

Citation: ☼ 0768548 BC Ltd. v. Strata Corporation Plan NW2205 Date: ☼20120525
2012 BCPC 0415

File No: 11-37396
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

0768548 BC Ltd.

CLAIMANT

AND:

**STRATA CORPORATION PLAN NW2205 &
ASCENT REAL ESTATE MANAGEMENT CORPORATION &
CROSBY PROPERTY MANAGEMENT LTD.**

DEFENDANTS

**RULING ON APPLICATION
OF THE
HONOURABLE JUDGE J. O'C. WINGHAM**

Counsel for the Claimant:

K. Duggleby

Counsel for the Defendants:

J. Bleay

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

March 26, 2012

Date of Judgment:

May 25, 2012

Introduction

[1] This is a ruling on application brought by the Defendants for an order dismissing the Claimant's claim against all three Defendants.

[2] The Defendants say that the Provincial Court does not have jurisdiction to hear the claim against the Defendant Strata Corporation. The Defendants say that the Claimant's action is one which falls under sections 164 and/or 165 of the *Strata Property Act* and, as such, it is a claim over which the Supreme Court of British Columbia has exclusive jurisdiction.

[3] The Defendants also say that the Claimant's action against the Defendant Ascent Real Estate Management Corporation and the Defendant Crosby Property Management Ltd. should be dismissed as those two Defendants were simply acting as agents for the Strata Corporation and that any liability which either of those two Defendants would have would arise only if they were sued directly by the Strata Corporation or if the Strata Corporation made a third party claim against them.

[4] In response to the application the Claimant says that the Provincial Court does have jurisdiction to hear its claim. It submits that the action brought by it and the legal remedies sought by it against the various Defendants do not fall under sections 164 and 165 of the *Strata Property Act*.

Background

[5] At the time that the facts giving rise to the claim in this case arose the Claimant was the owner of a strata lot in strata plan NW2205. The Defendant Ascent Real Estate Management Corporation was the property manager hired by the Strata Corporation to

manage the strata property. The Defendant Crosby Property Management Ltd. took over management of the strata property from Ascent Real Estate Management Corporation.

[6] On November 18, 2010 a resolution was approved at a special general meeting of the Strata Corporation which imposed a special levy on the owners of the various strata lots to finance the replacement of elevators in the building.

[7] In its notice of claim and its written submissions the Claimant alleges, firstly, that the special resolution which imposed the special levy was invalid as it did not comply with the requirements of the *Strata Property Act*. In the alternative the Claimant alleges that the Strata Corporation was negligent in the drafting of the resolution by failing to provide information required by the *Strata Property Act*, in particular the method of payment of the levy and the due dates of the levy.

[8] The Claimant also alleges that the Defendants Ascent Real Estate Management Corporation and Crosby Property Management Ltd. were negligent in the management of the Claimant's accounts in relation to the payment of the levy. The Claimant says that as a result of that negligence it suffered damages and seeks an assessment of those damages.

Facts alleged in support of the claim

[9] The Claimant alleges the following facts in support of its claim:

1. On November 18, 2010 a special general meeting was held by the Strata Corporation to discuss, among other things, replacement of the elevators. At that meeting, by a three-quarter vote, a resolution was passed to replace the elevators and to implement a special levy

- payable by all strata lot owners to finance the replacement of the elevators.
2. On March 7, 2011 the Claimant entered into an offer of purchase and sale of its strata lot with a completion date of May 16, 2011.
 3. On May 13, 2011 the Defendant Strata Corporation informed the prospective purchaser of the strata lot owned by the Claimant that the amount due and payable by the Claimant in order for the Strata Corporation to provide a Form F Certificate of Payment was \$45,000, an amount which included three future instalments of the elevator levy which totalled \$30,236.91.
 4. The Claimant had received statements of account for the property showing amounts due and payable on October 20, 2010, January 21, 2011 and May 4, 2011. None of those statements of account made any reference to future instalments being outstanding for the property.
 5. The Claimant objected to the inclusion of the future payments in the Form F but the Strata Corporation and the management company, Crosby Property Management Ltd., refused to amend the Form F and required the Claimant to pay the future instalments under protest in order to complete the sale of its strata lot.

