# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Kaufmann v. Strata Corporation, Strata Plan 770,*** 2008 BCSC 863

Date: 20080520
Docket: 06 2921
Registry: Victoria

Between:

**Ingrid Kaufmann and Mathias Kaufmann**

Petitioners

And:

**Strata Corporation, Strata Plan 770, Maria Wendy Tippett, Peter Frederick Clarke, Gerald Bruce Cranstoun, Norman David Simmons, Marilyn Marie Carey, Constance Eileen Tisdall, Roberta Alice Woods, Linda Ann Chorney, Dianne Linda Mary Whitecross**

Respondents

- and -

Docket: 06 3012
Registry: Victoria

Between:

**The Owners, Strata Plan VIS770**

Petitioner

And:

**Ingrid Kaufmann and Mathias Kaufmann**

Respondents

Before: The Honourable Mr. Justice Masuhara

## Oral Reasons for Judgment

In Chambers
May 20, 2008

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| Counsel for Ingrid Kaufmann and Mathias Kaufmann: | J. Hanson |
| Court-Appointed Administrator: | G. Fanaken |
| Appearing on her own behalf: | L. Chorney |
| Appearing on her own behalf: | M. Carey |
| Place of Trial/Hearing: | Victoria, B.C. |

[1] **THE COURT:** On December 5, 2006, a hearing was conducted before me regarding Strata Unit Number 8, which is owned by the Kaufmanns. This unit has three areas that were built prior to the Kaufmanns purchasing the unit but are areas that were not authorized or permitted. They encroach upon the common area of the corporation, and they are comprised of: (1) a full bedroom/bathroom, (2) a walk-in closet, and (3) a smaller child's bedroom.

[2] At the end of the hearing on December 5, I received submissions which included alternate proposals to a resolution of the dispute. I made an order that reflected a resolution that I thought met with the common points between the parties. I ordered several things:

1. that the areas encroached upon were common property;
2. that a lease be granted by the Strata Corporation to the Kaufmanns which dealt with the encroached area for 20 years;
3. that the Kaufmanns were to pay monthly rent for this additional area according to a formula provided; and
4. that the lease was conditional upon certain things: that the Kaufmanns were to obtain retroactive building permits within 18

> months from the date of the order from the City of Victoria and ensuring that the attic improvements were brought into conformity with the building code at the time that they were constructed.

Those were specific itemized conditions in the order.

[3] The matter has now returned to me on the basis that it is not possible to comply with my order, more specifically:

1. The City of Victoria's practice and policy is that no building permit will be issued unless the improvements to which the building permit applies meet the building code applicable at the time the building permit is applied for. The City will not grant a retroactive building permit.

2. The building is a nonconforming building in that it contains more habitable area than the building's present zoning allows. The City of Victoria requires the Strata Corporation building to be rezoned before a building permit will be issued. Rezoning will require the Strata Corporation building to comply with the ***British Columbia Building Code*** requirements for a building of more than three storeys or more than 6,000 square feet. One such requirement will be the entire building must be fitted with fire sprinklers.

[4] As my order has not been entered, I am not *functus* and no issue has arisen regarding my jurisdiction to hear this matter.

[5] The Kaufmanns, in their application before me, seek additional language to be added to my order. The language reads as follows:

> The respondent Strata Corporation shall provide all necessary consents and authorizations to allow the petitioner to apply for and obtain the necessary permits from the City of Victoria and shall make best efforts to assist the petitioner to obtain the permits.

[6] The Kaufmanns argue the basis that this language is needed to give effect to my order as they now have no other option by which they can retain the attic improvement short of rezoning. They refer to Dr. Chorney's letter-writing campaign which led to the issuance of a remedial work requirement against the Strata Corporation, a requirement to demolish or remove all parts of the building which were constructed without a building permit.

[7] It is agreed by the parties that that work requirement relates to the three subject areas that I mentioned earlier.

[8] The Kaufmanns also note that there are six out of eight units which have patio enclosures which, along with the attic improvements, increase the habitable area beyond the building's zoning, and no permits were granted.

[9] The Kaufmanns also submit that the proposed language that they have placed before me is consistent with the language made in an earlier case, ***Poole v. Owners, Strata Plan VR 2506***, 2004 BCSC 1613.

[10] Dr. Chorney opposes the application. She outlined in her submission a history of events and noted that in 2004 all of the owners, including the Kaufmanns, rejected a rezoning initiative or application. She referred in her materials to the considerable investigations and reviews that have been conducted in regards to the three subject areas, which include reports by an inspection company, an architect, engineer, and municipal officials of Victoria, both staff and elected, regarding significant safety and building health concerns and, specifically, fire safety issues, roof ventilation issues, and structural integrity issues.

[11] The Kaufmanns have provided no responding evidence regarding these concerns.

[12] Dr. Chorney has also identified significant other financial issues that will affect her and other owners if a full rezoning application were to be initiated. She referred to an early report that itemized some of the costs that would be involved. As well, she mentioned that these costs have now increased and referred to a drainage tile issue which would be significant given that the building is built upon solid rock.

[13] I was also provided the helpful comments of Mr. Fanaken who has been installed as an administrator pursuant to an order of Mr. Justice Macaulay. He noted that there is no statutory provision that permits a corporation to be taken through a rezoning process by the owners. He also provided some context in terms of the three levels of voting that would be in place. The first relates to majority votes, the second relates to a three-quarters' majority vote, and the third relates to requirements for unanimous decisions. He stated that given the level of significance of rezoning, if such a vote were to exist it would be in the unanimous category.

[14] He also provided commentary with respect to the ***Poole*** case. His submission was that it was a case where the Strata Corporation was ordered to provide authorization and consents for the use of a roof in accordance with safety requirements but noted that it was not a case where the Strata Corporation was being ordered to seek an entire rezoning for the property.

[15] Mr. Fanaken also took no issue and, indeed, agreed with Dr. Chorney's materials that refer to safety and building health issues.

[16] In the circumstances, I am not persuaded that the order sought by the Kaufmanns is warranted. The rezoning sought is well out of proportion to my original order. There is a significant difference in character of what is sought in this application and what I ordered in December.

[17] The ***Poole*** case is not analogous to this case. There is a significant disparity in the costs to the Strata Corporation relative to the benefit to what the Kaufmanns seek, particularly as there is some uncertainty with respect to the rezoning being successful in any event.

[18] While it is unfortunate that the Kaufmanns did not realize the three areas were not part of the original plan, and they obviously did not construct the areas that are the subject of the dispute, they did not, however, conduct an investigation to ensure that they were actually purchasing what they saw.

[19] Balancing the interests and finding that the language sought is out of proportion to the scope of my original order, the application of the Kaufmanns is dismissed.

[20] That concludes my ruling.

The Honourable Mr. Justice D. M. Masuhara

July 8, 2008 – ***Revised Judgment***

Corrigendum to the Oral Reasons for Judgment issued advising that the second sentence of paragraph 17 should properly read as follows:

> "...what the Kaufmanns seek, particularly as there is some uncertainty with respect to the rezoning being successful in any event."