

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Foley v. The Owners, Strata Plan VR 387*,
2014 BCSC 1333

Date: 20140717
Docket: S135680
Registry: Vancouver

Between:

**Michael Foley, Barney Strandberg, Susan McNicol, Reena Lazar,
Deborah Blacquiere, Jacqlen Hayes, and Susan Kehoe**

Petitioners

And

**The Owners, Strata Plan VR 387
and Troy Martin**

Respondents

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment In Chambers

Counsel for the Petitioners:

P.J. Dougan

Counsel for the Respondent,
The Owners, Strata Plan VR 387:

E.T. McCormack

Counsel for the Respondent, Mr. Martin:

G.S. Hamilton

Place and Date of Trial/Hearing:

Vancouver, B.C.
May 2, 2014

Place and Date of Judgment:

Vancouver, B.C.
July 17, 2014

I. INTRODUCTION

[1] This proceeding is by way of a petition brought by some owners of strata lots in a building known as West Park, situated at 1855 Nelson Street in the City of Vancouver. The strata plan of the building is filed as VR 387.

[2] The respondents include the owner of Strata Lot 40 or “PH1”, Troy Martin, and the other owners of Strata Plan VR 387.

[3] This dispute focuses on a deck and railing that Mr. Martin has added to the roof deck adjoining his unit.

[4] Among other remedies, the petitioners seek an order that Mr. Martin remove the addition to the roof deck and restore the deck to its earlier state.

II. BACKGROUND

[5] West Park is a four storey apartment building containing 42 strata lots. PH1 is one of the five penthouses on the top floor of the building. Three of the penthouses face the back of the building, and two of them, namely, PH1 and PH5, face the front on Nelson Street.

[6] Areas of the roof adjoining the penthouses are covered with wooden decking. PH1 and PH5 have had decking over a portion of the adjoining roof area that has been accessible from their units for many years. Historically, the decks adjoining PH1 and PH5 did not extend to the front of the building facing Nelson Street. They ended some distance from the front parapet walls of the building with a railing to prevent access to the part of the roof at the front of the building.

[7] All of the roof area and decks are designated as common property under the Strata Plan.

[8] It was determined at some point that the deck and railing adjoining PH1 had to be removed to allow the roof to be repaired. On August 22, 2012, Mr. Martin submitted an “alteration agreement” to the strata council to reinstall the roof deck adjoining PH1 after the roof repair was complete. The alteration was approved.

[9] After the roof repair was completed, some owners noticed that Mr. Martin had gone beyond the approved alteration and extended the decking to cover the roof up to the front of the building and then placed a glass railing on top of the front parapet walls.

[10] In Mr. Martin's response to the petition he admits that he fell into error when he extended the deck and added a new railing. He also admitted a further error in allowing the railing to be built along the roof line. He attributes that mistake to the railing installer but says that he decided that it made sense to leave the new railing there. He did not submit a new alteration agreement to the strata council.

[11] On February 7, 2013, the strata council met to discuss the unauthorized deck extension and railing. The president Jana Beaumont, vice-president Paul Burton, secretary Diane Warriner, and treasurer Susan Kehoe were present at that meeting. It was decided that Mr. Martin had to return the deck and railing to the configuration before the alterations took place and a letter was sent to him notifying him of that decision. He was also fined \$200 for altering common property without obtaining the approval of the strata council.

[12] A special meeting of the strata council was held on March 3, 2013, at the request of Mr. Martin. Susan Kehoe says that she was not given notice of the meeting. The other three officers are shown in the minutes of that meeting as being present, along with Mr. Martin as a guest. The strata council reversed its decision of February 7, 2013, and decided that the deck extension and railing could remain, provided a gate was installed restricting access to the front five feet of the deck. That portion, however, would be available to Mr. Martin to place planters and he would be permitted access to water the plants. They also decided that the alteration was not a "significant change" within the meaning of s. 71 of the *Strata Property Act*, S.B.C. 1998, c. 43, such that it did not require the approval of three quarters of the owners.

[13] A petition demanding a special general meeting was submitted to the strata council by 21 owners. A meeting was held on April 19, 2013, and resolutions stating,

in effect, that the alteration made by Mr. Martin was a significant change and that the area be restored to its original condition were defeated. The resolutions were worded incorrectly and not in accordance with the provisions of s. 71 of the *Strata Property Act*.

[14] The evidence shows that the alterations made by Mr. Martin were noticeable by other tenants. The addition of the railing also changes the appearance of the front of the building on Nelson Street.

[15] In his affidavit, Mr. Michael Foley, the owner of strata lot 41 ("PH2"), stated that the extension of the deck adjoining Mr. Martin's unit was directly above his main bedroom. In his letter to the strata council, Mr. Foley says that he and his partner hear the sounds of footsteps and movement on the roof deck above them. As his partner works night shifts someone is often asleep during the day and the noise is of concern to them.

