

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan KAS 3162 v.
Staerkle,*
2017 BCSC 392

Date: 20170309
Docket: S109673
Registry: Kelowna

Between:

The Owners, Strata Plan KAS 3162

Plaintiff

And

Neil Staerkle and Chantal Staerkle

Defendants

Before: Master S. Wilson

Reasons for Judgment

Counsel for the Plaintiff:

J.A. Burgess

Counsel for the Defendants:

S. Todesco

Place and Date of Trial/Hearing:

Kelowna, B.C.
February 22, 2017

Place and Date of Judgment:

Kelowna, B.C.
March 9, 2017

[1] A strata corporation is entitled to sue one or more of the owners in the Supreme Court provided the suit has been authorized by a resolution passed by a three-quarter vote at an annual general meeting or a special general meeting called for the purpose. By contrast, a claim may be made in the Provincial Court under the *Small Claims Act* without such a resolution, provided the strata corporation has passed a bylaw that dispenses with the need for authorization. The issue on this application is whether authorization by way of a three-quarter vote is required to continue with an action in the Supreme Court of British Columbia where the claim had been commenced in the Provincial Court but was subsequently transferred.

Background

[2] The defendants own property in the High Pointe development located in Kelowna, which was subject to a statutory building scheme at the time of their purchase in 2008. In 2011, the plaintiff Strata Corporation was formed and it adopted bylaws which included restrictions on construction on the same terms as the statutory building scheme.

[3] After putting the defendants on notice that their construction was contrary to the bylaws, the Strata Corporation started to issue fines for non-compliance in June 2012. The defendants do not agree that they have breached the bylaws and take issue with the fines.

[4] The Strata Corporation commenced these proceedings in the Provincial Court on February 23, 2013. A settlement conference was conducted and the matter was first set for trial in March 2014. The trial was adjourned by consent and a new trial date scheduled for May 5, 2014. The defendants successfully applied to adjourn the trial in order to allow for third party proceedings to be commenced and a second settlement conference was held. A new trial date was set for January 7, 2015. This trial date was also adjourned by consent and the third party proceeding was discontinued.

[5] By the fall of 2015, the fines had accrued to the point where they exceeded the \$25,000 small claims limit. The Strata Corporation applied to transfer the

proceeding to Supreme Court, which application was not opposed. The Provincial Court ordered the transfer of this proceeding to Supreme Court on December 9, 2015.

[6] The question of whether a resolution passed by three-quarters of the members of the Strata Corporation was required in order for this proceeding to continue in the Supreme Court was first raised by the defendants approximately 11 months ago, roughly three months after the proceeding was transferred to Supreme Court. The Strata Corporation denies that authorization from the owners is required and has since filed an application to determine the case by way of summary trial.

[7] The defendants have brought this application prior to the Strata Corporation's summary trial application and seeks the following relief:

1. A declaration that the Plaintiff is in breach of section 171(2) of the *Strata Property Act*, SBC 1998, c. 43...;
2. A declaration that bylaw 32.6 of the Strata Corporation's bylaws ... is invalid and of no force and effect;
3. An order adjourning the Summary Trial application unless and until the Plaintiff receives % vote resolution by ownership in favour of proceeding proceed with the action against the Defendants; and
4. The Defendants received their costs of this application in any event of the cause.

[8] The first item was not pursued. As for the second, as the application proceeded it became apparent that the parties did not disagree with regard to the bylaw. The defendants say the application to have the bylaw declared invalid was brought in case the Strata Corporation may have intended to argue that its bylaw would authorize commencement of proceedings in Supreme Court without authorization from the owners; however, the Strata Corporation did not take that position and agrees, quite properly, that even if the bylaw did purport to grant the Strata Corporation that authority, it would be invalid.

[9] The Strata Corporation did not take issue with the defendants' right to bring this application and therefore the sole matter for me to determine is whether the summary trial ought to be adjourned in order for the Strata Corporation to obtain authorization from the owners to continue with this litigation.

[10] For the reasons set out below, I conclude that such approval is required and therefore the Strata Corporation's summary trial application is adjourned generally in order to afford it the opportunity to obtain the requisite approval.

