

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wilfert et al v. Ward et al*,
2004 BCSC 289

Date: 20040303
Docket: 03 3367
Registry: Victoria

Between:

Lorna Wilfert, Evelyn Forrest, Nancy Paiva, et al

Petitioners

And:

Tatianna Ward, Therese Brend-Elston, et al

Respondents

Before: The Honourable Mr. Justice Melvin

Reasons for Judgment

Counsel for the Petitioners:

A. R. Tryon

Counsel for the Respondents:

P. J. Pearlman

Date and Place of Trial/Hearing:

January 14, 2004
Victoria, B.C.

[1] Pursuant to their amended petition issued August 25, 2003, the petitioners seek a declaration that all owners of strata lots in Strata Plan VIS 1650 must contribute to the strata corporation their strata lot share of the cost to repair and remediate the building envelope for the apartment style strata lot building.

[2] The premises in question are known as "Cordova Bay Beach Estates". The development was created in three phases. The first and second phases were completed in 1988 and 1989 and consisted exclusively of townhouse style strata lots. The third phase was completed in 1994 and consisted exclusively of apartment style strata lots. The apartment style strata lots building suffers serious water ingress.

[3] At issue is the obligation of the townhouse style strata lot owners to contribute to the cost of remedying and rehabilitating the apartment style building. The anticipated cost of repair at the time of the petition was uncertain, but will exceed \$2,400,000. No special resolution has been passed to assess the owners and proceed with the repair. The owners have chosen to place this issue before the court to obtain clarification before proceeding to the stage of resolution.

[4] The petitioners submit that the **Strata Property Act** and regulations passed thereunder require all owners to contribute

to the cost of the repair, regardless of the type of strata lot, unless the strata corporation is divided into separate sections as contemplated by the **Strata Property Act**. The Cordova Bay Beach Estates, having been constructed prior to the effective date of the **Strata Property Act**, namely, July 1, 2000, was governed by the **Condominium Act** and bylaws passed pursuant to that Act. That Act provided for a differentiation between strata lot types, and the legislation specified as follows:

- 128 (1) The strata lot owner's contribution to the common expenses of the strata corporation must be levied in accordance with this bylaw.
- (2) If a strata plan consists of more than one type of strata lot, the common expenses must be apportioned in the following manner:
- (a) common expenses attributable to one or more type of strata lot must be allocated to that type of strata lot and must be borne by the owners of that type of strata lot in the proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned;
 - (b) common expenses not attributable to a particular type or types of strata lot must be allocated to all strata lots and must be borne by the owners in proportion to the unit entitlement of their strata lots.

[5] Consequently, had the **Condominium Act** continued in full force and effect, the common expenses of the corporation would be apportioned in accordance with the type of strata lot and the apartment remediation expenses would be attributed to that type.

[6] As previously stated, the **Strata Property Act** was proclaimed effective July 1, 2000. That statute defined "common expenses" as follows:

"common expenses" means expenses

- (a) relating to the common property and common assets of the strata corporation, or
- (b) required to meet any other purpose or obligation of the strata corporation;

[7] The next definition of significance is the definition of "contingency reserve fund", as follows:

"contingency reserve fund" means a fund for common expenses that usually occur less often than once a year or that do not usually occur, as set out in section 92(b);

[8] The next definition of significance is as follows:

"operating fund" means a fund for common expenses that usually occur either once a year or more often than once a year, as set out in section 92(a);

[9] Consequently, under the **Strata Property Act**, an operating fund and a contingency reserve fund are maintained. In

addition, the **Strata Property Act** provides that there may be an identification of a type of lot in a strata corporation's bylaws resulting in the owners of that type being solely responsible for contributing to the operating fund and to pay common expenses relating to that type of lot. In that respect, Strata Property Regulation 6.4(2) is of significance:

(2) For the purposes of section 99 of the Act, but subject to a resolution under section 100 of the Act, if a contribution to the operating fund relates to and benefits only one type of strata lot, and that type is identified as a type of strata lot in the bylaws of the strata corporation, the contribution is shared only by owners of strata lots of that type, and each strata lot's share of that contribution is to be calculated in accordance with the following formula and not in accordance with the formula set out in section 99(2) of the Act:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lot of the type to which the contribution relates}} \times \text{contribution to operating fund}$$

[my emphasis]

[10] On reviewing that regulation, which allocates expenses to type, there are three factors to consider. Firstly, it relates only to the operating fund; secondly, it must be a contribution that benefits only one type of strata lot; and thirdly, the type must be identified in the bylaws of the strata corporation.

