

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jay v. The Owners Strata Plan NW 3353*,  
2019 BCCA 102

Date: 20190315  
Docket: CA45335

Between:

**Douglas Jay**

Appellant  
(Petitioner)

And

**The Owners Strata Plan NW 3353**

Respondent  
(Respondent)

Before: The Honourable Mr. Justice Groberman  
The Honourable Mr. Justice Hunter  
The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia dated  
May 11, 2018 (*Jay v. The Owners Strata Plan NW 3353*, 2018 BCSC 780,  
Vancouver Docket S1611707).

## Oral Reasons for Judgment

The Appellant, appearing in person: D. Jay

Counsel for the Respondent: L.N. Mackie

Place and Date of Hearing: Vancouver, British Columbia  
March 15, 2019

Place and Date of Judgment: Vancouver, British Columbia  
March 15, 2019

**Summary:**

*From 2009 onward, the appellant occupied a residential strata property owned by his father and his father's wife. Under the Strata Property Act, he was eligible to be a member of the strata council if (a) he was a tenant, and (b) he provided the strata corporation with a notice that the owners' rights had been assigned to him. A Supreme Court judge denied the appellant's application for a declaration that he was a tenant, finding that there was insufficient evidence of a tenancy. She also found that the notice of assignment provided by the appellant to the strata corporation was inadequate, as it did not refer to a tenancy. On appeal held: Appeal dismissed. The judge made no reversible error in finding the evidence insufficient to prove a tenancy arrangement. She was also correct in finding that the notice filed with the strata corporation was deficient. With respect to costs, each party should bear their own costs of the appeal. The appellant offered to end the litigation if, after being furnished with a fully executed tenancy agreement and a proper notice of assignment, the strata corporation confirmed that he was eligible to run for council. The offer was summarily and unreasonably rejected by the strata corporation.*

[1] **GROBERMAN J.A.:** This appeal concerns Mr. Jay's eligibility to be a member of the strata council of the respondent strata corporation. Mr. Jay claims that he is a tenant occupying a condominium owned by his father, and that he has taken an assignment of his father's rights. As such, he says he is eligible to be a member of the strata council. The strata corporation says that Mr. Jay has not demonstrated that he is a tenant, and so is ineligible. It also contends that the document purporting to assign rights to Mr. Jay does not comply with statutory requirements.

[2] The judge in the court below accepted the strata corporation's arguments. She refused Mr. Jay's application for declarations that he was a tenant and that he was eligible to stand as a candidate for the strata council. She also dismissed his alternative application for a declaration that the strata corporation was estopped from denying his eligibility. Mr. Jay appeals.

[3] I would observe that there is a certain pointlessness to this litigation. Three annual general meetings of the strata corporation have been held since the filing of the petition. Assuming the situation is as he alleges, Mr. Jay could have, at any time, simply provided the strata corporation with documentation establishing his rights. He would then have indisputably had the right to stand for election to the strata council. Instead, he chose to prosecute a complicated, prolonged and, to date, unsuccessful

legal battle dedicated to establishing that he has no obligation to obtain and provide the documentation.

[4] The fault does not, by any means, lie solely with Mr. Jay. He did, before filing this appeal, propose just such a resolution of the matter, but the strata corporation indicated that it would not accept it.

[5] While this Court has little choice but to determine the dispute presented to it, it seems to me that the needless expenditure of public and private resources is unfortunate.

### **Background**

[6] Mr. Jay is not an owner of a strata unit, but lives in a unit owned by his father and his father's wife, and has done so since 2009. In 2009, his father executed a document purporting to assign to Mr. Jay the right to run for a seat on the strata council. The document was filed with the strata corporation. Between 2012 and 2016, Mr. Jay was an elected member of the strata council and served as its president. No issue was taken as to his eligibility to be a council member during that period.

[7] On March 30, 2016, Mr. Jay became frustrated at a strata council meeting, apparently over lack of support for a new property management proposal that he put forward. It is uncontested that he told the other members of the strata council that he "was done" and that he left the meeting. Mr. Jay deposes that he said only that he was done "with the meeting". The strata corporation takes the position that Mr. Jay clearly indicated that he was resigning from council, and that it accepted his resignation. Mr. Jay says that the other council members subsequently took steps to prevent him from fulfilling his role as an elected council member.

[8] At its outset, this litigation was primarily concerned with the issue of whether Mr. Jay had resigned from the council. As I will indicate, it has since become focussed on the issue of whether Mr. Jay is eligible to be on the council at all.

