

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chorney v. The Owners, Strata Plan
VIS770,*
2011 BCSC 1811

Date: 20111216
Docket: 11-3721
Registry: Victoria

Between:

Linda Chorney and Marilyn Carey

Petitioners

And:

**The Owners, Strata Plan VIS770
and
Chris Pepperdine**

Respondents

Before: The Honourable Mr. Justice Schultes
(appearing via teleconference)

Oral Reasons for Judgment

**Corrected Judgment: The text of the judgment was corrected on
the front page on February 10, 2012**

In Chambers
December 16, 2011

Appearing on their own behalf:

Linda Chorney
Marilyn Carey

Counsel for the Respondent The Owners,
Strata Plan VIS770, appearing via
teleconference:

G.H. Dabbs

Appearing as agent on behalf of the
Respondent Chris Pepperdine:

Catherine Watt

Place and Date of Hearing:

Victoria, B.C.
November 23, 2011

Place and Date of Judgment:

Victoria, B.C.
December 16, 2011

[1] **THE COURT:** The petitioners seek orders declaring that the respondent, Chris Pepperdine, has contravened one of the bylaws of the strata corporation, an order that the strata corporation enforce this bylaw against her, and ancillary orders carrying out the enforcement of the bylaw, which amount to a form of injunction.

[2] The essential background facts are that the petitioners and Ms. Pepperdine are owners of strata lots in a converted heritage building located on Rockland Avenue in Victoria. It contains eight such units. The building does not currently have an operating strata council. For reasons unrelated to the present application and having to do with building remediation in conformance with city bylaws, the governance of the building became dysfunctional and, in a series of applications, Mr. Justice Macaulay has appointed and reappointed an administrator in place of the council, pursuant to s. 174 of the *Strata Property Act*. This is so that the administrator can manage the affairs of the strata corporation. The administrator, Mr. Fanaken, has been appointed six times by the court.

[3] The present application deals with the effects of cigarette smoke, that is said to emanate from Ms. Pepperdine's unit, on the health of the petitioners and the enjoyment of their units. The petitioners allege that smoke began entering their units and the common areas of the building in 2010. According to the affidavit evidence, this has a harmful effect on both of them. Dr. Chorney is allergic to cigarette smoke and encounters serious physical reactions when it is present, and Ms. Carey is a two-time survivor of cancer, who is very concerned about the increased health risks from second-hand smoke, not to mention the interference of the presence of smoke with her day-to-day enjoyment of her property.

[4] The petitioners repeatedly complained to the administrator about this problem, according to the material. He in turn issued several warnings to Ms. Pepperdine that she was breaching ss. 4(1)(a) and (c) of the strata corporation's bylaws. These prohibit the use of a unit in a way that causes a nuisance, emits an offensive smell, or otherwise interferes with the rights of other persons to enjoy the common property or another unit.

[5] The administrator maintains that the smoke emanating from Ms. Pepperdine's unit constitutes a nuisance and thereby a bylaw infraction.

[6] In her responses to the administrator, Ms. Pepperdine did not deny having the occasional cigarette in her unit, but pointed out what she regards as two essential points: that the other owners in the building also occasionally have smoking going on in their units; and secondly, that the building does not, through its bylaws, prohibit smoking, and that accordingly she has a right to engage in that practice within her unit. She offered to insulate the area where she smokes or use her balcony when it has been repaired, but the former offer does not appear to have been carried out, according to the petitioners' material, and the latter would, in the view of the petitioners, only add to the problem of smoke infiltration from another location.

[7] There is evidence that the structure of the building is such that a substantial amount of air, perhaps more than would be ideal, is able to flow between the units. I infer that this may be exacerbating the problem of cigarette smoke infiltration in the common areas and the units of the petitioners.

[8] Following his efforts to obtain Ms. Pepperdine's compliance by request and direction, in April of this year the administrator sought the approval of the owners to take enforcement action in court against Ms. Pepperdine to restrain her from smoking.

[9] Section 171 of the *Strata Property Act*, which permits such legal action on behalf of the strata corporation, requires a resolution authorized by a three-quarters vote of the owners. The resolution brought forward to this effect by the administrator was defeated, with only the petitioners voting in favour of it. The administrator advised Dr. Chorney of this and indicated in his letter that he was prepared to lend her his support in any court action that she might be contemplating taking on her own.

