

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Legend Holding Group Ltd. v. Chen*,
2014 BCSC 1064

Date: 20140613
Docket: S131264
Registry: Vancouver

Between:

Legend Holding Group Ltd. and the Owners, Strata Plan LMS 1162

Petitioners

And

Kuei-Pin Chen and Jack Chen

Respondents

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Petitioners:

P. Mendes
A. Chang

Counsel for the Respondents:

S. Coval
J. Cabott

Place and Date of Hearing:

Vancouver, B.C.
April 3-4, 2014

Place and Date of Judgment:

Vancouver, B.C.
June 13, 2014

Introduction

[1] This is a petition brought to resolve a dispute between the owners of strata lots in a commercial strata title building located in Richmond, British Columbia (the “Building”).

[2] The petitioners are The Owners Strata Plan LMS 1162 (the “Strata Corporation”) and Legend Holdings Group Ltd (“Legend”). Legend owns strata lot 43 in the Building. The respondents Kuei-Pin Chen and Jack Chen are the owner and tenant respectively of strata lot 31 in the Building. Strata lot 43 is located on the sixth floor of the Building immediately above strata lot 31 which is on the fifth floor.

[3] This dispute has arisen because Legend wishes to enter into a lease with a company called Lavar Spa to permit Lavar Spa to operate a colon cleansing spa in strata lot 43. Mr. Jun Jun Yu is a director of Legend and the principal of Lavar Spa. To operate the spa, Lavar Spa proposes to install approximately 10 stations for carrying out colon cleansing procedures as well as two additional washrooms. These facilities will require the installation of additional drains connecting to the existing waste water drainage pipe that runs vertically through the Building.

[4] Legend wishes to connect these drains to the existing drainage pipe by collecting the waste water from the drains in a pipe that will run through the service area located above the drop ceiling installed in strata lot 31 and connect to the main vertical pipe in the service area. While it was not stated in evidence, it is apparent that the purpose of collecting the waste water in this way is to ensure that there is a sufficient vertical drop to provide adequate drainage. The service area is located above the drop ceiling but is entirely within strata lot 31.

Relief Sought

[5] In the course of submissions it became clear that the relief sought in the petition does not reflect the order being sought from the court. The relief set out in the petition is as follows:

1. An order pursuant to section 69 of the Strata Property Act (the “Act”) that the Respondents grant the Petitioner, Legend Holding Group Ltd. (“Legend”) access to unit 5510-8181 Cambie Road, Richmond, British Columbia for the purpose of accessing and carrying out the renovations to Legend’s strata lot that have been approved by the Petitioner, the Owners, Stata Plan LMS 1162.
2. Special costs, or in the alternative, costs against the Respondents at scale B.

[6] However, it is apparent that the relief sought is in fact a declaration that the petitioner has the right pursuant to s. 69 of the *Strata Property Act*, S.B.C. 1998 c. 43 [SPA] to utilize the service area of strata lot 31 for the purpose of installing a drainage pipe connecting the additional waste water drains to the central waste water drain. As I understand it, the parties are prepared to have that issue decided without amending the petition, and the argument before me proceeded on that basis.

[7] There is some dispute in the evidence as to the length of the pipe that is proposed to run through strata lot 31. In addition, there is a dispute over whether it is necessary to run the collection drain through strata lot 31 at all, or whether other measures could be taken to minimize the length of the pipe. However, on the view that I take of the issues in this case, I do not find it necessary to resolve those disputes.

Position of the Parties

[8] Legend’s position is that s. 69 of the SPA grants it an easement over strata lot 31 that entitles it to utilize the service area of the strata lot for the purpose of installing the drainage pipe.

[9] The respondents’ position is that s. 69 does not grant the petitioner any such right and that properly construed the easement created by s. 69 is limited to providing an easement for existing facilities and replacement of such facilities. The

respondents' alternative positions are that the relief sought is too extensive to be the subject matter of an easement because it amounts to joint occupation of their strata lot and that in any event the relief sought goes beyond what is reasonably necessary to permit the passage of waste water through the existing drainage system and would impose an undue burden on their strata lot.

