

Case Name:

Strata Plan VR 2000 v. Grabarczyk

Between

The Owners, Strata Plan VR 2000, Petitioner, and
Isobel Grabarczyk, Respondent

[2006] B.C.J. No. 3370

2006 BCSC 1960

Vancouver Registry No. L053103

British Columbia Supreme Court

Vancouver, British Columbia

Cullen J.

(In Chambers)

Oral judgment: December 15, 2006.

Released: January 23, 2007.

(57 paras.)

Counsel:

Counsel for the Petitioner: P. Mendes

Appearing on her own behalf: I. Grabarczyk

¶ 1 CULLEN J. (orally):— The petitioner, the owners of Strata Plan VR 2000, bring this petition against Isobel Grabarczyk, seeking the following relief --

¶ 2 MS. GRABARCZYK: Excuse me, My Lord.

¶ 3 THE COURT: Yes?

¶ 4 MS. GRABARCZYK: May I say a couple of last statements before you make a judgment?

¶ 5 THE COURT: All right.

¶ 6 MS. GRABARCZYK: Thank you very much, My Lord.

[SUBMISSIONS]

¶ 7 THE COURT: I will just carry on. What the petitioner is seeking is a declaration that the respondent has breached the petitioner's noise by-law, an order that respondent cease and desist from certain noisy behaviour in her suite and an order that she pay the petitioner \$22,928.69 in fines that the strata corporation has imposed on her for breaches of the strata corporation's noise by-laws.

¶ 8 The petitioner is a strata corporation known as the Palladain located at 1705 Nelson Street in the West End of Vancouver. It has 40 units housed in three buildings of four stories each. The three buildings are connected by walkways.

¶ 9 The respondent owns suite 208, having moved there in April 2001 following her mother's death. The respondent has, by notice of motion dated November 6, 2006, made application that the petitioner's application be struck and that the petitioner pay to the respondent the sum of \$4,000 in home warranty proceeds and \$2,000 in what she described as toilet fraud "as summarized in respondent's summary closing statement, numbers 1 to 25."

¶ 10 The petitioners seek an order setting aside an order granting the respondent indigent status.

¶ 11 The allegations made by the petitioner against the respondent consist primarily of the evidence of Elizabeth Sears contained in two affidavits, the first sworn March 17, 2006 and the second sworn September 19, 2006, and the evidence of Phyllis Johnston sworn September 19, 2006.

¶ 12 Ms. Sears' affidavits attest to loud, disruptive ongoing noises coming from the respondent's unit from the time she moved into in April 2001 until September 29, 2006, the date of her most recent affidavit. The sounds described by Ms. Sears include loud yelling, crying, stamping, jumping up and down, apparent movement of furniture back and forth, and the washing of metal objects in the bathtub of the respondent. Since December 2005 when this petition was filed, according to Ms. Sears the noise has changed to consist mainly of loud stamping coming from the respondent's suite, or stomping in one place for varying periods of times after midnight. Ms. Johnston in her affidavit deposes as follows:

My daughter-in-law, Rebecca Johnston, and I are the owners of suite 207 of Palladian. My son rents the suite for business purposes but makes it available to family members and friends, and of course I stay there frequently. On many occasions when I have stayed in the suite I have heard loud and disturbing noises coming from suite 208. These noises including thumping, yelling, crying, furniture being moved around and what sounds like objects being washed in the tub. When I have heard the noise, it usually occurs between 1:00 and 5:00 in the morning. The voice appears to be that of a woman. I know the noise is coming from suite 208 because the bedroom in our suite shares a common wall with suite 208. This noise cannot be coming from any other suite other than 208. The noise does not sound like normal apartment living noises. The noise is not being caused by squeaking hardwood floors.

¶ 13 Ms. Sears' sister, Jean Hamilton, also swore an affidavit dated November 17, 2006. The pertinent paragraphs of her affidavit read as follows:

For the past three years I have visited my sister in Vancouver and stayed with her in her apartment, unit 106. I usually visit in the fall around Thanksgiving. My last visit was from September 24, 2006 to October 14, 2006. I stayed in the apartment with Elizabeth for three weeks. Every time I have stayed with my sister I have noticed loud thumping or stomping noises coming from the suite directly above my sister's bedroom. The noises are so loud that I refer to the person residing there as Thumper. During my last visit this past fall the noise occurred every night of varying durations, usually between 11:00 p.m. and 1:00 a.m. Sometimes it sounded as though the person was stomping on one spot and then moved to stomp in another spot. Sometimes the stomping would sound as though the person upstairs was marching back and forth or around in circles. Occasionally the stomping would start up again between 2:00 a.m. and 4:00 a.m. The

noise would last anywhere from 15 minutes to half an hour.

