Case Name:

Strata Plan VR 1280 v. Oberto Oberti Architecture

Between
The Owners, Strata Plan VR 1280, plaintiff, and
Oberto Oberti Architecture and Urban Design Inc.,
Oberto Oberti, Def Co. Ltd., and XYZ Co. Ltd. #1
through XYZ Co. Ltd. #10, defendants

[2003] B.C.J. No. 129
2003 BCSC 112
Vancouver Registry No. S001082

British Columbia Supreme Court
Vancouver, British Columbia
Henderson J.

Oral judgment: January 10, 2003.
(20 paras.)

Counsel:

B.D. Gleig, for the plaintiff.
C.E. Hirst, for the defendants, Oberto Oberti Architecture and Urban Design Inc. and Oberto Oberti.

¶ 1 **HENDERSON J.** (orally):— The defendants ask for production of certain documents which are said to be relevant to the capacity or authority of the plaintiff to bring the action and a stay of proceedings pending production of those documents. The plaintiff is described as "The Owners, Strata Plan VR 1280". This is what has come to be called a "leaky condo" case.

¶ 2 The endorsement on the writ of summons recites that the strata corporation is bringing the action on its own behalf and on behalf of the owners. It goes on to refer to a claim for damage suffered by the strata lots, the common property, the common facilities, and the other assets of the strata corporation.

¶ 3 The statement of claim is long and detailed. It sets out a number of claims for compensation caused by damage to the common property. It also makes certain claims which are clearly advanced on behalf of individual owners. For example, paragraph 15(f) of the statement of claim asks for damages for diminution in value of strata lots. Paragraph 15(g) asks for damages for the loss of use and enjoyment of strata lots. Those are claims which, in the absence of special provision made by legislation (to which I will refer in a minute), could be advanced only by the individual owners. No individual owners are named as plaintiffs.

¶ 4 It is my view, therefore, that Mr. Gleig's first argument in opposition to disclosure must fail. He argued that, when the endorsement and statement of claim are read reasonably and as a whole, they advance no more than a claim for damages by the strata corporation itself with respect to damage caused to the common property. The plain language of the writ and statement of claim demonstrate otherwise.

¶ 5 There are two Acts bearing on the capacity in law of a strata corporation to commence civil action.

¶ 6 The Condominium Act addresses the topic in s. 15. Section 15(1) provides that:

> A strata corporation may, as representative of the owners of the strata lots included in the strata plan, bring proceedings for damages and costs for any damage or injury to the common property, common facilities and the assets of the strata corporation caused by any person.

Section 15(7)(a) provides that:

> A strata corporation may sue, on its own behalf and on behalf of an owner, about matters affecting the common property, common facilities and other assets of the strata corporation.

¶ 7 Those provisions are clearly limited to a claim for damages arising from damage to the common property. They permit the strata corporation to act as a representative of the owners as a whole. They would permit the strata corporation to bring the present claim, insofar as it is a claim for damages arising from damage to the common property, but they say nothing about the right of the strata corporation to step into the shoes of an individual unit holder and advance a claim which is personal to that unit holder.

¶ 8 Section 15(7)(b) of the Condominium Act goes further. It permits a strata corporation to sue:

> ...on behalf of those owners who consent in writing to the strata corporation so doing, about matters affecting individual strata lots...

The first requirement, as the section indicates, is that the individual owner, who enjoys the right of action concerning his or her individual strata lot, must consent in writing prior to the commencement of the action.

¶ 9 The section contains another stipulation. The action must be "authorized by special resolution of the strata corporation."

¶ 10 In my view, those are necessary preconditions to the advancement of any claim made on behalf of an individual owner. That is so whether or not the claim is coupled with a claim by the strata corporation relating to the common property.

¶ 11 The second statute bearing on the question is the Strata Property Act. In ss. 171 and 172, that Act provides for a right of action in terms which are very similar (but not identical) to the Condominium Act.

¶ 12 It follows from what I have said that this plaintiff has no capacity or authority to advance some of the claims it makes unless, at the time the writ was filed, there was in existence a special resolution of the strata corporation; and unless there was a consent in writing from each of the individual owners whose units are the subject of the claim or claims.

¶ 13 The question, then, is whether the plaintiff has a legal obligation to disclose evidence of the special resolution and copies of the written consents.

¶ 14 The plaintiff argues that such documents are privileged. It says they were created for the dominant purpose of this litigation and are not discoverable.

¶ 15 In my view, that submission misconceives the nature of the documents. The special resolution of the strata council and the written consents of the owners come into existence for the very purpose of authorizing the action to begin. They are evidence of the strata corporation's exceptional right to sue on behalf of someone else, that is to say, the owners. That evidence must be available to any who would question the right or capacity of the strata corporation to sue. It was created for that very purpose. It is true that the documents were created for the purpose of this litigation, but there was never at any time a reasonable expectation on anyone's part that the documents would remain private or confidential. I find that the concept of privilege has no application to such documents.

¶ 16 Traditionally, courts have accepted without question the proposition that a plaintiff who brings an action has the capacity or authority to bring it. However, when that authority or capacity is called into question, the courts have never been slow to require the production of evidence to justify the claimed authority or capacity.

¶ 17 I make no criticism of this plaintiff for failing to disclose the special resolution or the written consents in the first instance. Now that the defendant has placed the matter in issue, those documents must be disclosed. It is particularly important that the defendants know which of the unit holders has consented to this action being brought on his or her behalf and which have not, so that the defendants may appreciate the scope of the liability to which they are exposed.

¶ 18 In argument, counsel suggested that the plaintiff might prefer to amend the statement of claim so as to remove any

claim for damages on behalf of an individual unit holder rather than make the requested disclosure. I think the plaintiff be permitted that option.

¶ 19 My order is as follows. The plaintiff is to produce evidence of the special resolution and copies of the written consents within 21 days or, in the alternative, the plaintiff is to amend its statement of claim so as to remove the individual claims of the unit holders within 21 days.

(DISCUSSION BETWEEN THE COURT AND COUNSEL)

¶ 20 **THE COURT**: The application was somewhat unusual. It is not what I would call routine disclosure. I will leave costs in the cause.

HENDERSON J.

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