



**SUPREME COURT OF CANADA**

**CITATION:** Owners, Strata Plan LMS 3905 v.  
Crystal Square Parking Corp., 2020 SCC 29

**APPEAL HEARD:** June 9, 2020  
**JUDGMENT RENDERED:** October 23, 2020  
**DOCKET:** 38741

**BETWEEN:**

**Owners, Strata Plan LMS 3905**  
Appellant

and

**Crystal Square Parking Corporation**  
Respondent

- and -

**C.H.O.A. Condominium Home Owners' Association of B.C.**  
**and Urban Development Institute – Pacific Region**  
Intervenors

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:** Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis,  
(paras. 1 to 59) Brown, Martin and Kasirer JJ. concurring)

**REASONS DISSENTING IN PART:** Rowe J.  
(paras. 60 to 106)

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OWNERS, STRATA PLAN LMS 3905 v. CRYSTAL SQUARE

**Owners, Strata Plan LMS 3905**

*Appellant*

v.

**Crystal Square Parking Corporation**

*Respondent*

and

**C.H.O.A. Condominium Home Owners' Association of B.C. and  
Urban Development Institute – Pacific Region**

*Interveners*

**Indexed as: Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.**

**2020 SCC 29**

File No.: 38741.

2020: June 9; 2020: October 23.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin  
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Contracts — Post-incorporation contracts — Formation — Strata corporations — Air space parcel agreement providing for payment obligations in relation to parking rights entered into and registered on title by developer prior to incorporation of strata corporation — Dispute later arising between strata corporation and owner of parking facility — Whether strata corporation bound by air space parcel agreement — Strata Property Act, S.B.C. 1998, c. 43.*

The Crystal development is a large multi-use development with various air space parcels, including an office tower and parking facility. In 1999, the developer and the City of Burnaby entered into an agreement (“ASP Agreement”), which provided for mutual easements for support, service connections, vehicular access and other uses to and on the Crystal’s various air space parcels. In particular, s. 7.5 of the ASP Agreement obliged the owner of the parking facility to provide the owners of the other air space parcels with parking and vehicular access rights in exchange for an annual fee, payable monthly. It also provided that, upon the subdivision of any of the air space parcels by a strata plan, the strata corporation so created would be entitled to give all permissions and consents permitted to be given by the owners of the subdivided parcel, and that the strata corporation would be responsible for payment of the fee as well as for administering the parking rights of the strata lot owners. In addition, it provided that once the owner of the parking facility had recouped the capital costs of construction of the facility, the annual fee would be significantly reduced. Further, s. 16.3 provided that, upon subdivision of a parcel by a strata plan, the strata corporation was to enter into an assumption agreement with the owners of the other air space parcels

so as to assume obligations under the ASP Agreement. The ASP Agreement was registered as an easement in a land title office on March 17, 1999.

On May 26, 1999, Strata Plan LMS 3905, which comprises 68 strata lots in the office tower on the Crystal's second air space parcel, was deposited in a land title office, establishing Strata Co. Strata Co. never entered into the assumption agreement with the other air space parcel owners that was provided for in the ASP Agreement. On June 28, 2002, the developer sold the fifth air space parcel, upon which the parking facility is situated, to a parking corporation ("CSPC"). As part of the transaction, the developer assigned the ASP Agreement to CSPC.

Until 2012, Strata Co.'s members parked in the parking facility and paid the fees at the rate contemplated in the ASP Agreement. A dispute then arose between the parties and Strata Co. ceased paying the parking fees. CSPC responded by revoking the parking privileges of Strata Co.'s members. Litigation ensued. Strata Co. sought a declaration that s. 7.5 of the ASP agreement was null and void or an order that it was unenforceable, or, in the alternative, an order that s. 7.5 be rectified to state that the capital costs had been fully recovered, and also sought damages or disgorgement for breach of contract. CSPC filed a counterclaim, seeking judgment in the amount of unpaid fees it alleged were owed to it by Strata Co. pursuant to the ASP Agreement. The trial judge found Strata Co.'s conduct did not evince an intention to enter into a post-incorporation agreement and therefore that it was not bound by the ASP Agreement. The Court of Appeal reversed the trial judge's decision and held that Strata

Co. had entered into a post-incorporation contract on the same terms as those of the ASP Agreement.

*Held* (Rowe J. dissenting in part): The appeal should be dismissed.

*Per* Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Martin and Kasirer JJ.: Although a corporation is not bound by a pre-incorporation contract, it may, after coming into existence, enter into a new contract on the same terms as those of the pre-incorporation contract. The applicable test for finding that a post-incorporation contract exists is the same as the one for finding that any other agreement exists at common law. The test is objective, and the offer, acceptance, consideration and terms may be inferred from the parties' conduct and from the surrounding circumstances. An outward manifestation of assent by each party such as to induce a reasonable expectation in the other is required, and an examination of how each party's conduct would appear to a reasonable person in the position of the other party is necessary.

The *Strata Property Act* ("SPA") does not oust the common law principles relating to contract formation. The common law forms part of the context in which a legislature enacts statutes, and the legislature is presumed not to have intended to alter or extinguish common law rules in doing so. These presumptions can be rebutted only by establishing a clear expression of legislative intent to the contrary. There is no indication in the SPA of a clear legislative intent to rebut the presumptions; on the contrary, there are signs in the SPA that the legislature in fact intended to allow strata

corporations to enter into unwritten agreements by their conduct. Finding that a contract is binding on a strata corporation on the basis of its objective conduct is not inconsistent with the *SPA*'s governance model for strata corporations. Furthermore, there are no compelling reasons to alter the common law of contracts as applied to strata corporations in order to protect strata lot purchasers from unscrupulous practices of or unfair surprises from developers, because British Columbia's legislative framework already includes several protections for strata lot purchasers. Abrogating the generally applicable principles of contract formation in the case of strata corporations would undermine commercial certainty and thwart the reasonable expectations of commercial parties by casting aside the wisdom and experience found in centuries of incrementally developed precedent and principle governing commercial relations. Rather than attempting to reinvent contract law to accommodate the novelty of strata property ownership, it is best to resort to the settled and generally applicable principles established in the jurisprudence. Thus, the need for certainty in commercial affairs and the importance of protecting the reasonable expectations of commercial parties compel the continued ordinary operation of the common law in this area. A strata corporation can therefore enter into a post-incorporation contract by its conduct.

The enforcement of a post-incorporation contract which affects interests in land does not amount to an exception to the general rule that positive covenants do not bind subsequent purchasers of land. Real covenants and contracts create juridically distinct forms of rights and obligations, which should not be confused with one another. Landowners may use restrictive real covenants to bind subsequent purchasers in equity,

even in the absence of privity of contract. In contrast, the right to contractual performance is a legal interest that is personal to the contracting parties. Another distinction between real covenants and contractual rights lies in the timing of the creation of the right. When equity is used to enforce a restrictive real covenant against a subsequent purchaser who purchased the land with notice of the covenant, the right being enforced is a pre-existing equitable right which persisted through the transfer from the predecessor in title. Contractual rights, on the other hand, are created at the time of contract formation. In the case of a post-incorporation contract, they are created after the corporation comes into existence when the parties objectively manifest an intention to be bound by a new agreement on the same terms as those of the pre-incorporation contract. The enforcement of a contractual right against a party to the contract is therefore not to be equated with the enforcement of a real covenant against a subsequent purchaser and an otherwise valid and effective post-incorporation contract is not unenforceable simply because its terms affect interests in land.

In the present case, the Court of Appeal was correct to find that Strata Co. did in fact manifest an intention, by way of objective conduct, to be bound by a post-incorporation contract with CSPC after CSPC purchased the parking facility from the developer. There is strong evidence of both offer and acceptance of a post-incorporation contract between Strata Co. and CSPC. After purchasing the parking facility, CSPC objectively manifested an intention to offer Strata Co. a contract on the terms of the ASP Agreement by making valid parking passes available to Strata Co.'s members in a quantity which corresponded to their share of parking spaces under s. 7.5

the ASP Agreement. As well, CSPC's maintenance and operation of the parking facility over the years would have required significant capital expenditures. The ASP Agreement in fact provided for such expenditures, which were factored into the parking fee paid by Strata Co. Strata Co.'s members ought to have known that valuable consideration was being rendered for their benefit with an expectation that they would pay for it on terms corresponding to those set out in s. 7.5 the ASP Agreement. In turn, Strata Co. objectively manifested an intention to accept CSPC's offer by paying the fees contemplated in the ASP Agreement, and its members exercised the rights corresponding to those payments by parking in the facility after CSPC became the facility's owner. The members, having either assented to the consideration or acquiesced in its being rendered, taking the benefit of it when it was rendered, should be taken impliedly to have requested its being rendered. Thus, a reasonable person in CSPC's position would consider that Strata Co.'s course of conduct constituted assent by Strata Co. to the terms set out in s. 7.5 of the ASP Agreement. Strata Co.'s objective conduct evinces an intention to enter into a legally binding agreement on the terms set out in s. 7.5 of the ASP Agreement.

*Per Rowe J. (dissenting in part):* The majority's analysis of the law in this case should be adopted, but not the disposition of the appeal. It should not be decided whether Strata Co. had manifested an objective intent to be bound to the terms of the ASP Agreement. Rather, this question should be remitted for determination by the trial court as it is better placed to answer it. Applying the law here is a fact-specific exercise and the Court does not have all the facts needed to do so. The majority's finding of fact



differs from that made by the trial judge and the Court of Appeal. The Court of Appeal treated taking the benefit of the agreement as a *per se* manifestation of the intention of the party to be bound by the terms as expressed. The majority, however, appears to frame things slightly differently in favour of a more traditional assessment of offer and acceptance. By reframing the legal test, the application of the law to the facts necessarily gives rise to a different question of mixed fact and law than that decided by the Court of Appeal.

