IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan BCS3642 v. Unimet Levo Development Limited Partnership,* 2015 BCSC 1921

Date: 20151021
Docket: S137496
Registry: Vancouver

Between:

The Owners, Strata Plan BCS3642

Plaintiff

And

Unimet Levo Development Limited Partnership and Unimet Investments Ltd.

Defendants

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:	S.M. Smith
Counsel for the Defendants:	S.D. Coblin
Place and Date of Trial/Hearing:	Vancouver, B.C. July 7, 2015
Place and Date of Judgment:	Vancouver, B.C. October 21, 2015

[1] These are cross applications brought by the parties whereby the plaintiff seeks summary judgement against the defendants rescinding the sale of the caretaker's suite (the "Suite") on the basis the sale was not properly authorized under the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] and for an order the defendants repay the plaintiff monies it spent in relation to the purchase of the Suite. In the alternative, the plaintiff claims damages for breach of fiduciary duty in setting the price paid for the Suite.

[2] The defendants seek dismissal of the plaintiff's claims.

[3] The parties agree although a determination of the issues involves findings of credibility, the matters to be resolved are suitable for determination by summary trial: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at paras. 22-31. There has been extensive cross-examination on the affidavits, particularly those filed by the defendants.

Issues

[4] The issues between the parties are:

1. Did the defendants pass a resolution on November 10, 2009 authorizing conveyance of the suite to the strata corporation?

2. Was the resolution reduced to writing and did it otherwise comply with the *SPA*?

3. Did Unimet Investments Ltd. breach its fiduciary duty to the plaintiff in setting the sale price at $339,000?

Background

[5] The plaintiff, The Owners, Strata Plan BCS3642 (the "Strata Corporation"), comprises the residential potion of a residential/commercial high-rise building known as the "Levo" located in Coquitlam, British Columbia.

[6] The defendant Unimet Levo Development Limited Partnership ("Unimet LP") is the developer of the building. The defendant Unimet Investments Ltd. ("Investments") was the registered owner of the land on which the Levo was developed. It held the land as a bare trustee for Unimet LP.

[7] While acting in its capacity as the strata council of the development, Investments caused the plaintiff to enter into an agreement of purchase and sale with Unimet LP to purchase the Suite and to finance the purchase with a first mortgage with North Shore Credit Union and a second mortgage with Investments.

[8] The units in Levo were offered to the public on a "pre-sale" basis.

[9] The transaction concerning the Suite was disclosed to prospective purchasers, as required by the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41.

[10] The pertinent portion of the disclosure statement filed with the Superintendent of Real Estate on October 23, 2006 read:

> There will be a caretaker's suite in the Development which will be owned by the Strata Corporation. The Developer intends to grant a mortgage in favour [of] a third party lender with respect to the caretaker suite, and the costs of such mortgage shall be payable by members of the Strata Corporation and collected by way of monthly strata fees.

[11] On or about November 7, 2006 the Suite was removed from the pre-sale inventory of units to be sold and set aside as a caretaker's suite.

[12] The pre-sale price list at the time it was removed from the inventory showed the Suite as being "sold" and as having a list price of $372,800.

[13] On November 10, 2009 the strata plan was deposited in the Land Title Office and the Strata Corporation was established.

[14] What happened next is in contention. The defendants say that on November 10, 2009, following the deposit of the strata plan in the Land Title Office they held a meeting as owner developer acting as the strata council and passed a resolution

authorizing the sale of the Suite to the Strata Corporation for $339,000, authorizing the Strata Corporation to secure the necessary mortgage financing for the purchase and authorizing Mr. Nicola Marini of MacDonald Commercial Real Estate Services Ltd. ("MacDonald"), as strata manager and agent to sign the documents relating to the purchase (the "November Resolution").

[15] The defendants say while the resolution was in writing, was passed and signed at that time notwithstanding their best efforts they have been unable to locate a copy.

[16] The plaintiff says no such resolution was ever signed and if it was, it was not passed until much later, on March 11, 2010 (the "March Resolution"), and was not passed by a 75% majority of unit holders as required by the *SPA*.

[17] I turn to the evidence relating to this issue.

[18] Mr. Reck, Vice-president of Operations of Investments; Mr. Sung, President of Investments; and Mr. Tombs, the President of Pinetree Projects (a General Partner in the development), each deposed that Investments passed the November Resolution at a meeting at which the three of them were present on November 10, 2009, the day the strata plan was deposited in the Land Title Office. Mr. Reck and Mr. Sung deposed they recalled signing the November Resolution.

