IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd.,* 2015 BCSC 2273

Date: 20151204
Docket: 108032
Registry: Kelowna

Between:

The Owners, Strata Plan KAS 3549

Petitioner

And

0738039 B.C. Ltd.

Respondent

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Petitioner:	G.S. Hamilton
Counsel for the Respondent:	J.J. Klassen
Place and Date of Trial/Hearing:	Kelowna, B.C. November 20, 2015
Place and Date of Judgment:	Kelowna, B.C. December 4, 2015

Introduction

[1] The question in this case is whether subsections 17 (a) and (b) of the *Strata Property Act*, S.B.C. 1998, c. 43 [*Act*], should be read conjunctively, so that the event stipulated in subsection (a) is a condition precedent to the levying of a penalty under subsection (b), or whether they should be read disjunctively, so that the penalty will be levied even if the event contemplated by subsection (a) does not occur.

[2] Sections 16 and 17 of the *Act* read as follows:

> First annual general meeting to be held by owner developer
>
> 16 (1) The owner developer must hold the first annual general meeting during the 6 week period that begins on the earlier of
>
> (a) the date on which 50% plus one of the strata lots have been conveyed to purchasers, and
>
> (b) the date that is 9 months after the date of the first conveyance of a strata lot to a purchaser.
>
> (2) The owner developer must give notice of the meeting in accordance with section 45 and must include with the notice the budget and financial statement referred to in section 21.
>
> Owners may hold first annual general meeting
>
> 17 If the owner developer does not hold the first annual general meeting as required by section 16,
>
> (a) an owner may hold the first annual general meeting after giving notice in accordance with section 45 to the persons referred to in section 45 and to the owner developer, and
>
> (b) the owner developer must pay to the strata corporation an amount calculated according to the regulations.

[3] Section 16 of the *Act* imposes a duty upon a developer to call the first AGM for the strata council for its development and requires that the meeting be held within a certain period of time. Section 17 comes into play if the developer does not comply with the s. 16 deadline. Section 17(a) gives an owner authority he would not otherwise have to call the first AGM. Section 17(b) imposes a penalty upon the developer for its delay.

[4] The petitioner strata corporation seeks a finding that subsections 17(a) and (b) are independent. For its part, the respondent developer argues that they must be read together so that subsection (a) must be satisfied before subsection (b) takes effect.

[5] A penalty against the respondent of some $198,000 hangs on the outcome of these opposing positions.

Background

[6] The petitioner is a strata corporation. The petitioner governs a six lot bare land strata development located in Keremeos, B.C. The development is known as Sunridge Estates.

[7] The respondent is the strata's developer.

[8] The respondent started development of Sunridge Estates in 2008. It sold the first strata lot to Mr. and Mrs. Anderson on May 31, 2010. The next to buy a lot were Mr. and Mrs. Pleasants on April 25, 2012. Then Ms. Freeman bought a lot on November 27, 2013, and on August 28, 2014, Ms. Gerard and Mr. Prince bought their lot. Those sales account for four lots. The respondent owns the remaining two lots.

[9] The first lot was sold on May 31, 2010. Section 16 of the *Act* required that the respondent call the first AGM by April 11, 2011. The respondent did not comply with that deadline. In fact, it was not until February 28, 2015, that the respondent called the first AGM. The explanation for the delay appears to be that the respondent mistakenly believed that s. 16 gave it the option of calling a meeting as late as nine months plus six weeks after the sale of 50 percent plus one of the strata lots.

[10] After the first AGM, the strata council decided to pursue the respondent for payment of the penalty established by s. 17(b) of the *Act*. Given the lateness of the AGM, that penalty now amounts to $198,000. The petitioner has registered a lien for the amount claimed against the respondent's title to the two remaining unsold lots.

[11] Each buyer of a lot at Sunridge Estates was aware that no strata council had been formed as of their purchase. They were aware that no AGM had been called. They knew that the respondent was operating the strata development's business absent direction from a strata council. They were aware that they, at least, were not paying strata fees. At all material times before the first AGM, the respondent funded all of the strata's expenses.

[12] There is no evidence that the respondent mishandled the development prior to the first AGM. Neither is there evidence that grounds exist for a claim by the owners or the strata corporation against the respondent based upon malfeasance or negligence.