¶ 14 The petitioner also filed three affidavits of Vlad Postelnicu, an employee of Vancouver Condominium Services Ltd., the managing agent of the plaintiff. The respondent takes issue with the admissibility of significant portions of his affidavits to the extent that they are based on information and belief and constitute hearsay evidence. The petitioner submits that the evidence is not being adduced to prove the truth of what is asserted, but in effect to establish the state of the record of complaints made against the respondent and actions taken in relation to those complaints.

¶ 15 In resistance to the petitioner's application and in support of her own application the respondent has sworn five affidavits and has adduced by affidavit the evidence of Margaret Geoffrey. She also adduced evidence in the form of letters from Marie Lafreniere from suite 206 of the Palladian and Tim and Hillary Temple from suite 309 to the effect that they heard no noise emanating from Ms. Grabarczyk's unit.

¶ 16 By affidavit sworn May 15, 2006, Anna Temple, the daughter of Tim and Hillary Temple, deposed that she signed the letter on behalf of her parents, in effect misunderstanding what she was signing and attesting that suite 309 was not directly above suite 208, the respondent's suite.

¶ 17 There is evidence that Ms. Lafreniere's unit is in another building and it therefore does not appear that her evidence of an absence of noise is of relevance to this case.

¶ 18 This matter was brought before Justice Edwards on May 5, 2006, and he ordered that the respondent and Ms. Geoffrey be cross-examined on their respective affidavits. The respondent failed to attend the cross-examination originally set for May 18, 2006. Another date was set on June 16, 2006. Although Ms. Grabarczyk attended, she left after 23 minutes.

¶ 19 Ms. Geoffrey was cross-examined on her affidavit, which attested that although her unit is adjacent to the respondent's she heard no noise emanating from the respondent's unit. Under cross-examination Ms. Geoffrey conceded that she was a very heavy sleeper and under medication, that her bedroom does not share a common wall with the respondent's suite and that she would not likely hear noise from the respondent's unit if it occurred between 12:00 and 5:00 a.m. because of her heavy sleeping and the situation of her bedroom.

¶ 20 I have read through the respondent's five affidavits. They are lengthy and contain many attachments. I am satisfied that the petitioner's summary of the theory they espouse is an accurate one and reflect the essential assertions relied on by the respondent in advancing her application and resisting the petitioners. That summary reads as follows:

Over the course of these affidavits Ms. Grabarczyk develops the theory of this case that may be summarized as follows:

- (a) she is not making the noise;
- (b) the noise is being caused by hardwood flooring in other units and the wood frame structure of the building;
- (c) the noise complaints are fabricated by the strata council and the property manager as part of a conspiracy she refers to in her material interchangeably as the toilet fraud or the chain of causation;
- (d) the toilet fraud and the chain of causation are part of a retaliatory conspiracy to defraud Ms. Grabarczyk of her home and money. Ms. Grabarczyk alleges that

the toilet fraud was the cause of her mother's death in 2001 and that the present noise complaints are being made against her in retaliation for her previous complaints about minor deficiencies in her suite.

- (e) the toilet fraud and chain of causation is a conspiracy between the following parties with the strata council, the property manager and Ms. Sears at the top of the conspiracy, the public guardian and trustee, her former legal counsel Mr. David Mossop, Q.C., Legal Aid staff, Car 87 of the Vancouver Police Department, the RCMP, the court registry staff, a plumbing contractor, Coast Drop-In Centre and the Kettle Friendship Society. The complaints alleged against these various parties include conspiracy, malice, defamation, contributory negligence, libel, false pretences, malicious prosecution, sedition, perjury, theft, trespassing, kidnapping, home invasion and breach of trust.

¶ 21 I note that in addition to what is summarized in the petitioner's memorandum of argument the respondent has also included in her materials letters from her doctor, Dr. Barzelai, from the Kettle Friendship Society and from the Ministry of Human Resources attesting to an absence of any misconduct engaged in by the respondent while involved with them.

¶ 22 The "toilet fraud" allegation made by the respondent upon which in part she bases her resistance to this petition, characterizing it as part of an overall conspiracy against her involves water entering Ms. Sears' suite apparently caused by a leak in the respondent's mother's toilet line in 1998. The repairs in question were charged to the respondent's mother, a fact which Ms. Grabarczyk attributes as contributing to her mother's death in 2001.

