Case Name:

Giroday v. Strata Plan VIS 3242

Between
Patrick J. Giroday, solicitor, and
Strata Plan VIS 3242, client

[2003] B.C.J. No. 122
2003 BCSC 66
Nanaimo Registry No. S30241

British Columbia Supreme Court
Nanaimo, British Columbia
Registrar Horn

Heard: July 17, 2002.
Final submissions received: November 29, 2002.
Judgment: January 17, 2003.
(33 paras.)

Counsel:

Patrick J. Giroday appeared in person and for Mr. Torrie.
J.R. Jordan, for Strata Plan VIS 3242.

¶ 1 REGISTRAR HORN:-- Two bills were rendered by Patrick J. Giroday Law Corporation dated February 16, 2000, and June 7, 2000, and two bills were rendered by D. Douglas Torrie Law Corporation dated February 14, 2000, and April 27, 2000. The bills were rendered to Strata Corporation VIS 3242. The solicitors, Mr. Giroday and Mr. Torrie, are associated in practice and they were retained, if they were retained at all, in respect of one matter only. Their services were terminated before they had completed the work upon which they were engaged and $1,578.78 of Mr. Giroday's bill has been paid. Mr. Giroday's bills amount to $4,032.50. Mr. Torrie's bills amount to $1,247.43.

¶ 2 During the hearing, Mr. Torrie acknowledged that $22 ought to be deducted as a disbursement improperly charged.

¶ 3 The chief issue before me was whether the lawyers were lawfully retained by the Strata Corporation. If they were not so retained, then the Strata Corporation owes them nothing. Some argument was addressed to me upon the basis that they had done work for the Corporation which was of value to it and were entitled to be remunerated on a quantum meruit basis. That may or may not be a good claim in law but it is not a matter which I as a taxing officer have any authority to deal with upon a review under the Legal Profession Act.

¶ 4 The retainer issue arises out of s. 49 of the Condominium Act which reads as follows:

> Maximum expenditure by strata council
>
> 49 Unless otherwise provided by a bylaw added to Part 5, a strata council must not, except in emergencies, authorize, without authorization by a special resolution of the strata corporation, an expenditure of more than $500 which was not set out in the annual budget of the corporation and approved by the owners at a general meeting.

¶ 5 Mr. Sutherland and Mr. Baker were owners of two strata units in Twinfalls Condominium in Ladysmith. There were twenty-three units, not all of which had been sold. The owner/developer, a Mr. Lang, through the agency of a company, still owned five of the units.

¶ 6 By December, 1999, a Strata Council had been formed and Mr. Sutherland and Mr. Baker were respectively Chairperson and Secretary of the Strata Council.

¶ 7 By December, 1999, concerns had arisen among the strata owners as to the integrity of the building envelope. In other words, they feared that they had bought into a "leaky condo." They had received, informally and without cost, some opinions from building contractors as to steps that they should take to assure themselves of the integrity of the building envelope and they had been advised to obtain a building envelope assessment from some qualified person. They had approached a governmental body called the Homeowner Protection Office and had been provided with a condominium-owner's manual relating to managing major repairs. They had been advised that if they obtained such assessment they might be in a position to obtain financial assistance from the Homeowner Protection Office. They were also of the understanding that upon presentation of an assessment showing defects, the municipal assessed value of each of the condominiums might be reduced, resulting in lower taxes to the owners.

¶ 8 They had other concerns. They were not able to ascertain whether Mr. Lang had, prior to the formation of the Strata Council, collected or paid Strata fees and if so, whether these fees had been expended upon things which were the responsibility of Mr. Lang rather than of the Strata Plan Corporation and they wanted an accounting.

¶ 9 On December 2, 1999, Mr. Giroday, who specializes in civil litigation, and Mr. Torrie, who is a solicitor with a practice including real property, met with Mr. Sutherland and Mr. Baker who represented the Strata council. They were engaged by them to act in respect of all the matters with which the Strata owners were concerned.

¶ 10 No written retainer was obtained, but they were informed of the hourly rate at which the two lawyers would be charging their fees.

¶ 11 Since what was said by Messers. Sutherland and Baker in respect of the services that they were seeking has assumed some importance, in that it is argued that the lawyers were also asked to advise them in regard to the internal management of the Strata Corporation and the Strata Council's affairs, I shall set out what my notes of evidence say in that regard, with my interpretations in brackets.

