IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 1495 v. 0753874 B.C. Ltd.,* 2015 BCSC 2124

Date: 20151119
Docket: S151889
Registry: Vancouver

Between:

The Owners, Strata Plan LMS 1495

Plaintiff

And

0753874 B.C. Ltd.

Defendant

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:	G. Stephen Hamilton
Counsel for the Defendant:	David J. Letkemann
Place and Date of Trial/Hearing:	Vancouver, B.C. October 30, 2015
Place and Date of Judgment:	Vancouver, B.C. November 19, 2015

Introduction

[1] This action is brought by the plaintiff, The Owners, Strata Plan LMS 1495 (the "Strata"), against the defendant, 0753874 B.C. Ltd. ("075"), for the recovery of what the Strata alleges is 075's share of the expenses of operating, maintaining and repairing the common facilities of the subject phased strata development.

[2] By agreement of the parties, this application is brought by way of a special case pursuant to the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 9-3. The specific question to be answered is whether 075 is an "owner developer" within the meaning of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"), such that it is liable to contribute to such expenses.

Agreed Statement of Facts

[3] The Strata and 075 have agreed to the following facts for the purposes of this special case. There is also agreement about the relevant documents.

[4] The Strata is a strata corporation established pursuant to the *Act*. 075 is a British Columbia corporation.

[5] On June 23, 1994, Park Ridge Developments Ltd. ("Park Ridge"), became the registered owner of lands in Abbotsford, British Columbia, legally described as:

> PID: 018-799-175
> Lot 2 Section 21 Township 16 New Westminster District Plan
> LMP17182 ("Lot 2")

[6] On July 19, 1994, Park Ridge, as an "owner developer" under the *Act*, filed a Form E "Declaration of Intention to Create a Strata Plan by Phased Development" on Lot 2 (the "Declaration").

[7] The Declaration provided for the creation of 220 units, or strata lots, to be developed in four phases:

Phase I	Phase II	Phase III	Phase IV
67 units	28 units (including common facility)	63 units	62 units

(the "Strata Plan")

As indicated above, Phase IV consists of 62 of the 220 units and comprises approximately 28.18% of the proposed lots in the Strata Plan.

[8] The disclosure statement dated July 4, 1994 was prepared by Park Ridge as the “developer”, and was provided to purchasers of the strata lots in Phases I, II and III. It included the following reference under “General Description”:

> The Development will consist of 220 strata lots in four phases in four-story plus basement frame buildings. …
>
> The recreational facilities included in the Development are an exercise room, meeting/games room, lap pool, jacuzzi, change rooms and guest rooms, to be constructed in the second phase.

[9] When the Declaration was filed by Park Ridge, it stated that the estimated start date of construction of Phase IV was August 1996, and the estimated completion date of construction was August 1997. The Declaration also indicated that Park Ridge would elect whether or not it would proceed with Phase IV by August 1996. This Declaration was attached to the disclosure statement provided to purchasers.

[10] Over time, Park Ridge developed, sold, and transferred its interests in the strata lots in Phases I, II and III of the Strata Plan, which came to be known collectively as “Regency Park".

[11] The Declaration was amended by Park Ridge on two occasions, as allowed by s. 232 of the *Act*. Those amendments, which were filed in November 1995 and

August 1997, amended the estimated start date of construction of Phase IV to August 1997, and the completion date of Phase IV to May 1998. By those amendments, Park Ridge also indicated that it would elect whether or not to proceed with Phase IV by August 1997 (a one-year delay).

[12] By June 11, 1996, the construction of the common facilities for Regency Park was completed in compliance with the Declaration.

[13] Park Ridge did not proceed to develop Phase IV of the Strata Plan, and Phase IV remains as bare land.

