

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1049442 B.C. Ltd. v. The Owners, Strata
Plan LMS 1669,*
2018 BCSC 1631

Date: 20180824
Docket: S185501
Registry: Vancouver

Between:

1049442 B.C. Ltd.

Petitioner

And

The Owners, Strata Plan LMS 1669

Respondent

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

M. Lithwick
K. MacEwan

Counsel for the Respondent:

A. Erickson

Place and Date of Hearing:

Vancouver, B.C.
August 24, 2018

Place and Date of Judgment:

Vancouver, B.C.
August 24, 2018

[1] **THE COURT:** This is a petition by the owner of two strata units within the respondent strata corporation seeking the appointment of an administrator under s.174 of the *Strata Property Act*, S.B.C. 1998, c. 43 [Act] as well as remedies for unfair acts under s.164 of the *Act*.

Preventing or remedying unfair acts

164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final 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 or tenant, or
- (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

- (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
- (b) vary a transaction or resolution, and
- (c) regulate the conduct of the strata corporation's future affairs.

...

Appointment of administrator

174 (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.

(2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.

(3) The court may

- (a) appoint the administrator for an indefinite or set period,
- (b) set the administrator's remuneration,
- (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and
- (d) relieve the strata corporation of some or all of its powers and duties.

(4) The remuneration and expenses of the administrator must be paid by the strata corporation.

(5) The administrator may delegate a power.

(6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.

(7) Unless the court otherwise orders, if, under this Act, a strata corporation must, before exercising a power or performing a duty, obtain approval by a resolution passed by a majority vote, 3/4 vote, 80% vote or unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[2] I find that the petitioner has not met the standard for an appointment of an administrator at this time but there is sufficient evidence to support a number of orders under s.164. Indeed, the respondent conceded that certain orders should issue to address particular failings on the part of the strata corporation.

[3] As it relates to the appointment of an administrator, the test is set out in *Lum v. Strata Plan VR519*, 2001 BCSC 493 at para. 11, where the court provided the following factors informing the exercise of the court's discretion to appoint an administrator:

(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 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 or prevent 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.

[4] Generally, courts are reluctant to interfere with the democratic government of the strata community except where absolutely necessary. The cost of involving an administrator is also a factor to be considered.

[5] I find that the strata corporation's conduct has been lax and sloppy in certain respects. However, it has not been sufficiently egregious to justify the appointment of an administrator. The complaints advanced range from minor to moderate in

significance and are better suited for specific orders under s.164(2)(c) of the *Act* than a wholesale removal of the strata corporation's government.

[6] I will review each issue briefly and then indicate what remedy, if any, I have found to be appropriate to address it.

Improper Issues Raised at the Annual General Meeting

[7] The petitioner raises a concern that certain items were put on the agenda for the last Annual General Meeting that could not have been passed because they were contrary to statute or would result in breach of contract and that the strata corporation knew this to be so. However, as these proposals were not passed, it is difficult to give these any material weight. I obviously caution the respondent that they must carefully consider any advice they receive from their professional advisors but no special order is required at this time.

Overpayment of Strata Fees

[8] The respondent conceded that there had been overpayment of strata fees by the petitioner and consented to an order for the return of \$28,153.09 over a period of 12 months.

Failure to Collect Strata Fees from Other Owners

[9] There are said to be roughly \$34,000 in strata fees owing. This has caused the strata corporation some financial strain as it amounts to approximately one-third of their annual revenue, based on the material before me. However, these amounts have only been outstanding for approximately 18 months or less. I note that the strata corporation is prepared to consent to an order that it will take steps to collect all properly outstanding fees forthwith and I do make that order.

Parking

[10] The respondent agrees that it received the amount of exclusive parking spaces to which it was contractually entitled. However, as a matter of fairness, it suggests that it should be allocated an additional exclusive spot or spots for itself

and for other commercial strata members, particularly in light of the Richmond bylaw that requires a specific number of spots to be provided by restaurants, which is the business intended to be carried on by the petitioner's two tenants: City of Richmond, Bylaw No. 8500, *Zoning Bylaw* (16 November 2009) [Richmond Bylaw].

