

Case Name:
Armanowski v. Strata Corp., Strata Plan LMS 2151

Between
Andrew Armanowski, Claimant, and
Strata Corporation Strata Plan LMS 2151, Defendants

[2011] B.C.J. No. 1942

2011 BCPC 271

File No. 1033051

Registry: Vancouver

British Columbia Provincial Court
Vancouver, British Columbia

D.W. Yule J.P.

Heard: October 5, 2011.
Judgment: October 14, 2011.

(33 paras.)

Counsel:

Appearing on their own behalf: Andrew Armanowski.

Counsel for the Defendant: Jamie Allan Bleay.

REASONS FOR JUDGMENT

D.W. YULE J.P.:--

INTRODUCTION

1 The Claimant Andrew Armanowski seeks reimbursement from the Defendant Strata Corporation of the sum of \$1,269.78, plus interest and expenses. The Claimant has a 2.66% ownership interest in the condominium located at 5577 Smith Avenue, Burnaby, B.C. In 2008, the Strata Council

paid RDH Building Engineering Limited ("RDH") the sum of \$47,736.15 which, according to the Notice of Claim was "for a service which was never provided". The claim of \$1,269.78 represents the Claimant's 2.66% share of the monies paid to RDH which were raised from all unit owners by a special levy. In its Reply, the Defendant whilst formally denying every allegation in the Notice of Claim in the alternative asserts that it followed all the necessary steps required of it to approve a special levy to pay for anticipated engineering fees and costs associated with necessary balcony repairs at the condominium building. Paragraph 14 of the Defendant's Trial Statement asserts that the monies raised by the special levy "did not exceed the total payments made to RDH which, as of December 2008, totaled \$47,250.00." The Claimant's Trial Statement attaches a copy of the Defendant's "vendor ledger" as well as various accounts from RDH indicating the amounts paid by the Defendant to RDH as well as invoices from RDH.

2 Paragraph 6 of the Defendant's Reply asserts that this Court has no jurisdiction because, inter alia, "questions regarding the decision making of the strata corporation are within the sole jurisdiction of the Supreme Court of British Columbia." This matter previously came before Adjudicator Kahn on May 18, 2011. According to the Adjudicator's notes, the matter was adjourned generally as the jurisdiction of the Court was in issue and if reset for hearing in this Court, there should be argument on the jurisdictional issue at the outset.

3 At the outset of the hearing before me on October 5, I was advised by the parties that there had been no determination by any other Court that this Court had jurisdiction; the matter had simply been reset down for hearing. The Defendant maintained its position that this Court has no jurisdiction and accordingly the only issue argued on October 5 was the jurisdictional issue.

BACKGROUND INFORMATION

4 In order to decide properly the jurisdictional issue, it is necessary to consider the proper characterization of the Claimant's claim. This necessitates some review of the underlying allegations, without in any way addressing the merits of the Claimant's allegations or the Defendant's response.

5 From the respective Trial Statement of the parties, I summarize the underlying circumstances as follows:

- a. The Claimant is owner of strata lot 22, unit 210, representing a 2.66% interest in the condominium building;
- b. There was a problem with the balconies at the building requiring repair. In 2006, two balconies were repaired, and RDH was involved in providing engineering and design services for which it was paid;
- c. In 2007 the strata council wished to proceed with repairs to the remaining 26 balconies. It obtained an estimate of approximately \$320,000.00 for the repairs, including additional engineering costs.
- d. At a special general meeting of unit owners on September 11, 2007, a resolution was passed by the requisite 3/4 majority to levy a special assessment on all strata lots based on unit entitlement to raise \$365,000.00 for the purpose of funding necessary balcony repairs.
- e. By letter dated March 7, 2008 addressed to the Owners, Strata Plan LMS 2151 care of Dan Bourke, Pacific Quorum Properties Incorporated, RDH set out a proposal for consulting services in connection with the balcony

repairs, which proposal was divided into three distinct phases, namely pre-construction, construction, post-construction. Separate fees were set out for each of the three phases. The proposal letter was noted to be "accepted by the Owners, Strata Plan LMS 2151" and bore the signature of Mr. Bourke, described as property manager for the Owners. The acceptance was dated April 24, 2008 and described as acceptance "for pre-construction phases \$45,000.00". I understand that one of the issues raised by the Claimant is whether Mr. Bourke was in fact authorized to sign this contract on behalf of the Owners.

