IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Carnahan v. The Owners Strata Plan LMS522,* 2014 BCSC 2375

Date: 20141215
Docket: S27955
Registry: Chilliwack

Between:

Allan Reaburn Carnahan
Colleen Audrey Carnahan

Petitioners

And

The Owners Strata Plan LMS522

Respondent

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

Counsel for Petitioners:	J.J. Klassen
Counsel for Respondent:	D. Stander
Place and Date of Hearing:	Chilliwack, B.C. November 3, 2014
Place and Date of Judgment:	Chilliwack, B.C. December 15, 2014

QUESTION TO BE DECIDED

[1] The petitioners, Allan Carnahan and Colleen Carnahan (the "Carnahans") have asked the court to declare the rental restriction bylaw of the respondent strata corporation (the "Strata Corporation") invalid. They say it is invalid because it does not include a procedure that the Strata Council has to follow when it administers its rental restriction limit. The petitioners also ask the court to cancel fines the Strata Corporation has so far levied against them for their alleged breach of the rental restriction bylaw.

FACTUAL BACKGROUND

[2] The Carnahans own a condominium style residential strata lot (the "Strata Lot") located in a building called Village Creek Estates ("Village Creek") in Chilliwack, British Columbia.

[3] A rental restriction bylaw the Strata Corporation has had in place since 1994 limits the number of rental units in Village Creek to five. On February 22, 2010, by resolution, the Strata Corporation amended its bylaws (the "Bylaws") and filed them in the Land Title Office. Section 9 of the Bylaws governs rentals. It states:

> 9 RENTAL PROHIBITION
>
> 9.1 The maximum number of strata units that may be rented at any one time is five (5).
>
> 9.2 An owner shall obtain the written permission of the strata council before renting or leasing the strata unit.
>
> 9.3 Where hardship results to the owner, he may appeal to the council for permission to lease his strata lot, and the council shall not unreasonably refuse the appeal, all pursuant to the *Strata Property Act, section 144* and amendments thereto.
>
> 9.4 Owners who have rental units must accompany or have an appointed agent accompany prospective renters when showing their unit.
>
> 9.5 Before an owner rents his strata lot, the owner must give the Strata Corporation the undertaking in *Strata Property Act* Form K, signed by the tenant, that the owner and the occupants of the strata lot will comply with the bylaws and rules of the Strata Corporation.

[4] Section 10 of the Bylaws exempts owners from the rental restriction bylaw if the bylaw causes a strata owner hardship. It essentially reproduces the hardship

exemption and the procedure to be followed in administering the hardship exemption outlined in s. 144 of the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*].

[5] The Carnahans began to rent the Strata Lot in December 2010 after the strata council granted them a one-year hardship exemption. Several further extensions of the exemption permitted them to continue renting the Strata Lot. On July 21, 2013, the Strata Corporation extended the Carnahans' hardship exemption to January 31, 2014, but advised them they would not grant them a further extension.

[6] The Carnahans therefore advised their tenant he would have to leave the Strata Lot by the end of January 2014. Meanwhile, the Carnahans continued to lobby the Strata Corporation for a further extension of the hardship exemption. On September 29, 2013, the Strata Corporation notified the Carnahans their position remained unchanged, and that as of February 1, 2014, they would no longer allow the Carnahans to rent the Strata Lot. In December 2013, the tenant vacated the Strata Lot.

[7] On November 26, 2013, the Carnahans' counsel wrote the Strata Corporation, seeking confirmation the Carnahans were entitled to rent the Strata Lot because, as they asserted, the rental restriction in s. 9 of the Bylaws was unenforceable for its failure to specify a procedure the Strata Counsel had to follow when it administered the rental restriction limit.

[8] On January 13, 2014, Mr. Carnahan sent an e-mail to Christine Short, an employee of Homelife Glenayre Realty Chilliwack Ltd. and the strata property manager for Village Creek, stating that the Carnahans intended to rent the Strata Lot as soon as possible.

[9] On January 14, 2014, counsel for the Strata Corporation wrote the Carnahans' counsel to dispute the Carnahans' interpretation of s. 9 of the Bylaws, saying the rental restriction was enforceable.

[10] On February 27, 2014, the Carnahans provided the Strata Corporation with a signed Form K [Notice of Tenant's Responsibilities] for a new tenant as required by s. 9.5 of the Bylaws (and s. 146 of the *SPA*). On March 1, 2014, the Carnahans began to rent the Strata Lot to their new tenant.