[19] Mr. Tombs testified in cross-examination of his affidavit that he came to the November 10 meeting with the resolution already prepared. He said he signed it at the meeting and sent the resolution via letter to Mr. Marini on November 16, 2009. He said he advised Mr. Marini of the November 10, 2009 resolution. The letter read in part:

> We wish to advise that, pursuant to section 8 of the Strata Property Act, a meeting of the Owners, Strata Plan BCS3642 was held in our office on November 10 2009 at which a resolution was passed approving the Strata's intended purchase of strata lot 3 for the purpose of providing accommodation for resident caretaker of the Levo building. As you are already aware, the proposed purchase of the caretaker suite was previously disclosed in section 3.10 of the Levo Disclosure Statement dated October 23 2006.

> The approved resolution directed the Strata Corporation to enter into a purchase and sale contract with Unimet Levo Development Limited Partnership to purchase caretaker suite for a purchase price of $339,000 and also directed the Strata Corporation to borrow funds and grant mortgages as will be necessary to complete this purchase.
>
> The resolution also authorized you and Macdonald Commercial Real Estate Services Ltd. as strata managers and agents of the Strata Corporation to execute, on behalf of the Strata Corporation, the contract of purchase and sale and all documents that will be required for obtaining financing and granting mortgages necessary for the purchase.
>
> [Emphasis added.]

[20] The letter noted that a copy of the resolution would be sent to a Ms. Gfeller.

[21] Mr. Marini confirmed he received Mr. Tombs' letter. In his cross-examination, Mr. Marini said he was aware of the November Resolution as it was referred to in the letter but was not sure if it was attached to the letter as he could not locate a copy of the resolution in MacDonald's records.

[22] On November 27, 2009, the first conveyance of a strata lot in the Levo was completed. This is a critical date because, pursuant to s. 11 of the *SPA*, after this event all resolutions must be passed by a unanimous vote at a special general meeting.

[23] On February 4, 2010, the purchase agreement as authorized by the November Resolution was signed by Mr. Marini acting on behalf of Macdonald as agent for the Strata Corporation. Mr. Marini deposed the signing of the purchase agreement was delayed because of difficulty in securing mortgage financing.

[24] Mr. Marini retained a notary public to represent the Strata Corporation in the transaction to purchase the Suite. Mr. Marini attended the notary's office "in or about early March, 2010and executed the closing documents.

[25] He signed a number of resolutions including:

> (a) a ¾ Resolution of The Owners, Strata Plan BCS3642 indicating that on March 11, 2010 the owners passed by a ¾ vote directing the Strata Corporation to purchase the caretaker's suite, borrow funds to finance the purchase, grant a first mortgage to North Shore Credit

Union, and authorizing Nicola Marini to act on behalf of the Strata Corporation and

(b) a Resolution of Directors to the effect that the Strata Corporation had authority to purchase the caretaker's suite.

[26] When cross-examined on his affidavit, Mr. Marini testified he signed the documents the notary asked him to sign because he assumed they had been properly prepared and was required for filing at the Land Title Office and that the documents were "all in order". He deposed his intention in signing the resolutions "was in no way meant to indicate that the (November) Resolution had not previously been passed or that there were any other issues with respect of my authorization to do what I was doing".

Events Subsequent to Conveyance of the Suite

[27] In 2011 Macdonald ceased acting as agent for the strata council. The strata council requested and received its records from MacDonald. The November resolution could not be found in the records.

[28] Upon reviewing the records the council's then members became concerned the conveyance of the Suite may not have been properly done. The council retained legal counsel who pursued tracking down the conveyance documents, and in particular but without success, the November Resolution.

[29] The strata council sought resolutions at its AGMs in 2012 and 2013 seeking a 3/4 approval for the purchase of the Suite and was not successful.

[30] In March 2013, the mortgage in favour of Investments came due. The strata council decided to continue payments under the mortgage to avoid potential foreclosure.

[31] At a Special General Meeting in September 2013, the members voted to commence this litigation seeking to set aside the purchase of the Suite.

[32] The strata council says as of April 10, 2015 it has incurred expenses of $134,689 in relation to the Suite (property taxes, strata fees and mortgage interest) and that it has received total rental income during the same period of $35,830.

Did the defendants pass a resolution on November 10, 2009 authorizing conveyance of the suite to the Strata Corporation?

