IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Schaper-Kotter et al. v The Owners, Strata Plan 148,*** 2006 BCSC 634

Date: 20060424
Docket: L051902
Registry: Vancouver

Between:

Hendrik Schaper-Kotter, Ethel Johnson, Linda Lawrence aka Linda Kubinec, Dorothy Blake, Siegfried Werner Tittel, Virginia Tittel, Denise Allard, Paul Anderson, Franz Schmidt, Martina Schmidt, Gonul Parkinson, George Lewczuk

Petitioners

And

The Owners, Strata Plan 148

Respondent

06 124 112

Before: The Honourable Mr. Justice Brooke

Reasons for Judgment

Counsel for the Petitioners: P.A. Williams

Counsel for Deborah Comaniuk, an Interested Party: M.A. Worfolk

Date and Place of Hearing: January 20, 2006 Vancouver, B.C.

[1] The petitioners are the registered owners of 10 of the 42 strata lots comprising this strata corporation. They are seeking an order, or orders, that the contribution to the common expenses by the owners shall be based upon the habitable square area of each strata lot. That is, that the total of those common expenses be shared proportionately to the habitable square area of each strata lot. Alternatively, the petitioners seek an order that the contributions not be significantly unfair to the petitioners.

[2] The strata corporation is one of the first created in British Columbia. Strata Plan 94, for 22 lots, was registered in the Victoria Land Title Office on September 10, 1973; and Strata Plan 125, for 20 lots, was registered on March 5, 1974. The two strata plans were amalgamated and registered as the respondent, Strata Plan 148, on July 18, 1974. Prior to amalgamation, each of the lots had an equal unit entitlement of one, and following amalgamation that continued. However, the habitable square area of the 22 lots within Strata Plan 94 ranged from 1184 to 1200 square feet, while the habitable square area of Strata Plan 125 ranged from 1400 to 1429 square feet. Before the amalgamation each of the strata lots was within a percentage point or two of any other strata lot. With amalgamation, however, the difference between the largest and the smallest strata lot rose to more than 20 percent. Moreover, some of the strata lots included unfinished basements and storage areas which were not

included within the habitable square foot area on registration. Thus, the petitioners say, equal unit entitlement and its concomitant equal obligation to share in the costs of maintenance, replacement and repair is significantly unfair. The respondent strata corporation did not appear on the hearing of the petition, but one of the owners opposing the petitioners appeared as an interested party, or a person whose interests may be affected. The reason, as I understand it, that the strata corporation was not represented was that there was not sufficient support amongst the owners to pass a resolution of three-quarters of the owners to do so. Hence, Deborah Comaniuk was accorded standing as a person whose interest may be affected and she was represented by counsel. In her affidavit she describes the property as consisting of eight buildings, each divided into between four and eight strata lots placed in a rectangle around a central courtyard containing a playground and pool. She describes each unit as having its own entrance from the street, there being no common hallways or lobby. She describes 22 lots of approximately 1200 square feet; 12 lots of approximately 1400 square feet; and eight lots of approximately 1400 square feet with basements that are not shown on the strata plan and therefore by definition are common property.

[3] The petition is brought pursuant to s. 246(7) and 164 of the ***Strata Property Act***, S.B.C. 1998, c. 43. Section 264(7) says:

> Subject to the regulations, an owner or the strata corporation may apply to the Supreme Court for an order under subsection (8) if
>
> (a) the unit entitlement of a residential strata lot is calculated on the basis of habitable area in accordance with subsection (3)(a)(i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, and
>
> (b) the actual habitable area or square footage is not accurately reflected in the unit entitlement of the strata lot as shown on the Schedule of Unit Entitlement.

[4] Regulation 14.2 says this:

> For the purposes of section 246 of the *Act*, "habitable area" means the area of a residential strata lot which can be lived in, but does not include patios, balconies, garages, parking stalls or storage areas other than closet space.

[5] Regulation 14.13 says this:

> No application may be brought under section 246(7) of the Act unless one or both of the following conditions apply:
>
> (a) the actual habitable area or square footage of a strata lot is at least 10% greater than, or 10% less than, the habitable area or square footage used to determine the unit entitlement of the strata lot;
>
> (b) the actual habitable area or square footage of a strata lot is at least 20 square metres greater than, or 20 square metres less than, the habitable area or square footage used to determine the unit entitlement of the strata lot.

