lot in and of itself in that it has nothing to do with the occupation of the Front Desk Lot or its value. The covenant here is for the benefit of the Residential Section *qua* hotel rental pool.

[29] The Residential Section submits that it is irrelevant that the Font Desk Lot has never been used for the Rental Business. It is not a requirement of enforceability that the benefited land be used for the very undertaking restricted by a covenant. The requirement that a restrictive covenant “touch or concern” land has to do with the benefited land, as opposed to the land burdened. A restrictive covenant touches or concerns benefited land if it affects the nature, quality or value of the demised land: *Canada Safeway Ltd. v. Thompson (City)*, [1996] M.J. No 393 (QB), at para. 27; *aff’d* [1997] M.J. No 271 (CA); Di Castri, *Registration of Title to Land*, vol. 1, looseleaf (Toronto: Carswell, 2009) at para. 332.

[30] The Residential Section argues that one must have regard to the scheme of covenants and bylaws to appreciate the nature of the benefits contemplated to enhance the value of the benefited land. This scheme was put in place in 2003. Its purpose is to allow Le Chamois to promote itself as a boutique hotel capable of offering a diverse shopping experience to its guests and avoid being seen as a discount shopping centre. To achieve that objective, competition had to be restricted and diversity of commercial undertakings enhanced.

[31] The Residential Section's ability to restrict direct competition for ski rental business among the commercial lots, including the PMT Lots, adds value to the interests of the Owners of the hotel units at Le Chamois. The PMT Covenant governs the use to which the PMT Lots may be put and is imposed to enhance the value of the Owners' interests in the hotel as represented by the Front Desk Lot.

Analysis

[32] Sections 35(1) and (2) of the *Property Law Act* permit a person interested in land to apply to the Supreme Court for an order to modify or cancel a restrictive covenant. The grounds for modifying or cancelling a restrictive covenant are set out in subsection 35(2) of the *Act*:

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

[33] Subparagraphs 35(2)(a) through (e) are disjunctive and the applicant only need satisfy the Court under one of the subparagraphs to permit the Court to make the order: *Fleischman v. British Pacific Properties Ltd.*, [1997] B.C.J. No. 2838 at para. 34.

[34] The requirements for an enforceable restrictive covenant are as follows:

The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement.

The covenant must be one that touches and concerns the land, i.e. it must be imposed for the benefit of, or to enhance the value of, the benefited land.

The benefited land as well as the burdened land must be defined with precision in the instrument creating the restrictive covenant.

The conveyance or agreement should state that the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee.

Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered.

Di Castri at para. 332, cited with approval in
Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.,
2009 BCCA 5, at para. 9

[35] A restrictive covenant is to be construed strictly. Restrictive covenants limit the freedom to make use of property and can limit competition: *Aquadel Golf Course* at para. 11.

[36] There is no serious dispute that the PMT Covenant would be enforceable if it were registered against title of the Residential Units. In that case the benefit of the covenant would touch and concern the land because it would satisfy the requirement of benefitting or enhancing the value of the dominant tenements. Controlling the nature of commercial activity in a building used as a hotel clearly affects the value of the units used by the hotel.

[37] The Residential Section says that the Restrictive Covenants, including the PMT Covenant, benefit the Residential Units. When extrinsic evidence is used to identify the dominant tenements, as it may be, it is obvious that the Residential Units, alongside the Front Desk Lot, are the dominant tenements. It says that registration against the Front Desk Lot as representative of the interests of the Residential Units is sufficient to support the enforceability of the PMT Covenant. To require that the covenant be registered against each unit is commercially unreasonable and excessively technical.

[38] The parties disagree on whether it is common practice to register against each title or to register only against a representative lot, such as a front desk lot. In any event, the Residential Section says that the Front Desk Lot, which is a common

asset, is administered in connection with the hotel operation for the benefit of the Residential Units and this is sufficient to satisfy the requirement that a restrictive covenant touch and concern benefited land.

[39] It is common ground that the PMT Covenant identifies, at least, the Front Desk Lot as the dominant tenement. In my view it is necessary to analyse the nature of that tenement and its relationship to the Residential Units to understand whether the PMT Covenant touches and concerns the land. PMT says that the benefit does not touch and concern the land. Rather, it supports the hotel business which may indirectly benefit the Residential Units in the Rental Pool, but those units are not identified by the instrument as the dominant tenements and the covenant is not registered against their title. Either ground is fatal to the enforceability of the PMT Covenant.