Discussion

[10] The petitioners base their application on s. 69 of the *SPA*, which provides as follows:

69 (1) There exists an easement in favour of each strata lot in the strata plan and the owner of each strata lot

- (a) for the strata lot's vertical and sideways support by the common property and by every other strata lot capable of providing support,
- (b) for the passage or provision of water, sewage, drainage, gas, oil, electricity, garbage, heating and cooling systems and other services, including telephone, radio and television, through or by means of any pipes, wires, cables, chutes, ducts or other facilities existing in the common property or another strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of the strata lot, and
- (c) for shelter of the strata lot by every part of a building that is shown on the strata plan as part of the common property or another strata lot and that is capable of providing shelter.

(2) There exists an easement in favour of the common property and the owners of the common property

- (a) for the common property's vertical and sideways support by every strata lot capable of providing support,
- (b) for the passage or provision of the services and facilities described in subsection (1) (b) existing in a strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of the common property, and
- (c) for shelter of the common property by every part of a building that is shown on the strata plan as part of a strata lot and that is capable of providing shelter.

(3) The easements referred to in subsections (1) and (2)

- (a) exist without registration in a land title office,
- (b) charge and burden that part of the common property capable of providing support or shelter to a strata lot,
- (c) charge and burden each strata lot capable of providing support or shelter to another strata lot or to the common property,

(d) charge and burden each strata lot and that part of the common property in which any part of the services and facilities described in subsections (1) (b) and (2) (b) are located, and

(e) include all of the rights and obligations needed to give effect to and enforce them, including a right of entry to inspect, maintain, repair and replace the shelter, support, services and facilities described in subsections (1) and (2).

(4) The easements referred to in subsections (1) and (2) may be enforced by the strata corporation on its own behalf or on behalf of one or more owners to the same extent as if the strata corporation were the owner of a strata lot or the common property that benefits from the easement.

(5) The easements referred to in subsections (1) (c) and (2) (c) do not apply to strata lots in a bare land strata plan.

[11] The threshold question is whether s. 69 gives an owner of a strata lot the right to construct new facilities that pass through another owner's strata lot to allow the first owner to utilize his or her strata lot for a particular purpose, in this case, a colon cleansing clinic.

[12] Justice Leask considered s. 69 of the *SPA* in *Shaw Cablesystems Ltd. v. Concord Pacific Group Inc.*, 2007 BCSC 1711, affirmed on other grounds 2008 BCCA 234. In *Shaw*, Leask J. upheld the right of the owner developer, acting as the first strata council of the strata corporation, to deny access to Shaw Cablesystems to provide cable services through the common property for the benefit of those owners who wished to subscribe to its cable network.

[13] Leask J. based his decision on two grounds. The first was that a strata corporation is a relatively new form of collective ownership and the *SPA* bestowed considerable decision making power on the strata corporation with which the court should not lightly interfere. The second ground, relied upon by the respondents in this case, was that properly construed s. 69 did not give an individual owner the right to install new facilities for its benefit in the common property. At para. 11, Leask J. stated as follows:

[11] These principles lead me to a negative answer to both questions posed in this application. I would also answer the first question in the negative for a narrower reason - the reference in s. 69(1)(b) to the language "facilities existing," and I emphasize existing, "in the common property," which I interpret to mean that the individual owner does not have a right to have

someone "install" new facilities. I reach this conclusion bearing in mind the provision of s. 69(3)(e).

[14] The Court of Appeal upheld the result in *Shaw*. However, the court expressly stated that it did not need to address the issue of whether the easements created by s. 69 of the *SPA* are limited to facilities already existing in the common property. At para 37, Huddart J.A. stated as follows:

[37] The s. 69(1)(b) easement does not provide a right that is the equivalent to trampling at will in a park. It does not provide joint ownership or occupation of the services and facilities. Nor does it give any of the proprietorship or possession rights of an owner. The unit owner enjoys those rights in common property through its co-tenancy and membership in the strata corporation and its ability to elect and direct the strata council. The strata corporation exercises those rights in accordance with the *Act*, and may install such facilities and services as it deems desirable on the common property. The unit owner is entitled to the enjoyment of those services and facilities that are reasonably necessary to his enjoyment of his unit. The individual unit owner has no absolute right to install services or facilities in the common property any more than he has the right to plant a tree in a common garden or pluck its fruit.