[16] Someone on the extended deck now can look down upon units 301 and 302. Unit 301 has a sunroom on its deck and in her affidavit, the owner of unit 301 says that from the new railing above, an observer can look directly down on their sunroom as well as the decks of PH2 and unit 302 below.

[17] Unfortunately, there is now a division of opinions amongst the owners of this building regarding the appropriateness of the procedures that have been followed leading to the approval of the alterations made by Mr. Martin.

[18] I will first decide whether the alteration of the deck area and railing adjoining PH1 amounts to a significant change in the use or appearance of common property within the meaning of that phrase in s. 71 of the *Strata Property Act*. That section provides:

71 Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless

(a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

(b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

[19] In *Chan v. The Owners, Strata Plan VR677*, (Vancouver Registry No. S115516), Groves J. considered the meaning of that phrase and suggested some criteria for determining what is a significant change in use and appearance. He said that there are both subjective and objective indicators. I will paraphrase the criteria that he referred to in paras. 21 to 25 as follows:

- 1) A change would be more significant based on its visibility or non-visibility to residents and its visibility or non-visibility towards the general public;
- 2) Whether the change to the common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units;
- 3) Is there a direct interference or disruption as a result of the changed use?
- 4) Does the change impact on the marketability or value of the unit?
- 5) The number of units in the building may be significant along with the general use, such as whether it is commercial, residential or mixed use.
- 6) Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the *Strata Property Act*.

[20] In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, some owners had placed potted plants, cedars, bushes and other shrubs in the entrance area which was common property. The Court of Appeal said that this type of change was decorative and did not constitute a significant change to the use or appearance of the common property under s. 71.

[21] In *Sidhu v. The Owners Strata Plan VR1886*, 2008 BCSC 92, this Court considered a mixed use strata corporation where the owner of a dry cleaning business installed new equipment and cut some two to three-inch holes in the outside wall for vents. He made those changes without the permission of the strata corporation. Cullen J. (as he then was) concluded that the appearance of the vents and their function of expelling emissions from a dry cleaning plant were sufficient to constitute a significant change in the appearance and use of common property.

[22] Considering the changes made by Mr. Martin in light of these cases, I consider the changes to be significant.

[23] The changes were visible to some of the owners and the railings are visible to a member of the public looking up at the front of the building.

[24] The changes adversely affect two other owners. The owner of unit 301 has lost some of her privacy when using her glass-enclosed deck. The owners of PH2 are now subjected to noise from someone using the extended deck which is directly above their bedroom.

[25] While I have not considered the evidence of a real estate valuator submitted by the petitioners, it is readily apparent that the expansion of PH1's deck space is likely to enhance the value of that unit.

[26] Based on the evidence presented it appears that this strata corporation generally governs itself in accordance with the *Strata Property Act* and the standard form bylaws.

[27] As to whether such changes have been permitted in the past, the minutes of a strata council meeting on May 31, 2006, indicate that the owner of PH5 requested and was given permission to replace the roof deck, provided that it followed the current deck's footprint. That is similar to the approval first given to Mr. Martin before he made the unauthorized changes. It seems that no similar alteration has been approved in the past.

[28] In my view, another consideration is that by reason of the alteration to the roof deck, Mr. Martin has ostensibly incorporated that portion of the common property into his private area. It has not been suggested that anyone other than the owner of PH1 would be entitled to the use or enjoyment of the extended deck. Even ignoring the other criteria this would suggest to me that the change is significant.

[29] I have concluded that the alteration to the deck adjoining PH1 or strata lot 40, including the extension of the deck and the addition of a new railing, is a significant change to the common property.

[30] Turning to the procedure to be followed, I accept the comments of Harvey J. in *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493 at para. 12, wherein he stated:

... the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.

In my view, it is important that owners in a strata complex attempt to resolve their differences by following the procedures contemplated by their bylaws and by the *Strata Property Act*. A court proceeding should be a last resort.

[31] I have decided to follow an approach that will allow the 42 owners of this building an opportunity to determine whether the alterations by Mr. Martin should be allowed to stand.

[32] In this case, it is my view that the question of the acceptability of the alterations to PH1 has never properly been considered by the owners. As I have found that the alterations amount to a significant change, I now order that the respondent Strata Plan VR 387 call a special general meeting, following the procedures in their bylaws, including notice of the meeting to all owners, for the purpose of determining whether the change is approved by a resolution passed by a three-quarters majority of the owners.

[33] Although it appears that s. 71 is intended to be complied with before a significant change is made rather than after, it is my view that someone should not

be in any better position by making significant changes before they are approved rather than after.

[34] If, at a properly held meeting, the alteration is approved by the requisite three-quarters majority vote, then that will be the end of this matter. If it is not approved, then the configuration of the deck should be returned by Mr. Martin and at his expense to the state it was in before the changes were made and the railing removed.

[35] As the results of this petition are of mixed benefit to the parties, each party shall bear their own costs.

“Bowden J.”