IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bosworth v. Jurock,*
2011 BCSC 1583

Date: 20111124
Docket: S101930
Registry: Vancouver

2011 BCSC 1583 (CanLII)

Between:

Gregory Bosworth

Plaintiff

And

**Oswald Jurock, David Barnes, Ralph Case,
Standard Apartments Ltd., Proper Tee Investments Ltd.,
and Greenwich Holdings Ltd.**

Defendants

And

**Shannon Stange, Frank Lonardelli, and
Arlington Street Investments Inc.**

Defendants by Counterclaim

Before: The Honourable Mr. Justice Sigurdson

Corrected Judgment: The front page of these reasons were amended on December 8, 2011 to reflect counsel appearing on the Certification Hearing only.

Reasons for Judgment - Certification Hearing

Counsel for the Plaintiff and Defendants by Counterclaim: Roy W. Millen
Jonathan R. Goheen

Counsel for the Defendants: Alex Eged
Ward Branch

Place and Date of Hearing: Vancouver, B.C.
April 11, 2011
May 6, 2011

Place and Date of Judgment: Vancouver, B.C.
November 24, 2011

2011 BCSC 1583 (CanLII)

Introduction

[1] This is an application for certification in a proposed class proceeding. It concerns alleged misrepresentations in a disclosure statement made by the defendants in connection with the plaintiff's purchase in February 2007 (and the purchase by proposed class members) of condominium units in Prince Rupert.

Issues

[2] The issues on this application are:

1. Have the requirements of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*) been satisfied, in particular:

   (a) Do the pleadings disclose a cause of action?

   (b) Is there an identifiable class of two or more persons?

   (c) Are the claims of the class members common issues?

   (d) Is there a representative plaintiff who would fairly and adequately represent the interest of the class?

2. Is certification precluded by s. 41(a) of the *CPA* because this proceeding may be brought under another statute, particularly under ss. 171 or 172 of the *Strata Property Act*, S.B.C. 1998, c. 43 (*SPA*)?

3. If certification is not precluded, is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

[3] Although the defendants dispute that several of the requirements for certification as a class proceeding have been met, the key issues are the last two: whether certification must be denied because (2) the representative claim may be brought under another statute and (3) because proceeding under the *CPA* is not the preferable proceeding.

Background

[4] On February 22, 2007, the plaintiff and his wife purchased a unit in Roosevelt Apartments in Prince Rupert for $73,000. The plaintiff seeks to bring this action on

behalf of all persons who acquired a strata unit in Strata Corporation BCS 2210 in Roosevelt Apartments, which unit was transferred to the purchaser either from the vendor or Seal Cove Properties in or about February or March 2007. The proceedings are brought against the developer of Roosevelt Apartments which is a joint venture held by the corporate defendants, Standard Apartments Ltd., Proper Tee Investments Ltd., and Greenwich Holdings Ltd., and the three principals of the developer, the defendants Oswald Jurock, David Barnes, and Ralph Case.

2011 BCSC 1583 (CanLII)

[5] The defendants marketed the units of the proposed stratified apartments to members of the proposed class in 2006 and 2007.

[6] The allegation of the plaintiff is that the plaintiff and his wife had participated in two investments offered by the principals of the developer, one in Kamloops and one in Nanaimo, and insofar as Roosevelt Apartments was concerned, the registered owner, Seal Cove Properties Ltd., entered into an agreement to sell the lands and premises to the vendor once the property had been subdivided into individual lots by registration and filing of a strata plan.

[7] The defendants, the plaintiff alleges, were required under the *Real Estate Development and Marketing Act*, S.B.C. 2004, c. 41 (*REDMA*) to provide prospective purchasers with a disclosure statement. The plaintiff alleges that the disclosure statement stated that the registered owner and the developer had commissioned an engineer’s report that would be available at the developer’s office, and the plaintiff alleges the disclosure statement stated that, according to the report, the Roosevelt buildings were “free from material defect”. The plaintiff asserts that he has a right of action against the developer, its directors and anyone who signed or authorized the filing of the disclosure statement.

[8] The plaintiff alleges that the disclosure statement does not refer to a field review done in June 2005 where the defendants instructed an engineer to perform the review only to provide a quick assessment of the condition of the buildings and grounds.

2011 BCSC 1583 (CanLII)

[9] According to the plaintiff, the field review identified a number of building envelope issues, including that the building suffered from a long-term maintenance problem with window panes in the existing windows and patio doors in the buildings and the buildings also required a number of near-term repairs including chimney flashings, siding repainting, replacement of certain fogged-up window panes and other repairs pertaining to the grounds and a retaining wall.

