

Citation: Valana v. Law et al
2005 BCPC 0587

Date: 20051213
File No: 19238
Registry: Richmond

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

PASQUALE VALANA

CLAIMANT

AND:

TIM LAW, KAM LAW and ANJI LEU

DEFENDANTS

AND:

OWNERS OF STRATA PLAN LMS 2524 PARC SAVANNAH

THIRD PARTY

**RULING ON APPLICATION
OF THE
HONOURABLE JUDGE P. CHEN**

Counsel for the Claimant:

R.J. Wilinofsky

Counsel for the Defendant:

Camilla karlicki

Counsel for Third Party:

Chelsea McKay

Place of Hearing:

Richmond, B.C.

Date of Hearing:

November 1st, 2005

Date of Judgment:

December 13, 2005

[1] The Claimant and the Defendants are both owners of strata lots in the same strata corporation – a townhouse development. The Claimant has sued the Defendants for damages arising from injuries suffered by the Claimant’s dog as a result of an alleged mauling by the Defendant’s dog. The altercation between the two dogs took place in the vicinity of the Defendants’ fence. The Claimant’s dog was allegedly on common property outside of the fence while the Defendants’ dog was in the Defendants’ limited common property – his yard. The Defendants have third-partied the Strata Corporation, claiming that if they are liable to the Claimant, then the Strata Corporation is liable to the Defendants for any loss they may sustain, because of its failure to maintain an adequate fence.

[2] This Application by the Strata Corporation to dismiss the Third Party Claim is in two parts. Firstly, the Strata Corporation seeks a ruling that the Provincial Court has no jurisdiction to hear the Third Party Claim. Secondly, the Strata Corporation seeks a ruling that there are no facts that could give rise to any liability on their part.

[3] Counsel for the Strata Corporation spoke to the first issue of jurisdiction only, and that is the ruling that is being sought at this time.

[4] The jurisdiction of the Provincial Court is defined in the **Provincial Court Act**.

“2(3) The court and every judge have jurisdiction throughout British Columbia to exercise all the power and perform all the duties conferred or imposed on a judge of the Provincial Court, a magistrate, justice or 2 or more justices sitting together, by or under an enactment of British Columbia or of Canada.”

[5] Clearly the Provincial Court has jurisdiction to hear claims in contract or negligence subject to our monetary limit (recently increased to \$25,000.00) and subject to limits imposed by other statutes.

[6] What limitations to the Provincial Court’s jurisdiction are found in the **Strata Property Act**?

[7] In **David v. Vancouver Condominium Services Ltd.** [1999] B.C.J. No. 1869 and in **Owners SPLMS 2604 v. Biamonti** [1999] B.C.J. No. 1267, both decisions of our court, it was held that the Provincial Court had jurisdiction to hear certain disputes between strata property owners and their strata corporations, depending on the nature of the dispute and the nature of the remedy sought. Both of those cases examined the limitations on this court’s jurisdiction that were found in the former **Condominium Act** which has now been repealed and replaced by the **Strata Property Act**.

[8] In the **Condominium Act**, “court” was defined as the Supreme Court of British Columbia.

[9] In **Biamonte**, a strata corporation claimed against Biamonte, a strata lot owner, for debt arising from unpaid maintenance fees, NSF fees, and special assessment fees as well as a fee for filing a certificate against the defendant’s strata lot. Judge Bruce found that, although “court” was defined in the **Condominium Act** as the Supreme Court of British Columbia, Section 35 of the **Act** permitted the strata corporation to recover monthly contributions and moneys expended by the strata corporation in a “court of competent jurisdiction”. Judge Bruce held that the term “court of competent jurisdiction” in reference to this category of disputes was a broader term which denoted both the Provincial Court and the Supreme Court.

[10] In **David**, Judge Dhillon of our court followed the reasoning of Bruce, J. in **Biamonte**, stating:

“I accept the foregoing as the correct analysis. Thus, if the matter is one which falls within the jurisdiction of the Provincial Court, and is not otherwise expressly

reserved to the Supreme Court under the Condominium Act, the Provincial Court has the jurisdiction to adjudicate it.”

[11] The **Strata Property Act**, successor to the **Condominium Act**, refers specifically to the Supreme Court in a number of sections.

[12] Section 52(2)(b) gives the Supreme Court jurisdiction over applications for relief from the requirement for a unanimous vote.

[13] Sections 58(1) gives the Supreme Court the power to appoint a person to vote at a meeting where there is no person to vote in respect of a strata lot.

[14] Section 59(6) gives the Supreme Court the power to relieve a Strata Corporation from the consequences of an inaccurate information certificate.

[15] Sections 89(1), 90(1) and 117(1) give the Supreme Court jurisdiction with respect to orders relating to builders liens.

