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Case Name:

**❶ Aviawest Resort Club v. Strata Plan LMS1863**

Between

Aviawest Resort Club, Aviawest Resort Inc.,  
Dorothy Clarkstone, Andrew Shanley Pearson and  
Susan Lee Pearson, respondents (plaintiffs), and  
Chevalier Tower Property Inc., Rosedale on Robson  
Suite Hotel Inc., C.P. Man, Larry Man, Louis Man,  
John Logan and Eric Fung, appellants (defendants),  
and  
The Owners Strata Plan LMS1863, respondent  
(defendant)

[2005] B.C.J. No. 1057

2005 BCCA 267

Vancouver Registry No. CA032059

**British Columbia Court of Appeal  
Vancouver, British Columbia  
Newbury, Mackenzie and Smith J.J.A.**

Heard: April 27 - 28, 2005.

Judgment: May 12, 2005.

(37 paras.)

*Civil procedure — Appeal — Appeal by the defendants from the decision of a motions judge allowed.*

*Real property law — Condominiums — Condominium corporation — Status.*

*Real property law — Condominiums — Unit holders — Voting rights.*

*Statutory interpretation — Statutes — Construction — Legislative intent.*

Appeal by the defendants, Chevalier Tower Property, Rosedale on Robson Suite Hotel, elected members of the strata council and others, against the defendants, owners of Strata Plan LMS1863, and plaintiffs, Aviawest Resort and others, from certain provisions of an order appointing an administrator under s. 174 of the Strata Property Act. Chevalier controlled, through ownership of strata lots, more than 50 per cent of the votes at meetings of the strata corporation. As a result of disputes that arose with other owners and the plaintiffs (the Aviawest group), the Aviawest group commenced the underlying action for relief from Chevalier's control of the strata corporation allegedly for the benefit of some owners to the detriment of others. The chambers judge appointed an administrator under s. 174 of the Strata

Property Act to exercise the powers and duties of the strata corporation. The order included the impugned provisions that the administrator would exercise the powers to the exclusion of the members of the strata corporation, and that the administrator would have the power to impose a special levy, approve a special budget and pass any other resolution normally requiring a majority of 75 per cent.

**HELD:** Appeal allowed. The impugned provisions in the order were set aside. Section 174 of the Act did not confer authority on the court to make the orders. An administrator did not have the power to act without a resolution passed by the members of the corporation in situations where the strata corporation itself could not act without such a resolution. The change in language from the previous Condominium Act did not manifest an intention to change the law but was stylistic. The owners and the strata corporation were separate entities in law and the owners' rights as members of the corporation were separate from their rights as individual owners, which included the right to vote at meetings of the strata corporation. The motions judge did not purport to make an order relieving the strata corporation of its powers or duties. In any event, the passage of a resolution by members of the strata corporation at a general or special meeting was not a power or duty of the corporation. It was an individual right and nothing in s. 174(3)(d) would support an order abrogating that right. An administrator appointed under s. 174 could do no more than a strata corporation could do. If the strata corporation could not act without a resolution, the administrator was equally restrained.

**Statutes, Regulations and Rules Cited:**

Condominium Act, s. 71

Strata Property Act, S.B.C. 1998, c. 43 , ss. 1, 2(1), 2(2), 4, 26, 27(1), 53(1), 78(1), 164, 165, 174, 174(3)(c), 174(3)(d)

**Counsel:**

P.A. Williams and A.L. Baker: Counsel for the Appellants Chevalier Tower Property Inc., C.P. Man, Larry Man, Louis Man and Eric Fung

B.A. Thompson: Counsel for the Appellants Rosedale on Robson Suite Hotel Inc. and John Logan

P.C.P. Behie and S.G. McPhee: Counsel for the Respondents/Plaintiffs

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The judgment of the Court was delivered by

¶ 1 **SMITH J.A.**:— We allowed this appeal with reasons to follow. These are my reasons.

¶ 2 The appeal raises the question whether an administrator appointed under s. 174 of the Strata Property Act, S.B.C. 1998, c. 43 to perform the functions of a strata corporation has the power to act without a resolution passed by the members of the corporation in situations where the corporation could not act without such a resolution.

¶ 3 The question arises out of a dispute amongst the owners of strata lots in a condominium complex known as "The Rosedale on Robson", which is operated in part as a hotel. The relevant facts, as they existed at the time of the order under appeal, are these.

