IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Christensen v. The Owners, Strata Plan KAS468,* 2013 BCSC 1714

Date: 20130802
Docket: 98324
Registry: Kelowna

Between:

Susan Linda Christensen

Petitioner

And

The Owners, Strata Plan KAS468

Respondent

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	Douglas W. Welder
Counsel for the Respondent:	Joni D. Metherell
Place and Date of Hearing:	Kelowna, B.C. August 1, 2013
Place and Date of Judgment:	Kelowna, B.C. August 2, 2013

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[1] **THE COURT:** These are my oral reasons on the application that was brought yesterday, the hearing of the petition in this matter. As always, if someone should order the transcript, I reserve the right to change it in form, but not in substance.

[2] Susan Christensen seeks by way of petition, numerous orders relating to special levy charges to her Strata Lot 45, one of the lots in the respondent strata corporation. She asks for a declaration that certain special levies charged against Lot 45 are invalid and that the respondent is not entitled to charge interest, penalties or legal fees against Lot 45 on so-called arrears of special levy charges. She also seeks a declaration that the respondent is not allocating special levies in accordance with the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"). She asks for an accounting of the levies, interest, penalties, and legal fees which have been charged and seeks an order for repayment of any amounts which have been charged without authority along with prejudgment interest. She says the amount that she has overpaid, not including the interests and penalties, is $15,319.67.

[3] The special levies in question were imposed in order to fund a major renovation of the strata buildings. The total cost of the renovations is almost $5 million. At the hearing of the application, Ms. Christensen submitted that it was perhaps premature to grant an order for repayment. She took the position that if the declarations she seeks are made, then an accounting should be ordered, following which, she would bring a further application to determine what amounts are owing to her in the event that the parties cannot agree on that matter.

[4] The respondent opposes the orders sought on a number of bases. First, the respondent notes that the petitioner has not made it clear whether her application is brought under s. 164 or s. 165 of the *Act*. Under either provision, it says that Ms. Christensen has no standing to bring the petition as she was not an owner of Lot 45 until July 30, 2010. The respondent says that all of the special levies in question were voted on and passed prior to that date. Further, the prior owner, Mr. James Scott, paid all of the levies before Ms. Christensen actually acquired her interest.

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[5] In that regard, I should note that Ms. Christensen is the daughter-in-law of the prior owner and acquired a half interest in Lot 45 in July 2010. She received the entire interest by right of survivorship when he passed away in February 2012. As set out in the materials, she acquired her half interest after paying an outstanding levy, which represented the unpaid amounts from the special levies in question, on behalf of her father-in-law. The amount outstanding was approximately $28,870. After that sum was paid, she and her father-in-law were able to conclude the transaction which saw the half interest in the strata lot transferred to her.

[6] Turning back to the position of the respondent on this petition, it says that if the petitioner has standing to bring this action, it admits that the way in which it allocated the costs of the renovation is not in accordance with the provisions in the *Act*. However, the respondent argues that Ms. Christensen should not be permitted to succeed whether her petition is based on s. 164 or s. 165. The respondent says that s. 164 requires that the actions of the strata corporation be shown to be significantly unfair before the individual strata owner has a right to a remedy. The respondent says that the way in which it allocated the costs of the renovation was fair. Indeed, it says the allocation was agreed to by the owners on numerous occasions prior to the work being accomplished and the allocation was in accordance with the accepted practice of the strata corporation.

[7] The respondent also says that if Ms. Christensen is relying on s. 165, the petition should be dismissed on the basis of the equitable doctrines of estoppel, laches, and acquiescence. The respondent founds this argument on the fact that Mr. James Scott did not oppose the special levies when passed. Indeed, Mr. Scott paid all the special levies prior to Ms. Christensen acquiring an interest in the strata lot. Second, the respondent says that it collected and disbursed to contractors almost $5 million in reliance on the resolutions that were passed and the agreement of the owners to raise funds using the allocation employed. The respondent and all of the owners proceeded under the assumption that the expenses would be allocated as agreed.

