IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chow v. The Owners, Strata Plan NW 3243,* 2017 BCSC 2331

Date: 20171218
Docket: S143231
Registry: Vancouver

Between:

Angela Yick Ying Chow, Kuo Wei Chin, Tien-Min Chao, Shu-Chen Lin, Zhe Lu, Yu Huang, Dominic Ching Ming Ng Barbara Cheuk Mee Ng, Alice Sao Kuan Chan

Petitioners

And

The Owners, Strata Plan NW 3243

Respondent

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment

Counsel for the Petitioner, Angela Yick Ying Chow:	G. Stephen Hamilton
Counsel for the Respondent:	Geoffrey Trotter
Counsel for the Interested Parties, Richard Chang, Ying Qiao and Linglin Su:	Patrick A. Williams
Place and Date of Trial/Hearing:	Vancouver, B.C. September 25, 2017
Place and Date of Judgment:	Vancouver, B.C. December 18, 2017

[1] This proceeding concerns classification of parking spaces in a strata complex called Bristol Gardens, located in Richmond, British Columbia. At issue is the designation of certain carport-type parking spaces as either common property, to be used by visitors to the complex, or limited common property, for the exclusive use of owners of immediately adjacent units. The strata complex was constructed in 1990, and most of the 37 townhouse units were initially sold to individual buyers in that year.

[2] Each unit has an attached two-car garage, which is limited common property. Seven units have a third carport-style parking stall adjacent to the garage. Signage for those stalls has been in place since the marketing phase of the project identifying them as guest parking. They have been treated as such by every strata council since 1990. Apart from those seven spaces, there are only two other parking spaces for visitors on site. The entire complex is surrounded by a fence, and is equipped with an intercom system, which requires visitors to gain access through communication with the individual owner they are visiting.

[3] A strata plan filed in the Land Title Office on May 22, 1990, shows each of the carport stalls as “limited common property for the exclusive use of” the adjacent unit. One year prior, at the time the developer obtained approval for some zoning variances from Richmond City Council, the project architect represented to Council that there would be ten visitor parking spaces in the complex. A disclosure statement (the “Disclosure Statement”) filed by the developer with the Superintendent of Financial Institutions on May 26, 1989 stated that each unit would have two parking stalls designated as limited common property, and that there would be an additional ten parking stalls for visitors, designated as common property. There is a considerable body of evidence before me that at the time of initial marketing and sale of units, the developer represented that each unit came with an attached two-car garage, and that there was additional parking on site for visitors. That characterization of things also appears to be the predominant one which applied to subsequent sales of the townhouse units.

[4] Litigation concerning the impugned parking spaces commenced in 2014 and initially led to a judge of this Court hearing two petitions, one brought by the owners claiming exclusive use of the carports, and another brought by the majority of owners who sought classification of the carports as common property. In Reasons indexed as *Chow v. The Owners, Strata Plan NW 3243*, 2015 BCSC 1944, Mr. Justice Smith found for the owners claiming exclusive use, and gave effect to the designation of the carports as limited common property. The majority owners appealed that order, and in Reasons indexed at 2017 BCCA 28, the Court of Appeal allowed the appeal and remitted the matter to this Court for a new hearing.

[5] The Court of Appeal found that the chambers judge had been led into error by the manner in which the petitions were argued, and thus had not decided the fundamental preliminary question, namely whether or not the labelling of the carports as "limited common property" on the strata plan was an error. If the court determined that the "limited common property" designation was a mistake, such error could potentially be corrected pursuant to s. 14.12 of the *Strata Property Regulation*, B.C. Reg. 43/2000 (the "*Regulation"*).

[6] The Court of Appeal further held at paras. 20 and 21:

> [20] In my opinion, the first question that needed to be answered definitively was whether the strata plan contained an error in its description of the parking spots as limited common property. Such a finding is the foundation for the rest of the analysis.
>
> [21] Section 257 is not the only means by which errors in the designation of property in a strata plan can be rectified. Errors may be corrected under the *Strata Property Regulation,* B.C. Reg 43/2000 (the "*Regulation*"). Section 14.12 of the *Regulation* provides:
>
> > **Correction of errors**
> >
> > **14.12** (1) In this section:
> >
> > **"error"** means any erroneous measurement or error, defect or omission in a registered strata plan;
> >
> > **"registered strata plan"** includes any document, deposited in the land title office, that
> >
> > (a) is referred to in section 245(a) or (b) of the Act,
> >
> > (b) forms part of a strata plan under the *Condominium Act*, R.S.B.C. 1996, c. 64 or a former Act, or

> (c) amends or replaces a document referred to in paragraph (a) or (b).
>
> (2) If it appears to the registrar that there is an error in any registered strata plan, the registrar may give notice or direct that notice be given to any person, in the manner and within the time determined by the registrar, and the registrar, after considering submissions, if any, and examining the evidence, may correct the error.