Appellate courts should make findings of fact not made by courts below only when doing so is in the interests of justice and is feasible on a practical level. This involves weighing two factors: first, the possible savings to the parties in cost and time arising from the appellate court deciding such factual issues; and, second, the possible harm from an appellate court making such findings in the absence of adequate evidence. In this case, both factors run counter to the Court making findings of fact; rather, they favour appellate restraint. It is questionable whether there is efficiency in the use of judicial or counsel resources to be gained by the Court making the factual determinations that the majority would make. The Court cannot finally dispose of the action, as even if it dismisses the appeal, the case must be remitted to the trial court for determination of mutual mistake of fact, rectification, unconscionability or frustration; and, if the claim is not made out, for determination of the counterclaim and assessment of damages. In addition, at that trial the judge may well need to consider the circumstances of contract formation in detail. Second, there is possible harm from this Court making the factual findings that are proposed. In this case, evidence to which the

Court does not have access to could plausibly lead the trial judge to a different conclusion on whether and, if so, when the Strata Co. objectively manifested an intention to be bound. Moreover, the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact and can assess the credibility of witnesses, is relatively expert with respect to the weighing and assessing of evidence, and has had greater exposure to the entire factual nexus of the case.

The existence of a pre-incorporation contract is part of the circumstances in which the parties' conduct is objectively interpreted. Conduct consistent with the contract can be persuasive evidence that an offer has been accepted. Such conduct is not, however, dispositive evidence of the acceptance of the offer. In some circumstances, an alternate inference may provide an objectively better explanation for the conduct than acceptance of the offer. It is plausible that the trial court, with the benefit of a more complete record, would not see the conduct by the Strata Co. as objectively manifesting an intention to accept the contract. There are three competing inferences that the trial court might prefer: in paying the parking fees, Strata Co. was performing a pre-existing obligation rather than assenting to a new obligation; Strata Co. was performing what it (mistakenly) thought to be a pre-existing obligation and if the parking corporation, CSPC had reason to know this, it could be unreasonable for it to take Strata Co.'s payment as an indication of acceptance of a new obligation; and the ASP Agreement formed a conditional easement, and Strata Co.'s payment was the exercise of an option under the conditional easement. Accordingly, these factual matters should be remitted to the trial court.

## Cases Cited

By Côté J.

**Applied:** *Saint John Tug Boat Co. v. Irving Refining Ltd.*, [1964] S.C.R. 614; **adopted:** *Touche v. Metropolitan Railway Warehousing Co.* (1871), L.R. 6 Ch. App. 671; *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156; *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; **considered:** *Heinhuis v. Blacksheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239; **disapproved:** *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1901] 1 Ch. D. 196; **referred to:** *Rhone v. Stephens*, [1994] 2 A.C. 310; *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143; *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750; *Noble v. Alley*, [1951] S.C.R. 64; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306; *Parkinson v. Reid*, [1966] S.C.R. 162; *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737; *Keppell v. Bailey* (1834), 2 My. & K. 517, 39 E.R. 1042; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Kelner v. Baxter* (1866), L.R. 2 C.P. 174; *In re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Natal Land and Colonization Co. v. Pauline Colliery and Development Syndicate Ltd.*, [1904] A.C. 120; *Scotsburn Co-operative Services Ltd. v. W. T. Goodwin Ltd.*, [1985] 1 S.C.R. 54; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 1 A.C. 1101; *Grant v. Province of New Brunswick* (1973), 6 N.B.R. (2d) 95; *Phelps Holdings Ltd. v. Strata Plan VIS 3430*, 2010 BCCA 196, 71 B.L.R. 1; *Gibson v. Manchester City Council*, [1979] 1 W.L.R. 294; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC

55, [2007] 3 S.C.R. 679; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *Vallejo v. Wheeler* (1774), 1 Cowp 143, 98 E.R. 1012; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Davies v. Jones*, [2009] EWCA Civ. 1164, [2010] 2 All E.R. 755; *Wilkinson & Ors v. Kerdene Ltd.*, [2013] EWCA Civ. 44, [2013] 2 E.G.L.R. 163; *Halsall v. Brizell*, [1957] 1 Ch. 169; *Tito v. Waddell (No. 2)*, [1977] 1 Ch. 106; *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2019 BCCA 144, 22 B.C.L.R. (6th) 35; *Amberwood Investments Ltd. v. Durham Condominium Corporation No. 123* (2002), 58 O.R. (3d) 481; *Black v. Owen*, 2017 ONCA 397, 137 O.R. (3d) 334; *Elwood v. Goodman*, [2013] EWCA Civ. 1103, [2014] Ch. 442.

By Rowe J. (dissenting in part)

*Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Heinhuis v. Blacksheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Madsen Estate v. Saylor*, 2007 SCC 18, [2007] 1 S.C.R. 838; *Matchim v. Bgi Atlantic Inc.*, 2010 NLCA 9, 294 Nfld. & P.E.I.R. 46; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Uber v. Heller*, 2020 SCC 16; *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720; *Amberwood Investments Limited v. Durham Condominium Corporation No. 123* (2002), 58 O.R. (3d) 481; *The*

*Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2019 BCCA 144, 22 B.C.L.R. (6th) 35; *Robb v. Walker*, 2015 BCCA 117, 69 B.C.L.R. (5th) 249; *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2017 BCCA 374, 3 B.C.L.R. (6th) 59; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

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*Business Corporations Act*, R.S.A. 2000, c. B-9, s. 15(3).

*Business Corporations Act*, R.S.O. 1990, c. B.16, s. 21(2).

*Business Corporations Act*, S.B.C. 2002, c. 57, s. 20.

*Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 14(2).

*Land Title Act*, R.S.B.C. 1996, c. 250, ss. 20, 23, 26, 27, 29, 282, 288.

*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 59.

*Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, ss. 14, 15, 21, 23.

*Real Estate Development Marketing Regulation*, B.C. Reg. 230/2018, s. 3(2).

*Strata Property Act*, S.B.C. 1998, c. 43, ss. 2, 4, 5, 6(1), 7 to 11, 20(2)(a)(iii), 30, 32, 35(2)(g), 38(a), 291.

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APPEAL from a judgment of the British Columbia Court of Appeal (Garson, Willcock and Fisher JJ.A.), 2019 BCCA 145, 24 B.C.L.R. (6th) 24, 2 R.P.R. (6th) 1, [2019] 12 W.W.R. 263, [2019] B.C.J. No. 790 (QL), 2019 CarswellBC 1227 (WL Can.), setting aside a decision of Young J., 2017 BCSC 71, 73 R.P.R. (5th) 244, [2017] B.C.J. No. 68 (QL), 2017 CarswellBC 93 (WL Can.). Appeal dismissed, Rowe J. dissenting in part.

*Stephen Hamilton*, for the appellant.

*Ken McEwan, Q.C.*, and *Emily Kirkpatrick*, for the respondent.

*Wes McMillan*, for the intervener C.H.O.A. Condominium Home Owners' Association of B.C.

*Andrew Morrison* and *Mark V. Lewis*, for the intervener Urban Development Institute – Pacific Region.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Martin and Kasirer JJ. was delivered by

CÔTÉ J. —

I. Introduction

[1] The narrow question raised by this appeal concerns the enforceability of a payment obligation in relation to parking rights provided for in an instrument that is registered on title. In answering this narrow question, however, the Court must consider more fundamental legal questions related to the distinction between property rights and contractual rights, general common law principles with respect to contract formation, the common law’s interaction with the relevant statutory framework and a proposed means of circumventing the long-standing rule that positive covenants do not bind subsequent purchasers of land.

[2] The facts of this appeal involve a number of players. The appellant is a strata corporation for the owners of Strata Plan LMS 3905 (“Strata Co.”) established pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43 (“SPA”). The strata property is situated on an air space parcel within the “Crystal” development, a large multi-use

development in Burnaby, B.C. Tyba Crystal Investments Corp. and Dong Ah Canada Development Corp. developed the Crystal in the 1990s as a joint venture through the Crystal Square Development Corporation (“Developer”). The respondent, the Crystal Square Parking Corporation (“CSPC”), owns and operates a parking facility situated on another air space parcel in the Crystal.

[3] The dispute between Strata Co. and CSPC is centred on whether the former is bound by payment obligations in relation to parking rights provided for in an air space parcel agreement that is registered on title (“ASP Agreement”). The primary difficulty arises from the fact that the ASP Agreement was entered into and registered on title by the Developer before Strata Co. was incorporated. Strata Co. cannot therefore be bound by it as a matter of contract, because the agreement predates Strata Co.’s existence. However, CSPC takes the position that Strata Co.’s post-incorporation conduct manifested its assent to a new agreement on the same terms as those of the ASP Agreement and that the result was a contract that was binding on Strata Co. CSPC also argues that the payment obligations should be held to be binding on subsequent owners on the basis of the narrow English law principle of benefit and burden, such that Strata Co., having accepted the benefits arising under the ASP Agreement, is bound by the burden of that agreement. Strata Co. denies liability under either of these approaches.

[4] For the reasons that follow, I conclude that Strata Co. entered into a post-incorporation contract with CSPC on the terms set out in s. 7.5 of the ASP Agreement.



As a result, I find it unnecessary to consider whether Strata Co. is bound on the basis of the narrow principle of benefit and burden. The appeal is therefore dismissed.

## II. Facts

[5] The Crystal is comprised of seven air space parcels upon which are built, respectively, (1) a retail complex, (2) an office tower, (3) a residential tower, (4) a hotel, (5) a parking facility, (6) a police office and (7) a cultural centre.

[6] In March 1999, the Developer and the City of Burnaby entered into the ASP Agreement, which provided for mutual easements for support, service connections, vehicular access and other uses to and on the Crystal's various air space parcels. The ASP Agreement was registered as an easement in a land title office on March 17, 1999.

