

Case Name:

**Clappa v. Parker Management Ltd.**

Between

Mary Clappa, claimant, and  
Parker Management Ltd., D. Henriksen Contracting &  
Construction Inc., and Strata Corp VR 193, defendants

[2003] B.C.J. No. 1980

2003 BCPC 305

Vancouver Registry No. 2001-71711

**British Columbia Provincial Court  
Vancouver, British Columbia  
Meyers Prov. Ct. J.**

Heard: May 29, 2003.

Judgment: August 7, 2003.

(25 paras.)

**Counsel:**

G. Grunberg, for the claimant.

A.M. Murray, for the defendants.

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¶ 1 **MEYERS PROV. CT. J.**:— The Claimant owns a strata lot in a residential building. The Defendant is the Strata Corporation. The building envelope required repairs and the Defendant hired a contractor to do the repairs. The Claimant submits that the repairs were done negligently and that has negatively impacted her strata lot property. The Claimant submits that the contractor rebuilt her balcony floor at too high a level. She claims that she is entitled to monetary damages to compensate her for loss of enjoyment of the balcony and for causing a diminished potential selling price for her unit.

¶ 2 It is agreed between the parties that the Claimant's balcony constitutes common property in as much as it is "limited property" and limited property is included in the definition of "common property" under the Strata Property Act. It is agreed between the parties that the Strata Property Act should govern this case and not the former Condominium Act.

¶ 3 As a preliminary matter, the Defendant raised the issue of whether or not the Provincial Court has jurisdiction to hear case. For the purposes of the preliminary argument only, the Court is asked to assume that the work was done negligently and that the damages claimed could be substantiated. The claim is in negligence and not contract. The question therefore is: does the Provincial Court (Small Claims Division) have jurisdiction to hear a case where the owner of a strata lot sues the strata corporation for negligence in the performance of its duty to the owners to "maintain and repair the common property" pursuant to s. 72(1) of the Strata Property Act?

¶ 4 The relevant sections of the Strata Property Act are: 3, 14, 42, 43, 72, 73, 163, 164 and 165. The relevant section of the Provincial Court Act is s. 3. The relevant cases are: David v. Vancouver Condo Services Limited [1999] B.C.J. No. 1869; Ashton v. Strata Corp VR 524 [1999] B.C.J. No. 2429; Seller v. Singla Brothers Holdings and Owners S.P.K.A. 5976 [1995] B.C.J. No. 2826; McNeill v. Owners Strata Plan K.A.S. 1099, [1996] B.C.J. No. 2553, (November 5, 1996) Provincial Court Penticton #12642; Owners S.P.L.M.S. 2064 v. Biamonte, [1999] B.C.J.

No. 1267, (April 28, 1999) Provincial Court Vancouver #98-43918; Re B.C. Aircraft Propeller and Engine Company Limited (1968) 66 D.L.R. (2d) 628 (B.C. Supreme Court); British Columbia Electric Company Limited (1964) 47 D.L.R. (2d) 754 (B.C. Supreme Court) and Diligenti v. RWMD Operations Kelowna Ltd [1976] B.C.J. No. 38 (B.C. Supreme Court).

¶ 5 Both parties heavily rely on the precedent set in the case of David v. Vancouver Condo Services Limited (Supra), a decision of my sister Judge Dhillon. That case however, is different from the case at bar. The case at bar involves a claim for negligence whereas the David case involved a claim for breach of contract. In the David case, the property manager, on behalf of the strata corp. had told the claimant (one of the strata owners) that she could hire someone to repair her damaged balcony and that the Strata Corp. would reimburse her for the repair bill. When the repair bill was submitted, it was twice as high as anticipated by the Strata Corp. and they refused to reimburse the owner for the full repair costs. Dhillon J. ruled that there was a breach of contract and that the Strata Corp. were liable for damages to the strata owner. It was held that the Provincial Court had jurisdiction to adjudicate a dispute between a strata owner and the Strata Corp. when the claim was for breach of contract as between them. It was obiter dicta when Dhillon J. commented that "the Provincial Court would be the proper forum to hear claims regarding breach of agreement or negligence". The David case was argued and decided exclusively as a breach of contract case. It should be noted that the case proceeded at a time when the former Condominium Act was still the governing statute. The Ashton case (supra), although also decided under the former Condominium Act, was a negligence claim which was initiated by a strata lot owner against the strata corp. The strata corp. was found partially negligent and therefore partially responsible for towing the car belonging to the claimant's tenant and its eventual destruction by Buster's Towing. The question as to the jurisdiction of the Provincial Court to hear the case, does not appear to have been argued in the Ashton case.

¶ 6 In the case of Owners SPLMS 2064 v. Biamonte (supra), Bruce J., dealt with the jurisdictional issue in the context of a debt owed by a strata lot owner to the Strata Corporation. This case was also decided under the former Condominium Act. Bruce J., in deciding that the Provincial Court did have jurisdiction to resolve the issue, based her decision on the specific wording of sections 1(1), 35, 36 and 127(3) of the former Condominium Act. The Condominium Act used the term "court" in one section and then the term "court of competent jurisdiction", in another section of the Act. Bruce J., held, that because the legislation referred in one instance to "court" and in another instance, to "court of competent jurisdiction", that logically implied that jurisdiction to resolve disputes rested in different courts for different issues.

