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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Oldaker v. Strata Plan VR 1008,*** 2008 BCSC 346

Date: 20080320
Docket: L052371
Registry: Vancouver

Between:

Richard Bedford Oldaker

Petitioner

And

The Owners, Strata Plan VR 1008

Respondent

And

Denise M. Hamilton, Nevena Vojic and Nikica Vojic

Respondents

Before: The Honourable Madam Justice Gill

Reasons for Judgment

Counsel for the Petitioner:	D.E. Burns
Counsel for the Respondent, The Owners, Strata Plan VR 1008:	G.S. Hamilton
No Appearance by:	The Respondents, Denise M. Hamilton, Nevena Vojic and Nikica Vojic
Date and Place of Trial/Hearing:	January 7-9, 2008 Vancouver, B.C.

[1] In November, 2007, application was made by the petitioner for an order that:

> [R]eopens the hearing to adduce into evidence facts that occurred after the conclusion of the hearing on February 27, 2006, namely that the Respondent, The Owners, Strata Plan VR 1008 did not promptly move to repair the building envelope bounding Suite 504, that the Respondent, The Owners, Strata Plan VR 1008, did not obtain a building permit for repair to the building envelope bounding Suite 504 until January 2, 2007, that the Respondent, The Owners, Strata Plan VR 1008 did not complete the envelope repairs within 30 days of being ordered to do so by the City of Vancouver on July 5, 2007, and that the Respondent, The Owners, Strata Plan VR 1008 has not repaired all damage caused to the interior of Suite 504, which evidence is more particularly described in the Affidavit #03 of the Petitioner in support of this application;

[2] That order was granted.

[3] I begin by referring to what occurred in 2006 and 2007.

[4] On January 10, 2006, the respondent passed a special resolution to raise $77,100 to complete work on the upper rear quadrant of the east wall of the building known as Pendrell Place. An estimate of the cost of the remedial work made necessary by water ingress had been prepared for budgeting purposes. Everyone understood that actual costs could be not obtained until the work was tendered.

[5] When the petition was originally heard, the respondent represented that it would promptly begin and complete the work. In fact, this petition was commenced to compel remediation of the east wall and by September, 2005, the respondent knew of the petitioner's intention to do so. Perhaps because of the contemplated litigation, in October, 2005, Mr. Evans of Levelton Engineering Ltd. ("Levelton") was asked by the respondent to confirm the scope of work required in respect of "the

repairs that need to be undertaken to that wall to satisfy Levelton's concerns and recommendations" and was also asked to confirm construction cost estimates.

[6] Levelton had prepared a Building Envelope Condition Assessment in 2002. Although Levelton had agreed that work on the building could be phased, which was why the east wall had not been remediated when earlier work was done, the assessment stated that "the items discussed in this report are of a significant and serious enough nature that they should be addressed soon". According, there was never a question as to the need for the work. The issue was timing.

[7] It was not until May 29, 2006, that Levelton was asked to proceed with preparing a scope of work and contract documents. The instructions to Mr. Evans included a request that he confirm that the petitioner was satisfied with the scope of the work. During argument, reference was made to communications between the parties prior to May 29, including what might be described as the petitioner's concern about the repair strategy, but there is really no explanation for why Levelton was not provided with instructions at an earlier date. Given all that had occurred, and the fact that the debate between the parties had consumed much ink, time and money, as the petitioner's counsel noted, it is frankly surprising that this instruction was not given immediately after the January 10 meeting.

[8] Returning to the narrative, the minutes of a strata council meeting held June 21, 2006, refer to the east wall remediation. The minutes record that the strata agent advised council that Mr. Evans and Mr. van Blankenstein, an engineer retained by the petitioner in 2005, had agreed to review the scope of work, including

specifications, prior to tendering. The minutes also state that the engineers had discussed weather conditions and had agreed that the work could continue during the fall wet weather. The time frame for completion was 30-45 days and the work was expected to commence in September.