[14] Park Ridge did not file a notice of the election not to proceed or a reference plan with the Land Title Office, as set out in s.79 of the *Condominium Act,* R.S.B.C. 1996, c. 64 (the predecessor legislation to the *Act*) or s. 235 of the *Act.*

[15] By February 2002, Park Ridge's remaining ownership interest in Lot 2 consisted of the undeveloped Phase IV of the Strata Plan, which notionally comprised 28.18% of the proposed strata lots in the Strata Plan. This remaining ownership interest was evidenced by the following legal description:

> PID: 018-799-175
> Lot 2 Except; Firstly: Phase One Strata Plan LMS 1495,
> Secondly: Phase Two Strata Plan LMS 1495,
> Thirdly: Phase Three Strata Plan LMS 1495,
> Section 21 Township 16 New Westminster District Plan
> LMP17182

("Phase IV of Lot 2")

[16] On February 25, 2002, Park Ridge transferred its title to Phase IV of Lot 2 to 622120 B.C. Ltd. ("622").

[17] On June 3, 2009, 622 transferred its title to Phase IV of Lot 2 to 075. 075 remains the registered owner of Phase IV of Lot 2.

[18] At all material times, the Declaration, as amended, was registered as a legal notation against Lot 2. It is presently recorded against 075's title in relation to Phase IV of Lot 2.

[19] The Strata's common facilities consist of an exercise room, meeting room, lap pool, jacuzzi, changing room and guest rooms. This fact is not particularly relevant as the parties are seeking a decision generally as to expenses attributable to the "common facilities". "Common facility" is defined in s. 217 of the *Act* as a "major facility in a phased strata plan … available for the use of the owners".

Issues

[20] The sole question for the Court is as follows:

> Is 075 an "owner developer" and as such liable to contribute to the Strata's common facility expenses in accordance with Part 13 of the *Act*?

[21] If the answer to above question is "No", the parties agree that the Strata's claim should be dismissed with costs, which will include the costs of this special case.

[22] If the answer to above question is "Yes", the parties agree that the facts and defences pleaded in paragraph 16 of the Response to Civil Claim have been adjudicated as against 075, and the parties are at liberty to continue this action to resolve the remaining issues. In that event, the parties also agree that the Strata should have its costs of this special case as against 075.

Discussion

General Framework

[23] The parties agree that there are two types of people who are liable under the *Act* to contribute to expenses relating to the common facilities.

[24] Firstly, s. 99(1) of the *Act* provides that "owners" must contribute their share of the total contributions budgeted for the operating and contingency reserve funds

to the strata corporation. Section 99(2) provides a formula to calculate this obligation that essentially allocates the proportionate share of the expenses based on the unit entitlement of a strata lot. Section 1(1) defines an "owner" in various ways, although the most common situation is where a person is shown as the registered owner of a strata lot title at the Land Title Office.

[25] The parties agree that 075 is not an "owner" within the meaning of s. 99(1) of the *Act*.

[26] Part 13 of the *Act* is entitled "Phased Strata Plans" and includes provisions from ss. 217 to 238. "Phased strata plan" is defined in s. 1(1) as meaning "a strata plan that is deposited in successive phases under Part 13".

[27] The second provision that imposes an obligation to contribute to common expenses is found in Part 13 of the *Act.* Whether 075 is caught by this provision is the critical question in this special case.

[28] Section 227(1) of the *Act* provides that an "owner developer" must also contribute to the expenses relating to common facilities. Section 227(2) sets out a formula by which that share is calculated. Section 227 provides:

> **Owner developer's contribution to expenses**
>
> 227 (1) Subject to sections 233 (2) and 235 (3), until all phases of a phased strata plan have been deposited, the owner developer must contribute to the expenses of the strata corporation that are attributable to the common facilities.
>
> (2) Subject to the regulations, the owner developer's share of the expenses under subsection (1) is calculated as follows:
>
> $$\frac{\text{unit entitlement of strata lots in phases not deposited}}{\text{unit entitlement of strata lots in all phases whether deposited or not}} \times \text{expenses attributable to the common facilities}$$
>
> (3) For the purposes of subsection (2), the unit entitlement of strata lots in the phases not deposited is as set out in the Phased Strata Plan Declaration.

