

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wiener v. Strata Corporation KAS1354***,
2008 BCSC 746

Date: 20080410
Docket: 70081
Registry: Kelowna

Between:

Jay Lucien Wiener

Petitioner

And:

Strata Corporation KAS1354

Respondent

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

In Chambers
April 10, 2008

Counsel for the Petitioner:

K.J. Ihas

Counsel for the Respondent:

J.G. Hardwick

Dates and Place of Hearing:

March 26 and 27, 2008
Kelowna, B.C.

[1] **THE COURT:** In 2001, the petitioner, Jay Wiener, purchased unit number 8 of the Silver Queen Mews, a strata development at Silver Star Mountain near Vernon, British Columbia.

[2] In 2005, Mr. Wiener commenced this proceeding by filing a petition seeking many heads of relief, including the appointment of an Administrator, pursuant to s. 174 of the **Strata Property Act**, S.B.C. 1998, c. 43. On December 16, 2005, the matter came before the court. The hearing of the petition was adjourned generally. An Administrator was appointed, on an interim basis, and given the task of investigating and preparing a written report on certain issues, and holding an annual general meeting prior to March 1, 2006, on which date the Administrator's appointment was to expire.

[3] The court ordered report was completed, and the annual general meeting took place.

[4] In November 2006, counsel for the petitioner filed and served a notice of motion seeking further relief in this proceeding. That motion was heard on March 26 and 27, 2008.

[5] The relief sought in the motion is for the appointment of an Administrator with specified tasks to be performed, ancillary orders with regard to the appointment, and declarations with regard to alleged bylaw contraventions concerning improvements to some of the strata lots.

[6] By way of background, the Silver Queen Mews is comprised of 12 strata lots, contained in three separate buildings. The property was developed in approximately 1993. The development is in what is referred to as the townhouse style. Each unit was constructed with a two-car garage and either three or four bedrooms.

[7] Until approximately 2002, the strata corporation was informally run and managed. There was no Strata Council; proper annual general meetings were not held. In 2002, steps were taken to regularize the operation of the Strata Council. In the years 2002 through 2007, annual general meetings were held. A Strata Council was elected at each - the petitioner was a Council member in 2002 and 2003, but he has not been on Council since.

[8] In 2005, the petitioner retained counsel to correspond with the Strata Council about a number of concerns he had with regard to the management of the strata corporation. That correspondence set the wheels in motion for this proceeding and eventually unabated litigation or at least involvement by lawyers on each side ever since.

[9] I do not intend to review in detail the voluminous affidavit material before me which is contained in four large binders, nor the specifics of each and every one of the petitioner's allegations of improper management or illegality. I will, instead, summarize the main issues as they appear from the material before me.

[10] Strata Lots 2, 5, 9, 10 and 11 have been modified by way of a conversion of part of the garage into living space, variously described as bedroom, den, sleeping area, bonus room, and the like. All of these conversions were done without the prior

written approval of the Strata Council, or at times when indeed there was not a Strata Council. This is one of the issues the Administrator appointed in December 2005 dealt with in its report. The Administrator commented on the failure to obtain approval, in breach of Bylaw 5(1), as well as referencing a lack of documentation with regard to building permits. It was the Administrator's recommendation that the strata corporation notify owners "of the contravention of the bylaw and indicate the steps required to obtain written permission".

[11] It was further recommended that if the strata corporation considered "the alteration viable", then permission should be given, but conditional upon the owner providing permits or letters from approving authorities.

[12] The Council followed the recommendation to send out letters. Four of the five owners with garage conversions have obtained authorization and been granted permission for the alterations.

[13] The strata corporation takes the position that those four conversions are essentially now unchallengeable, and with regard to the fifth, the owner is elderly, has said she will not request permission but instead will remove the conversion, and the Council has decided to give her time to do so.

