

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VR 663 v. Murphy*,
2012 BCSC 1294

Date: 20120904
Docket: S116421
Registry: Vancouver

Between:

The Owners, Strata Plan VR 663

Petitioner

And

Sean Clay Murphy

Respondent

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Petitioner:

R. L. Liang

Counsel for the Respondent:

W. E. Derber

Place and Date of Trial/Hearing:

Vancouver, B.C.
August 15, 2012

Place and Date of Judgment:

Vancouver, B.C.
September 4, 2012

[1] This is a dispute over repairs to a roof and related structures of a strata complex. The petitioner says the repairs should be accomplished after removing a balcony enclosure adjacent to the respondent's strata unit. The respondent says that he will be put to considerable expense and inconvenience to remove the enclosure and that the repairs can be accomplished by the use of scaffolding without the need to remove the enclosure.

[2] The petitioner seeks an order for the removal of the enclosure by the respondent or the removal of the enclosure by the petitioner but at the expense of the respondent. The respondent seeks a declaration pursuant to section 164 of the *Strata Property Act*, S.B.C. 1998, c. 43 that the petitioner has been significantly unfair in its demand that he remove the enclosure on his balcony.

[3] The strata complex consists of two three story buildings on West 49th Avenue in Vancouver. The balconies of some units are enclosed. Unit 210, which belongs to the respondent, is one of them.

[4] In 2009, the strata council decided roof repairs were needed to various areas of the complex. The roofs of units 214 and 215 were replaced without removal of their balcony enclosures. I am told the repairs to the roofs in the vicinity of those units were not a success. The roofs leaked and it is said that the leaks emerged in the area where the enclosures butted the roofs. I have been given no expert opinion evidence on the reason or reasons for the leaks. When there were such leaks repairs had to be undertaken to the interior of unit 214.

[5] The balconies of the complex are common property. The owner of unit 210 has exclusive right of occupancy of the balcony, subject to the obligations of the strata corporation to maintain the common property in a safe and clean condition.

[6] An owner of a strata unit may not alter the exterior appearance of an area to which there is exclusive use without approval of the strata council. The balcony enclosure of unit 210 had been constructed before the respondent purchased that

unit. There is no evidence the strata council took objection to the presence of the enclosure except in relation to the repairs which began in 2009.

[7] A second phase of roof repairs commenced in 2010. All gutters were to be rebuilt, walls raised, slopes changed, drains moved and all shingles and roofing materials for slope roofs were to be replaced.

[8] The council decided that to overcome similar leakage problems to those that had been encountered in 2009 with units 214 and 215, the balcony enclosures at units 210 and 308 must be removed. The owner of unit 308 removed the enclosure at her expense.

[9] The respondent was requested in several letters in 2011 to remove the enclosure over his balcony. There were a number of communications between the respondent and the petitioner and ultimately the respondent attended a meeting with the strata council in June of 2011. At that meeting the respondent proposed an alternative of a type of scaffolding that would permit access to the roof over his unit so that the repairs could be affected without the need to remove the enclosure. The respondent offered to pay extra costs of scaffolding which would be occasioned by the presence of the enclosure to his unit. I understand that regardless of whether an enclosure was present scaffolding would be used for the roof repairs as it had been used in relation to the earlier repairs.

[10] The strata council advised the respondent that his proposal was unacceptable unless he met certain conditions including the use of a reputable scaffolding company; a schedule acceptable to the council; proof of payment of additional costs, and proof of insurance so that the strata corporation would not encounter the risk of incurring a claim arising from the use of the scaffolding for which it would be obliged to pay. The respondent did not agree to those conditions.

[11] The roof repairs to the complex were completed except for those related to unit 210. Scaffolding had been in place for some of the repairs and it remained in place while consideration was given to how best to approach the repairs to the

respondent's unit. It was eventually removed but with the strata corporation incurring extra rental charges.

[12] The strata corporation has an obligation to keep the common property of the strata complex in good repair. This includes the roofs and gutters. One difficulty it says it faces in doing so in relation to unit 210 is that it is said the enclosure blocks access to the gutters.

[13] I have no doubt the strata council is entitled to request the respondent to remove his balcony enclosure if it impedes roof and gutter repairs and therefore the integrity of the building. I also have no doubt that when the strata council considers the removal of a structure such as the enclosure, it must do so taking into account the interest of the strata property as a whole and the interest of the unit owner to the extent they can be accommodated while the wider obligations of the strata council are met.

[14] In the absence of significantly unfair conduct on the part of the strata council in directing the respondent to remove the enclosure at his expense the council is entitled to insist on removal. This court should have difference for the council's decision in that regard unless the decision is made in a manner which is significantly unfair. The expression "significantly unfair" is used in section 164 of the *Strata Property Act*. In *Chan v. Strata Plan VR 151*, 2010 B.C.J. No. 2425, this court held the phrase means oppressive, or unfairly prejudicial, burdensome, harsh, wrongful, lacking in probity or unfair dealing, done in bad faith. In the context of this application I would add that it could mean an arbitrary decision affecting the interest of the respondent when it is unnecessary to make that decision to meet the wider obligations of the strata council.