[29] Section 1(1) of the *Act* defines an "owner developer". It provides:

> In this Act:
>
> **"owner developer"** means
>
> (a) a person
>
> (i) who, on the date that application is made to the registrar for deposit of the strata plan, is registered in the land title office as
>
> (A) the owner of the freehold estate in the land shown on the strata plan, or
>
> …, or
>
> (ii) who acquires all the strata lots in a strata plan from the person referred to in subparagraph (i), and
>
> (b) a person who acquires all of the interest of a person who is an owner developer under paragraph (a) in more than 50% of the strata lots in a strata plan;

[30] Who then is an "owner developer" within the meaning of s. 227 of the *Act* and, in particular, in light of this phased strata development?

[31] The usual sharing regime between owners and the developer in phased developments that are not yet complete was described by Mr. Justice Harris, as he then was, in *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2010 BCSC 1811; aff'd 2011 BCCA 421. He stated that s. 227:

> [2] ….applies to so-called "phased developments". It provides for the sharing of expenses attributable to "common facilities" between a strata corporation and the owner developer during the build out phase of the development. Thus, at any given time, expenses are allocated as if the development were completed. Each owner of an existing strata lot pays a proportional share of the expenses and the owner developer pays the balance as a proxy for the strata lots that have not yet come into existence.

[32] It is agreed that, for the purposes of the definition in s. 1(1)(a)(i)(A) above, on the date of the application for deposit of the strata plan, Park Ridge, not 075, was the registered owner of the freehold estate in the Land Title Office and is an "owner developer" on that basis. Therefore, in the ordinary course, Park Ridge would be liable to pay its proportionate share of the expenses attributable to the strata lots not yet created in Phase IV in accordance with s. 227.

[33] The remaining portions of the definition of "owner developer" above - (a)(ii) and (b) - refer to situations where a person acquires interests from the original owner

developer (Park Ridge), or any transferee of all of the strata lots of the original owner developer. 075 argues that it does not also come within either of these definitions:

a) definition (a)(ii): 075 did not acquire "all the strata lots in a strata plan" from Park Ridge; and

b) definition (b): 075 only acquired the undeveloped Phase IV of the Strata Plan, or 28.18% of the undeveloped strata lots, from 622, who had acquired that same interest from Park Ridge. Therefore, 075 did not acquire "all of the interest" of Park Ridge or even 622 "in more than 50% of the strata lots in a strata plan". 075 describes this provision as the operative "threshold" established under the *Act* by which another person may become an "owner developer".

[34] The Strata agrees that, on a strict reading of the definition of "owner developer", 075 does not come within either aspect of the definition found in (a)(ii) or (b). It does, however, advance a broader interpretation of "owner developer" that applies here, as I will discuss in more detail below.

Statutory Interpretation

[35] The modern approach to statutory interpretation in Canada has been stated by the Supreme Court of Canada time and time again: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, at para. 26; *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54, at para. 10; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, at para. 27.

[36] In *Timberline*, the Court of Appeal applied this modern approach in their interpretation of the *Act* and ss. 217 and 227. In particular, the Court noted that both of these sections are found in Part 13 of the *Act*, which specifically deals with phased strata plans:

> [12] The accepted principle for purposes of interpreting a statutory provision is contained in this much-endorsed passage from E.A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [13] The words of a section to be interpreted must first, therefore, be understood in the context of the *Act* as a whole. In addition, in this case, attention must be paid to the fact that both ss. 217 and 227 are contained in Part 13 of the *Strata Property Act*, which deals specifically with phased strata plans.
>
> [14] As well, the words of an Act are to be read or understood "in their grammatical and ordinary sense". That is, words must be given their plain meaning, considered in the context of the legislation as a whole.
>
> [15] Finally, the plain meaning of the words, as read in their statutory context, must not conflict with the overall design and purpose of the legislation, nor with the intention of Parliament or the Legislature as it appears from the language of the Act.
>
> [16] In general terms, the purpose of the *Strata Property Act* is to lay down clear rules for the creation, registration and transfer of strata titles, and for the delineation of the respective rights and responsibilities of those who develop strata plans, and those who purchase or who may subsequently wish to transfer a strata property.
>
> [17] Part 13 of the *Act* contains provisions specifically tailored to strata properties that are developed in stages, or "phases". For present purposes, Part 13 allocates responsibility for expenses attributable to "common facilities" as between owners of strata lots in a phased development that is only partially completed at the time they become owners, and the owner developer of the phased development, as collectively representing all strata lots in the completed development.

