

Citation: Adibfar and Alipour v. Kaulius
2005 BCPC 0461

Date: 20051018
File No: RMD-P-C-20318184
Registry: Richmond

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

FAHIMEH ADIBFAR and ANOUSHIRAVAN ALIPOUR

CLAIMANTS

AND:

PATRICIA KAULIUS and MARK KAULIUS

DEFENDANTS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE T. GOVE**

Appearing on their own behalf:

F. Adibfar and A. Alipour

Counsel for the Defendants:

A. Holmes

Place of Hearing:

Richmond, B.C.

Date of Hearing:

October 14, 2005

Date of Judgment:

October 18, 2005

Introduction

[1] The Claimants purchased a strata titled apartment at "Dolphin Place" from the Defendants that included two parking stalls or spaces. Several years later the Claimants were informed that they only had entitlement to one parking stall. The Claimants sue the Defendants for the cost of renting a second parking stall and for the reduced value of their property.

Facts

[2] The June 12, 1992, by-laws of "Dolphin Place" provided:

Vehicles and Parking:

3.1 An Owner/Tenant shall use the parking space(s) which has (have) been specifically assigned to his/her Strata Lot, save and except for private arrangements with other Owners for the use of parking spaces assigned to such other Owners.

[3] On July 1, 1992, the Defendants purchased the apartment with one parking spot allocated to their suite. In October 1993, at their request, the resident manager assigned a second parking stall to them. They did not pay for this. They continued to use both parking stall until they sold the apartment. In July 2000, the Defendants listed their apartment for sale. The real estate listing said that there were "2 parking stalls included w/suite", clearly indicating that the apartment came with two parking stalls. On July 31, 2000, the Claimants and Defendants entered into a contract of purchase and sale which incorporated a property disclosure statement. The property disclosure statement says that there are two parking stalls included and that they are "limited common property". When the Claimants went to view the property with their realtor, the Defendants' realtor and one of the Defendants showed the Claimants the two parking stalls that went with the suite. The Claimants completed the sale and moved into the apartment on September 30, 2002. They used the two parking stalls.

[4] On May 23, 2002, the Dolphin Place by-laws were amended:

(25) Parking:

(a) Only vehicles with current registration and public liability and property damage insurance of \$1,000,000.00 shall be allowed in the parking areas, except with special written permission of the Strata Council. Parking of vehicles other than those owned or used by a resident or their guests is prohibited.

(b) Assignment of parking spaces will be made only by the Strata Corporation and only vehicles of the type described in 26(a) above will be allowed the use thereof. The indoor extra parking fee shall be determined by Council and be paid monthly along with or including the monthly strata fee.

[5] On March 17, 2003, the property manager of Dolphin Place wrote a letter to the Claimants regarding their parking stalls. The letter says in part:

The parking garage is designated as common property and one parking stall was assigned for the exclusive use of each strata lot when Dolphin Place was converted from a rental building to a Strata Corporation. A number of additional parking spaces were provided for visitor parking and supplementary parking. None of the strata lots were entitled to use any more than the one assigned parking stall.

Supplementary parking stalls are available for rent at a cost of \$20.00 per month on a first come, first serve basis.

[6] In order to be able to use the second parking stall, the Claimants paid to the management company \$20.00 each month.

[7] The Claimants seek damages for the cost of having to pay \$20.00 each month for a second parking stall and for the difference in value of their apartment having one, rather than two, parking stall. Their realtor testified that this apartment would likely be worth \$10,000 more if sold with two parking stalls rather instead of one.

[8] **The Strata Property Act** (SBC 1998) Chapter 43 reads:

“**limited common property**” means common property designated for the exclusive use of the owners of one or more strata lots;

**Division 2 – Limited Common Property and Exclusive
Use of Common Property**

Designation of limited common property

73 Common property may be designated as limited common property

- (a) by the owner developer
 - (i) by a designation on the strata plan when it is deposited in the land title office, or
 - (ii) by a plan amendment under section 258,
- (b) by an amendment to the strata plan under section 257, or
- (c) by a resolution passed at an annual or special general meeting under section 74.

