Case Name:

Harvey v. Strata Plan NW 2489

IN THE MATTER OF the Strata Property Act,
S.B.C. 1998, c. 43
Between
Leo George Harvey and Vikki Ellen Genge a.k.a. Vikki Ellen Harvey, petitioners, and
The Owners, Strata Plan NW 2489, respondent

[2003] B.C.J. No. 2024
2003 BCSC 1316
Vancouver Registry No. LO22164

British Columbia Supreme Court
Vancouver, British Columbia
Ballance J.

Heard: March 10, 2003.
Judgment: August 29, 2003.
(38 paras.)

Real property — Condominiums — Liability of unit holders — Bylaws — Voting rights.

Petition by Harvey for a declaration that the installation of hardwood flooring in his strata lot was not a violation of the strata plan's bylaws, a declaration that violation charges imposed as a result of the installation were unfair, an order prohibiting the Strata Plan from interfering with Harvey's right to vote at general meeting, and special costs. Harvey notified the Strata Plan in 1998 that he wanted to install floating hardwood flooring in his unit. The Strata Plan asked Harvey to enter into a covenant registered against the lot addressing noise concerns. Harvey refused to do so, and stated that he did not need the Strata Plan's permission to install the flooring. Correspondence continued for the next several months, and the Strata Plan began to include its legal costs as part of Harvey's monthly assessments. Harvey refused to pay these costs, and the Strata Plan filed a lien against Harvey's lot. Harvey installed the flooring in 2000. There had been no complaints from other lot owners as a result. In 2002, a special gas assessment became payable by all strata lot owners, but erroneously believing it to be related to the flooring dispute, Harvey refused to pay. The Strata Plan then refused to allow Harvey to vote at the annual general meeting. Harvey argued that the bylaws only restricted structural changes, and a change of interior flooring was not a structural change. The Strata Plan argued that its actions complied with the bylaws, but if they did not, the levies were still enforceable because the Plan's actions were not significantly unfair.

HELD: Petition allowed in part. The new flooring was not a structural alteration and did not violate the applicable bylaws or legislation. The Strata Plan had no authority to levy the extra assessments because no bylaw had been violated. Whether the Strata Plan's conduct was unfair was irrelevant. The parties had already agreed that Harvey's failure to pay the gas assessment was an error and that Harvey would be allowed to vote at meetings, so that declaration was unnecessary. Strata Plan's conduct warranted criticism, but it did not fall within the category of scandalous or outrageous, such that special costs were inappropriate.

Statutes, Regulations and Rules Cited:

Condominium Act, R.S.B.C. 1996, c. 64. Strata Property Act, S.B.C. 1998, c. 43, s. 164.

Counsel:

K.B. Friesen, for the petitioners.
M. Lithwick, for the respondent.

BALLANCE J.:—

INTRODUCTION

¶ 1 The petitioners, Leo Harvey and Vikki Genge, are the registered owners of strata lot 53 (the "Strata Lot") of Strata Plan NW2489 located at 803 - 6070 McMurray Avenue, Burnaby, British Columbia. The respondent is a strata corporation created under the provisions of the Condominium Act, R.S.B.C. 1996, c. 64 (now the Strata Property Act, S.B.C. 1998, c. 43.)

¶ 2 At issue is a dispute between the parties over the petitioners' installation of floating hardwood flooring in certain rooms of the petitioners' Strata Lot.

BACKGROUND FACTS

¶ 3 On about May 18, 1998, the petitioners wrote to the respondent expressing an interest in installing a new hardwood or laminate floating floor in particular rooms of their Strata Lot. Citing concerns over sound transmission between adjoining strata lots, the respondent asked the petitioners to enter into a form of covenant to be registered against their Strata Lot. The chief matter addressed in the covenant was the potential transmission of unacceptable noise levels which the respondent was concerned might flow from the contemplated flooring change.

¶ 4 The respondent's position was that the governing strata bylaws obligated the petitioners to obtain the respondent's permission in order to install the new flooring. The petitioners, on the other hand, believed that on a proper reading of the applicable bylaws, they did not require the respondent's permission and would not be in violation of any of the bylaws by installing their new wood flooring.

¶ 5 Over the span of the next several months, the parties exchanged correspondence relative to the sound transmission of the wood flooring as well as the petitioners' objections to certain of the terms contained in the respondent's proposed covenant. Ultimately, the petitioners refused to sign the covenant and advised the respondent accordingly.