[10] In view of this outcome, the petitioners submit that they are left with no recourse but to seek the assistance of the court to end what they say is a serious ongoing threat to their health and to their enjoyment of their own units that is being

caused by the cigarette smoke. To that end they seek, in addition to a declaration that Ms. Pepperdine is violating the bylaw, an order enforcing it that prohibits her from smoking in and about her own unit and on any portion of the common property that is likely to result in smoke going into the other units.

[11] The petitioners have provided considerable authority, which is not contested, for the proposition that cigarette smoke can constitute a nuisance if its effect is such that a reasonable person's use and enjoyment of their property would be negatively affected by it. Particular or unique sensitivities of a particular owner should not be taken into account in such an analysis, according to these authorities.

[12] The administrator, given his previous position, does not oppose a declaration that Ms. Pepperdine is breaching the bylaw. Indeed, that has been his position in his dealings with her and in his proposal of the resolution to the owners permitting legal action, but he points out that he is powerless to act at this point in the absence of the necessary approval from the owners. He also submits that the essence of this disagreement is between the petitioners and Ms. Pepperdine. The proper approach would have been for the petitioners themselves to seek an injunction against Ms. Pepperdine for nuisance; something that the strata legislation does not prevent. The outcome of that action would either render the present application superfluous, or would demonstrate that it could not have succeeded in any case. Counsel also invites the court to consider the possibility of converting this petition into an action of that kind against Ms. Pepperdine by the petitioners.

[13] Ms. Pepperdine, in her submissions, responded in much the same way that she responded to the administrator's original efforts to enforce the bylaw. In her view, there is no restriction in the bylaws in smoking in the units and she submits that Dr. Chorney purchased her unit knowing that no such prohibition existed. While she is only an occasional smoker, Ms. Pepperdine stands by her rights to do so under appropriate circumstances.

[14] To achieve the result they seek, the petitioners rely on s. 165 of the *Strata Property Act* which provides as follows:

Other court remedies

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

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

[15] I accept the authority relied on by the petitioners that the powers of the court under s. 165 may apply to situations in which a three-quarters majority is otherwise required under the Act: *Toth v. The Owners, Strata Plan LMS1564*, unreported, British Columbia Supreme Court, Vancouver Registry L022502, at paragraphs 25 to 33, and *Clarke v. The Owners, Strata Plan VIS770*, 2009 BCSC 1415, at paragraphs 20 and 21.

[16] It must be noted, however, that the circumstances under which those courts concluded that they should act under s. 165 was somewhat different than the present circumstances. In *Toth*, the strata council was paralyzed because a three-quarters majority could not be mustered by either side to choose between two building repair plans that differed very significantly in cost.

[17] In *Clarke*, an earlier decision involving this very same building, a majority, but not three-quarters of the owners, opposed a building remediation plan proposed by the administrator.

[18] In both cases, the court found that orders under s. 165 were necessary so that the strata corporation could fulfil its duties.

[19] However, after noting the factual distinctions, at the end of the day I do not think that they undermine the applicability of those authorities to the present petition. While it is true in this case that a majority of owners did not support a special resolution approving court action against Ms. Pepperdine, the administrator was, in seeking it, standing in the place of the council which he represents.

[20] Properly analyzed, I think this has been a situation in which the administrator was blocked from taking action that he had proposed in the best interests of the strata corporation, namely enjoining Ms. Pepperdine from continuing to breach the bylaw, by his inability to gain the support of the required number of owners. There is no meaningful difference between his being stymied in this matter and the same thing occurring to an elected council of owners who, having proposed court action, could not obtain the necessary three-quarters majority.

[21] In this regard, I find the administrator's position in this application, that the matter should essentially be regarded as one as between the petitioners and Ms. Pepperdine, to be contrary to the position he had taken in seeking to enforce the bylaw internally up to this point.

[22] While I am satisfied that this is a proper case in which to apply s. 165, I am not convinced that the remedies sought by the petitioners are yet necessarily the ones that should flow from its application. In particular, it is difficult to understand why the administrator has not yet availed himself of the corporation's power to impose fines for bylaw violations pursuant to s. 24(1)(a) of the bylaws. These provide for fines of \$200 for each infraction. Mr. Justice Macaulay's initial appointment of the administrator to act in place of the council did not reserve any powers such as those with respect to imposing fines.

