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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Smith v. The Owners, Strata Plan VIS4673,*** 2008 BCSC 28

Date: 20080121
Docket: S48655
Registry: Nanaimo

Between:

Dennis Walter Smith, Devina Villafor Smith, Harry Wenngatz, Trudy Wenngatz, Ernst Adolf Grecht, Maureen Elizabeth Grecht, Kenneth Malcolm Ally, Michaela Daria Ally, Oliver Board, Kristiane Board, Alan Graham Courtice, Phyllis Mae Courtice, Alan David Kirkup, Vera Kirkup and Barbara Jean Lemoine

Petitioners

And

The Owners, Strata Plan No. VIS4673 and 528872 B.C. Ltd.

Respondents

Before: The Honourable Mr. Justice D.A. Halfyard

Reasons for Judgment

Counsel for the Petitioners — W.A. MacEwen

T. Peligren appeared as the representative of the Respondent 528872 B.C. Ltd.
No One appeared for the respondent The Owners, Strata Plan No. VIS4673, although duly served

Date and Place of Hearing: December 19, 2007, Nanaimo, B.C.

Introduction

[1] The petitioners sought the following relief, when they filed their petition on November 15, 2006:

> 1. An order that By-law 144(1) of the respondent strata corporation is *ultra vires* the *Strata Property Act*, S.B.C. 1998, c.43 and the former *Condominium Act*, R.S.B.C. 1996, c.64;
>
> 2. An order directing the Strata Council to collect strata fees that were not collected due to the existence of By-law 144(1)....

[2] At the commencement of the hearing, counsel for the petitioners informed the court that the first two named petitioners, Dennis Walter Smith and Devina Villafor Smith had sold their strata lot and were no longer pursuing the claim. Counsel also advised that paragraph 2 of the relief sought in the petition is no longer being applied for.

[3] The remaining 13 petitioners are the registered owners of seven strata lots of the Strata Plan No. VIS4673.

The Facts

[4] The respondent, The Owners, Strata Plan No. VIS4673 are the owners of lots of the Strata Plan No. VIS4673.

[5] The respondent 528872 B.C. Ltd. does business as "Home Tec," and is the owner/developer of the residential strata development located at Qualicum Beach B.C. which was established by Strata Plan No. VIS4673.

[6] The said residential strata development consists of 286 strata lots. Strata

Plan No. VIS4673 ("the Strata Plan") was registered in the Land Title Office in October 1998 pursuant to the *Condominium Act*. In or about 1999, Home Tec began marketing and selling the strata lots.

[7] The first Annual General Meeting of the Owners of the Strata Plan was held on December 3, 1999. The minutes of the meeting show that it was attended by the owners of 25 strata lots and by Tim Peligren, representative of the owner/developer which was stated to be "the owner of the balance of the 286 strata lots." It is apparent that the owner/developer then owned 261 of the 286 strata lots.

[8] The minutes of the meeting of December 3, 1999, state, among other things, that a unanimous resolution was passed by the owners adopting certain amendments to the bylaws of the Strata Corporation. One of the bylaws adopted at the first Annual General Meeting was the bylaw which is challenged by the petitioners, namely, Bylaw 144(1). The relevant part of that bylaw reads as follows:

> 144(1) Notwithstanding the provisions of Bylaw 128, any Owner, including the Developer, that is the registered owner of three (3) or more Strata Lots that have unimproved Private Yard Areas, shall be entitled to a 50% reduction of the semi-annual assessment for any such Strata Lot.

[9] It is apparent from the minutes of the meeting of December 3, 1999 that, except for the owner/developer, there were only three other owners who owned three or more strata lots.

[10] Also at the meeting of December 3, 1999, the owners accepted the offer of the owner/developer to pay all strata maintenance fees up to May 31, 2000. As it

turned out, the owner/developer paid all strata maintenance fees up to December 31, 2000, and each owner of a strata lot only became responsible for the payment of strata fees after January 1, 2001.

