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Burt v. Strata Plan KAS3196

Lisa Burt and Laura McKibben, Petitioners and The Owners, Strata Plan KAS3196, Respondents

British Columbia Supreme Court

P.J. Rogers J.

Heard: June 6, 2012
Judgment: June 26, 2012
Docket: Kelowna S92214

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Counsel: C.D. Goodrich, for Petitioners

T. Gillard, for Respondents

Subject: Property

Real property.

P.J. Rogers J.:

1 At the conclusion of the hearing of this petition, I advised the parties that the petition must be dismissed with costs to the respondents and that I would later release reasons for taking that decision. These are those reasons.

2 The petitioners are each owners of a lot in a 30-lot bare land strata development located near Summerland, B.C. The respondents are owners of the remaining 28 lots. Of those 28 lots, 18 are owned by Mr. Gillard. Mr. Gillard was one of the original developers of the strata project.

3 In May 2007, the petitioner Ms. McKibben and her spouse purchased lot 30. That was the first conveyance of a lot in the project. The sale of that lot triggered several obligations on the developer. One obligation was to deposit a certain sum of the developer's money into a contingency reserve fund (the "CRF"), pursuant to s. 12 of the *Strata Property Act*, S.B.C. 1998, c. 43. Another was to place the CRF in a bank account. Yet another was to create a 12-month interim budget for the **strata corporation**. That obligation arose from s. 13 of the *Act*. Pursuant to s. 16(1)(b), the developer was obliged to call a first Annual General Meeting of the **strata corporation** within nine months of the first conveyance of a strata lot to a purchaser.

4 The petitioners complain that the developer did not comply with any of these obligations. The evidence on the application satisfied me that the developer, i.e.: Mr. Gillard, did not create a CRF bank account; did not deposit the required seed money into that account; created an interim budget but for only 7 months, not 12 as required; and that if

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he convened a first AGM, he did so in a very informal and unsatisfactory way.

5 The petitioners go on to complain that contrary to s. 19 of the *Act*, Mr. Gillard caused the **strata corporation** to contract with him for the provision of various maintenance and upkeep operations in the development. They also complain that Mr. Gillard caused the **strata corporation** to set strata fees on lots owned by Mr. Gillard off against fees that the corporation owed to Mr. Gillard for those maintenance and upkeep operations.

6 The evidence at the hearing of this petition satisfied me that the **strata corporation** did contract with Mr. Gillard as the petitioners assert, but that Mr. Gillard charged the corporation less than an outside contractor would have charged, and so the contracts were advantageous to the corporation. I find that the corporation did offset strata fees that Mr. Gillard would otherwise have had to pay, but that given the financial circumstances at the time (the corporation did not have the cash to actually pay Mr. Gillard), the set off was, again, advantageous to the corporation.

7 The petitioners complained about Mr. Gillard's involvement in the corporation's operations. They determined to hold Mr. Gillard to a strict application of and compliance with the *Act*. In their petition, the petitioners seek declarations that Mr. Gillard and the **strata corporation** have failed to adhere to numerous strictures imposed by the *Act*. They seek an order appointing an administrator and a professional property manager over the strata development.

8 Since 2007, the owners have paid strata fees of approximately \$30 per month. The corporation's annual budget is on the order of \$10,000 to \$12,000. The administrator proposed by the petitioner would charge \$200 per hour for two to four hours of work per month, and the professional property manager would charge on the order of \$500 per month. Adding those fees to the corporation's budget would, near as makes no difference, double it. The owners' strata fees would consequently double.

9 The evidence on the petition satisfied me that although the **strata corporation's** operations were irregular at the start, by 2010 the owners had begun to get a grip on how to properly administer and operate the corporation's business. The petitioners' complaints further focused the owners' attention on the necessity to properly manage the corporation.

10 On September 20, 2011, the owners convened an annual general meeting. By then, the petitioners' had fully aired their complaints about financial and procedural irregularities. Also by then, the corporation's treasurer, Mr. Jack, who is a Certified General Accountant, had completed a review of the corporation's financial records from 2007 and forward. Mr. Jack reconciled those accounts. According to his affidavit, he was satisfied that as of September 2011, the corporation's financial affairs were in order, that all money had been accounted for, that the CRF was fully funded, and that the CRF was lodged in a bank account as required. As the annual general meeting progressed, the owners voted on and approved a series of resolutions ratifying *nunc pro tunc* the corporation's budgets, financial statements and fiscal years, expenditures, and insurance certificates for the years 2007, 2008, 2009, 2010 and 2011. Those votes passed unanimously with the exception of votes from the petitioners.

11 The petitioners have not put a precise or an estimated figure to the financial mismanagement they allege that the corporation and Mr. Gillard have perpetrated. Doing the best that I can with the limited information available to me, I find that the issues raised by the petitioners involve modest amounts — in all likelihood less than \$5,000 overall. By their votes at the September 20, 2011 annual general meeting, the majority of the corporation's members have, for lack of a better word, "forgiven" the corporation and Mr. Gillard for any errors that they made in the past. The members have decided that the corporation should press ahead with its business now that its books and affairs are in proper order.

12 In the course of submissions, Mr. Goodrich for the petitioners submitted that the members had no capacity to take the decisions they did at the September 20, 2011 annual general meeting. Mr. Goodrich cannot be faulted for making that argument: he was doing his best for his clients, and they can have no complaint about the quality of their counsel; however, the petition did not put the validity of the annual general meeting resolutions in issue, and the

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petitioners did not give the respondents notice that they intended to make that attack. For that reason, I will pass no comment on the merits of that argument, other than to say that it can play no part in the decision I must make on the petition as it was presented.

13 In *Lum v. Strata Plan VR519*, 2001 BCSC 493, Harvey J. discussed the factors to consider on an application to appoint an administrator of a **strata corporation**. At para. 11 of his judgment, Harvey J. wrote:

[11] In my view after reviewing the authority available, bearing upon this question, factors to be considered in exercising the Court's discretion whether the appointment of an administrator is in the best interests of the **strata corporation** include:

- (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**.

14 In the present case, I find that during the initial operation of the **strata corporation**, the corporation was not properly managed. This was not a case of inability to properly manage, but rather a case of Mr. Gillard not really knowing what he was doing and of not fully applying himself to learning how to properly manage the corporation. I find that there was no substantial misconduct or mismanagement of the affairs of the corporation: money did not go missing or become diverted to an improper account; one owner's interests were not preferred over another's; the common property was maintained; the roads were plowed in the winter; and water ran through the pipes in the summer. In any event, the cost of having an administrator and property manager take over the operation of the corporation would, in my opinion, outweigh the value their services would bring to the corporation. Factors (c) and (e) are substantially the same, and in this case the evidence has demonstrated that Mr. Jack has the expertise and the corporation's members have the capacity to take control of the corporation, to repair the holes in her hull and sails, to man her with a competent crew, and to steer a safe course away from fiscal shoals. As for factor (d), the petitioners are on one side with their firmly held opinions, and the rest of the owners are on the other side with their equally strong views. There are, therefore, competing groups within the **strata corporation**. However, given the outcome of the September 2011 annual general meeting, it is clear that the struggle between them is not such as to impede or prevent proper governance of the corporation.

15 For these reasons, I find that the petitioners have not shown that it is necessary to appoint an administrator and a property manager. The petition must therefore be dismissed. The respondents are entitled to their costs against the petitioners on Scale B.

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