

Case Name:

Matthews v. Strata Plan NW1874

Between

**George C. Matthews, Claimant, and
The Owners, Strata Plan NW1874, Defendant**

[2009] B.C.J. No. 418

2009 BCPC 66

File No. 64180

Registry: Surrey

British Columbia Provincial Court
Surrey, British Columbia

K.D. Skilnick Prov. Ct. J.

Heard: February 3, 2009.

Judgment: March 3, 2009.

(22 paras.)

Counsel:

Appearing in person: G.C. Matthews.

Counsel for the Defendant: G. Blanchard.

RULING ON APPLICATION

1 K.D. SKILNICK PROV. CT. J.:-- The Claimant has brought this action against the Defendant Strata Corporation for the cost of repairs to the windows of his strata unit which have broken seals. The Defendant denies liability for this cost and takes the position that these costs are the responsibility of the individual unit owner, pursuant to the strata bylaws. The Defendant also takes the position that the Claimant is seeking an order which can only be made by the Supreme Court of British Columbia and therefore this court lacks jurisdiction in this matter.

2 At the Settlement Conference the Defendant brought an application pursuant to Rule 7(14) of the Small Claims Rules for an order that the Claim in the matter be dismissed because this court is without jurisdiction to grant the remedy requested. That Rule reads in part as follows:

What happens at a trial conference

- (14) At a trial conference, a judge may do one or more of the following:
- (a) decide on any issues that do not require evidence; ...
 - (i) dismiss a claim, counterclaim, reply or third party notice if, after discussion with the parties and reviewing the filed documents, a judge determines that it
 - (i) is without reasonable grounds,
 - (ii) discloses no triable issue, or
 - (iii) is frivolous or an abuse of the court's process; ...
- (l) make any other order for the just, speedy and inexpensive resolution of the claim.

3 One of the functions of a settlement conference judge is to serve as gatekeeper, determining which claims have a triable issue and which can be determined without the expenditure of trial time, (which, by some accounts, costs the taxpayers of British Columbia in excess of \$27,000 per day.) In order to give the Claimant its day in court on this issue, the settlement conference judge must first be satisfied that there is a claim before the court on which the court has jurisdiction to make an order and that there is a triable issue, i.e. that there is some evidence on which the trial judge could rest a finding of liability on the defendant, without any weighing of that evidence. If either of these are lacking, Rule 7(14) gives the court jurisdiction to terminate the proceedings prior to trial, in effect to close the gate on what can clearly be seen to be a claim that lacks merit.

Position of the Parties

4 It is the position of the Defendant that the Claimant is asking for an order that the Defendant repair his windows. It argues that such relief can only be made by an order of the Supreme Court. In support of this, the Defendant relies on the following sections of the *Strata Property Act* of British Columbia:

160 (1) If the strata corporation decides not to repair or replace the damaged property and the strata plan is not cancelled, any of the following persons may apply to the Supreme Court for an order under this section:

- (a) an owner; ...

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

- (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
- (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

(Emphasis added).

5 The Defendant takes the position that, as this is really a lawsuit asking that the Strata Corporation follows its bylaws, such an action must be brought in Supreme Court and that this court lacks the jurisdiction to order the grant the relief that the Claimant is requesting.

6 In his written submission, the Claimant does not address the jurisdictional issue. He makes it clear that he takes the position that the existing bylaws require the Defendant to fix his windows and that this is the relief he is requesting. He writes:

"Their own bylaws (Strata Plan NW1874 dated October, 2002) state as follows:

'The Strata Corporation must repair and maintain all of the following:

-Page 12, 16 (1)(d) exterior perimeter doors, common area windows and skylights (including the casings, the frames and the sills of such doors, windows and skylights) on the exterior of the building or that front on the common property ...

My windows are exterior and front of the Common Property ...

It is not my purpose to challenge or modify the BC Strata Act but only to ask the Strata Council to follow the precepts of their bylaws as stated in Strata Plan NW1874.

Your Honour, I am only asking the Strata Council to follow their own bylaws as written."

Jurisdictional Issue

7 The Small Claims Court of British Columbia is intended to afford the average citizen of the province access to justice on an affordable basis. The purpose of the *Small Claims Act* and Rules is set out in section 2(1) of the Act as follows:

2 (1) The purpose of this Act and the rules is to allow people who bring claims to the Provincial Court to have them resolved and to have enforcement proceedings concluded in a just, speedy, inexpensive and simple manner.

8 Accordingly, a court should be reluctant to decline jurisdiction unless it can be clearly shown why the court lacks that jurisdiction. This principle was perhaps best articulated in *Lou Guidi Construction Ltd. v. Fedick* [1994] B.C.J. No. 2409 (B.C. Prov. Ct.) where Chief Judge Stansfield of this court wrote:

"In short, as a general proposition, I conclude that a judge of this court should assume she or he has jurisdiction to hear every claim for debt or damages (other than defamation and malicious prosecution) where the claim is limited to \$ 10,000 [now \$25,000] or less, unless a party can demonstrate a statutory bar to that exercise of jurisdiction."