[11] The second Annual General Meeting of the Owners was held on December 2, 2000. At that time, the owner/developer was the owner of 223 of the 286 strata lots. The minutes indicate that only two other owners who attended the meeting, owned three or more strata lots.

[12] The "Consolidated Disclosure Statement" issued by the owner/developer and dated December 14, 2001, under the headings "Executive Summary" and "Strata Corporation Bylaws" (at page 2) contained the following paragraph:

> In particular, the Strata Council intends to consider Bylaw 144(1) which may conflict with ss.99 and 100 of the Act, Bylaw 144(2) which may conflict with Regulation 6.8 and Bylaw 144(4) which may conflict with Regulation 7.1(3) and, as such, may be unenforceable.

[13] In his affidavit sworn November 17, 2007, Timothy Peligren deposes (in paragraph 11) that only three owners other than the owner/developer had been the registered owners of three or more strata lots with unimproved private yard areas, since Bylaw 144(1) was passed.

[14] Subject to the reductions authorized by Bylaw 144(1), the strata fees that have been assessed on each strata lot since January 1, 2001, have been in the following annual amounts:

2001	$245.50
2002	$330.00
2003	$330.00
2004	$395.00
2005	$395.00
2006	$380.00

[15] The eighth Annual General Meeting of the Strata Corporation was held on December 2, 2006. This meeting included much discussion of Bylaw 144(1). A motion "that council is directed to initiate proceedings to obtain a court decision regarding the enforceability of Bylaw 144(1)," was defeated. A motion that ". . . binding arbitration be sought with the mutual consent of Mr. Peligren ... on the matter of any alleged debt of the owner developer and/or his companies before any legal proceedings are taken through the courts," was tabled.

[16] At that same meeting, a motion "that Bylaw 144(1) be rescinded" was carried. But a motion "that council be directed to pursue the alleged issue of under-paid strata fees" was defeated.

[17] It should be noted that the present petition was filed on November 15, 2006. The resolution rescinding Bylaw 144(1) was passed just over two weeks later.

[18] The facts which I have summarized above are established by the affidavits of Alan David Kirkup, sworn November 15, 2006, and August 24, 2007, and the affidavit of Timothy Peligren, sworn November 17, 2007. None of the facts were in

controversy. Counsel for the petitioners did argue that the minutes of the first Annual General Meeting of the owners (December 3, 1999) were wrong in referring to the resolutions passed at that meeting as being "unanimous" resolutions. I would not accede to this argument.

The Substantive Issue

[19] For convenience, I repeat Bylaw 144(1):

> 144(1) Notwithstanding the provisions of Bylaw 128, any Owner, including the Developer, that is the registered owner of three (3) or more Strata Lots that have unimproved Private Yard Areas, shall be entitled to a 50% reduction of the semi-annual assessment for any such Strata Lot.

[20] Bylaw 133(29) defines "Private Yard Area" as being that part of a Strata Lot illustrated as "Private Yard Areas on the Strata Plan." Bylaw 133(43) states:

> (43) Strata Lot or Strata Lots shall mean and include any one or more of the 286 Strata Lots included in the Strata Plan.

[21] There is no definition in the bylaws or the statute for the word "unimproved." I took it to be common ground that "unimproved" meant that there had been no residence constructed on a Strata Lot, in whole or in part. That was apparently the meaning adopted by the strata council.

[22] The substantive issue is whether the Strata Council had power to pass Bylaw 144(1).

[23] Counsel for the petitioners begins with the undisputed point that each Strata Lot within the development has a "unit entitlement" of one (see paragraph 7.3 of the Owner/Developer's disclosure statement). Next, counsel refers to the definition of "unit entitlement" in s.1(1) of the *Condominium Act*, which states:

> Unit Entitlement means the unit entitlement of a Strata Lot and indicates the share of an owner in the common property, common facilities and other assets of the Strata Corporation and is the figure by reference to which the owners' contribution to the common expenses of a Strata Corporation is calculated. (My underlining)

[24] Counsel next refers to s.128 of the *Condominium Act*, and I set out the relevant subsections:

