

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Strata Plan VR386 (The Owners) v.
Luttrell*,
2009 BCSC 1680

Date: 20091207
Docket: S086996
Registry: Vancouver

Between:

The Owners, Strata Plan VR386

Petitioner

And

**Mark Shortley Luttrell
The Crown in Right of British Columbia**

Respondents

Before: Master Taylor

Reasons for Judgment

Counsel for Petitioner: K.P. All

Counsel for Respondent, Luttrell: L.J. Grenier

No appearance for Crown

Place and Date of Hearing: Vancouver, B.C.
October 1, 2009

Further case law submitted by Petitioner: October 5, 2009

Written submissions by Respondent: October 19, 2009

Written reply by Petitioner: October 21, 2009

Place and Date of Judgment: Vancouver, B.C.
December 7, 2009

[1] This matter has its genesis in a disagreement between The Owners, Strata Plan VR386 (the “strata corporation”) and the respondent as a result of some unpaid strata fees, interest and a special levy imposed on all owners for replacement of the roof on the building comprising the strata corporation.

[2] The petition of the strata corporation seeks, *inter alia*, a declaration that the respondent, Luttrell, is in default of his obligation to pay strata fees; a declaration that the respondent is in default of his obligation to pay a special levy approved by the petitioner on January 22, 2008; a declaration that a certificate of lien registered against the respondent's strata lot on September 11, 2007 ranks in priority to every other lien or registered charge except if the other lien or charge is in favour of the Crown and is not a mortgage or other lien or charge under the *Builders Lien Act*; Judgment against the respondent in the amount of \$13,165.38 as at October 1, 2009, plus court ordered interest; an order that after 30 days from judgment sought that the petitioner be granted exclusive conduct of sale of the respondent's strata lot should any judgment granted remain unsatisfied without further applications; and all collateral relief in relation to the sale of the strata lot; plus costs.

[3] The respondent, The Crown in Right of British Columbia, is the registered charge holder of a Crown debt filed against the respondent's strata lot on August 13, 2007.

Background Facts

[4] The respondent maintains that the petitioner's methodology for calculating and billing the monthly strata maintenance fees is not proper and instead says he has tried to persuade the petitioner to adopt a five-year rolling maintenance and capital expenditure program to ensure that adequate provision is made for ongoing maintenance. This would include building up an adequate contingency reserve fund so that special levies for repairs would not necessarily be so large.

[5] The respondent also says he has an issue with the petitioner and its property management company over the policy of presenting the budget and maintenance

fees for approval at an Annual General Meeting held after the start of the financial year and then purporting to charge maintenance fees at the new rate backdated to the start of the fiscal year.

[6] In his effort to discuss these concerns with the strata council, and due to the fact that no one seemed to take his concerns seriously, the respondent intentionally withheld the payment of his maintenance fees and continued to do so until the strata council agreed to meet with him.

[7] After a warning letter had been sent to the respondent, pursuant to the requirements of the *Strata Property Act*, a lien for unpaid maintenance fees was registered against his strata lot.

[8] Eventually, a meeting was arranged between the respondent and the strata council. This meeting took place on November 28, 2007.

[9] At the meeting, it was suggested the respondent should pay the fees not in dispute and that a further meeting could be held in January, 2008, after the respondent returned from a trip.

[10] Within a day or two of the meeting, the respondent calculated his outstanding amount owing to the strata corporation and delivered a cheque to the treasurer on the evening of November 30, 2007. The cheque was in the amount of \$2,425.22 based upon the respondent's calculation of strata fees of \$346.46 per month owing for seven months.

[11] The respondent confirmed with the treasurer the treasurer's suggestion that the respondent pay what he thought he owed.

[12] The respondent formed the impression that having paid what he believed to be outstanding, the lien would be removed and that a further meeting with council would be arranged in January, 2008 on his return.

[13] On his return, the respondent discovered the minutes of the December 12, 2007 council meeting and a letter dated January 15, 2008 from Mr. Rothberg, the property manager, waiting for him.