[10] The plaintiff alleges that the disclosure statement did not refer to the problems highlighted in the field review, it did not indicate the field review was a quick assessment of the buildings, and the disclosure statement included an estimated interim budget for the operation of the proposed strata plan but it, like the cash flow estimate, did not forecast any significant maintenance repairs or capital expenditures.

[11] The plaintiff asserts that during a presentation in December 2006, the principals of the developer described the units as real estate investments that would provide purchasers with long-term capital appreciation and an ongoing rental income stream.

[12] The plaintiff asserts that after the presentation, he was presented with a cash flow estimate for unit 202, a contract of purchase and sale, and a copy of the filed disclosure statement with respect to Roosevelt Apartments, and on December 18, 2006 the plaintiff and his wife entered into a purchase and sale agreement with the vendor to acquire unit 202.

[13] In February 2007, Strata Plan BCS 2210 was deposited in the Land Title office and the strata plan converted the existing apartments into 45 strata units presently comprising the Roosevelt units.

[14] The Bosworths state that they made inquiries to investigate purchasing a unit on the third floor with a better view, and that change was made. The plaintiff's sale completed on February 22, 2007 for the purchase price of $73,000 plus taxes and adjustments, with mortgage financing of $54,750 and the balance paid in cash.

[15] The strata corporation has 45 individual strata lots. AMG Investments, which is owned by the individual defendants, is one of the strata lot owners in BCS 2210.

[16] All of the purchasers of the strata lots in BCS 2210 remain owners. In other words there are no former strata lot owners and all potential class members remain as owners of the strata lots.

2011 BCSC 1583 (CanLII)

[17] The plaintiff asserts that at a meeting of the strata owners on April 23, 2009, the plaintiff first became aware of a number of deficiencies. According to the plaintiff, the strata council, of which neither of Mr. Bosworth nor his wife is a member, undertook its evaluation of the deficiencies independent from a 2009 review which indicated the same problems as noted in 2005. The plaintiff asserts that the strata council confirmed the deficiencies required the removal of the building's siding, the building paper installed improperly around the windows, and some of the buildings sheathing to visually inspect for mould.

[18] The strata council has completed its investigation and determined that substantial repairs will be required and currently the total cost to repair the Roosevelt buildings is $1,579,922, or $35,109 per unit.

[19] The plaintiff asserts that he has had an independent appraisal done as of December 2006 taking into account information known at that time, such as the field review, and the appraised value according to the plaintiff is $57,000.

[20] The repairs have not been done.

[21] The defendants assert that before entering the purchase agreement, they were advised that new windows were installed in around 1987, new siding in 1997, and a new roof in 1998. It is the defendants' position that the buildings were well maintained, that they met the building code and fire code requirements in 1994, and in September 2006 had met current building code standards.

[22] In addition to the claim for misrepresentation pursuant to *REDMA*, the plaintiff makes a claim of negligent and fraudulent misrepresentation.

2011 BCSC 1583 (CanLII)

[23] The defendants assert, which appears not to be disputed, that all deficiencies in relation to the Roosevelt Apartments pertain to common property or common assets of BCS 2210 and there are no alleged deficiencies in respect of the individual owners' strata lots. According to the defendants, the plaintiff failed to take any steps to have BCS 2210 commence a lawsuit on behalf of the class members and/or strata lot owners, and that BCS 2210 has not approved or authorized a special levy or any charge to the strata lots for the cost of repairing any of the deficiencies that are alleged.

Requirements for Certification

[24] Section 4(1) of the *CPA* requires the court to certify a proceeding as a class proceeding on an application under s. 2 or s. 3 if the requirements of s. 4(1) are met. Section 4(1) of the *CPA* reads as follows:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> > (a) the pleadings disclose a cause of action;
> >
> > (b) there is an identifiable class of 2 or more persons;
> >
> > (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> >
> > (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> >
> > (e) there is a representative plaintiff who
> >
> > > (i) would fairly and adequately represent the interests of the class,
> > >
> > > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> > >
> > > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[25] In this first part of the judgment I will discuss the requirements that are not particularly contentious: whether the pleadings disclose a cause of action, whether there is an identifiable class of two or more persons, and whether the claims of the class members raise common issues.

[26] The question is whether the pleadings disclose a cause of action. They assert a claim for a statutory cause of action for misrepresentation under *REDMA* alleging that the disclosure statements contain false or misleading statements which could reasonably be expected to affect the value or price of the unit, and for a claim of common law negligent misrepresentation.

[27] I find that the pleadings disclose a cause of action. This is not disputed by counsel for the defendants.

[28] There was significant argument about the merit and quantum of damages available.

