IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chorney v. The Owners, Strata Plan VIS770*, 2016 BCSC 148

Date: 20160115
Docket: 15-1981
Registry: Victoria

Between:

Linda Chorney and Marilyn Carey

Petitioners

And:

The Owners, Strata Plan VIS770

Respondent

Before: The Honourable Mr. Justice MacKenzie

Oral Reasons for Judgment

(In Chambers)

Appearing on her own behalf:	L. Chorney
Counsel for the Respondent:	R.A. Comeau
Place and Date of Hearing:	Victoria, B.C. January 12, 2016
Place and Date of Judgment:	Victoria, B.C. January 15, 2016

[1] **THE COURT:** This is a petition where two owners in a small eight-unit strata property seek the following orders:

> 1. A declaration that the respondent strata corporation made decisions that were significantly unfair to the petitioners during its investigations into the petitioners' complaints concerning violations of the strata corporation's no-hazard and no-nuisance bylaw in regard to the ingress of second hand cigarette smoke into the petitioners' strata lots.
> 2. An order pursuant to section 164 of the *Strata Property Act* that the conduct of the respondent strata corporation when investigating any future complaints of a bylaw violation comply with principles of procedural fairness and the requirements of section 135 of the *Strata Property Act*.
> 3. Such further orders as are necessary to give effect to the previous order of this Court in *Chorney v. The Owners, Strata Plan VIS770* (Victoria Registry No. 13 0478) made March 11, 2013 that requires the strata corporation to provide any owner of a strata lot in Strata Plan VIS770 (an "Owner"), upon that Owner's request, with copies of strata corporation records to which that Owner is entitled, including but not limited to copies of monthly financial records.

[2] The petitioners also seek costs at Scale B.

[3] The respondent strata corporation resists the application and says all of the relief should be dismissed.

[4] The strata property in question is relatively unique, a 1912 character building originally built as a single family residence. It remained a single family residence until it was converted into the eight strata lots in the early 1970s. It is described by Ms. Carey, one of the petitioners who has been a long-time resident at this property, as "lack[ing] modern amenities such as soundproofing between suites, and its construction allows air to flow (a) between strata lots, and (b) from strata lots into the common property, and vice versa."

[5] The other petitioner, Dr. Chorney, deposes that, "Odours also permeate the building, moving from strata lot to strata lot and from strata lot into the common areas."

[6] The petitioners submit that because of the nature of this character building, the owners of the strata units are particularly reliant on the enforcement of the no-nuisance, no-hazard bylaw which is integral to the quality of life for all strata owners in this building.

[7] The basis for the petition and the relief sought involves the petitioners' complaints about second-hand cigarette smoke entering their strata lots from either within another unit or from areas of common property close enough to their respective units to allow smoke to enter, thereby, in their submission, contravening s. 4(1) of the no-nuisance, no-hazard bylaw.

[8] The petitioners' concerns commenced in 2010, when Ms. Pepperdine moved into a unit close to Ms. Carey's, and have continued on and off since then. In this regard, the first complaint was from Dr. Chorney, contained in a letter of July 30, 2014, where she advised the strata corporation that the second-hand smoke ingress problem was "still continuing" and that if the problem persisted, a formal complaint would follow. In due course, Dr. Chorney and Ms. Carey filed a written formal complaint on September 6, 2014, respecting smoke entering their units. Dr. Chorney stated the smoke was emanating from Ms. Pepperdine's unit.

[9] As a result of this formal complaint, the strata council commenced an investigation, including having conversations with both Ms. Carey and Ms. Pepperdine, and as a result of the complaint and subsequent investigation, Ms. Pepperdine was eventually fined $25 on October 4, 2014, for breach of Bylaw 4(a)(1), again the no-nuisance, no-hazard bylaw.

[10] As there is not, as of yet, a no-smoking bylaw at this property, this was the regulation the formal complaint was proceeded under.

[11] In this regard, it is the nature of the investigation and the procedures undertaken by the strata council that the petitioners take issue with and say that the process throughout the investigation was significantly unfair to them.

[12] As the respondent points out, what makes this situation somewhat unique, having regard to the relief sought by the petitioners, is that the alleged perpetrator, Ms. Pepperdine, has sold her unit and has moved out as of the summer of 2015, prompting the respondent to submit that there is now no outstanding issue between the parties and what the petitioners seek with respect to potential breaches of a rule or bylaw in the future is speculative, inappropriate, and unnecessary, given the strata corporation is required to comply with the many procedural rules outlined in the *Strata Property Act*, in addition to not acting significantly unfairly to any strata owner, as mandated in s. 164.