[11] The **Strata Property Act** further defines the rights of owners under the legislation as it allows, in s. 191, a strata corporation to have sections for the purpose of representing different interests of owners of apartment style strata lots and townhouse style strata lots. The importance of that provision is found in Part XI of the **Strata Property Act**, s. 195:

195 Subject to section 100 and the regulations, expenses of the strata corporation that relate solely to the strata lots in a section are shared by the owners of strata lots in the section and each strata lot's share of a contribution to the operating fund and contingency reserve fund is calculated as follows:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots in section}} \times \text{total contribution}$$

[12] Consequently, the legislation has anticipated types of strata lots and the contribution to the types in relation to the operating fund and contingency reserve fund based on the individual type in the event the strata corporation creates sections. This was not done in the case at bar.

[13] Counsel have reviewed a number of authorities dealing with the transition from the **Condominium Act** to the **Strata Property Act**. In that respect, it should be noted that there is a transition provision set forth in s. 293 of the **Strata Property Act** which reads:

293 (1) Except as otherwise provided by this Act and the regulations, this Act and the regulations apply to a strata plan deposited and a strata corporation created under the *Condominium Act*, R.S.B.C. 1996, c. 64 or any former Act.

[14] Counsel for the respondents submits that the need for significant repairs as a result of water damage was apparent and the obligation to perform repairs arose during the period the **Condominium Act** applied. Consequently, the rights and obligations created by that Act continue and apply to the subsequent remediation expense.

[15] The respondents submit that s. 128 of the **Condominium Act** applies and where two types of strata lots exist, common expenses attributed to a type of strata lot shall be borne by the owners of that type. If that submission is accepted, the expenses attributed to the apartment style remediation would be borne only by the owners of that type.

[16] There is no doubt that the need for some repairs was known before the **Strata Property Act** came into force. The summary repair history outlined in the material indicated in February 2001 the sum of \$155,000 of expenditures was approved, although the apartment style building was referred to as being "not a leaky condo". On February 14, 2002, the owners passed a resolution for remediation in the amount of approximately \$600,000. In March of 2003, the owners rejected

a special resolution authorizing a special levy of up to \$2,400,000 for the remediation of the apartment style condominiums.

[17] Some water damage was known during the period the strata corporation was governed by the **Condominium Act**. In particular, a report of June 16, 2000 identified water ingress problems. The significance of the eventual water problem was not recognized. The summary of the anticipated expenses in that report allocates the total expense over nine years of approximately \$725,000. The report acknowledges that the structure was approximately seven or eight years of age at the time and that the budget should anticipate the need for rain screen rehabilitation "of at least the east and some south elevations within the next 10 years".

[18] There is no doubt that the townhouse and apartment type strata lots are different. Consequently, if s. 128 of the **Condominium Act** applies, the remedial expenses in the apartment type would be borne by that type.

[19] Counsel for the respondents in this respect relies on s. 35(1) of the **Interpretation Act**:

35 (1) If all or part of an enactment is repealed, the repeal does not

...

(c) affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed, ...

[20] The submission is that a right or obligation existed prior to the repeal of the *Condominium Act* and that the repeal does not affect such a right or obligation. If one accepts that the need for substantial repairs was discovered before the effective date of the *Strata Property Act*, some authorities have decided that the rights that accrued pursuant to s. 128 of the *Condominium Act* continue. In that respect, see *Strata Plan LMS608 v. Strata Plan LMS608*, [2001] B.C.J. No. 2116 (S.C.) (QL) (Josephson J.); *Lim v. Strata Plan VR2654*, 2001 BCSC 1386 (Boyd J.); and *Coupal v. Strata Plan LMS2503*, 2002 BCSC 1444 (Sigurdson J.).