Law

[10] The *Strata Property Act* reads in part as follows:

Strata Corporation may be sued

- 163 (1) The Strata Corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the Strata Corporation.
- (2) An owner may sue the Strata Corporation.

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.

Other court remedies

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

- (a) order the Strata Corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
- (b) order the Strata Corporation to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[11] The Defendants rely on *Clappa v. Parker Management Ltd. et al.*, [2003] B.C.J. No. 1980 (BCPC) and *Frechette v. Crosby Management Ltd.*, [2007] B.C.J. No. 1162 (BCPC). Counsel for the Claimant refers and relies on *Valana v. Law et al.*, [2005] B.C.J. 2820 (BCPC).

[12] In *Clappa* the court considered a claim in negligence against a Strata Corporation by a strata lot owner, a property management company and a construction company. The Claimant alleged that the balcony of his strata lot had been negligently repaired, resulting in a loss of enjoyment and a loss of value.

[13] Meyers, PCJ reviewed the provisions of the *Strata Property Act* and concluded that the provisions of that *Act* require that any action by a strata lot owner against a Strata Corporation which involved governance be commenced in the Supreme Court of British Columbia. At paragraphs 21 and 22 Meyers, PCJ. stated:

21 Having reviewed the foregoing sections of the new Strata Property Act, it is my finding that the Legislature intended to outline the procedures which must be followed when there is a dispute between the strata corporation and an owner involving the Strata Corporation's governance of the strata properties. The strata corporation is to be sued in the Supreme Court by an owner with respect to any matter relating to the common property. An owner must sue the strata corporation in the Supreme Court if it is alleged that the strata corporation failed to perform the duties which it was required to perform, pursuant to its obligations under the Strata Property Act. The Supreme Court can make any order necessary to direct the strata corporation to fulfil its statutory duty to maintain and repair the common property.

22 In the final analysis, the Claimant's complaint in the case at bar, is that the strata corporation failed in its duty to properly repair and maintain "limited common property" pursuant to its s. 72 obligation under the Strata Property Act. As a result of the strata corporation's failure to properly fulfil that obligation, the Claimant asserted her claim pursuant to s. 163(1) of the Strata Property Act. The law suit against the strata corporation was for acts or omissions by the strata corporation in maintaining and repairing the specific limited common property of the Claimant.

[14] In *Frechette* the Court considered the jurisdiction of the Provincial Court to hear a dispute between a strata lot owner and the strata corporation concerning the interpretation of a formula for the payment of the proportionate shares of recreation center costs. In that case the Claimant argued that the Strata Corporation and the management company had failed to act fairly and in accordance with an easement agreement in setting the Claimant strata property owner's share of costs relating to the operation of a recreation center. Meyers, PCJ, determined that the claim fell within the exclusive jurisdiction of the Supreme Court. At paragraph 12 he stated:

12 The essence of the Claim at Bar is that the two Strata Corporations and the Property Management company, failed to act fairly and in accordance with the Easement Agreement, in order to ensure that the Claimants' were charged properly and equitably for their share of the recreation centre costs and to ensure an ease of access to the recreation centre, which was equal to that of owners of the units next door to them. Whether the Claimants use the terms "significantly unfair actions", "oppressive conduct" (the wording in the former **Condominium Act**) or simply "a failure in governance", by the Strata

Corporations and the Property Management company, their complaints fall squarely within the ambit of section 164 of the **Strata Property Act**. Section 164 of the **Strata Property Act** specifically, requires that cases based on complaints about the way the strata corporation makes and applies decisions, be heard in the Supreme Court.

[15] With respect to the liability of the property management company Meyers, J. concluded that the property management company was at all times acting as an agent for the Strata Corporation and any actions or inactions by the property management company could only serve to attach liability to the Strata Corporation.

[16] In *Valana* the Claimant and the Defendant were strata lot owners in the same building. The Claimant in that case sued the Defendant for damages resulting from an attack by the Defendant's dog on the Claimant's dog. The dogs had been separated by a fence which allegedly had not been properly maintained by the Strata Corporation. The Defendant brought a third-party notice against the Strata Corporation alleging negligence by the Strata Corporation in failing to maintain the fence.

