

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS3259 v.
Sze Hang Holding Inc.,*
2009 BCSC 473

Date: 20090407
Docket: L050030
Registry: Vancouver

Between:

The Owners, Strata Plan LMS3259

Plaintiff

And

Sze Hang Holding Inc. and Leon Lam

Defendants

and

Docket: L052756
Registry: Vancouver

Between:

The Owners, Strata Plan LMS3259

Plaintiff

And

Sze Hang Holding Ltd. and Leon Lam

Defendants

Before: The Honourable Madam Justice Sinclair Prowse

Reasons for Judgment

Counsel for the Plaintiff:

R. Shore
P. Mendes

Leon Lam

Appearing on his own behalf

S.H. Lee

Appearing on behalf of
Sze Hang Holding Inc.

Date and Place of Trial:

October 11, 2007;
September 2 – 4, 2008

Vancouver, B.C.

(I) NATURE OF THE HEARING

[1] The Plaintiff is the Strata Corporation of the strata development in which the Defendants own two units. In these two actions (which have been ordered to be heard together), the Strata Corporation is seeking to enforce various bylaws against the Defendants as owners of those units.

[2] In this hearing, the Defendants seek to have these actions dismissed on the ground that the Strata Corporation is without jurisdiction to bring them. The Strata Corporation, on the other hand, seeks, pursuant to R. 19(24), to have the Defendants' pleadings struck; to have the Defendants denied permission to redraft any of their pleadings; and to have Judgment entered on its behalf.

[3] Before addressing these applications, it became apparent upon reviewing the pleadings of all of the parties that a typographical error had been made in the style of cause in the second action (Vancouver Registry No. L0527856). Specifically, the Defendant Sze Hang Holding Inc. is mistakenly described as Sze Hang Holding Ltd. Because this is a typographical error, leave is granted to the Strata Corporation to amend its pleading to correct this error.

(II) BACKGROUND CIRCUMSTANCES

[4] To put the issues raised in these applications in context, the Strata Corporation is the strata corporation for Pacific Plaza, a business as opposed to a residential strata development. Although there is a dispute as to whether the proper business designation of this strata development is "wholesale industrial" (the position

of the Defendants) or "a combination of wholesale industrial and commercial retail" (the position of the Strata Corporation), there is no issue that it is a "business" as opposed to a "residential" strata development.

[5] This strata development was built by Ernest & Twins Ventures (PP) Ltd. and completed in 1998. The Defendants were not original owners. Rather, it was about 3 years after it was built that Sze Hang Holding purchased two units (namely, the North and South Units).

[6] It was not until 1 year after that (or 4 years after it was built) that Mr. Lam acquired any ownership interest in any of the strata units. This is the ownership that he continues to hold. Specifically, the South Unit is owned by him and Sze Hang Holding – Mr. Lam having acquired a 1% interest and Sze Hang Holding having a 99% interest. The North Unit is wholly owned by Sze Hang Holding.

[7] Although Mr. Lam did not acquire an ownership interest in any of the strata units until the summer of 2002, he has operated a business from those units from the time that they were acquired by Sze Hang Holding. For much, if not all, of this time, Extra Gift Exchange Inc. has been the tenant of these units. (Extra Gift Exchange is a company in which Mr. Lam and Ms. Sze Hang Lee are principals. Ms. Lee is also a principal in Sze Hang Holding.)

[8] In addition, to operating a business in this strata development from at least 2001, Mr. Lam has been actively involved in the affairs of the strata development and in particular of the Strata Council. (As with all strata developments, pursuant to s. 4 and s. 26 of the **Strata Property Act**, S.B.C. 1998, c.43 [**SPA**] the strata council

is the mechanism through which the powers and duties of the strata corporation are exercised. Put another way, the strata council acts as the board of directors for the strata corporation.)

[9] Over the last 8 years, Mr. Lam has been involved in a number of actions pertaining to various aspects of this strata development. Although some of these matters have been completed, there are approximately 5 other outstanding actions in addition to the present actions. While some of these actions include claims of defamation and personal injury, for the most part these actions pertain to claims regarding the construction, sale, management, and governance of this development. (This was also the situation with the actions that are now completed.) I am the Case Management Judge for the present actions as well as the 5 other outstanding ones.