Designation of limited common property by ¾ vote

74 (1) Common property may be designated as limited common property by a resolution passed by a ¾ vote at an annual or special general meeting.

(2) A resolution passed under subsection (1) must be filed in the land titled office with a sketch plan that

- (a) satisfies the registrar,
- (b) defines the areas of limited common property, and
- (c) specifies each strata lot whose owners are entitled to the exclusive use of the limited common property.

(3) A resolution passed under subsection (1) does not have effect until it is filed in the land title office.

(4) The designation of limited common property by a resolution under this section does not require an amendment to the strata plan.

Removal of designation of limited common property

75 (1) If a designation of common property as limited common property was made

- (a) by the owner developer at the time the strata plan was deposited or by a plan

amendment by the owner developer under section 258, or

(b) by an amendment to the strata plan under section 257,

the designation may only be removed by amending the plan under section 257.

(2) If a designation of common property as limited common property was made by a resolution passed by a $\frac{3}{4}$ vote under section 74, it may only be removed by a resolution passed by a $\frac{3}{4}$ vote at an annual or special general meeting.

(3) A resolution passed under subsection (2) does not have effect until it is filed in the land title office.

(4) The removal of a designation of limited common property by a resolution under subsection (2) does not require an amendment to the strata plan.

[9] No evidence has been led at this trial as to what, if anything, was filed in the Land Titles Office with respect to limited common property.

Position of the Parties

[10] The Claimants position is quite simple. They purchased an apartment with two parking stalls described as "limited common property". They understood this to mean that the parking stalls came with their suite and they were entitled to use the parking stalls as long as they owned the suite. If they rent the suite, the tenant gets to use two parking stalls. If they sell the suite they would sell the entitlement to two parking stalls along with it. Through representation by the Defendants which the Claimants accept was innocent, they only actually received entitlement to one parking stall and therefore they did not get what they bargained for.

[11] The Defendants position is that they at no time owned either parking stall but rather all parking stalls are part of the limited common property of the strata corporation. Each apartment is assigned one stall to park in, the second parking spot was "given" to them for their use without cost. The Strata Council changed the by-laws and the Council decided to assess parking fees. The Defendants say that the Strata Council could have decided to assess parking fees for both of the parking stalls. The changes to the by-laws and the decision by the Strata Council to charge fees for the second parking stall, occurred after the sale to the Claimants was completed and over which the Defendants had no control. The Defendants say the Claimants are in no worse position, they can still have a second parking stall but they have to pay for it. For this the Defendants say that are not liable.

Discussion

[12] Although no Land Title Office documents have been filed in this trial, there is an assumption by both parties that the Defendants believed the two parking stalls were limited common property whereas in fact only one was. If the second parking stall was limited common property, its status could not have been changed by the Strata Council but, pursuant to the **Strata Property Act**, only by a $\frac{3}{4}$ vote of the owners which resolution would then be filed in the Land Title Office. Therefore the sale by the Defendants of the second stall as limited common property amounts to a misrepresentation as they were not able to do so. The Defendants ought to have exercised more care in ascertaining their status with respect to the second parking stall before purporting to sell it as "limited common property" to which they had an entitlement.

[13] That it took until March 2003 for the Claimants to learn that they did not have the second stall as limited common property does not mean that the Defendants are not liable for what they purported to sell.

[14] I am satisfied that the contract for purchase and sale included two parking stalls whereas only one was able to be delivered. Accordingly, the Claimants are successful in their action. The Defendants are liable to the Claimants for the failure to provide the second stall.

Damages

[15] The only evidence before me is that it costs \$20.00 per month to secure a second parking stall. This, of course, may change depending on the vote of the Strata Council. The other evidence is that the value of the property, including parking stalls would be increased by \$10,000 if sold on today's market. I told the parties and counsel that after I had determined the issue of liability, I would leave it for them to resolve the quantum of damages and if they were not able to do so, they should notify the Judicial Case Manager I would reconvene to hear any further evidence and submissions.

[16] In addition to the damages to be determined, the Claimants are also entitled to their costs of filing fees and incidentals related to this action.

T. Gove, P.C.J.