¶ 23 The state of the respondent's belief as to the toilet fraud is relied on by the petitioner as a motive for the respondent's conduct in causing the noises complained of. The petitioner relies on further evidence of that motive in some of Ms. Grabarczyk's materials in which she expresses animosity towards Ms. Sears as the cause of her difficulties.

¶ 24 The issues before me as identified in the plaintiff's memorandum of argument are as follows:

1. Whether the respondent has contravened the strata corporation's noise by-law;
2. Whether the court should impose an injunction in the terms proposed by the strata corporation;
3. Whether Ms. Grabarczyk should be ordered to pay the fines claimed by the strata corporation;
4. Whether a claim for an injunction and a claim for unpaid fines can be joined under a petition pursuant to s. 173 of the *Strata Properties Act*; and
5. Whether the evidence in the strata manager's affidavit and paragraph 16 and 33 of Ms. Sears' are inadmissible as being hearsay.

¶ 25 The relevant provisions governing the issues read as follows:

4.1 A resident or visitor must not use a strata lot, the common property or common assets in a way that

- (a) causes a nuisance or hazard to another person,
- (b) causes unreasonable noise,
- (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

- (d) is illegal, or
- (e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.

27.2 The council must, if it determines in its discretion that a resident is in repeated contravention of any bylaws or rules of the strata corporation, levy fines and the fines so levied shall be immediately added to the strata fees for the strata lot and shall be due and payable together with the strata fees for the strata lot in the next month following such contravention.

¶ 26 Section 135 of the *Strata Properties Act* reads as follows:

- (1) The strata corporation must not
 - (a) impose a fine against a person,
 - (b) require a person to pay the costs of remedying a contravention, or
 - (c) deny a person the use of a recreational facility for a contravention of a bylaw or rule unless the strata corporation has
 - (d) received a complaint about the contravention,
 - (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
 - (f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.
- (2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1)(a), (b) or (c) to the persons referred to in subsection (1)(e) and (f).
- (3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

¶ 27 Section 171 of the *Strata Properties Act* reads as follows:

- (1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
 - (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
 - (b) the common property or common assets;
 - (c) the use or enjoyment of a strata lot;
 - (d) money owing, including money owing as a fine, under this *Act*, the regulations, the bylaws or the rules.
- (2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.
- (3) For the purposes of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter.

- (4) The authorization referred to in subsection (2) is not required for a proceeding under the *Small Claims Act* against an owner or other person to collect money owing to the strata corporation, including money owing as a fine, if the strata corporation has passed a bylaw dispensing with the need for authorization, and the terms and conditions of that bylaw are met.
- (5) All owners, except any being sued, must contribute to the expense of suing under this section.
- (6) A strata lot's share of the total contribution to the expense of suing is calculated in accordance with section 99(2) or 100(1) except that
 - (a) an owner who is being sued is not required to contribute, and
 - (b) the unit entitlement of a strata lot owned by an owner who is being sued is not used in the calculations

¶ 28 Section 173 of the *Strata Properties Act* reads as follows:

On application by the strata corporation, the Supreme Court may do one or more of the following:

- (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the regulations, the bylaws or the rules;
- (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

¶ 29 Dealing with the first issue, did the respondent contravene the noise by-law? Having read through the material adduced by both the petitioner and the respondent and considered the arguments advanced by the petitioner and by the respondent through her outline of argument, I am satisfied on a balance of probabilities that the respondent has contravened the strata corporation's noise by-law by deliberately and repeatedly making loud noises highly disruptive to Ms. Sears' entitlement to enjoy her property with a reasonable threshold of peace and quiet.

¶ 30 In electing to accept Ms. Sears' version of the events I rely on her careful documentation of extensive and repeated instances of noise emanating from the respondent's suite at hours of the day when the normal noises of living are unlikely to be heard. I also accept that in her materials the respondent has revealed anger or antipathy towards Ms. Sears for reasons which, although they may seem real to the respondent, are not based on reason. I also accept that when this petition was launched against the respondent the noises changed and decreased to some extent, reflecting a confirmation that the respondent was indeed responsible for the noises and that she exercised some control over them. I further accept as corroboration of Ms. Sears' evidence the evidence of Ms. Johnston and Ms. Hamilton and I do not find that Ms. Geoffrey's evidence or that of Ms. Temple or Ms. Lafreniere the basis for even a doubt about the cause, source or nature of the noise complained of.

