Court of Appeal for British Columbia

Citation: ***Reid v. Strata Plan LMS 2503,***
2003 BCCA 126

Date: 20030228
Docket: CA029245

Between:

Dennis Reid

Appellant
(Petitioner)

And

The Owners, Strata Plan LMS 2503

Respondent
(Respondent)

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Ryan
The Honourable Madam Justice Levine

J.A. Bleay	Counsel for the Appellant
M.A. Worfolk and E.M. Tully	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia January 14, 2003
Place and Date of Judgment:	Vancouver, British Columbia February 28, 2003

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Madam Justice Levine

Concurring Reasons by:
The Honourable Madam Justice Southin (Page 19, para. 33)

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] This is an appeal from the order of Madam Justice Sinclair Prowse, pronounced November 14, 2001, dismissing Dennis Reid's petition for an order declaring that a resolution made by the strata council for the Owners, Strata Plan LMS 2503 (the "strata council") was, pursuant to s. 164 of the ***Strata Property Act***, S.B.C. 1998, c. 43, significantly unfair to him.

Background Facts

[2] The hearing before the Chambers judge was the result of a dispute between the owners of three neighbouring units in a condominium building. The units owned by Ms. Flotten and Mr. and Mrs. Nomura face each other across a patio which comprised a common property entry way to their units. The back wall of Mr. Reid's unit, which has three picture windows in it, borders the common entry. The dispute concerned the use that could be made of this common area.

[3] In May 1999, Mr. Reid complained to the strata council that Ms. Flotten and the Nomuras were placing personal belongings, including patio furniture and planters, on the common entry. He asked the council to tell the Nomuras and

Ms. Flotten to remove the personal items from the area. In response, Ms. Flotten asked the strata council to convene an extraordinary general meeting at which all of the owners could vote on Ms. Flotten's proposal that the common entry be designated as limited common property. A vote was held and the proposal was defeated on October 6, 1999.

[4] The personal items remained on the common entry after the defeat of the proposal. Mr. Reid once again asked the strata council to have Ms. Flotten and the Nomuras remove their personal belongings from the area. The council agreed and sent several letters to Ms. Flotten and the Nomuras asking them to remove the items. They did not do so and the dispute between the neighbours intensified.

[5] Attempts were made by the strata council to have the matters resolved by binding arbitration but no consensus was obtained among the owners of the units to agree to it.

[6] On May 31, 2000 the strata council resolved that all items on common property not specifically approved by council to be placed on common property be removed by July 15, 2000, except doormats. It invited owners to make application requesting that personal items or plants be permitted to be placed on the common property.

[7] On July 19, 2000 the strata council considered the application of the Nomuras and Ms. Flotten to place items on the common entry, and granted them permission on a temporary basis to place on the common entry the following items: four potted cedar trees, one potted holly bush, one-half barrel planter, one garden bench, one tripod planter, three rectangular window boxes, one potted fuchsia tree and various small planters filled with annuals clustered around the larger planters and the perimeter. It was resolved that Ms. Flotten and the Nomuras were to be responsible for the care and upkeep of these items and for keeping the area tidy and clean. They would also be liable for any damage to the common entry which occurred as a result of the placement of these items.

[8] At the same time the strata council granted the owners of two other units permission to place tables, chairs and plants on common property in their areas as well.

[9] The strata council passed these resolutions with provisos that the owners remove the items on reasonable notice by the strata council.

[10] On August 11, 2000 Ms. Flotten and the Nomuras were advised in writing of the contents of council's resolution.

Reasons for Judgment

[11] Mr. Reid petitioned the Supreme Court for the following relief:

> A. A declaration that the decision of the strata council to grant the registered owners of strata lots 46 and 47 temporary permission to place items on the common property entry way appurtenant to the Petitioner's strata lot was a significantly unfair decision, in relation to the Petitioner.
>
> B. An Order varying the significantly unfair decision of the strata council by revoking the temporary permission given to the registered owners of strata lots 46 and 47 to place any items on the common property entry way appurtenant to the Petitioner's strata lot.
>
> C. An Order regulating the conduct of the Respondent's future affairs by permanently prohibiting the strata council or the Respondent from permitting the placement of any items on the common property entry way, temporarily or otherwise.
>
> D. An Order that the Respondent enforce the *Strata Property* Act (the "Act"), the regulations, the bylaws or the rules as against the registered owners of strata lots 46 and 47.
>
> E. An Order that the Respondent stop contravening the Act, the regulations, the bylaws or rules by permitting the registered owners of strata lots 46 and 47 to temporarily, or otherwise, place any items on the common property entry way.
>
> F. An Order for costs.
>
> G. An Order for such further and other relief as to this Honourable Court may seem just.