¶ 12 My notes of what Mr. Giroday said in evidence in chief are:

> I was asked if there was any problem entering into a contract (i.e. a contract with the consulting engineer). I advised on form of contract. I did not advise Sutherland or Baker that they would need a special resolution to contract - wasn't asked about internal affairs nor to give advice.

¶ 13 My notes as to the relevant questions and answers in cross examination are as follows:

Question:	"Did you ask if they had authority?"
Answer:	"I assumed that they did."
Question:	"Aware that no expenditure without approval?"
Answer:	"Engaged to give advice."
Question:	"Could not spend money outside budget?"
Answer:	"They did not ask me anything except the form of the contract. Aware that quote was $3,900. Was not aware that such expenditure requires special resolution - not necessarily required - emergency - no special resolution and can use contingency fund. In hind sight, I wish I had asked."
Question:	"Emergency measures or in budget? Did anyone say it was urgent?"
Answer:	"BC Assessment Authority to meet in February or March also Levelton report showed serious problems."
Answer:	"My retainer was to help them assess the problems with view to litigation."

Answer: "I understood they had attended a seminar and had a manual."

Answer: "I gave no advice as to their duties."

Answer: "My firm prepared a borrowing resolution."

Question: "No representation?

Answer: "Yes, they gave us to believe that they had authority."

Question: "See s. 49. If you had read section would you have got a special resolution?"

Answer: "I don't know. They did not ask."

Question: "When did you become aware that a borrowing resolution might be required?"

Answer: "I don't know. I don't know if it was required. They presented a draft resolution. They received information from HPO see March 15, 2000, (this was a letter marked Exhibit 7 which advises that the wording of the borrowing resolution should be completed by Mr. Giroday's office to ensure against any future problems).

I never advised them to comply with the Condominium Act."

Question: "Were you aware that they had to have a special resolution to commence litigation? Any concern they could not get the votes?"

Answer: "My involvement was arranging envelope assessment."

¶ 14 My notes as to Mr. Torrie's evidence in chief are as follows:

I did not ask for authority or special resolution to spend more than $500. I was aware that a resolution was required to spend money out of budget. Their authority was based on the "indoor management rule" - I did not concern myself with their bylaws. I proposed a borrowing resolution to vote for "expenses incurred in work done and to be done." I knew that they needed resolution to borrow. I did not concern myself with their budget or bylaws.

¶ 15 My notes of Mr. Baker's evidence in cross examination are:

I had a copy of the Home Protection Office brochure. It was distributed to members in November, 1999. I knew how to approach management of leaky condos - there are references (in the brochure). I did not know that a special resolution was required to spend money over $500.

Question: Did you go to him (Mr. Giroday) for legal advice.

Answer: He did not ask if we had authority or to obtain a special resolution - as soon as we knew we got a borrowing resolution - we wanted to find out how a developer could be held responsible for deficiencies and failures.

¶ 16 The evidence which I recorded and set out above leads me to the conclusion that

1. Neither Mr. Giroday nor Mr. Torrie was approached to give advice about the internal management of the strata corporation or the strata council. They were approached to undertake litigation, if so advised, in respect of the cost of repairs to the condominium and to undertake litigation, if so advised, to obtain an accounting of strata fees owed by the developer.

2. Mr. Jordan in his supplementary submissions of September 30, 2002, says in Paragraph 64: "The council member who gave evidence, unchallenged, was clear that he and the other member were at the lawyers for legal advice on how to proceed and be in compliance with the Act. Mr. Baker specifically asked for that assurance. Mr. Giroday said he gave it." My notes, though admittedly sketchy, do not indicate that such assurance was requested or given.

¶ 17 I have only been directed to one authority dealing with the effect of s. 49 of the Act upon parties contracting with a Strata Corporation. It is Can-Pac v. Carriage Management (1990) 49 BCLR (2d) 139 (BCCoCt). In that case the plaintiff company was engaged in the sale and servicing of a heat-saving device. The defendant, Carriage Management, was the building manager operating under written contract for the strata owners of an apartment block. The plaintiff proposed to install an energy management system on a 90-day trial and that proposal was accepted by the property manager who forwarded the proposal to a member of the strata council recommending that it be authorized. It was unclear whether any such authorisation was given by the council.