[21] These authorities were discussed in detail by Mr. Justice Bauman in *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085. He concluded that the transition sections of the *Strata Property Act* and Regulations represented "a contrary intention" within the meaning of s. 2 of the *Interpretation Act*:

- 2 (1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

(2) The provisions of this Act apply to this Act.

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to it and not inconsistent with this Act.

[22] In this respect, Bauman J. stated with reference to the transition section:

[62] Simply put, these provisions represent "a contrary intention" within the meaning of s. 2 of the **Interpretation Act**, thereby muting the applicability of s. 35 of that **Act**.

[23] Consequently, any right or obligation that may have existed prior to the effective date of the **Strata Property Act** ceased to exist on that date. Accepting that reasoning, I conclude that despite the condition of the apartment style strata lots and the extent of the knowledge of the strata owners, the **Strata Property Act** applies and not the **Condominium Act**.

[24] Consequently, once this legislation came into effect on July 1, 2000, the **Strata Property Act** and its regulations applied to Cordova Bay Beach Estates. As of the date of the hearing of the petition, there has been no allocation of future expenses associated with reference to the remediation work to be done on the building.

[25] Bauman J. concluded that the **Strata Property Act** and regulations created a complete legislative scheme which applied effective July 1, 2000. In the course of his reasons, he dealt with the submission that accruing rights occurred in cases where the building was constructed prior to July 1, 2000 and any defect that may have been in the building was obviously in existence prior to that date. In this respect, he concluded that s. 128(2) bylaws under the **Condominium Act** continued to apply during the transition period with two provisos: (a) it is only to the extent that the strata corporation's budget on July 1, 2000 apportioned common expenses to one or more types of strata lots and secondly, (b) it is only in respect of contributions to the operating fund, not the contingency reserve fund or special levy.

[26] Insofar as it might be suggested that there had been an allocation of common expenses prior to July 1, 2000, I note that in **Alvarez, supra**, Bauman J. stated, with respect to s. 293 of the **Strata Property Act**:

[69] Again, this is a detailed transitional provision, which in the defined circumstances permits a pre-**SPA** strata corporation to continue to allocate certain common expenses to one or more types of strata lot in accordance with s. 128(2) of the **CA**. But it is only for the purposes of ss. 6.4(2) and 11.2(2) of the **SPA Regulation**, which cover contributions to the operating fund, not to the contingency reserve fund or a special levy, the

sources for funding extraordinary building envelope repairs. [my emphasis]

[27] It is obvious when considering the definition of "operating fund" and "contingency reserve fund" that the operating fund is clearly marked with repetitive expenses that one would expect to occur year by year, not extraordinary expenses which are involved in the case at bar, and in similar cases involving the remediation of a building of a magnitude that has been contemplated.

[28] Although the **Condominium Act** determined how an owner's contribution to the common expenses must be levied, the **Strata Property Act** governs the allocation and ends the rights of owners under the **Condominium Act** at the end of the transition period (see s. 293). In the case at bar, there has been no allocation of building repair expenses; hence, the **Strata Property Act** applies.

[29] Insofar as there may be allocations post January 1, 2002, where there is more than one type of strata lot, that may be governed by Strata Property Regulation 6.42 (see s. 17.11 of the **Strata Property Act**). In the case at bar there is more than one type of strata lot identified in the bylaws, but Regulation 6.42 relates to the operating fund as defined. In addition, the section specifies that the contributions to the

operating fund relate to and benefit only one type of strata lot.

[30] In the case at bar, in my opinion, the remediation expense of the apartment type strata lots of approximately \$2,400,000 does not fall within the operating fund. It cannot be said that the remediation expenses usually occur once a year or more often than once a year. Consequently, this requirement of Regulation 6.4(2) has not been met and the section is not applicable.

[31] The solution for members of a strata corporation who wish all expenses apportioned by type is to act pursuant to s. 191 *et seq* of the **Strata Property Act** to establish separate sections, each with an operating and contingency reserve fund. This course has not been followed in the case at bar.

[32] Consequently, I am satisfied that the reasoning in **Alvarez, supra** applies and all owners of strata lots within Cordova Bay Beach Estates are required to contribute on their proportional basis to the cost of repair and remediation of the building envelope for the apartment style lots.

"F.A. Melvin, J."
The Honourable Mr. Justice F.A. Melvin