Issue

[13] Here, the s. 16 deadline for the first AGM passed without the meeting being called, and it was the developer rather than an owner who called the first AGM. These facts give rise to the issue in this case and the question is this: does the s. 17(b) penalty accrue no matter who calls the first late AGM or does the penalty accrue only if an owner exercises his power under s. 17(a) to call the first AGM?

Parties' Positions

Petitioner

[14] The petitioner says that s. 17(a) and (b) stand alone and should be read disjunctively. It points out that s. 17 lies in Part 3 of the *Act*, and argues Part 3 has to do with protection of the interests of owners while their affairs are in the hands of the developer, and that the provisions of Part 3 are designed to convey control of the strata development to its owners on a strict and clearly defined timetable. The petitioner says that if the overarching purpose of Part 3 is to control a developer's behavior then, if the developer should fail to comply with one of those controls, vis: calling a meeting on time as required by s. 16, the developer ought to be liable for that failure and must pay the penalty under s. 17(b).

[15] The petitioner maintains that the key to the proper interpretation of s. 17 is to keep consumer protection in the forefront of one's mind and to not be distracted by irrelevancies such as the identity of the caller of the first AGM.

Respondent

[16] The respondent says that s. 17(a) and (b) should be read conjunctively so that the calling of the first AGM by an owner is a condition precedent to the levying of a penalty against the developer.

[17] The respondent points out that the heading for s. 17 specifically refers to an owner calling the meeting. That, the respondent says, defines the circumstance in which the powers and obligations set out in s. 17 come into play.

[18] Further, the respondent says that if the s. 17(b) penalty is intended to punish a developer for simply failing to comply with the deadline set out in s. 16, then it would have been more logical to make the penalty part of s. 16 rather than tagging it on to the end of s. 17.

[19] The respondent also argues that the petitioner is estopped from pursuing the respondent for the penalty. The estoppel arises out of the owners' acknowledgment when they bought their lots that an AGM had not been called. The respondent says that the respondent relied on the owners' acquiescence and that it would not be equitable for the court to allow the owners to pursue the respondent for payment of the penalty.

[20] The respondent also argues that a two month portion of the delay period is statute barred by virtue of the *Limitation Act*, S.B.C. 2012, c. 13.

The Law

[21] Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 provides as follows:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[22] The leading text on statutory interpretation is Driedger's *The Construction of Statutes*, 2d ed. 1983. This passage appears at page 87:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[23] The B.C. Court of Appeal has recently commented on the correct approach when interpreting the *Strata Property Act*. In *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2011 BCCA 421, the court was asked to interpret ss. 217 and 227 of Part 13 of the *Act*. The court said:

> [13] The words of a section to be interpreted must first, therefore, be understood in the context of the *Act* as a whole. In addition, in this case, attention must be paid to the fact that both ss. 217 and 227 are contained in Part 13 of the *Strata Property Act*, which deals specifically with phased strata plans.
>
> [14] As well, the words of an Act are to be read or understood “in their grammatical and ordinary sense”. That is, words must be given their plain meaning, considered in the context of the legislation as a whole.
>
> [15] Finally, the plain meaning of the words, as read in their statutory context, must not conflict with the overall design and purpose of the legislation, nor with the intention of Parliament or the Legislature as it appears from the language of the Act.
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> [16] In general terms, the purpose of the *Strata Property Act* is to lay down clear rules for the creation, registration and transfer of strata titles, and for the delineation of the respective rights and responsibilities of those who develop strata plans, and those who purchase or who may subsequently wish to transfer a strata property.
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> [17] Part 13 of the *Act* contains provisions specifically tailored to strata properties that are developed in stages, or “phases”. For present purposes, Part 13 allocates responsibility for expenses attributable to “common facilities” as between owners of strata lots in a phased development that is only partially completed at the time they become owners, and the owner developer of the phased development, as collectively representing all strata lots in the completed development.

[24] The court may refer to headings in legislation in order to give context to the provision under consideration. In *Jacobs v. Laumaillet*, 2010 BCSC 1229, Butler, J. wrote:

> [31] Section 11 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that a heading to a provision is not part of an enactment and must be

> considered to have been added editorially or for convenience of reference only. Notwithstanding this provision, courts have favoured the view that for the purposes of statutory interpretation, headings should be read and relied on like any other contextual feature. Headings are a valid indicator of legislative intent and may be taken into account on interpretation: *Ruth Sullivan, Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 392-397; *Arts Umbrella v. British Columbia (Assessor Of Area 9 - Vancouver*), 2007 BCCA 45 at para. 3.