[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 conducted 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.

[47] It is unnecessary in my opinion to decide whether the Residential Units are clearly identified by the instrument creating the PMT Covenant as dominant tenements. It is sufficient for enforceability that the Front Desk Lot is explicitly identified in the instrument and the PMT Covenant is registered on its title.

[48] In the result, I reject the submission that the PMT Covenant does not touch and concern the land in the sense of benefiting it or enhancing its value. I conclude that the PMT Covenant meets the requirements for enforceability in that (a) it is

negative in substance; (b) it touches and concerns the land; (c) it is defined with sufficient precision in the instrument creating it; and (d) it is registered.

Alternative Grounds for Cancellation

Positions of the Parties

[49] PMT also seeks cancellation of the restrictive covenant on the grounds that (a) the reasonable use of the PMT land will be impeded, without practical benefit to others, if the registered charge is not cancelled; (b) cancellation of the covenant will not injure the person entitled to the benefit of the registered charge; and (c) the covenant is obsolete.

[50] PMT argues that preventing the PMT Strata Lots from being used in connection with the Rental Business impedes their reasonable use and that cancelling the PMT Covenant will not injure the Front Desk Lot and the Residential Section, or deprive them of any practical benefit.

[51] It is submitted that nothing in the evidence put forward by the Residential Section explains how having more than one Rental Business would bring the hotel below the “Standard”. The putative objective of creating diversity of shopping experiences in a boutique hotel is undercut when it is recognised that, other than the Rental Business, there has been no attempt by the Strata Corporation (via the Covenants or the bylaws) to ensure that no other type of business or service is duplicated amongst the commercial strata lots. The PMT Covenant itself deals with only one possible use of the PMT Strata Lots and does little to promote the diversity of the business being carried on in the Front Desk Lot or the hotel.

[52] The operation of the overall scheme of covenants produces the result that there can be multiple commercial units carrying on the sale as opposed to the rental of ski and other equipment, or being run as restaurants, bike rental businesses, cigar stores, etc. Indeed, there are at least 3 businesses selling ski and related equipment at Le Chamois (Affinity, Excess Sports and Spicy Sports), two bike rental businesses and two restaurants.

[53] PMT urges me to recognise that the reality is that the PMT Covenant, in conjunction with the General Restrictive Covenant, is an attempt to create a monopoly on the Rental Business for the benefit of the owner and tenant of the Spicy Lot. However, the Spicy Lot is not a beneficiary of the PMT Covenant. Given that restrictive covenants are to be construed narrowly, the PMT Covenant cannot be interpreted to benefit the Spicy Lot.

[54] PMT argues that, in any event, the PMT Covenant is obsolete. The character of the Blackcomb area has changed since the scheme was put in place in 2003. There has been increased competition in the Whistler area generally amongst retail and restaurant businesses. The area around Le Chamois, in particular, has suffered competitively by the elimination of parking on the nearby Bench Lands. In short, the PMT Covenant is no longer of practical benefit.

[55] The Residential Section argues that the application is premature. The burden is on the applicant to establish the application is not premature (s. 35(2)). If the court finds the application premature, the court must dismiss the application even if it might otherwise succeed on one or more of the grounds in s. 35(2)(a) to (e): *Newco Investments Corp. v. British Columbia Transit* (1987), 14 B.C.L.R. (2d) 212, [1987] B.C.J. No 1266 (C.A.).

[56] The delay built into the PMT Covenant means that the overall restrictive covenant scheme comprised of: 1) restricting competition in renting ski equipment among businesses operating out of the Commercial Units at Le Chamois (the General and PMT Covenants); and 2) ensuring complimentary ski storage and valet services to hotel guests as well as the provision of ski rentals from one of the commercial lots (the 89 Restrictive Covenant) has yet to fully come into effect.

[57] In the circumstances, the Residential Section says it is simply too soon to determine whether there have been any changes to the character of the surrounding neighbourhood which would render the PMT Covenant obsolete (s. 35(2)(a)) or whether reasonable use of the land will be impeded, without practical benefit, if the covenant is not cancelled (s. 35(2)(b)).

[58] If anything, the objectives of the overall restrictive covenant scheme are even more relevant and valuable today than they were when the Covenants were created and registered in 2003. The decline in rental ski business in the Blackcomb base area since the early 2000s suggests fewer customers, more competition, or both.

