COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc.,*** 2009 BCCA 36

Date: 20090204
Docket: CA35185

2009 BCCA 36 (CanLII)

Between:

The Owners, Strata Plan VIS2968

Appellant
(Plaintiff)

And

K.R.C. Enterprises Inc.

Respondent
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Saunders
The Honourable Madam Justice Kirkpatrick

A.R. Tryon	Counsel for the Appellant
M.J. Hargreaves	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 18 December 2008
Place and Date of Judgment:	Vancouver, British Columbia 4 February 2009

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

I. INTRODUCTION

[1] This appeal arises from a dispute between the owners of bare land strata lots in a development in Sooke, B.C., and the party to whom the developer assigned options to purchase some of the common property of the strata corporation. The sole issue on this appeal is whether the granting of options to purchase some of the common property of a strata corporation without first obtaining subdivision approval is prohibited by s. 73 of the ***Land Title Act***, R.S.B.C. 1979, c. 219, the statute in force at the time the options were granted.

[2] The only issue on the cross-appeal is whether the fact that a strata plan was not registered at the time invalidates the granting of the option to purchase the common property in respect of one phase of the development.

[3] The action in the Supreme Court was heard as a special case by consent of the parties in March 2007. Reasons for judgment were pronounced on 1 June 2007, and are indexed as 2007 BCSC 774, and reported at 74 B.C.L.R. (4th) 89, 59 R.P.R. (4th) 183.

II. FACTS

[4] The facts relevant to the appeal may be briefly stated. The appellants, The Owners, Strata Plan VIS2968 (the "strata corporation"), are the owners of 48 bare land strata lots located in the District of Sooke on Vancouver Island in a development known as Sooke Bay Estates. There is a single family dwelling on

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each strata lot. The strata corporation was created by deposit of the strata plan in the Victoria Land Title Office on 25 November 1993. The developer and registrant of the strata plan was Blackstone Capital Corp. ("Blackstone").

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[5] The strata plan was developed in three stages with each phase consisting of 16 strata lots. The three phases were registered as follows:

(a) Phase 1: 25 November 1993;
(b) Phase 2: 9 March 1994; and
(c) Phase 3: 9 March 1994.

[6] Each phase of the strata plan includes a common property area of parklands where the septic field for the sewage of that phase is located.

[7] During development, Blackstone contemplated that in the future the local government might extend sewage services to the area and there would be no need for the septic fields.

[8] In anticipation of this possibility, Blackstone, while owner of the parent property or while owner of all of the strata lots, granted to itself contingent options to acquire the parklands in the event that municipal sewage services became available.

[9] The three contingent options are substantially identical to one another. In particular, each option states (with the necessary modification in respect of the particular strata lots),

> PROVIDED HOWEVER, that the Option hereby granted may only be exercised following a municipal, provincial or other public body providing access to a sewage disposal system (the "Public Sewer System") to service Strata Lots 1 through 16, Strata Plan VIS2968, and upon the Optionee providing to the Optionor, at the sole expense of the

> Optionee, a Subdivision Plan converting the Optioned Property to a separate and legally distinct lot or lots, no longer a part of the Common Property of the Optionor.

[10] Pursuant to the ***Real Estate Act***, R.S.B.C. 1979, c. 356, Blackstone was required to file an approved disclosure statement or prospectus with the Superintendent of Real Estate as a condition of offering strata lots for sale. The disclosure statement refers to the options as follows:

> The Developer will grant an Option To Purchase the Common Area septic disposal fields in each phase in favour of the Developer, which Option To Purchase will only be exercisable by the Developer in the event that the development is serviced with a Municipal or other public sewage system at the date of exercise.

[11] All original purchasers of the strata lots received a copy of the disclosure statement. Many of the strata lots are now owned by successors in title from original purchasers.

[12] On 24 February 2004, Blackstone notified the strata corporation that the options were being offered for sale. The strata corporation responded and advised that it considered the options to be void and unenforceable. On 1 April 2004, all of the options were assigned by Blackstone to the respondent, K.R.C. Enterprises Inc. ("K.R.C. Enterprises").

[13] At all material times, the standard by-laws in Part 5 of the ***Condominium Act***, R.S.B.C. 1979, c. 61, applied to the strata corporation.

[14] Municipal sewage services have not yet been extended to Sooke Bay Estates but the parties anticipate that services will be within a few years.

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[15] Since 1995 a search of the common property folio for the strata corporation discloses registration of the options. Prior to 1995, the options were recorded on a separate strata plan sheet which, as with the common property folio, could be searched by any interested party. The options are not registered against the individual strata lots.