- f. The Claimant paid his proportionate share of the special levy.
- g. The Defendant asserts (Trial Statement paragraph 9) that RDH provided pre-construction services and was paid for them in 2008. The Claimant asserts (Trial Statement paragraph 2) that RDH was paid "for services never provided." The Claimant also asserts (Trial Statement paragraph 4) that because two balconies had previously been repaired apparently based on a design of RDH for which RDH was previously paid, and because the design of all 28 balconies was exactly the same, "there was no need for RDH to do any additional engineering or designing work for the remaining 26 balconies."
- h. At a further special general meeting of unit owners held December 15, 2008 resolutions seeking approval to levy a further special assessment to raise additional monies to fund the actual repair costs of the balconies were defeated. Shortly thereafter the services of RDH were terminated.
- i. In 2009, at the annual general meeting on April 20, 2009 the Owners approved by the requisite 3/4 vote a remediation budget of \$309,750.00 to be funded in part by the balcony special levy fund and that "to the extent that any of the following monies are not required to fund any portion of the remediation project when the final accounting reconciliation is made at the end of the remediation project, these monies shall be returned to the strata's contingency fund." At the same meeting the Owners authorized the engagement of a project manager and a new engineering consultant. The actual balcony repairs were carried out in 2009 by a different contractor from that previously proposed, using a different engineering consultant.

THE APPLICABLE LEGISLATION

6 The jurisdiction of this Court is in Section 3 of the *Small Claims Act* R.S.B.C. 1996, c. 430 which provides as follows:

"3. (1) The Provincial Court has jurisdiction in a claim for

(a) debt or damages,

(b) Recovery of personal property,

(c) specific performance of an agreement relating to personal property or services, or

(d) relief from opposing claims to personal property if the amount claimed or the value of the personal property or services is equal to or less than an amount that is prescribed by the regulation, excluding interest and costs.

(2) The Provincial Court does not have jurisdiction in a claim for libel, slander or malicious prosecution."

7 The claim is within the monetary jurisdiction of \$25,000.00.

8 Part 10 of the *Strata Property Act* (S.B.C. 1998, c. 43) deals with litigation between unit owners and the strata corporation. The Defendant relies upon Section 164 and 165. Section 163-165 provide as follows:

"Strata corporation may be sued

163 (1) The strata corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the strata corporation.

(2) An owner may sue the strata corporation.

Preventing or remedying unfair acts

164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

- (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
- (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

- (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
- (b) vary a transaction or resolution, and
- (c) regulate the conduct of the strata corporation's future affairs.

Other court remedies

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

- (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;

- (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b)."

9 In addition, Part 6, Division 4 of the *Strata Property Act* deals with special levies and user fees.

SUBMISSION OF THE PARTIES

Submission of the Claimant

10 Mr. Armanowski submits that this is a simple matter of his wishing to have reimbursed to him monies he paid pursuant to the special levy where the services were never provided by RDH. His relies particularly on Section 3(1)(c) of the *Small Claims Act* which gives this Court jurisdiction in a claim for specific performance of an agreement relating to services. He asserts that the strata corporation is responsible for maintaining the balconies, as limited common property, and the \$47,436.15 was paid to RDH but the balconies were not fixed. He further asserts that he is not questioning decisions made by the strata council; he just wants to be reimbursed for monies paid where nothing was done. He denies alleging that the payments to RDH were unlawful, although he also says it is possible the payments were made without the knowledge or authority of the strata council because a former property manager acted without authority. Mr. Armanowski did not refer to any case law and did not have the opportunity to consider in advance of the hearing the case authorities relied upon by the Defendant.

Submission of the Defendant

11 First, the Defendant submits that Section 3(1)(c) of the *Small Claims Act* has no application. The Claimant is not seeking specific performance of any agreement and there is no agreement for services as between this Claimant and the strata corporation. Mr. Armanowski is simply an owner in a dispute with the strata corporation. The Defendant submits this dispute is governed by Sections 164 and 165 of the *Strata Property Act* and jurisdiction is exclusively in the Supreme Court of British Columbia. Section 164(1) provides that on application of an owner, the Supreme Court may make any Order it considers necessary to remedy a significantly unfair decision of the strata council in relation to the owner. Section 165 provides that on the application of an owner, the Supreme Court may do one or more of (a) order the strata corporation to perform a duty it is required to perform under the *Strata Property Act*, the bylaws or the rules; (b) order the strata corporation to stop contravening the *Strata Property Act*, the regulations, the bylaws or the rules; or (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b). In essence, the Defendant says that the pith and substance of Mr. Armanowski's claim is a challenge to the decisions and actions of the strata council in engaging and subsequently paying RDH for its services. The Defendant relies upon two decisions of this Court, *Frechette v. Crosby Property Management Ltd. et al* (2007 BCPC 174) and *Stettner v. The Owners, Strata Plan PG56* (2011 BCPC 82). These cases are said to have determined that disputes between owners and the strata corporation on "governance" issues are exclusively reserved to the jurisdiction of the Supreme Court.

