IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Smith et al. v. The Owners, Strata Plan LMS 1821 et al.,*** 2007 BCSC 402

Date: 20070323
Docket: S067364
Registry: Vancouver

Between:

Thomas Bernard Smith, Louise Denise Smith, Hugh Hocking Trerise, Amelia Barbara Trerise, Daniel George Mcinnis, Andrew John McInnis, Theresa Louise Anderson, Allan Livingstone Dickie, Beverly June Dickie, John Peter, Ronald Gerald Smith, Linda Rita Smith, Hedy Cassap, William Charles Pound, Linda Anne Pound, Thomas Albert Schultz, Hazel Gertrude Schultz, Marjory Kathleen Cope, Gordon Harold Chandler, Eunice Jean Sobkowicz, Rhoda Louise O'Brien, Gale Patricia O'Brien, Robert William Dube, Helen Jean Dube, Olga Moore, Marjorie Aileen Smith, William Manning, Peter Manning, Francis Leo Manning, Margaret King, Johann Bernhard Segelken, Audrey Annie Bittner, Jean Watson D'Angelo, Douglas Pilgrim, Mildred Edith Pilgrim, Eileen Viola Green, Hendrick Jacob Kikstra, Shirley Mona Kikstra, Valmar Harman, Diane Lawrence, Mark Harman, Eileen Nurse, Ferguson Norman Will, Linda Anne Taphorn, Kenneth Edward Lehman, Jeannette Lehman, Neil Joseph Bavaro, Wendy Jane Bavaro, Henry Robert Furness, Beatrice Olive Furness, Robert Gotts, Adeline Gotts, Robert Morgan, Joy Mary Morgan, Maria Abolis, Donald Raymond Clelland, Lucy Clara Clelland, Johanna Maria Van Koll, Wilbert Stuart Prentice, Margaret Elizabeth Prentice, Melroy Frank Sauer, Audrey Evelyn Sauer, Gerald Russell Doerksen, Norma Jean Doerksen, Richard George Ewart, Marie Pauline Ewart, Donato Monetta, Caroline Aurelia Monetta, Bruce Arthur Mills, Margaret May Mills, Margaret Moseley, Geri Moseley, Richard Joseph Barrett, Melba Yvonne Barrett, Audrey Lorraine Girard, Robert Romeo Girard, Marian Catherine Maclean, Finn Nygaard, Donna Carol Nygaard, Nadia Odne, John Harold Odne, and Lillian Elizabeth Pitkanen

Petitioners

And

The Owners, Strata Plan LMS 1821, Bernice Alice Thomas, Glenn Frederick Eyre, William Joseph Hulgaard, Lana Marie Hulgaard, James Arthur Legge, Mary Gail Legge, Clementine Morrison, Hans Karl Leupold, Margaret Ann Leupold, Philip Anthony Fourchalk, Annette Dale Fourchalk, Maurice Jacob, Mary Gertrude Jacob, Ronald Lorrie Sherman, Judith Lynne Sherman, Glenn Sydney Miller, Elizabeth Kaban, David Warren Bieker, Shirley Myrtle Bieker,

Vito Tunzi, Tina Tunzi, Robert Ralph Ulmer, Shirley Carrie Ulmer, Lana Madeline Kettley, John William Bickle, Sandra Geraldine Bickle, Daria Mosoryn, Ronald Edwin Collier, Catherine Scotland Collier, Daljit Singh Sandhu, Patricia Isabel Livingston, Monika Marie Luise Jacques, Robert Rene Albert Joseph Jacques, Marlene Justine Epneris, Arnold Fenrick, Rosalie Fenrick, John Barrie Hancock, Bridget Teresa Hancock, Joan Marie Arnold, Ronald Ayers, Lillie Patreta Ayers, Walter Janzen, Erna Janzen, Bennet Burleigh McMillan, Jean Margaret McMillan, Edward Anthony Rainko, Helen Theresa Rainko, Margaret Williams, Alvin James Williams, Lois Jean Harry, Wayne Chow, Ruby Sum Yet Chow, George Harry Humberstone, Geraldine Marie Humberstone, Arthur Edward Hunchak, and Lilian Margaret Hunchak,
Respondents

Before: **The Honourable Mr. Justice E. R. A. Edwards**

Reasons for Judgment

Counsel for the Petitioners	E. T. McCormack
Counsel for the Respondents except The Owners, Strata Plan LMS 1821	C. G. Haddock
Date and Place of Trial/Hearing:	March 16, 2007 Vancouver, B.C.

[1] This is a dispute between two groups of owners of strata lots in a 78 unit residential strata complex.

[2] The Owners, Strata Plan LMS 1821, ("the strata corporation") though served, was not represented at the hearing. Hereafter, I refer to the individual owners who are respondents collectively as "the respondents".