[14] The petitioner says that the Administrator was in error in making the recommendations. It is his position that the Council, as constituted, was in a conflict with regard to the issue, as three of the four Council members own units with garage conversions. He says they failed to consider the best interests of the strata corporation as a whole and simply treated the matter as if their only mandate was to

find a way to regularize the existing conversions, rather than considering whether the conversions were in the best interests of the strata corporation or whether they ought to be ordered to be removed.

[15] Even more fundamentally, the petitioner says the conversions do not just contravene Bylaw 5(1), which contravention may in fact be remedied by permission after the fact, but the conversions also contravene Bylaw 3(1), and included in 3(1) is subsection (e) which provides that an owner must not use a strata lot in a way that “is contrary to a purpose for which the strata lot...is intended as shown expressly or by necessary implication on or by the strata plan”. With respect to this issue, the strata plan shows the areas in question as “Garage”, and it is common ground that the converted areas are now living space and not garage.

[16] Further, the effect of each conversion is that each strata lot in question is now more than 10 percent larger than it was originally designed to be in terms of habitable area. Pursuant to s. 70(4) of the **Strata Property Act**,

...if an owner wishes to increase or decrease the habitable part of the area of a residential strata lot, by making a nonhabitable part of the strata lot habitable,...and the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246(3)(a)(i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*,...the owner must

(a) seek an amendment to the Schedule of Unit Entitlement under section 261, and

(b) obtain the unanimous vote referred to in section 261 before making the change.

[17] Section 261(1) provides that

To amend a Schedule of Unit Entitlement to reflect a change in the habitable area of a residential strata lot in a strata plan in which the unit entitlement of the strata lot is calculated on the basis of habitable area [as is the case for this strata development], the schedule must be amended as follows:

- (a) a resolution approving the amendment must be passed by unanimous vote at an annual or special general meeting;
- (b) an application to amend the schedule must be made to the registrar, accompanied by
 - (i) a new Schedule of Unit Entitlement that meets the requirements of section 46, together with evidence of the Superintendent's approval...

[18] The only exception to this process is set out at s. 5.1 of the **Strata Property**

Regulations. Subsection (2) provides that:

An owner who wishes to increase the habitable part of the area of a residential strata lot without amending the Schedule of Unit Entitlement need not comply with the requirements set out in section 70(4) of the Act if

- (a) the increase to the habitable part, combined with any previous increase to the habitable part, is less than 10% of the habitable part and less than 20 square metres, and
- (b) the owner obtains prior written approval of the strata corporation.

[19] I am satisfied that this exception does not apply, as on the respondent's evidence in this matter before me, the habitable space of each of the strata lots has increased by more than 10 percent.

[20] Dealing with the garage conversions in units 2, 5, 9, 10 and 11, I declare that they are in contravention of Bylaw 3(1)(e). I cannot conclude, on the evidence before me, that the conversions contravene any other bylaw, with the exception of

the contravention addressed by the Administrator in his original report. I also find that the provisions of s. 70(4) and s. 261 of the Act have not been met by the owners of those five units. Having made those findings, it is strictly unnecessary for me to consider the allegations with regard to Council's process of approval, including the alleged conflict of interest. However, having heard argument and having read the material, I will say that I am satisfied that the approval process had to be approached by Council not as an *ex post facto* rubber stamping of unauthorized alterations but rather from the perspective of the strata corporation and its best interests as a whole. I am not satisfied that the Strata Council approached the issue in that way.

[21] Strata Lot 3 has had a loft added to its living space. The Administrator dealt with that issue by recommending that the owner be required to request permission and that if Council considered the alteration viable, any permission be conditional upon the obtaining of permits or comfort letters from the authorizing authorities and confirmation from an architect or other professional that the alteration does not affect parts of the property which the strata corporation must maintain, repair or insure. I cannot determine, on the evidence before me, whether the alteration increases the habitable area of unit 3 by more than 10 percent.

