Case Name:

Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259

Between
Ernest & Twins Ventures (PP) Ltd. and No. 213 Cathedral Ventures Ltd., appellants (petitioners),
and
The Owners, Strata Plan LMS 3259, respondent (respondent)

[2004] B.C.J. No. 2455
2004 BCCA 597
Vancouver Registry No. CA031474

British Columbia Court of Appeal
Vancouver, British Columbia
Southin, Low and Lowry JJ.A.

Heard: November 17, 2004.
Judgment: November 29, 2004.
(29 paras.)

Counsel:

J.C. McKechnie: Counsel for the Appellants

R.M. Shore: Counsel for the Respondent

The judgment of the Court was delivered by

¶ 1 **LOWRY J.A.**:— Two owners of several strata lot units of a commercial strata complex appeal from a judgment of Mr. Justice Warren who dismissed a part of the petition they filed seeking relief with respect to a change in strata fee contributions to operating expenses: (2003), 21 B.C.L.R. (4th) 327, 2003 BCSC 1769. They contend that the contribution required of them as a result of the change is illegal and that it is significantly unfair such that the court's intervention is required.

¶ 2 The relief sought is a determination that the contribution required by the subject budget is illegal and an order directing that the strata corporation adopt a new budget that complies with the law by which its administration is governed.

¶ 3 The Owners, Strata Plan LMS 3259, which I refer to as the "Corporation", is a strata corporation incorporated in 1998 consisting of 265 strata lot units divided into what the Corporation's bylaws refer to as three "sections". The Commercial Section consists of 190 units, the Parking Section consists of 73 units, and the Signage Section consists of two units, although it has throughout been treated as part of the Commercial Section.

¶ 4 Ernest & Twins Ventures (PP) Ltd. developed the commercial strata complex, which is a shopping mall in Richmond known as "Pacific Plaza". No. 213 Cathedral Ventures Ltd. is a related company. I refer to the two companies as the "Developer". Together, at the time the petition was filed, they owned 20 units in the Commercial

Section, 42 units in the Parking Section, and the two Signage Units.

¶ 5 For the years 1999-2000, 2000-2001, and 2001-2002, by voting majority, the Corporation approved an operating budget that allocated what were described as "Common Expenses" to the Commercial Section and what were described as "Additional Expenses" to the Parking Section. The strata fees for the units in each of the two sections were then set pro rata (in accordance with designated unit entitlement). The owners of the commercial units bore none of the additional expenses and the owners of the parking units bore none of the common expenses.

¶ 6 During 2001, the strata council, which had consisted of at least three employees of the Developer, was replaced, as was the strata manager. The Developer challenged the process in court proceedings but was not successful. It appears evident from the Reasons for Judgment that what underlay the changes was a concern on the part of some owners that the interests of the Developer had been preferred over those of other owners: Ernest & Twins Ventures (PP) Ltd. v. The Owners, Strata Plan LMS 3259, (21 November 2001), Vancouver Registry No. L013084 (B.C.S.C.).

¶ 7 For the year 2002-2003, the Corporation approved what was the first operating budget of the new council. The budget allocated what were formally described as "Common Expenses" and "Additional Expenses" to all of the units such that the strata fees of the owners of both commercial units and parking units were set pro rata based on all of the owners bearing a portion of all the expenses. The effect was to dramatically increase the monthly strata fees of the parking units (e.g. from $8 to $87) and significantly decrease the strata fees of the commercial units (e.g. from $271 to $232). As deposed by the President of the Developer, because of the proportion of parking units the Developer held, the impact of the change was to increase its aggregate strata fees levied in respect of all the units owned by the Developer by 17% or $18,000 a year.

¶ 8 The treasurer of the strata council explains the reason for the change. He says that the new council determined the owners of the parking units had not been contributing to the cost of services that had benefited the parking units. The expenses allocated to those units were limited to janitorial services and supplies, insurance, snow removal, and electricity. There was no allocation to those units of expenses for which they derived a benefit which included landscaping, garbage removal, managerial services, security, and financing expenses. The treasurer says that the council determined it was not possible to attribute the sole benefit of any item of the operating expenses of this commercial complex solely to a particular section. The council concluded that because the operating expenses of the complex as a whole benefit all of the owners in drawing customers to the mall, they should be shared pro rata by the owners of both the commercial units and the parking units.

¶ 9 The budget was approved for 2002-2003 at the Annual General Meeting of the Corporation on 30 March 2002. The petition was filed 12 November 2002.

¶ 10 The Developer maintains that there must be some items of expense contained in the budget from which, as the owner of parking units, it derived no, or no appreciable, benefit and that it cannot be made to contribute to such items to the extent required by the approved budget. It contends that it is not open to the Corporation to allocate all of the operating expenses equally among the owners of strata lot units and says the Corporation must apportion each item of operating expense in a fair manner that properly reflects the benefit that owners actually derive from the operating expenses incurred.

Was the approved budget illegal?

¶ 11 The Developer contends that the approved budget breached what, as a matter of common ground, is the governing regulatory provision.

¶ 12 Section 99 of the Strata Property Act, S.B.C. 1998, c. 43 provides that, subject to regulations promulgated under the Act, strata fees for the operation of a strata corporation are to be levied pro rata according to unit entitlement. The Strata Property Regulation, B.C. Reg. 43/2000 provides:

> [6.4] (2) For the purposes of section 99 of the Act, but subject to a resolution under section 100 of the Act, if a contribution to the operating fund relates to and benefits only one type of strata lot, and that type is identified as a type of strata lot in the bylaws of the strata corporation, the contribution is shared only by owners of strata lots of that type, and each strata lot's share of that contribution is to be [pro rated as among those owners].