[37] Both parties rely on the interpretive principles arising from *Timberline*. The Strata also relies on the *Interpretation Act,* R.S.B.C. 1996, c. 238, s. 8, which provides for a "remedial" construction of the *Act*:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[38] In *Timberline*, Harris J. noted that there could be two competing purposes to ss. 217 and 227, being certainty and fairness:

> [21] I agree that the rationale for the enactment of s. 227 and s. 217 of the *Act* is to achieve a scheme allocating expenses for certain kinds of facilities between owners who purchase strata lots early in the development of a project and the owner developer who is in effect a proxy for persons who will become owners in the future, sometime after the common facilities have been

> built. An obvious example would be where a large swimming pool is built that is intended to benefit all of the eventual owners of the strata corporation, but the pool is built when only 10% of the strata lots have been completed. In those circumstances, it is fair to allocate the burden of the expenses between the 10% of the existing owners and the owner developer standing in effect as a proxy for the 90% of the strata lots yet to be created.
>
> [22] While it is appropriate that the rationale underlying the sections be taken into account in their interpretation, it is not appropriate to do so at the expense of the plain language of the sections. I agree with the submission of the plaintiff that fairness in allocating the burden may not be the only purpose underlying the enactment. As counsel submitted, another purpose is ensuring certainty, even if that comes at the price of rough justice. The circumstances to which the section could apply are complex and varied. It may not be possible to craft a legislative rule that is responsive to all of the potential nuances that can arise in a phased development. In such circumstances, effect must be given to the plain wording of the section. Its application cannot be distorted in an effort to respond equitably to complex nuanced situations. That is what the defendant is asking me to do here.

[39] Despite upholding this court's decision in *Timberline*, the Court of Appeal cast considerable doubt upon whether fairness is a true purpose of the *Act* that might otherwise override the goal of certainty: paras. 23-29.

Which Approach - Strict or Remedial?

[40] The crux of the issue is, therefore, to decide if a *transferee* of the undeveloped phases of a strata development "inherits" the obligations of the original owner developer (here, Park Ridge), to contribute to the common facility expenses pending final build-out of the development. Fundamentally, the competing approaches urged upon me depend on whether the issue is strictly determined by the definition of "owner developer" in s. 1(1) of the *Act* (per 075), or whether a broader interpretation is appropriate, particularly when considering Part 13 of the *Act* (per the Strata).

[41] 075 argues that it is not included under the plain language and wording of the definition of "owner developer" in s. 1(1). Further, 075 states that if the Legislature had intended to impose these obligations on a person who later acquires an interest in less than 50% of the strata lots from the original owner developer (or in this case even further removed, being not from the original owner developer, but from a person who itself acquired that interest from the original owner developer), it would

not have created the very clear and specific definition in s. 1(1) which applies, by its terms, "in this Act".

[42] 075 contends that the application of this express definition achieves certainty in terms of allocating obligations for the payment of these common expenses.

[43] However, the primacy of the definition of "owner developer" found in s. 1(1) is less clear when one considers other provisions in the *Act*, specifically Part 13. The Strata places considerable reliance on s. 220, which is found in Part 13:

> If an owner developer transfers the owner developer's interest in land described in a Phased Strata Plan Declaration, the owner developer's rights and responsibilities under the declaration and this Act transfer to the new owner developer.

[44] In addition, s. 218(2) of the *Act* provides that any conflict in the provisions is resolved in favour of the application of the provisions in Part 13, including s. 220:

> 218(2) If there is a conflict between a provision of this Part and a provision of another Part, the provision of this Part prevails.

[45] There has been no judicial consideration of the meaning of s. 220 or how it might be interpreted in light of the definition of "owner developer" in s. 1(1).