[59] In determining whether a restrictive covenant is obsolete, the court is not called upon to balance the rights of the parties. The section requires a consideration of the nature of the charge itself in the circumstances of the use of the relevant property and a determination of whether on those facts the charge or interest is obsolete: *Chivas v. Mysek*, [1986] B.C.J. No 2547 (C.A.) at p. 3; *Fleischman v. British Pacific Properties Ltd.* at para. 40.

[60] Obsolescence normally connotes disuse. A covenant may be described as obsolete when its original purpose can no longer be served. The change must so stultify the operation of the covenant as to render it obsolete: *Di Castri*, at para. 348.

[61] The respondent argues several factors are relevant to the analysis. First, the evidence does not establish the neighbourhood has changed to a sufficient degree so as to render the object of the PMT Covenant – less competition in the ski rental market among the Commercial Units, more diverse retail offerings for hotel guests, only one ski rental shop, and complimentary ski valet and storage service – obsolete.

[62] Second, the burden imposed by the PMT Covenant has yet to come into effect. The overall restrictive covenant scheme is less than 7 years old. Courts are reluctant to cancel relatively recent restrictive covenants on the basis they are obsolete or may impede reasonable use without practical benefit: *Di Castri*, at para. 349, citing *Cresswell v. Proctor*, 1 WLR 906 (C.A.), cited with approval in *Murrayfield Developments Ltd. v. Brandon* (1995), 8 B.C.L.R. (3d) 364 (S.C.) at para. 19.

[63] Third, the delay in the realization of plans to establish Le Chamois as a boutique hotel caused by necessary repairs to Le Chamois' building envelope also

militates against finding the PMT Covenant obsolete. The repairs, along with the overall restrictive covenant scheme, are crucial to the implementation of the plan to establish Le Chamois as a boutique hotel. The overall relevance and value of the restrictive covenant scheme cannot be accurately assessed until after the repairs are complete.

[64] Lastly, with respect to the argument that the PMT Covenant is impeding reasonable use of the PMT Lots without practical benefit to the Residential Section, the emphasis of the test under s. 35(2)(b) is on whether the restrictive covenant is of practical benefit to the party entitled to the interest, rather than on whether it impedes use. If the covenant provides a practical benefit, the fact that it interferes with an owner's reasonable use of the land is not sufficient to cancel the charge: *Collinson v. Laplante* (1992), 73 B.C.L.R. (2d) 257 (C.A.), at paras. 22-23.

[65] The fact that Chamois Inc., as covenantee, and previous owner of the Front Desk Lot, saw fit to include in the PMT Covenant and the General Restrictive Covenant a restriction on the provision of rental ski equipment in order to promote diversity as part of the overall scheme for the better operation of the hotel, suggests the PMT Covenant has a practical benefit. The fact that the Residential Owners are opposing PMT's petition to cancel it further suggests the restriction is one that benefits them: *Sargent v. Sandhorst, et al*, 2002 BCSC 107, at para. 32.

Analysis of the Alternative Grounds for Cancellation of the PMT Covenant

[66] The analysis of whether alternative grounds exist to cancel the PMT Covenant requires a further amplification of the factual context.

[67] Spicy Sports operates from strata lots that can be accessed from the lobby of the hotel. By contrast, Affinity Sports operates from the PMT Lots which open to the outside of the building. The PMT Lots face the Fairmont Chateaux Whistler and the Glacier Lodge. Most of Affinity Sports' customers enter the store from the "Blackcomb Stroll" and are guests of other hotels.

[68] The ski and snowboard sale and rental business has generally declined in Whistler since the early 2000s. Both Affinity Sports and Spicy Sports have seen significant declines in revenue in both the sales and rental business in recent years. This decline is in part explained by the elimination of nearby parking which has reduced walk by business for all retailers and restaurants in the Blackcomb base area. A number of businesses have closed in recent years. These include a clothing store and a cafe in the hotel, a jewellery store in the Fairmont, a real estate office and a spa in Glacier Lodge and Munks Restaurant at Blackcomb Base.

[69] The ski and snowboard rental market in the Blackcomb Base area is competitive. There are four other hotels in close proximity to Le Chamois, each of which contains a ski and snowboard rental outlet. Nevertheless, it appears that the area is more conducive to ski and snowboard rental operations than it is to other kinds of business.

[70] The rental of ski and snowboard equipment forms approximately 52% of the business of Affinity Sports at the hotel location. Very few of the Affinity Sports customers at the hotel location are from the hotel. Approximately 50% of Spicy Sports' revenue comes from guests of the hotel. Mr. Cousins, a director of Spicy Sports, stated in his affidavit that Spicy Sports may no longer be viable if the PMT Covenant is cancelled.