[23] Section 26(1) allows for any contravention that continues for more than seven days to result in the imposition of such fines every seven days. A ready enforcement mechanism is provided by s. 2.1 of the bylaws, which provides that any amounts paid to the corporation, such as strata fees, may be applied firstly against unpaid fines. Thus, a violator who refuses to pay fines, risks falling into arrears of strata fees, a default that would have significant consequences of its own under Part 6 of the *Strata Property Act*, up to and including the forced sale of the property.

[24] Section 135 of that Act provides certain procedural safeguards prior to the imposition of a fine for a bylaw infraction:

The strata corporation must not

(a) impose a fine against a person,

...

for a contravention of a bylaw or rule unless the strata corporation has

(d) received a complaint about the contravention,

(e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant . . .

...

(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in [the preceding subsections] to the persons referred to in subsection (1) (e) and (f).

(3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

[25] There is no basis to believe that these safeguards, including a hearing before the administrator if requested, could not be provided to Ms. Pepperdine.

[26] In my view, the proper application of s. 165 in this case is to order the administrator to follow the process set out in s. 135, forward it to Ms. Pepperdine, and, if he concludes that a contravention of the bylaw has occurred, to impose fines upon her accordingly.

[27] Unlike *Toth* and *Clarke*, this is not a case in which a council or administrator is powerless to resolve a situation critical to the proper operation of the corporation and the proper use of the property. As a result, I think the administrator should first be directed to consider whether the exercise of the powers that he now has is justified, before it becomes necessary to consider what amounts to injunctive relief on behalf of the corporation.

[28] Having identified what he deemed to be a violation and having sought to enforce the bylaws informally, it is not open to him now to characterize all further steps as the sole responsibility of the petitioners.

[29] Accordingly, my order will be that the petition is granted only to the extent of ordering the administrator, if he is of the view that violations of subsections 4(1)(a) or

(c) of the bylaws have been or are being committed by Ms. Pepperdine, to afford her all of the procedural safeguards provided by s. 135 of the *Strata Title Act*. If, after observing the requirements of that section, he concludes that she has committed any such violations, he should impose upon her the fines permitted by s. 25 and 26 of the bylaws, as is appropriate to the circumstances.

[30] In essence, I do not think it is appropriate at this stage to authorize an application on behalf of the corporation for an injunction against Ms. Pepperdine, a very factually and legally complex endeavour with significant and far-reaching circumstances, when a much more straightforward solution, tailored to the particular problems here, is quite likely lying within the corporation's own current powers, as the administrator is empowered to exercise them.

[31] Put another way, court intervention in strata disputes should be limited to that which the governing council or administrator are incapable of doing for themselves. If fines are unsuccessful in remedying the problem, the administrator may seek injunctive relief through the further application of s. 165. That course of action always remains open to the petitioners as well.

[32] I believe that this more restrained approach to the application of s. 165 is consistent with the analysis in the recent decision of our Court of Appeal in *Jiwan Dhillon & Company Inc. v. Gosal*, 2010 BCCA 324.

[33] With respect to costs, no party can really be said to have had substantial success on issues of importance to them in this application. As a result, I think it is appropriate that the parties bear their own costs.

[34] Thank you very much.

[35] MR. DABBS: Thank you, My Lord.

"Schultes J."

THE SUPREME COURT
OF BRITISH COLUMBIA



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MEMORANDUM TO COUNSEL

TO: The Parties and Legal Counsel

CC: All Legal Publishers

FROM: Superior Courts Judgment Office

DATE: February 10, 2012

RE: ***Chorney v. The Owners, Strata Plan VIS770, 2011 BCSC 1811 [VI 11-3721]***

Please be advised that the attached Oral Reasons for Judgment of the Honourable Mr. Justice Schultes dated December 16, 2011 have been edited.

The date of hearing has been changed to November 23, 2011.

A copy of this memorandum and attached Oral Reasons for Judgment will be placed in the court file. The original Oral Reasons for Judgment which was previously distributed will be retained in the court file.

Please direct any enquires to the Superior Courts Judgment Office at:
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"Mr. Justice Terence Schultes"