[13] The petitioners acknowledge Ms. Pepperdine has indeed moved out and that it was her alleged behaviour which prompted the complaints, but they submit this does not answer their concerns. What the petitioners say they are concerned about is the procedures the strata corporation followed during their investigation of these allegations and what might follow in the future, if indeed there are any further complaints about second-hand smoke ingress.

[14] Dr. Chorney has put it this way in her written submission:

> Marilyn Carey and I are here today because the strata corporation has done nothing that would even remotely suggest it will conduct itself differently upon receiving a complaint about second hand smoke ingress in the future

[15] It is these concerns about future potential proceedings, as well as the actions of council leading up to the imposition of the fine imposed on Ms. Pepperdine in 2014, and further complaints made by Ms. Carey in 2015 about Ms. Pepperdine's alleged smoking, which have prompted the petitioners to seek the orders sought in paragraphs 1 and 2 of the petition, relying on s. 164 of the Act, which gives the Supreme Court jurisdiction to make any order it considers necessary to prevent or remedy any "significantly unfair" action or threatened action by a decision of the strata corporation or council in relation to any owner or tenant.

[16] The petitioners also rely on several court decisions that deal with the question of significant unfairness including, amongst others, *Dollan* in the B.C. Court of Appeal, *Gentis*, *Farren*, and *Mitchell*, all from the B.C. Supreme Court.

[17] The petitioners also submit that the well-known decision in *Dunsmuir v. New Brunswick*, even though this case focused primarily on the area of administrative law, is instructive and they submit that, in addition to the specific provisions of the *Strata Property Act*, the overriding principles with respect to any tribunal or organization such as a strata council should be procedural fairness and natural justice.

[18] The petitioners have characterized the order they seek in paragraph 2 of their petition as a "comprehensive complaint procedure" that they would like to see the council adopt for any potential allegation of bylaw or rules infractions in the future, as outlined in an extensive proposal they put forward to the respondent with a view, in their words, to "stop the egregious procedure" adopted by the strata corporation in handling the complaints filed by the petitioners pertaining to the issue of second-hand smoke permeating their respective units.

[19] As stated, the respondent submits that the orders sought are premature and unnecessary, as there presently again is no issue between the parties pertaining to any alleged violation of the bylaw, and that until there is a future complaint and a subsequent allegation of significant unfairness in the manner in which any complaint might be handled, there is no necessity for the court to consider this aspect of the petition, especially when the petitioners are basically seeking to have the court impose a set of procedural rules for this strata council when the Act provides for procedures the strata council must comply with as outlined, for example, in s. 135.

[20] In this regard, the petitioners made extensive submissions on what they say are the procedural requirements the strata corporation had to comply with pursuant to the provisions of s. 135, and that by discussing the matters with Ms. Carey, the strata council violated that section by embarking upon a "hearing" without giving

Ms. Carey notice of this so-called hearing. The petitioners therefore say this is a violation of the "most basic principle of procedural fairness."

[21] The petitioners submit because of this investigation and "questioning" of Ms. Carey by Ms. Courtney, a strata council member, in September 2014, council appeared in essence to have conducted a hearing without giving Ms. Carey proper notice.

[22] Along with the respondents, the difficulty I have with this submission is that s. 135 refers to the procedural requirements a strata corporation must undertake if it intends to impose sanctions against a person who has violated a rule or bylaw. The section, in my view, clearly refers to a person who is alleged to have breached a rule and, prior to imposing any penalties, mandates the strata corporation must first provide the alleged offender particulars of the complaint in writing, and then provide that person with a reasonable opportunity to answer the complaint "including a hearing if requested by the owner or the tenant".

[23] Moreover, this is exactly what Judge Schultes ordered in 2011 in response to the petitioners' earlier complaints of cigarette smoke, when he ordered the then-administrator of the strata corporation, if, in his view, there had been a violation, to, "invoke and observe s. 135 of *Strata Property Act* and afford Ms. Pepperdine all of the procedural safeguards of the section."