Legislative Framework

[11] Section 171 of the *Strata Property Act*, S.B.C. 1998, c. 43 ["SPA"] sets out the requirements for a strata corporation with regard to the commencement of legal proceedings:

- 171** (1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
- (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
 - (b) the common property or common assets;
 - (c) the use or enjoyment of a strata lot;
 - (d) money owing, including money owing as a fine, under this Act, the bylaws or the rules.
- (2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.
- (3) For the purposes of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter.
- (4) The authorization referred to in subsection (2) is not required for a proceeding under the *Small Claims Act* against an owner or other person to collect money owing to the strata corporation, including money owing as a fine, if the strata corporation has passed a bylaw dispensing with the need for authorization, and the terms and conditions of that bylaw are met.
- (5) All owners, except any being sued, must contribute to the expense of suing under this section.
- (6) A strata lot's share of the total contribution to the expense of suing is calculated in accordance with section 99 (2) or 100 (1) except that
- (a) an owner who is being sued is not required to contribute, and
 - (b) the unit entitlement of a strata lot owned by an owner who is being sued is not used in the calculations.

[12] The legislature subsequently enacted s. 173.1 of the SPA. The portion that is relevant to this application is set out below:

173.1 (1) The failure of a strata corporation to obtain an authorization required under section 171 (2) or 172 (1) (b) or the written consent of an owner under section 172 (1) (a) in relation to a suit or an arbitration

(a) does not affect the strata corporation's capacity to commence a suit or arbitration that is otherwise undertaken in accordance with this Act,

(b) does not invalidate a suit or arbitration that is otherwise undertaken in accordance with this Act, and

(c) does not, in respect of a suit or arbitration commenced or continued by the strata corporation that is otherwise undertaken in accordance with this Act, constitute

(i) a defence to that suit or arbitration, or

(ii) an objection to the capacity of the strata corporation to commence or continue that suit or arbitration.

[13] The Court of Appeal explained in *The Owners, Strata Plan LMS 2940 v. Squamish Whistler Express and Freight*, 2010 BCCA 74 that s. 173.1 of the SPA was enacted to address an issue that arose as a result of the court's decision in *Owners, Strata Plan LMS 888 v. Coquitlam (City)*, 2003 BCSC 941 where the court held that the failure to obtain the requisite authorization rendered the strata corporation's claim a nullity.

[14] In *Squamish Whistler*, the Court of Appeal went on to conclude that although an action commenced without the required authority is no longer a nullity, the need for authorization as provided under s. 172 still remains. At para. 36, Madam Justice Smith held the following:

[36] ... The trial judge was also correct in finding that, regardless of its retroactive effect in this case, s. 173.1 does not remove the statutory impediment presented by ss. 171 and 172. Although an unauthorized action commenced by a strata corporation action is no longer void by operation of s. 173.1, it must still obtain a special resolution from the requisite number of owners before it is authorized to bring an action on their behalf. If the intention of the Legislature was to make a special resolution in these circumstances optional, or to remove the consequences of a strata corporation bringing an unauthorized action, then it would have been sufficient to simply repeal ss. 171 and 172 instead of adding s. 173.1.

[15] The Court of Appeal concluded at para. 38 that the effect of s. 173.1 was to render suits commenced without authorization voidable as opposed to void.

Positions of the Parties

[16] The Strata Corporation says that no authorization was required prior to the commencement of this proceeding because its bylaws authorize commencement of proceedings in small claims court without the need for authorization from the owners as contemplated under section 171(4) of the *SPA*. It says there is nothing in the legislation that requires authorization to continue with an action in Supreme Court upon transfer of an action that was validly commenced in Provincial Court.

[17] The Strata Corporation also says that the defendants ought not to be able to rely on this argument now, given that they did not take that position at the transfer application in Provincial Court. It does not, however, argue that the defendants do not have standing to raise the argument in bringing this application.

[18] The Strata Corporation questions whether I have the jurisdiction to make the order sought, as it could have the effect of being a final order should the owners not authorize the litigation.

[19] The Strata Corporation says that there may be a gap in the legislation, but that I ought not to read into the legislation something that is not there and should therefore not attempt to fill the legislative gap. It says the only consideration under s.171(2) is whether authorization was needed at the time the proceeding was commenced and points out that this proceeding was so authorized as it was filed in Provincial Court. It refers me to R. 19-1(2) of the *Supreme Court Civil Rules* in support of the position that this is not a new proceeding, but rather is the same proceeding in a different forum. Rule 19-1(2) states the following:

(2) If a proceeding has been started in the Provincial Court and a judge of that court orders that the proceeding be transferred to the Supreme Court, these *Supreme Court Civil Rules* apply to the proceeding as if it had been started in the Supreme Court.

[20] The defendants say that the purpose of requiring the authorization is to ensure that the owners do not find themselves embroiled in litigation that they do not support. They say that the exception for small claims matters is reasonable, because costs are not generally awarded and the only matters that could be decided are

financial matters. They contrast this with Supreme Court proceedings which, in addition to the possibility of adverse costs consequences, can include forced sales, injunctive relief, and other relief *in rem*.