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[8] The respondent says it would be substantially inequitable to it and to the other owners of the strata corporation if an order for repayment of funds is made. It notes that a significant period of time has passed since the funds were collected and disbursed. The actions were taken on a shared assumption by all that the allocation was fair. The allocation attempted to take into account the benefit to be received by each strata lot as a result of the renovations and the owners have all now received the benefit. It would be extraordinarily difficult for the respondent to repay any funds, given that they have, with the exception of a $50,000 holdback, been disbursed long ago.

[9] Finally, the respondent argues that in any event, Ms. Christensen has suffered no loss. It says that if the renovation charges were to be applied on a unit entitlement basis in accordance with the *Act*, Ms. Christensen would have had to pay slightly more than she actually paid.

[10] Before commencing my analysis of the issues before the court, I should note that the respondent has conceded that its claim for interest and penalties must fail. The resolutions in question which authorized the special levies did not provide for dates by which the amounts were to be paid. Given the failure to specify dates for payment, the respondent has no right to claim that the payments were overdue and no right to claim interest. The respondent has conceded that any liens filed against Ms. Christensen's property to secure payment of interest, penalties, or legal fees must, therefore, be discharged.

[11] Accordingly, there will be a declaration that the respondent has no right to claim those interest, penalties, or legal fees with respect to the special levies and a further order requiring the discharge of any remaining liens. I also order that the respondent repay any amounts collected with respect to interest, penalties, and legal fees.

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Background

[12] I will provide a brief summary of the background. The strata corporation in question is called Casa Loma. It is a resort property in West Kelowna. It was constructed many years ago and, by 2006, the owners realized that steps had to be taken to either redevelop the property or refurbish the resort. Eventually, at a Special General Meeting in October 2006, it was decided to do a retrofit upgrade and facelift rather than a full redevelopment of the property. It was anticipated at that time that the costs of the renovations would not exceed $1.5 million. The owners agreed to proceed. In April 2007, an owner design panel was formed to pursue the development and, by special resolution, the owners agreed to increase the amount required for the work to $3.5 million. Only one owner voted against the resolution. Mr. Scott, the owner of unit 45, did not oppose it.

[13] On July 7, 2007, by special resolution, the owners approved the design concept proposed by the panel. The specified goal was to keep costs below $3.5 million. For that meeting, 46 of the 47 owners were present and the resolution was passed by all present. The only absent owner was Mr. Scott. However, he never indicated an opposition to the proposal.

[14] The respondent's bylaws, which were passed in 2003, presumably following the passage of the new *Act*, identified three types of buildings for the purpose of allocating expenses. Those are cabin lots, fourplex lots, and main building lots. Lot 45 is a main building lot. From 2003 onwards, it was the respondent's practice to allocate operating expenses and significant repairs or maintenance by type of strata lot. The respondent also allocated expenses associated with limited common property to those units who had the benefit of that limited common property.

[15] In accordance with this standing practice, the respondent proposed that the expenditures associated with the renovation be allocated in the same way. This came to a special resolution on October 13, 2007. On that date, the aggregate approved expenditure was increased to $3.736 million. The resolution provided for "costs to be allocated by unit entitlement, unit type, and limited common property

allocation in a manner consistent with the current practice of the resort." Three of the 42 members present opposed the motion. However, the affidavit of Mr. Ball indicates that their opposition was not to the allocation of expenses, but to the increase in the amount of the approved expenditure.

[16] On August 1, 2008, at a further Special General Meeting, the aggregate approved budget was increased to $4.292 million "with costs to be allocated by unit entitlement, unit type, and limited common property allocation in a manner consistent with the current practice of the resort."

[17] On December 15, 2008, by way of email, the respondent made a cash call to owners for an additional $105,000. The owners were advised that the allocations would be based on a unit type, common property, limited common property or owner cost basis as had been done with the other costs. Mr. Scott did not object to this cash call and made the payment as requested in response to it. All of the previous payments were also made in accordance with the special resolutions.

[18] A further cash call was made by the respondent in the total amount of $393,000. This was approved at a Special General Meeting held on July 31, 2009, and this cash call related to unbudgeted design fees and cost overruns for certain trades.