**The Statutory Scheme**

[9] Section 28 of the *Strata Property Act*, S.B.C. 1998, c. 43 sets out the criteria for eligibility to be a strata council member:

28 (1) The only persons who may be council members are the following:

- (a) owners;
- (b) individuals representing corporate owners;
- (c) tenants who, under section 147 or 148, have been assigned a landlord's right to stand for council.

(2) Despite subsection (1), the strata corporation may, by a bylaw passed at an annual or special general meeting held after the first annual general meeting, allow classes of persons, other than those referred to in subsection (1), to be council members.

...

[10] The strata council has not passed any bylaw under subsection 2. Mr. Jay is not an owner of a strata unit, nor is he a representative of any corporate owner. He occupies a unit that is owned jointly by his father and his father's wife. He claims eligibility to be a member of council under s. 28(1)(c). That subsection contains two requirements – first, the person must be a “tenant”, and second, the person must have been assigned the right to stand for council under ss. 147 or 148.

[11] “Tenant” is a term defined, for the purposes of the *Act*. The definition is in s. 1(1):

"tenant" means a person who rents all or part of a strata lot, and includes a subtenant ....

[12] Paragraph 141(2)(a) of the *Act* allows a strata corporation to pass a bylaw prohibiting the rental of residential strata lots, and this strata corporation has such a bylaw. Rentals to “family members” are excluded from the prohibition by virtue of s. 142, which reads as follows:

142 (1) For the purposes of this section, "family" and "family member" have the meaning set out in the regulations.

(2) A bylaw referred to in section 141(2) does not apply to prevent the rental of a strata lot to a member of the owner's family.

(3) A rental of a strata lot to a family member under this section creates an assignment of the owner's powers and duties under section 148.

...

[13] Paragraph 8.1(1)(b) of the *Strata Property Regulation*, B.C. Reg. 43/2000 provides that, for the purposes of s. 142 of the *Act*, “family” and “family member” include a child of the owner. It is common ground that Mr. Jay, as a child of one of the owners, is a “family member”.

[14] Section 146 of the statute requires a “landlord” (a term defined as including “an owner who rents a strata lot to a tenant”) to take certain steps when renting a residential strata lot:

146 (1) Before a landlord rents all or part of a residential strata lot, the landlord must give the prospective tenant

- (a) the current bylaws and rules, and
- (b) a Notice of Tenant's Responsibilities in the prescribed form.

(2) Within 2 weeks of renting all or part of a residential strata lot, the landlord must give the strata corporation a copy of the notice signed by the tenant.

...

[15] The *Strata Property Regulation* prescribes the form (“Form K”) for the purposes of s. 146(1)(b) of the statute.

[16] Sections 147 and 148 of the *Act* govern the assignment of owners’ rights and duties to tenants:

147 (1) A landlord may assign to a tenant some or all of the powers and duties of the landlord that arise under this Act, the bylaws or the rules, but may not assign to a tenant the landlord's responsibility under section 131 for fines or the costs of remedying a contravention of the bylaws or rules.

(2) The assignment is not effective until the landlord gives the strata corporation a written notice stating all of the following:

- (a) the name of the tenant to whom the assignment is made;
- (b) the powers and duties that have been assigned;
- (c) the time period during which the assignment is effective.

148 (1) In this section, "long term lease" means a lease to the same person for a set term of 3 years or more.

(2) If a residential strata lot is leased under a long term lease, the tenant is assigned the powers and duties of the landlord under this Act, the bylaws and the rules for the term of the lease.

(3) Before exercising any powers of the landlord, the tenant must have given to the strata corporation written notice of the assignment referred to in subsection (2), stating the name of the tenant and the time period during which the lease is effective.

(4) The strata corporation must give a copy of the notice referred to in subsection (3) to the landlord and to the owner.

...

[17] In short, s. 147 allows an owner to assign powers and duties to a tenant. Section 148 provides that, where there is a fixed-term lease of three years or more, the powers and duties of the owner are automatically assigned to the tenant. While there may be some issues with the interpretation of s. 142(3), it appears to equate rentals by owners to close family members with fixed term leases of three years or more, so that there is an automatic assignment of powers and duties.

[18] Both ss. 147 and 148 require a notice establishing the assignment to be filed with the strata corporation. Under s. 147, the filing is typically the landlord's responsibility, while under s. 148, it is the tenant's responsibility. Unfortunately, there are no prescribed forms for the written notices required by ss. 147(2) and 148(3). If there were such forms, some of the difficulties in this case might have been prevented.