[7] *Section 7.5* of the ASP Agreement obliged the owner of the parking facility to provide the owners of the other air space parcels with parking and vehicular access rights in exchange for an annual fee, payable monthly. In particular, it allocated 76 parking spaces to the owners of the second air space parcel, where the office tower was located. It also provided that, upon the subdivision of any of the air space parcels by a strata plan, the strata corporation so created would be entitled to give all permissions and consents permitted to be given by the owner(s) of the subdivided parcel, and that the strata corporation would be responsible for payment of the fee as well as for administering the parking rights of the strata lot owners. *Section 7.5(g)*

provided that, once the owner of the parking facility had recouped the capital costs, that is, the costs of construction of that facility, the annual fee would be significantly reduced, as 90 percent of the revenues from charging the public for parking would be applied to cover operating costs and taxes so as to reduce the amount of the fee charged to the other air space parcel owners. In addition, s. 16.3 provided that, upon subdivision of a parcel by a strata plan, the strata corporation was to enter into an assumption agreement with the owners of the other air space parcels so as to assume obligations under the ASP Agreement.

[8] On May 26, 1999, Strata Plan LMS 3905 was deposited in a land title office, thereby establishing Strata Co. This plan comprises 68 strata lots in the office tower on the Crystal's second air space parcel. Strata Co. never entered into the assumption agreement with the other air space parcel owners that was provided for in the ASP Agreement.

[9] On June 28, 2002, the Developer sold CSPC the fifth air space parcel, upon which the parking facility is situated. As part of the transaction, the Developer assigned the ASP Agreement to CSPC together with "all other existing agreements . . . relating to the [air space parcel] approved by [CSPC]": A.R., vol. II, at p. 106. The record contains no indication of what "existing agreements", if any, were approved by CSPC.

[10] Until 2012, Strata Co.'s members parked in the parking facility and paid the fees at the rate contemplated in the ASP Agreement.

[11] In that year, a dispute arose between the parties. Strata Co. ceased paying the parking fees and CSPC responded by revoking the parking privileges of Strata Co.'s members. Litigation ensued. Strata Co. sought a declaration that s. 7.5 of the ASP agreement was null and void or an order that it was unenforceable, or, in the alternative, an order that s. 7.5 be rectified to state that the capital costs had been fully recovered, and also sought damages or disgorgement for breach of contract. CSPC filed a counterclaim, seeking judgment in the amount of unpaid fees it alleged were owed to it by Strata Co. pursuant to the ASP Agreement.

### III. Procedural History

#### A. *Supreme Court of British Columbia, 2017 BCSC 71, 73 R.P.R. (5th) 244*

[12] Justice Young held that Strata Co. was not bound by the ASP Agreement. In her view, Strata Co.'s conduct did not evince an intention to enter into a post-incorporation agreement on the same terms as those of the ASP Agreement: para. 64. She observed that Strata Co.'s members had parked in the parking facility and made corresponding payments as contemplated by the ASP Agreement, but that this conduct was animated by their mistaken belief that they were already bound by that agreement: paras. 76-77. She held that conduct flowing from a mistaken belief that a pre-incorporation contract is binding is not sufficient to find that the newly incorporated entity has entered into a post-incorporation contract: para. 77. Given her conclusion that a post-incorporation contract did not exist, she did not address Strata Co.'s further

arguments with respect to mistake, frustration and unconscionability, and she dismissed CSPC's counterclaim.

B. *Court of Appeal for British Columbia, 2019 BCCA 145, 24 B.C.L.R. (6th) 24*

[13] The Court of Appeal reversed the trial judge's decision. Willcock J.A. held that Strata Co. had entered into a post-incorporation contract on the same terms as those of the ASP Agreement. He concluded that the trial judge had erred in principle by relying on the facts that Strata Co. did not have privity of contract in respect of the pre-incorporation contract and that it had not adopted or ratified that contract, because such circumstances were irrelevant to the determination of whether Strata Co. had entered into a post-incorporation contract by its conduct. Willcock J.A. also held that Strata Co.'s subjective misunderstanding that it was bound by the pre-incorporation contract was irrelevant to the determination of whether the parties had objectively manifested an intention to be bound by a post-incorporation contract. The court ordered that Strata Co.'s claim and CSPC's counterclaim be remitted to the trial court for determination of the contractual issues not addressed: mutual mistake of fact, rectification, unconscionability, or frustration and, if the claim is not made out, consideration of the counterclaim and assessment of amount owing, if any.

#### IV. Issues

[14] In this Court, Strata Co. maintains that it is not bound to pay the parking fees provided for in the ASP Agreement. Its arguments raise the following issues:

- Does the enforcement of a post-incorporation contract which affects interests in land amount to an exception to the general rule that positive covenants do not bind subsequent purchasers of land?
- What is the correct analytical approach to take in order to find that parties have entered into a post-incorporation contract on the same terms as those of a pre-incorporation contract?
- Can a strata corporation enter into a post-incorporation contract by its conduct?
- Did the parties objectively manifest an intention to be bound by a post-incorporation contract on the relevant terms of the ASP Agreement?

[15] CSPC raises another issue which it urges this Court to consider even if the Court should find against Strata Co. on the other grounds of appeal:

- Is there a narrow principle of benefit and burden that can be applied to circumvent the general rule that positive covenants do not bind subsequent purchasers of land?

[16] I will address each of these issues below.

## V. Discussion

A. *Does the Enforcement of a Post-incorporation Contract Which Affects Interests in Land Amount to an Exception to the General Rule That Positive Covenants Do Not Bind Subsequent Purchasers of Land?*

[17] I begin by discussing the jurisprudence on when covenants may run with the land, which, despite having been memorably described as an “unspeakable quagmire”, can be summarized succinctly for the purposes of this appeal as establishing a general rule that positive covenants do not run with the land: E. Rabin, *Fundamentals of Modern Real Property Law* (1974), at p. 489. I then address the distinction between property rights and contractual rights, after which I consider Strata Co.’s suggestion that applying the principles for pre-incorporation contracts to agreements affecting interests in land is novel and its assertion that there is a public policy interest which justifies curtailing the parties’ freedom to contract in regard to its interests in land.

[18] At common law, the burden of a covenant which either requires the performance of an obligation by a landowner (a positive covenant) or restricts a landowner’s use of the land (a restrictive covenant) is not enforceable against a subsequent purchaser: *Rhone v. Stephens*, [1994] 2 A.C. 310 (H.L.), at pp. 316-17. In equity, however, a restrictive covenant may be enforced against a subsequent purchaser who purchased the land with notice of the covenant: *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143 (Ch.), at pp. 1144-45; *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750 (C.A.), at pp. 773-74, per Cotton L.J.; *Noble v. Alley*, [1951] S.C.R. 64, at p. 69, per Rand J. Where positive covenants are concerned, the general rule is that

they do not run with the land: *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 25; *Parkinson v. Reid*, [1966] S.C.R. 162, at p. 167.

[19] Strata Co. argues that there is no difference between enforcing a post-incorporation contract against it and enforcing the burden of a positive covenant against it as if it ran with the land: A.F., at para. 71. But this submission disregards the important distinction between contract law and property law: *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at para. 39; J. Beatson, A. Burrows and J. Cartwright, *Anson's Law of Contract* (30th ed. 2016), at pp. 27-28. Landowners may use real covenants to create rights enforceable by one owner against another, even in the absence of privity of contract: B. Ziff, *Principles of Property Law* (7th ed. 2018), at p. 448. The resulting interests are distinct from contractual rights, as a restrictive covenant binds subsequent purchasers in equity, whereas the right to contractual performance is a legal interest that is personal to the contracting parties. Another distinction between real covenants and contractual rights in this instance lies in the timing of the creation of the right. When equity is used to enforce a restrictive real covenant against a subsequent purchaser who purchased the land with notice of the covenant, the right being enforced is a pre-existing equitable right which persisted through the transfer from the predecessor in title: *Rhone*, at p. 317. Contractual rights, on the other hand, are created at the time of contract formation. In the case of a post-incorporation contract, they are created after the corporation comes into existence when the parties objectively manifest an intention to be bound by a new agreement on the same terms as those of the pre-incorporation contract. Thus, real covenants and

contracts create juridically distinct forms of rights and obligations, which should not be confused with one another.

[20] Further, the historical reluctance of common law courts to impose the burden of either a positive or a restrictive real covenant on a subsequent purchaser was founded on the principle that “a person cannot be made liable upon a contract unless he was a party to it”: *Rhone*, at p. 316; see also p. 318. Thus, to enforce a positive covenant against a subsequent purchaser of land “would be to enforce a personal obligation against a person who has not covenanted”: *Rhone*, at p. 321. To enforce a positive covenant against a party to a contract, however, would be to enforce a personal obligation against a person who has in fact covenanted to perform that obligation. The imperative which militates against enforcing a covenant against a successor in title does not exist when the successor in title has assumed the covenant by way of a contract (i.e. the covenant will survive only if there is a chain of contracts between subsequent successors in title). The enforcement of a contractual right against a party to the contract is therefore not to be equated with the enforcement of a real covenant against a subsequent purchaser.

[21] *Strata Co.* also suggests that to find that a corporation entered into a post-incorporation contract concerning interests in land would be to create a novel mode of holding and enjoying real property interests: *A.F.*, at para. 74. However, there is nothing truly novel about a corporation entering into a post-incorporation contract which affects interests in land. There is no general prohibition against enforcing



contractual obligations affecting interests in land other than s. 59 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (“*LEA*”), which was not pleaded in this case. Privity of contract has always served as a means by which landowners may bypass the operation of the general rule that positive covenants do not run with the land, because “if there is privity of contract, all covenants are enforceable”: P. M. Perell, “Covenants as Contracts and as Interests in Land” (2005), 29 *Adv. Q.* 476, at p. 479; see also Ziff, at p. 472. As a result, a post-incorporation contract which affects interests in land does not represent a “new mod[e] of holding and enjoying real property”, and therefore does not offend the *numerus clausus* principle: *Keppell v. Bailey* (1834), 2 My. & K. 517, 39 E.R. 1042 (Ch.), at p. 1049.