[29] The defendants say that the plaintiff's claim lacks merit and is modest at best. It is clear, counsel for the defendants says, that the purchasers only received a budget or an estimate. He says that the evidence that the defendants will tender is that any repairs really amount to maintenance costs of about $61,000, an amount to be considered in the context of a building where the cumulative price for the units was $3,375,000. The defendants challenge whether these types of repairs could be said to be material. Mr. Eged said that the plaintiff has gone from a few leaky windows to a complete retrofit. In short, the plaintiff's claim, according to the defendants, is at best a minor claim.

[30] However, the question at this stage is whether the pleadings disclose a cause of action, not the resolution of disputed facts about whether there was a misrepresentation and the cost of reasonable repairs. At this stage, the plaintiff has established that the pleadings disclose a cause of action.

[31] The next aspect is whether there is an identifiable class. The proposed class is made up of those who purchased the units directly from the vendor under the disclosure statement, and does not include secondary purchasers. The total number of units is 45. The class has been determined by objective criteria, namely persons who acquired ownership in BCS 2210 by purchase from Roosevelt Apartments and who received a transfer of that unit either from Roosevelt Apartments Ltd. or Seal

2011 BCSC 1583 (CanLII)

Cove Properties Ltd. in or around February or March 2007. I find, that s. 4(1)(b) of the *CPA* has been met.

[32] The next issue is the third requirement, that there be common issues. The plaintiff has proposed the following common issues, as they appear in his written submissions:

> (a) Did the Defendants owe a duty of care to the Class Members?
>
> (b) Were the Defendants required to provide a Disclosure Statement to the Class Members?
>
> (c) Did the Defendants authorize, approve and file the Disclosure Statement?
>
> (d) If so, in respect of the Disclosure Statement, do the Defendants fall within the class of individuals referred to in s. 22(3)(b) of REDMA?
>
> (e) Do the Disclosure Statement Representations, as defined in the Statement of Claim, give rise to an implied representation of fact that the Units were "free from material defect"?
>
> (f) Do the Deficiencies, as defined in the Statement of Claim, constitute a "material fact" within the meaning of REDMA?
>
> (g) Were the Deficiencies, as alleged or otherwise, present in the Roosevelt Apartments buildings:
>
> > (i) Prior to the execution and filing of the Disclosure Statement;
> >
> > (ii) After the filing of the Disclosure Statement and before the close of the Class Members' acquisition of the Units; or
> >
> > (iii) As of the close of the Class Members' acquisition of the Units?
>
> (h) Were the Defendants aware of the Deficiencies:
>
> > (i) Prior to the execution and filing of the Disclosure Statement;
> >
> > (ii) After the filing of the Disclosure Statement and before the close of the Class Members' acquisition of the Units; or
> >
> > (iii) As of the Close of the Class Members' acquisition of the Units?
>
> (i) If not, should the Defendants have been aware of the Deficiencies prior to the close of the Class Member's acquisition of the Units?
>
> (j) If the answer to (h) or (i) is yes, does the failure to disclose the Deficiencies in the Disclosure Statement constitute a "misrepresentation" (by omission) within the meaning of REDMA?
>
> (k) Do the Disclosure Statement Misrepresentations constitute "misrepresentations" within the meaning of REDMA?
>
> (l) Are the Defendants entitled to rely upon s. 22(7) of REDMA as a defence to the statutory misrepresentation claim?

2011 BCSC 1583 (CanLII)

(m) Are the Defendants entitled to rely upon s. 22(8) of REDMA as a defence to the statutory misrepresentation claim?

(n) Did the Defendants make the Disclosure Statement Misrepresentations with knowledge that they were false?

(o) Alternatively, did the Defendants make the Disclosure Statement Misrepresentations recklessly without knowing whether they were true or false?

(p) If the answer to (n) or (o) is yes, was the failure to disclose the Deficiencies an omission made with an intent to deceive the Class Members?

(q) Did the Defendants breach the duty of care they owed the Class Members by failing to be aware of the Deficiencies at the time the Disclosure Statement was provided to the Class Members?

(r) Did the Defendants breach the duty of care they owed the Class Members by failing to be aware of the Deficiencies before the close of the Class Members' acquisition of the Units?

(s) Does the deemed reliance under section 22 of REDMA also apply to common law claims of negligent or fraudulent misrepresentation, or both?

(t) Subject to s. 22(5) of REDMA, was the deemed reliance of the Class Members reasonable on a class basis?

(u) Should the Class Members' measure of damages be calculated as:

> (i) the difference between the purchase price paid and the fair market value at the close of the Class Members' acquisition of the Units;
>
> (ii) the amounts assessed or to be assessed by the Strata Corporation against each of the Class Members for the repairs required to remedy the Deficiencies;
>
> (iii) some combination of (i) and (ii); or
>
> (iv) some other manner?

(v) Was the Defendants' conduct in making the Disclosure Statement Misrepresentations to the Class Members of a sufficient character to merit an award of punitive damages?