[16] Section 160(1) gives the Supreme Court jurisdiction in respect of applications by a strata corporation for orders relating to a strata corporation’s decision not to repair or replace damaged property.

[17] Section 164 gives the Supreme Court jurisdiction to make orders on applications by owners or tenants of strata lots seeking relief from significantly unfair actions by a strata corporation or by persons holding 50% or more of the votes at an annual or special general meeting.

[18] Section 165 gives the Supreme Court the power, on application by owners, tenants or mortgagees of strata lots, to order a strata corporation to perform duties required of it under the **Act**, regulations, bylaws or rules, or to stop contravening the same, and to make any other order the court considers necessary to ensure the strata corporation’s compliance with the same.

[19] Section 173 gives the Supreme Court the power to order an owner, tenant or other person to perform a duty required of it under the **Act**, regulations, bylaws or rules, or to stop contravening the same and to make any other order it considers necessary to ensure the owner, tenant or other person’s compliance with the same.

[20] Section 174(1) gives the Supreme Court the power to order the appointment of an administrator to perform the duties of a strata corporation.

[21] Sections 179, 188, 189 all provide the Supreme Court jurisdiction with respect to appointment of arbitrators under the **Act**, appeals from arbitrator’s decisions and filing of arbitrator’s decisions as orders of the court.

[22] Sections 208 and 209 give the Supreme Court jurisdiction, on application by a leasehold landlord in respect of a leasehold strata plan, to order a strata corporation to perform the duties required of it under the **Act**, to maintain insurance, to repair the common property and to require the leasehold tenants to comply with the **Act**, the regulations, the bylaws and rules and any restrictions imposed by the leasehold landlord that are filed at the Land Title Office.

[23] Sections 226, 232, 233, 235 and 236 all relate to phased strata plans and give the Supreme Court jurisdiction to make the following orders:

Section 226; for release of posted security in respect of common facilities,

Section 232; ordering an approving officer to grant extension of time in respect to election to proceed with the next phase,

Section 233; ordering an owner/developer to post security for its share of expenses in relation to the common facilities,

Section 235; orders relating to expenses attributable to the common facilities where the owner/developer elects not to proceed with the next phase of the plan,

Section 236; orders to complete a phase by a set date.

[24] Section 246 gives the Supreme Court the power to make orders amending the Schedule of Unit Entitlement to accurately reflect the habitable area or square footage of a strata lot.

[25] Section 279 gives the Supreme Court the power to make orders confirming the appointment of a liquidator and orders vesting strata corporation land in a liquidator. Section 250 requires the registrar to endorse all such orders in the general index of the strata corporation.

[26] Sections 284 and 285 give the Supreme Court the power to make orders regarding the winding up of a strata corporation.

[27] I accept that in all of the areas described in the sections of the **Strata Property Act** noted above, the Supreme Court has exclusive jurisdiction.

[28] Unlike the **Condominium Act**, “court” is no longer a defined term in the **Strata Property Act**. It would appear that the removal of the definition of “court” as the Supreme Court of British Columbia has necessitated these numerous specific references in the **Strata Property Act** to that court.

[29] In my view, the removal of the definition of “court” in the **Strata Property Act** as the Supreme Court of British Columbia, denotes an intention of the legislature to be less restrictive of the choice of court in respect of disputes involving strata property.

[30] In the former **Condominium Act**, any reference to “court” denoted the Supreme Court. The Provincial Court had no jurisdiction except where the **Act** used broader language to describe the court, or where the Provincial Court was specifically referred to.

[31] Because “court” is no longer a defined term in the **Strata Property Act**, references to “court” in that **Act** include both the Supreme Court and the Provincial Court, except where jurisdiction is specifically restricted to one court by the language of the **Act** or by the monetary limits to the Provincial Court’s jurisdiction.

[32] The issue that remains is whether this third party claim falls within any of those areas expressly reserved by the **Strata Property Act** to the jurisdiction of the Supreme Court. At this point, it is useful to re-examine some of those sections of the **Act** described above.

[33] Part 10 of the **Strata Property Act** governs “Legal Proceedings and Arbitration”. Division 1 of Part 10 – sections 163 to 169 - governs “Suits Against the Strata Corporation”.

[34] Section 163 provides that:

“(1) *The strata corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the strata corporation.*

(2) *An owner may sue the strata corporation.”*

[35] Section 164 gives exclusive jurisdiction to the Supreme Court to make orders to prevent or remedy significantly unfair actions or threatened actions by the strata corporation or a significantly unfair exercise of voting rights by a person holding 50% or more of the votes at an annual or special general meeting.

[36] Section 165 gives exclusive jurisdiction to the Supreme Court to order a strata corporation to perform a duty or to stop contravening the **Act**, regulations, bylaws or rules, and to make any other orders to give effect to such orders.