¶ 4 The appellant Chevalier Tower Property Inc. is the "owner developer" of the building, which contains 276 suite strata lots, 13 commercial strata lots, and a parking strata lot. It controls, through ownership of strata lots, more than 50% of the votes at meetings of the strata corporation. The appellant Rosedale on Robson Suite Hotel Inc. is the manager of the hotel operation. The personal appellants are the elected members of the strata council. The appellants C.P. Man, Larry Man, and Louis Man are also directors of both the owner developer and the management company. The appellant Logan is an employee of the management company.

¶ 5 The respondents other than the strata corporation, to whom I will refer as "the Aviawest group", control, through ownership of strata lots, approximately 6% of the votes at meetings of the strata corporation. The balance of the votes - more than 40% - belong to owners of strata lots who are not parties to these proceedings.

¶ 6 Purchasers of strata lots from the owner developer were given the option of having their strata lots placed in a rental pool and managed by the management company. Virtually all purchasers exercised that option and the hotel opened for business in April 1995. The Aviawest group, which had acquired 16 strata lots at the material time, operates a time-share-use business. Initially, the members of this group left their units in the rental pool under the control of the management company. However, in January 2004, they withdrew their suites from the rental pool after their request to have their suites managed on a different basis than the others was refused.

¶ 7 Subsequently, disputes arose between the two groups over use of the common property, including the registration desk and concierge services in the lobby, the exercise room and recreation lounge, and the housekeeping rooms on each floor. As well, the allocation of revenues and expenses relating to telephones and coin-operated washers, dryers, and vending machines situated on common property became a matter of contention.

¶ 8 As a result, the Aviawest group alleged that the appellants were controlling the strata corporation for the benefit of the owners in the rental pool and to the detriment of other owners. On 5 March 2004, the Aviawest group commenced the underlying action claiming declaratory and injunctive relief, an accounting of income and expenditures, and ancillary relief. As well, they sought the appointment of an administrator pursuant to s. 174 of the Act:

- 174 (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.
- (2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.
- (3) The court may
- (a) appoint the administrator for an indefinite or set period,
  - (b) set the administrator's remuneration,
  - (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and

- (d) relieve the strata corporation of some or all of its powers and duties.
- (4) The remuneration and expenses of the administrator must be paid by the strata corporation.
  - (5) The administrator may delegate a power.
  - (6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.

¶ 9 On 9 June 2004, on application of the Aviawest group, Mr. Justice Lander appointed an administrator for a term of one year with liberty to apply for a renewal of the appointment. The formal order contains the following two orders to which the appellants object:

1. An Administrator be appointed to exercise the powers and perform the duties of the Strata Council for The Owners, Strata Plan LMS 1863, (the "Rosedale Strata Corporation") pursuant to s. 174 of the Strata Property Act, S.B.C. 1998, Chapter 43 (the "Act"), with the powers contained in section 174 of the Act, such powers and duties to be held at the exclusion of the members of the Rosedale Strata Corporation.

\* \* \*

9. Pursuant to s. 174(3)(c) of the Act, the Administrator shall have the power to impose a special levy, to approve a special budget and to pass any other resolution normally requiring a majority or 75%, if such resolution is in the best interest of the Rosedale Strata Corporation. ...

¶ 10 The appellants appealed, with leave, seeking an order setting aside the provision "such powers and duties to be held at the exclusion of the members of the Rosedale Strata Corporation" in paragraph 1 and the whole of paragraph 9. They submitted that the chambers judge had no authority under s. 174 of the Act to make these orders. Alternatively, they submitted that, if the chambers judge had authority to make the orders, he erred in doing so in all of the circumstances. It should be noted that they do not challenge the appointment of the administrator.

¶ 11 Since we have concluded that s. 174 does not confer authority on the court to make the impugned orders and have allowed the appeal on that basis, it is not necessary to consider the second ground of appeal. As a result, I would dismiss the Aviawest group's application to adduce fresh evidence on the basis that the proposed fresh evidence relates only to that ground.

¶ 12 Although he made no specific findings of fact, the chambers judge appears to have based his order on a conclusion that the hotel was being managed in a manner that was unfair to the Aviawest group. He said,

[29] It is apparent that the strata council is non-existent and that the strata pool is in control of the day-to-day operations under the direction of Mr. Pang and unless an independent party is placed in control of this operation, the unfairness that exists will

continue.

¶ 13 After ordering the appointment of the administrator, the chambers judge heard submissions on the terms of the formal order, a draft of which was presented by counsel for the Aviawest group. Counsel for the appellants objected that the appointment should not abrogate the rights of the owners of strata lots. His objection and the response of the chambers judge were as follows:

MR. THOMPSON: I would urge you, My Lord, not to take away the rights of the owners at this time.