[24] It is clear, therefore, that the petitioners' submission that the council in 2014 and 2015 failed to follow the order of Judge Schultes, because it did not "follow the process set out in s. 135", is without merit. In fact, one could reasonably argue that Judge Schultes' order clearly presumes an investigation would be undertaken by the administrator or the strata council prior to notice being given because it is only "if in his view" violations of the bylaw "have been or are being committed by the respondent" did Judge Schultes direct that the administrator or council will then follow the procedural safeguards afforded to a person who is alleged to have breached a bylaw.

[25] As a result, I find that this aspect of the petitioners' argument has no merit, as Ms. Carey does not come within the purview of s. 135, given she was in fact the person who was complaining of a violation, not the person with which the strata corporation was dealing with as a potential offender.

[26] Moreover, some of the concerns expressed by the petitioners with respect to procedural fairness or whether council's conduct was significantly unfair in investigating the petitioners' complaints focuses on suggestions the respondent received from an organization known as the Vancouver Island Strata Owners' Association, after the newly-formed council, given their inexperience, sought some advice from this organization. It would appear from the materials filed that this organization suggested as a "first step" that council should call a meeting and formally record in the minutes that a complaint had been received.

[27] The petitioners say that instead of following this suggestion, the then-president of the council, Mr. Scott, on September 15, 2014, emailed Dr. Chorney wherein he discussed the nature of the complaint received from the petitioners. In that email, it was confirmed that Ms. Pepperdine, who allegedly was breaching the bylaw, was notified of the complaint. She was also provided with written notice of the petitioners' complaint on September 27, 2014. Moreover, there is no suggestion Ms. Pepperdine requested a hearing.

[28] Mr. Scott also suggested that it appeared there would be no further issues after speaking to Ms. Pepperdine, even if she was responsible for the smoking, and therefore suggested that:

> If you decide not to continue with this complaint, I think it would be in all of our best interests.

But he then went on to state:

> It could always be reinstated at a future date if the problem should persist ...

[29] The petitioners submit that this communication from Mr. Scott and other communication from the corporation was inappropriate and amounted to a

strong-arm tactic by the corporation to force the petitioners into withdrawing their complaint. The petitioners submit that this supports their submission that the strata corporation was biased and had prejudged the matter, and was acting significantly unfairly by embarking upon this process in an attempt to resolve the matter.

[30] Given the totality of the circumstances and the evidence presented on this hearing, I cannot accede to the petitioners' submission. Rather, I accept the submission of the respondent that the strata corporation was attempting to resolve this matter in a reasonable manner, given the conflicting evidence from the alleged perpetrator, Ms. Pepperdine, and the belief or suspicions expressed by the petitioners. I am satisfied council was acting in a reasonable manner in attempting to resolve the problem without the necessity of proceeding further, especially given the unique living arrangements in this character building and its lack of modern construction details, as acknowledged by all parties.

[31] As Mr. Scott stated in his email to Dr. Chorney:

> This all puts us in a very difficult situation, Linda. We certainly take your complaint seriously, but without any real evidence, and with conflicting accounts, it is very hard for us to make a judgement.

[32] While it is clear the petitioners disagree with the steps taken by council to try and resolve these matters and that another council might very well not have elected to proceed in such a fashion, that is not the test. The test is whether, in these circumstances, the action taken by the council was significantly unfair. In this regard, I am not satisfied the petitioners have established that the conduct of council met this threshold level of significantly unfair.

[33] Moreover, the petitioners themselves had quoted from paragraph 27 in *Gentis*, 2003 BCSC 120, where Judge Masuhara quoted Judge Martinson in *Strata Plan VR1767* at paragraph 47 of that case:

> The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been

> done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: *Reid v. Strata Plan LMS 2503* ...

Moreover, at paragraph 28, Judge Masuhara states:

> [28] I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

[34] The petitioners also complain about the conduct of council in relation to Ms. Carey's written complaints in February and March of 2015. Again, it was clear that Ms. Carey continued to believe that the origin of the cigarette smoke at that time was because of Ms. Pepperdine's conduct. Again, the primary concern of the petitioner is that Ms. Courtney again tried to contact Ms. Carey in March of 2015 to discuss these particular complaints.

[35] As the petitioners have stated it, they view this as another attempt by council to "have another impromptu hearing with Marilyn Carey." Ms. Carey has deposed that she did not respond to a request that she contact Ms. Courtney, because she says she did not wish to be subjected to "the pressure I felt from the previous experience I had with her", with respect to her earlier complaints.