(w) If so, what is the quantum of punitive damages to be paid by the Defendants?

[33] The plaintiff says that a fundamental question relates to whether the deficiencies that he asserts were a material fact that was not disclosed or was misrepresented. According to Mr. Millen, the plaintiff's counsel, the issue is whether a reasonable person would consider that expense to be a fact that would affect or could reasonably be seen to affect the value of the price of a unit.

2011 BCSC 1583 (CanLII)

2011 BCSC 1583 (CanLII)

[34] According to the plaintiff, the class members may be entitled to compensation for damages that flow from the disclosure statement representations. Mr. Millen submitted that ss. 22(7) and (8) of *REDMA* provide two defences to a developer who will not be found liable with respect to any portion of the disclosure statement made on the authority of an expert if the defendant had no reason to believe the defendant's expert's opinion was based upon or contained a misrepresentation and made reasonable inquiries and believed there was no misrepresentation.

[35] It was not seriously disputed that there were common issues arising in this case.

[36] I turn to what I describe as the more contentious matters on this application for certification, starting with issue (2): whether s. 41(a) of the *CPA* applies to bar this proceeding as a class proceeding; issue (3), whether there is another preferable procedure; and finally, issue 1(d) whether the plaintiff is a proper representative for the proposed class.

Is Certification Precluded by s. 41(a) of the *CPA*?

[37] The defendants say that certification of this proceeding is precluded by s. 41(a) which reads

> 41 This Act does not apply to
>
> > (a) a proceeding that may be brought in a representative capacity under another Act,
> >
> > ...

[38] The defendants say that because a proceeding may be brought by the strata corporation in a representative capacity under ss. 171(1), 171(2) and 172(1) of the *Strata Property Act*, I must deny this certification application.

Parties Positions

[39] The defendants say that it is a question of statutory interpretation whether in connection with the plaintiff's proposed class action, the provisions of the *Strata*

Property Act provide "a proceeding that may be brought in a representative capacity": *Jellema v. American Bullion Minerals Ltd.*, 2010 BCCA 495 at para. 22.

[40] The defendants contend that s. 41 of the *CPA* does not provide that the action must be brought in a representative capacity under another Act, but it is enough if it may be so brought.

[41] The defendants rely on ss. 171(1), 171(2) and 172(1) of the *Strata Property Act*, which read:

> 171(1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
>
> > ...
> >
> > (b) the common property or common assets;
> >
> > (c) the use or enjoyment of a strata lot;
> >
> > ...
>
> (2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.
>
> ...
>
> 172(1) The strata corporation may sue on behalf of one or more owners about matters affecting only their strata lots if, before beginning the suit,
>
> > (a) it obtains the written consent of those owners, and
> >
> > (b) the suit is authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.

[42] Mr. Branch for the defendants says in the case at bar, the *Strata Property Act* provides for an action for damages to be brought by the strata corporation on behalf of and as a representative of others. He says that the *SPA* expressly contemplates the strata corporation, such as BCS 2210, bringing an action as a "representative of all owners" or "on behalf of one or more of the owners". Mr. Branch argues that the plaintiff has made no effort to obtain the approval for BCS 2210 to bring an action as a representative of all owners or on behalf of one or more owners, and there is no evidence that it has refused or would refuse. His argument is that even though the plaintiff has chosen not to pursue the route of having the proceeding brought by the strata corporation, if that route is available, the plaintiff must use it by reason of s. 41

2011 BCSC 1583 (CanLII)

of the *CPA*. Mr. Branch argues that in the context of strata corporations, the legislature has made structural choices where under the *CPA,* one plaintiff alone is needed and court approval is required both to opt out or to proceed. Under the *SPA*, only a 3/4 vote of all members is required and no court approval or opt out provision applies.

[43] The plaintiff's position on s. 41 of the *CPA* is that there are two key requirements of s. 41(a) that are not applicable in these circumstances, or at least the first is doubtful and the second is not met. The first requirement is that the cause of action must be available under another statute. The second requirement is that this plaintiff is entitled to pursue his cause of action in a representative capacity under another statute.

[44] As to the first requirement, the plaintiff says that it is doubtful that a strata corporation may bring an action in these circumstances as it is not a claim for damage to common property; the claim for loss, although manifested in the common property of the strata corporation, is because of misrepresentations made to each individual investor.

[45] Even if the strata corporation could bring a misrepresentation-based *REDMA* claim, or a common law misrepresentation claim, Mr. Millen argues that the second requirement has been determined against the defendants, that is, that this plaintiff' be entitled to pursue his cause of action in a representative capacity under another statute. His basic point is that contrary to the suggestion of the defendants, Mr. Bosworth cannot do so under the *SPA* or otherwise -- no statute authorizes him to bring this proceeding in a representative capacity except the *CPA*. He relies on the decision in *Crawford v. London (City)* (2000), 47 O.R. (3d) 784 (S.C.J.) and says that the analysis in that case mirrors the comments of Justice Binnie quoted below from *Seidel* that because Ms. Seidel could not do so, that is bring the claim, her claim was not barred by s. 41(a).

