

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clarke v. The Owners, Strata Plan VIS770*,  
2011 BCSC 240

Date: 20110228  
Docket: 08-0064  
Registry: Victoria

Between:

**Peter Clarke, Connie Tisdall and Maria Tippett**

Petitioners

And:

**The Owners, Strata Plan VIS770**

Respondent

Before: The Honourable Mr. Justice Macaulay

## **Reasons for Judgment**

**(In Chambers)**

Counsel for the Administrator,  
Gerry Fanaken:

G. Dabbs

Counsel for the Owners:  
Brian Whittingham, Dianne Whitecross,  
Chris Pepperdine, Eric Vilnis and  
Ingrid and Mathias Kaufmann

H. Wellman

Owner appearing on her own behalf:

L. Chorney

Place and Date of Hearing:

Victoria, B.C.  
February 17, 2011

Place and Date of Judgment:

Victoria, B.C.  
February 28, 2011

[1] At the conclusion of a hearing in Chambers on 17 February 2011, I granted a series of applications that the administrator brought, and dismissed all the applications that the majority of the current strata lot owners brought.

[2] I granted the following orders:

A. Administrator's Notice of Application filed 17 December 2010:

1. An order that paragraph nos. 1, 3 and 9 of the order of Mr. Justice Macaulay dated May 18, 2010 in these proceedings be varied by deleting the reference to "\$250,000.00" as set out therein and substituting for it the amount of "\$381,000.00".
2. An order that paragraph no. 8 of the order of Mr. Justice Macaulay dated May 18, 2010 in these proceedings be varied by deleting the reference to "\$230,000.00" as set out therein and substituting for it the amount of "\$343,000.00".
3. An order that there shall be a special levy imposed upon the following strata lot owners in the following respective amounts for the purposes of creating a fund for the estimated costs of the removal of the balcony enclosures with respect to those strata lots:

<u>Strata lot:</u>	<u>Amount:</u>
1	\$ 2,000.00
2	10,000.00
3	8,000.00
6	10,000.00
7	10,000.00
8	<u>10,000.00</u>
Total	\$50,000.00

4. An order that there shall be a special levy imposed upon the following strata lot owners in the following respective amounts for the purposes of creating a fund for the estimated costs of deck repairs with respect to those strata lots:

<u>Strata lot:</u>	<u>Amount:</u>
1	\$ 2,000.00
2	22,600.00
3	22,600.00
6	22,600.00
7	22,600.00
8	<u>22,600.00</u>
Total	\$115,000.00

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5. An order that only the Administrator may draw upon the above funds unless the Court otherwise orders.
  6. An order that each strata lot owner and the Administrator are at liberty to apply to the Court for further directions.
- B. Administrator's Notice of Application filed 7 February 2011:
1. An order that the term of the Administrator be extended from March 20, 2011 to September 20, 2011 or to such other date as may be set by this Honourable Court.
  2. An order that there be a special levy imposed upon the strata lot owners in the amount of \$20,000.00 for the purposes of funding the expenses of the Administrator.
  3. An order that each party and the Administrator be at liberty to apply to the Court for further directions.

I dismissed the following applications by the majority of the current individual strata lot owners:

1. The Administrator be discharged;
2. The Administrator attend immediately to presenting his final report and pass his accounts;
3. In the alternative, directions from this Honourable Court.

[3] In spite of significant changes in ownership of individual units, there continues to be a fractious dispute regarding the direction and management of the subject eight unit strata title building. For context, I observe that the current applications necessitated the eighth court hearing since 20 March 2008 (2008 BCSC 347) when I first ordered the appointment of an administrator and the fifth in the last twelve months alone. Throughout, the administrator has been forced to apply to the court because the owners have consistently failed to reach the necessary 75% majority to address the issues at hand. In light of that, it is not surprising that the administrator recently failed to achieve the unanimous support required for special levies in differing amounts for individual strata lot owners.

[4] Much of the history is recited in my earlier reasons, particularly at 2009 BCSC 1415, 2010 BCSC 293, 2010 BCSC 705, and oral reasons August 13, 2010, and September 17, 2010. I will not repeat that history but have had regard to it.

Dr. Chorney, who is in agreement with continuing the court appointed administrator, and is in favour of the special levies sought, estimates that the cost of the various court applications which, of course, are funded by the court ordered special assessments, totals about \$105,000.

[5] Nobody challenged Dr. Chorney's calculation. In addition to the cost, the need to make the applications has added to the pre-existing delay in addressing serious issues, including the need to proceed with the extensive building envelope repairs that everybody agrees are necessary. Most recently, in my view, the administrator has encountered additional delay and resistance attributable to another problem that the strata corporation has a legal duty to address.