[36] There was further contact from the council to Ms. Carey wherein Ms. Courtney wanted to ask further questions and discuss the matter further. Again, this conduct by Ms. Courtney has inspired the petitioners to submit that there was again a breach of s. 135 because it did not inform Ms. Carey of what they again submit was a hearing.

[37] First off, as I have decided, this was not a hearing and, as I have also stated, s. 135 has no applicability to the process embarked upon by the strata council when seeking out further information from Ms. Carey.

[38] In due course, council wrote a letter to Ms. Carey on March 24, 2015, seeking information, including what effect the smoke was having on her, in order to determine whether it was a nuisance or a hazard that is "capable of significantly harming you."

[39] While I have concerns about the necessity of this type of information requested by council, I cannot conclude council was acting in a harsh, wrongful, or unfair manner in requesting further information. Nonetheless, one might expect that council might very well conduct themselves differently in the future, if and when there are any future complaints of smoke ingress into Ms. Carey's unit.

[40] Be that as it may, I am again satisfied that in these circumstances, council's response to the February and March 2015 complaints was appropriate and again an attempt to try and find a solution that would be fair to all parties or, in due course, proceed with the complaints once further information was obtained. Again, upon receiving this letter, Ms. Carey has deposed in her affidavit that she was "left with the impression that council was biased in favour of the owner against whom I had complained."

[41] As a result, there was no further direct interaction between Ms. Carey and council's request for further information, and eventually at a meeting on May 20, 2015, council concluded that, as Ms. Pepperdine had sold her unit and was moving, this development "effectively closed the issue."

[42] Nevertheless, Ms. Carey and Dr. Chorney submit that what remains in issue is the "flawed process" undertaken by the strata corporation upon receipt of a complaint about a bylaw violation. They submit, "Among other things, the process adopted lacks even-handedness and adherence to the law."

[43] Again, in response, the respondent submits it was reasonable for council to explore the possibility of resolving these concerns in the manner in which it did, and that the request for further information and evidence in no way supports the

conclusion council is biased or not prepared to proceed with a complaint if a reasonable solution was not forthcoming.

[44] Given the totality of the circumstances, I am not satisfied the petitioners have established that council's conduct throughout both the 2014 and the 2015 investigations of the petitioners' complaints about second-hand smoke was significantly unfair to them. I am satisfied the corporation acted reasonably and fairly in investigating the complaints and trying to resolve the allegations made by the petitioners, given the denial by Ms. Pepperdine and the lack of corroborating evidence to support either version of events.

[45] In my view, there is insufficient evidence to establish the corporation exercised its discretion oppressively, nor is there sufficient evidence to establish there was any procedural unfairness on the part of council, given the misguided submission by the petitioners as to the applicability of s. 135 of the Act.

[46] That is, in these circumstances, that the overall actions taken by council, while it might very well have done some things differently, does not reach the threshold of significant unfairness: see *Dollan* at paragraph 38.

[47] I pause here to simply say that I feel it is important to note that I accept the reasonableness of Ms. Carey's concerns about second-hand smoke entering her unit, given her unfortunate medical history. In fact, one could probably take judicial notice of the hazard cigarette smoke presents to all persons, whether or not they are allergic to smoke or physically compromised. I also accept bylaw enforcement in any strata property is a matter of great importance, especially in a character building such as this one with its unique characteristics.

[48] Again, however, I am not satisfied council acted significantly unfairly during their investigations.

[49] So the relief sought in paragraph 1 of the petition is dismissed.

[50] As noted, the other relief sought by the petitioner is for an order directing the corporation, when investigating future complaints of a bylaw violation, if indeed those are forthcoming, that it comply with the principles of procedural fairness and the requirements of s. 135 of the *Strata Property Act*.

[51] As I have already found that the strata corporation did not act significantly unfairly in dealing with the petitioners' complaints, coupled with the fact that the requirements of s. 135 are not applicable to the petitioners' concerns with respect to them being the persons who were filing a complaint, this aspect of the petition is dismissed as well.

[52] In addition, I will also state I see no practical utility in recommending any particular procedure for council to follow in the future, as this is not contemplated by the *Strata Property Act* which, in my view, allows strata corporations to deal with matters of complaints pursuant to bylaw violations as it sees fit, as long as it complies with the principles of procedural fairness and not be significantly unfair to any person who appears before it.

[53] As the court in *Mitchell* said at paragraph 50, "the Act sets up a detailed scheme and establishes processes for every aspect of the business" of a strata corporation. In my view, there is no need to add to this comprehensive statutory regime.