[19] There is some uncertainty as to the full amount paid for the renovations, as these are questioned by Ms. Christensen, and I am not confident that the information provided to me is sufficient. Ms. Metherell, on behalf of the respondent, indicated in argument that her client is not opposed to an order for an accounting to resolve any issues that might remain regarding expenditures and allocation. I will come back to that issue at the conclusion of my reasons. However, I will utilize the information provided by the respondent as the basis for my decision. In particular, I will assume that the owners approved, through special levies and cash calls, the expenditure of $4,838,295 for the renovations. I will also assume that this sum has been paid by all of the owners.

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[20] I will assume for the purpose of these reasons that Mr. Scott paid $112,679.68 pursuant to the allocation of costs to his unit. This amount includes amounts charged by the respondent to Lot 45 for penalties, interest, and legal fees. I understand from the respondent that the total of those amounts is $2,676.68. As I indicated above, the respondent has agreed it had no right to claim these amounts and so it will pay that amount to Ms. Christensen. Accordingly, the sum paid by Mr. Scott and Ms. Christensen for the Lot 45 allocation of expenses totals $110,003. As described above, this allocation is based on a number of calculations which were used over a period of years by the respondent to allocate costs. It allocates some of the costs based on unit entitlement and others based on unit type, limited common property, and owner assessment. Once again, I stress that I am using the figures provided by the respondent.

[21] I also assume for the purpose of these reasons that if the total expenditure for the renovations is $4,838,295 and if the costs were to be allocated according to unit entitlement, the amount to be allocated to Lot 45 would be $110,655.39. There is no question here that Strata Lot 45 has a unit entitlement of .02287074. In any event, once the respondent returns the improperly charged interest and penalties, the amount actually paid by the Lot 45 owner or her predecessor is $652.39 less than what they should have paid if costs were allocated according to unit entitlement, rather than the allocation which was agreed to pursuant to the resolution of the owners.

The Legislation

[22] Section 99 of the *Act* provides that, subject to s. 100, owners must contribute to operating funds and contingency reserve funds of a strata corporation in accordance with the strata lot's unit entitlement. Section 100 allows a strata corporation to use a different formula for calculating costs, but such formula must be passed by way of unanimous resolution. Section 108 of the *Act* requires that special levies be allocated to owners in accordance with ss. 99 and 100 of the *Act*. The effect of these provisions is that under the *Act*, which came into force early in the last decade, unit entitlement is the only way to allocate costs unless there is a

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unanimous resolution to change that allocation. Here, there was no unanimous resolution to change the statutory allocation.

[23] The old *Act* allowed costs to be allocated according to unit type. The new *Act* makes such allocation much more difficult to put into place.

[24] The other provisions of the *Act* which are relevant are ss. 164 and 165. Those provide as follows:

> 164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant …
>
> (2) For the purposes of subsection (1), the court may
>
> (a) direct or prohibit an act of the strata corporation, the council …
>
> (b) vary a transaction or resolution, and
>
> (c) regulate the conduct of the strata corporation's future affairs.

[25] Section 165 reads:

> 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).

Issues

[26] I turn now to the issues raised by this proceeding. It is evident that Ms. Christensen's action must fall within either of s. 164 or s. 165. Those are the provisions in the *Act* which permit a court to grant relief to an owner against the strata corporation. Her petition did not specify the section under which she was proceeding. In argument, Mr. Welder indicated initially that he was not alleging any unfairness on the part of the respondent. Rather, the petition was based on the

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respondent's failure to follow the statutory requirements. When I further questioned him on this issue, Mr. Welder said that his client was advancing the argument under both sections.

[27] Accordingly, there are three issues to be considered:

1. Is Ms. Christensen an owner for the purpose of bringing a proceeding under either s. 164 or s. 165?

2. Is Ms. Christensen entitled to an order pursuant to s. 164 to remedy a significantly unfair action or decision of the respondent in relation to her?

3. Is Ms. Christensen entitled to an order under s. 165 requiring the respondent to perform a duty required under the *Act* or to stop contravening the *Act*?

[28] I have determined that Ms. Christensen is not entitled to an order under either s. 164 or s. 165. Accordingly, there is no need for me to consider Issue 1 and I will not do so.