¶ 31 So far as the respondent's evidence of conspiracy is concerned, it, like her antipathy towards Ms. Sears, may be rooted in her beliefs but it is not based on reason or a realistic appraisal of the evidence or facts at issue. Thus, I find her explanation of the reasons for the complaints brought against her to be fanciful and lacking in reliability and I similarly find her denials of involvement to be unreliable and I reject them.

¶ 32 On the second issue, whether the court should impose an injunction on the terms proposed by

the strata corporation, the respondent submits the court has a discretion to issue the order sought. It is her submission that there are a number of factors that militate against the court imposing an injunction.

¶ 33 Firstly, there has been a delay of some four years between giving notice of an intent to bring proceedings and in issuing the petition, that is, between December 2001 and December 2005.

¶ 34 Secondly, there is evidence that the noise situation has improved, and here the respondent relies on paragraph 33 of the affidavit of Ms. Sears. Secondly, that in 2006 it has further lessened, and here the respondent relies on paragraph 34 of the affidavit of Ms. Sears. Thirdly, the respondent relied on evidence that Ms. Sears for a period was not living in her apartment and that the Johnstons do not regularly inhabit their unit. Those are the two sources of complaint.

¶ 35 In my view, the issues raised by the respondent do not individually or collectively justify declining the order sought. The delay in bringing these proceedings has not prejudiced the respondent. She has received many warnings concerning her conduct and cannot be said to have been lured into a sense of complacency about what she was doing. If anything, the delay in proceeding against the respondent was prompted by a concern for her well-being. The delay could not, in my view, be regarded by any reasonable person as amounting to acquiescence in the conduct which has been complained of, or in giving rise to any meaningful prejudice to the respondent.

¶ 36 Although there is some evidence that the noise situation has improved, it has clearly not been resolved and it is dependant on the respondent's willingness to become and remain cooperative and abide by the terms of the strata corporation's by-law. The fact that she failed to appear at one court-ordered cross-examination on her affidavit and left after the other one before it was concluded suggests that if left unaddressed Ms. Grabarczyk's conduct may not only continue but may increase in intensity.

¶ 37 It appears on the affidavit material that Ms. Sears is back living in her unit, having moved out for a respite from the noise. She and other neighbours, either actual or potential, are entitled to enforcement of the strata's by-laws. I therefore conclude it is appropriate to issue an injunction in this case in the terms sought by the petitioner.

¶ 38 On the issue of whether a claim for unpaid fines and a claim for an injunction can be joined in a petition of this sort, the respondent relies on a distinction between s. 173 and s. 171 of the *Strata Properties Act*. She submits that s. 173 applies to applications for injunctions, which by virtue of s. 10 (1)(a) of the Rules of Court may be brought by originating application, that is a petition. She submits, however, that s. 171(1)(d) gives the strata corporation the power to sue for money owing such as a fine and that it must be brought in separate proceedings. The respondent submits that ordinarily a claim for debt must be commenced by a writ of summons in accordance with Rule 8(1) which reads:

Except where otherwise authorized by an enactment or these rules, every proceeding in the court shall be commenced by filing a writ of summons.

The respondent relies on *Royal Bank of Canada v. Martens*, [1998] B.C.J. No. 785 in support of that submission.

¶ 39 I am satisfied on the circumstances of this case that the effect of the *Strata Property Act* is to provide authorization to proceed by way of petition in claiming unpaid fines as well as in claiming an injunction. Section 173 authorizes the court on application by the strata corporation to make an order to an owner to perform a duty [subsection (a)] or any other order it considers necessary [subsection (c)]. Section 171(1)(d) authorizes the strata corporation to sue about any matter including "money owing as a

fine". The word "sue" is broad enough to include bringing a petition. See s. 1(1) of the *Strata Property Act*, the definition of sue and suit and the Rules, Rule 1(5).

¶ 40 Rule 1(5) expressly contemplates joinder of several claims in one proceeding. Here, as I see it, while there is a dispute on the facts concerning the issue of whether the respondent contravened the noise by-law, I have found that issue to be determinable on the evidence before me. In my view, the real issue with respect to the fines is whether, on a reading of s. 135(3), they relate to a continuing contravention, thus relieving the strata corporation of complying with the provisions of s. 135(1) and (2) before the imposition of serial fines or whether it is a repeated contravention requiring ongoing compliance with s. 135(1) and (2). In other words, the issue is a legal one.