[19] In order to show eligibility to be a council member, Mr. Jay had to demonstrate both that he was a "tenant", and that proper notice of an assignment of rights to him had been provided to the strata corporation, under either s. 147(2) or s. 148(3).

### **History of the Litigation**

[20] In December 2016, Mr. Jay filed a petition in the Supreme Court seeking a declaration that he remained a member of the strata council. The strata corporation filed its response to the petition on January 20, 2017, alleging that Mr. Jay had

resigned from the council, and that, in any event, he was not eligible to be a member of it, as he was neither the owner of a strata unit, nor a tenant as defined in the Act.

[21] On the same day that the strata corporation filed its response, Mr. Jay filed a notice of hearing of petition, setting the matter down for the following week. Over the following few days, the parties filed several affidavits. The main affidavits, which included extensive exhibits, were sworn by Mr. Jay and by the person who succeeded him as president of the strata council. The strata corporation also filed a brief affidavit sworn by Adrian Lipsey, a property manager employed by the property management company that contracted with the strata corporation to manage the development. At various times, Mr. Lipsey had been the property manager with responsibility for the development. Mr. Jay filed an affidavit sworn by another former member of the strata council.

[22] The parties first appeared in court, represented by counsel, on January 27, 2017, the date set by Mr. Jay for the hearing of the petition. Counsel were agreed that cross-examination on the affidavits that had been filed to date should take place, though they disagreed on whether it should be in open court. Ultimately, the judge ruled that the cross-examinations should take place in private, before a court reporter, with the transcripts to be provided to the judge hearing the matter.

[23] Cross-examinations of three of the four deponents took place. The cross-examination of Mr. Lipsey did not. Initially, this was due to scheduling difficulties. Eventually, the strata corporation resisted putting him forward until after it had received a promised affidavit from Mr. Jay's father, which did not materialize.

[24] The question of whether Mr. Jay had resigned from the council ceased to have obvious practical significance on February 27, 2017, when a new council was elected at the annual general meeting of the strata corporation. At the very least, the petition required amendment in order for any practical relief to be at issue.

[25] On April 21, 2017, Mr. Jay amended his petition. He abandoned much of the relief that he was seeking, and in particular, abandoned his request for a declaration

invalidating the decisions of the strata council from April 1, 2016 onward. He added two claims for relief, seeking a declaration that he is a tenant for the purposes of the *Act*, and an order that the strata corporation convene a special general meeting to elect a new council.

[26] In May 2017, Mr. Jay filed an application seeking, among other things, the setting down of the petition for a one-day hearing, and an order striking Mr. Lipsey's affidavit as a result of him having not been made available for cross-examination. The strata corporation opposed the application, arguing that the hearing of the petition would take longer than Mr. Jay estimated, and contending that it should produce Mr. Lipsey for cross-examination only after Mr. Jay's father's affidavit had been provided.

[27] The application came on for hearing before a master on June 7, 2017. The master dismissed parts of the application, but simply adjourned the applications to set the petition down for hearing and the application to strike Mr. Lipsey's affidavit. The master directed the parties to resolve the issue of Mr. Jay's eligibility to serve as a member of the strata council before bringing the adjourned applications back on for hearing. Although Mr. Jay filed a notice of appeal from the master's decision to a judge of the Supreme Court, he did not proceed with the appeal.

[28] Instead, on November 17, 2017, he filed a notice of application, seeking declarations that he was a tenant as that term is defined in the *Act*, that he had been assigned rights to stand for strata council under ss. 147 and 148 of the *Act*, and that the strata corporation was estopped from denying his eligibility to stand for council. It is not clear what provision of the Supreme Court Civil Rules authorized the filing of the application, but no objection was taken to it being heard, and it appears to have been necessary in order to have procedures conform to the master's order.

[29] The application came on for hearing on March 1, 2018, and the judge provided reasons dismissing the application on May 11, 2018. The current appeal is an appeal from the dismissal of the application.



### The Judge's Reasons

[30] The evidence clearly established that Mr. Jay had been an occupant of the residential strata unit from 2009. It also established that a document entitled "Letter of Appointment" had been executed by Mr. Jay's father (but not by his father's wife, who co-owned the strata lot) in 2009. A copy of that document had been provided to the strata corporation. The pertinent parts of that document are as follows:

I, the undersigned, being an owner of [the residential strata unit] ... hereby appoint Douglas Jay to be my representative with authority to act on my behalf on all matters pertaining to this unit. All rights shall be assigned to all such matters including but are not limited to: attending meetings of the Strata Council, voting on matters thereof, attending Annual General Meetings and voting on matters thereof, standing for election to council and with any and all other matters pertaining to the unit and the Strata Corporation.