Issue 2: Is Ms. Christensen entitled to an order pursuant to s. 164 to remedy a significantly unfair action or decision of the respondent in relation to her?

[29] The meaning of "significantly unfair" has been considered in a number of cases. "Significant unfairness" has been interpreted to encompass oppressive conduct and unfairly prejudicial conduct or resolutions. This would include conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the court drew on oppression remedy jurisprudence and articulated the test as follows at para. 30:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the [owner] was violated by action that was significantly unfair?

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[30] When that test is applied to the case at bar, it can be seen why Ms. Christensen initially did not base her case on s. 164. She cannot establish that she, or more properly, Mr. Scott, had a reasonable expectation that was contrary to the resolution passed by the owners. Further, she cannot say that her expectations were violated by any action that was significantly unfair.

[31] It is evident from all of the evidence that the way to proceed with the renovation project was debated at length by the owners. The method of allocation of expense was also the subject of extended discussions. The owners had an established way of allocating costs. While that was based more on the approach set out in the old Act, there was a reasonable basis for it. The owners accepted that approach and had worked with it for some time. The resolutions passed in favour of the renovation expenditures specifically contemplated that method of allocation and were not objected to by Mr. Scott or others.

[32] When the owners decided to proceed with the renovation, they decided to allocate the costs as they had done in the past. This meant that owners would pay directly for costs which benefited only their unit or their type of strata lot. Those expenses which benefitted common property were to be paid according to unit entitlement. Presumably, the owners believed this to be a fairer allocation of expenses than to have all of the costs allocated on the basis of unit entitlement. There is a reasonable argument to be made for that proposition.

[33] In *Fraser v. Strata Plan VR1411*, 2006 BCSC 1316, Cullen J., as he then was, considered whether an allocation of costs which was not based on unit entitlement could be ordered. He determined that it would be significantly unfair to order that costs be based on unit entitlement given that there were two buildings, only three owners, and very different costs applicable to the two buildings. He stated at para. 61:

> While I accept Justice Bauman's observation in *Strata Plan LMS 1537 v. Alvarez* (2003), 17 B.C.L.R. (4th) 63, 2003 BCSC 1085, that as a general rule the underlying approach endorsed by the *SPA* is "you're all in it together", in my view, giving effect to that precept in the present case, where Mr. Fraser

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> and Mr. Duteau have previously benefited from a separate allocation of costs between Buildings "A" and "B" and Ms. Buchanan would now be significantly prejudiced by uniting the costs, would result in an inherently and significantly unfair action.

[34] The situation in the present case has some similarity. Here, the owners have for many years proceeded on an allocation which attempted to distribute costs in accordance with the particular benefits received by each individual unit. While this is not in accordance with the provisions in the *Act*, there is a logical basis for allocation in this fashion. Further, each allocation was made after presentation of the proposal to the owners on a number of occasions over the years. There was little or no opposition to the proposals. In these circumstances, there can be no claim of unfairness to Lot 45, let alone significant unfairness.

[35] Indeed, the only basis on which the allocation can be challenged is because it is contrary to provisions of the *Act*. However, that issue is better considered under s. 165.

Issue 3: Is Ms. Christensen entitled to an order under s. 165 requiring the respondent to perform a duty required under the *Act* or to stop contravening the *Act*?

[36] Section 165 gives the court the power to order relief which is in the nature of injunctive relief in order to compel a strata corporation to perform a duty or to cease contravening a requirement under the *Act* or bylaws. This is the section pursuant to which Ms. Christensen's application for relief is more properly based.

[37] Subsection (a) permits an order requiring a strata corporation to perform a duty. I am of the view that the section is not applicable to the present circumstance. Ms. Christensen does not point to or allege the failure to observe or the breach of any outstanding duty. Rather, she says that the resolutions of the respondent and the allocation of expenses and imposition of levies to pay those expenses contravene the *Act*. This argument is more properly founded under subsection (b).