¶ 6 A further exchange of correspondence between the petitioners and the respondent and its legal counsel ensued throughout 1999 and part of 2000. Beginning in early 1999 the respondent began to include the legal fees and disbursements charged by to it by its legal counsel as part of the petitioners' monthly assessments. The respondent's rationale for doing so was that those legal expenses were being incurred in relation to the respondent's attempts to enforce its bylaws and, as such, were properly included in the petitioners' monthly operating assessments pursuant to the bylaws. Evidently, the respondent also charged penalties and/or fines and interest attributable to such amounts and attributable to the legal expenses to the petitioners. For ease of reference I will refer to these legal expenses, penalties, costs and interest as the "Violation Charges". The petitioners refused to pay the portion of their monthly assessments comprised of the Violation Charges and repeatedly requested the respondent and its counsel to reverse such charges, but the law firm invoices kept coming.

¶ 7 The floating hardwood floor was not actually installed by the petitioners until some time in July 2000. It appears that the respondent had initially assumed that the flooring had been installed when the petitioners first raised the issue in 1998. It is not clear precisely when the respondent realized that the floors had not been installed at that time. However, the evidence indicates that by at least February 1999, the respondent was aware that the petitioners may not have yet installed the new flooring.

¶ 8 In early Spring 2002, a special gas assessment became payable by the petitioners and the other strata lot owners. Erroneously believing that the notices of arrears relating to this special gas levy were connected to the payment of the Violation Charges the petitioners failed to pay the special levy for a number of months following its due date.

¶ 9 The respondent barred the petitioners from voting at a special general strata meeting in April 2002, on account of the arrears of the petitioners' assessment payments. As well, in October 2002, the respondent filed a lien against the petitioners' Strata Lot for failure to pay all outstanding assessments, which included the Violation Charges. Also around this time, the respondent informed the petitioners' bank which held the mortgage against the petitioners' Strata Lot, that the petitioners were seriously in arrears of their monthly assessments and that a lien had been registered against their unit.

¶ 10 Although it was the respondent which repeatedly threatened legal action against the petitioners with the stated goal of enforcing its bylaws, it never did so and eventually the petitioners commenced these proceedings.

¶ 11 Pursuant to the filed Petition, (which was amended, in part, at the hearing), the petitioners seek:

1. a declaration that the installation of the wood flooring is not an alteration to the structure of the Strata Lot and does not contravene the rules, bylaws, regulations or the Act in force at the time of the installation;

2. a declaration that the imposition of the Violation Charges to the petitioners by the respondent is unfair and an inappropriate application of the rules, bylaws, Act, or regulations, and that the outstanding Violation Charges be cancelled;

3. an Order prohibiting the respondent from interfering with the petitioners' right to vote at the respondent's general meetings; and

4. special costs.

ANALYSIS AND DISPOSITION

¶ 12 The relevant bylaws in place when the petitioners installed their new flooring read as follows:

Bylaws 1.5, 1.8

An Owner shall: (...)

1.5 not use his Lot or permit the same to be used, in a manner or for a purpose that will cause a nuisance or hazard to any occupier of a Lot (whether an Owner or not) or his family;

1.8 receive the written permission of the Strata Council before undertaking alterations to the exterior or structure of the Strata Lot, but permission shall not be unreasonably withheld.

Bylaw 12.1

No noise shall be made in or about any Strata Lot or the common property which in the opinion of the Strata Council is a nuisance or unreasonably interferes with use and enjoyment of any

other Strata Lot by its Owners. Municipal By-Laws covering noise, disturbances, and public nuisance shall apply to all Owners, tenants or visitors.

Bylaw 15.2(a)

(a) No Owner and/or Resident will alter the finish or appearance of the fencing, railings, floors, walls or ceilings of the patios or balconies adjoining any Strata Lot. An Owner and/or Resident wishing to make any changes or improvements to these areas must submit, in writing, their proposal for consideration by the Strata Council. If the Strata Council approves any changes or improvements, such approval must be in writing.