[21] The defendants say that the significance of R. 19-1(2) is that the transferred proceeding is treated as if it had been a Supreme Court proceeding from its commencement, which includes costs consequences should the action fail. The defendants also point out the possible mischief that could result if a strata corporation could commence a proceeding in small claims court and apply to transfer it to Supreme Court as a method of circumventing the need for authorization from the owners.

[22] The defendants' position is that the Strata Corporation's application for summary trial should be adjourned until such time as this action has been authorized by a three-quarter vote of the Strata Corporation.

Preliminary Matter - Jurisdiction

[23] The Strata Corporation questions whether the order sought by the defendants to adjourn its summary trial application pending approval by a three-quarter vote of the owners constitutes a final order. It acknowledges that an adjournment of an application does not finally determine the rights and obligations of the parties, but says that the effect of an order adjourning the summary trial application until this claim has been authorized by the owners may have the effect of a final order if the action is not so authorized.

[24] The distinction between an interlocutory and final order was stated as follows in a decision of Lord Alversone C.J. in *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547 (C.A.) where he said at pp. 548-49:

It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

[25] This distinction was adopted by Mr. Justice Donald in *Burlington Northern Railroad Co. v. Canadian National Railway Co.* (1994), 10 B.C.L.R. (3d) 302 (C.A.).

[26] Any interlocutory order made by a master may serve as a basis for the subsequent disposition of a claim, depending upon subsequent events. For example, masters routinely make orders relating to examinations for discovery, production of documents, and other similar matters that could, if not complied with, result in the striking of the claim or defence as the case may be. Similarly, a master can order a plaintiff corporation to post security for costs, the result of which may be that the claim is dismissed if security is not posted.

[27] The fact that an interlocutory order could, depending upon various contingencies, form a foundation for a final order does not change the character of the initial order. The order sought to adjourn the Strata Corporation's application for a summary trial is an interlocutory one, as it does not finally dispose of the rights of the parties in this case and is one that I have the jurisdiction to make.

Discussion

[28] The defendants agree that the Strata Corporation had the authority to commence this proceeding in Provincial Court, because it has enacted a bylaw as contemplated in s. 171(4) of the *SPA*.

[29] Similarly, the Strata Corporation agrees that a resolution would have been required to authorize the commencement of this action had it been filed in the Supreme Court at the outset.

[30] The question I must decide is whether a resolution passed by three-quarters of the owners of the Strata Corporation is required in order for the Strata Corporation to continue this proceeding as contemplated in s. 171(2) of the *SPA*.

[31] The Strata Corporation says that this proceeding is the same proceeding that was commenced in Provincial Court and that since no authority from the owners was required to commence it as contemplated in s. 171(2), no such obligation to continue the claim should be inferred upon transfer to the Supreme Court in the absence of a

statutory requirement. The Strata Corporation refers to *Vandokkumberg v. Meyer*, 2006 BCCA 423 at para. 12, which cites with approval the following from E.A. Driedger in *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983):

[i]n reading a statute words should not be added or deleted and the reader should not try to fill in any gaps he thinks he sees". At 104, he cautions against "amend[ing] a statute to make it say something it does not say, or to make it say what is conjectured the legislature could have said or would have said if a particular situation had been before it".

[32] The court addressed the legislative purpose of s. 171(2) of the *SPA* when considering the authority of a strata corporation to engage in litigation in *Dockside Brewing Co. Ltd. et al. v. The Owners, Strata Plan LMS 3837 et al.*, 2005 BCSC 1209, a decision of Mr. Justice E.R.A. Edwards.

[33] In *Dockside Brewing*, the underlying dispute was between two factions of strata lot owners in a hotel. One group was able to secure a plurality on the strata council but could not obtain sufficient support to commence legal proceedings. The group in control of the strata corporation attempted to circumvent the requirements of s. 171(2) of the *SPA* by prompting others to sue the strata corporation on the basis that although a resolution passed by a three-quarter vote is required to commence proceedings, no such resolution is required to defend proceedings. The group that had not controlled the strata council sought a declaration that the conduct of the strata council had been significantly unfair because they had engaged in legal proceedings and paid legal costs out of operating funds without the requisite three-quarter resolution, and they sought to recover on behalf of the strata corporation from the strata council members individually the legal fees paid in furtherance of the unauthorized litigation.

[34] The court addressed the issue of the unauthorized litigation at paras. 73-75:

[73] Section 171(2) of the *SPA* indicates the Legislature determined that initiation of only such litigation as is approved by a resolution of 3/4 of the owners is in the best interests of the Strata Corporation. Without that measure of support the expense, including the potential exposure to costs if the litigation is unsuccessful, may be presumed to outweigh the benefits to the Strata Corporation. This proved to be so in this case where there was considerable expense and no benefit.