[22] In support of its argument, Strata Co. asserts that the need for certainty in the ascertainment of title and its incidental rights justifies limiting freedom of contract when the agreement at issue is a post-incorporation contract concerning interests in land: A.F., at paras. 75-81. Ensuring certainty in the ascertainment of title is, without a doubt, an objective of the scheme created by the *Land Title Act*, R.S.B.C. 1996, c. 250: see, e.g., ss. 20, 23, 26, 27, 29, 282 and 288. However, this objective is, by definition, generally not concerned with rights *in personam* that operate only as between the parties to a contract: e.g. s. 20(1). The legislature’s objective of ensuring certainty in the ascertainment of title is thus not a bar to the enforcement of a post-incorporation contract against a party to the post-incorporation contract.

[23] I appreciate that the members of a strata corporation may come and go, and that successive purchasers of strata lots will be bound by covenants arising from agreements to which they, as individual strata lot owners, were not parties. Thus, enforcing a post-incorporation contract may appear, from the perspective of the members of the strata corporation, to operate very similarly to an exception to the general rule that positive covenants do not run with the land. Rather than being a flaw in the legal framework, however, this appears to be a feature of the *SPA*, which gives a strata corporation the power and capacity of a natural person and specifically provides that the strata corporation itself may enter into contracts: *SPA*, ss. 2(2), 10, 30, 32, 35(2)(g) and 38(a); Ziff, at p. 472. Given the strata corporation's capacity to enter into contracts, its conduct may well cause a person to have a reasonable expectation that an agreement with the strata corporation will be legally binding. Parties' reasonable expectations are an interest which is generally protected in the common law of contracts: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 32-33; S. M. Waddams, *The Law of Contract* (7th ed. 2017), at §§141 and 148. Thus, the public policy interests raised by Strata Co. do not outweigh the "very strong public interest in the enforcement of contracts": *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 123, per Binnie J. (dissenting, but not on this point).

[24] In conclusion, an otherwise valid and effective post-incorporation contract is not unenforceable simply because its terms affect interests in land.

B. *What Is the Correct Analytical Approach to Take in Order to Find That Parties Have Entered Into a Post-Incorporation Contract on the Same Terms as Those of a Pre-Incorporation Contract?*

[25] I begin on this point by laying out the basic principles applicable to pre-incorporation contracts, which boil down quite simply to the proposition that, although a corporation is not bound by a pre-incorporation contract, it may, after coming into existence, enter into a new contract on the same terms as those of the pre-incorporation contract. I then address what the parties have identified as divergent lines of authority on the analytical approach to be taken in order to determine when a corporation has entered into a post-incorporation contract, as well as on the role of the intentions of the parties to the pre-incorporation contract in that approach.

[26] An agreement entered into prior to incorporation, even one that was purportedly entered into on behalf of the corporation, is not binding on the corporation once it comes into existence: *Kelner v. Baxter* (1866), L.R. 2 C.P. 174, at pp. 184-85, per Willes J., at p. 186, per Byles J. At common law, a corporation is incapable of ratifying or adopting a pre-incorporation contract, because a person cannot ratify or adopt a contract if they were not in a condition to be bound by it at the time it was made: *Kelner*, at p. 183, per Erle C.J., at p. 184, per Willes J., at pp. 185-86, per Byles J.; *In re Empress Engineering Co.* (1880), 16 Ch. D. 125 (C.A.), at p. 128, per Jessel M.R., at p. 130, per James L.J.; *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16 (C.A.), at p. 20, per Cotton L.J.; *Natal Land and Colonization Co. v. Pauline Colliery and Development Syndicate Ltd.*, [1904] A.C. 120 (P.C.), at p. 126. A

corporation can, however, enter into a post-incorporation contract on the same terms as the pre-incorporation contract: *Empress Engineering*, at p. 128, per Jessel M.R.; *Natal Land*, at p. 126.

[27] In contrast to the position at common law, company legislation throughout Canada generally provides that a business corporation may adopt a pre-incorporation contract by any act or conduct signifying its intention to be bound by the contract: e.g. *Business Corporations Act*, S.B.C. 2002, c. 57, s. 20(3) (“BCA”); *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 14(2); *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 15(3); *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 21(2). Thus, company legislation permits a business corporation to adopt the pre-incorporation contract, whereas the common law rule is that a corporation must enter into a new agreement on the same terms as the pre-incorporation contract. In British Columbia, the statutory framework does not enable a strata corporation to adopt a pre-incorporation contract, because s. 20 of the *BCA* does not apply to strata corporations: *SPA*, s. 291. Instead, the corporation must enter into a post-incorporation contract on the same terms as the pre-incorporation contract. This begs the question of what is required to establish a post-incorporation contract that is binding on a strata corporate at common law.

[28] There are two divergent lines of authority on post-incorporation contracts. According to the first approach, the conduct of the parties and the surrounding circumstances must be considered in order to determine whether the parties objectively

manifested an intention to enter into a post-incorporation agreement on the same terms as the pre-incorporation contract: *Touche v. Metropolitan Railway Warehousing Co.* (1871), L.R. 6 Ch. App. 671; *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156. The second approach is more subjective than the first. It involves considering whether the company's post-incorporation conduct was animated by an erroneous opinion that the company was bound by the pre-incorporation contract. According to this second approach, "the acting on that erroneous opinion, does not make a good contract": *Northumberland Avenue Hotel*, at p. 20, per Cotton L.J.; see also *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1901] 1 Ch. D. 196.

[29] The first approach coincides with the common law's long adherence to an objective theory of contract formation. The classic statement of the objective theory comes from *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, at p. 607, per Blackburn J.:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into [a] contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

[30] The objective theory has found clear expression in this Court's contract formation jurisprudence. For example, in *Saint John Tug Boat Co. v. Irving Refining Ltd.*, [1964] S.C.R. 614, Ritchie J. endorsed the classic statement from *Smith* and held that an objective approach is required for the purpose of determining whether a course of conduct constitutes acceptance of an offer: p. 622. He found on this basis that a contract had been formed as a result of an oil refinery operator's acquiescence in the

continued provision of a tug boat's services after an express agreement between them had expired and, crucially, notwithstanding the operator's subjective opinion that it had not agreed to pay for the continued service: p. 623; see also *Scotsburn Co-operative Services Ltd. v. W. T. Goodwin Ltd.*, [1985] 1 S.C.R. 54, at p. 63; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 1 A.C. 1101, at para. 39.

[31] The subjective approach taken in *Northumberland Avenue Hotel* and *Bagot Pneumatic Tyre* is anomalous, because parties' reasonable expectations are generally protected in the common law of contracts: McCamus, at pp. 32-33; Waddams, at §§141 and 148. This general rule means that "a subjective mutual consensus is neither necessary nor sufficient for the creation of an enforceable contract" and that "a person may be bound by contractual obligations that she did not intend (subjectively) to assume": Waddams, at §§92 and 146. At common law, the risk arising from one party's reasonable reliance on the existence of an agreement is allocated to the party whose conduct gave rise to a reasonable expectation that a contract between the parties would be legally binding. But the subjective approach in *Northumberland Avenue Hotel* and *Bagot Pneumatic Tyre* allocates that risk to the wrong party by excusing the corporation from liability even though the corporation, by its conduct, had objectively manifested its assent to be bound by the terms of the pre-incorporation agreement.

[32] Misunderstandings, errors and other irregularities which may arise during the contract formation process are generally addressed through the doctrines of mistake, misrepresentation, *non est factum* and — at least to some

extent — unconscionability, as well as through the remedies of rectification and rescission. Because of the unfortunate bifurcation of this case, unconscionability and mistake, although pleaded by Strata Co., were not addressed in the courts below and are not before this Court. It would be undesirable for this Court to develop a post-incorporation contract doctrine, particularly in a way that is out of step with its general contract formation jurisprudence, in order to account for the possibility of an irregularity in the contract formation process when other doctrines that have not been argued before the Court serve the same purpose and are better suited to accommodate such concerns. As there is no principled basis for exempting post-incorporation contracts from the generally applicable body of common law principles governing contract formation, the subjective approach to post-incorporation contracts does not apply.

[33] In sum, an “outward manifestation of assent by each party such as to induce a reasonable expectation in the other” is required in order to find that a binding post-incorporation contract exists: *Waddams*, at §25. The test is objective. It requires an examination of how each party’s conduct would appear to a reasonable person in the position of the other party: P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at pp. 112-13. Thus, a court should determine whether a reasonable person in the position of one party would consider that the other party’s conduct constituted an offer: *Grant v. Province of New Brunswick* (1973), 6 N.B.R. (2d) 95 (S.C. (App. Div.)), at para. 12. And, conversely, whether a reasonable person in the position of the latter would consider that the former’s conduct constituted an acceptance:

*Saint-John Tug Boat*, at pp. 621-22. The pre-incorporation contract is merely one aspect of the objective circumstances that can be used to interpret the parties' conduct and from which the terms of a post-incorporation contract may be inferred.

[34] Strata Co. argues that there can be no post-incorporation contract unless there was an agent who intended to contract on behalf of the corporation when it entered into the pre-incorporation contract: A.F., at paras. 101 and 103. But, given that the analytical approach to determining whether a post-incorporation contract exists is rooted in the common law's general approach to contract formation, it follows that the intentions of the parties to the pre-incorporation contract are not determinative of the issue. This is so because the parties to the pre-incorporation contract are strangers to the post-incorporation contract. The possibility that one of the parties to the pre-incorporation contract represented itself as an agent for a soon-to-be-incorporated entity is not particularly relevant to the determination of what the parties to the post-incorporation contract objectively intended. In any event, the search for a pre-incorporation agent is something of a wild goose chase, because one cannot be an agent for a non-existent principal.