Bylaw 15.4

No structural alterations either to the interior or the exterior of the building shall be made. No exterior alterations to wiring, plumbing, piping, or other services shall be made, either on the Strata Lot or the common property. Interior alterations to wiring plumbing, piping, or other services may be made providing they comply with all the building codes and do not affect any other Strata Lot. Municipal permits for wiring and plumbing must be obtained prior to any alteration. (emphasis in original)

¶ 13 I pause to note that sections of the strata bylaws not relevant to this action were amended in 1999. A comprehensive revision of the bylaws was subsequently undertaken and approved by the respondent in January 2002, after the petitioners had installed their new flooring. The new bylaws are only relevant to the issue concerning the denial of the petitioners' voting rights at the special general meeting in April 2002, which will be dealt with later in these Reasons. That said, however, it is interesting to note that one of the new bylaws addresses head-on the very issue in dispute in this case. It stipulates that an owner must obtain the prior written approval of the respondent before it makes an alteration to the structure of a building and explicitly provides that a structural alteration includes, among many things, "... any removal, addition or alterations of any wall, doorway, floor or ceiling or which will change the normal use of the room." It goes on to provide that wall-to-wall carpeting with appropriate underlay is the only allowable floor covering within a strata lot.

¶ 14 At the heart of this dispute is whether the installation of the floating floor in the petitioners' Strata Lot constitutes an alteration to its structure. If it does, then the petitioners are required to obtain the respondent's permission to make such an alteration and their failure to do so constitutes a violation of bylaw 1.8.

¶ 15 In considering this matter, it is important to understand what was involved in the implementation of the petitioners' new flooring. It appears that the old carpet and carpet underlay were first removed. A fresh underpad was then laid on the existing concrete floor in place of the discarded one, and a tongue and groove floating wooden floor was placed on top of the new underpad. New baseboards were also installed.

¶ 16 The petitioners contend that the installation of their floating wood floor does not amount to an alteration to the structure of their Strata Lot. In support of their position, they point to the plain and ordinary dictionary definition of the word "structure" contained in the New Lexicon Webster's Encyclopedic Dictionary of the English Language (Canadian Edition), 1988:

Structure (...)

> 1. n. something (e.g. a building or an organism) made of parts fitted or joined together // the essential supporting proportion of this (e.g. the frame work of steel girders supporting the building) // the way in which constituent parts are fitted or joined together, or arranged to give something its peculiar nature or character...

¶ 17 The respondent makes reference to the definition of "structural alteration or change" contained in Black's Law Dictionary 5th ed.:

> One that affects a vital and substantial portion of a thing; that changes its characteristic appearance, the fundamental purpose of its erection, and the uses contemplated. One that is extraordinary in scope and effect, or unusual in expenditure.

¶ 18 The language used in the bylaws is to be given its plain and ordinary meaning (Great Western Railway Co. v. Carpalla United China Clay Co. (1990), 1 Ch. 218 (C.A.)). Neither party supplied any judicial authority in which the term "structure" had been considered.

¶ 19 In my view, on a plain reading of the definitions submitted by each party, a structural alteration to the interior of an individual strata lot contemplated by the applicable bylaws must amount to something more than replacing wall-to-wall carpeting with floating hardwood flooring. To my mind, an alteration to structure would be along the lines of knocking out a load bearing wall, constructing an additional room or fundamentally reconfiguring the dimensions of an existing space. There is no evidence that the removal of the carpeting and accompanying underlay and the installation of the new underpad and wood flooring has altered the underlying concrete floor. I agree with the petitioners that their new flooring is more akin to fresh carpeting or wallpaper than it is to a wholesale alteration of some structural aspect of their Strata Lot - essentially, it is a decorating decision.

¶ 20 The respondent argues that because the flooring has been 'affixed' to the sub-floor, which is clearly a structural element, the flooring has thereby altered the structure of the Strata Lot. If I were to adopt the respondent's position, by extension any similarly removable and ultimately separate attachment which attached to a structural element would be captured. Arguably this would extend to things like wallpaper, paint and cupboards, and it is readily apparent that requiring the respondent's permission in order to change those items would produce an absurd result which cannot reasonably be said to be intended by the bylaws.

¶ 21 Another of the Respondent's arguments is that the bylaws are to be construed strictly for the benefit of the general welfare of all the owners. As such, the respondent has a responsibility to ensure that nothing disrupts the integrity of the common scheme. In support, and presumably in reference to the respondent's concern about potential noise transmission and other potential nuisances which might be caused by the wood flooring, the respondent cited a case from the Florida District Court of Appeal: Candib v. Carver (1977), 344 Southern Reporter, 2d Series 1312. This case stands for the proposition that even if a legal nuisance does not in fact exist, an individual owner can nevertheless be restrained from using his/her unit in a manner which interferes with the peaceful use and enjoyment of the other owners. The finding in Candib largely turned on the particular language contained in the articles of the governing condominium bylaws (called, Declaration of Condominium). As such, it is confined to its unique factual matrix and I do not find it to be of particular assistance in the base at bar.