REVIEW OF CASE LAW

12 Because Mr. Armanowski's submission did not address existing case law, I have reviewed not only the authorities relied upon by the Defendant, but I have also considered other decisions referred to in either the Frechette or Stettner cases.

13 I take as a starting point the statement of Chief Judge Stansfield in *Lou Guidi Construction Ltd. v. Fedick*, [1994] B.C.J. No. 2409 (B.C. Prov. CE.), cited in *Matthews v. The Owners, Strata Plan NW1874* (2009 BCPC 66), where Chief Judge Stansfield said:

"In short, as a general proposition, I conclude that a judge of this Court should assume she or he has jurisdiction to hear every claim for debt or damages (other than defamation and malicious prosecution) where the claim is limited to \$10,000.00 (now \$25,000.00) or less, unless a party can demonstrate a statutory bar to that exercise of jurisdiction."

14 I also adopt the statement of the Honourable Judge Skilnick in the Matthews decision at paragraph 9 where he said:

"This does not mean that a small claims court can assume jurisdiction on every claim that is brought. The Provincial Court of British Columbia is a creature of statute. In other words, as a general rule, before the court can make orders or render judgments, the court must first be given the authority to do so by the Legislature. If authority for the order cannot be found, or if the Legislature expressly takes the authority to make that order away, or requires for the order to be made by another court or tribunal, then this court lacks the jurisdiction to make that order or render that judgement."

15 In *David v. Vancouver Condominium Services Ltd.* [1999] B.C.J. No. 1869 (Prov. Ct. of B.C.), a case decided under the former *Condominium Act* R.S.B.C. 1996, c. 64, Ms. David, a strata unit owner sued her strata corporation and a separate strata management company seeking reimbursements of expenses she had incurred to repair water damage in her unit caused by dilatory repair of the defective construction of her patio deck. A former property manager had advised Ms. David to proceed with the repairs to her unit on the basis that she would be fully reimbursed by the strata corporation. Subsequently the strata corporation took the position that it could only reimburse her for a little over half the full repair costs. Ms. David sued in Provincial Court and the Defendants raised the jurisdiction issue.

16 Under the applicable *Condominium Act*, the "Court" was expressly defined to mean the Supreme Court of British Columbia. Section 42 (the predecessor of the current Section 164 of the *Strata Property Act*) gave exclusive jurisdiction to the Supreme Court where it was alleged that the affairs of the strata corporation were being conducted in a manner oppressive to one or more owners. Section 127(3) of the *Condominium Act* allowed the strata corporation to recover from an owner "by an action for debt in a court of competent jurisdiction" money owed to the strata corporation for a violation of bylaws, rules or regulation of the strata corporation. Dhillon, PCJ. concluded that the reference to a "court of competent jurisdiction" in Section 127(3) meant that the Legislature had not intended to give the Supreme Court exclusive jurisdiction in all matters within the scope of the *Condominium Act*. She also concluded, at paragraph 28 that a claim which, although within the monetary jurisdiction of the Provincial Court, also trespassed upon matters which fell within Section 42 of the *Condominium Act* could not be litigated in the Provincial Court. She then concluded at

paragraphs 30 and 33 that allegations directed to the affairs of the strata corporation, the exercise of its powers or the powers of the strata council are subject matters to be adjudicated in the Supreme Court and corporate governance disputes which raise the allegation that an owner is being oppressed should properly be brought in the Supreme Court.

17 In *Burdeny v. K & D Gourmet Baked Foods and Investments Inc.*, [1999] B.C.J. No. 953 (1999 CarswellBC 911, B.C.S.C.), Levine J. characterized the claims of a shareholder against a corporation in four broad categories, namely (a) claims relating to his participation in the company other than in his position as a shareholder, (b) claims regarding misuse of corporation funds (c) claims concerning the rights of a minority shareholder to participate in company affairs and (d) claims as to irregularities of corporate governance. Dhillon, PCJ. applied this analysis to disputes between unit owners and their strata corporation and concluded that the types of allegations set out in categories (b) through (d) above should properly fall to be decided in the Supreme Court because they are related to the rights of a strata lot owner as a participating member of the strata corporation and to corporate governance.

18 On the specific facts in the *David* case, however, Dhillon PCJ. concluded that the Provincial Court had jurisdiction because the essence of the dispute was whether the property manager had bound the strata corporation to an agreement to reimburse Ms. David for the cost of repairs.

