COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bosworth v. Jurock,*
2013 BCCA 4

Date: 20130110
Docket: CA039541

Between:

Gregory Bosworth

Respondent
(Plaintiff)

And

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

Appellants
(Defendants)

Corrected Judgment: The text of the judgment was corrected at page 1 where a change was made on January 10, 2013;

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, November 24, 2011
(*Bosworth v. Jurock*, 2011 BCSC 1583, Vancouver Docket S101830)

Counsel for the Appellants:	W. Branch and K.E. Saunders
Counsel for the Respondent:	R.W. Millen and J.R. Goheen
Place and Date of Hearing:	Vancouver, British Columbia December 10, 2012
Place and Date of Judgment:	Vancouver, British Columbia January 10, 2013

Written Reasons by:
The Honourable Mr. Justice Hinkson

Concurred in by:
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] This is an appeal from the order of a chambers judge certifying the respondent Mr. Bosworth's action as a class action, pursuant to the provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. The reasons for judgment of the chambers judge are indexed at 2011 BCSC 1583.

Background

[2] Seal Cove Properties Ltd. entered into an agreement with a developer to sell to it the property and premises of an existing building to be called the Roosevelt Apartments, once the property had been subdivided into individual lots by registration and a strata plan had been filed. Those steps were subsequently taken.

[3] The developer is a joint venture in Prince Rupert initially held by the corporate appellants, Standard Apartments Ltd., Proper Tee Investments Ltd., and Greenwich Holdings Ltd. The principals of the developer are the appellants Oswald Jurock, David Barnes, and Ralph Case.

[4] The appellants marketed the units of proposed stratified apartments in the Roosevelt Apartments to members of the public in 2006 and 2007. Mr. Bosworth and his wife purchased a unit in the Roosevelt Apartments on February 22, 2007. The condominium development is referred to as Strata Corporation BCS 2210 and has 45 units.

[5] It is alleged that the developer was required to and did provide prospective purchasers with a disclosure statement, pursuant to the *Real Estate Development and Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*]. That statement included an assertion that Seal Cove Properties Ltd. and the developer had commissioned an engineer's report that would be available at the developer's office and that, according to the report, the Strata Corporation BCS 2210 buildings were "free from material defect".

[6] Mr. Bosworth alleges the disclosure statement does not refer to a field review done by an engineer in June 2005, or to the problems highlighted in that review. He also alleges the disclosure statement did not indicate that the field review was only a quick assessment of the building and that, while it did include an estimated interim budget for the operation of the proposed strata plan, it did not forecast any significant maintenance repairs or capital expenditures.

[7] After the sale of a number of the strata units, the strata council of Strata Corporation BCS 2210 confirmed deficiencies in the development that required the removal of the building's siding, building paper that had been installed improperly around the windows, and some of the building's sheathing in order to visually inspect for mould. The anticipated repair costs are said to be $1,579,922, or $35,109 per unit. The latter is an assessment only, because the problem only affects the common property.

[8] Mr. Bosworth 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, and seeks to bring his action on behalf of all persons who acquired a strata unit in Strata Corporation BCS 2210 in the Roosevelt Apartments. His claims are for misrepresentation pursuant to *REDMA*, and for negligent and fraudulent misrepresentation.

[9] The chambers judge found that the pleadings filed by Mr. Bosworth met the requirements of s. 4(1) of the *CPA* as they disclose a cause of action, there is an identifiable class of two or more persons, the claims of the class members offer common issues to be determined, and Mr. Bosworth is a representative plaintiff who would fairly and adequately represent the interest of the proposed class. He described the key issues before him as whether the representative claim proposed for the class action might be brought under another statute and whether a proceeding under the *CPA* is not the preferable proceeding.

[10] The chambers judge rejected the appellants' argument that s. 41(a) of the *CPA*, which provides that the *CPA* does not apply to a proceeding that may be

brought in a representative capacity under another Act, precludes certification in this case because ss. 171 and 172 of the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] provide for an action for damages to be brought by the strata corporation on behalf of and as a representative of others. He concluded that s. 41(a) of the *CPA* did not bar certification, as Mr. Bosworth himself could not bring a representative proceeding under s. 171 of the *SPA*.

[11] Finally, the chambers judge found at para. 79 that the proposed class proceeding is the preferable proceeding, as "the strata representative proceeding, if it could be brought, would not be more practical, fair, efficient, or manageable" than the class action proposed by Mr. Bosworth.

Issue on Appeal

[12] The sole issue in this appeal is whether s. 41(a) of the *CPA* is a bar to proceedings by a strata owner on behalf of other owners of strata units in the same strata development.

Legislative Provisions

[13] The appellants contend, as they did before the chambers judge, that s. 41(a) of the *CPA* together with ss. 171 and 172 of the *SPA* prevent Mr. Bosworth from pursuing a class proceeding against them.

[14] Section 41(a) of the *CPA* provides:

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

[15] The relevant parts of ss. 171 and 172 of the *SPA* provide:

> 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.

Standard of Review

[16] As this appeal involves the interpretation of statutory wording, the appropriate standard of review is that of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at 247.

