IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NES 3120 v. Jedmen Holdings Inc.,* 2019 BCSC 688

Date: 20190502
Docket: S205646
Registry: New Westminster

Between:

The Owners, Strata Plan NES 3120

Appellant

And

Jedmen Holdings Inc. and Civil Resolution Tribunal

Respondents

Before: The Honourable Mr. Justice Skolrood

On appeal from: A decision of the Civil Resolution Tribunal, dated August 7, 2018 (*The Owners, Strata Plan NES 3120 v. Jedmen Holdings Inc.*, 2018 BCCRT 425, File No. ST-2017-004086).

Reasons for Judgment

Counsel for the Appellant:	G.S. Hamilton
Counsel for the Respondent, Jedmen Holdings Inc.:	W. McMillan
Place and Date of Trial/Hearing:	New Westminster, B.C.
Place and Date of Judgment:	New Westminster, B.C. May 2, 2019

Introduction

[1] This is an application for leave to appeal a decision (the "Decision") of the Civil Resolution Tribunal ("CRT") dated August 7, 2018. The application is brought pursuant to s. 56.5 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*CRTA*]. That section has since been repealed: Bill 22, *Civil Resolution Tribunal Amendment Act*, 3rd Sess., 41st Leg., British Columbia, 2018.

[2] The Decision concerns the manner in which certain units in a strata development located in Golden, BC are rented to members of the public for short term hotel-type accommodation.

Background

[3] The applicant (the "Strata Corporation") is a strata corporation established pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*]. As noted, the Strata Corporation comprises the owners of units of a strata development located in Golden, BC (the "Development"). The Development is made up of 48 residential strata lots and one commercial strata lot.

[4] The respondent Jedmen Holdings Inc. ("Jedmen") is the registered owner of a unit in the Development.

[5] The Development has an optional rental pool through which owners of residential strata lots may rent out their units on a short term basis. The residential strata lots are subject to a restrictive covenant that requires them to only rent through an appointed rental manager. Twenty-eight of the 48 residential lot owners participate in the rental pool. Jedmen does not.

[6] In accordance with the *SPA*, the Strata Corporation is governed by an elected strata council (the "Strata Council"). The Strata Council formed a committee, known as the Owners Rental Committee ("ORC"), which was created to deal with issues arising from the rental pool. Some members of the ORC are also members of the Strata Council, and some are not.

[7] On November 8, 2016, the ORC negotiated a Master Rental Management Agreement ("MRMA") with a third party property manager, Bellstar Hotels & Resorts Ltd. ("Bellstar"), pursuant to which Bellstar would act as the rental manager for units in the rental pool.

[8] Initially, the MRMA included provisions that purported to impose conditions on all owners of strata lots, regardless of whether the lot was part of the rental pool. Those provisions were subsequently removed such that the MRMA now only applies to owners who participate in the rental pool.

[9] On April 12, 2016, an amendment to the strata bylaws was approved at the strata annual general meeting which purported to restrict the ability of owners to rent their strata lots except through an agreement with the rental manager. Those amendments were subsequently removed at the following year's annual general meeting, held on April 17, 2018.

[10] Despite the removal of the restrictive provisions of the MRMA and the bylaws, Jedmen objects to the role of the Strata Corporation with respect to the rental pool. It brought its objections forward in the form of a notice of dispute filed with the CRT on August 13, 2017.

The CRT Decision

[11] Following the filing of Jedmen's notice of dispute, the parties engaged in a facilitation process as provided for in the *CRTA*. No resolution was reached. They then proceeded to the adjudication stage which involved a hearing in writing before a single CRT member. As part of that process, both Jedmen and the Strata Corporation submitted evidence and written argument.

[12] On August 7, 2018, the CRT issued the Decision in which it made the following orders:

a) The strata stop its involvement in the management of the rental pool,

b) The Strata Council stop having the ORC as a committee of the Strata Council,

c) The MRMA is not enforceable, and

d) The strata not enter into another agreement with any rental manager that deals with the rental pool.

