IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591,* 2017 BCSC 1646

Date: 20170918
Docket: S178026
Registry: New Westminster

Between:

Allwest International Equipment Sales Co. Ltd.

Petitioner

And

The Owners, Strata Plan LMS 4591

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Petitioner:	S. Smith
Counsel for the Respondent:	M. Bujar
Place and Date of Hearing:	New Westminster, B.C. March 6, 2017
Place and Date of Judgment:	New Westminster, B.C. September 18, 2017

[1] This petition arises from a dispute between the owner of one unit in what is described as a detached home style strata lot against the Strata Corporation which was incorporated in connection with that development. The petitioner has installed in an area of the exterior of its strata lot what the petitioner refers to as a "heat pump". The respondent takes the position that the equipment installed by the petitioner is a "mini-split" air conditioner which it refers to as the "AC Unit". Prior to installation of the unit, the petitioner sought permission of the strata council to install the unit. Permission was denied on the basis that installation of the unit would constitute installation of an air conditioning unit contrary to the by-laws of the respondent.

[2] The petition seeks a declaration that the petitioner is not in breach of Strata Plan LMS 4591's (the "respondents") by-laws. In the alternative, the petition seeks a declaration that it is significantly unfair to the petitioner for (1) the respondent to refuse to grant permission to install the "heat pump" on the rear patio of its unit; or (2) to apply the bylaws preventing installation of the "heat pump". Further, the petitioner seeks an order that all fines which have been imposed against the petitioner relating to the installation be cancelled or reduced, an order prohibiting removal of the "heat pump", or an order granting permission for the petitioner to install the "heat pump" from its rear patio.

[3] The bylaws of the Strata Corporation which were in effect at all material times were:

> **Use of Property**
>
> 3 (17) No air conditioning units, laundry, clothing, bedding or other articles shall be hung or displayed from windows, decks, balconies, or other parts of a strata lot so that they are visible from the outside of the building.
>
> (20) Nothing shall be stored or kept on a patio, deck, balcony or yard except for a reasonable amount of patio furniture, flower pots and one barbeque.
>
> **Obtain approval before altering a strata lot**
>
> 5 (1) An owner must obtain the written approval of the council before making an alteration to a strata lot that involves any of the following:
>
> (a) the structure of a building;
>
> (b) the exterior of a building;

> (c) chimneys, stairs, balconies or other things attached to the exterior of a building;
>
> . . .
>
> (f) common property located within the boundaries of a strata lot;
>
> **Obtain approval before altering common property**
>
> 6 (1) An owner must obtain the written approval of the council before making an alteration to common property, including limited common property, or common assets.
>
> . . . .
>
> (3) No awning, air conditioner, shade screen, shed, sunscreen, smokestack, antennae, satellite dish, greenhouse, basketball hoop, hot tub or enclosure, shall be hung, attached or placed on the common property, including limited common property, without the prior written permission of council. . . .

[4] "Limited common property" is defined in s. 1 of the *Strata Property Act,* [SBC 1998] c. 43 (the "*SPA*") as "common property designated for the exclusive use of the owners of one or more strata lots" which, in the case at bar, would include patios, decks balconies, and the back yard in the case of the detached strata lots of which strata lot 1 is one.

[5] The petitioner submits there are two issues to be decided by the court in this petition:

a) Does the installation of the heat pump contravene a by-law of the Strata Corporation either due to an express prohibition or the need for approval?

b) If it does, then is the application of that by-law to the petitioner significantly unfair? Or alternatively, is the decision to refuse to grant permission significantly unfair?

Factual Background

[6] The petitioner purchased title to strata lot 1 in February 2002. The sole director and shareholder of the petitioner is David Mason. For all intents and purposes he is the operating mind of the petitioner. Strata lot 1 has been the residence of Mr. Mason since it was purchased.

[7] In 2015, Mr. Mason carried out major renovations to strata lot 1. That was in the range of $400,000. At paras. 6 and 7 of affidavit #1 Mr. Mason describes the unit he wished to install as follows:

> 6. As part of the renovation work I wanted to install a “mini-split” air conditioning unit in the master bedroom (which faces west and can become unbearably hot in the summer). The portion of the “mini split” unit which vents into the bedroom and delivers the cold air is fully contained within the bedroom. It is not visible from the outside. From that interior unit are pipes approximately 2 inches in diameter which run down [from the second floor] through the wall cavity and connect to a heat pump which is located on a corner of the ground floor patio. The heat pump is roughly 32 inches high, 35 inches wide and 15 inches deep. Attached hereto and marked collectively as Exhibit “C” to this my affidavit are photographs I took of the heat pump and its location. Attached hereto and marked as Exhibit “D” to this my affidavit is a photograph of the pipe leading from the side of the building to the heat pump. The pipe is 2 inches in diameter.
>
> 7. The heat pump is hardly visible from a distance. Attached hereto and collectively marked as Exhibit “E” to this my affidavit are photographs I took looking back at the yard of strata lot 1.