¶ 7 At 8, Bruce J., commented:

In general, the scheme of the Condominium Act is to accord exclusive jurisdiction to the Supreme Court in respect of disputes between strata lot owners and strata corporations. The Legislature's intent in this regard is clearly expressed in s. 1 of the Act where "court" is defined as the Supreme Court of British Columbia. In my view, however, the use of the term "court of competent jurisdiction" makes specific provisions of the Act addressing the recovery of money evidences an intent to accord jurisdiction to courts apart from the Supreme Court. Had the Legislature intended that the Supreme Court exercise exclusive jurisdiction all matters within the scope of the Condominium Act, there would be no reason to choose the particular words used in s. 35(5) and s. 127(3) of the Act. Instead, the Legislature would have simply referred to the "court" in all cases. I am satisfied that the term "court of competent jurisdiction" is a broad term that denotes authority over the parties, the subject matter of the action, and the remedies sought.

¶ 8 The Biamonte Notice of Claim was filed as a claim for a debt owing by the strata owner to the strata corporation. It was not an action framed in negligence. Bruce J., ruled that the Provincial Court had jurisdiction over a debt owed by a condominium owner to the strata corp. due to a breach of the by laws. Once again, it should be pointed out that the case at bar, involves a negligence claim and not a debt claim.

¶ 9 Let us turn to the Strata Property Act which replaced the Condominium Act in July of 2000. Sections 163 to 173 of the Strata Property Act set out which Court is to be resorted to in order to resolve specific disputes between strata lot owners and their strata corporations. The two terms which were used in the former Condominium Act, that is "court" and "a court of competent jurisdiction", are no longer used in the Strata Property Act. Only the Supreme Court is used in reference to "the court" of resort in order to resolve specific disputes between the strata lot owners and their strata corporations. The "Supreme Court" is specifically mentioned by name in the above sections of the Strata Property Act. The Legislature specifically removed any reference to "a court of competent jurisdiction".

¶ 10 As Fulton J., commented in the Diligente case (supra) at p. 21:

It is a principal of statutory interpretation, as I appreciated, that where the Legislature has amended an enactment by adding a new provision, the intent was to remedy some deficiencies in, or to extend the scope of, the previous enactment. Sub clause (1)(a) of 221 (Company Act) retains substantially the same terms and is the same effect as the former s. 185(1). It is sub clause (1)(b) that is new in its terms. Is it fair to ask then, what was the intent of the Legislature in importing a new provision with this new term?

¶ 11 Fulton J. went on to say, that the deliberate use of a new expression denotes an intent that the Court should give the new words an effect different from words formerly used in an Act. Essentially, the rhetorical question is: why use different words, if the intent is to have them mean the same as the former words?

¶ 12 It is in my view, it is clear that the new Strata Property Act attempts to create a scheme whereby all disputes between strata property owners and their strata corporations which involve the strata corporation's "governance" of the common property, must be resolved in the Supreme Court of British Columbia and not in the Provincial Court of British Columbia.

¶ 13 Jurisdiction of the Provincial Court is set out in s. 3 of the Provincial Court Act.

3(1) the Provincial Court has jurisdiction in the claim for

1. debt or damages
2. recovery of personal property
3. specific performance of an agreement relating to personal property or services, or
4. relief from opposing claims to personal property

if the property claimed or the value of the personal property of services is \$10,000 or less, excluding interests and costs.

3(2) the Provincial Court does not have jurisdiction in a claim for liable, slander or malicious prosecution.

¶ 14 The only relevant reference in the Strata Property Act to any court other than the Supreme Court of British Columbia, comes in s. 171(4) which provides:

The authorization referred to in s.s. 2 (added: before the strata corporation can commence a law suit against an owner) is not required for a proceeding under the Small Claims Act against an owner ... to collect money owing to the strata corp., including money owing as a fine.

¶ 15 Sections 163(1), 164 and 165 of the Strata Property Act provide as follows:

- 163(1) The strata corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the strata corporation.
  - (2) An owner may sue the strata corporation.
- 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, or
  - (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
- (2) For the purposes of subsection (1), the court may
  - (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
  - (b) vary a transaction or resolution, and
  - (c) regulate the conduct of the strata corporation's future affairs.
- 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 regulations, 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).

¶ 16 Sections 163(1) to 169 of the Strata Property Act govern "Suits Against the Strata Corporation". Sections

163 to 165 of the Strata Property Act, specifically set out that a strata corp. can be sued by a strata lot owner, and that the Supreme Court, is the forum for the law suit. "The Small Claims Court" is not mentioned, nor is there any reference to "a court of competent jurisdiction", under this broad general heading of "Suits Against the Strata Corporation".