[9] In mid-July, 2006, the engineers met and reviewed specifications prepared by Mr. Evans relating to the east wall remediation. Mr. Evans has deposed that Mr. van Blankenstein advised him that the petitioner would be responsible for repairing the vapour barrier, insulation and interior drywall for the east wall because, amongst other reasons, Mr. Oldaker wanted the interior wall to remain open as he was planning significant renovations, including electrical work. It is the evidence of Mr. van Blankenstein that he did not request an exclusion of the insulation, vapour barrier and interior drywall and did not consider these matters to be relevant to his area of concern, which was the exterior cladding rain screening system and boundary conditions where the exterior tied into the existing building.

[10] Both engineers were cross examined on their affidavits and neither departed from what was stated in his affidavit. It is at least agreed that the vapour barrier, insulation and drywall were minor items and Mr. Evans testified that such work would typically be paid for by the strata corporation.

[11] On July 26, 2006, Levelton was asked to proceed with the tender process. Shortly thereafter, Levelton confirmed that tender documents had been issued to three contractors and it was expected that prices would be received by August 31, 2006. Mr. Dion, the current president of the strata council, has deposed that as of

August 18, 2006, it was the impression of the strata council that the east wall repair was proceeding in an orderly fashion with the agreement of the petitioner's engineer, Mr. van Blankenstein.

[12] In early September, 2006, Levelton provided a summary of the bid results for the east wall repair. The lowest bid was from Ocean West Construction Ltd. ("Ocean West") and was in the amount of $62,805. As was noted by counsel for the petitioner, the Ocean West bid stated that the duration of the work was 12 weeks, whereas the highest bid, which was $72,080, stated that the duration would be six weeks.

[13] Mr. Evans advised the respondent that overall construction costs would be $91,618, which not surprisingly was more than the initial amount raised at the January, 2006, special general meeting. Another special general meeting was convened and on October 18, 2006, a special resolution raising the additional funds was passed. Ocean West was awarded the contract on October 25, 2006. A building permit was obtained and work finally began in early January, 2007. It was completed in May.

[14] In the early months of 2007, there were a series of communications between the parties relating to alterations to the interior of the petitioner's suite. An indemnity agreement was one of the issues discussed.

[15] On June 19, 2007, Levelton issued Letters of Assurance for the repairs to the east wall. Mr. Dion has deposed that with the issuance of the Letters of Assurance,

it was the understanding of the strata council that the exterior work for the east wall was complete.

[16] It is the evidence of Mr. Dion that at a strata council meeting on June 25, 2007, the strata council was advised about the efforts of the property manager to facilitate the interior repairs to the petitioner's strata lot. It was his understanding that a dispute had apparently arisen between Levelton and Mr. Oldaker about who was responsible for completing the work for the vapour barrier, insulation and electrical work for the inside portion of the east wall. It was agreed that a meeting with "owners/lawyers/engineers" would be arranged to discuss these issues.

[17] In July, 2007, the strata council was advised that the City of Vancouver had rejected the Letters of Assurance. The letter from the City dated July 5 stated that the envelope repairs were incomplete and in order to comply with applicable bylaws, the thermal insulation, vapour barrier and interior drywall had to be completed. The letter concluded with the statement that to avoid further action, the work was to be completed within 30 days of the date of the letter.

[18] Following the meeting between owners, lawyers, and engineers on July 24, 2007, and further discussions between Mr. Evans and the City of Vancouver, the respondent agreed to complete the vapour barrier, insulation and drywall work. The work was done between August 8 and November 7, 2007. In his affidavit sworn December 7, 2007, Mr. Evans deposed that he had issued new Letters of Assurance to the City of Vancouver and in his opinion, the work is now complete.

[19] As is apparent from the above narrative, it took almost two years to complete the work for which funds were raised in January, 2006.

[20] Before turning to the arguments, I will refer to the evidence of Mr. Evans and Mr. van Blankenstein regarding responsibility for repairing the vapour barrier, insulation and interior drywall. As stated, both were cross examined on their affidavits. Mr. van Blankenstein said that it was his view that it would not make sense to seal off a wall if electrical work was to be done and he seemed to accept that there was discussion with Mr. Evans of work which the petitioner intended to do. I nevertheless accept that Mr. van Blankenstein did not specifically request an exclusion of the insulation, vapour barrier and interior drywall.