[17] Judge Chen determined that the Provincial Court did have jurisdiction to hear a claim of negligence by a strata lot owner against a Strata Corporation. At paragraph 37 he stated:

In my view, Sections 164 and 165 do not exhaustively describe the entire range of lawsuits that a strata lot owner may launch against a strata corporation. In my view, all causes of action against a strata corporation by a strata lot owner that fall outside of sections 164 and 165 may be pursued in either Provincial Court or Supreme Court, subject to monetary and other limits to the Provincial Court's jurisdiction. These would include actions in both tort and contract.

[18] The *Valana* case was considered by Meyers, PCJ in the *Frechette* case. He noted that in the *Valana* case the Claimant was not seeking relief from a significantly

unfair decision or action by the Strata Corporation, it was simply bringing an action in negligence which alleged a breach of a duty of care (to maintain a fence in the common area). He noted that in the *Frechette* case the allegation by the Claimant was one of significant unfairness, not a claim of negligence.

[19] In *Armanowski v. Strata Corp., Strata Plan LMS 2151* [2011] B.C.J. No. 1942 (BCPC) a strata lot owner brought an action against the Strata Corporation for reimbursement of his share of a special levy for anticipated engineering fees and costs associated with necessary balcony repairs. The allegation of the Claimant in that case was that the services were never provided and were unnecessary. The Claimant was seeking a refund of money paid by him pursuant to the special levy.

[20] In *Armanowski* the Claimant had alleged that the Strata Corporation had paid for services when the services had not been provided, that the Strata Corporation had entered into a contract for services which were never required and that the Strata Corporation paid for services when it was not required to do so because there was no legally binding contract between the Strata Corporation and the third-party.

[21] Yule, J.P. reviewed all of the cases noted above as well as other authorities. Despite the fact that the claim was one which might be characterized as debt or money owing the Court determined that all of the allegations of the Claimant involved corporate governance and concluded that the Provincial Court did not have jurisdiction to hear the claim. At paragraphs 29 and 31 he stated:

29 All of these allegations involve issues of corporate governance. If the Strata Corporation paid for services never provided, there would be a misuse of the Strata Corporation's special levy funds and potential incompetent oversight.

If the Strata Corporation paid for services that were duplicative of those provided by RDH in 2006 and therefore wholly unnecessary, issues of corporate oversight and competence would again arise. If the Strata Corporation paid RDH for services that it was not contractually obligated to pay, because no enforceable contract existed, whilst RDH might have a claim for services provided on a quantum meruit basis, there would still arise issues of corporate oversight and competence on the part of the strata council. It would also be significantly unfair to owners if the monies raised by the special levy were “wasted” in the manner alleged by Mr. Armanowski.

31 In any event, all of these alternative claims in my view do involve challenging the decisions of the strata council to retain the services of RDH and pay the 2008 accounts of RDH. These are governance matters. Accordingly, in my view, these claims must be brought in the Supreme Court of British Columbia.

Analysis

Jurisdictional Issue

[22] The Claimant is seeking a determination by the Court that the special resolution authorizing the special levy is invalid as it did not comply with the requirements of the *Strata Property Act* and a return of the funds paid by it under that special levy. The Claimant alleges that because the special resolution was invalid the Strata Corporation had no authority to charge any amount for the elevator levy. In the alternative the Claimant alleges that the Strata Corporation breached its duty of care to the strata lot owners, and in particular, to the Claimant, by preparing a deficient and confusing special resolution.

[23] In my view, despite the alternative claim in negligence, this is clearly a matter of corporate governance. It is a claim that challenges the validity of a special resolution passed at a special general meeting, the competence of the Strata Corporation in drafting the special resolution, the authority of the Strata Corporation to collect amounts

due under the allegedly invalid or deficient special resolution and the administration of the special levy which was the product of the resolution.

[24] As I have concluded that the allegations raised by the Claimant are clearly issues of governance I conclude that the claim must be brought in the Supreme Court British Columbia.

Claims against Ascent Real Estate Management Corporation and Crosby Property Management Ltd.

[25] As in *Frechette*, both Ascent Real Estate Management Corporation and Crosby Property Management Ltd., were property managers hired by the Strata Corporation. Any liability which either of them may have as a result of the preparation of the special resolution or the implementation of that resolution would be to the Strata Corporation and not to the individual strata lot owners. As such, the claims against those two Defendants are dismissed.

The Honourable Judge J. O’C. Wingham
Provincial Court of British Columbia