Case Name:

Gentis v. Strata Plan VR 368

Between
Liselotte Gentis, petitioner, and
The Owners, Strata Plan VR 368, respondents

[2003] B.C.J. No. 140
2003 BCSC 120
Vancouver Registry No. L022320

British Columbia Supreme Court
Vancouver, British Columbia
Masuhara J.

Heard: November 22, 2002.
Judgment: January 23, 2003.
(42 paras.)

Counsel:

E.T. McCormack and A.M. Murray, for the petitioner.
P.A. Williams, for the respondents.

MASUHARA J.:—

Introduction

¶ 1 The petitioner, Mrs. Gentis, and her husband Dr. Gentis entered into a contract for the purchase and sale of a strata lot, namely Strata Lot 73 or Suite 601 from Mr. Bull on June 18, 2001. The sale was completed in September 2001. The strata lot is located on the 6th floor of Shaughnessy Place, a condominium community in Vancouver, B.C. Mr. Bull was its original purchaser. Adjacent to this unit is an outdoor area that has been used as a patio deck (the "Subject Area" or "Area"), but is also the roof of another unit (Suite 501). In 1985, Mr. Bull entered into a lease for the Subject Area which permitted his use of the Area as a deck for the term of his ownership of the suite. In anticipation of a sale of Suite 601, Mr. Bull sought the Strata Council's approval to transfer the lease for the use of the Subject Area to a new owner of Suite 601. The Strata Council refused and ultimately decided, concurrent with its scheduled roof maintenance program (the roof is now over 25 years old), to terminate the use of the Subject Area and to remove and not replace the planters and decking located on the Area. The petitioner seeks the continued use of the Subject Area as a patio deck and has commenced this proceeding.

¶ 2 The petitioner seeks relief to have the continued use of the Subject Area as a patio pursuant to section 164 of the Strata Property Act, S.B.C. 1998, c. 43. Specifically, the petitioner seeks the following orders:

1. A Declaration that the Strata Corporation approved the change in use of common property from a roof to a deck in 1978 or alternatively in 1985;
2. A Declaration that the Strata Corporation's failure to permit the Petitioner to use the common property that is adjacent to the den ("the Deck") is significantly unfair;
3. An Order that the Strata Corporation refrain from interfering with the Petitioner's use of the Deck;
4. An Order that the Strata Corporation refrain from requiring the removal of the patio door to the Deck;
5. An Order that the Strata Corporation pay for the cost of reassembling the Deck in the event that the Deck is removed for the purpose of re-roofing; and
6. An award of costs at Scale 3 to the Petitioner with the Court directing a reference to the Registrar with respect to costs awarded to the Petitioner.

Background

¶ 3 Shaughnessy Place is a strata development that contains 76 strata units over six floors. Each unit in the complex has two or three patio balconies which extend from their strata lots.

¶ 4 In July 1977, Mr. Bull contracted to buy Suite 601 from the owner/developer Marathon Realty. In the purchase agreement, Marathon Realty agreed to construct and install a sliding door (the "doorway") in the east wall of the unit to allow access to the Area. Mr. Bull intended to use this Area as a third patio area. While Marathon agreed and installed the doorway, he was told by Marathon that the use of the Area would require the permission of the Strata Corporation.

¶ 5 It is important to note that the units at Shaughnessy Place have decks or patios. A full patio is 18 feet by 18 feet and a half patio is 18 feet by 9 feet. No strata lot has the use of two full patios except Suite 601, where there are three patios: a full patio, a half patio, and the Subject Area, which is twice the area of a full patio.

¶ 6 The original strata plan filed with the Land Registry Office in 1976 noted the various patios and decks as common property. The Subject Area was not depicted as it had not been considered as a deck since there was no access to it from the adjacent unit.