[16] The chambers judge was asked to answer seven question of which only two are in dispute on appeal.

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III. ANALYSIS

[17] The strata corporation's argument on appeal is essentially the same argument it advanced in the Supreme Court. The strata corporation submits the options were prohibited by the combined effect of ss. 20(1) and 21(4) of the ***Condominium Act*** and Part 7 of the ***Land Title Act***. At all relevant times, the capacity of the strata corporation to grant the options was governed by the ***Condominium Act***.

[18] Sections 20(1) and 21(4) of the ***Condominium Act*** governed the disposition of common property of a strata corporation as follows:

> 20(1) The owners may, by special resolution, direct the strata corporation to dispose of all or part of its common property or assets, and, without limiting the generality of the foregoing, may direct the strata corporation to grant an easement or a restrictive covenant burdening the common property included in the strata plan.
>
> ...
>
> 21(4) Notwithstanding the *Land Title Act*, a disposition, not including a lease for a term of 3 years or less, of all or part of the common

> property of a strata corporation under section 20 is a subdivision of land, and Part 7 of the *Land Title Act* applies.
>
> [Emphasis added]

[19] The relevant section of the ***Land Title Act*** that dealt with the subdivision of land read as follows:

> 73(1) Except on compliance with this Part, no person shall subdivide land into smaller parcels than those of which he is the owner for the purpose of
>
> (a) transferring it; or
>
> (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.
>
> (2) Except on compliance with this Part, no person shall subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.
>
> ...
>
> (4) No instrument executed by a person in contravention of this section confers on the party claiming under it a right to registration of the instrument or part of it.
>
> [Emphasis added]

Compliance with "this Part" requires the filing of a subdivision plan in conformity with Part 7 of the ***Land Title Act***.

[20] "Dispose" is defined by the ***Interpretation Act***, R.S.B.C. 1996, c. 238, s.29, (and the ***Interpretation Act***, R.S.B.C. 1979, c. 206, s. 29) to mean "to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things."

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[21] The strata corporation submits that since there was no subdivision plan filed at the time of the granting of the options, the options were invalid as they contravened s. 73 of the ***Land Title Act***.

[22] In both the Supreme Court and on appeal, K.R.C. Enterprises concedes that the granting of the options was a disposition as defined by the ***Interpretation Act*** and a subdivision of common property under s. 20(1) of the ***Condominium Act***. The respondent contends, however, that the disposition does not actually occur until the contingencies in the options come to pass – when the municipal sewage system becomes available and K.R.C. Enterprises provides a subdivision plan to the strata corporation.

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[23] The respondent relies on the wording of the options:

> PROVIDED HOWEVER, that the Option hereby granted may only be exercised ... upon the Optionee providing to the Optioner, at the sole expense of the Optionee, a Subdivision Plan converting the Optioned Property to a separate and legally distinct lot or lots ...

[24] K.R.C. Enterprises submits that the word "legally" means that the optionee must comply with Part 7 as a condition precedent to the exercise of the option. Thus the respondent submits that the options do not offend s. 73 of the ***Land Title Act***.

[25] The chambers judge accepted the respondent's submission. She held,

> [43] In this case, the options are conditional upon complying with Part 7 of the *Land Title Act* in that they specifically require that there must be a subdivision converting the optioned lot to a distinct lot or lots that are no longer a part of the common property prior to the option being exercised. In other words, the option holder is not entitled to the transfer of the fee simple without the approval of the subdivision by an

> Approving Officer who, in compliance with Part 7 of the *Land Title Act*, will consider whether or not the proposed subdivision is against public interest. Although the option holder can demand the right to acquire or transfer the fee simple in certain circumstances, those circumstances are that Part 7 of the *Land Title Act* has been complied with. Accordingly, I have concluded that the granting of the options was not prohibited under either the *Condominium Act* or the *Land Title Act.*

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[26] The strata corporation submits that the chambers judge erred in failing to recognize that the fact that the options are conditional does not exempt them from operation of s. 73(2) of the ***Land Title Act***. The strata corporation submits that this is because the "subdivision", within the meaning of the ***Land Title Act***, occurred when the options were granted, not when they were exercised, and thus Blackstone was obligated to comply with Part 7 of the ***Land Title Act*** at the time they were granted.