THE COURT: . . . No, I have made up my mind on that. I am satisfied from the material that those owners have been acting adversely to the interests of the other people, and this administrator is going to operate the building fairly to all people. Rental pool and everything else.

¶ 14 Thus, the impugned decrees were included in the formal order.

¶ 15 Before us, the appellants submitted that the court is not empowered by s. 174 of the Act to clothe an administrator with power to act without a resolution of the owners in situations where the strata corporation could not act except on the authority of a resolution passed at a general or special meeting. They relied primarily on the decision of Huddart J. (as she then was) in *Cook v. Strata Plan N-50 (1995)*, 16 B.C.L.R. (3d) 131, [1995] B.C.J. No. 2606 (S.C.), which was decided under s. 71 of the Condominium Act, R.S.B.C. 1979, c. 61:

71. (1) The strata corporation or any person having an interest in a strata lot may apply to the court for appointment of an administrator.

(2) The court may, for cause, appoint an administrator for an indefinite or fixed period on terms for remuneration or otherwise as it thinks proper.

(3) The remuneration and expenses of the administrator shall be an administrative expense within the meaning of this Act.

(4) The administrator shall, to the exclusion of the strata corporation, have the powers and duties of the strata corporation or such of them as the court orders.

(5) The administrator may delegate a power vested in him.

(6) The court may, on the application of the administrator or person referred to in subsection (1), remove or replace the administrator.

¶ 16 That case arose out of a lengthy and intractable dispute between the developer of a resort condominium and its manager, on the one hand, and a group of dissident owners, on the other. The parties had resorted to the court on several previous occasions and an administrator had been appointed. The particular question posed, on the application of the administrator, was whether, pursuant to s. 71(4), the court could "remove the shackles" of the statutory requirements for special resolutions (requiring 75% in favour) to approve the budget, terminate the management contract, and alter the bylaws.

¶ 17 Madam Justice Huddart began by noting the internal variation in statutory language relating to resolutions. One section of the Condominium Act required "a special resolution of the strata corporation"; another provided for an act to be done "by special resolution of the corporation"; others permitted the strata corporation to act "by special resolution"; another authorized the strata corporation to "resolve, by special resolution"; another provided that "the owners, by special resolution, may direct the strata corporation" to do certain things; and one provided that "the bylaws shall not be amended unless a strata council has been elected under the bylaws and the changes have been approved by special resolution". She found no significance in the grammatical differences and concluded that all of the provisions required the strata corporation to obtain the approval of 3/4 of the owners before acting. This result flowed necessarily, in her view, from the definitions of "strata corporation" - "the owners of the strata lots . . . shall . . . constitute and be members of" the strata corporation - and "special resolution" - "a resolution passed at a properly convened meeting of the strata corporation . . . by not less than 3/4 of the votes of all persons entitled to vote thereon . . . present in person or by proxy". Thus, she reasoned that, although the statute constituted the owners of strata lots a body corporate, they continued to have individual rights, including the right to vote on resolutions at meetings of the corporation. She observed that the owners' rights as members of the corporation were distinct from their rights as individual owners of strata lots. Accordingly, she concluded that s. 71(4) did not empower the court to authorize the administrator to do any act requiring a special resolution without such a resolution.

¶ 18 She found support for her analysis in the bylaws of the strata corporation, which provided that the powers and duties of the strata corporation were to be exercised and performed by the strata council and that the owners could control the strata council by ordinary resolution and could control the strata corporation only by special resolution. She continued,

[14] This reasoning leads me to conclude that this court can confer all of the powers and duties of the strata corporation on an administrator, but that an administrator appointed under section 71 will require the approval of a majority of the votes at a general meeting for the approval of a budget and 3/4 of the votes to amend the bylaws, or to do any other act where a special resolution is required by the Act. The administrator will require that approval because the strata corporation would require it.

¶ 19 Madam Justice Huddart also contrasted s. 71, which she saw as directed at "the inability to manage", with ss. 42 and 43, which empowered the court, on a finding of oppressive or prejudicial behaviour, to make any appropriate interim or final order, including an order to "direct or prohibit an act of council or vary a transaction or resolution" and to "regulate the conduct of the corporation's future affairs". In her view, such conduct requires more control than does a mere inability to manage. She noted, in a passage that resonates on this appeal, that the petitioners had alleged oppressive and prejudicial conduct but that it had not yet been proven.