[71] In order to determine whether the PMT Covenant is obsolete or should be cancelled because it is no longer of practical benefit or its cancellation would not injure anyone entitled to the benefit of the covenant, it is necessary to determine the object of the scheme of covenants controlling commercial activity at the hotel and the object of the PMT Covenant in particular.

[72] In my view there is little in the scheme of covenants to support a characterisation of their object being to create a boutique hotel experience, to prevent the perception of the hotel as a discount shopping centre and to provide a diversity of shopping experiences for the guests of the hotel. The Covenants refer to maintaining a standard characteristic of the standard of hotels in the area. With the

exception of the Rental Business, there is nothing that prevents the duplication of competitive businesses.

[73] I conclude that the object of the scheme of covenants is to limit competition in the Rental Business to ensure that hotel guests will have access to ski and snowboarding rentals and storage and valet services provided by an undertaking operating in premises that can be accessed from the lobby of the hotel.

[74] I also conclude that the object of the scheme of covenants, in so far as it is material to the issue before me, is to benefit the Residential Units operating in the context of a hotel by providing a service and facility which enhances the experience of a winter holiday for owners of the Residential Units and the guests of the hotel. The fact that the arrangement limits the competition faced by Spicy Sports, and is therefore to its commercial advantage, is a collateral consequence of the overall scheme, but not its purpose or object.

[75] The question whether the PMT Covenant continues to be of practical benefit or whether its cancellation would injure someone must be viewed with this object in mind. Equally, whether the covenant is obsolete must also be assessed from this perspective.

[76] I have concluded that it is not premature to assess whether the PMT Covenant should be cancelled. The overall scheme has been in place for some years. The only remaining aspect of the scheme to take effect is the restriction in the PMT Covenant. Enough is known now about the object of the scheme, the nature of the restrictions imposed by it and the environment in which it operates to determine the issues before me.

[77] I am satisfied that the PMT Covenant does impede the reasonable use of the PMT Lots. The use of those lots for a ski and snowboard business that includes the Rental Business is most likely the "highest and best use" that can be made of the lots.

[78] The critical question however is whether the PMT Covenant is of "practical benefit" to others or whether the cancellation will injure the person entitled to the

benefit of the covenant. For the purpose of the analysis I assume that the practical benefit is to be for the benefit of the person entitled to the benefit of the covenant.

[79] The evidence before me satisfies me that the maintenance of a ski and snowboard rental business providing storage and valet services that can be accessed directly from the lobby is a practical benefit to the Front Desk Lot as an integrated element of the hotel and through the Front Desk Lot to the Residential Units in the Rental Pool. The loss of that business would be an injury to the beneficiaries of the PMT Covenant.

[80] The evidence is that the Rental Business in the area has become increasingly competitive. Revenues have declined generally and for Spicy Sports in particular. The uncontradicted evidence is that Spicy Sports may not be viable if the PMT Covenant is cancelled. The loss of that business in its location would deprive the Residential Units and the hotel of a practical benefit and would be an injury.

[81] The object of the covenants in maintaining a Rental Business at the Spicy Sports location is one that is more pressing in an environment of intense competition and, therefore, it cannot be said that the impugned covenant is obsolete.

[82] I have reached this conclusion even though I accept that few customers of Affinity Sports are hotel guests. Affinity Sports and Spicy Sports compete for the Rental Business in the area generally and are not just alternative rental outlets for hotel guests.

[83] The PMT Covenant, it should be noted, is less than 7 years old. PMT was aware of the covenant when it purchased the PMT Lots by way of an assignment.

[84] Chamois Inc., the original owner, agreed to the temporary exception to the General Restrictive Covenant to allow the lease between Mr. Whistler's (dba "Affinity Sports") and Chamois Inc. to run its full term. This formed part of the bargain reached between Chamois Inc. and Hearthstone Investments Ltd. for sale of the PMT Lots. PMT took this bargain by way of an assignment of purchase and sale.

[85] It does not appear to me in those circumstances that I should lightly cancel arrangements freely entered into in the relatively recent past.

[86] I have concluded that PMT has not made out its case that the PMT Covenant should be cancelled. The petition is dismissed. The Residential Section is entitled to its costs on scale B.

[87] I wish to thank counsel for their assistance in this matter.

“Harris J.”