[11] Starting in March 2014, and relying on its authority under s. 38 of the Bylaws to punish rental restriction violations with a fine, the Strata Corporation began fining the Carnahans $300 each week for their violation of s. 9 of the Bylaws. On the date of the chambers hearing, the unpaid fines totalled $10,500.

ISSUE TO BE DECIDED

[12] Section 141 of the *SPA* governs the restriction of rentals by a strata corporation. It provides as follows:

> 141 (1) The strata corporation must not screen tenants, establish screening criteria, require the approval of tenants, require the insertion of terms in tenancy agreements or otherwise restrict the rental of a strata lot except as provided in subsection (2).
>
> (2) The strata corporation may only restrict the rental of a strata lot by a bylaw that
>
> (a) prohibits the rental of residential strata lots, or
>
> (b) limits one or more of the following:
>
> (i) the number or percentage of residential strata lots that may be rented;
>
> (ii) the period of time for which residential strata lots may be rented.
>
> (3) A bylaw under subsection (2)(b)(i) must set out the procedure to be followed by the strata corporation in administering the limit.
>
> [Emphasis added.]

[13] The main issue is whether s. 9 of the Bylaws satisfies s. 141(3) of the *SPA* by specifying the procedure it will be bound to follow when it administers the rental limit.

PARTIES' POSITIONS

1 The Strata Corporation

[14] The Strata Corporation argues that s. 9 of the Bylaws satisfies the requirements of s. 141 of the *SPA*. It argues:

- s. 9.1 of the Bylaws sets out a rental limit of five in accordance with s. 141(2)(b)(i) of the *SPA*; and
- ss. 9.2, 9.4 and 9.5 set out the "procedure" to be followed by the Strata Corporation in administering the limit in accordance with s. 141(3).

[15] The "procedure" the Strata Corporation alleges the Bylaws have established is:

(a) section 9.2 requires an owner to seek written permission from the Strata Corporation before renting out his or her unit;

(b) section 9.4 requires owners with rental units to have either the owner or an agent accompany prospective renters during the showing of their units; and

(c) section 9.5 requires owners wishing to rent to first provide the Strata Corporation with an undertaking in accordance with *SPA* Form K, signed by the prospective tenant, requiring the unit owner and the prospective tenant to comply with the bylaws and rules of the Strata Corporation.

[16] The Strata Corporation asserts this procedure satisfies the demands of s. 141(3) of the *SPA*, arguing that a plain reading of s. 141(3) indicates a Strata Corporation must have a procedure in place for administering the rental limit, but not that it must take a particular form.

[17] In addition to the process outlined in s. 9 of the Bylaws, the Strata Corporation points out it maintains and administers a list of the five units rented at a given time and that it grants an exemption once a place on the list becomes available. It submits the court should interpret the Bylaws liberally, especially considering laypeople, not professional lawyers, read the *SPA* and administer the Bylaws. Further, it points out the current rental restriction has been place for 20 years without any record of complaints or issues regarding the Strata Corporation's

administration of the limit; the lack of complaints demonstrating that a workable and predictable procedure for dealing with the rental limit is in place.

[18] Furthermore, the Strata Corporation argues that the "equities" do not favour the Carnahans, seeing that:

- the Carnahans are attempting to circumvent a rule successfully in place for 20 years;
- Mr. Carnhan enforced the rental bylaw himself in 2008, when he sat on strata council as President;
- in such capacity, Mr. Carnahan wrote a letter to a strata owner, denying his application to rent his strata lot based on the fact five lots were already rented, and that the strata council would add his name a list of rentable suites if the total number of rented suites should fall below five; and
- in 2010, Ms. Carnahan was Vice-President of the strata council when the same strata owner inquired about renting his suite. The strata council denied the request on the grounds that the five units were already being rented.

2 The Carnahans

[19] The Carnahans assert that a bylaw of a strata corporation that purports to restrict the ability of an owner to lease his or her strata lot is unenforceable unless it complies with s. 141 of the *SPA*. They argue that s. 9 of the Bylaws fails to set out the procedure to be followed by the Strata Corporation in administering the Strata Corporation's rental limit in accordance with s. 141(3) of the *SPA*, and is thus unenforceable.