¶ 7 Due to an apparent oversight by Marathon, permission for the use of the Area was not sought until April 1978. In August 1978, the Strata Council considered the request for

the use of the roof and set out certain conditions for its use as a deck. The conditions included: an engineering report confirming that the improvements made to the roof areas will not create any roof damage; a letter from the new owner of Suite 501 (a Mr. Oliver) stating that the roof improvements carried out by Mr. Bull do not create any disturbance or inconvenience to Suite 501; and a letter of undertaking from Mr. Bull that he would be responsible to the Strata Corporation for any damage resulting to the building from the improvements made on the roof adjacent to his den. While Mr. Bull carried on with the use of the Area, it appears that the matter remained sufficiently alive such that seven years later, in August 1985, a lease was entered into between the Strata Council and Mr. Bull for the use of the Area for $1.00 for so long as Mr. and Mrs. Bull continued as owners of the suite (the "Lease"). The description of the area is stated as "Non-Designated Common Property". The Lease also states that:

> In the event of a change of registered ownership, the Strata Council of that time shall have the option to renew or not renew this lease arrangement, and of access to the areas in question.

It appears that the Bulls carried on with the use of the Deck area thereafter.

¶ 8 In 2001, Suite 601 was put up for sale by Mr. Bull. In advance of a sale, Mr. Bull sought the approval of the Strata Council to include the transfer of the lease in the sale of the unit. This was refused and from the Form "B" Information Certificate dated June 5, 2001, it appears that the Strata Corporation had advised that the Doorway onto the roof deck "must be converted back and removed" and that "No access onto roof is permitted off den."

¶ 9 At a subsequent meeting on June 12, 2001, the Strata Council stated that it had received correspondence and input from the owner of Suite 501, noted legal considerations, and resolved that it could not approve the use of the common Deck area "due to an unresolved dispute between the owners of suite 501 and 601. Council feels unable to make a decision at this time, but will review if owners can resolve the issue. Council will consider any future proposal." There was no reference to the removal of the doorway.

¶ 10 On June 18, 2001, the Gentis' entered into a contract to purchase the Bull suite. A provision of the agreement states that:

> The Buyer acknowledges and accepts that the cedar deck located on the east end of the strata lot adjacent to the family room/den may not be allowed to remain.
> The Buyer is aware that in the event the deck is allowed to remain that it is at the option of the strata council, that the strata lot owner is responsible for all the repairs and maintenance of the deck and that the strata lot owner must pay the strata corporation $1.00 per year for the right to use the deck and that the terms under which the deck may be allowed to stay may change upon review by the strata corporation.

¶ 11 The completion of this transaction occurred and title to the strata lot was transferred and registered in the Land Registry office in September 2001.

¶ 12 On August 21, 2001, the Strata Council resolved that it would not approve the request to rent the common property roof and that no lease or rental agreement would be approved. However, it resolved to allow access to the area for watering and maintaining flower boxes; that no social interaction on the Deck area would be permitted; and that the owners would be responsible to provide the Strata Corporation access to the Deck for re-roofing when necessary.

¶ 13 This was unsatisfactory to the Gentis'. In response, they initiated a process seeking approval of a special resolution of the Strata Corporation to designate the Deck as limited common property. If successful, they would then be able to have the exclusive use of the Subject Area as a deck. For the special resolution to pass, three-quarters of the votes of persons entitled to vote present or by proxy at the special meeting would be required. The minutes of the meeting indicate that there was considerable debate prior to the vote. The resolution was defeated by a significant margin of 51 opposed to 14 in favour at a Special Meeting of the owners in April 2002.

¶ 14 The minutes of the April 16, 2002 meeting of the owners of the strata corporation indicate that the owners agreed that the area under dispute would be returned to its original condition as a roof. Council noted that reroofing this area is a possibility following the assessment of an independent roof inspector.

¶ 15 The Gentis' then petitioned this Court for relief.

Analysis

¶ 16 The first matter to be addressed is the characterization of the disputed area. Both parties agree that the Subject Area is common property. However, the Petitioner argues that it has been converted to a deck and as such cannot be changed. The Respondent argues that no such conversion occurred.