[27] The strata corporation contends that the decision creates mischief because it permits a host of dealings in respect of a portion of a lot – mortgages, transfers, options, etc. – creating clouds on title by the creation of partial interests in land. The strata corporation submits that there is no practice or precedent supporting the decision of the chambers judge, citing the Wendi J. MacKay *et al.*, eds., *Land Title Practice Manual*, looseleaf, 3d ed. (Vancouver: Continuing Legal Education Society of B.C., 2007) at §. 7.109, which states that "Section 73(2) prohibits the filing of options to purchase, rights to purchase, mortgages and other charges of a part of a lot."

[28] The strata corporation submits that the impugned decision would lead the way for developers to avoid the provisions of the ***Real Estate Development***

Marketing Act, S.B.C. 2004, c. 41, that require developers to first obtain preliminary approvals, and file a prospectus with the Superintendent of Real Estate, before entering into agreements with prospective purchasers. If the decision stands, the strata corporation submits that developers may enter into conditional purchase agreements and receive money from purchasers without first obtaining preliminary approval from the relevant authority.

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[29] K.R.C. Enterprises posits that no such mischief would be created, citing s. 4 of the ***Real Estate Development Marketing Act***:

> 4 A developer must not market a subdivision lot or a bare land strata lot unless, in relation to the subdivision lot or bare land strata lot,
>
> (a) a subdivision plan or bare land strata plan, as applicable, has been deposited in a land title office, or
>
> (b) an approving officer has given preliminary layout approval.

[30] Further, K.R.C. Enterprises submits that in the circumstances of this case, to require the optionor to obtain subdivision approval in advance of the granting of the option and before the realization of the event allowing the option to be exercised, namely the arrival of municipal sewage services, is unnecessarily costly and cumbersome.

[31] K.R.C. Enterprises seeks an interpretation that would limit the general proscription in s. 73 of the ***Land Title Act*** and make it conditional on compliance with Part 7. The respondent submits that s. 73 may, in its words, be "paraphrased" as follows:

> No person shall subdivide land for the purpose of a dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the other party would entitle that party, in law or equity, under any circumstances, other than on compliance with this Part, to demand or exercise the right to acquire the fee simple.

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[32] In support of its argument K.R.C. Enterprises relies on this Court's decision in ***Bank of British Columbia v. Tri Holdings Ltd.*** (1992), 71 B.C.L.R. (2d) 58, 71 B.C.A.C. 264 (cited to B.C.L.R.). The respondent emphasizes Seaton J.A.'s comments in reference to s. 73, at para. 29:

> I do not read these sections as prohibiting people making an agreement contingent on there being a subdivision. Doing so is a common practice that does not constitute subdividing for the purpose of transferring or leasing, or subdividing for the purpose of a mortgage or other dealing that might be registered.

[33] The crucial point in this appeal, however, is that K.R.C. Enterprises concedes that the granting of the option itself constituted a disposition. Pursuant to s. 21(4) of the ***Condominium Act*** a "disposition ... is a subdivision of land". The option is not contingent upon there being a subdivision. By operation of law, the granting of the option is a subdivision. It is contingent upon the availability of a municipal sewage system, after which the respondent must provide to the strata corporation a subdivision plan converting the septic fields to legally distinct lot or lots.

[34] It is useful to note that common law rights to subdivide land have been curtailed by statute for some time. In ***City of Vancouver v. Simpson***, [1977] 1 S.C.R. 71, 65 D.L.R. (3d) 669, the Supreme Court of Canada considered the effect

of the ***Land Registry Act***, R.S.B.C. 1960, c. 208, on the common law right to subdivide land. Martland J., for the majority, stated (at 77):

> The enactment of that statute took away a free right to subdivide. The landowner has no right to subdivide save subject to the approval of the approving officer who is required by the Act to determine if the contemplated development would be against the public interest. The very exercise of the power given to the approving officer by the Act must necessarily curtail the landowner's right to subdivide.

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[35] While I have some sympathy for the position taken by the respondent and its pragmatic interpretation of s. 73 of the ***Land Title Act***, regard must be had to the words of the applicable statutes. I am impelled to the view that the combined effect of ss. 20(1) and 21(4) of the ***Condominium Act*** and s. 73 of the ***Land Title Act*** render the options invalid, as they constitute subdivisions which have not first obtained subdivision approval.

[36] The challenges that flow from this interpretation – decreased profitability for developers or increased costs to strata corporations when common property becomes redundant and disposition is necessary – are matters that may best be considered by the Legislature. However, the current statutes, in my opinion, permit no other interpretation.

IV. DISPOSITION

[37] It follows that I would allow the appeal and declare the options invalid. In the circumstances, it is unnecessary to address the cross-appeal.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice Saunders"

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