2011 BCSC 1583 (CanLII)

2011 BCSC 1583 (CanLII)

Discussion

[46] In *Jellema*, the Court of Appeal considered whether an oppression action brought under s. 227 of the *Business Corporations Act* may be certified as a class action under the *CPA*.

[47] Section 227 provided in its relevant part as follows:

> (1) For the purposes of this section, "shareholder" has the same meaning as in section 1(1) and includes a beneficial owner of a share of the company <u>and any other person whom the court considers to be an appropriate person</u> to make an application under this section.
>
> (2) A shareholder may apply to the court for an order under this section on the ground
>
> > (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner <u>oppressive to one or more of the shareholders, including the applicant</u>, or
> >
> > (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is <u>unfairly prejudicial to one or more of the shareholders, including the applicant</u>.
>
> [emphasis in *Jellema*]

[48] Newbury J.A., in *Jellema*, said at paras. 22-23:

> 22 We are concerned here, however, with a question of statutory interpretation: is the oppression action codified in the *Business Corporations Act* "a proceeding that may be brought in a representative capacity" under that Act? If it is, then we would be bound to agree with the chambers judge that the *Class Proceedings Act* cannot be applied in this instance, regardless of the benefits of a class proceeding to this particular case.
>
> 23 I do not, however, interpret s. 227(2) of the *Business Corporations Act* as constituting a statutory representative action (as opposed to one that might be brought within the ambit of R. 5(11) of the former *Rules of Court* (see now R. 20-3 of the *Supreme Court Civil Rules*.) The phrase "in a manner oppressive to one or more of the shareholders, including the applicant" in s. 227(2)(a), and its counterpart in s. 227(2)(b) seem to be intended to describe the <u>kind of conduct or act</u> of the company that may qualify for an oppression action, rather than to open the door to other plaintiffs. The conduct or act must be oppressive to one or more shareholders, including the applicant. Conversely, it need not be oppressive <u>only</u> to the applicant but may be oppressive to an entire class or subclass of shareholders. Provided this class or subclass includes the applicant, he or she is entitled to proceed under s. 227. Like Hall J.A. in *Knight*, I do not consider that the section by its terms provides for the applicant to act as the

> representative of anyone else. In other words, nothing in the wording of s. 227 contemplates a "declaration made expressly by the court, or implicitly by the statute, at the front end of the proceeding that the complainant's action will govern the rights and obligations of the members of [a] specifically-defined representative class." (*Stern*, para. 68.)
>
> [emphasis in original.]

2011 BCSC 1583 (CanLII)

[49] In *Jellema*, Newbury J.A. concluded that since s. 227 does not itself create a representative action, then section 41 of the *Class Proceedings Act* does not bar a class proceedings in appropriate circumstances. She said at para. 24:

> ... Given also that the *Class Proceedings Act* is to be interpreted in a broad and remedial manner, I agree with the plaintiffs that the case at bar is exactly the type of case in which the benefits and protections of a class action are appropriate ...

[50] Newbury J.A. discussed the Court of Appeal's consideration of s. 41 in *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235. She noted that:

> Section 41 of the *Class Proceedings Act* was considered by this court in *Knight v. Imperial Tobacco Canada Ltd.* 2006 BCCA 235, 267 D.L.R. (4th) 579 in connection with purported class actions brought against cigarette manufacturers under the *Trade Practices Act*, R.S.B.C. 1996, c. 457 and its successor legislation, the *Business Practice and Consumer Protection Act*, S.B.C. 2004, c. 2. Section 18 of the earlier statute ("*TPA*") provided in ss. 1 that an action could be brought by a person whether or not that person had a special or any interest under the Act or was affected by a consumer transaction. Subsection 3 permitted any person to sue on his or her own behalf and on behalf of consumers generally or a designated class of consumers in British Columbia. The Court found in *Knight* that this was "legislation of the sort that would preclude a claim brought under it from certification because of the provisions of s. 41 of the [*Class Proceedings Act*]". (Para. 9.)
>
> [emphasis in original.]