[35] Nonetheless, the objective intentions of the parties to the pre-incorporation contract may be relevant insofar as the pre-incorporation contract prescribes certain benefits and burdens for a soon-to-be-incorporated entity, as that will assist the court in interpreting how a reasonable person would have perceived the parties' post-incorporation conduct. Thus, an inference of offer and acceptance may readily follow



where the “benefit . . . and burden . . . are contemplated pre-incorporation, and are then acted upon exactly as contemplated post-incorporation”: *Phelps Holdings Ltd. v. Strata Plan VIS 3430*, 2010 BCCA 196, 71 B.L.R. 1, at para. 19.

[36] My reaffirmation of traditional contract law principles does not, as my colleague suggests, differ from the Court of Appeal’s reasoning regarding its own jurisprudence, and in particular regarding *Heinhuis v. Blacksheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239. In my respectful view, I do not read *Heinhuis* as a departure from the framework I reiterate here. Although McLachlin J.A. (as she then was) did not find it necessary to engage in an analysis in the traditional terms of offer, acceptance and consideration, she was prepared to do so: at pp. 244-45. There is no principled reason to exempt post-incorporation contracts from generally applicable contract law principles, nor do I read the Court of Appeal’s reference to *Heinhuis* as suggesting that they should be. The conventional approach to contract formation is to construe the parties’ course of conduct according to the traditional requirements of offer and acceptance: *Gibson v. Manchester City Council*, [1979] 1 W.L.R. 294 (H.L.), at p. 297, per Lord Diplock; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, [2007] 3 S.C.R. 679, at para. 16.

[37] To conclude, the applicable test for finding that a post-incorporation contract exists is the same as the one for finding that any other agreement exists at common law. The test is objective, and the offer, acceptance, consideration and terms may be inferred from the parties’ conduct and from the surrounding circumstances.

C. *Can a Strata Corporation Enter Into a Post-Incorporation Contract by Its Conduct?*

[38] I now address the question of whether the *SPA* ousts the ordinary common law principles relating to contract formation. If it does not, I will then consider whether there is a compelling need to alter or preclude the operation of those principles in the context of strata corporations.

[39] The common law forms part of the context in which a legislature enacts statutes, and the legislature is presumed not to have intended to alter or extinguish common law rules in doing so: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39. In addition, when the legislature uses a term that has an established legal meaning, it is presumed to have given the term that meaning in the statute in question: *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20. In the *SPA*, the legislature has granted a strata corporation the power and capacity of a “natural person”: s. 2(2). At common law, a natural person is capable of entering into a contract by way of objective conduct which signifies the person’s assent to be bound by an agreement. Thus, the legislature is presumed to have intended to grant a strata corporation the power of a “natural person” to contract by way of conduct, and is also presumed not to have intended to alter or extinguish the common law rule in this respect.

[40] These presumptions can be rebutted only by establishing a clear expression of legislative intent to the contrary: *Heritage Capital*, at paras. 30-31; *D.L.W.*, at

paras. 18-20. There is no indication in the *SPA* of a clear legislative intent to rebut the presumptions. Strata Co. points to the fact that the *BCA*'s provisions regarding pre-incorporation and post-incorporation contracts do not apply to strata corporations as a signal that the legislature intended to exclude the operation of the common law principles with respect to post-incorporation contracts: *SPA*, s. 291; *BCA*, s. 20. However, this legislative choice says nothing about the applicability of the common law in this regard. On the contrary, there are signs in the *SPA* that the legislature in fact intended to allow strata corporations to enter into unwritten agreements by their conduct. While s. 35(2)(g) does provide that a strata corporation must prepare a record of, among other things, "written contracts" to which the strata corporation is a party, it is the only provision in the *SPA* which refers exclusively to "written contracts". There are, on the other hand, numerous references simply to "contract" and "contracts" in various contexts throughout the Act: e.g. *SPA*, ss. 10, 30, 32, 35(2)(g) and 38(a). In particular, s. 38 provides that a strata corporation has the capacity to enter into contracts in respect of its powers and duties under the *SPA* and under its bylaws. This provision makes no reference to "written contracts". If the legislature wished to limit the capacity of strata corporations to contract only through written agreements, it could easily have indicated this preference in the text of the statute, either expressly or by necessary implication. Because the legislature did not do so, the presumptions are not rebutted.

[41] Strata Co. submits that finding that a post-incorporation contract exists on the basis of conduct is inconsistent with the manner in which strata councils make decisions, exercise powers and record decisions made on behalf of strata corporations:

A.F., at para. 115. The opposite is true, however: finding that a contract is binding on a strata corporation on the basis of its objective conduct is not inconsistent with the SPA's governance model for strata corporations. The legislative scheme includes a form of indoor management rule, as s. 30(1) provides that the validity of a contract made by a strata corporation is not affected by a defect in the appointment or election of the council member or officer who makes the contract on the corporation's behalf or by a limitation on the authority of the council member or officer to act on its behalf. Thus, the legislature provided that a defect in the strata corporation's internal management processes should not defeat the *bona fide* reasonable expectations of third parties dealing with the strata corporation.

[42] Strata Co. also argues that finding that a post-incorporation contract exists on the basis of conduct opens an avenue for the Developer to enter into self-serving contracts in its capacity as both the developer and the initial owner of the strata property: A.F., at para. 79. However, there is no compelling reason to alter the common law of contracts as applied to strata corporations in order to protect strata lot purchasers from unscrupulous practices of or unfair surprises from developers, because British Columbia's legislative framework already includes several protections for strata lot purchasers. One is that, so long as the developer controls the strata corporation, it is required to act honestly and in good faith with a view to the best interests of the strata corporation, and to exercise the care, diligence and skill of a reasonably prudent person: SPA, s. 6(1). The legislature has also imposed a restriction on the strata corporation's ability to enter into non-arm's length agreements with the developer in the period after

the first conveyance of a strata lot to a purchaser but before the first annual general meeting: *SPA*, s. 10. As well, at the first annual general meeting, the developer is required to disclose all contracts entered into by or on behalf of the strata corporation: *SPA*, s. 20(2)(a)(iii). Thus, the legislature has already anticipated this problem and enacted provisions to address it.

[43] In addition to the protections provided for in the *SPA*, the legislature has enacted additional protections in the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 (“*REDMA*”). Although *REDMA* does not apply to all property developments (see *Real Estate Development Marketing Regulation*, B.C. Reg. 230/2018, s. 3(2)), where it does apply, a developer is not permitted to sell a development property to a purchaser without providing a statement of material facts about the development that contains no misrepresentations: *REDMA*, ss. 14 and 15. A developer’s breach of this disclosure obligation may entitle a purchaser to rescind the contract and may render the purchase agreement unenforceable against the purchaser: *REDMA*, ss. 21 and 23. The protections in the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, may also apply to certain transactions in accordance with the criteria set out in that Act. Moreover, s. 59 of the *LEA* addresses fraudulent transactions concerning interests in land. All of these provisions are in addition to the full range of protections and defenses available to any contracting party at common law or in equity. Thus, there does not appear to be any compelling reason to alter the common law of contracts as applied to strata corporations in order to protect strata lot purchasers.

[44] On the other hand, there are very compelling reasons why general contract law principles should continue to apply to strata developments. Lord Mansfield's old dictum that in commercial law "the great object should be certainty" is as relevant today as it was in the eighteenth century: *Vallejo v. Wheeler* (1774), 1 Cowp 143, 98 E.R. 1012, at p. 1017. In the same vein, this Court has stated that the common law of contracts should be developed in a way that "gives due weight to the importance of private ordering and certainty in commercial affairs": *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 66. In addition, this Court takes account of the "reasonable expectations of commercial parties" when contemplating a change to the common law: *Bhasin*, at paras. 32, 34, and 41. Abrogating the generally applicable principles of contract formation in the case of strata corporations would undermine commercial certainty and thwart the reasonable expectations of commercial parties by casting aside the wisdom and experience found in centuries of incrementally developed precedent and principle governing commercial relations. Rather than attempting to reinvent contract law to accommodate the novelty of strata property ownership, this Court can in my view do no better than to "avail [itself] of the general bank and capital of nations and of ages" by resorting to the settled and generally applicable principles established in the jurisprudence: E. Burke, *Reflections on the Revolution in France* (1790), at p. 84. Thus, the need for certainty in commercial affairs and the importance of protecting the reasonable expectations of commercial parties compel the continued ordinary operation of the common law in this area.

[45] In conclusion, there was nothing to preclude the Court of Appeal from finding that Strata Co. had entered into a post-incorporation contract on the relevant terms of the ASP Agreement. Whether the evidence supported the existence of such a contract is, however, another question, and one on which the trial judge and the Court of Appeal disagreed. I now turn to that question.

D. *Did the Parties Objectively Manifest an Intention to Be Bound by a Post-Incorporation Contract on the Relevant Terms of the ASP Agreement?*

[46] There are at least two points in time when Strata Co. might have entered into a post-incorporation contract: (1) before the Developer sold the parking facility to the CSPC — such a contract would be a post-incorporation contract between Strata Co. and the Developer — and (2) after the CSPC purchased the parking facility — this would entail a post-incorporation contract directly between CSPC and Strata Co. I will examine each of these possibilities below.

[47] CSPC argues that a binding post-incorporation contract was formed between the Developer and Strata Co. in 1999 when the Developer deposited the strata plan in a land title office, thereby creating Strata Co. However, causing Strata Co. to come into existence did not suffice to form a post-incorporation contract. A determination to that effect would disregard the separate legal personalities of the Developer and Strata Co. At the time of its incorporation, Strata Co. had not objectively manifested its assent to any agreements. The intentions and actions of the Developer are not, *per se*, the intentions and actions of Strata Co. It is Strata Co. which must, by

its conduct, manifest its assent to a new contract on the relevant terms of the ASP Agreement.