[20] The Carnahans argue that s. 141(3) requires that the procedure be expressly written into the bylaws, and cannot be merely implied. Moreover, the bylaws must go further than to reference only the steps an owner must take when they are seeking an exemption: they must also outline the procedure to be followed by the Strata Corporation when it administers the limit. The Carnahans stress the fact that a strata corporation has the authority to prohibit any rentals. Nevertheless, where a strata corporation has limited, rather than prohibited rentals, the *SPA* obliges it to establish a clear process. The Carnahans argue that this is the only way to ensure the Strata

Corporation will not act capriciously, but will rather administer the rental limit in a predictable and uniform way.

[21] Responding to the Strata Corporation's assertion that the "equities" do not favour them, the Carnahans submit this argument is a red herring: the rental restriction bylaw is either valid or invalid. As counsel put it, "a statute is a statute is a statute", and any party with an interest in the matter is entitled to challenge the validity of the Bylaws. As the Carnahans are strata owners, they have a right to so challenge.

CONCLUSION AND REASONS

[22] Section 121(1)(c) of the *SPA* provides that a bylaw restricting the right of an owner of a strata lot to freely lease their strata lot is not enforceable. Section 121(2)(a) stipulates that this rule does not apply to a bylaw enacted pursuant to s. 141 of the *SPA* that prohibits or limits rentals.

[23] Section 9.1 of the Bylaws clearly limits the number of residential strata lots that may be rented at Village Creek to five. Accordingly, s. 141(3) requires that the Strata Corporation set out the procedure it is obliged to follow when it administers the limit. If the Strata Corporation has not complied with s. 141(3), then the rental restriction bylaw is unenforceable pursuant to s. 121 of the *SPA* and the Carnahans are entitled to rent the Strata Lot.

[24] This case raises an issue of statutory interpretation. No previous cases have interpreted the scope and meaning of s. 141(3).

[25] Chief Justice McLachlin recently set out the proper approach to statutory interpretation in *Cuthbertson v. Rasouli*, 2013 SCC 53 at para. 32:

> The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

[26] In interpreting an Act of the British Columbia legislature, the court must also consider the provisions of the *Interpretation Act*, R.S.B.C. 1996, c. 238 [*IA*]. Section 8 of the *IA* reads:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[27] Section 29 of the *IA* is also relevant in this case. It provides that where the word "must" is used in an enactment, it is to be construed as imperative. Thus, s. 141 of the *SPA* obligates the Strata Corporation to set out a procedure for its own administration of the rental limit.

[28] A review of the provisions of the *SPA* on the rental of strata lots indicates that its object is the balancing of the interests of strata owners with the interests of the strata corporation as a whole.

[29] A common law presumption holds that the legislature does not intend to interfere with property rights unless clear statutory language states that intent: see *Hamilton (City) v. Equitable Trust Co*., 2013 ONCA 143 at para. 34. This principle is reflected in s. 121(1)(c) of the *SPA*, which states that a bylaw is not enforceable to the extent that it "prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot" (emphasis added). However, s. 121(2) permits a strata corporation to prohibit or restrict a strata owner's right to lease their strata lot through the strata corporation's passage of a bylaw pursuant to s. 141. In this way, the *SPA* clearly allows a strata council to subordinate a strata owner's individual property right to rent their strata lot to the communal rights of the strata corporation and its right to mould the communal living environment in accord with the wishes of the strata owners as a whole. The nature of this subordination is explained in *The Owners Strata Plan LMS 2768 v. Jordison*, 2013 BCCA 484 at para. 25, where Justice Donald states:

> The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting. In *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at 366, the learned author, Bruce Ziff, writes:

> Participation in condominium projects necessarily involves a surrender of some degree of proprietary independence. An owner is at the mercy of the rules enacted through the internal decision-making process. That is only logical…

[30] Section 141(2) grants a strata corporation wide scope to limit the ability of individual strata owners to rent their strata lots. But it is not absolute. The *SPA* contains several statutory protections for individual strata owners in certain circumstances: ss.142-143 insulate strata owners from the implementation of a rental restriction bylaw in prescribed situations; s. 144 grants an owner the right to apply to the strata corporation for a hardship exemption from a rental restriction bylaw; and s. 141(3) requires a strata corporation to set out the procedure that has to be followed when administering the rental limit.