¶ 17 Sections 170 to 171 of the Strata Property Act govern "Suits by the Strata Corporation", against a strata owner. A strata corp. can sue a strata owner in the Supreme Court or in Small Claims Court, depending upon the issue involved. Section 171(1) provides:

171(1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:

- (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
- (b) the common property or common assets;
- (c) the use or enjoyment of a strata lot;
- (d) money owing, including money owing as a fine, under this Act, the regulations, the bylaws or the rules.

¶ 18 Section 173 of the Strata Property Act provides as follows:

173 On application by the strata corporation, the Supreme Court may do one or more of the following:

- (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the regulations, the bylaws or the rules;
- (b) order an owner, tenant or other person 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).

¶ 19 Section 3 of the Strata Property Act outlines the responsibilities of the strata corporation to the strata owners. Section 3 provides as follows:

3 Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

¶ 20 Section 72 of the Strata Property Act sets out the duty imposed upon the strata corporation to repair and maintain common property. Section 72(1) provides as follows:

- 72(1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.
- (2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of
- (a) limited common property that the owner has a right to use, or
  - (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

¶ 21 Having reviewed the foregoing sections of the new Strata Property Act, it is my finding that the Legislature intended to outline the procedures which must be followed when there is a dispute between the strata corporation and an owner involving the strata corporation's governance of the strata properties. The strata corporation is to be sued in the Supreme Court by an owner with respect to any matter relating to the common property. An owner must sue the strata corporation in the Supreme Court if it is alleged that the strata corporation failed to perform the duties which it was required to perform, pursuant to its obligations under the Strata Property Act. The Supreme Court can make any order necessary to direct the strata corporation to fulfil its statutory duty to maintain and repair the common property.

¶ 22 In the final analysis, the Claimant's complaint in the case at bar, is that the Strata Corporation failed in its duty to properly repair and maintain "limited common property" pursuant to its s. 72 obligation under the Strata Property Act. As a result of the Strata Corporation's failure to properly fulfil that obligation, the Claimant asserted her claim pursuant to s. 163(1) of the Strata Property Act. The law suit against the Strata Corporation was for acts or omissions by the Strata Corporation in maintaining and repairing the specific limited common property of the Claimant.

¶ 23 Both parties argued that an important consideration revolved around the wording of s. 164(1) of the Strata Property Act. Section 164(1) provides for the remedies available to the Claimant in Supreme Court, if the Supreme Court, considers it necessary to prevent or remedy "a significantly unfair action by the strata corporation". Both counsel urged me to consider the wording in section 164(1) of the Strata Property Act. The wording that counsel were concerned with, is the following:

- 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 ... in relation to the owner or tenant.

¶ 24 It is my view, that for the purposes of this jurisdictional argument, I need not consider that, before the Supreme Court were to make a final order as between a strata owner and the strata corporation, they must take into consideration whether it is "necessary to prevent or remedy a significantly unfair action ... in relation to the owner or tenant". Section 42 of the former Condominium Act, used different wording when referring to the exercise of the powers of a strata corporation. Reference was to the exercise of the powers "in a manner oppressive to one or more of the owners". The Strata Property Act, in s. 164 now uses different wording. Section 164 provides that the strata corporation's actions must be shown to be "significantly unfair" in relation to the owner. Presumably, a change in wording would not have been made unless there was an intention by the Legislature to change what it required

before they would grant a relief. However, I shall leave that to another place and time, given that it is not necessary for me to decide that issue in the case at bar. If I am incorrect in my view that s. 164(1) need not be addressed in this case, I shall add the following: The Claimant's complaint is that the negligent repair of her balcony resulted in a "significantly unfair" action in relation to her. She argued that there were 18 units in total in the strata complex, and it is only her unit that had a faulty balcony. She argued that it was and is "significantly unfair" to her, because the negligent repair of her balcony (the "action" by the Strata Corp.) rendered only her property, as opposed to the 17 other properties, less enjoyable and less marketable. Accordingly, she argued that the Strata Corporation by their actions, left her in a "significantly unfair" position. I have been referred to a number of cases which considered the terms "oppressive" and, "unfairly prejudiced" which are (or were) used in statutes relating to companies and strata title properties. Diligenti (supra); B.C. Electric Company Ltd (supra); B.C. Aircraft and Propeller and Engine Company Limited (supra); Elder v. Elder and Watson Ltd (1952) Supreme Court p. 49 and Re H.R. Harmer (1958) 3 All E.R. 689. The words and concept of "oppressive acts" towards a particular strata lot owner was contained in s. 42 of the former Condominium Act. Section 42 however, was a section which gave an owner the right to "arbitrate" before an Arbitrator or before a Court. However, the new Strata Property Act, in particular s. 175(1), which dealt with "arbitration", omits the words and concept of "oppressive acts" by the strata corporation and there is no longer any reference to the parties having a choice between an Arbitration and Court.

¶ 25 The final conclusion therefore, is that the Provincial Court of B.C. does not have jurisdiction to hear the Claimant's claim of negligence by the Defendant in their maintenance and repair of the limited common property. Any claim and/or remedy sought against the Defendant in this case, must be filed in the Supreme Court of B.C..

MEYERS PROV. CT. J.

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## QUICKCITE

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**Court:** 2003 British Columbia Provincial Court

**Reported at:**

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2003 BCPC 305