[6] I now turn to s. 246(3) which says this:

> (3) The unit entitlement of a strata lot, other than a strata lot in a bare land strata plan, must be calculated as follows:
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> (a) if the strata lot is a residential strata lot, the unit entitlement is either
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> (i) the habitable area, in square metres, of the strata lot, as determined by a British Columbia land surveyor, rounded to the nearest whole number,
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> (ii) a whole number that is the same for all of the residential strata lots, or
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> (iii) a number that is approved by the superintendent and that in the

superintendent's opinion allocates a fair portion of the common expenses to the owner of the strata lot.

[7] The amalgamated plan is made up entirely of residential strata lots and unit entitlement is calculated in accordance with s. 246(3)(a)(ii) as "a whole number that is the same for all of the residential strata lots".

[8] Counsel for Ms. Comaniuk says that the language of s. 246(3) is imperative and that the permissive language of s. 246(7) is not engaged. That is, unit entitlement has not been calculated with reference to habitable area or a number approved by the superintendent and allocating a fair portion of the common expenses to an owner but has been calculated as a whole number that is the same for all the strata lots. I agree. An application to the court can only lie under s. 246(7) if unit entitlement is calculated on the basis of habitable area or square footage and the actual habitable area or square footage is inaccurately reflected. Here unit entitlement is, and has been since the deposit of the strata plans, calculated as a whole number that is the same for all the strata lots.

[9] The alternative submission of the petitioner is that if no application lies under ss. 246 or 247 then it clearly does lie under s. 164(1) which provides as follows:

> 164(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
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> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
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> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

The petitioner says that it is significantly unfair to those owners of strata lots with substantially less habitable area than others to share equally in the common expenses when the benefit accruing to each owner is proportional to the size of the habitable area.

[10] The evolution of condominium legislation within this province demonstrates the balancing of the interests of the individual strata lot owner against the interests of the strata community. It is a marriage of the ancient concept of property lines which define a proprietary interest exclusive to the world with a cooperative sharing of common amenities, facilities and resources. This dispute has arisen not because of the amalgamation which was registered more than 30 years ago, but because of the substantial costs which the present owners must share in order to largely rebuild the strata property - not to restore it to its original position but to ensure that it meets and will continue to meet the needs of the strata community for the next 30 years.

[11] In ***Gentis v. The Owners, Strata Plan VR 368***, 2003 BCSC 120, Mr. Justice Mashuhara considered the decision of this court in ***Strata Plan VR 1767 v. Seven Estate Ltd.*** where Madam Justice Martinson said this at para. 47:

> The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been...interpreted to mean conduct that is unjust and inequitable: ***Reid v. Strata Plan LMS 2503***, [2001] B.C.J. No. 2377.

Mr. Justice Mashuhara then says, at para. 28:

> ...Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants...[The] court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

[12] Can it be said that the consequence of continuance of the *status quo* leads to significant unfairness to the majority of strata lot owners whose strata lots have significantly less habitable area than others owned by a minority? I do not think so. First of all the unit entitlement based upon the same whole number for all lots has been the basis upon which the strata corporation and the owners of

the strata plan have conducted themselves since the beginning. Each prospective owner knew, or was deemed to have known, the basis upon which unit entitlement was calculated. Secondly, on the evidence before me the substantial work and expense now seen by all owners and the strata corporation as necessary is to replace and repair the building envelope the useful life of which is ending. It is the same essential envelope which was seen by each of the owners when they were first introduced to the property. There are many aspects of difference between the strata lots - some enjoy what might be seen as better views, more or less sunlight, greater security and similar intangibles. Others might have better kitchens, more attractive interior finishing, and similar tangible values. And the value of each strata lot can vary significantly both in the market place and for taxation purposes. But all of the units have a common need of a weatherproof and serviceable roof, weatherproof doors and windows and suitable exterior siding. And in my opinion in is not significantly unfair that these common expenses be shared equally. As Madam Justice Morrison said in ***The Owners, Strata Plan LMS 1934 v. Westminster Savings Credit Union et al.***, 2004 BCSC 1718 at paras. 69 and 72:

> [69] Condominiums have become an increasingly significant form of property ownership for both residential and commercial owners. ***The Strata Property Act*** was supposed to build upon and improve the ***Condominium Act*** without altering that scheme of condominium ownership. One can assume that an objective was to ensure protection for someone buying in a strata corporation.
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> [72] The rules and the bylaws have been clear over the years with regard to the type of self-government that this strata corporation had set out in its infancy. People buying into the strata corporation would properly have relied upon the bylaws. Those bylaws consistently separated expenses according to the three separate phases, and set out how the common expenses would be apportioned. In my view, the strata corporation has acted properly and validly at all times...

[13] In the result, the petition is dismissed.

"T.R. Brooke, J."
The Honourable Mr. Justice T.R. Brooke