[3] The petitioners, a majority, apply under s. 246 of the ***Strata Property Act***, S.B.C. 1998, c. 43 ("***SPA***") for an amendment to the Schedule of Unit Entitlement of the Strata Plan Owners ("the Schedule") based on the habitable areas of the units.

[4] The respondents acknowledge that the Schedule should be amended but ask the court to approve an amendment to the Schedule based on a formula for allocating unit entitlement which was approved by some 90% of the unit owners at a Special General Meeting of the strata corporation in 2005, but which failed to obtain the unanimous agreement of owners required for an amendment to the Schedule.

[5] The underlying cause of the dispute is that although the Schedule, when submitted by the developer of the complex pursuant to the ***Condominium Act***, R.S.B.C. 1996, c. 64, purported to allocate unit entitlements based on the square footage of each unit, it failed to do so by not including the basement areas of the 30 of the 78 units which have basements.

[6] There is no dispute that all the basements were finished habitable areas at the time the developer sold the units. Because the basement areas were not included in the calculation of unit entitlements, units without basements have unit

entitlements which are disproportionately large in comparison to otherwise equivalent units with basements.

[7] There are three types of units: Browning, Shelley and Tennyson. By way of example, a Browning unit with no basement has a habitable area of say, X sq. ft. and a unit entitlement of Y, while a Browning unit with an equivalent main floor area and habitable basement has a total habitable area of, say, 1.2 times X sq. ft. but also has a unit entitlement of Y, equal to that of the non basement Browning unit.

[8] Under the definition of "unit entitlement" in the ***Condominium Act***, which was in effect when the Schedule was originally filed, unit entitlements had to be based on the "square footage" of each unit relative to the total square footage of all units or based on an alternative formula, acceptable to the Superintendent of Real Estate ("the Superintendent"), which would "result in a more equitable contribution by the owners to the common expenses of the strata corporation".

[9] In this case there is no evidence the Superintendent accepted a formula other than that based on the relative square footage of the units. The purported basis for allocation of unit entitlements to all 78 units was their relative square footage.

[10] The practical effect of the allocation of unit entitlements not including the areas of basements is that the units without basements have paid disproportionately more towards the common expenses of the strata corporation.

[11] Under the Schedule the owners of units without basements pay, in aggregate, 61% of the strata corporation's expenses while the owners of units with basements

pay 39%. If the Schedule allocated unit entitlement on the basis of habitable area including basements the owners of units without basements would pay 52% and the owners of units with basements 48%.

[12] As result the owners of units without basements have effectively subsidized those with basements by paying, in aggregate, a disproportionately high share of the strata corporation's expenses since the complex opened in 1995.

[13] Not surprisingly, the majority of owners whose units do not have basements sought to rectify this situation but they faced the obstacle of the requirement of unanimous approval of the owners to amend the Schedule by resolution.

[14] In 2005, the owners passed a resolution establishing a committee of owners to propose a reallocation of unit entitlement all owners might accept. Half its members were owners of units with basements and half were owners of units without basements. A representative of owners of units with basements indicated they would be prepared to accept an increase in their monthly assessments for common expenses of $15 to $16 each.

[15] A formula ("the Formula") for allocating unit entitlements which calculated each unit's share based on 100% of the main floor area, 75% of the second floor area and 50% of any basement area was proposed by the committee. The Formula, if applied to reallocate unit entitlements, would result in the approximate increase in monthly fees for each unit with a basement which the owners of those units had indicated they were prepared to accept.

[16] If the Schedule were amended with unit entitlements allocated using the Formula, the owners of units without basements would pay 57% of the strata corporation's expenses and the owners of units with basements 43%.

[17] The Formula was unanimously recommended by the committee as a compromise solution to the unit entitlement dispute. It was the basis for the resolution which failed to obtain the required unanimous approval to amend the Schedule in 2005.

[18] The threshold issue before the court is whether the court has jurisdiction to order the amendment of the Schedule in accordance with the Formula proposed by the respondents which was supported by about 90% of the owners in 2005.

[19] Counsel for the respondents argued that the court has jurisdiction to amend the Schedule to accord with the Formula under either s. 246 or s. 164 of the ***SPA***.

[20] The relevant provisions of s. 246 are the following:

> (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,
>
> (ii) a whole number that is the same for all of the residential strata lots, or
>
> (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) 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.
>
> (8) On application under subsection (7) and after consideration of the matters set out in the regulations, the Supreme Court may
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> (a) order that a Schedule of Unit Entitlement be amended, in accordance with the regulations, to accurately reflect the habitable area of square footage of a strata lot, and
>
> (b) make any other orders it considers necessary to give effect to an order under this subsection.

[21] In this case the initial allocation of unit entitlements was purportedly on the basis of square footage. There is no evidence or contention by counsel that the Superintendent was asked by the developer to accept some other formula which would result in a more equitable contribution to common expenses by owners of strata lots. The Superintendent accepted an allocation based on square footage.

