COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd.,*** 2008 BCCA 509

Date: 20081211
Docket: CA035955; CA035956

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Docket: CA035956

Between:

The Owners, Strata Plan LMS 1564

Respondent
(Plaintiff)

And

Odyssey Tower Properties Ltd.

Appellant
(Defendant)

- and -

Docket: CA035955

Between:

The Owners, Strata Plan LMS 1564

Respondent
(Plaintiff)

And

Lawrence Fisher also known as Larry Fisher

Appellant
(Defendant)

Before: The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

D.W. Roberts, Q.C. R. Bajer	Counsel for the Appellants
P.G. Foy, Q.C. D.L. Miachika	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia October 23, 2008
Place and Date of Judgment:	Vancouver, British Columbia December 11, 2008

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] This appeal is from an order refusing to strike portions of statements of claim under R. 19(24) and R. 18(6) of the *Rules of Court*. The reasons of the chambers judge are indexed at 2008 BCSC 316.

[2] The plaintiff/respondent The Owners, Strata Plan LMS 1564 (the "Strata Corporation") is the strata corporation for a 20-storey high rise residential building with 109 strata lots (the "Phase I Tower"). The appellant Odyssey Tower Properties Ltd. ("Odyssey") is the developer of the project. The appellant Lawrence Fisher is a director of Odyssey. The development was planned as a two-phase development but Odyssey eventually elected not to proceed with Phase II after several extensions of its right of election. Phase II was planned as a second tower with 74 strata lots on an adjacent property held by Odyssey.

[3] The statements of claim allege faulty design and construction of the Phase I Tower resulting in water leaks in the building envelope that have required substantial repairs. Those claims advanced against Odyssey and other defendants are not in issue on this appeal. The strike motion is aimed at other portions of the statements of claim relating to Phase I and Phase II that involve only Odyssey and Mr. Fisher: the other defendants take no position on the motion and they are not represented on the appeal.

[4] In the impugned paragraphs, the Strata Corporation advances claims on behalf of strata lot owners that disclosure statements issued by Odyssey contained material misrepresentations. These include failure to disclose Phase I Tower design

and construction deficiencies and defects. The paragraphs in issue also allege misrepresentations with respect to Phase II, and that consequently the owners have lost the benefit of the contribution to common expenses and facility costs that they reasonably anticipated from Phase II owners as well as the benefit of additional common facilities to have been constructed as part of Phase II. The Strata Corporation on behalf of the owners claims damages for misrepresentation and breach of the disclosure statement. It also asks for a remedial constructive trust over the Phase II lands and a certificate of pending litigation against the title to the Phase II lands.

[5] The chambers judge concluded that the impugned claims raised triable issues that were not bound to fail. He therefore declined to strike the pleadings under R. 19(24) and R. 18(6). An alternative submission by the appellants under R. 18A was not pursued.

[6] The test on a motion to strike is stringent. The issue under R. 19(24) is whether, assuming all the facts alleged can be proved, it is plain and obvious that the statement of claim, as it exists or may be amended, is bound to fail: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 15 quoting *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. Similarly under R. 18(6) the applicant must satisfy the court that the claims are bound to fail: *Serup v. School District No. 57* (1989), 54 B.C.L.R. (2d) 258 (C.A.) at 259. This court also recognizes discretion in the judge at first instance in the application of the test: *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489, 58 B.C.L.R. (4th) 197 at para 23.

Standing

[7] The appellants contend that claims for material misrepresentations in disclosure statements and related to Phase I and Phase II exceed the powers of a strata corporation to sue on behalf of owners. They argue that the *Strata Property Act*, S.B.C. 1998, c. 43 is a complete code of the powers of a strata corporation and the relevant provision, s. 171(1), is controlling and does not include the requisite authority. It reads:

> 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.

Section 172 extends the authority of a strata corporation to sue on behalf of some owners "about matters only affecting their strata lots" but it does not otherwise expand the subject matter of an authorized suit.

[8] The appellants argue that the allegations of misrepresentation in the disclosure statements do not affect the Phase I common property or strata lots and therefore are beyond any of the powers of the Strata Corporation under s. 171(1) and s. 172. They note that the procedural provisions of s. 173.1(1) apply to suits "otherwise undertaken in accordance with this Act" reinforcing the limitation of

powers to those set out in s. 171(1) and s. 172. The appellants rely on the dictionary definition of "affect" in the *Concise Oxford Dictionary*, 8th ed., in support of their submission that claims involving the financial or economic interests of owners do not affect the common property, common assets or the use or enjoyment of strata lots. The dictionary definition of "affect" is to "produce an effect on".