[33] Section 78(1) of the *SPA* provides:

> **78** (1) Before the strata corporation acquires land, the acquisition must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting.

[34] Section 8 of the *SPA* provides that prior to the conveyance of the first strata lot, the owner developer may pass a resolution without holding a special general meeting.

[35] The plaintiff says that if the only resolution signed was the March Resolution signed by Mr. Marini, that resolution and the resulting transfer of the Suite are not valid as the conveyance had not been approved by all owners pursuant to s. 11 of the *SPA.*

[36] I conclude the defendants, when they were in control of the Strata Corporation following registration of the strata plan, were required to record their decisions in writing under s. 44 of the *SPA.* The owner developer stands in a fiduciary capacity for the ultimate owners of the strata lots and "must exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances" (*SPA*, s. 6(b)). In my view, it necessarily follows that a record of such a significant event as the sale of the Suite must be formally recorded as a resolution by the owner developer acting as the strata council and must pass that resolution on to the council representing the strata owners when constituted: *The Owners, Strata Plan NW 1942 v. The Owners, Strata Plan NW 2050*, 2008 BCSC 258 at paras. 52-55; see also ss. 5 and 6 of the *SPA*.

[37] The plaintiff says the evidence of a resolution being passed and reduced to writing at the November 10 meeting is not credible for a number of reasons.

[38] The plaintiff says neither Mr. Reck nor Mr. Sung deposed they saw Mr. Tombs sign the resolution at the meeting and that the defendants', Macdonald's and the strata council's records contain no reference to the November Resolution.

[39] Unimet LP has not been able to produce or reproduce a copy of the letter sending the November Resolution to MacDonald, notwithstanding several requests made before and during the course of the litigation. The plaintiff notes that other letters relating to strata documentation from the defendants to MacDonald have been produced.

[40] Mr. Tombs cannot reproduce a copy of the resolution or the letter from his computer.

[41] The plaintiff says Mr. Marini would not have signed the March Resolution if the November Resolution had been reduced to writing.

[42] The plaintiff also says the November Resolution was not mentioned by defendants' counsel in correspondence passing between the two during the initial portion of this litigation. In addition, the plaintiff has searched its records and the records of its strata manager at the time and can find no copy of or reference to the November Resolution.

[43] The defendants rely on Mr. Tombs' evidence that he prepared the resolution before attending the November 10 meeting. Mr. Tombs says the meeting followed the registration of the strata plan (which occurred at 3:04 p.m. that afternoon). The defendants say the evidence of both Mr. Sung and Mr. Reck supports that of Mr. Tombs. They both say they attended the meeting on the afternoon of November 10, 2009 and signed the resolution. They would only have signed a written document.

[44] The defendants also rely on the letter Mr. Tombs wrote to Mr. Marini on or about November 16, 2009 confirming the contents of the resolution passed at the November 10 meeting. Mr. Marini deposed he received the letter and on or about November 16, 2009 describing in full the November 10, 2009 resolution. In addition,

the defendants rely on Mr. Marini's specific denial in cross-examination he signed the March Resolution because he was unaware of the November Resolution.

Was the resolution reduced to writing and did it otherwise comply with the *SPA*?

[45] The evidence of Messrs. Reck, Tombs and Sung is that the November Resolution was in writing and was passed. Mr. Tombs recalls bringing the resolution to the meeting. Mr. Sung and Mr. Reck recall signing the November Resolution.

[46] Mr. Marini recalls receiving the November 16 letter which refers to the November Resolution.

[47] While the court must be cautious when assessing the credibility of persons who have a direct interest in the outcome of an issue as do Mr. Tombs, Mr. Reck and Mr. Sung in the issues in this case, their evidence is consistent and is supported by the evidence of Mr. Marini and by the letter of November 16, 2010. The evidence of the defendants' witnesses was unshaken in cross-examination on their affidavits.

[48] The fact Mr. Marini also signed the March Resolution does not detract from the fact the November Resolution was signed. I accept Mr. Marini thought he was simply signing documents the notary considered necessary at the time. As stated, Mr. Marini said he knew of the November Resolution at the time he signed the March Resolution.

[49] I also find support for my conclusion in the sequencing of events in and about the time the November Resolution was passed. The disclosure statement had been filed disclosing the Suite was to be removed from the pre-sale list. The Suite was removed from the pre-sale list on or about November 7, 2006 and the defendants determined a price at that time. The strata plan had been filed earlier on the day of the November Resolution.