[8] The photographs attached to the affidavit and referred to in paras. 6 and 7 are clear and in colour. They depict an item of the size described above which is visible on the lower deck and appears to be attached to the inside of the latticed outer wall on the deck. In photographs taken from the front of strata lot 1 the unit is not visible. However, in views from what would be the north side of the strata lot, the unit is visible, but unobtrusively so - it would not often be noticed by persons walking on a path to the shore which is adjacent to the unit.

[9] Mr. Mason also deposed that the renovation work in his unit was commenced in September 2015 and completed in January 2016.

[10] Mr. Mason attached to his affidavit #1 product information for the “heat pump”. From a review of that information, the unit has both a heating and cooling function which is not denied by the petitioner. There is also reference to the refrigerant system.

[11] Mr. Mason has also deposed that the “heat pump” is very quiet, and “barely audible when running”. Another owner of a unit in the strata plan, Malcom Cofman,

has filed an affidavit in support of this fact. Mr. Cofman has deposed that he has lived "in the detached home immediately to the south of Unit 1 since 2003" and that he became aware that the petitioner had installed "a heat pump on the ground floor adjacent to his strata lot". Mr. Cofman adds that "I do not see the heat pump from my patio or yard. Nor have I heard any noise from the heat pump".

[12] On September 18, 2015, Mr. Mason sent an email to the strata council which included the following statements:

> . . . It is my understanding that your monthly meeting is this coming Monday, September 21, and I would appreciate consideration of several upgrades I want done but need approval from council. They are as follows:
>
> . . .
>
> 2) Another thing I need permission from council to install is a mini-split AC for my master bedroom.

[13] Mr. Mason was firstly advised by way of email from the strata manager, Eric Holm, that his request to install a new boiler and vent it through the wall was approved. Subsequently, Mr. Mason received a letter of September 24, 2015 in which the strata council chairperson replied:

> Regretfully, Strata had to retract their original approval of letting you vent your Boiler through the side of your unit. Enclosed in the REVISED approval with the required Assumption of Liability Form.
>
> If you still wish to pursue the venting through the side of your unit and the installation of an A/C unit with heat pump you must do so by a ¾ vote of the owners at the upcoming SGM on November 17th. Strata Council has no authority to grant permission on your requests that contravene the Strata By-laws or the Strata Property Act without approval of the owners at a Special General Meeting.

The REVISED approval referred to in the council reply of September 24, 2015 which included the following:

> Council discussed and reviewed your requests and advise the following:
>
> 1. An air conditioning installation with an outside heat pump is NOT permitted as nothing can be installed permanently on the common property and air conditioners are NOT permitted as per the By-laws;
>
> 2. You may proceed with the installation of your new required boiler and hot water tank. The venting must continue to vent through the roof only.

[14] In response to further correspondence from the Strata Corporation, Mr. Mason requested a vote at a Special General Meeting scheduled for November 17, 2015, for his:

> 1) Request to install a 3" vent from my new boiler / hot water system through the side wall of the mechanical room to the outside wall instead of venting through to the roof.
>
> 2) Request to install a mini-split AC system in the master bedroom utilizing an exterior neat pump.

[15] In early November 2015, prior to the meeting of November 18, 2015, the petitioner installed what is referred to by the respondent as an "AC Unit" on the lower patio or yard area outside unit 1.

[16] On an unknown date between October 1 and November 17, 2015, Mr. Mason wrote to all or some of the owners in the complex which included what he referred to as a synopsis of "what I consider is at issue and its potential detrimental effect on every owner's right. The maximum sound level rating for my proposed Air Conditioning unit is 53 db at source . . . " and discusses how quiet the "AC system" would be.