[12] The Chambers judge, Sinclair Prowse J., found that the strata council had the power, pursuant to s. 76(1) of the

Strata Property Act, to give an owner ". . . permission to exclusively use, or a special privilege in relation to . . . common property." She explained, however, that if a strata council makes a decision that the court considers "significantly unfair" to an owner, the court can make either an interim or final order that remedies the situation under s. 164 of the ***Act***.

[13] Sinclair Prowse J. noted that there had been no decisions interpreting the meaning of "significantly unfair" since the ***Act*** came into force on July 1, 2000. However, under s. 42 of the ***Condominium Act***, R.S.B.C. 1996, c. 64, which was replaced and repealed by the ***Strata Property Act***, an owner could apply to the court for a remedy if the affairs of the strata corporation were being conducted in a manner which was "oppressive", or if some act or resolution of the strata council was "unfairly prejudicial" to the owner. Courts had interpreted oppressive conduct to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fail dealing or has been done in bad faith. Unfairly prejudicial conduct had been interpreted to mean conduct that is unjust and inequitable. Sinclair Prowse J. found that the term significantly unfair could be defined in the same way as oppressive and unfairly prejudicial.

[14] Sinclair Prowse J. then concluded that the strata council resolution was not significantly unfair to Mr. Reid. He had complained that the common entry was being used as a dog pen, a place to store personal belongings, a place to air out camping equipment and as a place to host picnics, barbecues and parties. As Sinclair Prowse J. noted, however, none of these uses was authorized in the resolution. The Chambers judge remarked that if Ms. Flotten or the Nomuras were using the common entry in the manner alleged by Mr. Reid then it was up to the strata council to rectify the misuse.

[15] Sinclair Prowse J. also found that the resolution did not grant Ms. Flotten or the Nomuras exclusive use of the common entry. It went no further than to grant them the "special privilege" of being permitted to place specific plants on the common area. The petition was dismissed. Mr. Reid appeals from the decision. He argues that Sinclair Prowse J. erred in finding that the resolution was not significantly unfair to him and asks this court to grant an order that all items on the common entry be removed and that all owners be permanently prohibited from placing items of any kind on the common entry patio area.

Strata Property Act

[16] According to s. 66 of the ***Strata Property Act***, an owner owns the common property of the strata corporation as a tenant in common. At common law, there was little a tenant in common could do to prevent a fellow tenant from making changes to their shared property. The courts were reluctant to restrict a tenant in common in the legitimate enjoyment of his or her property. An injunction to prevent the changes would not be ordered unless the changes would result in the destruction of the property. The normal recourse was to seek an order for partition: A.H. Oosterhoff and W.B. Rayner, *Anger and Hosenberger Law of Real Property*, 2d ed. (Aurora: Canada Law Book Inc., 1985).

[17] The ***Strata Property Act*** provides strata owners with a mechanism to deal with disputes over common property without having to resort to such a drastic remedy. Under s. 2 of the ***Act***, a strata corporation is established as soon as the strata plan is deposited in a land title office. 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." (s. 3) The powers and duties of the strata corporation are to be exercised by council members who are elected by all the owners.

[18] According to the s. 119 of the ***Act***, a strata corporation must have by-laws that provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation. Section 120 provides that if a strata corporation does not file its own by-laws then the Standard By-laws in the ***Act*** apply. In the case at bar, effective April 30, 1999 the Strata Corporation filed new by-laws with the Land Title Office. I will refer to the relevant by-laws presently.

[19] Section 129 gives the strata corporation powers to enforce its by-laws. It can impose a fine, do work on a strata lot, common property or common assets, remove objects from the common property or common assets or deny an owner access to a recreational facility.