[11] The petitioner relies on the case of *B.P.Y.A. 1163 Holdings Ltd. v. The Owners Strata Plan VR 2192*, 2008 BCSC 695, where the court directed a strata corporation to designate a particular number of units for the use of a pub. However, there are some key distinguishing features in that case:

- a) First, the strata corporation bylaw in that case specifically incorporated the local bylaw that required a specific number of units. As such, the case can be seen as simply enforcing the applicant's rights under the applicable strata bylaw.
- b) Second, it is not clear that the local Richmond bylaw applicable in this case is inconsistent with the current parking plan. In particular, it appears that s. 7.4.2 of the Richmond Bylaw may permit common spots to be included within the required number of spaces, so long as the total number of available spaces in the building is equal to the total collective number of spots required by each of the various uses in the building. There is no evidence that the City of Richmond would not accept the current parking plan as meeting the requirements. It is the petitioner's burden to establish substantial unfairness.

[12] Further, to the extent that the petitioner seeks to rely on broader fairness principles:

- a) The petitioner did strictly "get what it paid for" in terms of the number of exclusive spots it contracted to receive; and
- b) The petitioner's proposal for what would be an equitable further allocation either to it or to commercial strata holders has never been formally put to council or to the strata corporation for a vote. In particular, there was

greater specificity in the proposal made in court during the course of oral argument than has been advanced in the past to the respondent.

[13] That said, the petitioner does deserve closure and clarity on this long-simmering issue. As such, I order that the respondent formally consider and vote on a written proposal advanced by the petitioner after this hearing within 60 days of receipt of that proposal.

[14] The strata corporation is also prepared to consent to an order that the gate between the second and third parking levels remain open, absent an amendment to the strata corporation bylaw or further agreement of the parties. I make that order.

[15] While I am not making an order on this issue, the strata corporation would be well served to obtain an opinion on, and then reasonably consider, the extent to which the relevant provisions of the applicable municipal bylaw require a certain number of parking places for restaurants when they consider what is fair to all strata owners.

Budget

[16] The respondent has failed to pass a 2018 budget. A meeting was held, but the issue was adjourned. It is vitally important that a strata corporation properly manage its financial affairs. I make an order that the respondent meet and pass a budget within 60 days. I note that the respondent was prepared to consent to such an order, save that it was not prepared to commit to a certain date.

Bird Droppings

[17] A loading bay located at the rear entrance of the building, which is designated as common property and serves as tenant access to the petitioner's two units, has suffered from an accumulation of bird droppings. The petitioner raised this issue and noted that the local health inspector also raised it as early as June 2017. However, no concrete steps were taken and the petitioner eventually engaged in self-help to ensure that the requisite permits could be obtained. They were in fact obtained.

[18] The strata corporation did make some efforts to secure quotes for the work necessary to address this issue but their response was slower than it should have been. I make an order that the petitioner have leave to deliver a claim to the strata corporation for the expenses incurred to address the bird dropping issue as well as any other common property repairs that it conducted, and that the strata corporation shall reasonably consider these claims within 60 days of receiving them from the petitioner.

Ceiling Leaks

[19] There are apparently cracks in the concrete pad that forms the second level parking area. These cracks were apparently causing leaks. The leaks appear to have been caused by two drains that are located on the floor of the parkade and they require cleaning and resealing. The process by which this cause was determined was somewhat tortuous but it is unclear to what extent the fault rests with the strata corporation as opposed to the usual delays associated with dealing with contractors. I expect it was partially both.

[20] Be that as it may, the strata corporation has now obtained quotes to clean and reseal these drains. Council approved this work at a council meeting held on August 10, 2018. They state that once scheduled, the work will be completed within a reasonable timeframe. To ensure that there be no further delays from the respondent's end, I make an order that the respondent make best efforts to complete this work to correct the leaks within the next 60 days.

Additional Repair Issues

[21] The petitioner raised certain additional smaller repair issues but I do not find that any of these rise to a level that require a special order. Many of these issues have already been addressed or are scheduled to be addressed. Any ongoing difficulties in relation to these further issues can be addressed in the normal course through existing strata democratic procedures.

Administrator

[22] I have rejected the request for the appointment of an administrator at this time. However, given that the strata corporation has consented to, or had imposed upon it, a series of orders that require future implementation, I find that it is reasonable to adjourn generally this aspect of the motion seeking the appointment of an administrator. The petitioner should not be required to incur the cost of commencing a fresh proceeding if the strata corporation fails to live up to the commitments it has made in this proceeding.

[23] While I am not seizing myself of any future application, the parties do have leave to request that I be appointed to hear any return to court on this matter. If that request can be reasonably accommodated given other court obligations, I will endeavour to do so.

Costs

[24] Given that the petitioner has obtained a series of orders in its favour, some on consent and some on the basis of judicial direction, I find that they are entitled to their costs at Scale B.

“Branch J.”

The Honourable Mr. Justice Branch