[7] I will take as read the essential factual background as outlined in both previous judgments, and as well the conclusions of both courts concerning the legal effect of property being designated as "limited common property" pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43 *("SPA")* or its predecessor statute, the *Condominium Act*, R.S.B.C. 1996, c. 64. As noted by the Court of Appeal at para. 2:

> [2] … While limited common property is not part of indefeasible title under s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, it is a registered right associated with title constituting a special category of property "over which the unit owner has a substantial degree of control and something approaching a beneficial interest": see *Moure v. The Owners*, *Strata Plan NW2099*, 2003 BCSC 1364 at para. 22.

[8] Pursuant to s. 257 of the *SPA*, once a limited common property designation is made on a strata plan which is deposited with the Land Title Office, such designation may only be removed by a resolution passed by a unanimous vote of the owners. In effect, the owner of the property so designated possesses veto power over any resolution to remove the designation.

[9] Prior to the earlier proceedings in this Court, a resolution proposing an amendment to designate the seven disputed carport stalls as common property was defeated by "nay" votes cast by six of the seven owners of those units.

[10] In the earlier petition proceedings, the majority owners advanced two alternative bases on which the carport stalls should be re-classified as common property. First, they pled mistake, and sought rectification pursuant to s. 14.12 of the *Regulation*. In the alternative, they invoked s. 164 of the *SPA,* arguing that, in failing to amend the strata plan, the strata corporation acted in a manner which was significantly unfair to them.

[11] After the decision of the Court of Appeal was given, the majority owners filed an application, which was heard along with the original petition before me on September 25, 2017. In that application, the majority owners seek the following relief:

- a declaration that there is an error in the strata plan;
- an order that the registrar of titles correct the error;
- an order that the application be heard at the same time as the petition proceedings;
- an order that they be permitted to file additional evidence; and
- an order that the petition of the Chow petitioners be dismissed.

[12] The Chow petitioners did not oppose the hearing of the two applications together, nor the filing of additional material. The majority owners agreed to one part of the relief sought in the original petition, namely the waiver of all outstanding parking fines levied against the Chow petitioners.

[13] Also since the decision of the Court of Appeal, several of the owners of units adjacent to the disputed stalls reached an agreement with the majority owners concerning designation of those stalls. Thus, only the original named petitioner, Angela Yick Ying Chow, the owner of unit 12, remains as a named party to this litigation. In addition, one other owner, who purchased Unit 33 during the current litigation, appeared to oppose the relief sought by the majority owners and support Ms. Chow's position.

[14] The result of the additional evidence which has been filed by the majority owners is that there is a substantially more robust evidentiary record before me than was before the original hearing judge. In addition, the arguments advanced by the parties in this hearing have been focused on the essential question of potential error in the strata plan, and if I so find, how that finding might affect the equitable positions of the litigants.

[15] I have concluded that there was an error in the strata plan at the time it was created by the land surveyor, David Dyck, and deposited in the Land Title Office. In

particular, I am satisfied that Mr. Dyck mistakenly labelled the carport parking stalls as “limited common property”, as opposed to “common property”, which was clearly how the developer intended to designate them.

[16] The affidavit of Mr. Dyck, in which he deposes that, based on his review of the Disclosure Statement and the registered strata plan, he believes he made such an error, is but one piece of evidence upon which I rely in making my finding as to error. I have also considered the following in reaching that conclusion:

- the Disclosure Statement and surrounding evidence;
- the minutes of the city council meeting at which the architect made representations to council;
- the Richmond city bylaw in effect at the time, governing the number of required visitor parking spaces;
- the evidence of the developer, through a letter from counsel, that it intended to comply with its legal obligations; and
- the evidence concerning initial marketing and subsequent sale of the units.

[17] All of the above-noted evidence and legislation, upon which I will expand, satisfies me that the developer was required to ensure that there were at least eight visitor parking spaces available at the complex, and that its intention was to create nine such spaces, obviously to be designated as common property. It cannot have been the intention of the developer to create only two visitor parking spaces and to confer the added benefit of a third covered parking stall to the seven units in issue here.

[18] The Disclosure Statement prepared and filed by the developer in May 1989, under the heading “Limited Common Property” refers to balconies, patios, lawns and the two parking spaces within the attached garages of each unit as designated in that fashion, but is silent as to the carport-type parking stalls. The paragraph under this heading concludes with a statement that the developer does not intend to designate any other property as limited common property.