[10] As far as the present actions are concerned, as was set out earlier, the Strata Corporation is seeking to enforce various bylaws. Specifically, in the first action (Vancouver Registry No. L050030) which will hereinafter be referred to as the Fines Action, the Strata Corporation claims that for the last few years the Defendants have failed to open either of these units for business at all, let alone for the requisite number of business hours required under the bylaws; that as of December 2007, the Defendants had incurred fines in the amount of \$91,571.58 with respect to the South Unit and \$38,840.15 with respect to the North Unit because of these violations; and that to date the Defendants have neither paid these fines nor complied with the bylaws by opening their units for business.

[11] Moreover, the Strata Corporation claims that the Defendants have posted notices in the windows of their units, the purpose of these notices being to criticize and embarrass the members of the Strata Council.

[12] Further, the Strata Corporation claims that the Defendants stored items on the common property adjoining the South Unit contrary to the bylaws and that the Strata Corporation had to incur the costs of removing and then storing these items. (It still has these items and is still paying the costs of this storage.)

[13] With respect to the second action (Vancouver Registry No. L052756) which will hereinafter be referred to as the Access Action, the Strata Corporation claims that, contrary to the bylaws, the Defendants failed to grant it access to the North Unit to check that a sewer line that had backed up had been properly repaired (that is, in accordance with the building code); to the South Unit to investigate the cause of steam that was coming from it into an adjacent unit; and to the North Unit to investigate whether it was being used as a residence.

[14] As far as the present hearing is concerned, as is set out in an earlier decision in these proceedings (namely, 2008 BCSC 481), it was set at my direction for the purpose of clarifying the pleadings and specifically clarifying the claims, defences, and counterclaims to be made. The basis for this direction was that it had become apparent in pre-trial applications, pertaining to such matters as the extent of document production, the extent of examinations for discovery, and the period of time needed for trial, that the pleadings would have to be clarified sooner rather than

later as the issues raised in these pre-trial applications could not be decided until that was done.

[15] As an example, in these pre-trial applications the Defendants took the position that their defences and claims raised issues requiring extensive document production from the Strata Corporation (approximately 600,000 documents) and a trial of at least a month in length. The Strata Corporation, on the other hand, took the position that the issues in these actions were simple matters, requiring modest document production, and a trial of two weeks at the very most. Specifically, the Strata Corporation took the position that most, if not all, of the Defendants' pleadings were without legal foundation and would have been struck when considered by the Court.

[16] It was in these circumstances that I directed this hearing. The parties were invited to make whatever applications that they considered appropriate regarding the clarification of the pleadings.

(III) THE APPLICATION OF THE DEFENDANTS THAT THESE ACTIONS SHOULD BE DISMISSED BECAUSE THE STRATA CORPORATION DOES NOT HAVE THE AUTHORITY TO BRING THEM

[17] In this application, the Defendants submit that the Strata Corporation was not authorized to bring these actions as it had not passed the resolution required by s. 171 of the **SPA**. This section of the **SPA** specifies that a resolution must be passed by a 3/4 vote at an annual or special general meeting before litigation may be commenced by a strata corporation.

[18] Included in their arguments, the Strata Corporation submits that the Defendants do not have standing to bring this application. Rather, it is only the other owners that have standing to bring this application as they will be required to finance these purportedly unauthorized actions.

[19] It was unnecessary to determine this issue as the evidence does not support this application of the Defendants. To the contrary, the evidence shows that the required resolution to commence these actions was passed by a 3/4 vote at the annual or special general meeting held on October 26, 2006.

[20] Given these circumstances, this preliminary objection is dismissed.

(IV) THE APPLICATION OF THE STRATA CORPORATION TO STRIKE AND DISMISS THE PLEADINGS OF THE DEFENDANTS PURSUANT TO R. 19(24)

[21] The Strata Corporation brings this application pursuant to R. 19(24). Not only do the Defendants oppose this application, but they also contend that it should be dismissed on a preliminary basis as the Court is without jurisdiction to hear it.

(A) *The Preliminary Application Of The Defendants To Dismiss The R. 19(24) Application Of The Strata Corporation*

[22] The Defendants submit that the Court has already approved all of their pleadings as presently drawn and, therefore, it is without jurisdiction to revisit the matter. The Defendants contend that the matter is *res judicata*.

[23] The record of these proceedings does not support this contention.

[24] As is set out in my earlier decision (namely, 2008 BCSC 481), in the fall of 2007 at the request of both parties I directed that issues that had been raised regarding the Defendants' pleadings be postponed until the trial. (That is, those issues would be determined at trial by the trial judge.) However, as was touched upon earlier in these Reasons for Judgment as well as being set out in the aforementioned decision, it became apparent in the course of subsequent pre-trial applications that those issues could not be deferred until trial.

[25] There was never a decision made that the Defendants' pleadings were valid pleadings. To the contrary, the earlier direction went no further than postponing that decision until trial.

[26] As the issues raised in this hearing have not been addressed by the Court, these applications are not *res judicata*.

[27] For these reasons, this application is dismissed.

(B) *The R. 19(24) Application Of The Strata Corporation*

[28] The Defendants filed individual pleadings in each of these actions. In the Fines Action, they individually filed a Statement of Defence and Counterclaim and in the Access Action, they filed individual Statements of Defence. Mr. Lam also filed a Counterclaim in the Access Action while Sze Hang Holding did not.

[29] With respect to the South Unit, because they are joint owners Mr. Lam and Sze Hang Holding do not have the standing individually to raise defences or to bring claims as owners: ***Extra Gift Exchange Inc., Lam and Richmond Liquidation***

Sales v. Ernest & Twins Ventures (PP) Ltd. et al, 2007 BCSC 426. Rather, the standing to raise defences and to bring counterclaims as owners of the South Unit rests with the Defendants jointly.

[30] Although as the sole owner of the North Unit, Sze Hang Holding could file individual pleadings on behalf of that unit, it makes little sense to do so in this case, as for the most part (if not entirely) the Defendants bring the same defences and counterclaims for each of the units.

[31] For example, in the Fines Actions, with the exception of paragraphs 1-3, 38-40, 46, 55, 66, 83, and 96-98 in Mr. Lam's pleadings and paragraphs 1, 2, 38, 42, 51, 79, 92, and 93 in Sze Hang Holding's pleadings, the pleadings are essentially the same. In the Access action, with the exception of paragraphs 1, 30-36, 43, 60, 63-66, 68-70, 72-74, and 80-104 in Mr. Lam's pleadings and paragraphs 1, 30, 53, 54, 56, and 57 in Sze Hang Holding's pleadings, the pleadings are the same.

[32] During his submissions, Mr. Lam explained that, in addition to the defences and counterclaims that he is pursuing as an owner, he is also pursuing some individual claims as a tenant – that is, Sze Hang Holding is not pursuing these tenant claims. Because he has these individual claims, he argued that his pleadings should be individual.

[33] This argument is not sound in law. Rather, as was just set out, because neither Mr. Lam nor Sze Hang Holding has standing to individually defend or pursue any claims based as owners of the South Unit, their pleadings must be joint. Any

claims made solely by one of the Defendants on grounds other than as owners should be set out as an individual claim within that joint pleading.

[34] However, even though these pleadings were not brought in the proper form for purposes of this hearing, I have proceeded as if they had been. Furthermore, as the parties did during the hearing, I have addressed the pleadings in both actions collectively. (Many of the defences and counterclaims are repeated in both actions.)

[35] As was set out at the beginning of this section of this Judgment, the application of the Strata Corporation to strike the Defendants' pleadings is brought pursuant to R. 19(24). That rule provides that:

At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[36] Pursuant to this rule, pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck:

Gittings v. Caneco Audio-Publishers Inc. (1987), 17 B.C.L.R. (2d) 38 (S.C.), rev'd (1988), 26 B.C.L.R. (2d) 349 (C.A.) but not on this point. The underlying rationale of

this principle is that if causes of action (or defences for that matter) are not properly pleaded, it is impossible for a defendant (or a plaintiff) to know the case to meet:

Homalco Indian Band v. British Columbia (1998), 25 C.P.C. (4th) 107 (B.C.S.C.).

[37] The Defendants' pleadings are lengthy. In the Fines Action, Mr. Lam's Statement of Defence and Counterclaim (including the Prayer for Relief) is 51 pages long with 120 paragraphs while Sze Hang Holding's Statement of Defence and Counterclaim (including the Prayer for Relief) is 48 pages and 115 paragraphs. In the Access Action, Mr. Lam's Statement of Defence and Counterclaim is 42 pages and 114 paragraphs long while Sze Hang Holding's Statement of Defence is 25 pages and 65 paragraphs long. (As was touched on earlier, Sze Hang Holding did not file a Counterclaim in the Access Action.)

[38] These pleadings are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met. In addition to the proposed defences and counterclaims being incomprehensible, these pleadings include arguments, opinions, and allegations against people and businesses which are not parties – for example, allegations against members of the Strata Council, the present property management company, and a lawyer who has provided legal services to the Strata Corporation.

[39] Given these facts, the pleadings must be struck. Thus, the next issue is whether the Defendants should be permitted to redraft these pleadings.

[40] Generally, if the problem with a pleading is that it is inadequately drafted, a party will be given the opportunity to redraft it. However, if it is plain and obvious

that even if redrafted a pleading is bound to fail because it does not raise an arguable issue (that is, it is without legal foundation), a party will not be granted the opportunity to redraft: ***Braun Investment Group Inc. v. Emco Investment Corp.*** (1984), 58 B.C.L.R. 396, 46 C.P.C. 85 (S.C.), aff'd (1985), 67 B.C.L.R. 247 (C.A.); and ***McNaughton v. Baker*** (1988), 25 B.C.L.R. (2d) 17, [1988] 4 W.W.R. 742 (C.A.).

[41] In addition to this ground for denying a party the opportunity to redraft a pleading, the Court may deny that opportunity on the ground that to grant it would constitute an abuse of process.

[42] That is, as explained in John W. Horn & Hon. Susan A. Griffin, ***Fraser Horn & Griffin, The Conduct of Civil Litigation in British Columbia***, 2d ed., looseleaf (Markham, Ont.: LexisNexis, 2007) at 25-5:

A pleading or portion of a pleading may be struck out on any of the grounds set out in Rule 19(24)(b), (c) and (d). Though such an application is not usually made with the object of securing judgment in a summary way, the Rule in terms provides that this result may follow. If the ground of the application is that the entire proceeding is ... an abuse of process ... then the entire action may be stayed or dismissed or the entire defence struck out.

[43] As described in Frederick M. Irvine, ***McLachlin & Taylor British Columbia Practice***, 3rd ed., looseleaf (Markham, Ont.: LexisNexis, 3006) at 19-63(3):

Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In ***Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)***, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, the court stated at para. 37:

Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[44] Applying these principles to the circumstances of this case, for the reasons that follow I have concluded that the Defendants should not be granted the opportunity to redraft their pleadings. Given this decision, in turn, results in there being no Statements of Defences or Counterclaims filed in either of these actions, I have also concluded that the Strata Corporation should be granted judgment.

[45] Some of the proposed defences and claims of the Defendants could not be redrafted in any event as they are without legal foundation. That is, no matter how they are redrafted, they are bound to fail because they do not raise an arguable issue.

[46] For example, as they explained in their submissions (because it could not be discerned in their pleadings) the Defendants contend that the bylaws which form the basis of the Strata Corporation's claims are invalid because they are *ultra vires*. In other words, those bylaws are beyond the authority of the Strata Corporation to pass, let alone enforce.

[47] This contention is not supported by the law. Pursuant to s. 3 of the **SPA** "... 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." Moreover, as is set out in s. 119 of the **SPA**, strata corporations "must have bylaws"

and the bylaws "may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation."

[48] Under s. 129 and s. 133 of the **SPA**, the Strata Corporation may impose fines to enforce bylaws and may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including doing work on or to a strata lot, the common property, or common assets; removing objects from the common property or common assets; and requiring that reasonable costs of remedying the contravention be paid by the person who may be fined.

[49] As the bylaws in the present actions fall within the scope of the statutory responsibilities of strata corporations and as strata corporations are statutorily required to exercise these responsibilities through the passage and enforcement of bylaws, the bylaws are not *ultra vires* the power of the Strata Corporation.

[50] Given the statutory provisions governing strata corporations, there is no legal foundation for this contention either as a defence or as a claim. It is bound to fail.

[51] As another example of a pleading that cannot be redrafted in any event because it is without legal foundation, the Defendants submit that invalid proxies have been used to elect many, if not all, of the members of the Strata Council and have been used to pass resolutions, including the resolutions creating the bylaws that the Strata Corporation seeks to enforce in these actions. The Defendants argue that the proxies are invalid because the owners of the proxies sold them to other

owners. As a result of this flawed process, the Defendants submit that the bylaws are invalid and unenforceable.

[52] Assuming that some owners sold their proxies to other owners and that those proxies were used to elect members of the Strata Council and/or to pass resolutions creating or enforcing these bylaws, that fact alone does not invalidate the election of the members of Strata Council; the creation of the bylaws; and/or the enforcement of the bylaws.

[53] The fact that an owner chooses to sell his/her proxy to another owner does not invalidate that proxy. Pursuant to s. 56 of the **SPA**, a person who is otherwise eligible to vote at a general meeting may do so in person or by proxy. In other words, whether it is the election of members to the strata council or the passage of a resolution, a strata unit owner may exercise his/her vote by proxy.

[54] To be valid, as is set out in s. 56 of the **SPA**, a proxy must:

- (a) be in writing and signed by the person appointing the proxy;
- (b) be general or for a specific meeting or resolution; and
- (c) be revocable (and, by extension, a later proxy must be considered to revoke an earlier one).

In other words, as long as the proxy meets these statutory requirements, it is valid.

The fact that an owner chooses to sell his/her proxy to another owner does not invalidate it.

[55] Although s. 292(2)(g) of the **SPA** authorizes the making of regulations "respecting the person who may be proxies, the number of proxies they may hold,

the circumstances in which they may be proxies and restrictions on their powers as proxies", to date no regulations have been made that hold that the selling of a proxy invalidates it.

[56] Given these conclusions, any defences and/or counterclaims based on the premise that a proxy that has been sold is invalid are bound to fail because that is not a basis on which a proxy would be rendered invalid. Consequently, there is no point in redrafting these pleadings because they are without legal foundation.

[57] A further example of pleadings that cannot be redrafted in any event are the counterclaims brought by Mr. Lam as a tenant. (Presumably, these claims are brought as the tenant of the North Unit as he is an owner of the South Unit.) Aside from the fact that Mr. Lam has consistently maintained in these actions, as well as in related actions, that Extra Gift Exchange is the tenant of this unit as well as the South Unit, tenants do not have standing to bring claims or to raise a defence with respect to the bylaws.

[58] That is, although some powers and duties can be assigned to a tenant pursuant to s. 147(1) of the *SPA*, the landlord (that is, Sze Hang Holding as the owner) cannot assign to a tenant the responsibility for fines or the costs of remedying a contravention of the bylaws or rules.

[59] Mr. Lam relies on the provisions of the now-repealed *Condominium Act*, R.S.B.C. 1996, c. 64 to provide him with standing to bring claims as a tenant. In addition to the fact that claims based on this statute are bound to fail because this statute has been repealed, as was set out in *Extra Gift Exchange Inc., Lam and*

Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd., 2007 BCSC 426 when Mr. Lam brought claims on behalf of Extra Gift Exchange as a tenant, the provisions of the **Condominium Act** pertain to tenants of "residential" strata units. Given this situation, even if this statute had not been repealed, any claims or defences of the Defendants brought pursuant to its provisions would be bound to fail as it does not give them standing, the Pacific Plaza being a business rather than residential strata development.

[60] Quite apart from the fact that many, if not most, of the Defendants' pleadings could not be redrafted in any event because there is no legal foundation for the defences and counterclaims made, in the circumstances of this case it would be inappropriate to grant the Defendants permission to redraft their pleadings as to do so would constitute an abuse of process.

[61] To begin with, over the last 7, almost 8, year period the Defendants have been given at least 4 opportunities (including this time) to draft appropriate pleadings. These earlier opportunities were granted by Mr. Justice Thackray in ***Extra Gift Exchange Inc. and Lam v. The Strata Corporation LMS3259*** (18 September 2001), Vancouver No. S014678; Mr. Justice Shabbits in ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (18 February 2004), Vancouver No. L031802; ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (19 February 2004), Vancouver No. L031802; ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (20 February 2004), Vancouver No. L031802; and ***Extra Gift***

Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd. (18 March 2004), Vancouver No. L031802; and by myself in *Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.*, 2007 BCSC 426.

[62] Although the actions were different, the claims made in them are basically the same claims as the claims and defences made by the Defendants in these actions. That is, the claims pertain to the governance, management, and construction of this strata development.

[63] Furthermore, although Sze Hang Holding was not a party in any of these earlier actions, Mr. Lam brought all of the claims for its benefit as well as his own. In addition, Ms. Sze Hang Lee (who is a principal of Sze Hang Holding and who represented it throughout this proceeding) was in attendance for all of these other matters, either by assisting Mr. Lam or as the representative of Extra Gift Exchange. Moreover, as a review of the pleadings in these earlier efforts disclose, although not named as a party the claims were brought for the benefit of Sze Hang Holding as well as the named parties.

[64] Given the direct involvement of a principal of Sze Hang Holding in most if not all of these actions and the fact that claims were for the benefit of Sze Hang Holding as well as the named parties, I am satisfied that, for all practical purposes, Sze Hang Holding has also been given the benefit of these earlier opportunities.

[65] As occurred in the present actions, the Defendants were self-represented in these other actions. Because of that fact, in my view they have been given more opportunities than would normally have been given to redraft their pleadings

properly. On a number of previous occasions, the Court has urged them to secure legal assistance in this process. They have been advised that there are various legal organizations that can provide assistance at a modest cost. Given the state of the present pleadings, I can only conclude that the Defendants have either chosen not to get that assistance or have chosen not to follow the advice given.

[66] There may be defences or claims that if properly drafted, the Defendants could have pursued. However, that opportunity is now gone. Given the number of previous opportunities, it would be an abuse of process to permit the Defendants yet another opportunity to redraft their pleadings.

[67] In addition to being given these previous opportunities, it would be an abuse of process to permit the Defendants to redraft because of the fact that in their pleadings in the present actions the Defendants raised (as defences and counterclaims) claims that they knew had already been addressed and dismissed. Furthermore, they contravened earlier Court orders by raising matters that they had been specifically prohibited from raising in these actions.

[68] To put this conclusion in context, although the present actions were commenced before *Extra Gift Exchange Inc. et al. v. Ernest & Twins Ventures (PP) Ltd.*, 2007 BCSC 426, was released, the pleadings of the Defendants in these actions were drafted and filed after that judgment was issued.

[69] In the *Ernest & Twins* matter, Mr. Lam and Extra Gift Exchange (Ms. Lee, a principal in Sze Hang Holding, is also a principal in Extra Gift Exchange), made claims against a number of parties including the developer, the past and current

property management companies, and the former and current members of Strata Council. The claims pursued in that action pertained to construction, sale, management, and governance of the strata development.

[70] In the *Ernest & Twins* action, Mr. Lam and Extra Gift Exchange were the plaintiffs. Judgment was granted against the plaintiffs with respect to most of their claims. That is, most of the claims were dismissed because they were without legal foundation. There was no point to redrafting them because they did not raise an arguable issue—they were bound to fail.

[71] However, with respect to a few claims pertaining to the Strata Corporation and the current members of the Strata Council (current being defined as from 2002 onward), Mr. Lam was granted permission to redraft because there was potentially an arguable issue if they were properly drafted and if they were properly brought. However, that permission to redraft was subject to terms. Included in those terms was the requirement that the orders for special costs had to be paid before those potential claims could be pursued. (There were two orders for special costs – one in one of the earlier actions and the second I made in the *Ernest & Twins* matter.)

[72] However, there was an exception to the payment of that special costs term. In particular, Mr. Lam was granted the opportunity to redraft some of the claims against the Strata Corporation and bring them as counterclaims in the present actions, without having to pay the special costs order first.

[73] The rationale behind this exception was that some of the potential claims that Mr. Lam had been given the opportunity to redraft against the Strata Corporation

pertained to bylaw matters such as the oppressive and unfair levying of fines. Because these potential claims were interrelated to the claims that were being brought against him and Sze Hang Holding in the present actions, I concluded that it was inappropriate to require Mr. Lam to pay the special costs orders before they could pursue these potential claims as counterclaims in these actions.

[74] However, the claims from the *Ernest & Twins* decision that Mr. Lam was given the opportunity to redraft and pursue in the present actions were very limited.

Specifically, as far as the present actions were concerned:

With the exception of claims pertaining to the oppressive and unfair levying of fines and penalties, and the arbitrary and improper waiving of these fines and penalties (which also includes the improper acquisition and use of proxies), none of the potential claims may be brought until the outstanding orders of special costs have been paid.

In addition, "the potential counterclaims will not extend to potential claims against the Current Strata Council Members." That is, this exception did not extend to any of the potential claims against the current members of the Strata Council – the current members of the Strata council being defined as members from 2002 onwards. Put another way, before these claims could be redrafted and pursued Mr. Lam had to comply with all of the terms set out in *Ernest & Twins* decision which included the payment of the special costs orders.

[75] Unfortunately, not only did the Defendants pursue defences and claims in the present actions that went beyond the permitted categories, they pursued defences and counterclaims that had been dismissed (that is, had been found to be without legal foundation) in the *Ernest & Twins* action.

[76] Included in the defences and counterclaims that fall outside the permitted categories are the allegations that the Defendants have made in their pleadings against the members of the Strata Council. Although the Defendants have framed their defences and counterclaims as allegations of mismanagement by the Strata Corporation, these allegations are really against the members of Strata Council as it is their purported unauthorized acts and misconduct that the Defendants plead constitutes this mismanagement.

[77] Another prohibited claim that was included in the Defendants' pleadings in the present actions is the claim that the Strata Corporation failed to pursue an action for fraudulent misrepresentation against the developers, an action that was purportedly authorized by a resolution supported by at least 3/4 of the owners.

[78] To bring claims that contravene a Court order is an abuse of process.

[79] As was just touched upon earlier, with respect to many of the claims in the **Ernest & Twins** action, judgment was granted against the plaintiffs (that is, Mr. Lam) because the claims were without legal foundation – they did not raise an arguable issue. The Defendants bought many of these dismissed claims in the present actions, claims such as the failure of the Strata Corporation to take action regarding structural deficiencies; the alleged misconduct of the Strata Corporation regarding the payment of legal expenditures incurred by the Strata Corporation to defend or pursue actions; and breaches of fiduciary duty. These claims are *res judicata*. The Court has already determined that they are bound to fail. To bring them again is an abuse of process.

[80] Sze Hang Holding argues that as it was not a party to the *Ernest & Twins* action, it is not bound by any orders arising from that decision. I do not agree.

[81] As was just touched upon, some of the claims in the *Ernest & Twins* decision were dismissed. Those claims were dismissed because they were without legal foundation and therefore were bound to fail. With respect to these dismissed claims, the fact that there are now brought by Sze Hang Holding alone or jointly with Mr. Lam does not change the fact that they are not legally recognized claims. They do not raise an arguable issue.

[82] As far as the other orders in the *Ernest & Twins* decision are concerned, Sze Hang Holding's standing to defend the claims brought in the present actions and to bring counterclaims against the Strata Corporation is as an owner. As its ownership in the South Unit is joint with Mr. Lam, Sze Hang Holding cannot defend any claims or bring any counterclaims with respect to that unit without Mr. Lam.

[83] Consequently, because Mr. Lam was a party in the *Ernest & Twins* decision; because some of the orders in that case limited his capacity to bring or defend claims as an owner of the South Unit; and because Sze Hang Holding cannot raise defences or bring claims as an owner of the South Unit without Mr. Lam, Sze Hang Holding is bound by the orders made in that decision.

[84] Sze Hang Holding argues that with respect to the North Unit, however, because it was not a party to the *Ernest & Twins* decision and because it is the sole owner of that unit, it is not bound by the *Ernest & Twins* decision with respect to

counterclaims and defences raised on behalf of that unit. In the circumstances of this case, that argument is not persuasive.

[85] For the most part, if not entirely, the defences and counterclaims that it raises as owner of the North Unit are the same defences and counterclaims that it raises jointly with Mr. Lam as owners of the South Unit. In these circumstances, to permit Sze Hang Holding to pursue counterclaims or defences as the owner of the North Unit that it is prohibited from pursuing on behalf of the South Unit, as a result of the *Ernest & Twins* decision, would constitute an abuse of process as it would thwart that earlier decision.

[86] To summarize, in my view given all of the circumstances set out above, to allow the Defendants the opportunity to redraft some or all of their pleadings would, in the circumstances of this case, constitute an abuse of process. It would violate the principles of judicial economy, consistency, finality, and the integrity of the administration of justice.

[87] Having denied the Defendants the opportunity to redraft their pleadings, their Statements of Defence and Counterclaims are dismissed.

(C) Conclusion

[88] The Defendants pleadings are struck because they are so prolix and confusing that it is impossible for the Strata Corporation to discern the case that it is to meet.

[89] The Defendants are denied the opportunity to redraft not only because many of their defences and counterclaims are bound to fail as they do not raise an arguable issue, but primarily because it would constitute an abuse of process. Not only have the Defendants been granted previous opportunities to redraft but in these pleadings they contravened court orders and endeavoured to re-litigate matters that they knew had already been considered and decided.

[90] As the Defendants pleadings have been struck and as they have been denied the opportunity to redraft them, this matter will proceed as if Statements of Defence or Counterclaims had not been filed. Given those circumstances, Judgment is granted to the Strata Corporation in both actions against both Defendants.

[91] As far as the Fines Action is concerned, the question of the quantum of the fines to be awarded against the Defendants in regard to 1080 - 8888 Odlin Crescent, Richmond B.C. (the South Unit) for the breach of the business hour bylaw as of December 1, 2007; of the quantum of the fines to be awarded against the Defendant Sze Hang Holding in regard to 1380 - 8888 Odlin Crescent Richmond B.C. (the North Unit) for the breach of the business hour bylaw as of December 1, 2007; and of the amount to be awarded against the Defendants in regard to the cost of moving and storing the Defendants' property are all referred to the Registrar who will certify their findings.

[92] In the Access Action, with respect to the relief granted as a result of the Judgment against the Defendants, this Court orders:

- (a) that the Defendants, on or before 5:00 p.m. on May 15, 2009, provide access on a date and time agreed upon by the parties to enable a representative of the Strata Corporation (that representative having been chosen by the Strata Corporation) to attend the premises located at 1010 - 8888 Odlin Crescent in Richmond B.C. (the South Unit), the purpose of that access being to enable the Strata Corporation to determine whether the Defendants are complying with the bylaws;
- (b) that the Defendant Sze Hang Holding, on or before 5:00 p.m. on May 15, 2009, provide access on a date and time agreed upon by it and the Strata Corporation to enable a representative of Strata Corporation (that representative having been chosen by the Strata Corporation) to attend the premises located at 1380 - 8888 Odlin Crescent in Richmond B.C. (the North Unit), the purpose of that access being to enable the Strata Corporation to determine whether the Defendant Sze Hang Holding is complying with the bylaws;
- (c) that if the Defendants or either of them fail to comply with the aforementioned orders, the representative of the Strata Corporation is entitled to enter the premises with the assistance of a locksmith, provided that after that inspection is completed by the representative of the Strata Corporation that he or she secures the premises and provides the owners and/or owner of the premises entered with the new key to those premises or premise; and

- (d) that if the Defendants or either of them impedes or attempts to impede the representative of the Strata Corporation from entering 1380 – 8888 Odlin Crescent and/or 1010 – 8888 Odlin Crescent as permitted by this order, any peace officer and member of the Royal Canadian Mounted Police is authorized to arrest and remove that Defendant or Defendants.

(V) COSTS

[93] As the successful party, pursuant to R. 57(9), the Strata Corporation is entitled to be awarded costs. Under R. 19(24), the Court may order costs to be paid as special costs.

[94] Given that the Defendants included in their pleadings claims that they knew had been dismissed in other proceedings and that the Defendants contravened previous Court orders by including in these pleadings claims that they had been directed not to bring, I will exercise my discretion and award these costs as special costs.

"SINCLAIR PROWSE J."

April 16, 2009 – *Revised Judgment*

Corrigendum to Reasons for Judgment dated April 7, 2009, issued, advising that:

[1] Paragraph 81 will now read:

As was just touched upon, some of the claims in the *Ernest & Twins* decision were dismissed. Those claims were dismissed because they were without legal foundation and therefore were bound to fail. With respect to these dismissed claims, the fact that there are now brought by Sze Hang Holding alone or jointly with Mr. Lam does not change the fact that they are not legally recognized claims. They do not raise an arguable issue.

(amendment underlined)

The Reasons for Judgment are amended accordingly. In all other aspects, the Reasons stand.