¶ 17 Counsel for the Petitioner argues that by the action of Marathon Realty in 1977 or by the Strata Council entering into the lease in 1985, the Area was converted from a roof to a deck. I find that there is insufficient evidence before me to make such a determination. The evidence put forth in support of the conversion amounted to letters from Marathon confirming that while they did not oppose the use of the Subject Area, they had advised Mr. Bull that Strata Council approval was required for the use of the "common property"; a letter from Mr. Bull to the Strata Council inquiring as to whether such approval had been obtained; and finally, the minutes of a meeting of the Strata Corporation articulating certain conditions related to the use of the Subject Area. The conditions were:

1) That Mr. Bull provide "an Engineering Report that the improvements he has made to the roof area will not create any roof

damage;

2) provide a letter of undertaking from Mr. Hebert A.D. Oliver, Owner of Suite 501 that the roof improvements carried out by Mr. Bull do not create any disturbance or inconvenience to his occupancy; and

3) a letter of undertaking from Mr. Bull that he will be responsible to the Strata Corporation for any damage resulting to the building from the improvements on the roof adjacent to his den.

¶ 18 It should be noted that at all times there is no reference to the use of the Area as a deck; rather the term "roof area" is used. Except for a letter stating that the changes to the den/patio had been done "in compliance with specification as stated by the project engineers", no other documents indicating that the conditions had been met were produced. It is unclear as to when cedar decking was installed but it had not been installed originally when Mr. Bull took possession. A letter of Marathon Realty dated April 12, 1978 indicates that the roof at that time consisted of a slab, roofing membrane of insulation foam and river rock. There is no mention of any wooden decking. This letter appears to be a response to a complaint of the use of the Area by the owner of Suite 501, at the time Mr. Timber, relating to damage to his ceiling and a complaint of noise in his unit due to the use of the Area. The letter clearly establishes that the use of the Area must be approved by the Strata Council. The lack of any evidence from Mr. Bull to shed any light on this issue is also a difficulty for me in making a finding in favour of the Petitioner. An affidavit filed with the Chamber's Brief sworn by Mr. Bull's son specifically indicates that he has requested that the Gentis' not involve Mr. Bull due to his advanced age. On the basis of the foregoing factors, I am unable to make a finding that in 1977 a conversion of the Subject Area to a deck as common property occurred.

¶ 19 The petitioner also argues that there had been a conversion in 1985. In that year, a lease was entered into by the owner and the Strata Council. This agreement rents out the Subject Area to Mr. Bull for $1.00 per year for so long as Mr. or Mrs. Bull own Suite 601. The lease does not, however, provide any further evidence tending to prove the conversion of the Area to a common property deck. Rather, in my view, it serves only to confirm the uncertain nature of the common property. In the lease, the Area is described as "Non-Designated Common Property". Further, a specific provision of the lease reserved the option for the Strata Council to renew or not renew the lease in the event of a change in ownership. I construe this as only stating the obvious, that is, that the terms of use of the Deck could change pursuant to the Strata Council's authority to regulate the use of common property.

¶ 20 All owners in a Strata Property have an interest in, and entitlement to, common property. The conversion of such from one characterization to another requires a much higher level of proof than that adduced by the petitioner. The evidence presented in this proceeding is insufficient to establish a conversion as argued by counsel for the petitioner.

¶ 21 Having reached this conclusion, I turn now to the issue of whether this Court should interfere with the decision of the Strata Council. Given all the circumstances of the case, I have concluded that interference is not warranted.

¶ 22 Section 3 of the Strata Property Act requires Strata Corporations to be:

> responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

¶ 23 Neither party asserts that the Subject Area is anything other than common property. Therefore, the management and regulation of that Area falls to the Strata Corporation.

¶ 24 In carrying out this mandate, the Corporation must consider, and act in, the best interests of all the owners. Put differently, the Corporation "must endeavour to accomplish the greatest good for the greatest number": Sterloff v. Strata Plan No. VR 2613 (1994), 38 R.P.R. (2d) 102 at para. 35 (B.C.S.C.).

¶ 25 The petitioner seeks relief from this Court under section 164 of the Strata Property Act, which states:

> 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
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> (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
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> (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.

¶ 26 This provision grants broad authority to the Court to remedy 'significantly unfair' actions (or threatened actions) by a Strata Corporation vis-à-vis a tenant or owner.

¶ 27 The scope of significant unfairness has been recently considered by this Court in Strata Plan VR 1767 v. Seven Estate Ltd. (2002), 49 R.P.R. (3d) 156 (B.C.S.C.), 2002 BCSC 381. In that case, Martinson J. stated (at para. 47):

> The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: Reid v. Strata Plan LMS 2503, [2001] B.C.J. No. 2377.