[21] On this issue, Mr. Burns on behalf of the petitioner also referred to the exchange of correspondence between counsel in respect of electrical and plumbing components contained within the east wall assembly. There was also correspondence from the petitioner to the strata agent in March, 2007, in which he stated that he expected that the contractor would install the insulation and vapour barrier.

[22] At issue in this proceeding is what was done or not done by the respondent. For good reason, Mr. Evans was asked in May, 2006, to confirm that the petitioner was satisfied with the scope of the work. To that end, he met with the petitioner's engineer. Although I accept that there was not a specific request that work be excluded, I also accept that Mr. Evans was either genuinely mistaken or simply misinterpreted what was said. While it is truly unfortunate that yet another problem

delayed completion of the exterior repairs, the respondent relied upon Mr. Evans and in my view, cannot be faulted for doing so.

[23] I turn now to the arguments.

[24] The position of the petitioner is relatively straightforward. This additional two year delay must be considered in the context of all that has occurred since 2001 and when considered in that context, there can be no other conclusion than that the respondent has not carried out repairs in a timely fashion. There now appears to be yet another dispute brewing in respect of interior repairs and without the assistance of the court, the petitioner's unit will remain uninhabitable.

[25] Counsel for the petitioner ascribes the delay to the "hostile mindset of the majority". It may be that some owners feel some hostility to the petitioner. Some would say that it has been Mr. Oldaker or others who purport to assist him who have acted inappropriately. I do not, however, accept that the delay is the result of a "hostile mindset". But it is also difficult to accept the submission made on behalf of the respondent that the evidence supports a finding that in 2006 and 2007 the strata corporation continued to act reasonably to complete the repair of the east wall.

[26] It is my view that in the particular and unusual circumstances of this case, there can be no satisfactory explanation for the failure to give Levelton what Mr. Burns describes as "its marching orders" until the end of May, 2006, and this was a failure to act reasonably. Further, the respondent should have acted more promptly when advised that the City had rejected the Letters of Assurance. Simply

stated, too much time had already gone by. In my view, this can be categorized as a breach of either s. 72 or s. 164 of the ***Strata Property Act***, S.B.C. 1998, c. 43.

[27] I do not consider it necessary to deal with the petitioner's arguments in respect of breach of fiduciary duty. Nor does the fact that the petitioner's application to re-open was granted mean that every argument made by the petitioner at the earlier hearing may be re-visited.

[28] I turn finally to the next thorny issue – interior repairs.

[29] It was argued by counsel for the respondent that the petitioner must establish that work is needed because of water ingress and must prove that the respondent has not repaired damage caused by water ingress. It is argued that he cannot do so on the material before the court.

[30] The petitioner says that there can be no question about whether interior repairs are required because of water ingress and further, the strata corporation has represented to this court on several occasions that it would repair those parts of the petitioner's suite affected by water ingress. Other units which sustained interior damage caused by leaks were repaired at the cost of the strata corporation as part of the remediation process that began in 2003 and fairness requires that the same be done for the petitioner. He asks the court to order that the respondent take all such steps and perform such work as are reasonable and necessary to obtain an occupancy permit for Suite 504 and that a deadline be imposed.

[31] I do not accept the argument of the respondent that there is no basis upon which the court could conclude that interior repairs are needed because of water ingress. There are many reasons beginning with the toxicology report prepared in October, 2000. I would also note that Mr. Dion's affidavit addresses what occurred at a special general meeting held December 5, 2002. He deposes that the strata corporation "approved funding of $11,500 to repair those portions of Mr. Oldaker's strata lot that were damaged by water ingress".

[32] However, without some evidence of what work is reasonable and necessary, what is required for that work and the commitment of the petitioner not to interfere with the work, I am not prepared to make the order sought. I do accept that some order is necessary. Accordingly, I order that the petitioner will have liberty to apply for such further orders or directions as maybe reasonable to necessary to cause the respondent to comply with its statutory duties.

"Gill, J."