[46] The Strata takes the position that s. 220 directly applies in these circumstances to impose the obligations of the original owner developer (Park Ridge), for the payment of these expenses on any transferee of the undeveloped phases, including 622 and 075.

[47] The Strata's approach is grounded in the notion that one of the objectives of the *Act* is consumer protection: *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc.*, 2007 BCSC 774, at para. 27. As noted by Madam Justice Gerow in that case, that objective is addressed by the disclosure requirements found in the legislation.

[48] Part of the required disclosure includes the declaration for any phased strata plan: *Act*, ss. 221-222. It is an important piece of information that consumers will rely

on in deciding whether to purchase a strata lot. Here, the Declaration would have informed consumers that there would be 220 units in the development. To use an example, if the units all had the same entitlement, and assuming a yearly budget of $100,000 for common facility expenses, a purchaser would make their decision based on the fact that they would be responsible to make a yearly contribution of $454 toward those expenses. That purchaser would be secure in the knowledge that, until the development was complete, the owner developer would, as Harris J. stated, in *Timberline*, be the "proxy" for the yet-to-be constructed and purchased strata lots and make its own contribution to the common facility expenses for those lots.

[49] The Strata describes this as the "bargain" between the owner developer and the purchasers of the strata lots. Also, part of that "bargain" is the requirement that the owner developer advise prospective purchasers of the deadline by which it will declare whether it will elect to proceed with the remaining phases.

[50] Needless to say, not everyone lives up to their end of the bargain. Nevertheless, there are substantial provisions in the *Act* that are intended to protect consumers towards ensuring that the common facilities of the development are constructed as indicated in the Declaration:

a) if the common facilities are to be constructed after the first phase, an approving officer may require the owner developer to post a bond, letter of credit or other security, or make other satisfactory arrangements for its completion: s. 223; and

b) any security under s. 223 may be released under certain conditions and this Court may grant orders requiring the completion of the common facilities or the use of the security for that purpose: s. 226.

[51] Other remedies in the *Act* are driven by whether the owner developer has elected whether or not to proceed with any future phases.

[52] If an owner developer elects not to proceed, the *Act* provides a host of remedies to the strata corporation under s. 235. The strata corporation may apply to this Court for an order that the owner developer contribute to the expenses attributable to the common facilities as if the owner had elected to proceed and may order security to be provided: s. 235(3). This Court may also order the owner developer to complete the common facilities if it is "unfair" to the strata corporation: s. 235(5) and (6).

[53] In the absence of an election, the owner developer is conclusively deemed to have elected to proceed: *Act*, s. 231. Here, Park Ridge indicated in the Declaration that it would elect by August 1997. It failed to do so and, accordingly, is deemed to have elected to proceed. In that event, a remedy is also provided for in s. 236, which allows the Court to order that the owner developer complete the phase by a set date. Further, s. 236 provides that if the owner developer does not comply, the Court may order that the owner developer be deemed to have elected not to proceed, which leads to the remedies in s. 235.

[54] All this is to say that the *Act* is designed to protect consumers buying strata lots by providing them with substantial remedies in the event of default by the owner developer. However, until such time as those remedies are sought and granted, and perhaps even beyond, the provisions of s. 227 remain, in that this section requires an owner developer to contribute to these expenses.

[55] In that vein, s. 220 can be viewed as part of the protections afforded to consumers by the *Act* in relation to phased strata plans.

[56] If a developer can simply transfer its interest in any undeveloped phases (assumed to be less than 50% of the units) to another developer, and thereby avoid payment under the expense sharing scheme contemplated by s. 227, there is some potential for mischief. What would prevent a developer from transferring its interest to another company it held, and thereby enjoy a payment "holiday" while it decided whether it was profitable to proceed with any remaining phases? As well, what would prevent a developer from avoiding these expenses if it was not profitable, and that

developer wished to simply hold the property until the market improved? Even if the transfer was to another developer, why should this new developer enjoy this payment "holiday" at the expense of the existing owners?