[13] The CRT's key finding underlying these orders is found at para. 34 of the Decision:

> I find that by being a party to the MRMA and by having the ORC be a committee of the strata council, the strata is involved in the management of the rental pool, which is not in the interests of all owners. I find, on a balance of probabilities, that the strata council is not able to act in the interests of all owners when it is involved in the management of the rental pool, because the interests of rental pool owners and non-rental pool owners sometimes compete.

Legal Framework

[14] The issues raise by Jedmen's complaint engage the following sections of the *SPA*:

> **Responsibilities of strata corporation**
>
> **3** Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.
>
> …
>
> **Council member's standard of care**
>
> **31** In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.
>
> …
>
> **Restriction of rentals by strata corporation**
>
> **141** (1) The strata corporation must not screen tenants, establish screening criteria, require the approval of tenants, require the insertion of terms in tenancy agreements or otherwise restrict the rental of a strata lot except as provided in subsection (2).
>
> (2) The strata corporation may only restrict the rental of a strata lot by a bylaw that
>
> (a) prohibits the rental of residential strata lots, or
>
> (b) limits one or more of the following:

> (i) the number or percentage of residential strata lots that may be rented;
>
> (ii) the period of time for which residential strata lots may be rented.
>
> (3) A bylaw under subsection (2) (b) (i) must set out the procedure to be followed by the strata corporation in administering the limit.

[15] The Strata Corporation's application for leave to appeal is brought under s. 56.5 of the *CRTA*, which, prior to its repeal, stated:

> **Appeal to Supreme Court**
>
> **56.5** (1) Subject to this section, a party that is given notice of a final decision in a strata property claim may appeal to the Supreme Court on a question of law arising out of the decision.
>
> (2) A party may appeal to the Supreme Court only if
>
> (a) all parties consent, or
>
> (b) the court grants leave to appeal.
>
> …
>
> (4) The court may grant leave to appeal under subsection (2) (b) if it determines that it is in the interests of justice and fairness to do so.
>
> (5) When deciding whether it is in the interests of justice and fairness to grant leave, the court may consider the following:
>
> (a) whether an issue raised by the claim or dispute that is the subject of the appeal is of such importance that it would benefit from being resolved by the Supreme Court to establish a precedent;
>
> (b) whether an issue raised by the claim or dispute relates to the constitution or the *Human Rights Code*;
>
> (c) the importance of the issue to the parties, or to a class of persons of which one of the parties is a member;
>
> (d) the principle of proportionality. …

[16] Section 123 of the *CRTA* sets out the types of orders the CRT may make:

> **Orders available in strata property claims**
>
> **123** (1) In resolving a strata property claim, the tribunal may make one or more of the following orders:
>
> (a) an order requiring a party to do something;
>
> (b) an order requiring a party to refrain from doing something;
>
> (c) an order requiring a party to pay money.

> (2) In resolving a strata property claim described in section 121 (1) (e) to (g), the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.
>
> (3) Despite subsections (1) and (2), the tribunal may not make the following orders:
>
> (a) an order requiring the sale or other disposition of a strata lot;
>
> (b) an order in a class of orders prescribed by regulation.

[17] Section 56.5 of the *SPA* was recently considered by the Court of Appeal in *Allard v. The Owners, Strata Plan VIS 962*, 2019 BCCA 45, where the Court allowed an appeal from a decision of this Court granting leave to appeal from the CRT.

[18] Speaking for the Court, Justice Kirkpatrick described the proper analytical approach to be employed when considering an application for leave to appeal under s. 56.5. She said at para. 14:

> [14] For leave to be granted under s. 56.5, two requirements must be satisfied. First, the proposed appeal must engage a question of law. Second, it must be in the interests of justice and fairness to grant leave. Section 56.5(5), reproduced above, provides a list of factors that "may" be considered on the second branch of the test.