[22] The Strata Council has not yet granted approval with regard to the loft in unit 3, although I understand the process of obtaining architect or engineer certification is underway. The amount of the increase of habitable space is unclear, as I have said. I have not been asked to grant any declaratory relief with regard to Strata Lot 3, and consequently I will not do so, but that clearly remains an issue at this strata complex.

[23] The next issue relates to a ski locker and patio enclosure, both alterations to the deck area of Strata Lot 9. The Administrator considered this issue, and found the patio enclosure to be in contravention of the bylaws, and questioned whether the ski locker was consistent with a resolution passed by the owners in 1995 dealing with exterior changes.

[24] The petitioner says that the ski locker and patio enclosure are in breach of Bylaw 5(1) in that prior written approval was not obtained; and that Bylaw 3(1)(a), (c) and (e) are also contravened by these alterations.

[25] The owner of unit 9, who is a member of Council, has refused to request approval for the alterations, having taken the position that no approval is required or that prior verbal approval was given, and the Council has taken no steps to deal with this matter.

[26] Clearly, this issue must be addressed in some fashion. I accept that the modifications were made without prior written approval, and therefore are in breach of Bylaw 5(1). I cannot find on the evidence, however, that the locker or the patio enclosure cause a nuisance, unreasonably interfere with the rights of other persons, are illegal, or are contrary to the purpose shown on the strata plan. I will parenthetically note that I do not accept that decks cannot have a storage purpose.

[27] Consequently, with regard to declaratory relief, I will declare that the owner of Strata Lot 9 has contravened Bylaw 5(1) by having the ski storage locker and patio enclosure on the deck.

[28] The petitioner also alleges that the Strata Council has not met its obligations with regard to enforcement of bylaws, pursuant to s. 26 of the **Strata Property Act**, and with regard to general maintenance of the property. He also takes the position that counsel should have undertaken the task of preparing bylaws, for presentation to the owners for a vote, dealing with issues such as parking, rentals, use of common property, satellite dishes and hot tubs. I note that the Administrator recommended that the Council adopt a maintenance plan, with schedule, and that Council review the strata corporation's specific needs and draft, or have drafted, bylaws to suit the nature and intent of the owners. The Council has now created, and commenced implementation of, a painting and maintenance plan. However, with regard to the issue of a review of the bylaws as recommended by the Administrator, the Council has done very little, despite allocating, but then not spending, \$3,500 in the 2006 budget for this review, including retaining counsel.

[29] The Strata Council has also failed to act on some of the Administrator's other recommendations, including failing to remove, or take steps to deal with, walkways and decks constructed on common property. The petitioner has taken to photographing what he considers to be bylaw infractions, parking violations, inadequate maintenance and the like, and then putting Council on notice of his concerns, normally, through correspondence from his counsel.

[30] The Strata Council, for the most part, does not respond to the petitioner's correspondence, and does not take any steps to address the concerns. Requests for copies of documentation are not complied with in a timely fashion. The material strongly suggests that the Strata Council has adopted a double standard with regard

to its dealings with the petitioner, as evidenced by the detailed way in which the Strata Council has been dealing with the petitioner's interior renovations and remodellings of his unit.

[31] I return now, with that overview, to the application for the appointment of an Administrator. The relevant factors for consideration, pursuant to s. 174 of the Act, which provides that the court may appoint an Administrator to exercise the powers and perform the duties of the strata corporation if in the court's opinion the appointment of an Administrator is in the best interests of the strata corporation, are as follows:

- (a) whether there has been established a demonstrated inability to manage the strata corporation,
- (b) whether there has been demonstrated substantial misconduct or mismanagement or both, in relation to the affairs of the strata corporation,
- (c) whether the appointment of an Administrator is necessary to bring order to the affairs of the strata corporation,
- (d) where there is a struggle within the strata corporation among competing groups such as to impede proper governance of the strata corporation,
- (e) where only the appointment of an Administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

In addition, there is always to be considered the problem presented by the costs of the involvement of an Administrator: *Lum v. Strata Plan VR519*, 2001 BCSC 493.