[22] There is no statutory basis on which the court, years after the Schedule was filed, is authorized to now exercise the jurisdiction of the Superintendent so as to

amend the Schedule under s. 246(3)(a)(iii) to alter unit entitlements to allocate "a fair portion of common expenses" among owners of strata lots.

[23] The present application is governed by s. 246 (7) and (8). Under those sections the court "may" amend the Schedule to "accurately reflect the habitable area ... of a strata lot". The court has no other jurisdiction.

[24] Counsel for the respondents acknowledges that no regulations referred to in s. 246 are relevant to the court's exercise of this jurisdiction.

[25] The conjunctive "and" at the end of s. 246(8)(a) indicates that paragraph (b) does not expand the court's jurisdiction under paragraph (a) except to give effect to an order under s. 246(a) such as, for example, by authorizing a person to survey strata lots to measure their habitable areas for purposes of amending the Schedule.

[26] The options open to the court under s. 246(7) and (8) are to amend the schedule to accurately reflect the habitable areas of the units or to leave it unamended. The court has no jurisdiction under s. 246 to amend the Schedule on any other basis.

[27] It is not contested that the Schedule does not accurately reflect the habitable areas of the units. The respondents acknowledge that it ought to be amended for that reason, but contend it would be unfair to amend it to accurately reflect habitable areas for a variety of reasons.

[28] The most compelling of these reasons is that some 90% of the owners must be taken to have agreed when the resolution to reallocate unit entitlement in

accordance with the Formula was considered in 2005, that such a reallocation allocates "a fair portion of the common expenses" to each owner. I disagree that inference may be safely drawn. It is equally likely some of those voting in favour did so to resolve the issue without the delay and expense of litigation and in the hope that unanimity would contribute to harmony among owners, rather than because they thought it resulted in a fair contribution to common expenses by all owners.

[29] Neither this, nor any of the other reasons offered by the respondents for not amending the Schedule on the basis of habitable area, persuade me that the Schedule ought not to be so amended.

[30] In light of the fact that the failure of the Schedule to accurately reflect the habitable areas has resulted in the majority of owners subsidizing the minority for years, I have not been persuaded that the amendment of the Schedule on the basis of habitable area would be so unfair to the owners of units with basements that it ought not to be ordered.

[31] I have reached that conclusion notwithstanding the fact that the amended Schedule will result in the owners of units with basements paying a higher proportion of any special levy in future than they would have under the present Schedule.

[32] Counsel for the respondents argued s. 164 of the ***SPA*** gave the court jurisdiction to amend the Schedule to allocate unit entitlements according to the Formula which was supported by 90% of owners in 2005.

[33] Section 164 provides:

> **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.
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> (2) For the purposes of subsection (1), the court may
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> (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
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> (b) vary a transaction or resolution, and
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> (c) regulate the conduct of the strata corporation's future affairs.

[34] Section 164(1)(a) does not confer jurisdiction on the court to amend the Schedule. That jurisdiction is granted and circumscribed by s. 246 as explained above.

[35] The only other means of amending the Schedule is through unanimous vote of the members of the strata corporation. The resolution to apply the Formula failed to obtain unanimous approval. In light of the position of the respondents, a resolution to amend the Schedule to reallocate unit entitlements on the basis of habitable area would not obtain unanimous approval.

[36] The petitioners' application to the court under s. 246 is not an action by the strata corporation. It is a statutory remedy available to a group of owners to amend the Schedule.

[37] There is no "action or threatened action by, or decision of, the strata corporation" or council in prospect. So there is no such action which the court could determine to be "significantly unfair" to the respondents so as to invoke the remedial jurisdiction of the court under s. 164.

[38] The respondents filed a Notice of Motion seeking the amendment or cancellation of the strata corporation's Schedule of Interest on Destruction ("SID").

[39] The respondent's counsel cited s. 164 as the basis of the court's jurisdiction to amend or cancel the SID. In the absence of any action or threatened action by the strata corporation or council in relation to the SID, the court has no jurisdiction under s. 164 to amend or cancel it.

[40] The petitioners' application is granted. I order the Schedule amended in accordance with s. 246(8)(a) of the ***SPA***.

[41] The respondents' motion is dismissed.

[42] The petitioners' counsel asked for an order for costs against the strata corporation and for an order that the petitioners qua owners not be subject to contribute to those costs. The strata corporation which was served, has counsel who was not instructed to appear at the hearing of the applications before the court.

[43] While the petitioners are entitled to their costs against the respondents, I am not satisfied that an order for costs against the strata corporation is appropriate without giving its counsel the opportunity to address that issue. If counsel before the court and counsel for the strata corporation cannot agree on an order as to costs, they may address written argument on costs to the court. If they cannot agree on a schedule for doing so, any of them may apply in writing and I will set one.

"E.R.A. Edwards, J."
The Honourable Mr. Justice E.R.A. Edwards