19 In *Clappa v. Parker Management Ltd. et al* (2003 BCPC 305) the Claimant strata lot owner sued the strata corporation, its property manager and a construction firm alleging that required building envelope repairs were done negligently with the result that her balcony floor was at an incorrect level causing loss of enjoyment of the balcony and a diminished potential selling price for her unit. Meyers, PCJ. held that the Provincial Court did not have jurisdiction. The case was decided under the current *Strata Property Act*. The issue was characterized as whether the Provincial Court had jurisdiction to hear a case where the owner of a strata lot sues the **strata corporation** for negligence in the performance of its duty to the owners to maintain and repair common property. The Court concluded at paragraph 12 that the new *Strata Property Act* attempted to create a scheme whereby all disputes between strata property owners and their strata corporations which involve the strata corporation's "governance" of the common property, must be resolved in the Supreme Court of British Court and not in the Provincial Court.

20 In *Valana v. Law* (2005 BCPC 587) one strata lot owner sued another strata lot owner in the same strata corporation as a result of a dog fight between dogs owned by the two parties. The Defendant unit owners third partied the strata corporation alleging it was negligent in failing to maintain adequately a fence which would have kept the dogs separated. Chen, PCJ. concluded that the Provincial Court had jurisdiction because this was "simply an action in negligence alleging a breach of a duty of care." The case was decided under the *Strata Property Act*. Chen PCJ found Judge Dhillon's analysis in *David* even more appropriate under the *Strata Property Act* where "Court" was no longer a defined term. He found no reason to draw any distinction with respect to jurisdiction between claims in tort and claims in contract. All causes of action against a strata corporation by a strata lot owner that fell outside Sections 164 and 165 could be pursued in either Provincial Court or Supreme Court, subject to the monetary and other limits of the Provincial Court's jurisdiction (paragraph 37). Chen, PCJ. disagreed with the reasoning in the *Clappa* case which held that only the Supreme Court had jurisdiction respecting allegations that a strata corporation failed to perform the duties which it was required to perform relating to common property.

21 In *Frechette v. Crosby Property Management Ltd. et al* (2007 BCPC 174) one of the cases specifically relied on by the Defendant, a dispute arose between unit owners and the strata corporation respecting the interpretation of a formula by which unit owners were required to pay their proportionate share of recreation centre costs. The unit owners of two separate residential buildings shared common usage of a recreation centre. There was also an allegation of not equitable treatment because of different means of physical access to the recreation centre. Finally there was a request for reimbursement of alleged past overpayments. Meyers, PCJ. held that the Provincial Court did not have jurisdiction. Referring to Section 164 of the *Strata Property Act*, Meyers, PCJ. concluded that the case involved an allegation and claim of significant unfairness, and not an allegation and claim of negligence. At paragraph 12 the Court held:

"The essence of the Claim at Bar is that the two Strata Corporations and the Property Management company failed to act fairly and in accordance with the Easement Agreement, in order to ensure that the Claimants were charged properly and equitably for their share of the recreation centre costs and to ensure an ease of access to the recreation centre, which was equal to that of the owners of the units next door to them. Whether the Claimants used the terms "significantly unfair actions" or "oppressive conduct" (the wording in the former Condominium Act) or simply "a failure in governance", by the Strata Corporations and the Property Management company, their complaints fall squarely within the ambit of Section 164 of the Strata Property Act. Section 164 of the Strata Property Act specifically requires that cases based on complaints about the way the strata corporation makes and applies decisions, be heard in the Supreme Court."

22 In *Matthews v. The Owners, Strata Plan NW1874* (2009 BCPC 66), the Claimant sued the strata corporation for the cost of repairs to the windows of his unit which had broken seals. The issue was whether the unit owner or the strata corporation was responsible to make these repairs. The Court concluded that it did not have jurisdiction, as the Claimant was in essence suing for an order that the strata corporation follow its bylaws and repair the windows. Section 160 of the *Strata Property Act* provided that an owner may apply to the Supreme Court where the strata corporation decided not to repair or replace damaged property.

23 Finally, in *Stettner v. The Owners, Strata Plan PG56* (2011 BCPC 82), the second case specifically relied on by the Defendant, the Claimant unit owner sued to recover \$400.00 for expenses incurred in responding to an "Exclusive Use Agreement" issued by the strata corporation. The Exclusive Use Agreement related to a shed of the Claimant on common property. It was alleged that the strata corporation did not comply with Section 71 of the *Strata Property Act* in seeking to make a significant change in the use of common property. At paragraph 14, Dollis, PCJ. stated:

"Mr. Stettner's legal problem is that if he is correct, and Section 71 applies, the Provincial Court has no jurisdiction. This is clearly set out in Section 163, 164, and 165 of the Act, which gives jurisdiction on these issues only to the Supreme Court. This means that if Mr. Stettner wishes to pursue his claim for \$400.00 plus costs, he is required to proceed in Supreme Court. To him that legal result is at best foolish and unfair. I cannot disagree."