[48] This Court has not been provided with a sufficient factual basis to reach a conclusion on the question whether Strata Co. entered into a post-incorporation contract with the Developer. There is some suggestion that Strata Co. was paying the parking fees as contemplated in the ASP Agreement before CSPC purchased the parking facility: trial decision, at paras. 36-38, 67 and 76; appeal decision, at paras. 17 and 56; A.F., at para. 8. But it is unclear from the wording of the assignment between the Developer and CSPC that such a post-incorporation agreement, if one did in fact exist, was assigned to CSPC by the Developer. The Court simply does not have sufficient evidence to reach a conclusion on this question as the assignment of a contract was predicated on CSPC's approval and there is no information in the record as to what contracts were approved by CSPC. On this point, it must be remembered that a post-incorporation contract is a new agreement which is distinct from the pre-incorporation contract. The assignment of the ASP Agreement to CSPC therefore does not suffice to establish that CSPC had privity in respect of any post-incorporation contract with Strata Co.

[49] However, I agree with Willcock J.A. that Strata Co. did in fact manifest an intention, by way of objective conduct, to be bound by a post-incorporation contract with CSPC after CSPC purchased the parking facility from the Developer: paras. 60, 61 and 66. Indeed, there is strong evidence of both offer and acceptance of a post-



incorporation contract between Strata Co. and CSPC. After purchasing the parking facility, CSPC objectively manifested an intention to offer Strata Co. a contract on the terms of the ASP Agreement by making valid parking passes available to Strata Co.'s members in a quantity which corresponded to their share of parking spaces under s. 7.5 the ASP Agreement: trial decision, at para. 2; appeal decision, at para. 51. As well, CSPC's maintenance and operation of the parking facility over the years would have required significant capital expenditures. The ASP Agreement in fact provided for such expenditures in its definition of "Operating Costs", which were factored into the parking fee paid by Strata Co. Strata Co.'s members ought to have known that valuable consideration was being rendered for their benefit with an expectation that they would pay for it on terms corresponding to those set out in s. 7.5 the ASP Agreement.

[50] In turn, Strata Co. objectively manifested an intention to accept CSPC's offer by paying the fees contemplated in the ASP Agreement, and its members exercised the rights corresponding to those payments by parking in the facility after CSPC became the facility's owner: trial decision, at paras. 67, 76 and 93. The members, having either assented to the consideration or acquiesced in its being rendered, taking the benefit of it when it was rendered, should be taken impliedly to have requested its being rendered: *Saint John Tug Boat*, at p. 622. Thus, a reasonable person in CSPC's position would consider that Strata Co.'s course of conduct constituted assent by Strata Co. to the terms set out in s. 7.5 of the ASP Agreement.

[51] In oral argument, Strata Co. submitted that the ASP Agreement was not actually a contract at all, because only the Developer was a party to it and one cannot make a contract with oneself: transcript, at pp. 4-8. Strata Co.'s belated contention that the ASP Agreement was not a valid contract because it only had one party is of no moment in this appeal. The trial judge and the Court of Appeal both described the ASP Agreement as a contract between the Developer and the City of Burnaby: trial decision, at para. 9; appeal decision, at para. 8. Representatives of both the Developer and the City of Burnaby signed the ASP Agreement: A.R., vol. II, at p. 32. Strata Co. has not shown a palpable and overriding error, or an error in principle, which would justify overturning the finding of mixed fact and law that the ASP Agreement was indeed a contract.

[52] In any event, a pre-incorporation contract is merely one aspect of the objective circumstances which can be used to interpret the parties' post-incorporation conduct. In other words, at the time of formation of the post-incorporation contract, each party would have understood the other party's conduct in light of the knowledge that the ASP Agreement included a complex and interconnected scheme of benefits and burdens relating to the air space parcels in the Crystal. Thus, even if it were not a contract, the ASP Agreement formed part of the surrounding circumstances of formation of the post-incorporation contract, and a reasonable person would have understood that the parties were acting in a manner that implied an offer and an acceptance on terms that replicated the terms of s. 7.5 of the ASP Agreement.

[53] In conclusion, Strata Co.'s objective conduct evinces an intention to enter into a legally binding agreement on the terms set out in s. 7.5 of the ASP Agreement. The Court of Appeal appears to have concluded that the ASP Agreement itself was binding on Strata Co.: para. 66. This is not technically accurate, however, as Strata Co. is bound by a post-incorporation contract on terms which are based on those of the ASP Agreement. That minor point notwithstanding, I agree with the Court of Appeal that appellate intervention was warranted, and I find that the Court of Appeal was correct to conclude that Strata Co. had entered into a post-incorporation contract with CSPC.

[54] My colleague disagrees with this finding and argues that I should not be determining whether the parties objectively manifested an intention to be bound by a post-incorporation contract. He says that in doing so, I am reassessing the evidence and making new findings of fact: Rowe J.'s reasons, at paras. 75-76. With great respect, this is not the case, however. The trial judge explicitly found that there was significant objective conduct indicating that Strata Co. had entered into a post-incorporation contract with CSPC: trial decision, at para. 67. But in her opinion this objective conduct was overridden by the subjective intentions and later conduct of Strata Co.'s principals: trial decision, at para. 77. As the Court of Appeal found, it was an error of law for the trial judge to rely on these intentions and later conduct: para. 53. If the evidence the trial judge relied on improperly is disregarded, all that remains are the findings of fact that support the existence of a post-incorporation contract. Therefore, this Court will not be making any new findings of fact if it concludes that Strata Co. and CSPC entered into a legally binding agreement on the terms set out in s. 7.5 of the ASP Agreement.

[55] I am thus in agreement with the Court of Appeal that — subject to Strata Co.’s further arguments that have not been addressed, which will have to be remitted for determination — the payment obligations stipulated in the ASP Agreement are enforceable against Strata Co. in contract. Whether they are also enforceable on the basis of a benefit and burden exception is a different question, to which I will now turn.

E. *Is There a Narrow Principle of Benefit and Burden That Can Be Applied to Circumvent the General Rule That Positive Covenants Do Not Bind Subsequent Purchasers of Land?*

[56] CSPC asks this Court to adopt the narrow principle of benefit and burden from English law. It argues that this principle applies where the benefit and burden are conferred in or by the same transaction, the benefit and burden are related to each other in a material way, and a subsequent owner is permitted to accept or reject the benefit: *Davies v. Jones*, [2009] EWCA Civ. 1164, [2010] 2 All E.R. 755; *Wilkinson & Ors v. Kerdene Ltd.*, [2013] EWCA Civ. 44, [2013] 2 E.G.L.R. 163; see also Ziff, at p. 474. This narrow principle of benefit and burden was enunciated in *Halsall v. Brizell*, [1957] 1 Ch. 169, and subsequently endorsed by the House of Lords in *Rhone*, at p. 322. It is not to be confused with the wider and more general principle of benefit and burden enunciated in *Tito v. Waddell (No. 2)*, [1977] 1 Ch. 106, at p. 301, which the House of Lords rejected: *Rhone*, at p. 322. It is also not to be confused with a conditional grant of an easement, for which the failure to fulfill a condition triggers the termination of the easement: Ziff, at p. 476; *The Owners, Strata Plan BCS 4006 v. Jameson House*

*Ventures Ltd.*, 2019 BCCA 144, 22 B.C.L.R. (6th) 35, at para. 6; *Amberwood Investments Ltd. v. Durham Condominium Corporation No. 123* (2002), 58 O.R. (3d) 481 (C.A.), at paras. 85-86.

[57] The ultimate question, whether this Court should recognize the existence of a narrow principle of benefit and burden, must be left for another day. The conclusion that Strata Co. is bound by a post-incorporation contract with CSPC on the terms set out in s. 7.5 of the ASP Agreement is sufficient to dismiss the appeal. It is therefore unnecessary to consider the merits of this alternative means of binding a subsequent owner. Nonetheless, I offer the following brief remarks, which should be taken as no more than observations.

[58] The appellate courts in Canada that have considered this issue have declined to adopt the narrow principle of benefit and burden: *Black v. Owen*, 2017 ONCA 397, 137 O.R. (3d) 334, at para. 50; *Jameson House*, at para. 80; *Amberwood Investments Ltd.*, at para. 84. They appear to conceive of the principle as creating an interest which runs with the land. There is, however, some authority for the proposition that the English law principle does not create an interest in the land: *Elwood v. Goodman*, [2013] EWCA Civ. 1103, [2014] Ch. 442, at paras. 35-36. Rather, the English doctrine of benefit and burden may be contractually based, such that it imposes a personal obligation particular to a subsequent purchaser who has decided to accept the burden in order to enjoy the benefit: B. McFarlane, N. Hopkins and S. Nield, *Land Law* (2017), at p. 351.

## VI. Conclusion

[59] For the foregoing reasons, the appeal is dismissed with costs throughout. Therefore, the Court of Appeal's order remitting Strata Co.'s claim and CSPC's counterclaim to the trial court for determination of the unaddressed issues is upheld.

The following are the reasons delivered by

ROWE J. —

### I. Introduction

[60] I would adopt my colleague's analysis of the law in this case, but I would respectfully differ from her as to the disposition of the appeal. I would not decide whether Strata Co. had manifested an objective intent to be bound to the terms of the ASP Agreement. Rather, I would remit this question for determination by the trial court as the trial court is better placed to answer that question. Simply put, applying the law here is a fact-specific exercise and this Court does not have all the facts needed to do so.

### II. Facts

[61] As my colleague explained, Tyba Crystal Investments Corp. and Dong Ah Canada Development Corp. started a joint venture through Crystal Square Development Corporation (“Developer”) to create a mixed-use development known as the “Crystal”.

[62] In March 1999, the Developer entered an agreement with the City of Burnaby (“ASP Agreement”). The agreement purports to assign rights and liabilities among the owners of the seven “Air Space Parcels” (“ASPs”) that constitute the Crystal. At the time of the ASP Agreement, the Developer owned all seven ASPs. This agreement was registered as an easement at the Land Title Office on March 17, 1999.

[63] On May 26, 1999, the Developer deposited Strata Plan LMS 3905 at the Land Title Office, thereby creating the appellant (“Strata Co.”), a strata corporation for members residing in the second ASP (“ASP 2”). It consists of 68 strata lots in the office tower.