¶ 22 A far more instructive decision is Buchbinder v. Strata Plan VR2096 (1992), 12 B.C.A.C. 132, where Proudfoot J.A. discusses the concept of 'community living' as it pertains to condominium units. The arguments in that case are similar to the ones at bar; the appellant owner of a strata lot was accused of breaching a strata bylaw when she erected a freestanding garden shed outside of her unit on her patio. The bylaw did not specifically prohibit the erection of free-standing structures, but the respondent contended that the bylaws had to be purposively interpreted in order to "maintain and preserve the exterior appearance and landscaping of the Lagoon complex." In

addition, the respondent argued that the principle of community living should apply and that the wishes of individual unit owners cannot supersede the interests of the community. Proudfoot J.A. states at p. 3:

> The principle of community living has only been applied where there has been a clear infraction of a condominium by-law. The argument advanced is that when people join a condominium, development they agree to abide by the declaration of community living. In the case at bar, a garden shed being placed on a patio was not specifically prohibited by the by-law. The intention may have been to maintain the integrity of the complex (the aesthetics), however, it would be unreasonable to conclude that, based on the principle of community living, condominium owners should assume they are not entitled to place any object on their patios.

Proudfoot J.A. continues at p. 5:

> ...[the] garden shed does not fall within the specific prohibitions of the by-law. It is not a change to the building's exterior and is not an addition to or an enclosure of the limited common property. To give such a broad interpretation to the by-law would make matters even more difficult for condominium owners trying to interpret ambiguous and generalizing by-laws. If the Strata Council wants to prohibit garden sheds, or similar free-standing structures, they can easily adopt such course of action.

¶ 23 The bylaws enforce at the time that the petitioners first raised the flooring issue with the respondent in 1998 as well as at the time of the eventual installation of the flooring in July 2000, do specifically prohibit alteration to the floors of the patios and balconies, without the prior written permission of the respondent. The alteration of patio and balcony flooring was explicitly contemplated in the bylaws, but flooring alterations in the interior of individual strata lots was not specifically addressed. If the respondent seeks to prohibit the installation of wood flooring in individual units, it is certainly within its power to do so and, indeed, it purports to have done exactly that through its 2002 bylaw revisions.

¶ 24 The respondent concedes that there have been no complaints with regard to any increased noise or other such nuisance by other owners or tenants resulting from the petitioners' new flooring. If the respondent is made aware of some excessive sound transmission emanating from the petitioners' wood flooring, it is open to it to take appropriate action under the applicable bylaw.

¶ 25 In summary, I find that the installation of the wood flooring in the petitioners' Strata Lot did not violate any of the applicable bylaws or legislation.

¶ 26 The respondent relies on section 24 of the 2002 revised bylaws (which is, in essence, the same as ss. 10.1 - 10.3 of the predecessor bylaws) as authority for incorporating the Violation Charges into the petitioners' monthly assessment. Section 24 provides:

> (1) An infraction or violation of these Bylaws or any Rules and Regulations established under them on the part of an Owner...may be corrected, remedied or cured by the Strata Corporation
>
> (2) Any costs or expense so incurred by the Corporation shall be charged to that Owner and shall be added to and become part of the assessment or that Owner for the month next following the date on which the costs or expense are incurred, but not necessarily paid by the Corporation, and shall become due and payable on the date of payment of the monthly assessment.

(...)

¶ 27 It is clear that section 24 becomes operative only where a bylaw infraction or violation has in fact occurred. In my view, the corresponding and similarly worded sections of the former Condominium Act, R.S.B.C. 1996, c. 64, and current Strata Property Act, S.B.C. 1998, c. 43, are likewise triggered only upon the occurrence of a contravention.

¶ 28 The respondent began to charge the Violation Charges well before the flooring was even installed and, therefore, well before any violation could have occurred. Moreover, and in any event, I have found that the flooring installation does not constitute a violation of the applicable bylaws or legislation and, consequently, section 24 has never become operative and the respondent is therefore not entitled on the authority of section 24, to recoup the Violation Charges from the petitioners. Even if I had found that the flooring installation amounted to a breach, I would not allow the respondent to add to the petitioner's monthly assessments, those of the Violation Charges which were incurred prior to the actual installation.