> 128(1) The Strata Lot owner's contribution to the common expenses of the Strata Corporation must be levied in accordance with this bylaw.
>
> (2) If a strata plan consists of more than one type of strata lot, the common expenses must be apportioned in the following manner:
>
> (a) common expenses attributable to one or more type of strata lot must be allocated to that type of strata lot and must be borne by the owners of that type of strata lot in the proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned;
>
> (b) common expenses not attributable to a particular type or types of strata lot must be allocated to all strata lots and must be borne by the owners in proportion to the unit entitlement of their strata lots.
>
> ...
>
> (9) After the period referred to in subsection (8), all owners, including the owner developer, must, subject to subsections (2) and (3), pay a monthly assessment based on that budget determined in accordance with their unit entitlements.

...

> (11)At each annual general meeting after the first annual general meeting, the strata corporation must prepare an annual budget for the following 12 month period and, after that, all owners must, subject to subsections (2) and (3), pay a monthly assessment in accordance with their unit entitlement.

[25] Counsel then argues that Section 128 makes it plain that:

> all owners, including the owner developer, must ... pay a monthly assessment in accordance with ... their unit entitlements.

[26] It was implicit in counsel's argument that Bylaw 144(1) could only purport to negate the requirements of Section 128, if lots having "unimproved private yard areas" were different types of strata lots than those which had "improved private yard areas". It was submitted that the exception in Section 128(2) could not apply because the Strata Plan did not consist of more than one "type of Strata Lot". Counsel maintained that constructing an improvement on a strata lot could not transform it into a different type of strata lot within the meaning of Bylaw 128(2).

[27] Mr. McEwan contended that, because there was only one type of Strata Lot in the Strata Plan, the common expenses "must be allocated to all Strata Lots and must be borne by the owners in proportion to the unit entitlement of their Strata Lots."

[28] By operation of law, the bylaws in question continued in effect until January 1, 2002. After that date, a bylaw which conflicted with the *Strata Property Act* (which came into force on July 1, 2000) ceased to have effect to the extent of the conflict.

Counsel for the petitioners referred me to ss.99 and 100 of the *Strata Property Act*, and submitted that Bylaw 144(1) was clearly in conflict with these provisions. Those two sections state:

> **99** (1) Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.
>
> (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:
>
> $$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$
>
> **100** (1) At an annual or special general meeting held after the first annual general meeting, the strata corporation may, by a resolution passed by a unanimous vote, agree to use one or more different formulas, other than the formulas set out in section 99 and the regulations, for the calculation of a strata lot's share of the contribution to the operating fund and contingency reserve fund.
>
> (2) An agreement under subsection (1) may be revoked or changed by a resolution passed by a unanimous vote at an annual or special general meeting.
>
> (3) A resolution passed under subsection (1) or (2) has no effect until it is filed in the land title office, with a Certificate of Strata Corporation in the prescribed form stating that the resolution has been passed by a unanimous vote.

[29] It seems to me that section 99 requires all owners to contribute equally to the common expenses ("the operating fund and contingency reserve fund"), unless the Strata Corporation at a general meeting passes a resolution by unanimous vote to use a different formula for calculating such contribution, pursuant to section 100. The definition of "unit entitlement" in s.1(1) of the *Strata Property Act* is worded differently than in the *Condominium Act*, but in my opinion, the effect is the same.

[30] On behalf of the respondent owner/developer Home Tec, Mr. Peligren submitted that Bylaw 144(1) was valid. He argued that the discount given to owners of three or more unimproved lots was justified because strata lots which have "unimproved Private Yard Areas" were a different type of Strata Lot than those having "improved Private Yard Areas". He relied on the case of ***Smith v. G.C. (Goldie) Read*** [1993] B.C.J. No.1348, a decision of Mr. Justice Davies.

[31] In the Smith case, an issue arose as to whether s.128 of the *Condominium Act* allowed for differing maintenance fees to be charged for particular types of units in a strata complex, where different types of units existed within the complex. At paragraph 10, Davies J. noted that the *Act* did not define the word "type," but said that "type should be taken to denote the character or form of structure." As I read this case, it refers to particular types of units within a strata complex, which differ in structure in significant ways from each other. I do not find this case of assistance in relation to the present issue.