[6] All eight units have balconies. At some point, six of the balconies were glassed in and, as a result, the area of the individual units was effectively increased. As a result, the building does not comply with the applicable zoning. In late 2009, the City of Victoria notified individual owners of their responsibility to remove the offending structures. Eventually, the City issued remedial action requirements ("RAR") against six of the strata lot owners and subsequently against the strata corporation. This led to the administrator recommending the special levies against the owners of the six strata lots that the owners rejected.

[7] The owners seeking the removal of the administrator have consistently refused to comply with the RARs and have not proffered any realistic plans for addressing the balcony issues. Instead, they propose that the strata corporation, presumably through a newly elected strata council, negotiate a resolution with the City, including a rezoning to legalize the existing structures.

[8] The same owners complain that the administrator, who has been acting in place of the previous strata council, has not assisted them regarding potential rezoning. While it is correct that the administrator has not pursued potential rezoning, he was not, in the circumstances, required to do so. The owners fail to appreciate that it is not the responsibility of a strata council or an administrator to

advocate for rezoning on behalf of a limited number of owners. Neither has the power to do so and not all the owners are in favour of seeking rezoning.

[9] In any event, approaching the City of Victoria to seek rezoning as a solution to the enclosed balcony issues has no realistic likelihood of success. I address these issues in greater detail below, starting with the law.

[10] The responsibilities of the strata corporation are derived from s. 3 of the *Strata Property Act*, S.B.C. 1998, c. 43 ("SPA"). Section 3 states:

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.

For our purposes, the owners referred to immediately above are all the individual unit owners. Pursuant to s. 4 of the SPA, the powers and duties of a strata corporation are ordinarily exercised and performed by a strata council. In this case, the powers and duties of the strata council devolve to the administrator who was appointed, by the terms of my initial court order in March 2008, "to exercise all powers and perform all duties of the strata council for the corporation such powers and duties to be held to the exclusion of the strata council."

[11] It is important to keep in mind that the strata corporation does not own the common property and common assets. Its responsibilities relate to managing and maintaining these areas and assets for the benefit of the owners. Instead, the owners share ownership of the common property and assets. Section 66 states:

An owner owns the common property and common assets of the strata corporation as a tenant in common in a share equal to the unit entitlement of the owner's strata lot divided by the total unit entitlement of all the strata lots.

Further, for the purposes of assessment and municipal taxation, each strata lot, together with the owner's share in the common property and other taxable common assets, is considered "a separate parcel of land" (s. 67).

[12] In *Hamilton v. Ball*, 2006 BCCA 243, Newbury J.A. refers to the ownership scheme set out in s. 66 of the SPA in this way, at para. 3:

Although the phrase “of the strata corporation” may be confusing, other provisions of the Act confirm that the common property and common assets are held and owned directly (i.e., not through the medium of the corporation) by the owners in proportion to their respective unit entitlements. ...

[Emphasis in original.]

That interpretation flows from the plain and ordinary meaning of the words in the statute and are in harmony with the scheme of the SPA, its object and the intention of the legislature. It is binding on the court.

[13] Governance of the strata corporation raises different issues. In general terms, the owners decide the course of action to be taken by the strata corporation, directly, or indirectly, by electing a strata council which then makes certain decisions under the SPA, through voting. However, the owners cannot individually or collectively grant powers to the strata corporation or the strata council that those entities do not have under the SPA. Depending on the importance of the particular issue requiring a vote by the owners, the SPA provides for different votes, ranging from simple majority to 75% majority and, finally, to unanimity.

[14] Unanimity is required for the most important questions such as, for example, winding up a strata corporation and converting the interest of the owners to tenancy in common (s. 272). In such event, the strata plan would be cancelled and the strata corporation would be dissolved, but only if every owner agreed.

[15] Decisions respecting rezoning impact directly on individual ownership and, as a result, I do not see how a strata corporation, or strata council acting on its behalf, could become involved in a zoning application, even informally, unless all the owners asked it to. There is, as I have already stated, no such unanimity in the case at bar.

[16] I conclude that, absent the unanimous consent of all strata property owners, neither a strata corporation, nor a strata council on its behalf, nor a court appointed administrator, is entitled to seek any rezoning change for the simple reason that rezoning directly affects the property rights of each individual owner. Those

individual ownership rights extend beyond the individual strata lot to a proportionate undivided interest in the common property.

[17] A strata corporation, on the other hand, has no property interest; instead, it has duties respecting the property that it must carry out for the benefit of the owners. It follows that an administrator appointed by the court to carry out the functions of the strata council is also unable to seek rezoning on behalf of some of the individual owners, even if they represent a majority or 75% majority.

[18] Rezoning is a municipal function that affects all landowners within a district, not just those who own strata titles. Representatives of the City have responded to the approaches undertaken by one or more of the owners here respecting potential rezoning to regularize non-conforming uses on at least two occasions.