[64] On June 28, 2002, the Developer sold Crystal Square Parking Corp. (“CSPC”) the fifth ASP (“ASP 5”). ASP 5 consists of a parking facility. In the same transaction, the Developer made a general assignment to CSPC that transferred to CSPC “all other existing agreements . . . relating to the Property approved by [CSPC]” (“Assignment Agreement”) (A.R., vol. II, at p. 106). It also purported to transfer to CSPC “the benefit of all covenants, representations and warranties in respect of [ASP 5]”, and to give CSPC full power to demand and enforce payment for those covenants (*ibid.*). The Developer warranted that “to the best of its knowledge and belief” and

“subject to obtaining any necessary third party consents”, it had the power to make this assignment (p. 107).

[65] Among other terms, the ASP Agreement purported to set out rights and obligations between the ASP 2 Owner and the ASP 5 Owner. The ASP 5 Owner is to provide an easement to access and use 76 spots to the ASP 2 Owner, and “in consideration” for this access and use, the ASP 2 Owner is to pay the ASP 5 Owner an annual parking fee (ASP Agreement, s. 7.5(a), (b) and (d)). Although, at the time the ASP Agreement was entered on title, the Developer was the owner of both of those parcels and Strata Co. did not exist, the ASP Agreement purported to bind the successors in title of the Developer — that is to say, “run with the land” (ASP Agreement, ss. 1.1(h)-(n), 16.3, 17.3 and 18.8). Of course, the general rule is that positive covenants do not run with the land, even if by their terms they purport to do so (see Côté J.’s reasons, at para. 17).

[66] Regardless, Strata Co. paid fees and received parking for “many years” (2017 BCSC 71, 73 R.P.R. (5th) 244, at para. 93 (“trial judgment”)), at least some of which fees were paid to CSPC. Between 2010 and 2012, Strata Co. disputed some of the fees charged, and on 4 July 2012, CSPC revoked Strata Co.’s parking privileges.

[67] Eventually, this dispute led to the present proceeding wherein Strata Co. sought a declaration that it was not bound by the terms of the ASP Agreement. CSPC counterclaimed, seeking damages equal to the amount of unpaid fees.



[68] Strata Co. succeeded at trial in the British Columbia Supreme Court. The trial judge, Justice Young, considered two theories of how the ASP Agreement might bind Strata Co. — as a positive covenant that ran with the land, and as a post-incorporation contract that Strata Co. had adopted. Justice Young rejected both theories, holding that the obligations do not run with the land (para. 60), and that Strata Co. had not adopted the post-incorporation contract (paras. 77-79). She thus ordered that “[t]he payment provisions of the [ASP] Agreement . . . are not binding on [Strata Co.]”, that “Clauses 7.5(d), (e), (f), (g), (h) and (i) of the ASP Agreement are unenforceable against [Strata Co.]” and dismissed the counterclaim by CSPC and the claim against the Developer (A.R., vol. I, at p. 31). Having found that there was no obligation on this basis, she did not consider other arguments that Strata Co. had advanced.

[69] CSPC appealed to the Court of Appeal for British Columbia (2019 BCCA 145, 24 B.C.L.R. (6th) 24). It advanced two grounds: first, that the trial judge had erred by holding that a positive covenant could never run with the land, and, second, that the trial judge had erred in her application of the test for adoption of a pre-incorporation contract.

[70] The Court of Appeal allowed the appeal on the second ground, but not the first. It agreed with CSPC that the trial judge had erred by focusing on Strata Co.’s subjective understanding of their obligations. According to the Court of Appeal, the trial judge should instead have considered three requirements to find a contract: “(1)

objectively discernible essential terms; (2) consideration; and (3) outward expression of the intention of the parties to be bound by the terms as expressed” (para. 51). Applying this test, the Court of Appeal considered the third requirement to be made out because Strata Co. had taken advantage of all the terms of the ASP Agreement (paras. 60-66). It thus set aside the order of the trial judge. It then remitted the other “contractual issues” that Strata Co. had raised to the trial court, including “mutual mistake of fact, rectification, unconscionability, or frustration and, if the claim is not made out, consideration of the counterclaim and assessment of amount owing, if any” (A.R., vol. I, at p. 52).

[71] Strata Co. now appeals to this Court.

### III. The Legal Issues

[72] As my colleague describes, at para. 14 of her reasons, Strata Co. raises four issues in this appeal: first, whether a pre-incorporation contract relating to land can bind a land-owner post-incorporation; second, the analytical approach to determine whether parties agreed to a post-incorporation contract; third, whether strata corporations can enter post-incorporation contracts through conduct; and, fourth, whether the Strata Co. manifested an intention to be bound by the terms of the ASP Agreement. CSPC raises the further issue, on which it lost at the Court of Appeal (see appeal judgment, at para. 31), as to whether there is an exception to the general rule that positive covenants do not run with the land and, if so, whether it applies here.

[73] I agree with my colleague that the general prohibition against positive covenants that run with the land does not itself invalidate an otherwise valid post-incorporation contract that relates to land (Côté J.'s reasons, at paras. 17-24) and that a strata corporation can enter a post-incorporation contract through conduct (paras. 38-45). I also agree with my colleague as to the appropriate analytical framework through which to address the formation of a post-incorporation contract (paras. 32-35).

[74] Similarly, I am in full accord with my colleague in the restraint she has shown in refraining to make a change to the common law to adopt what she calls the narrow principle of benefit and burden (paras. 56-58). This Court properly considers a number of factors before making an incremental change to the common law where it is not necessary to do so in order to decide the case before it. This Court considers whether the issue was properly raised on the facts, whether it was argued fully here or in the courts below, whether the Court understands the issue fully, and whether there is an urgent need for guidance. As this Court explained in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, the Court “may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make” (p. 760). The legislature, not the courts, has the major responsibility for law reform in our system of government (pp. 760-61). Here, these factors point away from making such a change to the common law, and so it is prudent for the Court to await a more appropriate case before contemplating such a change.

#### IV. Application

[75] Where I respectfully differ from my colleague is in the application of the law to the facts. She would find “that Strata Co. did in fact manifest an intention, by way of objective conduct, to be bound by a post-incorporation contract with CSPC after CSPC purchased the parking facility from the Developer” (para. 49). I would not make such a finding. Rather I would remit this question of fact, along with the other questions the Court of Appeal remitted, to the trial court.

[76] The finding of fact that my colleague would make differs from that made by the trial judge. In addition, and with respect for my colleague’s contrary view, I do not see the Court of Appeal as having made this finding either. Following *Heinhuis v. Blacksheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239, the Court of Appeal treated taking the benefit of the agreement as a *per se* manifestation of the intention of the party to be bound by the terms as expressed. My colleague, however, appears to frame things slightly differently than did *Heinhuis* in that she favours a more traditional assessment of offer and acceptance (para. 36). While this may seem a subtle difference, it seems to me to be one that is meaningful. By reframing the legal test, the application of the law to the facts necessarily gives rise to a different question of mixed fact and law than that decided by the Court of Appeal.

[77] Appellate courts should make findings of fact not made by courts below only when doing so is in the interests of justice and is feasible on a practical level (*Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33; *Madsen Estate v. Saylor*, 2007 SCC 18, [2007] 1 S.C.R. 838, at paras. 23-24; *Matchim v. Bgi Atlantic*

*Inc.*, 2010 NLCA 9, 294 Nfld. & P.E.I.R. 46, at paras. 94-99). This involves weighing two factors: first, the possible savings to the parties in cost and time arising from the appellate court deciding such factual issues; and, second, the possible harm from an appellate court making such findings in the absence of adequate evidence (*Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 103; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, at paras. 94, 172 and 174). In this case, both factors run counter to this Court making findings of fact; rather, they favour appellate restraint.

[78] First, I question whether there is any efficiency in the use of judicial or counsel resources to be gained by this Court making the factual determinations that my colleague would make. This Court cannot finally dispose of the action, as even if it dismisses the appeal, the case must be remitted to the trial court for determination of mutual mistake of fact, rectification, unconscionability or frustration; and, if the claim is not made out, for determination of the counterclaim and assessment of damages. In addition, at that trial the judge may well need to consider the circumstances of contract formation in detail.

[79] Second, there is possible harm from this Court making the factual findings that are proposed. In contrast to various cases where this Court has made its own findings of fact (e.g., *Masterpiece*, at paras. 103-12; *Sharbern Holding*, at para. 175; *Madsen Estate*, at paras. 24-31) the record before this Court is limited: in addition to the findings of fact made by the trial judge and those by the Court of Appeal, this Court

has before it only the pleadings, the ASP Agreement, the Assignment Agreement, and the transfer of title from the Developer to CSPC. No transcript was provided on appeal, despite the substantial *vive voce* evidence heard by the trial judge (see trial judgment, at paras. 18-34). In this case, evidence this Court does not have access to could plausibly lead the trial judge to a different conclusion on whether and, if so, when the Strata Co. objectively manifested an intention to be bound. Moreover, as this Court explained in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the “trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact” (para. 25 (emphasis in original)). The trial judge can assess the credibility of witnesses, is relatively expert with respect to the weighing and assessing of evidence, and has had greater exposure to the entire factual nexus of the case (*ibid.*).

[80] In the following sections, I will first reiterate the legal framework, then set out the alternate inferences that would be available to the trial judge, were this Court to remit rather than decide these factual matters.

#### A. *The Legal Framework*

[81] As my colleague explains, there is no principled reason to exempt post-incorporation contracts from generally applicable contract law principles (para. 32). An “outward manifestation of assent by each party such as to induce a reasonable expectation in the other” is required (para. 33). Framed as offer and acceptance, the test is whether a reasonable person in the position of the offeree would interpret the other’s conduct as an offer, and whether a reasonable person in the position of the offeror

would interpret the other's conduct as acceptance. The existence of a pre-incorporation contract is part of the circumstances in which the parties' conduct is objectively interpreted (para. 33). My colleague's statement of the law in this regard is sound.