[32] I think the argument that there are not two different types of strata lots, is a strong one. It seems to me that the bylaw purports to fix the amount of contributions based on the number of strata lots owned by a particular owner, rather than on the "type" of strata lots owned. If that is right, then Bylaw 144(1) would conflict with Section 128 of the *Condominium Act* and Section 99 of the *Strata Property Act.*

[33] The second argument advanced by the owner/developer was that Bylaw 144(1) was passed by unanimous resolution, it was relied on by the owners for more than five years and reaffirmed each year with the approval of the budget, and there

has been a long and unexplained delay in the bringing of this application. It was further submitted that if Bylaw 144(1) conflicted with the *Strata Property Act*, then the repeal of the *Condominium Act* did not affect the valid operation of the bylaw, up to January 1, 2002. This latter point was based on the assumption that the bylaw was not *ultra vires* the *Condominium Act*.

The Procedural Issue

[34] The primary position of the owner/developer, however, was that the issue of the validity of Bylaw 144(1) should not be decided by the court, because the issue is now moot. Mr. Peligren pointed out that Bylaw 144(1) was rescinded on December 2, 2006, and that the petitioners have abandoned the claim for relief contained in paragraph 2 of the petition. Reliance was placed on ***Borowski v. The Attorney General of Canada*** [1989] 1 S.C.R. 242.

[35] In ***Borowski***, Sopinka J., speaking for a seven-member court, defined the doctrine of mootness at page 352, in the following terms:

> Mootness
>
> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced

> in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[36] Counsel for the petitioners contended that there was still a live controversy between the parties, because the Strata Council might in the future decide to sue the owner/developer for payment of the 50% of common expenses not paid by the owner/developer as a consequence of Bylaw 144(1), in the event that the court decides this application in favour of the petitioners. Counsel submitted that the present application should be considered as being a proper and necessary precondition to such an action by the Strata Council.

[37] Mr. MacEwen did not address the two motions that were advanced and defeated at the annual general meeting on December 2, 2006. It will be recalled that those motions proposed:

> That Council is directed to initiate proceedings to obtain a court decision regarding the enforceability of Bylaw 144(1).
>
> . . .
>
> That Council be directed to pursue the issue of alleged underpaid

strata fees.

[38] No evidence was presented to show that the attitude of the majority of the owners has changed since that meeting. In his affidavit, Mr. Kirkup estimated that more than $61,000 of strata fees had wrongly been discounted under Bylaw 144(1). That figure was not accepted by the owner/developer but I infer that the total amount of the discounts was substantial. Yet the owners in general meeting voted not to pursue the matter.

[39] Applying the first branch of the test in ***Borowski*** to the facts of this case, it is my opinion that ". . . the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties." The petitioners did not argue that, if the case was moot, the court should nevertheless exercise its discretion in favour of deciding the case. I have considered the factors discussed by Mr. Justice Sopinka at pages 358-363 of ***Borowski***. I am not persuaded that the discretion of the court should be exercised in favour of the petitioners, and I decline to do so.

Disposition

[40] It will be apparent from my discussion of the merits of this application that I consider the interpretations advanced by the petitioners with respect to the statutes and the bylaws to be preferable to the meanings contended for by the owner/developer. However, it is my opinion that this application should be dismissed on the ground that the issue of the validity of Bylaw 144(1) has been rendered moot. Accordingly, the petition is dismissed.

Costs

[41] The parties did not address the issue of costs. I think it is arguable that full costs should not follow the event in this case. The events which rendered the issue moot, did not occur until after the petition had been filed. The case for the petitioners on the issue of whether Bylaw 144(1) was *ultra vires*, was a strong one, and I do not think that it was plain and obvious that the case was moot. To my mind, these matters are relevant to the issue of costs, and these comments may assist the parties in settling costs.

[42] If it is necessary to speak to costs, a date may be arranged with the Trial Coordinator.

"D.A. Halfyard, J."