¶ 28 I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

¶ 29 I am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": The Canadian Oxford Dictionary (Toronto: Oxford University Press, 1998) at 1349.

¶ 30 Applying this analysis to the instant case, I have concluded that there has been no oppressive conduct. There is no evidence before me that the Council has acted in bad faith, or in a harsh, burdensome, or wrongful manner. Rather, the Council appears to have taken into consideration many factors and reached a decision in accord with its duties to act in the best interests of all tenants and owners. The Council took into account the impact of the continued use of the Deck on the suite below, the possibility that other tenants might demand similar treatment insofar as deck-space is concerned, potential changes in property value, and the potential impact on the nature and character of the strata community. Each of these factors is clearly a legitimate consideration.

¶ 31 Moreover, the Lease Agreement explicitly granted to the Strata Council the option to renew (or decline to renew) the lease and/or alter the accessibility of the Subject Area.

¶ 32 Therefore, it remains only to determine whether the decision was unfairly prejudicial to the interests of the petitioner. A number of facts weigh against resolving this question in favour of the Petitioner.

¶ 33 First, as noted above, the Council's decision was based on the consideration of legitimate factors.

¶ 34 Second, after the Strata Council refused to renew the lease of the Subject Area, the Gentis' sought a special resolution of the Strata Corporation owners. This resolution was soundly defeated by a final tally of 51 against to 14 in favour. While this fact is not

dispositive of the issue, it is additional evidence in support of the position that the Council's decision represented the interests of the majority of the Strata owners.

¶ 35 Third, the Gentis' will not be disadvantaged in terms of deck-space compared to other Strata owners. The Subject Area is the only oversized deck in the complex. The Gentis' have two other balcony decks, neither of which is at issue in this proceeding. Likewise, the Gentis' will not be financially disadvantaged - the sale contract places the financial burden of removing the Deck (and patio door, if so desired) on the seller, Mr. Bull.

¶ 36 Finally, in determining whether the Gentis' deprivation is unfairly prejudicial, it is informative to examine their reasonable expectations as buyers of the unit. From the evidence before me, it is clear that the Gentis' were aware of the uncertainty surrounding their continued use of the Subject Area.

¶ 37 The purchase contract for the Strata lot contained the following provisions:

> The Buyer acknowledges and accepts that the Cedar Deck located on the east end of the strata lot adjacent to the family room/den may not be allowed to remain.
> The Buyer is aware that in the event the deck is allowed to remain that it is at the option of the Strata Council, that the strata lot owner is responsible for all repairs and maintenance of the deck and that the strata lot owner must pay the strata corporation $1.00 per year for the right to use the deck and that the terms under which the deck may be allowed to stay may be changed upon review by the Strata Corporation.
> The seller agrees that in the event that the deck cannot stay that he will assume full responsibility for complying with the strata council decision (if it is made within 2 years of the completion date) and absolve the Buyer from all financial burden regarding the deck and patio door removed, and restoration of the roof surface. [emphasis added]

¶ 38 The contract discloses to the Gentis' the distinct possibility that access to the Deck could be withdrawn by the Strata Corporation. I accept as evidence that this eventuality was more than a passing consideration given that the contract even contemplated the allocation of the financial burden of removing the decking and door by placing that burden squarely on the shoulders of the seller.

¶ 39 Notwithstanding these uncertainties, the Gentis' went ahead with the purchase of the strata lot. While continued use of the Deck may have been desirous, it is not a reasonable expectation of the petitioner in these circumstances.

¶ 40 With respect to the patio doorway, it is my view that the Strata Corporation has no authority to order its removal. The doorway is not common property and there is no evidence that its existence causes any nuisance.

¶ 41 My view is that the framework of the legislation at bar requires court intervention only when there is significant unfairness to a petitioner's interests. This unfairness must be determined with regard to all of the circumstances of the case and in light of the balancing of competing interests that must be undertaken by the Strata Council. While the situation in which the Gentis' find themselves is unfortunate, I do not conclude that it is significantly unfair.

¶ 42 Accordingly, the petitioner's application is dismissed. The respondents are entitled to their costs at Scale 3.

MASUHARA J.

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