[19] In terms of the first requirement, that the appeal engage a question of law, Justice Kirkpatrick said at paras. 20-22:

> [20] Section 56.5(1) of the *CRTA* only permits appeals from "a question of law." The character of a question of law, as opposed to a question of fact or mixed fact and law, was explained by the Supreme Court of Canada in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35:
>
> > Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.
>
> The Court in that case went on to caution that "the distinction between law on the one hand and mixed law and fact on the other is difficult."
>
> [21] I first observe that the alleged questions of law identified in the order under appeal are quintessentially questions of mixed-fact-and-law. At the very least, the order frames the pertinent legal questions from the standpoint of a particular factual matrix. The definition of a question of mixed fact and

> law invokes the application of the relevant legal standard to a particular set of facts: see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 26.
>
> [22] In addressing this first issue, the jurisprudence on appeals under the *Arbitration Act*, R.S.B.C. 1996, c. 55—the appeal mechanism which likewise requires the identification of a question of law—provides general guidance. Notably, in *Elk Valley Coal Partnership v. Westshore Terminals Ltd.*, 2008 BCCA 154 at para. 17, this Court reasoned that "a court considering an application for leave to appeal must be careful to grant leave only where questions of law can be clearly perceived and delineated." This caution is clearly apposite in the present case.

The Strata Corporation's Proposed Appeal

[20] The Strata Corporation filed its application for leave to appeal on September 4, 2018. In the application, the Strata Corporation alleged a number of errors on the part of the CRT. At the hearing of its application, the Strata Corporation recast its position somewhat, based on the *Allard* decision that was released in February 2019, and posed the following four questions which it submits are questions of law on which leave to appeal can and should be granted:

1. Must the Strata Council act in the interests of all owners under s. 3 of the *SPA* when conducting Strata Council business?

2. Does s. 141 of the *SPA* apply to voluntary arrangements between the Strata Corporation and owners?

3. Does s. 141 of the *SPA* apply to licences to occupy?

4. Does s. 123 of the *CRTA* allow the CRT to declare a contract unenforceable?

Discussion

[21] To the extent that the questions posed by the Strata Corporation concern the validity of the rental pool arrangement and the jurisdiction of the CRT to make certain orders, it may appear at first glance that the proposed appeal engages general issues of law. However, in considering the leave application, the Court must assess whether the applicant has identified specific questions of law arising out of

the Decision that can be "clearly perceived and delineated": *Allard* at para. 22, citing *Elk Valley Coal Partnership v. Westshore Terminals Ltd.*, 2008 BCCA 154 at para. 17.

[22] It is therefore necessary to consider each of the questions posed by the Strata Corporation to determine if a true question of law arises. If one or more questions of law are identified, it is then necessary to determine whether it is in the interests of justice and fairness to grant leave to appeal, a determination which is informed by the factors set out in s. 56.5.

Must the Strata Council act in the interests of all owners under s. 3 of the *SPA* when conducting strata council business?

[23] The Strata Corporation submits that the CRT misconstrued the duty of the Strata Council as set out in s. 3 of the *SPA* as meaning that the Council must act only in the best interests of all owners. It points to the CRT's finding, reproduced at para. 13 above, that the Strata Council cannot be involved in managing the rental pool because there are competing interests between owners who participate in the rental pool and owners who do not.

[24] The Strata Corporation submits that a strata council will often be faced with competing interests that it will have to resolve and that, properly construed, the duty of the strata council is to "accomplish the greatest good for the greatest number": *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120 at para. 24, citing *Sterloff v. Strata Plan No. VR 2613* (1994), 38 R.P.R. (2d) 102 at para. 35 (B.C.S.C.).

[25] The Strata Corporation submits that the proper interpretation of the Strata Council's duty is a question of law.

[26] In my view, the CRT's decision on this point involves the application of the statutory duty of the Strata Council to the specific facts that were before it, namely the role of the Strata Council and the ORC in the management of the rental pool. Specifically, the CRT found that that the Strata Council, by creating the ORC and by

involving itself in the management of the rental pool, it put itself in a conflict position where it was not able to act in the interests of all the owners, thereby violating s. 3: Decision, para. 34.