¶ 13 The argument focuses in particular on the words "if a contribution to the operating fund relates to and benefits only one type of strata lot".

¶ 14 The Corporation's bylaws provide for the allocation of operating expenses. Warren J. rested his judgment largely on the interpretation he gave to the relevant provisions. But those provisions are accepted to be consistent in material respects with s. 6.4(2) and need not be separately considered for the disposition of this appeal.

¶ 15 The Developer maintains that s. 6.4(2) of the Regulation applies because the bylaws identify at least two types of strata lots, although they are referred to as sections of strata units: commercial and parking. It contends that s. 6.4(2) requires the Corporation to make a bona fide determination of the benefit, if any, of each item of operating expense to each type of strata lot and to allocate each item in proportion to the benefit.

¶ 16 The Developer would say that, where an item of expense benefits all types of strata lots equally, the expense is to be allocated equally among them, but where an item of expense benefits one type of strata lot disproportionately, the Corporation must allocate the expense in a manner that reflects the extent of the benefit derived by each type of strata lot from that item of expense.

¶ 17 According to the Developer, the budgets preceding the budget that gave rise to the petition appear to reflect an allocation of operating expenses that is more consistent with what, it says, s. 6.4(2) of the Regulation requires.

¶ 18 In my view, s. 6.4(2) of the Regulation provides only that where an item of operating expense relates to or benefits one type of strata lot exclusively, and that type is identified in the bylaws, the contribution for that item of expense is to be shared by the owners of that one type of strata lot alone; the section does not provide for any greater apportioning of expenses among types of strata lots. As worded, the section serves to burden the owners of one type of strata lot with an item of expense from which they derive the only benefit. It affords a limited exception to the equal sharing of operating expenses based on a pro rata allocation in accordance with unit entitlement, for which s. 99 of the Act provides.

¶ 19 The evidence adduced on the hearing of the petition does not lend itself to any reliable analysis of the benefits derived from the Corporation's operating expenses. It may be that there are items of operating expense in the Corporation's budget for the year 2002-2003 that could be shown to be of benefit to only one type of strata lot. If so, s. 6.4(2) of the Regulation requires that the expense be borne by the owners of that type of strata lot. But that is a matter that would have to be the subject of arbitration for which the bylaws provide.

¶ 20 The Developer cites Primero Cigar Imports Ltd. v. Strata Plan VR 2327, [2003] B.C.J. No. 233, 2003 BCSC 175, a case decided under the predecessor legislation, where an arbitrator's decision, holding the owner of a commercial strata lot consisting of a concrete building liable for expenses incurred in repainting the stucco on an adjacent residential strata lot, was in part set aside. It cites, as well, Strata Plan LMS608 v. Strata Plan LMS608, [2001] B.C.J. No. 2116 (S.C.) where the owners of townhouse strata lots were held not liable for an allocated share of the cost of water damage repairs to an apartment building that was part of the same complex. While, in my view, those cases lend little support to the Developer's argument, they are illustrative of the kind of expenses that can be allocated to one type of strata lot.

¶ 21 I do not consider that the Developer has established that the 2002-2003 budget adopted by the

Corporation was illegal and I would not accede to what is the first ground of appeal.

Was the approved budget significantly unfair?

¶ 22 Section 164 of the Act gives the court jurisdiction to make such order as it considers necessary to relieve the owner of a strata lot of the act of a strata corporation that the court considers to be significantly unfair.

¶ 23 It must be accepted that some actions of a strata corporation will be unfair to one or more strata lot owners in that the will of the majority may often serve the interest of the majority of owners to the detriment of a minority. Thus, to obtain relief, an owner must establish significant unfairness.

¶ 24 What amounts to significant unfairness was addressed by this Court in Reid v. Strata Plan LMS 2503 (2003), 12 B.C.L.R. (4th) 67, 2003 BCCA 126. There, at paras. 26-27, it was accepted that while it might relate to conduct that was less severe, at least for the purposes of that case, "significantly unfair" was equated with that which is oppressive and unfairly prejudicial. I do not understand the Developer to contend otherwise here.

¶ 25 The Developer contends that the change in the allocation of operating expenses was significantly unfair because it violated an established convention upon which the Developer was entitled to rely. The Developer cites a statement made in Coupal v. Strata Plan LMS2503 (2002), 6 B.C.L.R. (4th) 372, 2002 BCSC 1444 [paragraph] 50, to the effect that an estoppel by convention may arise where there is a shared assumption of fact or law relating to the interpretation of a strata corporation's bylaws, the subsequent dealings were based on that convention, and one party would suffer detriment if the other party were permitted to resile from that convention. The estoppel claimed in that case was rejected.

¶ 26 No estoppel was argued before Warren J. in this case.

¶ 27 In my view, the short answer to the point is that nothing amounting to a convention is established here. At best, there were three budgets before the budget that led to the petition. There was, in that period, dissension among the owners which led to the strata council and the strata manager being replaced. Further, I question whether an estoppel of the kind for which the Developer contends here could arise with respect to the broad allocation of operating expenses if it were to serve to entrench an allocation that was inconsistent with the provisions of the Act and Regulation. I see nothing in the Regulation or bylaws which prevents the Corporation, led by a new council, adopting an allocation of expenses different from the allocations in previous budgets.

¶ 28 I would not accede to what is the second ground of appeal.

¶ 29 I conclude then that Warren J. has not been shown to have erred in dismissing the part of the petition that he heard and I would dismiss the appeal.

LOWRY J.A.
SOUTHIN J.A.:— I agree.
LOW J.A.:— I agree.

QL UPDATE: 20041201
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