[20] A strata corporation also has the power to allow owners to use the common property in special ways, as occurred in this case. Section 76 of the ***Act*** reads:

> (1) Subject to section 71, the strata corporation may give an owner or tenant permission to exclusively use, or a special privilege in relation to, common assets or common property that is not designated as limited common property.
>
> (2) A permission or privilege under subsection (1) may be given for a period of not more than one year, and may be made subject to conditions.

> (3) The strata corporation may renew the permission or privilege and on renewal may change the period or conditions.
>
> (4) The permission or privilege given under subsection (1) may be cancelled by the strata corporation giving the owner or tenant reasonable notice of the cancellation.

[21] However, in granting the permission or privilege, s. 71 dictates that the strata corporation must not allow a "significant change" in the use or appearance of common property unless the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting or unless there are reasonable grounds to believe that the immediate change is necessary to ensure safety or prevent significant loss or damages.

[22] An owner who is unhappy with a decision of the strata corporation has recourse to the courts. Section 164 of the ***Act*** states:

> (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 . . . .
>
> [Emphasis added.]

[23] As can be seen from these sections, the ***Strata Property Act*** allows a strata corporation to manage the common property in a condominium and, to some extent, decide on the use to be made of it. Owners have a say in the strata corporation's decisions through their right to vote on by-laws and resolutions at strata corporation meetings and through their representatives on council. If an owner feels that an action taken by the strata corporation or council is significantly unfair, the owner can go to court and seek an appropriate remedy. In this way, the courts act as a final check on the powers of the strata corporation.

The By-Laws

[24] The by-laws of the Strata Corporation in the case at bar which are relevant to this appeal are the following:

> **BY-LAW 2: DISTURBANCE OF OTHERS**
>
> 2.1 No noise shall be made in or about any Strata Lot or the common property which in the opinion of the Strata Council is considered a nuisance or unreasonably interferes with the use and enjoyment of any other Strata Lot.
>
> * * *
>
> **BY-LAW 5: EXTERIOR APPEARANCE & ALTERATIONS**
>
> 5.1 No changes or alterations may be made to common property without the express written consent of Council as long as they are within their rights according to the applicable municipal law.

Discussion

[25] At the heart of this appeal is the question of whether the resolution passed by the strata council concerning the common entry was significantly unfair to Mr. Reid. He argues that the temporary permission to place various items on the common entry given to Ms. Flotten and the Nomuras adversely affects his view and the marketability of his unit. Mr. Reid further argues that Sinclair Prowse J. erred in not ordering the strata council to enforce strata by-laws 2.1 and 5.1 by requiring Ms. Flotten and the Nomuras to end their social activities on the common entry and remove from the area those items not listed in the resolution.

[26] As was noted by the Chambers judge, the meaning of the term "significantly unfair" in s. 164 of the ***Strata Property Act*** had not been judicially considered at the time the matter was heard. As a result, Sinclair Prowse J. looked to s. 42 of the former ***Condominium Act*** to find a definition for the term. Under s. 42 of the ***Condominium Act***, an owner could apply to the court to remedy behaviour of the strata corporation that was "oppressive" or acts or resolutions that were "unfairly prejudicial" to the owner. A review of how these terms had been defined by the courts can be found in the case of ***Blue-Red Holdings Ltd. v. Strata Plan VR 857*** (1994), 42 R.P.R. (2d)

49 (B.C.S.C.). In that case, the court found that oppressive conduct had been defined as conduct that is burdensome, harsh, wrongful, lacking in probity or fail dealing, or has been done in bad faith and that unfairly prejudicial conduct had been defined as conduct that is unjust or inequitable. In the case at bar counsel for both parties submitted that the meaning of "significantly unfair" would encompass, at the very least, oppressive and unfairly prejudicial conduct and the judge agreed with them. Counsel continue to take that position on this appeal.

[27] A number of subsequent decisions from the B.C. Supreme Court have cited Sinclair Prowse J.'s definition of "significantly unfair" with approval. Most recently, Masuhara J. in ***Gentis v. The Owners, Strata Plan VR 368***, 2003 BCSC 120, referred to Sinclair Prowse's decision as authority for the definition of significantly unfair. The judge, however, added the following comment:

> [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.