[15] In *Abdoh v. Owners of Strata Plan KAS 2003*, 2013 BCSC 817, Meiklem J. was of the same view as Leask J. with respect to the construction of s. 69. At para. 44 he stated as follows:

44 Sub-section 69(1)(b) of the *Act* is cited in respect of the easement argument, but I would not interpret that subsection as authorizing any individual owner to install a cooling system or part of a cooling system in common property or another strata lot.

[16] The petitioners seek to distinguish *Shaw* and *Abdoh*. In their submission in both these cases, the plaintiffs were seeking relief that the Strata Corporations had denied them. They rely on *Shaw* to argue that the court should show deference to decisions of a strata corporation on questions involving the corporation's internal affairs. They point out that the Strata Corporation supports them in this proceeding and is in fact a co-petitioner. In their submission the additional drainage pipe, once installed, will become common property as defined in s. 1(1) of the *SPA* and therefore subject to the s. 69 easement. They submit that it is a matter of internal governance of the Strata Corporation whether to permit its installation.

[17] On April 25, 2013 by a 3/4 vote resolution, the Strata Corporation approved the bringing of this petition, subject to Legend agreeing to fully indemnify the Strata Corporation for its costs and expenses in connection with the proceeding. While the 3/4 vote resolution could have been more clearly worded, I am satisfied its intent was to allow this petition to proceed in the name of the Strata Corporation for the purpose of requiring Mr. Chen to permit the proposed drainage pipe to pass through strata lot 31.

[18] The 3/4 vote resolution is premised on the assumption that the easement created by s. 69 of the *SPA* extends to the placing of new facilities and that the Strata Corporation is obligated to ensure all owners are entitled to the benefits of such an easement.

[19] The petitioners' submission is that the easement created by s. 69 of the *SPA* does permit the installation of new facilities as long as those facilities are for the provision of services reasonably necessary to the use and enjoyment of strata lots by the owners of the Strata Corporation. The petitioners rely on the statements made in *Shaw*, both in the Supreme Court and the Court of Appeal, that emphasize that given the nature of a strata corporation, individual rights may be qualified to accommodate the reasonable requirements of other owners.

[20] In particular they rely on the following passage at para. 10 of Leask J.'s decision:

[10] In answering the two questions posed on this Rule 34 application, I am persuaded that the defendant's position is correct. Owning a strata lot and sharing ownership of the common property in a condominium development is a new system of owning property and has required the development of new mechanisms and procedures. Living in a strata development, as the Nova Scotia Court of Appeal stated, combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times. The council meeting of a strata corporation, while similar in some respects to a corporate annual general meeting, also resembles the town hall meeting of a small community. Stratas are small communities, with all the benefits and the potential problems that go with living in close collaboration with former strangers. In the circumstances, I believe the court should be slow to find absolute rights in individual owners that cannot be modified by the considered view of the majority of owners, controlled by judicial supervision where appropriate.

[21] The petitioners submit that as the easement created by s. 69 is for the installation of facilities that permit the use and enjoyment of strata lots, it must extend to facilities that are required to meet the evolving needs of the owners. Their position is that it is in the first instance for the Strata Corporation to decide whether such facilities are reasonably required and that the court should be slow to permit individual owners to have an absolute right to frustrate the reasonable requirements of other owners.

[22] It is clear from para. 37 of the Court of Appeal decision in *Shaw* that the governance provisions of the *SPA* would apply with respect to the installation of new facilities within the common property. The installation of such facilities in the common property could be authorized by a 3/4 vote. However, in my view, different considerations arise with respect to proposed installation of such facilities within the boundaries of a strata lot.

[23] Relying on the principle set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, [1954] B.C.J. 136, counsel for the respondent urged me to follow the decision of Leask J. with respect to the proper construction of s. 69. However, there seems to be little authority on the application of that principle when the previous decision was appealed and the Court of Appeal expressly declined to comment on the correctness of the point decided in this court.