[31] It is within this context, the balancing of interests, that s. 141(3) of the *SPA* must be considered. In my view, s. 141(3) intends to benefit both strata owners and prospective strata owners by ensuring they both have at hand information that clearly states limitations on a strata owner's ability to rent their strata lot.

[32] Section 141(3) creates two obligations for a strata corporation purporting to restrict the number of strata lots that may be rented: (1) the strata corporation must have a procedure for administering the limit; and (2) that procedure must be set out in the strata corporation's bylaws.

[33] The Strata Corporation submits that a plain reading of s. 141(3) shows that strata corporations must have a procedure for administering the rental limit, not that the procedure must have a specific form. I agree. Unlike s. 144, which sets out the procedure a strata corporation must follow when it considers a hardship exemption, s. 141(3) gives a strata corporation considerable discretion in devising a procedure for administering a rental limit.

[34] However, merely because the legislature did not set a particular procedure to follow does not leave a strata corporation with unfettered discretion to decide the content and scope of that procedure. By obliging a strata corporation to set out the "procedure," s. 141(3) requires it to establish a process for administering the rental

limit that is clear and logical, not ambiguous or arbitrary. A strata corporation must do more than set out a single step in the process. Rather, the procedure must be detailed enough that a strata owner, or a prospective strata owner, who reads the bylaws can clearly see how the strata corporation decides which strata owner is entitled to lease their strata lot when the rental restriction limit is not reached, and how a strata owner can attain that right. Such a requirement protects strata owners from the application of an informal and arbitrary procedure. Moreover, the bylaw's procedure must not itself allow the strata corporation to administer the rental limit arbitrarily. In my view, these minimum procedural requirements for the administration of a rental limit accord with the objective of balancing the rights of individual strata owners with the strata corporation as a whole.

[35] In the case at bar, the Strata Corporation's "procedure" was inadequate. As set out above, the Strata Corporation asserts that its "procedure" for administering the rental limit is set out in ss. 9.2, 9.4 and 9.5 of the Bylaws. I also consider s. 38 of the Bylaws to be a part of the procedure.

[36] Of these sections, only ss. 9.2 and 38 have anything to do with the administration of the rental limit. Sections 9.4 and 9.5 detail a strata owner's obligations after receiving the right to rent their unit; the sections say nothing about how the Strata Corporation administers the rental limit. Moreover, s. 9.5 merely incorporates a landlord's obligation under s. 146 of the *SPA* to furnish the strata corporation with a signed Form K; this obligation would exist regardless of whether it was included in the Bylaws.

[37] That leaves ss. 9.2 and 38 as the only sections in the Bylaws saying anything about the "procedure" the Strata Corporation follows in administering the rental limit. Section 9.2 requires owners wishing to rent their strata lot to obtain the written permission of the strata council before they rent their strata lot. In essence, all s. 9.2 establishes is that the Strata Corporation will provide a written permission to a strata owner entitled to rent their strata lot. Section 38 outlines the Strata Corporation's authority to punish strata owners for rental restriction violations.

[38] In my view, ss. 9.2 and 38 of the Bylaws do not establish an adequate procedure within the meaning of s. 141(3) of the *SPA*. The Bylaws do not establish a clear and logical process for administering the limit and are completely silent on how the Strata Corporation determines which strata owners are entitled to be designated as rental units when the rental limit is not reached. Moreover, on their face, the Bylaws do not prevent the Strata Corporation from administering the rental limit in an arbitrary fashion.

[39] The Strata Corporation argues that its practical procedure involves the keeping of a waiting list, but this does not save it from running afoul of s. 141(3). As stated above, the language of s. 141(3) clearly requires that the procedure must be set out in the bylaws. There is no scope for a strata corporation to outline a deficient procedure in the bylaws and in practice to adopt a more expansive informal procedure. The procedure the strata corporation follows in its administering of the rental limit must be clearly set out in the bylaws. This makes sense from a practical perspective as well. If a strata corporation were entitled to adopt an informal procedure for administering the rental limit not set out in the bylaws, a prospective strata owner would be at an informational disadvantage, left with no accurate understanding of how the strata corporation administers the rental limit. Without such information, when deciding whether to purchase a strata lot, they may overestimate their prospects for renting it and suffer financial loss.