[19] Under the heading “Parking”, the Disclosure Statement refers to the fact that each unit will have the benefit of two parking spaces within the attached garage, designated as limited common property, and also to the fact that there will be an additional “ten (10) surface parking stalls for visitors” to the complex, “which have been designated as Common Property by the Developer.”

[20] Schedule “C” to the Disclosure Statement is a scale plan of the complex, which shows the disputed carport stalls marked as “visitor” parking.

[21] The amended Disclosure Statement is silent on both any additional limited common property and parking stalls.

[22] Both documents are signed on behalf of the developer by Andras Molnar, director. Mr. Molnar, through his counsel, has stated that at all times the developer, Tiburon City Homes Ltd., intended to comply with its legal obligations.

[23] The Disclosure Statement, under the then provincial legislation, served as a substitute for a prospectus for the strata plan. Section 22 of the relevant Schedule to the *Real Estate Act*, R.S.B.C. 1979, c. 356 [repealed], required a prospectus to contain a statement from the developer regarding designation of parking spaces as either common property or for exclusive use for a particular unit. In addition, it required a statement of future intention regarding limited common property, as referred to at para. 18 of these Reasons.

[24] Thus, the developer appears to have been in compliance with the provincial legislation in effect at the time, in clearly setting out its intention regarding the carport parking stalls, and filing that document with the Superintendent of Financial Institutions. Pursuant to s. 59 of the former *Real Estate Act*, a purchaser is deemed to have relied on the prospectus regardless of whether he or she actually received a copy of it.

[25] The municipal bylaw in effect at the time, Zoning and Development Bylaw No. 5300, required a minimum of 0.2 visitor parking spaces per dwelling unit. For this complex, encompassing 37 units, that would necessitate 8 such spaces.

[26] Minutes for the Richmond City Council meeting of May 8, 1989, show that the project architect, Peter Reese, attended the meeting to propose some zoning variance for the development. Council were referred to a staff report prepared on April 17, 1989, responsive to the variance application. That report refers to contemplated compliance with Bylaw No. 5300. It also refers to the requirement for eight visitor parking spaces, and the intention of the developer that there will in fact be ten.

[27] All of the foregoing is, in my view, overwhelming evidence that the intention of the developer at the time permits were obtained for the development was that the seven disputed carport stalls would be common property, designated for use as visitor or guest parking.

[28] I turn then to the strata plan which was prepared by Mr. Dyck and deposited in the Land Title Office. On the first page it has a Legend, which uses strata unit 12 as the example, and identifies the area noted as “PK” (clearly the disputed carport adjacent to unit 12) as follows: “PK-12 Denotes parking being limited common property for the exclusive use of S.L. 12.” Underneath the notation “PK-12” is written the word “typical”, thus clearly signifying that on each subsequent page where there appears a “PK-#” with a specific number, the identified parking stall is for the exclusive use of the numbered unit. This is the repetition of the designation to which the Court of Appeal referred at para. 28 of its Reasons.

[29] Mr. Dyck has deposed that he believes he made a mistake in labelling the disputed parking stalls as limited common property. He bases that belief on his review of the Disclosure Statement and the strata plan. I, too, have compared the two documents, and find that there is a sound objective basis upon which to conclude that Mr. Dyck made such a mistake. As I noted earlier, the evidence is overwhelming that the original intention of the developer was to designate the seven carport stalls as visitor parking, and to have them comprise the majority of parking which was to be available for guests (on the evidence at the time, between eight and ten stalls).

[30] There is no evidence that the developer ever formed a different intention. Indeed, any reduction in the overall number of visitor parking stalls would have been non-compliant with the municipal bylaw, and contrary to the representation made to City Council. Also, any change in designation of the seven carport stalls to limited common property would have needed to be reflected in the amended Disclosure Statement, and was clearly not. Against the backdrop of the developer's claim that it intended to meet its legal obligations, I find such to be inherently unlikely. Much more likely is the explanation offered by Mr. Dyck, namely that he made a simple mistake in the drafting of the strata plan.

[31] The developer installed the "guest parking" signs for the carport stalls prior to the open houses which were held for prospective initial purchasers. One such purchaser, Dennis Begin, has sworn an affidavit in which he deposes to his observation of those signs during his attendance at an open house. He has appended to his affidavit extracts from the printed marketing materials which he received from the sales representative, which clearly show the carport stalls as "visitor" parking.

[32] During the marketing phase of the project, the units were described as having double garages. I see nothing in the marketing brochures which refers to a third parking spot for the exclusive use of any individual units.

[33] Kent Lam, who is both an owner in the complex and a licenced real estate agent, swore an affidavit to which he appended the results of his search of the MLX database for historical listings of the seven units adjacent to the disputed stalls. With one exception, those listings show that the unit comes with two parking spaces. Some of the listings make reference to the availability of additional or guest parking on site.