[14] A portion of the letter addressed to the respondent from Mr. Rothberg reads as follows:

Further to your meeting with the Strata Council on November 28, 2007, Council advised that the Strata would release the lien on your Strata Lot on the condition that your account was paid, in full, for all outstanding Strata fees to the end of December, 2007, by December 31st, 2007. As such, Council acknowledges the payment you made by cheque, in the amount of \$2,425.22, on December 10, 2007. However, after reviewing your account history in detail, Council has determined that you still owe \$97.88 for outstanding Strata Fees and, therefore, did not fulfil the agreement to release the lien. In addition, there are still outstanding charges of \$408.10 for lien charges, as well as \$346.46 for January 2008 fees.

In order to resolve this matter, and release the lien on your Strata Lot, the Strata Council has advised that you must bring your account up to date by paying your outstanding Strata Fees (including January 2008) and lien charges, in the total amount of \$852.44.

[15] The respondent attended the Annual General Meeting of the strata council on January 22, 2008, but, according to the respondent, was not allowed to vote due to the arrears of \$97.88.

[16] The respondent maintains that the alleged arrears of \$97.88 arise from a dispute as to the correct amount of monthly strata fees dating back some 4 to 6 years.

[17] Due to the strata council's refusal to meet again with the respondent, the respondent resolved to withhold his strata fees in order to force the strata council to meet with him again. To date, the respondent has not paid his monthly strata fees.

[18] At the Annual General Meeting on January, 22, 2008, a resolution was passed authorizing expenditure of not greater than \$122,000 to replace the roof with funds to be raised by way of a one-time special levy of the registered owners. According to the respondent's unit entitlement of 408/10,000, his obligation was to

pay \$4,977.60 of the total or \$1,659.20 for the months of February, March, and April, 2008.

[19] The respondent took the position that, as part of the special levy resolution, it was also resolved to pay any surplus funds raised into the contingency reserve fund, (CRF) rather than distribute the surplus back to the owners, which provision contravened the *Strata Property Act* and therefore he refused to pay the special levy.

The Applicable Legislation

[20] The operative portions of the *Strata Property Act*, S.B.C. 1998, c. 43 are set out below:

Strata corporation responsible for common expenses

91 The strata corporation is responsible for the common expenses of the strata corporation.

Operating fund and contingency reserve fund

92 To meet its expenses the strata corporation must establish, and the owners must contribute, by means of strata fees, to

- (a) an operating fund for common expenses that usually occur either once a year or more often than once a year, and
- (b) a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur.

...

Expenditures from contingency reserve fund

96 The strata corporation must not spend money from the contingency reserve fund unless the expenditure is

- (a) consistent with the purposes of the fund as set out in section 92 (b), and
- (b) first approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or authorized under section 98.

Expenditures from operating fund

97 The strata corporation must not spend money from the operating fund unless the expenditure is

- (a) consistent with the purposes of the fund as set out in section 92 (a), and

(b) first approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or authorized

- (i) in the budget, or
- (ii) under section 98 or 104 (3).

Unapproved expenditures

98 (1) If a proposed expenditure has not been put forward for approval in the budget or at an annual or special general meeting, the strata corporation may only make the expenditure in accordance with this section.

(2) Subject to subsection (3), the expenditure may be made out of the operating fund if the expenditure, together with all other unapproved expenditures, whether of the same type or not, that were made under this subsection in the same fiscal year, is

- (a) less than the amount set out in the bylaws, or
- (b) if the bylaws are silent as to the amount, less than \$2 000 or 5% of the total contribution to the operating fund for the current year, whichever is less.

(3) The expenditure may be made out of the operating fund or contingency reserve fund if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise.

(4) A bylaw setting out an amount for the purposes of subsection (2) (a) may set out further conditions for, or limitations on, any expenditures under that provision.

(5) Any expenditure under subsection (3) must not exceed the minimum amount needed to ensure safety or prevent significant loss or damage.

(6) The strata corporation must inform owners as soon as feasible about any expenditure made under subsection (3).

Division 2 — Contribution to Expenses

Calculating strata fees

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:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$

Change to basis for calculation of 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.

...

Budget surpluses and deficits

105 (1) Subject to section 14, contributions to the operating fund which are not required to meet operating expenses accruing during the fiscal year to which the budget relates must be dealt with in one or more of the following ways, unless the strata corporation determines otherwise by a resolution passed by a 3/4 vote at an annual or special general meeting:

- (a) transferred into the contingency reserve fund;
- (b) carried forward as part of the operating fund, as a surplus;
- (c) used to reduce the total contribution to the next fiscal year's operating fund.