I agree with Masuhara J. that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the ***Condominium Act***, which was to put the legislation in "plain language" and make it easier to use (British Columbia, *Official Report of Debates of the Legislative Assembly*, Vol. 12 (1998) at 10379). I also note that the term "unfair" is defined in the ***Canadian Oxford Dictionary*** as "not just, reasonable or objective." It may be that this definition of "unfair" connotes conduct that is not as severe as the conduct envisaged by the definitions of oppressive or unfairly prejudicial. However, counsel argued this appeal on the basis that "significantly unfair" has essentially the same meaning as "oppressive and unfairly prejudicial". For the purposes of this appeal the distinction between the definitions makes no difference. On either

definition, the resolution passed by the strata council cannot be said to be significantly unfair to Mr. Reid.

[28] By-law 5.1 permits no changes or alterations to common property without written consent of council. Section 76 of the ***Act*** permits council to grant owners temporary special privileges in relation to common property. Council voted to give Ms. Flotten and the Nomuras temporary special privileges with respect to the common property in question and advised them of their decision in writing. As the Chambers judge explained in her reasons for judgment, the resolution passed by the strata council went no further than to permit Ms. Flotten and the Nomuras to place certain plants on the common entry patio area. Allowing the placement of plants in a common area that Mr. Reid looks out onto does not strike me as being unfair, much less "significantly unfair" to him.

[29] Mr. Reid complains that the resolution will affect the market value of his unit. A letter from a property appraisal company was introduced as an exhibit at the hearing before Sinclair Prowse J. The letter indicated that it was probable that a change in use of the common entry from common property to limited common property would negatively affect the marketability of Mr. Reid's unit. As noted above, the proposal to make the common entry a limited common property

was defeated by all of the owners. As I said, the strata council simply gave permission to Ms. Flotten and the Nomuras to place plants on the common entry for a temporary period. There is no evidence that the placement of a few plants on this common area would in any way reduce the value of Mr. Reid's unit. As for the question of whether the placement of the plants in front of Mr. Reid's window is significantly unfair, I agree with the comments of the Chambers judge. Sinclair Prowse J. stated that the placement of the plants in this manner was not authorized in the resolution and if that placement is unfair to Mr. Reid then the strata council should ensure that the plants are placed elsewhere on the common entry.

[30] Mr. Reid further submits that this court should order the strata council to enforce the strata corporation by-laws 2.1 and 5.1 by requiring Ms. Flotten and the Nomuras to remove personal items not listed in the resolution from the common entry. After noting that Mr. Reid complained that the common entry was being used as a dog pen, as a place to store personal belongings, as a place to air out camping equipment, and as a place to hold parties, the Chambers judge made the following comment in her reasons for judgment:

> [17] Therefore, if Ms. Flotten and Mr. and Mrs. Nomura are using the Common Property in the manner alleged by Mr. Reid (and there was evidence led in this hearing to indicate that they were using it in the manner alleged), the Strata Council should take steps to rectify that misuse.
>
> [Emphasis added.]

In the absence of a finding that the activities alleged by Mr. Reid did in fact occur and that these activities would constitute a breach of the strata by-laws, this court is unable to order the strata council to force Ms. Flotten and the Nomuras to remove these non-authorized items from the common entry.

[31] Finally, counsel for Mr. Reid submitted that the resolution passed by the strata council violated s. 71 of the ***Act*** which provides that "the strata corporation must not make significant change in the use or appearance of common property" unless "the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting". The resolution in question permitted the respondents to decorate this patio area with trees and plants which must be removed when and if council requests. I am not persuaded that this decoration could be said to constitute a "significant change" within the meaning of s. 71 of the ***Act***.

[32] It follows from what I have said that I would dismiss the appeal.

The Honourable Madam Justice Ryan

I AGREE:

The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Southin:

[33] I have had the privilege of reading in draft the reasons for judgment of my colleague, Madam Justice Ryan, and concur in her proposed disposition of this appeal.

[34] I agree with her that the resolution of 19th July, 2000, which falls within the authority granted to the Council by s. 76 of the ***Strata Property Act***, S.B.C. 1998, c. 43, was not "significantly unfair" within the meaning of that phrase in s. 164.

[35] It follows that the relief sought in paragraphs A, B and E of the petition, as quoted in paragraph 11 of my colleague's reasons for judgment (and these prayers are, in my opinion, simply different ways of saying the same thing) cannot be granted.

[36] But as I understand the proceedings, the appellant was also seeking, by paragraphs C and D, an order, in effect, that the strata council insist that Ms. Flotten and the Nomuras not go beyond the permission granted by the impugned resolution. I do not disagree with my colleague's conclusion on that aspect of the case but think it useful to expand on it.

[37] The petition was brought on 19th January, 2001. It was heard on 29th August, 2001, and reasons for judgment were

delivered, according to the face of the judgment, on the same date. I suspect the judgment in that respect is grossly erroneous as the face page of the appeal book [as well as the date at the top of the reasons for judgment] asserts that the learned trial judge pronounced her reasons on the 14th November, 2001.

[38] The evidence before the learned judge in support of the petition was the affidavits of the petitioner sworn 16th January and 26th August, 2001, and against the petition, the affidavits of Mr. Ballarin and Ms. Nomura, both sworn 11th July, 2001, and of Ms. Flotten, sworn 12th July, 2001.

[39] As to events subsequent to 19th July, 2000, the appellant deposed:

> 47. Further to Fact 53 of the Petition, now shown to me and marked collectively as Exhibit "OO" to this my Affidavit are numerous photographs taken by me in June, July, August and September, 2000 of the Common Property Entry Way. Over the course of the summer of 2000, Nomura and Flotten routinely used the Common Property Entry Way as a private garden, to store personal belongings, to air out camping equipment, to host picnics, barbecues and parties, and from time to time, as a dog pen. Over the course of the summer of 2000, the activities and use of the Common Property Entry Way seriously interfered with my use and enjoyment of my Lot, and of the common property. I dreaded looking out my windows and began to spend less and less time in the kitchen/eating area and family room of my Lot.
>
> 48. Further to Fact 54 of the Petition, now shown to me and marked as Exhibit "PP" to this my

Affidavit is a true copy of the July 19, 2000, strata council meeting minutes at which the strata council, in my absence, granted temporary permission to Nomura and Flotten to place certain items on the Common Property Entry Way. This permission was granted less than 10 months after the owners defeated a special resolution to designate the Common Property Entry Way as limited common property for the exclusive use of strata lots 46 and 47, and after the repeated requests made of Nomura and Flotten by the strata council, through its property manager, to remove all furnishings and belongings from the Common Property Entry Way.

49. On or about July 29, 2000, several potted cedar trees, approximately 6 feet in height, were placed directly in front of the 3 picture windows of the Lot. The placement of these trees, which remain in front of the 3 picture windows as of the date of this Affidavit, have dramatically interfered with my use and enjoyment of the Lot and of the common property as I have little or no view out of my 3 picture windows.

50. Now shown to me and marked as Exhibit "QQ" are true copies of the registered bylaws of the Respondent Strata Corporation.

51. The use of the Common Property Entry Way by Nomura and Flotten is, to the best of my knowledge, a violation of one or more of the bylaws of the Respondent. Since May, 1999, the use of the Common Property Entry Way by Nomura and Flotten has substantially and unreasonably interfered with my enjoyment of the Lot and of the common property. I no longer have an unobstructed view out of the 3 picture windows. The Common Property Entry Way is used for storage, for social functions, where alcohol is served immediately outside of the Lot, and as a yard for Flotten's dog. My repeated requests that the strata council enforce the bylaws of the Respondent, including having the Items and other belongings removed from the Common Property Entry Way, have not been complied with.

[40] Ms. Flotten and Ms. Nomura also had something to say about events after the 19th July, 2000, but they do not expressly depose as to whether they had abided by the terms of the resolution of the 19th July, 2000.

[41] As to those events, the learned judge said:

> [17] Therefore, if Ms. Flotten and Mr. and Mrs. Nomura are using the Common Property in the manner alleged by Mr. Reid (and there was evidence led in this hearing to indicate that they were using it in the manner alleged), the Strata Council should take steps to rectify that misuse.

[42] I infer the learned judge put it thus because the evidence was inconclusive as to whether Ms. Flotten and the Nomuras had gone beyond the permission given to them.

[43] I am unable to say that she erred in that appreciation of the evidence.

[44] Therefore, she could not properly grant the relief of requiring the Council to enforce obedience to that resolution.

[45] What relief might have been granted had the evidence established that Ms. Flotten and the Nomuras had gone beyond the permission given to them cannot be addressed in this Court upon this appeal.

The Honourable Madam Justice Southin