[17] At the Special General Meeting of November 17, 2015, the owners were faced with resolutions to add new by-laws and did not have a vote on the request of the petitioner, which was based upon the by-laws which were in place up to November 17, 2015. The resolutions put before the Special General Meeting, which in order to pass required a ¾ majority of the owners in favour, were as follows:

> 3. Use of Property
>
> (30) An owner, tenant or occupant shall not install, attach or place any exterior exhaust venting to the side of a unit (common property) without prior Strata Council approval, subject to the installation meeting the requirements and guidelines of the Strata Corporation
>
> 3. Use of Property
>
> (29) An owner, tenant or occupant shall not:
>
> (a) install, attach, fix, or place an air conditioning or heating unit (including a heat pump), or any component thereof, to the common property (including limited common property) of the strata complex without prior Strata Council approval, subject to

> the installation meeting the requirements and guidelines of the Strata Corporation;
>
> (b) Install, attach, fix or place an air conditioning unit to the outside of a window or window frame included in a strata lot under any circumstances;
>
> (c) Where an owner installs an air conditioning or heating device in their strata lot without prior Strata Council approval, the strata corporation shall levy against the owner a fine of Five Hundred ($500.00) every seven days during the period of the unauthorized installation.

[18] The proposed amendments to the by-laws were defeated at the Special General Meeting. Regarding discussion at the meeting, Mr. Holm deposed at para. 18 of his 1st affidavit:

> 18. After resolution #4 was proposed, a lengthy discussion ensued where the following was discussed:
>
> a) the bylaws and the bylaws therein related to air conditioning unit installation;
>
> b) that the petitioner had already installed the AC Unit;
>
> c) that the AC Unit may emit a significant amount of noise and be an "eye sore" for persons walking by the strata lot and the premises which may cause a reduction in value of the strata lots at the premises;
>
> d) that of the AC Unit was approved, other owners may rely on the approval of the AC Unit installation in support of the position that they should be entitled to install air conditioning units which may be particularly noisy and / or an "eye sore".
>
> e) not all strata lots at the premises would be able to accommodate air conditioning unit installation;
>
> f) that the petitioner had drilled a hole into the side of the strata lot, which is common property, absent the strata corporation's approval of this; and
>
> g) the concern that the AC Unit installation could give rise to legal liability, for example, tripping hazards.

[19] The petitioner was not represented at the meeting of November 17, 2015.

[20] On November 18, 2015, the Strata Corporation'sagent wrote to the petitioner stating the "air conditioning system outside of your unit on the strata's common property . . . is an unauthorized installation and a breach of the strata's bylaws". The letter also advised the petitioner:

> Pursuant to bylaw 24(a) the Strata will fine you $200.00 if you do not remove the unauthorized installation, and restore any modifications to walls (such as the holes drilled in the west wall) to their original condition, by December 3, 2015.
>
> Non-compliance will result in the Strata enforcing bylaw 25 and fining you $200.00 every seven (7) days until the work described in the preceding paragraph is completed to the satisfaction of the Strata.

[21] At the request of the petitioner, the Strata Corporation agreed to reconsider its position regarding the air conditioning unit and a hearing was held under s. 34.1 of the *SPA* on January 25, 2016. Counsel for the petitioner attended the meeting of January 25, 2016. The strata council was not convinced to change its decision of November 17, 2015 and wrote to the petitioner on February 2, 2016, stating, in part:

> . . . Upon your departure, Strata Council discussed at length the arguments that your lawyer put forward at the Council meeting. Council reviewed By-Law 6(3), where it clearly states that no air conditioner shall be hung, attached or placed on the common property, including limited common property, without the prior written permission of Council.
>
> Council first discussed the interpretation of "air conditioner". As the heat pump in question is clearly part of the air conditioner mechanism, the Council decided the meaning of "air conditioner" in By-law 6(3) includes the heat pump.
>
> Council noted that By-Law 6(3) refers to "on the common property, including limited common property", as opposed to just "on limited common property". Council also noted that "without the prior written permission of Council" is ***not*** qualified by "which permission must not be unreasonably withheld".
>
> For all of the above reasons, Council decided that they stand firm on the November 18th 2015 correspondence. Consequently, Council requires that you remove the unauthorized installation . . . . . .

[22] As the petitioner has not removed the unit, the Strata Corporation has assessed fines which totalled $9,600 as of January 26, 2017.

Analysis

[23] The item in issue in this case is that portion of the air conditioning system which has been installed by the petitioner on gravel on or adjacent to its lower deck or patio. That deck or patio is common property designated for the exclusive use of the owner of strata lot 1 and I find meets the definition of "limited common property".