[40] Moreover, there is no merit to the Strata Corporation's contention that the Court should adopt a liberal approach to the interpretation of the Bylaws because they have been administered by laypeople without difficulty for many years. In my view, it is precisely because strata bylaws are administered by, and affect laypeople, that a clear procedure must be outlined in the bylaws. Requiring that the bylaws set out a clear, predictable and non-arbitrary procedure for administering the rental limit ensures decisions on which strata owners have the right to rent their units will not be left to the unfettered discretion of the strata council, whose members could have ulterior motives.

[41] I will now make some general comments about the information strata corporations should consider including in procedural bylaws for the administration of a rental limit. These considerations are simply offered as guidance and are not exhaustive requirements for a rental restriction procedure.

[42] The *British Columbia Strata Property Practice Manual* suggests that procedural bylaws should address the following matters:

> (a) Must the application to rent be in writing?
>
> (b) What information must be included in the application to rent?
>
> (c) Who receives applications to rent? Should applications be sent to the strata council or the strata management company?
>
> (d) Within what time frame will the strata corporation respond to an application? Must the strata corporation's response be in writing?
>
> (e) How much time does the owner have to find a tenant before permission to rent is revoked and another owner is given permission?
>
> (f) If the limit has been reached, is there a waiting list? If so, what is the procedure for use of the waiting list?
>
> (g) What is the penalty for renting a strata lot in contravention of a rental limit?
>
> (L. Joy Tataryn, ed., *British Columbia Strata Property Practice Manual*, looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2008) at §11.6.)

[43] To these, one could add the following:

> (a) Is there a time limit on the rental period, or is it for an indeterminate period?
>
> (b) In what circumstances could the right of an owner to rent their strata lot be revoked? For example, when a renting owner sells, transfers, or takes occupancy of the strata lot? When a tenant vacates the strata lot? When a strata owner or tenant fails to comply with certain bylaws? When an owner fails to pay strata fees, and if so, in what circumstances?

[44] It is not necessary that a rental restriction procedure outline all of the abovementioned information to meet the requirements of s. 141(3). These are just

possible examples. However, these are the kind of matters a strata corporation should consider when drafting rental restriction bylaws.

STRATA CORPORATION'S EQUITY ARGUMENT

[45] As mentioned earlier, the Strata Corporation argues that the "equities" are not in favour of the Carnahans. The Strata Corporation (presumably) points to the following as examples of inequitable conduct on the part of the Carnahans:

- the Carnahans, having benefited from hardship exemptions for several years, and only now bringing this petition after their having been informed they were no longer entitled to rent the Strata Lot pursuant to an exemption;
- the Carnahans knowing the Strata Corporation's informal procedure for processing rental requests;
- the Carnahans having applied that procedure to other strata members while members of the strata council; and
- the Carnahans having understood the procedure, indeed, partially complying with it, when they sought to rent the Strata Lot when their hardship exemption came to an end by providing a Form K.

[46] I agree with counsel for the petitioners that this is a red herring. As strata owners, the Carnahans have standing to challenge the validity of the Strata Corporation's rental restriction. Other than a vague assertion that the "equities" were not in favour of the Carnahans, the Strata Corporation did not plead that the Carnahans are not entitled to a remedy. I find no equitable reason why the Court should deny the Carnahans the relief they seek.

[47] In any event, I do not find that the Carnahans engaged in inequitable behaviour. The fact that they benefited from a hardship exemption has nothing to do with the interpretation issue. Moreover, I do not agree that owners who know the practical procedure and apply that procedure while serving on a strata council are thereby forever barred from challenging the validity of a rental restriction bylaw in their capacity as strata owners. Finally, to suggest that the Carnahans "partially complied" with the Strata Corporation's procedure by providing a Form K is

misleading. Providing a Form K is an independent obligation required by s. 146 of the *SPA*.

[48] In summary, The Carnahans are not barred from the remedy they seek.

ORDER

[49] The Strata Corporation's Bylaws do not comply with s. 141(3) of the *SPA*. Pursuant to s. 121 of the *SPA*, the Strata Corporation's rental restriction limit is unenforceable. The Carnahans are entitled to lease their Strata Lot.

[50] As the rental restriction bylaw was unenforceable, the Strata Corporation had no right to levy fines against the Carnahans for breaching the rental restriction bylaw. I therefore cancel those fines pursuant to the court's authority to relieve against penalties under s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[51] The Carnahans are entitled to their costs.

"N. Brown J."