¶ 29 I find support for my conclusion on this matter in Hewitt v. Strata Corp. N.W. 1282, [1997] B.C.J. No. 1382 (S.C.). That judgment dealt with a strata council purporting to charge its legal fees in relation to an alleged bylaw breach. McKinnon J. stated at paras. 18, 21, 22-23:

> The defendant argues that given the particular provision of the Condominium Act, it is entitled to assess Mr. Hewitt for its legal costs in prosecuting him for defamation, regardless of the ultimate trial outcome. It is akin to requiring a party to pay the ongoing legal costs of the other side before Court resolution. That is certainly an unusual proposition that would have to be clearly legislated.
>
> (...)
>
> Section 127 [of the Condominium Act] provides for the collection of costs associated with "correcting, remedying, or curing," a breach of the bylaws.
>
> (...)
>
> I am unable to see where any of that could lead to the drastic right claimed for the council. One only has to consider what would happen if Mr. Hewitt successfully defended the defamation action to question the logic and fairness of this contention.
>
> Even if one could accept that defamation was a breach of the bylaws, rules or regulations, surely it must first be proved, and only then could one consider the assessment and collection issue.

¶ 30 I adopt that reasoning.

¶ 31 The respondent asserts that the petitioners ought to pay the Violation Charges even if I find (as I have) that the installation of the hardwood flooring did not constitute a violation of the bylaws. In this context, the respondent appears to argue that I have jurisdiction to deal with the petitioners' liability vis-à-vis the Violation Charges, only if I find that the respondent's actions in this matter have been "significantly unfair" within the meaning of section 164 of the Strata Property Act, S.B.C. 1998, c. 43. The respondent points to all of its surrounding conduct rather than focusing on the distinct act of charging the Violation Charges and asserts that it did not conduct itself in a significantly unfair manner because it was acting in good faith throughout and was genuinely attempting to balance the competing interests of the petitioners and those of the other owners and tenants.

¶ 32 I find the respondent's contention on this particular matter ill-conceived. I do not consider that a determination that the respondent's conduct in this matter has been significantly unfair is a pre-requisite to holding that the petitioners are not responsible to cover the Violation Charges. The key factor here is that I have concluded that the respondent has no authority or entitlement under the governing bylaws or legislation to charge the Violation Charges to the petitioners because the operative provisions of section 24 (and the corresponding section under the Strata Property Act) have not been triggered. This is not an instance where an otherwise authorized act of the respondent might be oppressive or significantly unfair to an owner; this is a case where there is simply no justifiable basis in the first place for the respondent to charge the petitioners with the Violation Charges. The distinction is an important and fundamental one. I wish to add that, in any event, the respondent's conduct as it pertains to charging the Violation Charges to the petitioners where there has been no bylaw contravention by the petitioners is, in my view, unduly burdensome, onerous, harsh, wrongful and fundamentally unfair. As such, I conclude that such conduct would be accurately characterized as significantly unfair within the meaning of section 164 (See Reid v. Strata Plan LMS 2503, [2003] B.C.J. No. 417 (C.A.) and Gentis v. The Owners, Strata Plan VR 368, [2003] B.C.J. No. 140.)

¶ 33 The petitioners are not liable to pay any part of the Violation Charges nor the cost of registering the above-mentioned lien against the petitioners' Strata Lot.

¶ 34 It is my understanding that the respondent has admitted to acting in error when it refused to allow the petitioners to vote at the respondent's April 2002 special general meeting. There appears to have been a misunderstanding on both sides: the petitioners with regard to the payment of the outstanding special levy owed by them, and the respondent with regard to their authority to prevent the petitioners from voting. No doubt the years of acrimony over the hardwood floor matter exacerbated the confusion. I decline to make an Order to correct a misunderstanding which has already been rectified by the parties.

¶ 35 The petitioners seek special costs. In general terms, special costs are awarded when there is:

> ...some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words scandalous and outrageous have also been used. (Stiles v. British Columbia (Workers' Compensation Board) (1989), 38 B.C.L.R. (2d) 307 (C.A.))

¶ 36 On occasion, special costs have also been awarded when there is behaviour deserving of "reproof or rebuke".

¶ 37 While I certainly am of the view that the respondent should consider modifying the manner in which it approaches disputes of this kind, this is not a case in which an award of special costs is appropriate. Although some aspects of the respondent's conduct warrants criticism, it does not fall within the category of scandalous or outrageous nor is it captured under the wider umbrella of reprehensible.

¶ 38 The petitioners will have their costs at scale 3.

BALLANCE J.

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