[74] Whether the Strata Corporation would have benefited from having the leases set aside is not an issue the Court need decide. More than one quarter of the owners opposed the litigation to challenge the leases and those owners had the right under s. 171(2) of the *SPA* to prevent the Strata Corporation from becoming involved in such litigation. The Respondent Strata Council Members, on behalf of the LSOG, deliberately set out to deprive the minority owners of that statutory right.

[75] The Respondent Strata Council Members attempted to circumvent s. 171(2) of the *SPA* by purporting to terminate the leases with a view to prompting Sunbelt to sue the Strata Corporation. When that failed, they instigated the Betty Ang Petition against the Strata Corporation and initially instructed counsel for the Strata Corporation to support the case the LSOG brought against it.

[35] In the result, Justice E.R.A. Edwards made the declaration sought as to the conduct of the strata council and found those members of the strata council jointly and severally liable for all of the legal costs incurred by the strata corporation.

[36] In coming to the conclusion that the group that controlled the strata council had acted in bad faith, the court considered the legislative purpose of s. 171(2) of the *SPA* and concluded that a three-quarter vote had been required for the underlying litigation, even though there was no specific requirement in the *SPA* for authorization to defend a claim. While the facts of this case are different as there is no allegation of bad faith, *Dockside Brewing* provides clear authority for the Court to consider the legislative purpose of s. 171(2) of the *SPA* in determining whether a three-quarter vote is required, despite there being no clear statutory requirement on a narrow reading of the *SPA*.

[37] The legislature has limited the ability of a strata council to bind a strata corporation by requiring that certain decisions require approval by resolution passed by the owners. The provisions of the *SPA* that require owner authorization restrict the ability of the strata council to bind the strata corporation and give the owners the opportunity to participate in those decisions deemed significant. Some matters require only a simple majority, while others require a unanimous vote. The requirement of a three-quarter vote in order to commence legal proceedings in the Supreme Court is one of about 40 circumstances in which a three-quarter vote is

required, according to the *British Columbia Strata Property Practice Manual* (Vancouver: Continuing Legal Education Society of British Columbia, March 2016).

[38] Rule 19-1(2) of the *Supreme Court Civil Rules* apply to this claim as if it had been commenced in Supreme Court, which would include the rules pertaining to costs, one of the concerns identified by Justice E.R.A. Edwards in *Dockside Brewing Co. Ltd.* at para. 73.

[39] Section 166 of the *SPA* provides that a judgment against the strata corporation is a judgment against all the owners and that each owner is liable for the judgment based upon a calculation of each owner's proportionate share. The ability of a strata council to expose the owners to the risk of a judgment for costs of a Supreme Court proceeding without their authorization is the sort of concern that s. 171(2) of the *SPA* was intended to prevent.

[40] I see no difference in principle between litigation that was precipitated by the strata council in which the strata corporation was a defendant as in *Dockside Brewing* and the transfer to Supreme Court of a proceeding commenced in Provincial Court as here, and therefore the Strata Corporation requires authorization from the owners to continue this claim.

[41] *Dockside Brewing* is also a reminder that the members of the strata council have an obligation to serve the strata corporation honestly and in good faith. If they fail to do so, they could be exposed to personal liability. In *Squamish Whistler*, Court of Appeal Justice D. Smith held the following at para. 39:

[39] The contravention of ss. 171 and 172 could also have consequences for strata council members, notwithstanding the effect of s. 173.1. For example, s. 31 of the *Act* requires council members, when exercising the powers and performing the duties of the strata corporation, to act honestly and in good faith with a view to the best interests of the strata corporation, and with the care, diligence, and skill of a reasonably prudent person in comparable circumstances. It is not likely that a reasonably prudent person (or strata corporation) would bring an action in contravention of the *Act*.

I assume that the members of the strata council would not want to act contrary to the legislation or risk personal liability.

[42] The final matter to be addressed is whether the defendants are precluded from raising the requirement for authorization because they took no position in that regard at the application to transfer proceedings to Supreme Court. No argument in the nature of estoppel can arise on the facts here. Section 171(2) of the *SPA* is intended to provide some measure of protection for the owners and is not therefore a defence for the defendants to waive.

[43] Furthermore, a strata corporation's authority to make or continue a claim is the exclusive concern of the strata corporation and it must be presumed that the Strata Corporation considered its authority in this case prior to making the transfer application in the Provincial Court.

[44] The application to adjourn the summary trial unless and until the Strata Corporation is authorized to continue with this litigation by a three-quarter vote of the owners is granted.

“Master S. Wilson”