[51] Newbury J. went on to say at para. 14, that the new legislation under the *Business Practice and Consumer Protection Act* provided, in s. 172, that:

> 172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction ...
>
> [Emphasis in *Knight*]

[52] She noted that the Court in *Knight* ruled that the proceeding contemplated by s. 172 of the *Business Practice and Consumer Protection Act* could not properly be

described as the type of action that could be brought in a representative capacity, and referred to the comments there of Mr. Justice Hall:

> ... There is no provision in this section that is similar in effect to s. 18(3) of the [*Trade Practices Act*]. While an individual may bring an action under s. 172 without having a special interest or indeed any interest under the statute, I do not consider that the section provides for the individual bringing the action to act as a representative of anyone else. Section 172 merely provides that the individual bringing the action does not have to have a specific interest in the consumer transaction that might give rise to an action.

[53] Mr. Branch, for the defendants, argues that the references in *Knight* point out where the line is drawn and s. 41 operates as a bar. He submits that the provisions of the *Strata Property Act*, like those of the *Trade Practices Act* considered in *Knight* contemplate a strata corporation bringing an action as “representative of all owners” or “on behalf of one or more owners”.

[54] In *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, the Supreme Court of Canada recently discussed s. 41 and the line drawn between the repealed *Trade Practices Act* and the British Columbia *Consumer Protection Act* in *Knight*. In *Seidel*, Binnie J. for the majority said, at para. 49:

> Reference was made to s. 41(a) of the *CPA* which provides that no class action can be instituted where a representative action is available. However, under the *BPCPA*, only the Director may bring a representative action. Ms. Seidel may not do so. While consumer activists may bring actions despite the fact that they have not personally suffered any damage, such actions cannot be brought as representative actions under the *BPCPA*. This is to be contrasted with the situation under the now repealed *TPA*, where s. 18(3) allowed consumer-brought representative actions. Accordingly, s. 41(a) of the *CPA* is not a bar to Ms. Seidel's application for certification.

[55] The question therefore is do the provisions of the *Strata Property Act* provide for a representative action of the type that operates as a bar to Mr. Bosworth’s application for certification.

[56] I refer to *Crawford, supra,* a decision of Haines J. In that case, an owner brought a proposed class proceeding against the city, asserting that it did not comply with building codes in connection with wood burning fireplaces, later learned to be defective. The city brought a motion for an order declaring the *CPA* did not apply by

2011 BCSC 1583 (CanLII)

reason of s. 37 of the Ontario *Class Proceedings Act* and s. 14 of the Ontario *Condominium Act* and also for a declaration that the *CPA* was not the preferable procedure in the circumstances.

[57] Section 37 of the Ontario *CPA*, like s. 41(a) of the *CPA*, provides:

> This Act does not apply to,
>
> (a) a proceeding that may be brought in a representative capacity under another Act;

[58] The Ontario *Condominium Act* provided at s. 14(1):

> The Corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units, and the legal and court costs in any such action brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

[59] The motion by the City was dismissed. The Court said, at para. 10

> A plain reading of s. 37(a) of the *CPA* seems to preclude the application of that *CPA* where it can be said that the proceeding the plaintiff is seeking to pursue under the *CPA* may be brought by the plaintiff in a representative capacity under another Act. In such circumstances, a plaintiff or applicant must proceed under the other Act. That is not the case here. The plaintiff, a unit owner, cannot maintain a representative action under any Act on behalf of current or former owners of any of the units in any of the subject condominium corporations. It may be that the unit owners will not be able to claim for damages to the common elements, but in my view that does not preclude the plaintiff from pursuing an action under the *CPA* for the damages the unit owners are entitled to claim.

[60] On the application for leave to appeal, [2000] O.T.C. 634, the defendants argued that the judge below erred by interpreting the Act so as to read as follows:

> This Act (i.e. CPA, 1992) does not apply to a proceeding that the plaintiff may bring in a representative capacity under another Act.

The defendants pointed out the actual words of s. 37(a) do not have the underlined words “the plaintiff”.

2011 BCSC 1583 (CanLII)

[61] The application for leave to appeal was dismissed. Gillese J. (as she then was) said at para. 28:

> The reality is that a remedy under the *Condominium Act* is not available to this class for a number of reasons. First, a condominium corporation must bring an action under the *Condominium Act* and the six condominium corporations in question have refused to bring such actions. I note that there is no mechanism under the *Condominium Act* to force a condominium corporation to advance a claim on behalf of the unit owners and that it appears that the condominium corporations are in conflict with the unit owners based on the defendant City's proposed third party claims against the condominium corporation. Second, an action under s. 14(1) by a condominium corporation can be brought only on behalf of current owners. There is no provision in s. 14(1) of the *Condominium Act* that allows a representative action to be brought by a condominium corporation on behalf of former unit owners. Third, this proceeding involves a claim initiated by a single unit owner with condominium units in two different condominium corporations. Under s. 14(1) of the *Condominium Act*, a single unit owner cannot advance a representative action for the members of a single condominium corporation much less for individuals who own units in different condominium corporations.