(2) If operating expenses exceed the total contribution to the operating fund, the deficit must be eliminated during the next fiscal year.

...

Division 4 — Special Levies and User Fees

Special levy

108 (1) The strata corporation may raise money from the owners by means of a special levy.

(2) The strata corporation must calculate each strata lot's share of a special levy

- (a) in accordance with section 99, 100 or 195, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
- (b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.

(3) The resolution to approve a special levy must set out all of the following:

- (a) the purpose of the levy;
- (b) the total amount of the levy;
- (c) the method used to determine each strata lot's share of the levy;
- (d) the amount of each strata lot's share of the levy;

(e) the date by which the levy is to be paid or, if the levy is payable in installments, the dates by which the installments are to be paid.

(4) The strata corporation must

(a) use the money collected for the purpose set out in the resolution, and

(b) inform owners about the expenditure of the money collected.

(5) If the amount collected exceeds that required, or for any other reason is not fully used for the purpose set out in the resolution, the strata corporation must return the money to the owners in amounts proportional to their contributions.

(6) Despite subsection (5), if no owner is entitled to receive more than \$100 in total under subsection (5), the strata corporation may deposit the excess in the contingency reserve fund.

Issues

[21] Whether the respondent is within his rights to withhold his monthly strata fee assessment because the strata council refused to meet with him.

[22] Whether the respondent is correct when he says any surplus funds raised were incorrectly paid into the contingency reserve fund rather than distributing the surplus back to the owners, and, in any event, whether he is correct in withholding his portion of the special levy.

[23] Whether a certificate of lien registered against the respondent's property on September 11, 2007 is still in effect and therefore ranks in priority to any other charges.

Discussion

1. Whether the respondent is within his rights to withhold his monthly strata fee assessment because the strata council refused to meet with him.

[24] The history of the relationship between the parties is succinctly set out in the affidavit of the respondent, sworn July 6, 2009, where he says starting at paragraph 3:

3. For many years I have been concerned about the petitioner's methodology for calculating and billing the monthly strata maintenance fees. In particular I have tried to persuade the petitioner to adopt a five year rolling maintenance and capital expenditure programme to ensure that adequate provision is made for ongoing maintenance, including building up an adequate contingency reserve fund, so that there are no nasty surprises, such as special levies for repairs that have suddenly become essential.

4. I have also had an issue with the petitioner and its property management company over the policy of presenting the budget and maintenance fees for approval at an Annual General Meeting held after the start of the financial year and then purporting to charge maintenance fees at the new rate backdated to the start of the fiscal year.

5. My efforts to discuss these matters with the petitioner's strata council have fallen on deaf ears. The only way in which it appeared I could get the Petitioner's attention was to withhold my maintenance fees. I therefore decided to withhold my fees until the strata council was agreeable to meeting with me.

6. I admit that a lien was filed against my unit for unpaid fees, after a warning letter had been sent.

[25] There appears to have been an agreement between the parties at their meeting on November 28, 2007 to the effect that the respondent pay the fees not in dispute pending the further meeting. Accordingly, he did pay what he thought to be his outstanding strata fees in the amount of \$2,425.22, but was then confronted with the unpaid portion of \$97.88 dating back some 4 to 6 years as well as his January strata fees and outstanding lien charges all totalling \$852.44. Thus, the strata council refused to meet with him further.

[26] To say that the position taken by the strata council in the absence of the respondent was petty is an understatement. Rather than try to break the logjam between themselves and the respondent, the council furthered the dispute between the two by insisting on payment of less than \$100.00 which apparently was in dispute and therefore contrary to the agreement. It is obvious that members of council wanted no further communication with the respondent and were not willing to consider his representations.

[27] However, given the position taken by council, this matter could easily have been resolved had the respondent paid the small amount requested by signifying it was paid "under protest". Rather, the respondent became just as petty as the

members of council and refused to pay his strata fees. I am unaware of any provisions in the *Strata Property Act* which permits this course of action.

[28] Instead of invoking one or more provisions of the *Act* or bylaws to assist himself in his dispute with the council, the respondent withheld payment of his strata fees contrary to section 99 of the *Act* and section 1 of the statutory bylaws. Accordingly, I must find the respondent in default of his obligation to pay strata fees as sought in the petition.

2. Whether the respondent is correct in withholding his portion of the special levy in order to protest the payment of the special levy surplus into the contingency reserve fund.