¶ 20 The Condominium Act was repealed and replaced by the Strata Property Act in 1998. In *Toth v. The Owners, Strata Plan LMS1564* (19 August 2003), Vancouver #L022502 (B.C.S.C.), Pitfield J. held that the reasoning in *Cook v. Strata Plan N-50* is applicable under s. 174 of the current Act. In *Toth*, the owners were unable to agree on a plan for remediation of damage caused by water leaks. Mr. Toth, an owner, applied for the appointment of an administrator under s. 174 and asked that the court confer upon the administrator the power to select and implement a particular plan of maintenance and repair and to impose a special levy on the owners to pay for the project. The strata corporation and another owner opposed the application, arguing that s. 174 does not empower the court to permit an administrator to override the provision, contained in s. 108 of the Act, that a 3/4 resolution of the owners is required for a special levy. Pitfield J. quoted and adopted the passage of the reasons of Madam Justice Huddart in *Cook* that I have set out above. He continued,

[12] The base principle in Cook is that under the Condominium Act the requirement of a 3/4 majority vote in support of certain actions by the strata council, as represented by the administrator, could not be abrogated or abridged.

[13] There is nothing in s. 174 of the Strata Property Act which persuades me that any different conclusion should be reached than that reached by Madam Justice Huddart in the Cook case.

[14] The result is that I construe s. 174 to provide no means whatsoever by which the court is empowered to permit the administrator, appointed for whatever purpose, to act in contravention of the wishes of the owners where a 3/4 majority is required.

[15] The submission made by counsel on behalf of the petitioner is that I should be persuaded to a different view because of paragraph (d) of s. 174(3) which specifically permits the court to relieve the strata corporation of some or all of its powers and duties.

[16] In my opinion, the duties and powers of the strata corporation are independent of the rights and powers of the owners. The court has the capacity to excuse an administrator, if appointed, from the performance of some or all of the duties and powers under the Strata Property Act. The wording is not directed to, nor does it permit, the abrogation of the owners' rights conferred by s. 108 of the Strata Property Act.

¶ 21 In response, counsel for the Aviawest group contended before us that the reasoning in Cook is inapplicable because of differences in the statutory language as between the Condominium Act and the current Act and that, since Pitfield J. did not take those differences into account, he decided the Toth case incorrectly.

¶ 22 As I understand the submission, it is that the language of the current Act eliminates the distinction between the owners and the strata corporation identified by Madam Justice Huddart in the Cook case - now, the powers of the owners and those of the strata corporation are unified and the conferral of the powers of the strata corporation on the administrator carries with it not only the power to act but also the power to resolve to act, on a majority or 3/4 basis, without resort to a formal vote of the members.

¶ 23 The notion that an administrator, a singular official, can pass an ordinary or special resolution is a difficult one to comprehend. Such difficulties suffuse the submission of the Aviawest group.

¶ 24 According to their argument, the strata corporation's powers and duties are exercised in two ways under the current Act. The "general rule" is that the strata council exercises the powers and duties of the strata corporation, viz.,

4 The powers and duties of the strata corporation must be exercised and performed by a council, unless this Act, the regulations or the bylaws provide otherwise.

and

26 Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

The second manner in which the powers and duties of the strata corporation are discharged, they say, is through the owners voting at general and special meetings. This flows from s. 27(1):

- 27 (1) The strata corporation may direct or restrict the council in its exercise of powers and performance of duties by a resolution passed by a majority vote at an annual or special general meeting.

Thus, the argument goes, "strata corporation" in s. 27(1) means "the owners acting at a meeting". There is no suggestion in this case of any resolution under s. 27(1) directing or restricting the administrator in the exercise of powers and duties normally within the purview of the council of the strata corporation.

¶ 25 They contended further that the powers and duties entrusted to the strata council relate to "day to day operations and administrative functions" of the strata corporation. On the other hand, the latter powers and duties relate to substantive decisions of the strata corporation, as distinct from the "day to day" matters dealt with by the strata council. That is so because the owners, not the strata corporation, own the common property and the owners hold their rights collectively and exercise them collectively through the strata corporation at meetings. Thus, in the words of the Aviawest group's factum,

It follows from this exegesis of the Act that the strata corporation performs its duties and carries out its powers by means of action taken by the strata council or by the owners through decisions made at meetings. Put differently, the statutory term "strata corporation" includes the constituent parts of the strata corporation, the owners or the strata council. Therefore, to relieve the strata corporation from its powers and duties is, ipso facto, to relieve the owners from their collective powers and duties.

¶ 26 They argued as well that the decision in Cook is inapplicable because the statutory language that influenced that decision has changed and because s. 174 "expands on the powers of the court with respect to the appointment of an administrator".