9 This does not mean that a small claims court can assume jurisdiction on every claim that is brought. The Provincial Court of British Columbia is a creature of statute. In other words, as a general rule, before the court can make orders or render judgements, the court must first be given the authority to do so by the Legislature. If authority for the order can not be found, or if the Legislature expressly takes the authority to make that order away, or requires for the order to be made by another court or tribunal, then this court lacks the jurisdiction to make that order or render that judgement.

10 The Legislature of British Columbia replaced the *Condominium Act* with the *Strata Property Act*. Under the old legislation, certain remedies under that act could be given by "a court of competent jurisdiction". Under the new legislation however, the Supreme Court is expressly named as the court

having the power to make certain orders and grant certain remedies.

11 In *Valana v. Law* [2005] B.C.J. No. 2820; 2005 BCPC 587, the Honourable Judge Chen of this court listed all of the sections of the *Strata Property Act* in which the Legislature decided that only the Supreme Court had jurisdiction to make orders for those matters. (I have included an excerpt from that judgement listing those sections at the end of this judgement in an appendix.) In all other matters, Judge Chen held that both the Supreme Court and this court have jurisdiction "except where jurisdiction is specifically restricted to one court by the language of the Act or by the monetary limits to the Provincial Court's jurisdiction."

12 In this case, the Claimant is suing for an order requiring that the Defendant follow its bylaws and repair his windows. The Defendant is saying to this court "you can't make such an order because the Legislature of this province does not permit you to do so. Only the Supreme Court can make such an order." Based on a reading of section 165 of the *Strata Property Act*, the Defendant is correct in its assertion. This is also consistent with this court's decision in *Clappa v. Parker Management Ltd.* [2003] B.C.J. No. 1980; 2003 BCPC 305 and *Frechette v. Crosby Property Management Ltd.* [2007] B.C.J. No. 1162; 2007 BCPC 174.

13 I therefore conclude that this claim is one which this court lacks the jurisdiction to grant a remedy for, based on section 165 of the *Strata Property Act*. Because this court lacks such jurisdiction, and because the certainty of this can be assessed without the need for a trial, this claim is now dismissed pursuant to Rule 7(14).

14 In coming to this conclusion I recognize the unfairness to the Claimant. I am unable to rationalize why the Legislature has decided that it is preferable to require someone in the Claimant's position to seek a remedy in the more expensive forum of the superior court, rather than in this court where it is intended that litigants can have more expedient access to justice. However any reservations about the wisdom of this can not override the requirement for this court to follow the law as written.

Non-Binding Opinion

15 Under Rule 7(14)(j), one of the options available to a judge at a Small Claims Settlement Conference is to:

"(j) give a non-binding opinion on the probable outcome of the trial based on the materials before the judge at the trial conference;

16 For the reasons stated in the previous section, I have found that this court lacks the jurisdiction to give the Claimant the remedy he requests and I have already dismissed his claim. I will nevertheless offer a non-binding opinion on the second aspect of the Defendant's application, that is whether there is any duty on the Defendant to repair the Claimant's windows. Perhaps this might assist the parties in deciding the wisdom of further proceedings in the Supreme Court or whether resolution or abandonment of the claim is the wiser course of action.

17 The Claimant takes the position that the duty on the Defendant to repair his windows arises out of section 16(1) (c)(D) and 16(1)(d)(iv) of the Bylaws. These read as follows:

16. Repair and Maintenance of Exterior Doors, Windows and Skylights
 - (1) The Strata Corporation must repair and maintain the following: ...
 - (c) limited common property, but the duty to repair and maintain it is restricted to: ...

(D) exterior perimeter doors, Common area windows and skylights (including the

casings, the frames and the sills of such doors, windows and skylights) on the exterior of a building or that front on the Common Property;

- (d) a strata lot in a Strata Plan that is not bare land Strata Plan, but the duty to repair and maintain is restricted to ...
 - (iv) perimeter doors, Common area windows and skylights (including the casings, the frames and the sill of such doors, windows and skylights) on the exterior of a building ...

18 The Claimant argues that the exterior of his windows are part of the common property because they front onto the common property. The Defendant takes the position that the exterior of the Claimant's windows are not common property, and that the bylaws clearly contemplate that the exterior of the windows to an individual unit are the owner's responsibility. It argues that this intention is clearly spelled out in the bylaws in section 9, which reads as follows:

9. Repair and Maintenance of Property by Owners

- (1) An owner must repair and maintain the Owner's strata lot, except for repair and maintenance that is the responsibility of the Strata Corporation under these Bylaws.
- (2) An owner who has the use of limited common property must repair and maintain it, except for repair and maintenance that is the responsibility of the Strata Corporation under these Bylaws.