This appointment shall remain in effect until such time as a written letter of revocation is duly filed.

[31] The judge was called upon to determine whether Mr. Jay had established that he was a "tenant", and, if he was, to determine whether the "Letter of Appointment" met the requirements of either s. 147(2) or s. 148(3) of the *Act*.

[32] The judge found that Mr. Jay had not established that he was a tenant. In that regard, she noted the absence of any written evidence of a tenancy relationship. She commented on the absence of any evidence from the owners of the residential strata unit stating that they were renting it to Mr. Jay, and the absence of any mention of a tenancy in the "Letter of Appointment".

[33] Mr. Jay suggests that the judge was under the misapprehension that a tenancy agreement must be in writing in order to meet the requirements of the *Act*. I do not read the judgment that way. Rather, the judge simply found that the absence of written evidence of any tenancy agreement was a factor that she could take into account in determining whether she was satisfied that there was a landlord-tenant relationship.

[34] The judge also noted the absence of documentary evidence of the payment of rent. She acknowledged that the petitioner deposed that he made periodic

payments at times prior to 2011 and some irregular payments after 2011, but was struck by the vagueness of the evidence, and by the lack of documentary support for it. She summarized her evidentiary concerns as follows:

[52] Without affidavit evidence from the registered strata unit owners, and without evidence of payments, I am unable to conclude that the petitioner is a tenant. The petitioner has not established that he is a tenant giving him a right to stand for election to Strata Council.

[35] In the context of the judgment, it is clear that the judge meant simply that she was not satisfied, on the evidence as a whole, that Mr. Jay was a tenant.

[36] The judge also found that the requirements of s. 146 had not been met, as there was no evidence that a Form K had ever been provided to Mr. Jay, or that a signed copy had ever been given to the strata corporation

[37] Having found that Mr. Jay had not established that he was a “tenant”, it was, strictly speaking, unnecessary for the judge to determine whether the Letter of Appointment was sufficient to meet the requirements of ss. 147(2) or 148(3) of the statute.

[38] She did find, however, that the letter failed to meet the requirements of s. 147(2), because it did not tie the assignment to a tenancy, and because only one of the two joint owners had executed the document. She noted that the evidence did not suggest that the other joint owner had made any assignment of her rights to Mr. Jay. Indeed, the evidence did not even indicate that the other joint owner was aware that Mr. Jay was occupying the unit.

[39] The judge also found that the letter failed to satisfy the requirements of s. 148 because it did not confirm that Mr. Jay was a tenant, and because it failed to specify how long the assignment was to be effective.

### **Analysis**

[40] The question of whether Mr. Jay was a tenant is a question of mixed fact and law, on which the judge at first instance is entitled to deference. It is clear that more

than mere occupancy of a unit is required in order for a person to be a tenant under the *Act*, even if that person is a family member of the owner. The statute recognizes different rights and obligations for “owners”, “tenants” and “occupants” of a strata lot. It defines “tenant” as a person who “rents” the strata lot. There must, then, be some formal arrangement for payment. It seems to me that the judge made no reversible error on the evidence before her in finding that such an arrangement was not in place.

[41] In saying this, I do not suggest that either a formal lease or monthly payments are necessary to establish a tenancy. The judge did not err, however, in refusing to find that the very limited evidence that Mr. Jay made some payments to his father established that he was a tenant.

[42] The establishment of a tenancy has significant legal consequences, as does the assignment of owners’ rights under ss. 146, 147 and 148 of the statute. The powers and duties of strata lot owners run with the land. A tenancy arrangement serves to transfer some interests in land. Under ss. 147 and 148, the rights and duties of owners of strata lots may be assigned as part of the landlord-tenant relationship.

[43] While I do not suggest that perfect compliance with the sections is always necessary, their limited formal requirements are significant. A strata corporation must be given sufficient information to enable it to determine whether rights have been assigned from an owner to a tenant so that it can determine which of the two is entitled to exercise powers or is liable for breach of duties.

[44] There were a number of problems with the “Letter of Appointment” that was filed with the strata corporation in this case. First, the letter did not tie the assignment to a tenancy. The statute is clear that, in the absence of a bylaw specifically dealing with assignments, individual owners can only assign their rights to tenants. The letter in this case purported to assign all rights, and did not refer in any way to a tenancy.