Discussion

[17] The chambers judge accepted that all of the purchasers of the strata lots in Strata Corporation BCS 2210 remain owners of their strata units in the Roosevelt Apartments. Mr. Bosworth's action is brought on behalf of all of the original strata unit purchasers. There are no former strata lot owners and all potential class members remain as owners of the strata lots. The action relates to deficiencies in the common property and common assets of Strata Corporation BSC 2210.

[18] The appellants contend that the Legislature has made structural choices under the *CPA*, where one plaintiff alone is needed and court approval is required both to opt out or to proceed, whereas under the *SPA*, only a 3/4 vote of all members is required and no court approval or opt out provision applies. They contend that because the *SPA* provides for an action for damages to be brought by Strata Corporation BCS 2210 "on behalf of one or more of the owners" or as a "representative of all owners", the action is barred from being brought as a class proceeding by s. 41 of the *CPA.*

[19] Mr. Bosworth contends that to bar an action under s. 41 of the *CPA*, the proposed cause of action must be available under another statute, and he must be entitled to pursue his cause of action in a representative capacity under that other statute. He contends that although the damage upon which his claim is based is manifested in the common property of the strata corporation, his claim is not for damage to common property but rather for misrepresentations allegedly made to each individual investor. He further contends that whether Strata Corporation BCS 2210 has standing to bring such a claim is unclear.

[20] The chambers judge found that the *SPA* did not authorize anyone other than the strata council to bring an action in a representative capacity, and that s. 41(a) of the *CPA* applied only if Mr. Bosworth could bring a representative proceeding under another statute. The basis for his finding is found at para. 66 of his reasons:

> ... 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.

[21] I respectfully agree with the finding of the chambers judge, and with the basis for his finding. Regardless of the appellants' argument that the history of the development of the legislation must be examined in order to properly interpret the relevant provisions, the chambers judge properly based his finding on the jurisprudence that has interpreted the legislation. The authorities that he relied upon applied a purposive and contextual approach to the statutory wording in issue and, despite the appellants' contention to the contrary, are consistent with the intended purpose of the bar against competing actions found in s. 41(a) of the *CPA.*

[22] I am not persuaded by the appellants' submission that the fact that there are no former strata lot owners and that all potential class members remain as owners of

the strata lots is a factor that diminishes the applicability of the reasoning in *Crawford v. London (City)* (2000), 47 OR (3d) 784 (S.C.J.), leave to appeal ref'd [2000] O.J. No. 2088 (S.C.J.). Moreover, while former owners were in the class proposed in that case, they were not in the other cases relied upon by the chambers judge.

[23] The chambers judge relied on *Knight v. Imperial Tobacco Canada Ltd*. 2006 BCCA 235, 267 D.L.R. (4th) 579, in which this Court considered s. 41 of the *CPA* 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 Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], and ruled that a proceeding contemplated by s. 172 of the *BPCPA* could not properly be described as the type of action that could be brought in a representative capacity.

[24] At para. 10 in *Knight*, Mr. Justice Hall wrote:

> ... 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.

[25] Madam Justice Newbury summarized aspects of *Knight* at para. 13 in *Jellema v. American Bullion Minerals Ltd.*, 2010 BCCA 495:

> ... 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*]".

[26] The chambers judge recognized that in *Jellema*, this Court held that an oppression action codified in s. 227(2) of the *Business Corporations Act* [*BCA*] was not a proceeding that may be brought in a representative capacity, and thus was not

a bar to a proceeding under the *CPA*. He referred to paras. 23–24 of the reasons of Newbury J.A., where she wrote:

> ... 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.)
>
> ...
>
> 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...

[27] The chambers judge also referred to the decision of the Supreme Court of Canada in *Seidel v. TELUS Communications Inc*., 2011 SCC 15, [2011] 1 S.C.R. 531, where the lines drawn by the repealed *Trade Practices Act* and the *BPCPA* that were considered in *Knight* was discussed with respect to s. 41 of the *CPA*. He referred to the reasons of Binnie J. for the majority who said, at 567–568:

> 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.

[28] In the case before us, Mr. Bosworth cannot personally bring an action against the appellants as a representative action. His inability to do so places his claim in the same context as the claims of Mr. Knight and Ms. Seidel under the *BPCPA*, and Mr.Jellema under the *BCA.*

[29] I therefore conclude that the chambers judge was correct in finding that, because Mr. Bosworth was unable to bring a representative proceeding under another statute, s. 41(a) of the *CPA* is not a bar to certification of his action as a class action, and I would dismiss the appeal.

[30] The standing of a strata corporation to bring representative claims on behalf of strata unit owners based upon allegations of misrepresentation in a disclosure statement was described simply as "arguable" in *Strata Plan LMS 1564 v. Lark Odyssey Project Ltd*., 2008 BCCA 509 at para. 12. Given my view that Mr. Bosworth's claim is not barred by s. 41(a) of the *CPA*, it is unnecessary to resolve this interesting question.

Conclusion

[31] I would dismiss the appeal.

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Frankel"