[34] The one exception is a 1991 listing for unit 12, which advertises three total parking spaces, two "covered" and one "other". Of note, a later listing for that unit contains the following notation after the word "Parking": "Total: 2 Covered: 2 Garage; Double, Visitor Parking." That listing refers to the unit having been sold on

September 5, 2009. That is the date on which Ms. Chow signed the contract for purchase and sale for unit 12, which is Exhibit "B" to her affidavit. Thus, it seems likely that Ms. Chow purchased the unit based on an expectation of two covered parking spaces.

[35] Although Ms. Chow deposes that her expectation at time of purchase was that the third parking space was limited common property for her exclusive use, she bases that belief on information she received from a notary public at the time she signed conveyancing documents. On the evidence, that date appears to be September 28, 2009, more than three weeks after she signed the contract of purchase and sale. I find that it was after-acquired information which caused Ms. Chow to believe that she would have exclusive use of the disputed parking stall adjacent to unit 12, as opposed to any information she learned at or prior to time of offer to purchase.

[36] Although the aforementioned finding about Ms. Chow's state of mind at time of purchase is not relevant or necessary to the discussion of possible mistake in the strata plan, it may be relevant to any consideration of the equities of the matter, should that be necessary. In short, Ms. Chow "got what she bargained for" in purchasing unit 12. She cannot realistically say that she agreed to a purchase price in the expectation of a third parking space, and now faces the prospect of having it unfairly removed from her. It would also have been clear to Ms. Chow, from the signage on the outer wall of the garage for unit 12, depicted in Exhibit "C" of her affidavit, that the unit she was purchasing had a visitor parking space adjacent to it. Thus, although I have some sympathy for her claim that the proximity of the visitor parking space to her home is inconvenient and annoying, she must have known about that potential at the time she agreed upon a purchase price for the unit.

[37] Having found as a fact that there was a mistake in the original strata plan, I must next consider if that mistake is legally of the kind which fits within the ambit of s. 14.12 of the *Regulation*, and is capable of being corrected by either the registrar or the court.

[38] Unfortunately, s. 14.12 itself provides little guidance on this question. It simply defines “error” as “any erroneous measurement or error, defect or omission in a registered strata plan.” At issue here is clearly not an erroneous measurement. Nor does it seem to be an omission. It must then, if it is to fall within the meaning of “error” in the section, be either an “error” or “defect”. The potential circularity of the exercise is obvious and unhelpful. I note that one of the definitions of “error” in the *Shorter Oxford English Dictionary* is: “something done incorrectly because (of) ignorance or inadvertence; a mistake.”

[39] In my view, what was done here by Mr. Dyck is precisely that, namely a mistake, something which he did incorrectly through inadvertence. He, through inadvertence, mistakenly labelled the carport parking stalls as “limited common property for the exclusive use of” certain owners, as opposed to “common property” for use as visitor parking. The latter was clearly what was envisaged by the developer and represented to Richmond City Council at the time building approval was obtained. It was also what was contained in the Disclosure Statement, which was prepared prior to the strata plan.

[40] I also take some comfort from paras. 22 and 24 of the Reasons of the Court of Appeal, in which Mr. Justice Harris clearly held that the sort of mistake at issue here could fall within the ambit of s. 14.12, subject to rectification by the registrar.

[41] The Court of Appeal also found that it is open to this Court, having found an “error”, to either direct the registrar to correct it, or to remit the matter to the registrar for consideration.

[42] In my view, the appropriate disposition is to direct the registrar to correct the error in the strata plan. I have reached that conclusion for two primary reasons: first, the fact that there is sufficient material before me to be satisfied, which I am, that the “common property” designation is the correct one; secondly, it is not in the interests of any of the parties that there be further adjudicative proceedings to resolve this question. The litigation to date has no doubt been costly and time-consuming for all

concerned. It is appropriate that this Court reach a decision which provides a final answer to the parties.

[43] I dismiss the petition of the petitioner, Angela Yick Ying Chow.

[44] I grant the declaratory relief sought by the respondent, The Owners, Strata Plan NW 3243, and declare that the strata plan deposited in the Land Title Office on May 22, 1990, contains an error within the meaning of s. 14.12 of the *Regulation.*

[45] I make a declaration that the seven disputed parking stalls should be designated as “common property” as opposed to “limited common property”, and direct the registrar of titles to correct the strata plan to reflect that designation.

[46] I grant one part of the relief sought by the petitioner, namely a declaration that all strata fines assessed against her for improperly parking in the PK-12 stall, be cancelled.

[47] The respondent is entitled to its costs for this hearing.

“Tammen J.”