24 Dollis, PCJ. at paragraph 16 adopted the analysis of Judge Skilnick in the Matthews case and concluded that suing for an order requiring the strata corporation to follow its bylaws could only be done in the Supreme Court.

APPLICATION OF THE CASE LAW TO THE PRESENT CASE

25 I agree with the Defendant that Section 3(1)(c) of the *Small Claims Court Act* is not applicable. The Claimant does not seek specific performance of an agreement for services. He seeks a refund of monies previously by him pursuant to the special levy. I would characterize his claim as one for monies owing, or debt, and falling within Section 3(1)(a) of the *Small Claims Court Act*. Thus in my view this Court has jurisdiction, unless the jurisdiction is assigned exclusively to the Supreme Court of British Columbia under Section 164 of the *Strata Property Act*.

26 I adopt the analysis of Dhillon, PCJ. in the David case and agree with Chen, PCJ. in the Valana case that the analysis remains valid following the introduction of the *Strata Property Act*. Thus not all disputes between unit owners and their strata corporation must be heard in the Supreme Court of British Columbia. It depends upon the nature of the unit owner's claim and whether it falls within the scope of Section 164 - 165 of the *Strata Property Act*. In the David case it was held that claims regarding misuse of corporate funds and claims as to irregularities of corporate governance properly fall to be decided in the Supreme Court.

27 The scope of Section 164 has been described using different language in the cases summarized above. I have already referred to the analysis of Dhillon, PCJ in the David case. In Clappa, the Court referred to a dispute involving the strata corporation's governance of the strata properties. In the Valana case the Court referred to actions that affect one's rights as a member of the strata corporation. In Matthews, the Court referred to seeking an order requiring the strata corporation to follow its bylaws. In Frechette, the Court referred to "significantly unfair actions", "oppressive conduct" or simply "a failure in governance".

28 With these guidelines from the existing case law, it is now necessary to analyze the true nature of Mr. Armanowski's claims. In my view these claims may be summarized as follows:

- a. Mr. Armanowski alleges that the strata corporation paid RDH when RDH did not provide any services (see Claimant's Trial Statement, paragraphs 2 and 6);
- b. Mr. Armanowski alleges that the strata corporation entered into a contract with RDH and paid RDH in circumstances in which RDH's services were never required;
- c. Mr. Armanowski alleges that the strata corporation paid RDH when it was not required to do so because there was no binding contract between the strata corporation and RDH because the proposal accepted on behalf of the strata corporation by Mr. Bourke was possibly executed without the knowledge or authority of the strata corporation.

29 All of these allegations involve issues of corporate governance. If the strata corporation paid for services never provided, there would be a misuse of the strata corporation's special levy funds and potential incompetent oversight. If the strata corporation paid for services that were duplicative of those provided by RDH in 2006 and therefore wholly unnecessary, issues of corporate oversight and competence would again arise. If the strata corporation paid RDH for services that it was not

contractually obligated to pay, because no enforceable contract existed, whilst RDH might have a claim for services provided on a quantum merit basis, there would still arise issues of corporate oversight and competence on the part of the strata council. It would also be significantly unfair to owners if the monies raised by the special levy were "wasted" in the manner alleged by Mr. Armanowski.

30 I have previously made reference to Division 4 of the *Strata Property Act* dealing with special levies. I note that Section 108(5) provides that if money collected by means of a special levy exceeds the amount required, or for any other reason is not fully used for the purpose set out in the resolution, the strata corporation "must" pay to each owner of a strata lot the portion of the unused amount of the special levy that is proportional to the contribution made to the special levy in respect of that strata lot. This section does not apply if no owner is entitled to receive more than \$100.00 in which case the excess may be deposited into the strata corporation's contingency fund. Although Mr. Armanowski's claim and Trial Statement make no reference to Section 108(5) it may be that this is another way of characterizing the claim described in sub-paragraph (a) above.

31 In any event, all of these alternative claims in my view do involve challenging the decisions of the strata council to retain the services of RDH and pay the 2008 accounts of RDH. These are governance matters. Accordingly, in my view, these claims must be brought in the Supreme Court of British Columbia.

32 I reiterate that in reaching this conclusion I make no comment on whether any of Mr. Armanowski's claims have any merit.

33 Accordingly, the Claimant's claim is dismissed with costs of \$26.00 payable to the Defendant if demanded.

D.W. YULE J.P.

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