[27] The issue of the scope or content of the Strata Council's duty does not arise as a discrete question, rather the issue is whether the duty was breached in the particular circumstances of this case. That is a quintessential question of mixed fact and law and, as such, leave to appeal is not available.

Does s. 141 of the *SPA* apply to voluntary arrangements between the Strata Corporation and owners?

Does s. 141 of the *SPA* apply to licences to occupy?

[28] These two questions can be dealt with together.

[29] The Strata Corporation submits that s. 141 of the *SPA* has no application to the rental structure, because it involves voluntary agreements between the Strata Corporation and owners. The Strata Corporation further submits that s.141 does not apply to the type of short term rentals arranged through the rental pool because those arrangements create licences to occupy, not tenancies, and the *SPA* does not apply to licences to occupy: *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064 at paras. 45-46, 52.

[30] On their face, both questions require an analysis of the facts of the rental arrangements in order to determine their legal character. Madam Justice Baker engaged in that process in *Semmler.* As she stated at para. 29:

> To determine whether temporary occupants of strata lots 12, 19 and 21 gain their occupancy under a rental agreement or a licence agreement, an examination of the facts is required.

[31] In other words, a factual determination must first be made before the Court can determine whether s. 141 of the *SPA* applies. The questions posed by the Strata Corporation are thus questions of mixed fact and law on which leave to appeal may not be granted.

Does s. 123 of the *CRTA* allow the CRT to declare a contract unenforceable?

[32] As noted, the CRT found that the MRMA is not enforceable. The Strata Corporation takes the position that such a finding is beyond the jurisdiction of the CRT in that it is not an order or remedy set out in s. 123 of the *CRTA*.

[33] Of all of the questions posed by the Strata Corporation, this question on its face appears to come closest to raising a pure question of law in that it goes to the jurisdiction of the CRT to grant a specific remedy under s. 123.

[34] However, it is clear from an examination of the Decision that the CRT reached its conclusion based on its interpretation of the MRMA. The CRT said at para. 38:

> Section 141 of the SPA explains that the strata cannot restrict the rental of strata lots, except to prohibit rentals, or place limits on the number of strata lots that may be rented. The MRMA places restrictions on the rental of strata lots in a way that is not permitted by section 141 of the SPA. I find that the MRMA is unenforceable.

[35] The MRMA is a contract, the interpretation of which involves issues of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 50. The CRT's finding that the MRMA is unenforceable flows directly from its interpretation of the contract and, in my view, it is not possible to extract or isolate the remedy granted in order to characterize it as a pure question of law.

[36] Based on the above, I find that the Strata Corporation has not identified questions of law on which leave to appeal may be granted and its application must therefore be dismissed.

Section 56.5(5) Factors

[37] In the event that I am wrong on one or more of the questions posed, I will briefly address the factors set out in s. 56.5(5) of the *CRTA*.

[38] The issues raised in the application are not, in my view, sufficiently important to warrant further consideration by the Court or the establishment of a precedent.

Tribunal decisions like the one in issue here are not binding and, in any event, the issues are specific to the unique rental arrangements established for this particular development. There was no evidence of similar structures being used in other strata developments or that the implications of the Decision go beyond the facts of this case.

[39] I would add that the fact that s. 56.5 of the *CRTA* has been repealed and statutory appeals eliminated further diminishes any precedential value of this case.

[40] I accept that the Decision is of some importance to the parties in that it may result in changes to the management of rentals within the Development. However, the individual owners continue to have contracts with the rental manager. Importantly, there is no evidence that any of the changes to the rental structure required by the Decision will negatively impact the owners or the Strata Corporation.

[41] Given that the issues raised are unique to the facts of this case and given the absence of any clear negative impact, the principle of proportionality militates against granting leave to appeal.

Conclusion

[42] The Strata Corporation's application for leave to appeal is dismissed.

"Skolrood J."