[37] In my view, Sections 164 and 165 do not exhaustively describe the entire range of lawsuits that a strata lot owner may launch against a strata corporation. In my view, all causes of action against a strata corporation by a strata lot owner that fall outside of sections 164 and 165 may be pursued in either Provincial Court or Supreme Court, subject to monetary and other limits to the Provincial Court's jurisdiction. These would include actions in both tort and contract.

[38] Division 2 of Part 10 of the **Act** – Sections 170 to 173 – governs “Suits by a Strata Corporation”. These sections contain one of the few references in the **Act** to the Provincial Court of British Columbia.

[39] Section 171(2) requires that before a strata corporation can sue as a representative of all owners, except any who are being sued, authorization by resolution passed at an annual or special general meeting passed by a $\frac{3}{4}$ vote must first be obtained. Section 171(4) makes an exception to 171(2) and reads:

“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 the bylaw are met.”

[40] The only other references in the **Strata Property Act** to the Provincial Court are found in Subsections 189(2) and (3). These subsections provide for arbitrator's awards that are within the Provincial Court's monetary jurisdiction to be filed in Provincial Court and enforced as though they were orders of the Provincial Court.

[41] In my view, these sections of the **Strata Property Act** referring specifically to the Provincial Court were never intended to define or limit the areas where the Provincial Court has jurisdiction and should not be read restrictively.

[42] In fact, it would appear from the language of Section 171(4) that the jurisdiction of the Provincial Court over lawsuits by a strata corporation suing on behalf of its owners – including lawsuits against strata lot owners - is an assumed fact.

[43] That same assumption should apply, in my view, to claims by strata lot owners against a strata corporation as well, notwithstanding that the only court mentioned specifically in that part of the **Act** is the Supreme Court. It would not make sense for the Strata Corporation to be able to sue for money owing from a strata lot owner in provincial court but require a strata lot owner to have to go to Supreme Court to sue for overpayment. Nor would it make sense for a Defendant strata lot owner to have to go to Supreme Court for his counterclaim where he is sued by the Strata Corporation in Provincial Court.

[44] In the case at bar, the Third Party Claim alleges that the strata corporation breached a duty of care owed to the Claimant in that it was negligent in the maintenance and design of the fence between the Defendant's limited common property, where the Defendant's dog was being kept, and the strata corporation's common property, where the Claimant's dog was being walked.

[45] The cause of action described in the Third Party Claim in the case at bar alleges a failure of the strata corporation to perform a duty required of it, breaching a duty of care owed to the Claimant. In my view, this Third Party Claimant does not fall within any of those sections under the **Strata Property Act** reserving jurisdiction exclusively to the Supreme Court.

[46] The Applicant relies on case of **Clappa v Parker Management Ltd.** (Provincial Court, August 7, 2003) a decision of my brother Judge Meyers.

[47] Judge Meyers came to the conclusion in **Clappa** that an owner must sue in Supreme Court if it is alleged that if it is alleged that the strata corporation failed to perform the duties which it was required to perform, pursuant to its obligations under the **Strata Property Act** and if the matter relates to common property.

[48] Meyers J. based this conclusion on his analysis of the provisions of the **Strata Property Act**, specifically sections 163 to 173 in Part 10 – Legal Proceedings and Arbitration.

[49] Meyers distinguished both **Biamonte** and **David**, on the basis that those cases dealt with issues of debt and contract, not negligence, and on the basis that they were under the former **Condominium Act** which had been replaced by the **Strata Property Act**.

[50] However, I find the reasoning in **Clappa** to be inconsistent with the analysis of Judge Dhillon in **David** when she held that if a matter is one which falls within the jurisdiction of the Provincial Court, and is not otherwise expressly reserved to the Supreme Court, under the **Condominium Act**, the Provincial Court has the jurisdiction to hear it. I find Judge Dhillon's analysis in **David** to be even more appropriate under the **Strata Property Act** where "court" is no longer a defined term. Judge Dhillon in **David** held that this applied to actions in negligence as well as contract. I agree. I find no reason to draw any distinction, with respect to jurisdiction, between claims in tort and claims in contract.

[51] Section 164 creates a statutory right against "significant unfairness". It is similar to the right against "oppression" that was found in Section 42 of the former **Condominium Act** that was analyzed by Judge Dhillon in **David**. In both of these statutes, what was created is a remedy providing relief from actions that affect one's rights as a member of the strata corporation, in the same way that oppression remedies in the **Business Corporations Act** are intended to provide relief from actions that affect one's rights as a shareholder.

[52] In my view, the cause of action described in the Third Party Claim does not fall within the ambit of Section 164 of the Act. It is not an action seeking relief from a significantly unfair decision or action by the strata corporation. It is simply an action in negligence alleging a breach of a duty of care.

[53] I find that the Provincial Court has jurisdiction to hear this Third Party Claim.

P. CHEN, P.C.J.