[82] Conduct consistent with the contract can be persuasive evidence that an offer has been accepted. A reasonable person in the position of the offeror would tend to understand from the conduct that the offeree has accepted the offer.

[83] Such conduct is not, however, *dispositive* evidence of the acceptance of the offer. In some circumstances, an alternate inference may provide an objectively better explanation for the conduct than acceptance of the offer. The paradigmatic example is that if the offeror declares that silence shall constitute acceptance, the silence of the offeree is often *not* best explained by acceptance (see J. Adamski and A. Swan, "*Halsbury's Laws of Canada — Contracts*" (2017 Reissue), at HCO-19 and HCO-20; S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at §93; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 54-55).

[84] Here, it is plausible that the trial court, with the benefit of a more complete record, would not see the conduct by Strata Co. as objectively manifesting an intention to accept the contract. I can contemplate three competing inferences that the trial court *might* prefer, as described below. Accordingly, I would remit these factual matters to the trial court.

B. *Potential Inference One: Strata Co. Was Performing a Pre-Existing Obligation*

[85] The first potential inference the trial court could make is that, in paying CSPC, Strata Co. was performing a pre-existing obligation rather than assenting to a new obligation. There is an absence of evidence on this point (Côté J.'s reasons, at para. 48), but that is not evidence of the absence of such a pre-existing contract. Rather, it would lead me to remit this question to the trial court, before whom there may be evidence leading to the finding that Strata Co. was bound to a pre-existing obligation.

[86] Specifically, evidence before the trial court may show that Strata Co. paid the parking fee to the Developer and so formed a contract with the Developer. As my colleague notes, on the record before us this remains an open possibility (para. 48). The evidence before the trial court may also show that the CSPC was assigned the Developer's interest in this contract with Strata Co. As my colleague indicates, this is not clear on the record before us either (*ibid.*).

[87] If Strata Co. formed a contract with the Developer, then Strata Co.'s payment to CSPC may be entirely explained by the assignment of the Developer's interest. It would not be objectively reasonable in such circumstances for CSPC to see Strata Co.'s conduct as acceptance of a new contract with CSPC; rather, the objectively reasonable inference would be that Strata Co.'s conduct was performance of an existing contractual obligation, which the Developer assigned to CSPC the right to enforce.

[88] With respect, I see this as an inconsistency in my colleague's reasons. Having (rightly) said that this Court cannot determine whether there is a pre-existing obligation because of the paucity of the factual record, my colleague proceeds to find



that a contract was formed with CSPC. In making the finding that a contract was formed with CSPC, my colleague forecloses the possibility of finding the contract was made first with the Developer and then assigned to CSPC.

[89] This is not merely an academic dispute: when the contract was formed matters for issues that are being remitted to the trial court. By declaring when, and with whom, Strata Co. manifested the intent to be bound, my colleague may be prejudging some issues that she would remit to the trial court.

[90] For example, as this Court recently affirmed in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, one of the two elements of the unconscionability analysis is an inequality of bargaining power ( para. 62). This element focuses on whether a party can adequately protect their interests in the contracting process (para. 66). There may be differences that have significance in the unconscionability analysis between the circumstances of Strata Co. forming a contract with the Developer and Strata Co. forming a contract with CSPC.

[91] The rectification analysis similarly depends on when the contract is made. Strata Co. sought rectification as an alternative remedy to the declaration that the ASP Agreement was unenforceable against them. Specifically, it sought to rectify a term of the ASP Agreement that set out the amount the ASP 2 Owner must pay the ASP 5 Owner (A.R., vol. II, at pp. 9 and 15). As this Court explained in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, rectification is available when an instrument “inaccurately records a party’s agreement respecting

what was to be done” (para. 3). Assuming Strata Co. originally formed a contract with the Developer, then the rectification analysis may differ if Strata Co. adopted the contract early in its existence, when the Developer would have had full control of the strata corporation (see *Strata Property Act*, S.B.C. 1998, c. 43, at ss. 2, 4, 5 and 7 to 11), as opposed to after the Developer had sold Strata Co. to individual unit holders. The rectification analysis would focus on whether the ASP Agreement accurately reflected the agreement between Strata Co. and the Developer, so who controlled Strata Co. at the time of contract formation matters. By contrast, if Strata Co. formed the contract with CSPC directly, the rectification analysis would have to focus on whether the parties could be said to have *any* agreement separate from the terms of the ASP Agreement.

[92] Given that unconscionability and rectification are two of the issues being remitted to the trial court, and given that both of these doctrines turn on the circumstances at the moment of contract, it is not appropriate to gloss over when Strata Co. first entered into a contract and who that contract was with.

C. *Potential Inference Two: Strata Co. Was Performing What it Thought to Be a Pre-Existing Obligation*

[93] The second potential inference is that Strata Co. was performing what it (mistakenly) thought to be a pre-existing obligation. If the evidence disclosed that CSPC had reason to know of Strata Co.’s belief that it was performing a pre-existing

obligation, one could legitimately ask whether it would be unreasonable for CSPC to take Strata Co.'s payment as an indication of acceptance of a new obligation.

[94] The trial judge found Strata Co. believed it was already bound by the ASP Agreement as a positive covenant that ran with the land (paras. 76-77). Although legally incorrect, this misapprehension by Strata Co. is understandable given the terms of the ASP Agreement that purport to bind successors in title.

[95] As my colleague explained, it was an error by the trial judge to solely consider Strata Co.'s subjective understanding that it was already bound. Although it is intuitively appealing to say that one cannot be tricked into a contract, this is not the legal test. The trial judge should also have considered whether Strata Co.'s counterparty had reason to know of Strata Co.'s misapprehension. One party cannot be "tricked" or misled into accepting a contract if the other party has reason to know of the trickery or the misunderstanding. In those circumstances, it would not be objectively reasonable for the other party to see conduct consistent with this misunderstanding as acceptance.

[96] Applied here, the question that arises is whether CSPC had reason to believe that Strata Co. laboured under a misapprehension that provided another explanation for its conduct. There is no evidence in the appeal record regarding communication that took place between CSPC and Strata Co. after the Assignment Agreement was executed. However, CSPC was aware of the terms of the ASP Agreement, including the terms that purported to cause the ASP Agreement to run with the land.

[97] Depending on the circumstances at the time of contract formation and what the parties communicated to each other, the trial court may find that acceptance of a new contract with CSPC is not the most reasonable explanation for Strata Co.'s objective, outward behaviour.

D. *Potential Inference Three: Strata Co. Was Exercising an Option Under a Conditional Easement*

[98] A third potential inference the trial court may make is that the ASP Agreement formed a conditional easement, and Strata Co.'s payment was the exercise of an option under the conditional easement.

[99] By "conditional easement", I refer to an easement, the benefit of which the dominant tenement can obtain only if it performs a positive action. Justice Charron adverted to this possibility in *Amberwood Investments Limited v. Durham Condominium Corporation No. 123* (2002), 58 O.R. (3d) 481 (C.A.), when she explained that "if a grant of benefit or easement is framed as conditional upon the continuing performance of a positive obligation, the positive obligation may well be enforceable, not because it would run with the land, but because the condition would serve to limit the scope of the grant itself" (para. 86). If this positive action is not performed, the only remedy for the servient tenement is to refuse to grant the benefit of the easement (*The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2019 BCCA 144, 22 B.C.L.R. (6th) 35, at paras. 86, 87 and 95, citing B. Ziff, "Restrictive Covenants: The Basic Ingredients", in *The Law Society of Upper Canada*,

ed., *Special Lectures 2002 - Real Property Law: Conquering the Complexities* (2003), at pp. 320-23.

[100] This can be contrasted with the English rule known as the “conditional grant exception”, which CSPC urged us to adopt (R.F., at paras. 82-135). Under this rule, the servient tenement may seek a remedy of performance of the positive action (or damages for failing to do so), rather than simply withholding the benefit of the easement.

[101] It would not be appropriate to decide whether the ASP Agreement can be construed as creating a conditional easement at this time. This issue has not been argued before us, and the construction of an easement is a question of mixed fact and law that ought to be considered in its entire factual matrix (*Robb v. Walker*, 2015 BCCA 117, 69 B.C.L.R. (5th) 249, at paras. 30-31; *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2017 BCCA 374, 3 B.C.L.R. (6th) 59, at paras. 27-29; see also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50).

[102] I do not wish to foreclose the possibility that the trial court would find there is a conditional easement, based on ss. 3(al) and (am) of Part I of the ASP Agreement (transferring an easement from the ASP 5 Owner to the ASP 2 Owner), and 7.5(a) and (b) (providing this easement is limited by “terms, conditions and limitations”), 7.5(f) (providing for the suspension of the easement in the event of non-payment), 7.8 (providing who has the benefit and burden of easements) of Part II of the ASP Agreement. If the judge were to find such a conditional easement, then it would seem

to follow that Strata Co. would be free to choose to either pay for the right to park or not to use the parking.

[103] If the trial court were to accept this construction, then the trial court might find that Strata Co.'s payment to CSPC is objectively best understood as Strata Co. exercising an option under the conditional easement, rather than as Strata Co. having accepted a new contract with CPSC.

[104] Making such a finding, of course, would not foreclose the possibility of Strata Co. also forming a covenant with CSPC by other conduct. Conduct that is consistent with Strata Co. forming a covenant with CSPC and that is not consistent with Strata Co. invoking a power under the conditional easement would be persuasive.

## V. Conclusion

[105] In the circumstances, it would be better for this Court not to decide whether Strata Co. made an objective manifestation of assent to CSPC. Rather, I see the better course of action to be simply to set out the law that the trial court will apply to the facts. There is no compelling reason for this Court to decide the factual questions. To the contrary, there is good reason for this Court to exercise restraint by remitting such questions to the trial court.

[106] I would, therefore, respectfully dissent in part as to the order to be granted.

*Appeal dismissed with costs throughout, ROWE J. dissenting in part.*

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