¶ 18 The court held that the defendant management corporation had actual authority to manage the common property and to perform all acts usually performed by property managers. To this extent the agreement was binding and created contractual rights between the plaintiff and the strata corporation.

¶ 19 As to s. 49, the court accepted that there was no authorization by special resolution for an expenditure over $500 and but came to the conclusion that s. 49 did not make a contract for such expenditure void and that it was only voidable. The court observed that this seems to follow from the fact that s. 49 itself does not attach any consequence to the failure to obtain such a special resolution.

¶ 20 Accordingly, the contract in this case is a valid contract until such time as one of the parties brings it to an end. It is not entirely clear when that event occurred.

¶ 21 It is said, however, that knowledge of the fact that a contract for legal service in excess of $500, must be authorized by special resolution and had not been so authorised, must be attributed to the solicitors.

¶ 22 It seems to me that what would have to be attributed is the knowledge:

(a) That the strata corporation had no bylaw added to Part 5 which exempted the strata council from the provisions of s. 49

(b) That there was no special resolution of the strata corporation authorising the expenditure.

(c) That the expenditure was not provided for in the annual budget of the corporation approved by the owners at a general meeting.

¶ 23 It is not easy to see how the solicitors can be deemed to have knowledge of all these matters. Perhaps they should have enquired. But I find that they did not enquire and did not know of any restriction on the Strata Council's ability to contract with them.

¶ 24 Ignorance of the law is not an excuse, of course, but I am not aware of any principle laying down that a solicitor is deemed to know all of the law or is to be held to any higher standard of inquisitiveness than a lay person about the authority of a person to contract with him.

¶ 25 I do not believe that s. 49 was intended to prevent tradesmen such as plumbers or electricians, who have done work for a strata council in excess of $500, from being paid, simply because no special resolution has been passed to authorize an expenditure over $500. The section, it seems to me, is aimed at the internal management of the strata corporation and not at external relations with persons such as plumbers, electricians or solicitors. One of the consequences, for example, of a breach of s. 49 by a strata council is that a strata owner may not be liable to a levy to cover the cost. (See Re Blunt and Strata Corporation VR 45 (1977) 2 B.C.L.R. 248 (B.C.S.C.))

¶ 26 What happened after the solicitors were engaged is not in question nor is it submitted that they over charged for the work done. Between the two of them they had several conferences with Messers Sutherland and Baker. They engaged a suitable person to make a building report. They delivered the report to the strata council. They engaged an accountant to

prepare an opinion as to whether the strata fees had been collected and, if not, what amount should have been collected. They drew a resolution to approve borrowing in order to pay for past and future expenditures in and about the assessment of and repairs to the building.

¶ 27 On April 15, 2000, there was an annual general meeting of the strata owners and the borrowing resolution was on the agenda, but at the meeting it was decided to adjourn that resolution until the engineering report had been received. Neither Mr. Sutherland nor Mr. Baker were re-elected to the council. A further meeting was then held on May 24, 2000, at which the report was considered.

¶ 28 Mr. Giroday was present at the latter meeting. The borrowing resolution was not passed by the necessary majority. The voting was 13 in favour and 10 against and five of the contra votes were cast by the developer, Mr. Lang.

¶ 29 After the meeting the issue was raised by some of the strata members whether Mr. Lang was entitled to vote in respect of the units that he still owned in view of the fact that, as developer, he had a conflict of interest. Subsequently, Mr. Giroday prepared and gave an opinion on that matter. Though Mr. Giroday was not involved in the subsequent litigation, that issue eventually went to court. It was held that the votes at the two meetings were valid.

¶ 30 While it is not easy, on the evidence, to fix the time at which it can be said that the Strata Council terminated the relationship with the solicitors it was, in my opinion, at the meeting of May 24, at which the borrowing resolution was defeated. Any work done after that was, in my view, unauthorized by the new Strata Council elected on April 15th.

¶ 31 Dealing with Mr. Giroday's bill, the entries for May 25, 26, and 30, 2000, are, for this reason, disallowed. Dealing with Mr. Torrie's bill, the bill is allowed in full.

¶ 32 If counsel, on the basis of this decision, will provide me with a certificate with agreed calculations, then I will sign it.

¶ 33 I have not taxed off more than one-sixth of either of the bills and unless there is an offer to settle, the solicitors will have their costs on a party and party basis but for one common bill. Failing agreement, a party and party bill of costs may be presented to me for assessment.

REGISTRAR HORN

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