[32] In addition, this court must consider the comments of Huddart J. in *Cook v. Strata Plan N-50*, [1995] B.C.J. No. 2882 (S.C.), that the democratic government of the strata community should not be overridden by the court, except where absolutely necessary.

[33] There is no question that there was a demonstrated inability to manage the strata corporation prior to the appointment of the interim Administrator in 2005. On balance, I am satisfied that there has continued to be an inability to manage demonstrated since, as evidenced by Council's approach to the garage conversions, the issue of unit entitlement, the delay in acting on recommendations made in the Administrator's report, and a refusal to act with regard to some of the bylaw infractions, most particularly those dealing with unauthorized use of common property and unauthorized alterations.

[34] On the other hand, I am not convinced that there has been the kind of gross or deliberate misconduct that is alleged by the petitioner. This is a small strata corporation. Many of the owners are not resident in Canada, let alone on the property. The property manager, formerly the court appointed Administrator, considers that the Council is functional. Some of the petitioner's complaints, I find, are trivial, and have no doubt served to exacerbate the lack of attention accorded by Council to those of his concerns which are legitimate and serious.

[35] I conclude, on all of the evidence before me, that the appointment of an Administrator is necessary to bring order to the affairs of the strata corporation and to ensure that the existing struggle, particularly between Council and the petitioner, does not impede proper governance. There clearly will be a cost to the strata corporation, but the current situation with ongoing litigation and communication reduced to the level that it has to be conducted between lawyers is not tolerable, nor is it in the best interests of the strata corporation.

[36] Therefore, in addition to the declaratory relief already granted, I make the following orders:

1. J. Garth Cambrey be appointed the Administrator of the strata corporation, to exclusively exercise the powers and duties of the Strata Council and the strata corporation, subject to the requirements of the Act and the bylaws.
2. The Administrator shall be appointed for a term of one year, with liberty to apply for renewal of the appointment.
3. The Administrator shall prepare a written report on the affairs of the corporation, including his recommendations respecting the resolution of all outstanding issues identified by the Administrator, including related costs, to be presented to the owners of the corporation not more than six months following the date of appointment, and then again at the 12-month mark. The issues to be addressed by the Administrator are to include but are not to be limited to the garage conversions, the loft, the exterior modifications to the

deck of Strata Lot 9, the unauthorized use of common property, and unit entitlement.

4. In addition, the Administrator shall engage independent legal counsel to prepare draft bylaws to include the following issues: parking, rental of strata lots, the use of common property, installation and use of satellite dishes, installation and use of hot tubs, and maintenance and repairs. Those draft bylaws are to be presented and voted on at a meeting of the owners, before the expiry of the 12-month term.

5. The Administrator shall also review the contractual relationship of the strata corporation with its current property manager, CML Properties, and report on the same to the owners.

6. The Administrator shall prepare a revised budget to accommodate the remuneration of the Administrator and the other costs associated with the administration, including the issue I have just addressed concerning draft bylaws and the Administrator will call a special general meeting of the owners to approve the revised budget.

7. The Administrator's account for fees plus disbursements shall be rendered monthly and shall be payable by the strata corporation, provided that at the request of any party the Administrator shall pass his accounts before the Registrar of the Supreme Court of British Columbia.

8. I will also order that the Administrator be permitted to retain the necessary professionals, including independent legal counsel, for opinion, advice and services in respect of his duties pursuant to this appointment.

[37] Finally, I turn to the issue of costs. Because counsel could not necessarily have anticipated the outcome of this case, and because I heard very limited submissions with respect to costs at the time of hearing of the motion itself, I will order that unless counsel are able to agree with respect to costs, the petitioner will file written submissions with regard to costs within two weeks of today. The respondent's submissions will be filed within one week after receipt of the petitioner's submissions, and the petitioner may, if desired, reply again within one week. After receipt of submissions, if submissions are in fact necessary, you will receive my decision with respect to costs in due course.

Beames J.