[29] The respondent sets out his position with respect to the excess raised by way of special levy in paragraph 18 of his affidavit sworn July 6, 2009:

18. At the AGM [Annual General Meeting], a special levy was approved in the total amount of \$122,000 to pay for roofing repairs. As part of the resolution with respect to the special levy, there was approval to pay any surplus funds raised into the contingency reserve fund, rather than distribute the surplus back to the owners. As I understood that such a provision contravened the *Strata Property Act*, I refused to pay the special levy.

[30] As I understand part of the respondent's concerns with respect to the management of the strata's funding of various expenses, he is worried that sufficient monies have not been allocated to the contingency reserve fund such that special levies wouldn't necessarily be too large when incurred. However, he opposes the procedure used by the strata corporation to pay excess funds from the special levy into the contingency reserve fund.

[31] This is not to say that what was proposed for the surplus raised by the special levy was legal. Sections 108(5) and (6) require that any excess monies raised by way of special levy be returned to the owners in amounts proportionate to their contributions unless no owner is entitled to receive more than \$100 reimbursement, in which case the excess may be deposited to the CRF.

[32] At the Annual General Meeting of the strata corporation on January 22, 2008, the special levy was passed unanimously with the proviso that any extra money would be transferred to the CRF.

[33] The roof repairs cost \$7,098.50 less than the budgeted amount. Thus, every one of the 26 strata lots would be entitled to a refund in excess of \$100 — the smallest being \$184.56, and the largest, \$370.54.

[34] The affidavit of C. Keren Freed, the president of the strata council, sworn July 6, 2009, provides a hint into the thinking of the members of council:

...

5. The roof repairs cost a total of \$7,098.50 less than the budgeted amount... Pursuant to the wording of the Special Levy, however, this money was not refunded to each owner, but transferred to the CRF of the Strata Corporation.

6. The extra money raised by the Special Levy and then transferred to the CRF has been used for further upgrades to the building subsequent to the roof repairs, including interior painting and lobby improvements.

7. The Strata Council believes that most of the owners would not desire a refund now when this would deplete the CRF and possibly require higher strata fees next year.

8. If this is found to be an improper use of the extra money raised by the Special Levy, if the result will avoid increasing the strata fees, the Strata Council will propose another special levy at the next annual general meeting in the exact dollar amount of \$7,098.50, being the excess from the roof repairs, to be placed into the contingency reserve fund. If passed, there will then be no need to refund each owner the amount of the excess from the Special Levy, as it will go straight back into the CRF.

[35] In my view, the excess monies placed in the CRF and then expended on painting and improvements does not meet the test set out in s. 98(3) where an expenditure out of the CRF is required to be made on reasonable grounds that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage.

[36] Thus, even if as stated in the affidavit of Keren Freed that the strata council will seek to pass a retroactive special levy to be placed to the CRF, it is my view that this process would result in a nullity simply because the council would be unable to

satisfy the test in s. 98(3). As well, s. 92 provides for how the CRF is to be funded and s. 93 provides that the strata corporation must establish, and the owners must contribute, by means of strata fees to a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur. (my emphasis)

[37] It is obvious that public policy requires a methodology for resolving issues among owners in a strata corporation. That methodology is set out in the *Strata Property Act*. Without reference to or use of that statute, there would exist a form of anarchy in a strata building and it would therefore be unlikely that the essential repairs and maintenance would ever get done. That the majority make the rules is an accepted way in which our democracy functions. In the case of the *Strata Property Act* that majority must be 75% of all the eligible votes.

[38] In the case of Mr. Luttrell, he has opted to disenfranchise himself by virtue of his refusal to pay his strata fees or his portion of the special levy, or has chosen not to follow the provisions of the *Act* for resolution of disputes.

[39] Thus, while I have found that the decision not to refund the excess to each strata lot owner of those monies raised by special levy is contrary to the statute, I have no other option but to declare the respondent in default of his obligation to pay his proportionate share of the special levy approved by the owners on January 22, 2008.

3. Whether the lien filed against the respondent's strata lot on September 11, 2007 is valid, and if so, whether it ranks in priority to any other lien or registered charges.

[40] Section 116 of the *Strata Property Act* is the governing provision with respect to certificates of lien. I set out all of section 116 below.