[62] The defendants said that *Crawford* is distinguishable and should not be followed as it has not been applied in British Columbia, it was only referred to in *Knight* as part of its analysis about the *TPA* where its findings were overturned, that *Crawford* does not consider the structural and policy considerations described in connection with proceedings brought by strata corporations, that *Crawford* included individual and common property elements in their damage claims, that there were former and current strata owners whereas here there are only the original owners, that *Crawford* involved 999 separate units but here only 45 units were involved, and in *Crawford* the strata corporation had already refused to commence an action on behalf of the owners but that has not arisen here.

[63] The defendants say that their position about the proper interpretation of s. 41 is buttressed by the fact that the Ontario Law Reform Commission referred to the predecessor B.C. *Condominium Act* as a statutory representative proceeding.

[64] Are there, as the plaintiff suggests, two arguments that operate against the application of s. 41 as a bar to this case going forward as a class proceeding? The arguments are that the cause of action must be available under another statute and

2011 BCSC 1583 (CanLII)

the second is whether this plaintiff, Mr. Bosworth, is entitled to pursue his cause of action in a representative capacity under another statute

[65] In *Strata Plan LMS 1564 v. Lark Odyssey Project Ltd. (c.o.b. Lark Group)*, 2008 BCSC 316, an action was brought on behalf of the unit holders for disclosure and misrepresentations under *REDMA* and Justice Preston on a Rule 19(24) application commented at para. 20, in refusing to strike the claim, that “the plaintiff could cure the defect, if there is a defect, by adding the individual owners as plaintiffs”. According to Mr. Millen, the case only stands for the proposition that the corporation may have standing to bring *REDMA*-based misrepresentation claims and in that case perhaps in response to Justice Preston’s comments, the individual owners were added. The other case is *Strata Plan VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329. Mr. Millen says that this case only stands for the proposition that a *REDMA* claim is not bound to fail but it is not clear on that authority that the strata in this instance can necessarily succeed and he argues that as a matter of policy the plaintiff’s action should not be barred on the basis of speculative suggestions.

[66] However, I need not resolve the first point because I agree with Mr. Millen that the second point is determinative on this issue. I think the weight of the authority supports the position that for s. 41 to operate as a bar to certification of a class proceeding such as this, another Act must authorize the plaintiff to bring the action in a representative capacity. In *Knight*, the Court of Appeal found that although s. 41(a) barred the *TPA* claims, it held that s. 41(a) did not bar the *BPCPA* claim because the *TPA* allowed any person including the plaintiff Knight to sue on behalf of others, whereas the *BPCPA* had no such provision. Similarly, in *Seidel*, because Ms. Seidel could not bring a representative action, only the Director, s. 41(a) of the *Class Proceedings Act* was not a bar to certification. As well, *Crawford* supports the interpretation that for s. 41 to be a bar to this class proceeding, Mr. Bosworth must be able to bring a representative proceeding under another statute.

2011 BCSC 1583 (CanLII)

[67] My view on this issue is that the authorities indicate that for s. 41(a) to be a bar to certification, it would require the plaintiff in this proceeding to be able to bring a representative proceeding under another Act, the *SPA*, and as it does not, this argument of the defendants must fail.

2011 BCSC 1583 (CanLII)

Preferable Procedure

[68] The next issue is whether, if s. 41(a) is not a bar, a strata corporation representative action that might be brought under ss. 171(1), 171(2) and 172(1) of the *Strata Property Act* is nevertheless the preferable procedure. The defendants' argument is that the class action is not the preferable procedure and they refer to s. 4(1)(d) and s. 4(2) of the *CPA* which read as follows:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> > ...
> >
> > (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> >
> > ...
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> >
> > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> >
> > (d) whether other means of resolving the claims are less practical or less efficient;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[69] Regardless of whether the proceeding must be brought as a representative proceeding by the strata corporation, the defendants say it is the preferable procedure. The provisions of s. 4(2)(d) and (e), the defendants say, are most

significant and they are that the action by the strata corporation as a representative of all owners, or on behalf of one or more owners, is preferable given that there are only 45 strata units, the owners are easily ascertainable, the class members are a small, finite group, and there will not be any substantial savings to the class members from certification that cannot be realized if one of the other mechanisms are taken. These other mechanisms include an action by the strata corporation under s. 171(1) of the *SPA*, under s. 172(1) of the *SPA*, or an action by one or more owners who self-elect and are specifically named as plaintiffs for any matters affecting their property interests.

2011 BCSC 1583 (CanLII)

[70] The defendants point out that there are countervailing considerations to a class action such as the defendants' inability to seek costs in a class proceeding they did not ask for or think will prevail and the fact that in a class proceeding the strata unit owners will have to opt out of an action they had no democratic input to launch. The defendants also rely on *Gary Jackson Holdings Ltd.* v. *Eden*, 2010 BCSC 273 which was another real estate case but not a *REDMA* case where there were only 15 or 16 proposed class members and Hinkson J, as he then was, was not persuaded that there would be savings to the proposed class members by certifying rather than proceeding as a conventional joint action.