[50] While the plaintiff argues the November Resolution was "manufactured" by the defendants to try to patch up a defect in the sale process, I find it is of some significance the above steps had been taken.

[51] In order to succeed the onus remains on the plaintiff to establish it is more likely than not that the November Resolution was not passed and that it was not reduced to writing.

[52] I conclude on the facts before me the plaintiff has not met that onus. I find the November Resolution was reduced to writing, passed and signed by Messrs. Reck, Tombs and Sung and that it has since been inadvertently lost. I accept the defendants' evidence that it was passed on November 10, 2009 and because this is prior to the first conveyance it was validly passed pursuant to s. 8 of the *SPA*. While the defendant's had an obligation to pass a copy of the November resolution on to the strata council, in the circumstances of this case, where the document was lost, they cannot be held to an obligation they were unable to perform.

Did Unimet Investments Ltd. breach its fiduciary duty to the plaintiff in setting the sale price at $339,000?

[53] Section 6(1) of the *SPA* provides:

> **6** (1) In exercising the powers and performing the duties of a council, the owner developer must
>
> > (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
> >
> > (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[54] In *Dockside Brewing Co. Ltd v. Strata Plan LMS 3837,* 2007 BCCA 183, the Court of Appeal of this province discussed the duty on strata council members imposed by s. 6(1) of the *SPA* at para. 53 (referring to the Supreme Court of Canada decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68):

> [53] The Supreme Court described (at para. 35), the statutory fiduciary duty, "to act honestly and in good faith with a view to the best interests of the corporation":
>
> > The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-á-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they

> acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly, and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999) at p. 715.
>
> [Underlining in original.]

[55] In my view the plaintiff has not established the defendants acted in a manner other than in good faith and honestly. As they were required to, the defendants disclosed they intended to set the Suite aside from the sales pool for the purposes of a caretaker's suite. They then proceeded to do so and set a price of $339,000.

[56] The defendants say the price of the Suite was the market value set for the Suite when it was removed from the sales inventory. The price list for the strata lots set by the defendants in early October 2006 show the Suite listed for sale at $372,800.

[57] The plaintiff relies on an appraisal done on November 7, 2013 by Mr. Andre Garon of Penny and Keenleyside Appraisals which opines that as of February 4, 2010, the date the offer to purchase was signed, the market value of the Suite was $305,000.

[58] The defendants rely on an appraisal by Mr. McLaren of Grover, Elliott and Co. Ltd. dated October 3, 2014. Mr. McLaren's opinion of the value of the Suite was $340,000 on November 7, 2006 around the time the Suite was removed from the pre-sale list and set aside for transfer to the plaintiff as a caretaker's suite.

[59] I am satisfied both appraisals accurately reflect the market value of the Suite on the date referred to in the respective reports. I am satisfied Mr. McLaren's opinion accurately reflects the market value of the Suite as of November 7, 2006. His appraisal used a date at or about the time the Suite was taken off the pre-sale list and the comparables he used were based on the sale of three lots in the Strata which occurred on or about the same time period and which were on the same floor in the Levo as the Suite.

[60] The plaintiff argues the defendants had an obligation to independently determine the value of the Suite before setting the sale price and that the appropriate time for setting that price was at the time of the sale of the Suite to the Strata Corporation. The plaintiff claims $34,000 as the loss in market value. The difference between the appraisals is the date chosen by each party. It is also relevant that in or about 2009/2010 real estate prices declined markedly.

[61] I do not view the defendants' setting of the price of the Suite at the market value at the time it was taken off the pre-sale list as being a breach of their statutory duty to act honestly and in good faith. The defendants had committed in the disclosure statement a lot would be set aside and were required to set the Suite aside at the time they did because of the number of pre-sales in the development. The price could as easily have risen between the date the lot was removed and the actual date of its transfer.

[62] Based on the evidence of the value of the Suite at the time it was removed from the pre-sale list for transfer to the plaintiff and when it was removed from such list, I cannot conclude the defendants acted in a manner which abused their position of trust or that they acted in less than an honest and good faith manner. I conclude they have not breached their fiduciary duty to the plaintiff.

[63] Accordingly, I dismiss the plaintiff's application. I allow the defendants' application to dismiss the plaintiff's action.

[64] If the parties cannot agree on the issue of costs they have liberty to make submissions within 15 days of publication of this decision.

"Greyell J."