[24] Both parties are in agreement that a heat pump can heat or cool air. The Court of Appeal discussed heat pumps in *Allied Air Conditioning Inc. v. British Columbia,* (1993) 27 BCAC 197, 78 B.C.L.R. (2d) 349 at paras. 6 and 7:

> [6] The contractors, generally as sub-contractors in the construction of industrial or commercial buildings, install and service air conditioning equipment and heat pumps.
>
> In layman's terms, air conditioning provides the means of cooling the ambient air within a building while the heat pump is capable of both heating and cooling this air. Both use essentially the same equipment and both rely upon the same phenomenon: the temperature of a gas increases when compressed and liquefied and drops when the pressure is released.
>
> [7] In the air conditioning mode the temperature drop takes place inside the building, cooling the internal, circulating ambient air. The heat pump, as well as operating in the cooling cycle, is capable of reversing the cycle. When reversed, the temperature increase takes place inside the building. The phrase "heat pump" is misleading, although in common usage. In neither mode of operation is heat pumped; in both a compressor circulates a refrigerant and the ambient air in the building is either heated or cooled depending on where the expansion of the refrigerant takes place."

[25] I find that although a heat pump can be a part of an air conditioning system, it is different from an "air conditioning unit" in that an air conditioning unit provides only cooling of the air.

[26] Therefore, if the object in issue is a "heat pump" as submitted by the petitioner, is its installation as described in the affidavits filed in this petition, in breach of any of the by-laws for having installed the same in limited common property?

[27] I also note that the amendments to the bylaws which were voted on at the Special General Meeting called for a prohibition against the installation of,

specifically, heat pumps, without permission of the strata council. This leads the court to believe that the strata council likely was of the opinion that the by-laws did not prohibit the installation of a heat pump.

[28] Turning to by-law 3(17) there could be no breach as the item installed on limited common property was not an air conditioning unit, it was a heat pump.

[29] Even so, it is evident from the wording of bylaw 3(17), the concern of the Strata Corporation was air conditioning units “hung or displayed from windows, decks, balconies or other parts of a strata lot so that they are visible from outside of the building”. In this case, the heat pump sits on gravel adjacent to the ground floor patio and is not “hung or displayed” or protruding from a window as do some air conditioning units.

[30] Bylaw 3(20) excepts “patio furniture, flower pots and a barbeque” from items that may be stored or kept on a patio. All of the specifically listed items are chattels which are readily moveable and can be moved about on a patio. That is not the case with the heat pump.

[31] Bylaw 5(1) requires an owner to obtain written approval of the council before making an “alteration to a strata lot” involving the structure or exterior of building, things attached to the exterior of a building and common property located within the boundaries of a strata lot. The heat pump in this case is not in strata lot 1, it rests on limited common property; ie. the lower patio of strata lot 1.

[32] Bylaw 6(1) requires an owner to obtain written approval of the strata council before altering limited common property or common assets. Was limited common property “altered” in this case for installation of the heat pump?

[33] The decision of *The Owners, Strata Plan LMS 4255 v. Newell,* 2012 BCSC 1542, involved the placement of a hot tub, air conditioner, a large screen television and speakers mounted on balcony railings and elsewhere, all on a roof deck above his strata lot. The major issue of concern to the strata council was noisy gatherings on the deck and in the respondent’s strata lot. There was little information in the

reasons for judgment as to how the various items were affixed or placed on the deck, however, at para. 90, Adair J. found:

> 90. On the facts before me, I find that none of the hot tub and air conditioning units is an "alteration" to common property. None were designed to be permanent, and the fact that a crane was required to hoist the hot tub up to its current home is not determinative. I find there has been no breach of Bylaw 6(1)

I note the bylaws in the above case were identical to those in the case at bar, however, the degree of attachment of the items to the structure was not clear from the decision.

[34] The decision of *The Owners, Strata Plan NW 1245 v. Linden,* 2016 BCSC 619 (*Linden*), was referred to by the respondent and included a proposal by owners of a strata lot to install an air conditioner "in their unit". Bylaw 8 in that case was similar to bylaw 6(1) in the case at bar. In *Linden,* the proposed installation of an air conditioner would "involve putting holes in an outside wall, which is common property" (para. 30). The owners indicated they intended to proceed with the installation without obtaining permission to put holes in the "common wall". Again, details of the type of unit and alterations needed to install the unit in *Linden* were sparse. Ehrcke J. ordered the respondents restrained from altering common property without written permission of the strata council.

[35] In this case, it was necessary to connect the air conditioning unit, which was located within the petitioner's unit and not visible to the outside, to the heat pump located on the lower patio. In order to do so, the petitioner installed two pipes within the exterior wall of his unit, a portion of which is common property. Installation required penetration of the exterior wall, albeit, that portion which is limited common property in the inside of the wall at the lower patio. Penetrating a wall to allow for the installation of piping is an alteration to common property, albeit not significant. The only concern to the strata council would be whether the installation could present a water ingress issue into the wall. Nevertheless, it is an alteration in that it "changes the structure"(see *Wentworth Condominium Corp. No. 198 v. McMahon,* 2009 CarswellOnt 1273). In this respect, I find that the structure, ie. the building, has been

altered, however, it is very unlikely that the alteration could alter the structural integrity of the building.

[36] Bylaw 6(3), deals with objects which would be readily apparent and not in keeping with the appearance and maintenance of a strata project. I find there has been no breach of this bylaw.

[37] Having found a breach of by-law 6(1), there is one other consideration and that is whether the decision of the Strata Corporation and its remedy would be significantly unfair under s. 164 of the *SPA.* As well, the petitioner submits that the court has the power to reduce any fines which may be assessed by the Strata Corporation under s. 24 of the *Law and Equity Act.*

[38] The term “significantly unfair” was considered in the Court of Appeal decision of *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, 12 B.C.L.R. (4th) 67. At para. [27] the court stated:

> [27] A number of subsequent decisions from the B.C. Supreme Court have cited Sinclair Prowse J.'s definition of "significantly unfair" with approval. Most recently, Masuhara J. in *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120, referred to Sinclair Prowse J's decision as authority for the definition of significantly unfair. The judge, however, added the following comment:
>
> > [28] I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

[39] In this case, there are factors both for and against favouring a finding of unfairness towards the petitioner. The most significant factor militating against unfairness was the decision of Mr. Mason to proceed to install the heat pump and air conditioning unit without the written approval of the strata council. He did have an opinion from counsel that he should be allowed to install the unit he proposed,

however, he was aware that the strata council was not in agreement with that opinion.

[40] In his correspondence to other owners and to the strata council, Mr. Mason put forward a reasonable solution to the general policy against the installation of air conditioning systems with the heat pump option in place of an unsightly and often noisy installation of a traditional air conditioning unit installed in a window. He proposed a quiet and non-obtrusive alternative which could easily have been accepted by the owners. The unit which Mr. Mason proposed minimally impeded upon the objectives the strata council maintains towards the installation of air conditioning units, ie. his proposal was for quiet operation was not visible from most sightlines towards his unit.

[41] Also, the offending nature of the installation, ie. two small holes in the exterior of his unit to allow for the pipes connecting the heat pump to the air conditioning unit in his bedroom represent a minimal intrusion in the structure.

[42] The grounds for denying his request included concern over contravening the bylaws, however, whether or not the bylaws were to be contravened was not clear at the time. The council expressed concern that there “may” be noise issues, that other owners could want to install similar units, and that council had previously rejected the installation of other types of air conditioning equipment. The proposal here was for a different, more discreet unit which was less likely to result in complaints from other owners.

[43] The strata council also suggests its proposal to allow for the installation of heat pumps which was before the Special General Meeting of November 17, 2015 was an attempt to accommodate the petitioner’s wish to install air conditioning equipment, however, upon a careful review of the proposed bylaw, the installation of heat pumps was being specifically targeted as contrary to the bylaws whereas the original and current bylaws made no mention of heat pumps.

[44] I conclude that the relief sought, ie. that of removing the equipment including the heat pump and the significant fines imposed by the strata council would definitely place a hardship upon the petitioner, however, especially since the unit was installed prior to approval being obtained, the degree of unfairness is compromised.

[45] I therefore find that the petitioner has failed to substantiate "significant unfairness" overall. I do, however, find the fines imposed to be far more onerous than the breach of the bylaws would justify. In place of the continuing, weekly fines, I order the petitioner to pay a single fine of $1,000 payable within thirty days and that all other fines imposed by the strata council be cancelled.

[46] The heat pump and piping are to be removed within 30 days and the petitioner is ordered to repair any damage caused by the penetration of the exterior walls to allow for the installation of the piping. Failure to remove the same will result in additional fines.

[47] The respondent is entitled to costs on Scale B.

"Jenkins J."