[38] The respondent submits, and I agree, that subsection (b) is intended to be applied by a court to remedy or address a current breach. There must be some

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existing or contemporaneous action of the strata corporation which requires a remedy in the nature of a mandatory injunctive order. As should be obvious from the facts of this case, it is simply too late to issue such an order. The contravention of the *Act* occurred several years ago. The allocation of expenses and collection of levies took place more than three years ago. The expenditures which were agreed to have been paid and the funds disbursed. Accordingly, the respondent argues, and I agree, that it is not currently contravening the *Act*. There is no evidence before the court to indicate that it intends to contravene the *Act* in the future.

[39] The question then becomes whether it is possible under s. 165(b) to order a strata corporation to correct a past contravention. I will approach this issue in two ways. First, I will indicate why it would be inappropriate to do so in this case. Second, I will indicate that I agree with the respondent's submission that even if I could make that order, I should not do so here on the basis of estoppel.

[40] It would be inappropriate and unfair to make an order at this time because there were steps that the respondent could have taken when the resolutions in question were passed had Ms. Christensen or, more properly, her predecessor, raised the complaint that is now advanced. Under s. 108(2), the strata corporation could have sought to establish a fair allocation of expenses using the formula it had applied for years by way of passage of a unanimous resolution. If Mr. Scott had objected, the respondent could have applied to court for approval of the proposed resolution. By waiting to raise this issue for many years, the owner of Lot 45 has prevented the respondent from taking advantage of provisions in the *Act* directed at precisely the kind of issue which has arisen in this case.

[41] Secondly, I accept the respondent's argument that Ms. Christensen should be estopped from raising this issue at this late date. Ms. Metherell relies on the doctrine of estoppel by convention as explained by Sigurdson J. in *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, 2002 BCSC 934. I agree that such an estoppel is applicable in the present case. The two requirements for the estoppel are, and here I quote from Spencer Bower and Turner, *Estoppel by*

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Representation, 3rd ed. (London: Butterworths, 1977) as quoted at para. 72 in *Norenger*:

> [An estoppel by convention] is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of fact so assumed.

[42] The second requirement is that it must be unjust or unconscionable to allow one party to resile from the common assumption. In other words, the party asserting estoppel must show that it would suffer detriment if the other party is permitted to resile from the common assumption.

[43] Here, the common assumption between the owners and the respondent was that the method of allocation of the special levies for the renovation was permitted under the *Act*. The parties then acted on that mistaken assumption by passing the special resolutions, paying the levies so calculated, and expending the substantial sum on the renovation project. I have no hesitation in concluding that it would be unconscionable and unjust to permit Ms. Christensen to resile from the common assumption. The levies were assessed, the monies paid by the owners including Mr. Scott, the project substantially completed, and the funds have been paid out.

[44] In summary, I am dismissing Ms. Christensen's petition.

[45] However, as I indicated, I am not satisfied with the accounting presented to me. As I have indicated, I have arrived at my decision based on the figures presented primarily by the respondent. It may be that my assumption as to the proper accounting is not correct. While I do not believe that a variance in the accounting will be of significance, I am going to make the following order. I direct that the respondent provide to Ms. Christensen a full accounting of both the collection and distribution of the funds used for the renovation project, whether those were raised by way of special levy, cash call, or from the maintenance reserve fund.

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I believe that most, if not all, of this information has already been provided. However, given the confusion that was before me on this issue, I direct that a further accounting be provided to Ms. Christensen.

[46] Once that is done, either Ms. Christensen or the respondent may set this matter down before me in order to finalize the order. In the interim, the order I have made today may not be entered. In other words, I remain seized of further applications and the case is not closed until the further accounting has been provided to Ms. Christensen.

[47] Of course, if the parties can agree on the final order, including costs, there is no need for a further appearance before me and, as indicated, I am not making any order for costs today, but will await that final accounting.

[48] MR. WELDER: My Lord, can I just address what you said at the start about getting these liens off – the lien off. I think my client would want something about this last thing lien. They said they would take it off, a direction that it be removed.

[49] THE COURT: Well, what I think I can do is I will make the order for removal of that lien today –

[50] MR. WELDER: All right, because the others are gone.

[51] THE COURT: – and that order is effective today –

[52] MR. WELDER: All right.

[53] THE COURT: – and can be entered –

[54] MR. WELDER: I think that is all I need.

"Butler J."

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