[19] The Kaufmanns, who own one of the units and are part of the majority group referred to above, sought rezoning to legitimize a non-conforming use associated with unauthorized modifications to their unit that extended the footprint of the unit into a common area. After being ordered to obtain retroactive building permits and to ensure that improvements were changed as necessary to conform with the building code at the time, the Kaufmanns discovered that the City of Victoria required that the building be rezoned before it would issue a building permit but there was no prospect that all the owners would agree.

[20] The Kaufmanns then applied for an order compelling the strata corporation to provide all necessary consents and authorizations to assist them in obtaining the permit. Mr. Justice Masuhara denied the application (2008 BCSC 863). While the judge did not expressly find that the strata corporation had no authority to undertake a rezoning process by the owners, he referred, with apparent approval, to the views of the administrator to that effect.

[21] In June 2010, Mr. Vilnis, another of the majority owners, attended a special meeting of the City of Victoria Council and requested that the City reconsider the RARs and proceed, instead, with a rezoning. At one point, according to the minutes,

the Mayor stated erroneously that only the strata corporation, not the individuals, had the capacity to request a rezoning.

[22] However, the next entry in the minutes makes it clear that the City required all owners of strata lots to agree to apply for rezoning. To the same effect, on 26 October 2010, the City of Victoria wrote to Mr. Whittingham, also one of the majority owners, and advised, "The submission of a Rezoning Application requires the unanimous consent of all the owners of the Strata Corporation." In my view, the letter is indisputably correct.

[23] Quite apart from the need for unanimity, there are other significant hurdles to overcome in seeking rezoning of the building. Because it is a designated heritage building, a Heritage Alteration Permit would be required. As the letter referred to above points out, approval of the balcony enclosures would have to be consistent with heritage rehabilitation principles and also, the recommendations of the Heritage Advisory Committee and City staff. The evidence does not persuade me that seeking rezoning to address the balcony issues is feasible in the circumstances.

[24] In addition to the foregoing, the location and alteration of the balconies is an important component of the building envelope problems that all the owners agree must be attended to. The problems associated with the building envelope have been unresolved for a very long time. I refer in some detail to the history in my earlier rulings and need not repeat it here.

[25] It would make little sense to proceed with other building envelope issues if the balconies were not addressed at the same time. The engineering firm that has been retained pursuant to my previous orders has proceeded on the assumption that the work relating to the balconies will proceed at the same time as other work. To separate them would, in my view, lead to unnecessary delay and likely additional cost.

[26] To this point, the majority owners have refused to agree to the administrator's recommendations and instead, seek a termination of his appointment so that a new



strata council may be elected. At the hearing before me, the majority owners agreed to the additional financial levies, apart from those relating to the extension of the administrator's term, but only if they are permitted, after electing a new strata council, to pursue rezoning.

[27] Terminating the appointment of the administrator would not help because the newly elected strata council would be in exactly the same position as the administrator. Neither are permitted to ignore their duties under the SPA and seek rezoning on behalf of some owners.

[28] Over the last few months, the resistance demonstrated by the majority owners suggests the strata corporation continues to need the assistance of an administrator and the intervention of the court. Apart from the impasse respecting the balcony enclosures, I also take into account that the administrator has commenced legal proceedings against the Kaufmann unit to recover significant unpaid special levies. At least two of the other majority owners opposed the administrator's efforts to recover the money owing. It is also the responsibility of the administrator to attribute other costs to the Kaufmann unit arising out of work done or still to be done. The special levies respecting the balcony enclosures may require further efforts to recover against individual units.

[29] I have no confidence that the majority owners are committed to making decisions in the best interests of the strata corporation. To this point, they have consistently acted in their individual best interests and have resisted all attempts by the administrator to move matters forward in a responsible way having regard to the legal duties imposed on the strata corporation.

[30] I accept the administrator's recommendations as reflected by his first application so that he can continue with the resolution of the building envelope, including the balcony restorations. I have said before and repeat again, delay is not tolerable. The strata corporation has a legal duty to address these issues and must do so now.

[31] As to the renewal of the administrator's appointment, I have applied the same law, including *Lum et al v. The Owners, Strata Plan VR519*, 2001 BCSC 493, and *Aviawest Resort Club et al v. The Owners, Strata Plan LMS1863 et al*, 2005 BCSC 1728, that I reviewed on earlier applications for renewal. Counsel for the majority owners does not dispute the law set out in those cases and my earlier decisions.

[32] I also reviewed the additional cases that counsel for the majority owners provided. I find nothing inconsistent in those cases and need not refer to them directly.

[33] In the result, I am persuaded that the complexity of the problems that continue to plague this building and the inability of the owners to work in any cohesive way towards solutions that are consistent with the duties and best interests of the strata corporation require the continuing appointment of an administrator. As more financial decisions will likely arise at the conclusion of the tendering process, it is likely that, unless the owners demonstrate a remarkable reversal of attitude, the appointment will have to continue until the conclusion of the repair of the building envelope.

"M.D. Macaulay, J."  
The Honourable Mr. Justice Macaulay