[15] In *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597, the Court of Appeal recognized that it is not always possible for a strata corporation to treat all owners the same. It is the greater good of the complex as a whole which must prevail if there is a clash between that greater good and the interest of a particular unit owner.

[16] Nine affidavits are relied on by the parties. The petitioner objects to Affidavit Number 1 of Patrick Murphy and Affidavit number 3 of the respondent. I have disregarded both affidavits. They both contain hearsay of opinions of others.

[17] The general tenor of the evidence is that the respondent made proposals to the strata council for a solution to the need for repairs of the roof of the complex and adjacent structures but which proposals that council was not willing to entertain seriously. One difficulty the council has relied on to demonstrate that the enclosure adjacent to unit 210 must be removed is that it is said that the enclosure interferes with the adjacent gutter making repair or replacement of the gutter impracticable. In my view the evidence does not support that concern. There are a number of photographs in the evidence which lead me to conclude the enclosure does not interfere with the gutter and that repairs can be affected even with the enclosure in place.

[18] The respondent presented engineering drawings to the council to demonstrate his scaffolding proposal was feasible. There is no evidence those drawings or the approach being recommended was given any serious consideration.

[19] The respondent provided the affidavit of Sean Dingley who is a professional engineer with expertise in scaffolding. This was in response to the petitioner's concern that the scaffolding proposed by the respondent may cause some damage to the structure of the complex. Mr. Dingley addresses the concerns of the petitioner in a manner which I consider to be persuasive but to which the council gave no comprehensive response.

[20] Mr. Bernie Herstein, who is a member of the strata council with responsibility for supervising the roof repairs, in his affidavit number 1 refers to the leaks that occurred in units 214 and 215 after roof repairs were completed but without removing the adjoining balcony enclosures. Mr. Herstein alludes to leaks in those units in the area where "the enclosure butts against the roof". I have no evidence that Mr. Herstein has expertise in roofing projects and there is no other evidence to

satisfy me that the presence of the enclosure when the roof repairs were affected in relation to units 214 and 215 caused the leaks.

[21] In the respondent's affidavit number 2, he testifies to the following:

... Mr. Herstein has been totally resistant to finding a solution to repairing the roof area adjacent to my unit without the removal of my balcony enclosure. Initially, the only objection Mr. Herstein raised was that my balcony enclosure had to be removed in order for the scaffolding to be put in place. As a result of his statement, I spent considerable time and money investigating and then obtaining an expert opinion confirming that an alternate form of scaffolding could be used at a relatively nominal additional cost, which would not necessitate the removal of the balcony enclosure. After months of making attempts to have Mr. Herstein and strata council consider my proposal for alternate scaffolding, they only then raised the issue that it was necessary to remove my balcony enclosure in order to effect repairs to the roof area adjacent to my unit, despite the fact that successful repairs to the same area were completed in 2009 and my unit has not experienced any leakage since then.

My treatment at the hands of the previous strata council, and in particular Mr. Herstein, has caused me extreme distress both emotionally and financially. I have sold personal assets to pay the costs of these proceedings. My several attempts to find a solution have only been met with derision and non-cooperation. I have presented opinions from very experienced and qualified professionals that alternate scaffolding would be perfectly suitable and, when Mr. Herstein changed the issue to accessibility, that accessibility is clearly not an issue. Mr. Herstein has not responded to this other than to insist that my balcony enclosure be removed, without addressing the substance of my and my professionals' comments.

[22] The cost of the respondent of removing and later replacing the enclosure on unit 210 would be substantial. In the affidavit of Colin Kelly, who is the president of the strata council, he testifies that the strata corporation, "never took the position that the enclosure [adjacent to unit 210] was illegal ..." I take this to mean an effort to give some comfort to the respondent that he would be entitled to restore the enclosure after the roof repairs were affected. Nevertheless, the cost to the respondent of restoring the enclosure would run into many thousands of dollars.

[23] In my opinion the council has resisted a reasonable and satisfactory solution to the roofing and gutter repairs in relation to unit 210 without giving adequate consideration to the cost and inconvenience to the respondent. This is not the case of a strata council deciding it must sacrifice the interest of a single strata unit owner

to achieve a greater good for the majority of the owners. A strata council may find itself in the difficult position of making a decision which imposes a heavy burden on a single unit owner in order to achieve the greater good. There is no evidence to suggest the petitioner was motivated by those considerations in this instance.

[24] The respondent is entitled to a declaration that the petitioner has been significantly unfair in the decision it made to require him to remove the enclosure adjacent to his unit. The petitioner's application that the respondent remove the balcony enclosure adjacent to unit number 210 at 444 West 49th Avenue, Vancouver is dismissed with costs. The petitioner must find reasonable means to effect the roof and gutter repairs adjacent to unit 210 without the removal of the enclosure.

"Affleck J."