[57] To return to my example, the purchaser who thought they would only be paying $454 per year for the common facilities would now be faced with a payment of $632. This increase, if known to the consumer at the outset, might well have affected that person's decision to buy that strata lot in the first place.

[58] 075 argues that s. 220 does not apply to it because Park Ridge, the owner developer, did not transfer its "interest in land described in a Phased Strata Plan Declaration" but, rather, only a *portion* of its interest. I do not, however, agree with this restrictive interpretation of the section. In my view, it can apply to the transfer of any undeveloped phase, consistent with the fair, large, and liberal interpretation mandated by the *Interpretation Act.* In that case, the scheme under s. 227 would continue to apply to the transferee.

[59] Further, as the Strata points out, s. 220 refers to an "interest in land", while the s. 1(1) definition refers to "strata lots". It is evident from 075's title, that it did not acquire any strata lots from 622, nor did 622 acquire any strata lots from Park Ridge.

[60] 075 has emphasized the goal of certainty in respect of these payment obligations. There is no doubt that the commercial world relies on certainty. The scheme that applies to the original owner developer seems clear enough, but it becomes murkier when transfers by that developer take place where there are phases not yet completed. However, any person receiving a transfer of lands from the original developer must, by necessity, be aware of the requirements of the *Act* and the Declaration. In large part, that uncertainty is driven by the competing positions that present themselves on this application where the Court has not yet considered those positions. Certainty will be achieved by this decision and any possible appeal.

[61] In this case, certainty is not achieved by blindly applying one provision of the *Act* and ignoring others. As Driedger states, the words of the *Act* are to be read in their "*entire* context" and within the overall scheme of the *Act*. That entire context includes s. 220.

[62] 075's interpretation of s. 220 ignores the most compelling point made by the Strata - that if the Legislature had intended that the s. 1(1) definition of "owner developer" was to be the basis upon which transferees from the original developer would inherit any obligations, then there was no need to have enacted s. 220. Further, if, as 075 argues, the sections are to be read in "tandem" as supporting the 50% threshold, then what is the purpose of s. 220? Section 220 must have meaning, and must mean something more than the restrictive definition found in s. 1(1).

[63] I conclude that the *Act*, particularly s. 220, should be interpreted such that when Park Ridge transferred Phase IV of Lot 2 to 622, 622 became an "owner developer" for the purposes of Part 13 of the *Act*. Therefore, when 622 transferred Phase IV of Lot 2 to 075, 075 also became an "owner developer" for the purposes of Part 13 of the *Act*. As such, both 622 and 075 became liable to contribute to the common facility expenses in accordance with s. 227.

[64] A final note on the matter of fairness. In my view, there is no room for such a concept in the context of the expense sharing scheme in the *Act*. These are important commercial matters from the point of view of both the consumer and the developer. The consumer needs to know their financial obligations at the outset in terms of completing what will likely be the most significant financial transaction of their life. The developer needs to know its responsibilities in terms of determining the profitability of a project, among other things. The introduction of fairness into this scheme defeats the objective of certainty to the detriment of all concerned. I see nothing in these provisions of the *Act* to suggest that certainty should be a consideration, unlike other provisions which expressly mandate a consideration of fairness (see for example, s. 235(5)).

[65] Even so, 075 argues that if the court considered notions of "fairness", they favour 075 and not the Strata. It argues that it does not enjoy the exercise room, lap pool, jacuzzi and the other facilities. That may be true, however, it is equally true that the present owners did not bargain to pay the developer's portion of these expenses while the developer decides whether to proceed with the remaining phases, based on a consideration of its own commercial interests. In that sense, any elements of fairness are counterbalanced.

Disposition

[66] The answer to the question posed on this special case is "Yes", given my conclusion that 075 is an "owner developer" liable to contribute to the Strata's common facility expenses in accordance with Part 13 of the *Act*. As agreed, the Strata is awarded its costs of this special case as against 075.

[67] I commend counsel for their efficient approach to the resolution of this issue and for their well-prepared and reasoned arguments in this novel case.

"Fitzpatrick J."