¶ 27 As to the first point, they submitted that in Cook, Madam Justice Huddart concluded that the owners and the strata corporation had separate rights on the basis that the Condominium Act contained provisions that authorized "the owners . . . by special resolution" to do certain things. This led her to conclude that the strata corporation required the approval of a 3/4 vote of the owners for these actions. However, the current Act "has expunged all references to the owners by special resolution directing the strata corporation". In support of this proposition, the Aviawest group gave several examples containing similar wording, of which s. 78(1) is illustrative:

- 78 (1) Before the strata corporation acquires land, the acquisition must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting.

¶ 28 They made other points about the failure of the Act to specifically mention "owners" in relation to resolutions in support of their conclusion that

The clear effect of these changes is to remove all statutory provisions that suggest that the owners act separate from or control the strata corporation. Indeed, these provisions make it clear that the owners are a constituent part of the strata corporation and the powers of the strata corporation are exercised by the owners at meetings.



Accordingly, they submitted, the reasoning in Cook is no longer applicable and Toth was decided incorrectly.

¶ 29 Their second point is that s. 174(3)(d), which permits the court to "relieve the strata corporation of some or all of its powers and duties", authorizes the court to release the strata corporation from its duty to seek majority or 3/4 support by way of resolution of the owners.

¶ 30 I do not find these submissions persuasive.

¶ 31 In my view, the changes in language from s. 71 of the Condominium Act to s. 174 of the current Act do not manifest a legislative intention to change the law. Rather, they are merely stylistic: their purpose was to eliminate the variable descriptions of similar concepts identified in the previous legislation in the Cook decision and to bring uniformity of exposition to the Act. I find support for that view in Hansard where the Minister advised the House that the objectives of the current Act included simplifying and restructuring the legislation, which was seen as complex and difficult to understand. The Minister said plain language was used wherever possible.

¶ 32 By virtue of s. 1 of the Act, "owner" means "a person shown in the register of a land title office as the owner of a freehold estate in a strata lot". Under s. 2(1), the "owners of the strata lots" are the "members" of the strata corporation and, under s. 2(2), the strata corporation "has the power and capacity of a natural person of full capacity". "Unanimous vote" and "3/4 vote" are defined, in s. 1, in terms of votes of "eligible voters". By s. 53(1), "each strata lot has one vote" at annual and special general meetings. Thus, it is clear that, as Madam Justice Huddart concluded in Cook, the owners and the corporation are separate entities in law and the owners' rights as members of the corporation are separate from their rights as individual owners, which include the right to vote at meetings of the strata corporation.

¶ 33 Further, I reject the submission that the impugned orders can be justified as relieving the strata corporation of its "powers and duties" under s. 174(3)(d). Such an order would have to be made in express terms. Here, the chambers judge did not purport to make an order under that provision of the statute. Moreover, and in any event, the passage of a resolution by the members of the strata corporation at a general or special meeting is not a "power or duty" of the corporation. As was explained in Cook, the right to vote is an individual right possessed by the owners and nothing in s. 174(3)(d) would support an order abrogating that right.

¶ 34 Section 174 of the Act authorizes the court to appoint an administrator to exercise the powers and perform the duties of the strata corporation. He can do no more than the strata corporation could do. In particular, if the strata corporation could not act without the authority of a resolution, the administrator is equally restrained. The owners are members of the strata corporation. It is the members who vote on and pass resolutions at meetings of the strata corporation. Allowing the administrator to act without resort to the owners at all, as the impugned orders do, abrogates the rights of the owners to vote on actions requiring their authorization by resolution. The Act does not authorize such a result. In my view, Pitfield J. was correct when he concluded in Toth that the reasoning in Cook remains applicable under the current Act.

¶ 35 It may be, as was suggested in Toth, that the difficulties facing these parties may be resolved by applications to the court under s. 164 or s. 165 of the Act:

- 164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a

significantly unfair

- (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
  - (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
- (2) For the purposes of subsection (1), the court may
- (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
  - (b) vary a transaction or resolution, and
  - (c) regulate the conduct of the strata corporation's future affairs.

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

- (a) order the strata corporation to perform a duty it is required to perform under this Act, the regulations, the bylaws or the rules;
- (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

¶ 36 The application below invoked these sections of the Act, as well as s. 174. However, since the chambers judge made no mention of these sections in making his order and made no findings of fact that would enable us to consider their applicability, I will say no more about them except that the relevant allegations remain to be proven.

¶ 37 Those are my reasons for allowing the appeal and setting aside the impugned provisions in the order appointing the administrator.

**SMITH J.A.**

**NEWBURY J.A.:**— I agree.

**MACKENZIE J.A.:**— I agree.

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