116 (1) The strata corporation may register a lien against an owner's strata lot by registering in the land title office a Certificate of Lien in the prescribed form if the owner fails to pay the strata corporation any of the following with respect to that strata lot:

- (a) strata fees;

- (b) a special levy;
- (c) a reimbursement of the cost of work referred to in section 85;
- (d) the strata lot's share of a judgment against the strata corporation;
- (e) [Repealed 1999-21-25.]

(2) The strata corporation may register a lien against any strata lot, but only one strata lot, owned by an owner as owner developer, by registering in the land title office a Certificate of Lien in the prescribed form if the owner developer fails to pay an amount payable to the strata corporation under section 14 (4) or (5), 17 (b) or 20 (3).

(3) Subsections (1) and (2) do not apply if

- (a) the amount owing has, under section 114, been paid into court or to the strata corporation in trust,
- (b) arrangements satisfactory to the strata corporation have been made to pay the money owing, or
- (c) the amount owing is in respect of a fine or the costs of remedying a contravention.

(4) On registration the certificate creates a lien against the owner's strata lot in favour of the strata corporation for the amount owing.

(5) The strata corporation's lien ranks in priority to every other lien or registered charge except

- (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation,
- (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or
- (c) if the other lien or charge is made under the *Builders Lien Act*.

(6) On receiving the amount owing, the strata corporation must within one week remove the lien by registering in the land title office an Acknowledgment of Payment in the prescribed form.

[41] Section 116(3)(c) specifically prohibits the registration of a lien if the amount owing is in respect of a fine, otherwise a strata corporation *may* register a lien if the owner fails to pay four specific matters as set out in subsections (a) to (d) inclusive. Accordingly, and in my view, any certificate filed which includes amounts for fines levied against an owner or strata lot is invalid. (my emphasis)

[42] There are also other procedures as set out in section 114 of the *Act* where a debt to the strata corporation is disputed. That section provides for the payment into court or payment to the strata corporation in trust until the matter is resolved.

[43] It has been suggested to me by counsel for the owners that the case of *The Owners Strata Plan VR386 v. Chu* (unreported) Vancouver Registry No. L051770 is authority for the proposition that a lien is not invalid simply because the amount as claimed in the Certificate of Lien contains fines. I respectfully disagree.

[44] At paragraph 33 of the *Chu* decision, Drost, J. drew a distinction between the amount claimed in the certificate and the amount owing. There is no such distinction in the Form G Certificate prescribed by the *Act*. Further, the strata corporation must certify that the sum stated is owed pursuant to section 116 of the *Act*.

[45] It appears that the form and content of Form G were not brought to the attention of Drost, J. in *Chu* and thus that case cannot be treated as authority for the proposition that a Certificate can be registered for any amount, just so long as the owner owes something for strata fees.

[46] In summary therefore, I find the previous certificate invalid because it contained the calculation of fines and other matters not specifically allowed in s. 116(1). It therefore follows that it does not rank in priority to any other charges, liens or mortgages. However, I do find that as of the 1st day of October, 2009, the strata corporation is entitled to a Certificate for unpaid strata fees and levies in the amount of \$11,444.38. The sums owing by Luttrell to the strata corporation should be paid forthwith. In the event they are not, the strata corporation is entitled to file further Certificates on a monthly basis for any strata fees or levies which continue to be unpaid.

[47] The petitioner's application for judgment against the respondent is adjourned generally and the petitioner is given leave to renew the application for a judgment against the respondent if the matter of fines and costs cannot be agreed to between the parties within 14 days of the date of this judgment. Should the parties be unable

to come to an agreement, the whole amount in dispute must be paid in trust to the strata corporation pursuant to section 114(1)(b) of the *Strata Property Act* pending determination of what fines and costs are allowable.

[48] The respondent made some representations and submissions regarding the backdating of strata fees after the Annual General Meeting and the date from which the strata fees are calculated in relation to when the Annual General Meeting is held. I find it is not necessary for me to determine those issues, and, in any event, they were not properly before me as a motion before the court. Should the respondent wish a finding on these issues, he is invited to seek a remedy by using the procedural processes of the *Act* as I mentioned earlier, or make an application to the court for a declaration or an order.

[49] Unless there is something of which I am unaware regarding costs, the petitioner shall have 2/3 of its taxable costs and disbursements.

"Master Taylor"