[71] As to not having the 3/4 majority to proceed by way of a strata corporation proceeding, the defendants say that the owners have not tried to get the strata corporation to bring the action, but even if they try and fail, the owners can still fall back and sue as a joint action of individuals who are specifically named as plaintiffs in connection with matters affecting their property interest. The defendant's counsel submits that there is nothing that favours a class proceeding, something that is the plaintiff's burden to establish.

[72] The plaintiffs make the following points as to why a class proceeding is a preferable procedure in the circumstances.

[73] The plaintiff asserts that there are the following practical advantages to proceeding by way of a class proceeding that have been recognized by this Court:

- case management
- formal notice to all interested persons
- simplified structures and procedures
- court approval of any settlement
- protection from adverse costs awards during the common issues stage
- limitation periods may be tolled for the entire class

[74] The plaintiff argues that central to the preferability inquiry is whether the class action will be the preferable means of resolving the common issues. Mr. Millen argues the Court should consider whether the resolution of the common issue is necessary to the resolution of the claim of each class member and whether the issue is a substantial ingredient of each of the class member's claim: see *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 18-19 and 28-30. He submits that there is a clear community of interest and that 41 of the class members have contributed financially to allow Mr. Bosworth to commence and prosecute these proceedings, and that absent a class proceeding there would be a proliferation of individual actions either in this court or the Small Claims Court all seeking virtually identical relief. According to Mr. Millen, the present estimate of damages is based on different scenarios: the difference in value at the time of purchase or the potential per-unit strata assessment, or what he says is a range of $16,000-$35,000 per unit. He says it is unlikely that the individual members could economically litigate these claims. He points out that the benefit that no costs be payable is significant as the investors are not large, institutional investors but unsophisticated investors.

[75] Mr. Millen says judicial economy will also be enhanced because class members do not need to participate, he submits, in the initial discovery process or the common issues trial. If the defendants are successful at the common issues trial, the court and the class will be saved from having to manage and participate in individual procedures. If the plaintiff is successful, as suggested in the plaintiff's litigation plan, the Court can make directions to expedite and simplify the resolution

2011 BCSC 1583 (CanLII)

of the individual issues, including allowing for those claims to be advanced by affidavit evidence and subject if necessary to brief cross-examinations by the defendants. This would serve, he submits, to maintain a degree of balance and economy in resolving the individual issues following the common issues trial. Mr. Millen argues with respect to each of the elements of s. 4(2) of the *CPA* as follows. Under s. s. 4(2)(a) of the *CPA*, whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members, he says that the common issues not only predominate the individual issues, but they are potentially determinative of liability. With respect to s. 4(2)(b) he submits that there is no apparent person who wishes to pursue an individual action against the defendants, nor have the defendants suggested any.

[76] With respect to s. 4(2)(c), (d), and (e), the claims are not the subject of any other proceedings and the defendants, he says, have not suggested a preferable process or one that is more practical or efficient.

[77] The plaintiff argues that if the action is brought by the strata corporation, the defendants could pursue discovery of each individual owner and potentially have fifty days of discovery, rendering the proceedings impractical from a financial perspective.

[78] Moreover, Mr. Millen argues that unlike a class action, a court, in a strata corporation action, would not have the statutory authority to fashion procedures for the more simplified resolution of claims following a common issues trial.

[79] Overall, I found Mr. Millen’s submissions persuasive. Given the relatively modest amounts of the individual claims and what appear to be common issues that could efficiently resolve this litigation in large part from the plaintiffs’ perspective and perhaps entirely from the defendants’ perspective, I find that the proposed class proceeding is the preferable proceeding. My conclusion is that the strata representative proceeding, if it could be brought, would not be more practical, fair, efficient, or manageable, and that in all the circumstances, the class action proposed by the plaintiff is the preferable procedure.

2011 BCSC 1583 (CanLII)

2011 BCSC 1583 (CanLII)

Appropriate Representative Plaintiff

[80] The final issue is whether the plaintiff is an appropriate representative plaintiff. I am satisfied on the evidence that Mr. Bosworth is a suitable representative to pursue the class proceeding.

Nature of Order

[81] I grant the order certifying this class proceeding. My intention is to certify the action and the common issues as set out in the notice of application. However, as the focus of the defendants' submission was on reasons to deny certification, they did not focus on the issue of the appropriate common issues, and I invite the parties to arrange to appear before me at a case management conference where I can hear submissions on that aspect, as well as applications for any other directions sought by the parties for the prosecution of this claim.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson