COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591,* 2018 BCCA 187

Date: 20180503
Docket: CA44792

Between:

Allwest International Equipment Sales Co. Ltd.

Appellant
(Petitioner)

And

The Owners, Strata Plan LMS 4591

Respondent
(Respondent)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated September 18, 2017 (*Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591*, 2017 BCSC 1646, New Westminster Docket No. S178026).

Oral Reasons for Judgment

Counsel for the Appellant:	S.M. Smith
Counsel for the Respondent:	M.F. Bujar
Place and Date of Hearing:	Vancouver, British Columbia May 3, 2018
Place and Date of Judgment:	Vancouver, British Columbia May 3, 2018

Summary:

The appellant installed an air conditioning unit in his strata unit, and ran pipes through the exterior walls to connect it to a heat pump, which he affixed to an outdoor patio on limited common property. The strata corporation contended that these actions violated its bylaws, and ordered the heat pump and pipes removed, and the wall repaired. The appellant petitioned to the Supreme Court, seeking a declaration that it had not breached the bylaws, and, in the alternative, granting it relief from those bylaws. The chambers judge found that the bylaws had been violated, and denied relief from them. The appellant appealed and the respondent cross-appealed. Held: appeal and cross-appeal dismissed. The actions of the appellant were in clear violation of the bylaws, and the chambers judge made no error in refusing to grant relief from those bylaws. The cross-appeal in this case was brought to overturn certain findings by the chambers judge rather than to attack the order he made. As appeals are brought from orders rather than from reasons for judgment, there was no basis for a cross-appeal.

[1] **GROBERMAN J.A.**: The appellant is the owner of a residential strata unit within the development governed by the respondent strata corporation. The unit is occupied by David Mason, who is the sole director and shareholder and the operating mind of the appellant. When I refer, in this judgment, to things done by Mr. Mason, it should be understood that those things were, equally, the actions of the appellant.

[2] In early November, 2015 Mr. Mason installed a “mini-split” air conditioner in a bedroom within his unit. He also installed a heat pump, attaching it to the lower patio area outside of his strata unit. He connected the air conditioner to the heat pump by means of pipes that he installed within an exterior wall of the building. A 2-inch hole cut into the bottom part of the exterior wall allowed the pipes to connect to the heat pump.

[3] The strata corporation ordered the appellant to remove the heat pump and to restore the wall to its original condition. By January 26, 2017, it had levied fines against the appellant totalling $9600 for non-compliance with its orders.

[4] The appellant brought a petition seeking a declaration that the installation of the heat pump did not violate the strata corporation’s bylaws, or, alternatively, a declaration that the strata corporation’s refusal to grant permission to install the heat

pump was significantly unfair to it. It also sought an order cancelling or reducing the fines.

[5] The chambers judge considered the provisions of the *Strata Property Act*, S.B.C. 1998, c. 43, as well as various provisions of the strata corporation's bylaws. He ordered that:

> 1. The Petitioner pay to the Respondent the sum of $1,000.00 within thirty days of the date of this Order. All other fines imposed by the Respondent be cancelled.
> 2. The Petitioner remove the heat pump and piping within 30 days and the petitioner repair any damage caused by penetration of the exterior walls to allow for the installation of the piping.
> 3. In the event the Petitioner fails to comply with the order in Item 3 [sic] above, the Respondent may impose additional fines.
> 4. The Respondent is entitled to costs on Scale B.

[6] The appellant appeals, seeking an order allowing it to install the heat pump and cancelling all of the fines, as well as an order for costs.

[7] The respondent purported to cross-appeal. The notice of cross-appeal sought to overturn certain findings of the chambers judge. It did not challenge any part of the judge's order on the basis of those findings. The only part of the order challenged in the notice of cross-appeal was the cancellation of the fines, and the respondent did not pursue that remedy in its cross-appeal factum.

The Cross-Appeal

[8] It is well-established that appeals (and cross-appeals) lie from orders of the court below, not from passages in the reasons for judgment: see *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, 2017 BCCA 287 at para. 28; *Moore v. Expansion Holdings Ltd.* (1994), 96 B.C.L.R. (2d) 178 at para. 7; and Brinton, Senkpiel and Ohama-Darcus, *Civil Appeal Handbook* (Continuing Legal Education Society of British Columbia, 2002, looseleaf, updated to March 2018), §1.6. Accordingly, the cross-appeal in this matter is improper and is dismissed.

The Statute and the Bylaws

[9] While the judge considered a number of provisions of the bylaws, it is necessary to consider only two on this appeal:

> 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
>
> …
>
> (f) common property within the boundaries of a strata lot
>
> (2) The council must not unreasonably withhold its approval under subsection (1) but may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.
>
> 6(1) An owner must obtain the written approval of the council before making an alteration to common property, including limited common property ….

[10] Note should also be made of part of the definition of "common property" in s. 1 of the *Strata Property Act*:

> "common property" means
>
> …
>
> (b) pipes … for the passage or provision of … heating and cooling systems, or other similar services, if they are located
>
> (i) within a … wall … that forms a boundary
>
> …
>
> (B) between a strata lot and the common property …

The Chambers Judgment

[11] The judge found, at para. 31 of his reasons, that the lower patio area to which the heat pump was attached was limited common property, not within the boundaries of the appellant's strata lot. Similarly, at para. 35, he found that the part of the exterior wall that was penetrated by the pipes was common property. While he did not explicitly say so, it appears that he considered some other parts of the exterior wall traversed by the pipes to be within the appellant's strata unit. That

conclusion would appear to be consistent with s. 68(1) of the *Strata Property Act*, which ordinarily places the boundary between the strata lot and the common property midway between the exterior surface of the wall and its surface in the interior of the unit.

[12] The judge found that Bylaw 5(1) did not apply to the heat pump, because it was not located within the strata lot. He did not specifically address the question of whether bylaw 5(1) was applicable to the pipes that connected the heat pump to the air conditioner.

[13] The judge found that Mr. Mason's work did engage Bylaw 6, both because the act of attaching the heat pump to the patio and the act of cutting of a hole in the wall constituted "alterations" to common property.

[14] Having found that Mr. Mason made alterations to common property without permission, the judge considered whether it was appropriate to use s. 164 of the *Strata Property Act* to relieve the appellant from the consequences of the breach of Bylaw 6(1):

> 164(1) On application of an owner …, the Supreme Court may make any … order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner …

[15] The judge concluded that the order to remove the heat pump and restore the wall was not significantly unfair, but that the magnitude of the fines was:

> [44] I conclude that the relief sought, i.e. 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.

Analysis

[16] The parties agree that the standard of review applicable to the judge's interpretation of the strata bylaws is one of correctness. As I am of the view that, even if reviewed on that stringent standard, the judge's decision must be upheld, I need not say anything further about the standard of review.

[17] The parties also agree that the judge's evaluation of "significant unfairness" is reviewable only for palpable and overriding error. I accept that that is the appropriate standard of review.

[18] While the parties have cited a number of cases dealing with the question of what constitutes an "alteration" to common property, it seems to me that this case is a straightforward one, and no extensive parsing of the authorities is needed.

[19] The pipes, in my view, clearly became common property under subsection (b)(i)(B) of the definition of "common property" in the *Strata Property Act* as soon as they were installed in the exterior wall. The installation of the pipes was the "making [of] an alteration to a strata lot that involve[d] common property within the boundaries of a strata lot." Accordingly, Mr. Mason required permission under Bylaw 5(1) to install the pipes in the exterior wall. As he did not get permission, he was in violation of the Bylaw. Equally, the installation of the pipes served to modify the common property (by adding to it), thus engaging bylaw 6(1).

[20] On this appeal, the appellant argues that, if Mr. Mason infringed bylaw 5, consideration must be given to bylaw 5(2), which precludes the strata council from unreasonably withholding permission to make alterations involving common property. There was no specific pleading of that bylaw in the petition, and the record is not sufficient to reach the conclusion that council unreasonably withheld permission. Still, as the same issues in respect of the pipes arise under bylaw 6(1) as under bylaw 5(1), there is no need to come to any conclusion with respect to the bylaw 5(2) issue. There is no direct analog of bylaw 5(2) in bylaw 6.

[21] With respect to bylaw 6, the appellant presents a complex argument to the effect that the cutting of a 2-inch hole in the exterior wall did not constitute "making alterations to common property". It refers to *Wentworth Condominium Corp. No. 198 v. McMahon*, 2009 ONCA 870, a case concerned with whether a hot tub that was attached to the property only by an electrical connection constituted "an addition, alteration, or improvement" to the common elements of a strata property. The court in that case considered that the hot tub did not "alter" the common property, because the degree of attachment was limited, and because it did not change the "structure" of the common elements. Mere attachment by an electrical cable did not meet the requirement for "alteration".

[22] The appellant takes *Wentworth* to stand for the proposition that "structural change" is the test for "alteration", and then cites a number of cases dealing with what it means to "structurally change" a building. There are numerous problems with this approach, foremost of which is the fact that neither the word "structure" nor the phrase "structural change" appear in Bylaw 6(1).

[23] I accept the appellant's position that immaterial changes to common property will not be "alterations" for the purposes of Bylaw 6(1). It seems to me, however, that on any sensible definition of "alteration", the cutting of a 2-inch hole in an exterior wall, and the installation of permanent pipes in the wall and out to a heat pump constitutes an "alteration" that is material. The judge made no error in coming to such a conclusion.

[24] Because the heat pump was both affixed to the patio and permanently attached to the pipes, I also agree with the chambers judge's conclusion that it constituted an alteration to the common property.

[25] I am fortified in this view by the fact that the penetration of the exterior wall and the running of pipes through it carried some risk of making the building envelope vulnerable to leaks.

[26] I am, therefore, of the view that the judge was correct in finding that the appellant needed permission under Bylaw 6(1) to cut the hole, to install the pipes, and to attach the heat pump.

[27] The only remaining question is whether the judge made a palpable and overriding error in exercising his discretion not to excuse the appellant from the Bylaw requirements, using s. 164 of the *Strata Property Act*. In coming to his decision, the judge said:

> [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.

[28] The chambers judge did not quote the balance of paragraph 27 of *Reid*, but what this Court said was:

> I agree with Masuhara J. that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the *Condominium Act*, which was to put the legislation in "plain language" and make it easier to use (British Columbia, *Official Report of Debates of the Legislative Assembly*, Vol. 12 (1998) at 10379). I also note that the term "unfair" is defined in the *Canadian Oxford Dictionary* as "not just, reasonable or objective." It may be that this definition of "unfair" connotes conduct that is not as severe as the conduct envisaged by the definitions of oppressive or unfairly prejudicial. However, counsel argued this appeal on the basis that "significantly unfair" has essentially the same meaning as

> "oppressive and unfairly prejudicial". For the purposes of this appeal the distinction between the definitions makes no difference. On either definition, the resolution passed by the strata council cannot be said to be significantly unfair to Mr. Reid.

[29] We have also been referred to the judgment of this Court in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, in which this Court further considered s. 164 of the *Strata Property Act*, and, again, endorsed the observations of Ryan J.A. in *Reid*.

[30] The chambers judge applied the correct legal test in his consideration of s. 164 of the *Strata Property Act*. I am unable to see any basis for interfering with his assessment that requiring the appellant to remove the heat pump and repair the wall was not "significantly unfair".

Conclusion

[31] In the result, I would dismiss the appeal on the merits, and dismiss the cross-appeal on the basis that it was improperly brought.

[32] **FITCH J.A.**: I agree.

[33] **HUNTER J.A.**: I agree.

[34] **GROBERMAN J.A.**: The appeal and cross-appeal are both dismissed.

""he Honourable Mr. Justice Groberman