¶ 41 Here the petitioner submits that based on the evidence, and particularly the evidence of Ms. Sears documenting almost nightly contraventions of the noise by-law ongoing for significant periods of time that the contravention is, in essence, continuing, not repeated, and is therefore subject to 135(3).

¶ 42 The petitioner says concerns about applying s. 135(3) to a repeated contravention rather than a continuing one can be met by identifying and relying on the unique nature and quality of the noise complaints in this case which bring it within the characterization of continuing rather than repeated.

¶ 43 In my view, while given the persistence with which the respondent pursued her campaign of noise making, to treat it as continuing for the purposes of s. 135(3) relieving against the need for notice and the right to be heard in circumstances where the contraventions are the product of ongoing but discrete transactions would extend s. 135(3) beyond what it was designed to encompass and engage serial but not continuing conduct.

¶ 44 I therefore conclude that the series of fines imposed on the respondent apart from those fines for conduct for which the respondent received particulars of the complaint in writing and a reasonable opportunity to answer the complaint including a hearing if required, are not applicable. I am satisfied that in connection with a \$50 fine imposed in relation to a contravention on February 1, 2004, and \$2,450 imposed for 49 occurrences in July, August and September 2004, adequate written notice and opportunity to be heard was given to the respondent in accordance with s. 135(1) and (2). The imposition of the other fines does not accord with the relevant sections.

¶ 45 In the result, the fines owed by the respondent to the petitioner are reduced to the sum of \$2,500.

¶ 46 As I understand it, some portion of the \$4,000 seized from the respondent under the Home Warranty payment would notionally be returned to her subject to the question of costs yet to be determined. That sum also may have an impact on her indigent status.

¶ 47 In the result, I order an injunction in the terms sought by the strata corporation. I order fines payable to the strata corporation in the amount of \$2,500 offset against the \$4,000 seized.

¶ 48 I dismiss the respondent's application to have the petition struck, and I dismiss her application for \$2,000 in respect of the "toilet fraud".

¶ 49 Insofar as the balance of the \$4,000 is concerned, I will hear from you now on costs, I think, to deal with that issue. Mr. Mendes?

[SUBMISSIONS]

¶ 50 Ms. Grabarczyk, I have made findings against you on this petition. One of the things I have found is that you have deliberately and over time made noise that -- I have found this. It is no good shaking your head. The evidence before me is clear. Your evidence does not raise even a doubt. The other people in your strata corporation are entitled to live their lives in peace and quiet without you manifesting your anger through making noise in your apartment to bother them. That is the essence of my finding here. I am trying to reduce it to its absolute simplest form.

¶ 51 I have now made it an order of the court that you not engage in such behaviour. That is of some considerable significance to you, because if you breach an order of the court you can be held in contempt of court and subject to significant fines, and in the most extreme cases, imprisonment. Now, I know you do not want either of those things to happen so it is vitally important that you obey the order of the court. The court has a duty to give effect to its orders and it has a duty to protect the rights of others according to the law of the land. The *Strata Property Act* is the law of the land.

¶ 52 Now, the fines I have ordered paid in this case have been reduced to about \$2,500 on the basis of the law. If the law required me to order that you pay the full amount of \$22,000 I would do that. My view of the law is that all you can be ordered to pay at this juncture is \$2,500, not \$22,000.

¶ 53 At this stage in the proceedings Mr. Mendes for the corporation is saying to me that you have created a great deal of cost and difficulty for the strata corporation by your conduct over the last few years and in the course of this litigation. What he is saying to me is that I should recognize the fact that you have created this difficulty through allegations of fraud which I have found not to have an air of reality to them, and that you should, in effect, have costs imposed on you in a very substantial amount.

¶ 54 So you have an opportunity now to address what I have said, but bear in mind that I have made findings of fact and I think you have to accept those.

[SUBMISSIONS]

¶ 55 I have considered the issue of costs. I am concerned at the nature of the respondent here and what is motivating her and what is behind her set of beliefs. I certainly am going to award costs to the strata corporation.

¶ 56 However, I am going to limit them to Scale 4 and I will give effect to your order setting aside the order of indigent status because it is quite clear that she does have some resources to hand, and in view of the fact that I have reduced the costs to the extent I have, she can make use of those resources if she wishes.

¶ 57 If you wish to bring an application for indigent status in other proceedings you may do so, but for the time being I have set aside the order granting you that status.

CULLEN J.

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