[24] The statement of Meiklem J. in *Abdoh* is consistent with that of Leask J. in *Shaw*. However that statement was not a necessary step in Meiklem J.'s reasoning and therefore it is not binding.

[25] However, even if the *Re Hansard Spruce Mills* principle does not apply in this case, I do find *Re Hansard Spruce Mills* and *Abdoh* to be persuasive. I agree with the conclusion reached in those cases that the easement created by s. 69 of the *SPA* applies only to existing facilities.

[26] The *SPA* does not define what constitutes an "existing facility". In my view an existing facility is one that was in place or provided for when the strata corporation

was created by the filing of the plan in the Land Title Office or was subsequently installed pursuant to proper legal authority. In the case of facilities within common property, such authority would be provided by the passage of the necessary 3/4 vote resolution approving the installation.

[27] The issue in this case is whether it is open to the strata corporation, another owner, or the court to require an owner to permit such further facilities to be installed within its strata lot. Section 69 provides that such facilities may be replaced or repaired but in my view does not contemplate the appropriation of a part of a strata lot for the installation of facilities that were not in place or provided for when the strata corporation was created.

[28] In my view, the provisions of s. 69(3)(d) and (e) make it clear that the facilities for which the easement exists are facilities already in existence or any replacement of those facilities necessitated by their deterioration. I note in this regard that the word “replace” in s. 69(3)(e), relied upon by the petitioners, is found in a phrase that defines the right of entry to “inspect, maintain, repair and replace” the facilities described in s. 69(1) and (2), which both refer to existing facilities. In my view the word “replace” must be read in the context of the other words in the phrase in which it is contained. It does not extend to authorizing the installation of a completely new facility.

[29] This construction of s. 69 strikes a balance between the collective interests of all owners and the individual property rights of the owners of strata lots. The construction put forward by the petitioners would give the Strata Corporation the power to appropriate the property of an individual owner for the benefit of an adjoining owner. I can see no legislative foundation for implying such a power anywhere in the *SPA*.

[30] The owner of a strata lot is entitled to the exclusive use and enjoyment of his or her strata lot, subject of course to complying with the provisions of the *SPA* and the bylaws and rules of the Strata Corporation. Subject to that qualification,

ownership of a strata lot is equivalent to ownership of any other form of real property. This is made clear by s. 239 of the *SPA*:

239 (1) Land may be subdivided into 2 or more strata lots by the deposit of a strata plan in a land title office.

(2) The strata lots created by the deposit of a strata plan may, subject to this Act, devolve or be disposed of in the same manner and form as any land the title to which is registered in a land title office.

(3) Despite any other provision of this Act, a strata lot may not be subdivided by the deposit of a strata plan that, under section 2, would establish a strata corporation.

[31] Further, I consider s. 69 of the *SPA* to be primarily directed at providing the necessary legal framework for the provision of essential services and lateral support to the separate parcels of land created upon the filing of a strata plan. Section 69 provides the legal assurance to all owners that the services in place when they acquire their strata lot will continue to be in place, and that they have a legally enforceable right to require that such services continue to be provided. However, I can see nothing in s. 69, or elsewhere in the *SPA*, to support the conclusion that either a strata corporation or other owner can require new services or facilities to be installed within a strata lot simply to benefit other owners. If the Legislature had intended to grant such a power, I think it would have clearly expressed that intention.

[32] This interpretation of s. 69 is generally consistent with Huddart J.A.'s comments at para. 37 of *Shaw* that the easement created by s. 69 does not give individual owners an absolute right to install services or facilities in the common property. In my view, the same can be said with respect to a right to install such services in adjoining strata lots. Once such facilities are lawfully installed the easement granted by s. 69 will apply to them. However it does not follow that s. 69 creates a right to require an owner of a strata lot to permit new facilities to be installed.

[33] Accordingly I find that s. 69 of the *SPA* does not give the petitioners the right to require the respondent owner of strata lot 31 to permit the installation of the

proposed new drainage pipes in his strata unit. Given this finding it is unnecessary to address the alternative arguments raised by the respondents.

[34] The petition is dismissed with costs on scale B.

“The Honourable Mr. Justice Sewell”