[54] So for these reasons, the relief sought by the petitioners in paragraph 2 of their petition is dismissed.

[55] Finally, the petitioners ask for any orders necessary to give effect to the prior order of this court, referring to a March 20, 2013, consent order where all of the strata owners who owned units at that time signed this consent order in their capacity as owners, but there were no signatures in their capacity as petitioners or indeed as respondents. While I might have concerns about whether the strata corporation is bound by this "consent order": see *Terasen Gas v. Surrey*), I find it unnecessary to consider this question further for three reasons.

[56] One, Dr. Chorney, on behalf of herself and Ms. Carey, has stipulated during this hearing that she is content to have disclosure of any records or documents referred to in s. 35 of the Act be sent to her within two weeks of receipt of her request, pursuant to the mandatory provisions of s. 36 of the Act.

[57] Secondly, I am not satisfied the consent order referring to the deadline of seven days for forwarding documents in the case of a "standing request" is consistent with the provisions of the Act.

[58] Finally, this 2013 consent order was specifically dealing, in my view, with renovations and asbestos contamination occurring at that point in time at the residence and has little relevance to the present situation and the petitioners' general request for s. 35 documents.

[59] Therefore, the strata corporation is relieved of what I find is an overly onerous burden requiring it to produce documents within seven days of receipt of any request for disclosure. Pursuant to s. 36(3) of the Act, I order that the respondent will have two weeks to comply with any request for disclosure of documents and records that are referred to in s. 35.

[60] While I am not disposed to make this a term of the order, I would suggest that as far as documentation that is produced regularly, such as monthly bank statements, that it would be reasonable for the strata corporation to send these type of documents to any owner who requests them without the necessity of a formal request being made each and every month for such documentation. I will, however, leave this issue to all the parties, with the hope and expectation that there can be reasonable accommodations on the part of everyone involved in this matter.

[61] In this regard, the respondent acknowledges its responsibilities pursuant to s. 36, but submits that it is unreasonable for Dr. Chorney not to accept requested documents electronically, as this would "greatly ease the administrative workload of the volunteer strata member who is responsible" for production of documents. In this regard, when the court asked why receipt of these documents by email was not

agreeable to Dr. Chorney, she stated that extraneous matters not relevant to document disclosure could be forthcoming from the corporation when they were complying with the mandatory provisions of the Act, if they in fact were entitled to do so by email.

[62] In this regard, I have referred to the Act, which states that on application of an owner, the Supreme Court may order the strata corporation to perform a duty it is required to perform under the act and in 165(c) it states:

> ... make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[63] In this regard, I will order that the strata corporation is to perform its duty under s. 36 of the Act, but I am also satisfied it is necessary, in order to give effect to that order, in the absence of any reasonable argument as to why documents should not be forwarded by email, I will direct that the strata corporation can provide Dr. Chorney and Ms. Carey, or any other unit holder, with requested documentation by email or any other form of electronic communication as agreed to by the parties. If any other form of electronic communication is agreed to, such as suggested by Dr. Chorney, SharePoint or other similar websites or types of electronic mechanisms, the strata corporation will have until May 1, 2016, to set up such a delivery service.

[64] I am not inclined to discuss the issue of hard copies, other than if that is more convenient, I am going to leave it up to the parties to communicate in that regard. There is a requirement under the Act that the person requesting such documents pays for those and, as Dr. Chorney has said, she has paid her bills in the past with respect to that type of issue.

[65] Finally, even though the respondent has said that the Mac's Heating bill in the amount of $895.08 will be forwarded to Dr. Chorney as she requested, I will include that specific provision in the order, and in case the new insurance policy effective, apparently, as of mid-September 2015 has not been provided, it, too, will be provided electronically by council to Dr. Chorney or by hard copy if the parties can

agree. If that document has not already been forwarded to Dr. Chorney or Ms. Carey, both of those documents are to be disclosed and delivered by February 1, 2016.

[66] I now turn to the issue of costs. The rules state that costs of a proceeding must be awarded to the successful party, unless the court otherwise orders. Moreover, it is well established that success means substantial success especially where, as in this case, there are several issues before the court and applications for various forms of relief or orders.

[67] In these circumstances, having regard to the relief sought by the petitioners, the submissions made by the parties, compared to the ultimate outcome, I am satisfied that both parties have achieved partial success and, as a result, there will be an order that each party bears its own costs of this application.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie