

Case Name:

Strata Plan VR1008 v. Oldaker

IN THE MATTER OF City of Vancouver,
P.I.D.: 006-331-556 Strata Lot 22 District Lot 185
Strata Plan VR. 1008 (the "Property")

Between

The Owners, Strata Plan VR1008, petitioner, and
Richard Bedford Oldaker, Bank of Montreal,
respondents

[2004] B.C.J. No. 74

2004 BCSC 63

New Westminster Registry No. S78059

**British Columbia Supreme Court
New Westminster, British Columbia
Crawford J.**

Heard: October 20, 2003.

Judgment: January 19, 2004.

(38 paras.)

Counsel:

G.S. Hamilton, for the petitioner.

D. Creighton, for the respondent, Richard Bedford Oldaker.

CRAWFORD J.:—

INTRODUCTION

¶ 1 The petitioners, the owners of condominiums located at 1819 Pendrell Place, Vancouver, have filed a lien on Mr. Oldaker's unit and seek to enforce that lien under s. 117 of the Strata Property Act, S.B.C 1998 c. 43. In essence this section provides that after the Strata Corporation has registered a lien against the strata lot, the Strata Corporation may apply to the Supreme Court for an order for sale of the strata lot. The section further provides for a trial of the issue for an amount that the Court finds owing, and if Judgment is entered against the owner, make an order for the sale of the strata lot after considering all the circumstances.

¶ 2 The section states that an Order for the sale of the strata lot must provide that if the amount owing is not paid within the time period required by the Order, the Strata Corporation may sell the strata lot at a price and on terms approved by the Court.

BACKGROUND

¶ 3 While there is a lengthy history to the matter, it may be summarized as follows: Mr. Oldaker became concerned at water entry into the building. His initial attempts to alert the Strata Council were dismissed, but it is apparent that the engineering firm he went to has now provided advice which is leading to repairs of the building envelope, and that for a while (in other proceedings instituted by Mr. Oldaker) an administrator was put in control of the condominium. Mr. Oldaker, as a result of what he perceives as negligence on the part of some of the other

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unit owners and others, has brought separate proceedings alleging negligence and seeking compensation for loss of rental revenues of his unit.

¶ 4 The strata lot initially filed a lien on Mr. Oldaker's condominium on December 18, 2002. The petition alleged a debt owing to the petitioner as of January 1, 2003, in the amount of \$11,661.63.

¶ 5 An Affidavit of Accounting of charges and levies made against Mr. Oldaker, and payments made by Mr. Oldaker, now results in a claim by the Owners of \$20,674.39, which shows inter alia that Mr. Oldaker paid \$20,682.21 to the Strata Corporation on May 27, 2003.

¶ 6 During the course of this proceeding Mr. Oldaker's wife has died and he has a daughter with multiple sclerosis. He is aged 76 and says that although he appears to have material assets, his income is now reduced to \$1,000 per month. I further note that this matter came before Madam Justice Stromberg-Stein on September 10, 2003, and was adjourned, the Court ordering exchange of materials by October 6, and that Mr. Oldaker pay into Court the amount then owing (\$20,674.39) by October 11, 2003, and that Mr. Oldaker pay the costs of the day of \$500 by October 11, 2003. Mr. Oldaker has responded by saying that he is not able to obtain those monies.

¶ 7 Further he says that he has a sale, not at market price but at a lesser price, but the buyer is prepared to accept the unit "as is" and the difficulty is obtaining a completion date of repairs so that the sale can be finalized. Mr. Oldaker can then pay his various assessments (presumably under protest as he has a separate lawsuit against the Strata Corporation and others for lost rentals) and he will then be out of the building and these proceedings can come to an end.

¶ 8 I was also referred to Reasons for Judgment given by Madam Justice Dorgan in related proceedings brought by Mr. Oldaker that had led to the appointment of the administrator. I do not propose to repeat those Reasons, save that Mr. Oldaker's various claims were all dismissed, save for the extension of the powers of the administrator to the end of January 2003.

ANALYSIS

1. Process

¶ 9 The issue to be resolved in this case is whether the petitioners are required to get a 3/4 vote approval pursuant to s. 171(2) in order to bring a Petition based on s. 117 of the Act. I answer this question in the negative for the following reasons.

¶ 10 The principal argument raised by Mr. Oldaker can be put as follows. Section 171 of the Strata Property Act provides that the Strata Corporation may sue as a representative of all owners, except any who are being sued, about any matter affecting the Strata Corporation, including "(d) money owing" under this Act, the regulations, the by-laws or the rules. Section 171(2) provides: "Before the strata corporation sues under this section, the suit must be authorized by resolution passed by a 3/4 vote at an annual or special general meeting."

¶ 11 The proceedings brought by the Strata Corporation to force the sale of Mr. Oldaker's strata lot is based on s. 117. That simply provides that after the Strata Corporation has registered a Certificate of Lien against the strata lot, the Strata Corporation may apply to the Supreme Court for an Order for the sale of the strata lot.

¶ 12 "Suit" is defined in s. 2 of the Act as meaning any kind of court proceeding. These proceedings have been brought by Petition.

¶ 13 Romilly, J. in Strata Plan LMS2643 v. Kwan et al, 2003 BCSC 293, considered a similar argument where an application was made pursuant to s. 174 of the Strata Property Act, S.B.C. 1998 c. 43 for the appointment of an administrator to exercise the powers and duties of the Strata Corporation.

¶ 14 He found from a plain reading of s. 171 that it was a distinct section of the Act relating to the ability of the Strata Corporation to bring a lawsuit against another property and did not apply to an application for the appointment of an administrator under s. 174: See para. 26.

¶ 15 Section 117 is in Part 6 - "Finances" in the Strata Property Act. Finances is subdivided into 6 subheadings: Division 1 deals with operating fund and contingency reserve fund; Division 2 deals with contribution to expenses; Division 3 deals with budgets; Division 4 deals with special levies and user fees; Division 5 deals with the borrowing powers of the Strata Corporation; and Division 6 deals with money owing to the Strata Corporation.

¶ 16 Section 112(1) states:

- (1) before suing ... to collect money from an owner or tenant, the Strata Corporation must give the owner or tenant at least two weeks written notice demanding payment and indicating that action may be taken if payment is not made within that two week period.
- (2) Before the Strata Corporation registers a lien against an owner's strata lot under s. 116, the Strata Corporation must give the owner at least two weeks written notice demanding payment and indicating a lien may be registered if payment is not made within that two week period.

¶ 17 Thus the legislation provides two methods for a Strata Corporation to deal with a recalcitrant owner in terms of collecting monies, namely a debt action or the lien procedure. Section 113 provides for a notice to a mortgagee. Section 114 allows the unit owner to pay a disputed amount (a) into court in court proceedings, or (b) into trust.

¶ 18 Section 116 provides the Strata Corporation may register a lien against an owner's strata lot by registering in the Land Titles Office a Certificate of Lien in the prescribed form if the owner fails to pay the Strata Corporation any of the following with respect to the strata lot: (a) Strata fees; and (b) A special levy. Sub-section (4) provides that on registration the Certificate creates a lien against the owner's strata lot in favour of the Strata Corporation for the amount owing.

¶ 19 Then follows s. 117 which allows the Strata Corporation to apply to the Supreme Court for an Order for sale of the strata lot.

¶ 20 The question then becomes whether the lien/sale procedure is (as in the application for an administrator) a separate procedure and not caught by the provisions of s. 171, or is it a proceeding that must have the consent of 3/4 of the property owners?

¶ 21 A further consideration of s. 170 through 173 shows some distinctions. These sections are located in Part 10 - "Legal Proceedings and Arbitration", and further subdivided into "Division 2 - Suits by the Strata Corporation".

¶ 22 Sections 170, 171 and 172 use the verb "sue". Section 173, under the heading "Other court remedies" says: "On application by the Strata Corporation, the Supreme Court may do one of the following..." and provides various forms of mandatory relief.

¶ 23 In turning back to look at s. 117 it must be noted that the wording used there is that the Strata Corporation "may" apply to the Supreme Court for an Order for sale of the strata lot.

¶ 24 In the Supreme Court Rules, Rule 10 deals with originating application. Rule 10(1) says: "an application ... may be made by originating application where (a) an application is authorized to be made to the Court".

¶ 25 More often than not, an originating application is brought by Petition in Form 3: Rule 10(3).

¶ 26 In *The Owners, Strata Plan LMS 888 v. The City of Coquitlam et al*: 2003 BCSC 941, Cohen J. held that a representative claim in negligence had to be made pursuant to ss. 171 and 172: See para. 25.

¶ 27 But, here, in my view, in Part 6 of the Act there is provision for a separate summary process primarily for the collection of strata fees, special levies, cost of works or an owner's share of the Judgment against the Corporation (where the fees and levies have been voted on, the cost of works is ordered and the judgement litigated). In my opinion there is no need for the 3/4 vote of the unit owners to authorize suit under s. 171.

2. The Lien Amount

¶ 28 A further argument was made insofar as Mr. Oldaker paid over \$20,000 owing in order to vote at the annual meeting in May 2003, that the monies owing at the present time are not the monies that were owing and certified in the Certificate of Lien originally filed in December 2002.

¶ 29 Having done that, Mr. Oldaker argues that he should have seen the Strata Corporation, within one week of his payment, remove the Lien by registering in the Land Titles office an Acknowledgement of Payment in prescribed form: See s. 116(6).

¶ 30 The Strata Corporation's response is that there has been a trial of the issue under s. 117(3) and while the original Certificate amount may not be owing, in light of the evidence before it, the Court can now enter a Judgment against the owner for the amount found owing and then make an Order for sale of the strata lot after considering all of the circumstances.

¶ 31 The amount of monies set out in the Lien Certificate on December 2002 was \$11,153.51.

¶ 32 As of January 1, 2003, and at the time of issuing the Petition, the amount owing was said to be \$11,661.63.

¶ 33 There are a variety of special assessments, interest and other assessments which by the time Mr. Oldaker's payment of \$20,682.21 was made on May 27, 2003, (in order to vote at the annual meeting) left a balance of \$36,736.97. A large portion of that appears to be a special levy made on April 1, 2003, as a special assessment charging his title with \$38,283.48, presumably for the building envelope repair costs.

¶ 34 It was submitted that the Lien is in reality a floating charge and reference is made to *Royal Bank v. Holden*, [1996] B.C.J. No. 2360 (S.C. [In Chambers]), a decision of Bauman, J. and a decision of, Master Joyce (as he then was) in *Strata Plan LMS93 v. Neronovich*, [1997] B.C.J. No. 606 S.C. [In Chambers]). The submission of the Strata Corporation is that Mr. Oldaker's payment did not entitle him to the release of the lien.

¶ 35 While I accept that argument, on consideration of *Neronovich*, I am not satisfied that the matter of the amount that is owing under the lien has been properly tried or assessed.

CONCLUSION

¶ 36 At the end of the Hearing on October 20, 2003, I indicated that in view of Mr. Oldaker's intention to sell the property, and counsel's advice that the repairs contemplated by the Strata Corporation should be completed in January 2004, my inclination was to allow Mr. Oldaker to perfect his sale, as that at least would eliminate one of his primary on-going concerns. That would leave outstanding:

- (a) the amount of the lien, and

(b) he would be left to his recourse in his separate action for damages for lost rental.

¶ 37 In sum, I find:

- (1) The originating application by way of Petition does not need the 3/4 vote;
- (2) That I am not satisfied on the evidence that I am able to give Judgment for the amount of the lien;
- (3) That if the parties cannot agree on the amount outstanding by Mr. Oldaker to the Strata Corporation, they may bring the matter back before me, although recourse may be a reference to the Master or the Registrar for an accounting to settle the amount.

¶ 38 Once the amount is settled, and if Mr. Oldaker has not been able to complete his sale, the matter may then be brought back before the Court for an Order for sale of the strata lot on the terms provided for in s. 117 of the Strata Property Act.

CRAWFORD J.

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Court: 2004 British Columbia Supreme Court

Reported at:
[2004] B.C.J. No. 74