Discussion

[25] I will deal first with the respondent's positions on estoppel and the *Limitation Act*. I find that the estoppel argument cannot succeed because the evidence did not establish that the individual owners were aware that they had the right they are said to have waived. That is to say: on the evidence in this matter, I cannot find that the owners knew that the respondent was required to call the first AGM nine months plus six weeks after the Andersons bought the first lot in Sunridge Estates. If the owners did not know that they had a right to have the first AGM within that time frame, how can it be said that they knew they were giving up that right by allowing the date to slide by? I do not believe that the equitable principle of estoppel can arise from an unwitting acquiescence. Further, any understanding that the owners may have had about when the first AGM should be held was given to them by the respondent and what the respondent told them was plainly wrong. The respondent's advice was that the first AGM need not be held until more than 50 percent of the lots were sold. In fact, the first AGM had to be held nine months plus six weeks after the first lot was sold. The respondent mistakenly focused on the wrong triggering event. It cannot be that the respondent is entitled to the protection of estoppel when the acquiescence on which it relies is the product of its own misrepresentation.

[26] There is no merit to the respondent's position on the *Limitation Act*. I find that to be so because the *Limitation Act* applies to a "claim to remedy an injury, loss or damage that occurred as a result of an act or omission": *Limitation Act*, s. 1. The petitioner's claim is for payment of a penalty - it is not a claim to remedy an injury, loss, or damage.

[27] Turning to the main issue, the interpretation of s. 17, I am persuaded that there is merit in the positions taken by both parties. The petitioner is correct when it says that s. 17 lies in Part 3 of the *Act* and that the focus of Part 3 is the protection of the owners ahead of the formation of their strata council. It is during that time that the owners' affairs are very much in the hands of and under the control of the developer. The provisions of Part 3 exist to limit the scope of the developer's authority during that period. Those provisions also set up what amounts to a number of fiduciary duties owed by the developer to existing and future owners. More specifically, the provisions in s. 16 were clearly intended to ensure that the developer acts swiftly to transfer authority over the strata to the strata corporation. That transfer is effected by the calling and convening of the council's first AGM.

[28] If the over-arching purpose of Part 3 is to strictly control a developer's behavior vis-à-vis the owners, then it makes some sense that s. 17(b) should be read to penalize a developer who fails to comply with one of those controls and that the penalty should be imposed on the basis of that failure as opposed to turning on whether it is the developer or an owner who calls the first AGM.

[29] On the other hand, there is merit in the respondent's argument that if the penalty is intended to punish a laggard developer no matter who calls the first AGM, then the logical place for the penalty provision is at the end of s. 16. After all, s. 16 defines the deadline; appending the penalty provision to s. 16 as s. 16(3) would have obviated any ambiguity in its interpretation: miss the deadline - pay the penalty.

[30] I think it unlikely that when it passed ss. 16 and 17 the Legislature intended to set up an ambiguous situation.

[31] Further, s. 17 is clearly designed to remedy a particular and specific circumstance. That circumstance is a failure by a developer to call the first AGM on time. Absent the power given under s. 17(a) an owner could not force the devolution of power from the defaulting developer to the strata council. It seems to me logical that the developer should be held to account to the strata corporation for the developer's dereliction of duty. On the other hand, if it is the developer who calls the

first meeting, albeit late, it cannot be said that the developer has imposed a burden on the strata corporation that it would not otherwise have had to bear.

[32] For these reasons I am persuaded that the word 'and' between subsections 17(a) and (b) is meant to cause the two to be read together as one. I find that it would do no violence to the overall purpose of Part 3 if the penalty is imposed only in the case of an owner calling the first AGM.

[33] In this case an owner was not put to the trouble of calling the first AGM. For that reason s. 17(a) does not apply and because it does not apply, neither does s. 17(b). The respondent is therefore not liable to pay the s. 17(b) penalty.

Conclusion

[34] The petition must be dismissed. An order will go cancelling the registration of the petitioner's liens.

[35] Subject to an application for a different order brought within 30 days of the release of these reasons, the respondent shall have its costs on Scale B.

“Rogers J.”