19 It is helpful to reference the definitions set out in the *Strata Property Act* to determine whose interpretation is more reasonable. I would note the definitions of "common property" and "limited common property" as set out in section 1 of the Act:

"common property" means

- (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
- (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
 - (i) within a floor, wall or ceiling that forms a boundary

(A) between a strata lot and another strata lot,

- (B) between a strata lot and the common property, or
- (C) between a strata lot or common property and another parcel of land, or
- (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;

"limited common property" means common property designated for the exclusive use of the owners of one or more strata lots;

20 It is clear that the bylaws intend that all owners should share the cost of repairs to common property, while repairs to limited common property should generally be the expense of those owners who have the exclusive use of that property. Here, the exterior of the Claimant's windows can not be said to be the benefit of the owners as a whole. It is the Claimant who has the exclusive benefit of

looking out of them, or of restricting their view with appropriate covering. Unlike something like a hallway or a common room which many owners might reasonably be expected to use and access, other owners could not reasonably be expected to use the exterior of the Claimant's windows, without being considered to be invading his privacy or otherwise acting unreasonably.

21 From this it follows that the Claimant's windows are, at best, limited common property. According to the bylaws, their repair is the obligation of the Claimant, pursuant to section 9 of the Bylaws.

Order

22 For the foregoing reasons, the Defendant's application under rule 7(14) for dismissal of the Claim is granted. The Claimant's claim is dismissed. The Defendant is entitled to its costs for the filing of its reply in the sum of \$50.

Dated at the City of Abbotsford, in the Province of British Columbia this 3rd day of March, 2009.

K.D. SKILNICK PROV. CT. J.

Appendix 1: Excerpt from Reasons for Judgement in *Valana v. Law*

11 The Strata Property Act, successor to the **Condominium** Act, refers specifically to the Supreme Court in a number of sections.

12 Section 52(2)(b) gives the Supreme Court jurisdiction over applications for relief from the requirement for a unanimous vote.

13 Sections 58(1) gives the Supreme Court the power to appoint a person to vote at a meeting where there is no person to vote in respect of a strata lot.

14 Section 59(6) gives the Supreme Court the power to relieve a Strata Corporation from the consequences of an inaccurate information certificate.

15 Sections 89(1), 90(1) and 117(1) give the Supreme Court jurisdiction with respect to orders relating to builders liens.

16 Section 160(1) gives the Supreme Court jurisdiction in respect of applications by a strata corporation for orders relating to a strata corporation's decision not to repair or replace damaged property.

17 Section 164 gives the Supreme Court jurisdiction to make orders on applications by owners or tenants of strata lots seeking relief from significantly unfair actions by a strata corporation or by persons holding 50% or more of the votes at an annual or special general meeting.

18 Section 165 gives the Supreme Court the power, on application by owners, tenants or mortgagees of strata lots, to order a strata corporation to perform duties required of it under the Act, regulations, bylaws or rules, or to stop contravening the same, and to make any other order the court considers necessary to ensure the strata corporation's compliance with the same.

19 Section 173 gives the Supreme Court the power to order an owner, tenant or other person to perform a duty required of it under the Act, regulations, bylaws or rules, or to stop contravening the same and to make any other order it considers necessary to ensure the owner, tenant or other person's compliance with the same.

20 Section 174(1) gives the Supreme Court the power to order the appointment of an administrator to

perform the duties of a strata corporation.

21 Sections 179, 188, 189 all provide the Supreme Court jurisdiction with respect to appointment of arbitrators under the Act, appeals from arbitrator's decisions and filing of arbitrator's decisions as orders of the court.

22 Sections 208 and 209 give the Supreme Court jurisdiction, on application by a leasehold landlord in respect of a leasehold strata plan, to order a strata corporation to perform the duties required of it under the Act, to maintain insurance, to repair the common property and to require the leasehold tenants to comply with the Act, the regulations, the bylaws and rules and any restrictions imposed by the leasehold landlord that are filed at the Land Title Office.

23 Sections 226, 232, 233, 235 and 236 all relate to phased strata plans and give the Supreme Court jurisdiction to make the following orders:

Section 226; for release of posted security in respect of common facilities,

Section 232; ordering an approving officer to grant extension of time in respect to election to proceed with the next phase,

Section 233; ordering an owner/developer to post security for its share of expenses in relation to the common facilities,

Section 235; orders relating to expenses attributable to the common facilities where the owner/developer elects not to proceed with the next phase of the plan,

Section 236; orders to complete a phase by a set date.

24 Section 246 gives the Supreme Court the power to make orders amending the Schedule of Unit Entitlement to accurately reflect the habitable area or square footage of a strata lot.

25 Section 279 gives the Supreme Court the power to make orders confirming the appointment of a liquidator and orders vesting strata corporation land in a liquidator. Section 250 requires the registrar to endorse all such orders in the general index of the strata corporation.

26 Sections 284 and 285 give the Supreme Court the power to make orders regarding the winding up of a strata corporation.

27 I accept that in all of the areas described in the sections of the Strata Property Act noted above, the Supreme Court has exclusive jurisdiction.

cp/e/qlrds/qlpwb