[45] Second, the letter was ambiguous as to whether the rights were genuinely “assigned” at all. The opening words of the Letter of Appointment refer to the appointment of a “representative with authority to act on my behalf”. Such language suggests the appointment of an agent rather than an assignment or transfer of rights.

[46] Third, the clause of the letter of appointment dealing with revocation would appear to contemplate the assignment continuing to operate whether or not Mr. Jay continued to be a tenant.

[47] The judge was concerned, as well, with the fact that only one of two joint owners had assigned rights to Mr. Jay. I agree that that is problematic. Joint owners must, ordinarily, all agree in order to give up rights that they have as owners. It is not at all clear that a single joint owner can unilaterally assign the right to stand for strata council to a tenant. It is unnecessary, however, to reach any firm conclusion on this issue for the purposes of this litigation.

[48] As I have indicated, the judge made no error in finding that a tenancy arrangement was not established on the evidence, nor did she err in finding that the Letter of Assignment was ineffective under ss. 147 and 148 of the statute.

### **Estoppel**

[49] Mr. Jay contended that, even if he was not a tenant, or had not complied with ss. 147 or 148 of the statute, the strata corporation was estopped from denying his right to sit on the strata council.

[50] The estoppel argument was based on an alleged representation by the property manager at some point prior to Mr. Jay occupying the strata unit, to the effect that a Form K was not needed, because Mr. Jay was a family member. The estoppel allegation was also based on the strata corporation’s acceptance of Mr. Jay as a council member for several years.

[51] The judge rejected the estoppel arguments:

[55] Although the parties did operate on an assumed [state] of facts for a number of years, the petitioner has not met the second requirement to establish an estoppel. The petitioner has not proven that it would be unjust or unconscionable for the respondent to resile from its common assumption. The petitioner had an easy remedy. He simply needed to provide the Strata Corporation with concrete evidence of payment or other compensation to establish a tenancy. Alternatively, the petitioner's father could have deposed that he is renting Strata Lot 35 to the petitioner.

[52] I agree that Mr. Jay failed to establish that it would be unjust or unconscionable for the strata corporation to insist on further documentation at this stage. Mr. Jay can easily file a Form K, and, if he is indeed a tenant, can easily file a proper notice of assignment under s. 148, tying the assignment to his tenancy. Those requirements are not onerous.

[53] Mr. Jay has, in his fresh evidence application, included a document that appears to show that the strata corporation will refuse to recognize him as a tenant even if he files proof of a tenancy signed by both owners and by himself, together with a proper notice under s. 148. It appears to me that the strata corporation would not be operating in a lawful manner if it refused to recognize a tenancy and an assignment of powers and duties in such a situation.

### **Evidentiary Issues**

[54] Mr. Jay has attempted to shore up the weaknesses of his case by filing voluminous additional evidence on appeal. The evidence does not meet the requirements of *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Almost all of the evidence could have been provided, with due diligence, at the trial level. The evidence that is new, in the sense that it was generated after the hearing in the court below, is insufficiently connected to the declarations sought below to be of value. I note, as well, that there are significant credibility issues in this case, particularly in view of Mr. Jay's changing accounts of how he paid rent. The fresh evidence that has been tendered cannot be said, in the circumstances of this case, to be conclusive of any issue.

[55] I would decline to admit any of the new or fresh evidence.

[56] Mr. Jay also raises the issue of the affidavit of Mr. Lipsey. He says that the failure of the respondent to produce Mr. Lipsey for cross-examination precluded the judge from considering his affidavit.

[57] I do not agree that the judge was required to strike Mr. Lipsey's affidavit, particularly in circumstances where she was not asked to do so. The affidavit did not, in any event, figure in any substantial way in the judge's analysis, and it cannot be said that its presence as part of the record was unfair to Mr. Jay.

### **Conclusion**

[58] I observe that this litigation is unfortunate, and, as I indicated previously, unproductive. There should be nothing to stop Mr. Jay from complying with the *Act* by filing evidence of a tenancy (if one exists) and furnishing a proper notice of assignment of rights to the strata corporation.

[59] I am not persuaded that the judge made any reversible errors in her analysis. I would dismiss the appeal.

[60] In light of the appellant's reasonable efforts to reach a resolution prior to filing the notice of appeal, I am of the view that the appropriate costs disposition is that each side bear its own costs of the appeal. I would not interfere with the costs award made by the trial judge.

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

[62] **GRIFFIN J.A.:** I agree.

[63] **GROBERMAN J.A.:** The appeal is dismissed with each side to bear its own costs.

"The Honourable Mr. Justice Groberman"