[9] The *Strata Property Act* provisions replaced s. 15(7) of the *Condominium Act*, R.S.B.C. 1996, c. 64 that limited a strata corporation's capacity to sue to matters affecting the common property and facilities or its other assets. In *Strata Plan LMS 1328 v. Marco Polo Properties*, 2000 BCSC 776, 17 C.B.R. (4th) 149 at para. 44, Holmes J. observed that the wider and more general capacity to sue in the *Strata Property Act* stands in stark contrast to the limited and specific capacity of the predecessor statute. The *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8 directs that the new provisions are to be given "such fair, large and liberal construction and interpretation as best ensures the attainment" of the objects of the Act.

[10] The chambers judge relied on *Strata Plan LMS 1463 v. Krahn Bros. Construction Ltd.,* 2003 BCSC 903, 24 C.L.R. (3d) 170, where Bennett J. upheld the amendment of a statement of claim in a "leaky condo" case to include misrepresentation claims under the *Real Estate Act* by a strata corporation on behalf of individual owners. The appellants contend that the issue there involved the ability of the strata corporation to cure a procedural irregularity and the broader issue of standing was not raised.

[11] The appellants also contend that claims for damages for material misrepresentations in disclosure statements pursuant to s. 59(1) of the *Real Estate Act*, R.S.B.C. 1979, c. 256 and s. 22 of the *Real Estate Marketing Act*, S.B.C. 2004, c. 41 are restricted to original owners of strata lots and do not extend to subsequent purchasers of those lots: *Grenoble v. 6853477 Holdings Ltd.* (1992), 78 B.C.L.R. (2d) 166 (C.A.) at para 20. The statements of claim do not distinguish between remaining original owners and subsequent purchasers.

[12] The issue before us is whether the chambers judge erred in concluding that there is at least an arguable case that the respondent has standing to bring the action on behalf of the owners. I am not persuaded that there was any error by the chambers judge in reaching that conclusion. It is at least arguable that the financial interests of owners in shared expenses and their benefit from additional common facilities affects their use and enjoyment of their strata lots. I think that the standing of the strata corporation to bring claims for disclosure statement misrepresentation on behalf of owners is also arguable.

Phase II Lands Constructive Trust

[13] The Strata Corporation extends its claims based on misrepresentation beyond damages to include a constructive trust interest in the Phase II lands supported by a certificate of pending litigation against title. The appellants contend that there is no foundation in law for a claim against the Phase II lands and any claim is contrary to the purposes of s. 235 of the *Strata Property Act*. The appellants submit that even if the owners' damages claims for misrepresentation can be

pursued by the Strata Corporation there is no foundation for extending the claims to include a constructive trust remedy against the Phase II lands. They emphasize that the disclosure statements expressly stated that Odyssey had a right of election whether to proceed with Phase II.

[14] Part 13 of the *Strata Property Act* addresses phased strata plans and, under s. 232, provides for extensions of time to proceed with a subsequent phase of a planned development. Odyssey was given several extensions of the time for election under that section with court approval and eventually elected not to proceed. That election engaged s. 235 of the *Act*, which reads:

> 235(1) An owner developer who elects not to proceed with the next phase must, before the time set in the Phased Strata Plan Declaration for the election to proceed,
>
> (a) give written notice of the election not to proceed to the strata corporation and the approving officer, and
>
> (b) file with the registrar a notice of the election not to proceed, together with a reference plan, in accordance with section 100 (1) (a) of the *Land Title Act*, of the remainder parcel.
>
> (2) On receipt of the notice of the election not to proceed, the registrar must remove the Phased Strata Plan Declaration notation from the title to the strata lots and from the title to the remainder parcel.
>
> (3) Unless otherwise agreed between the owner developer and the strata corporation, if an owner developer elects not to proceed, the Supreme Court may order, on application of the owner developer or the strata corporation made within 2 years of the receipt of notice under subsection (1) (a), that the owner developer
>
> (a) contribute to the expenses of the strata corporation that are attributable to the common facilities as if the owner developer had elected to proceed, and

> (b) pay money, post a bond, provide a letter of credit or provide other security for the owner developer's share of the expenses of the strata corporation under paragraph (a).
>
> (4) Subsection (3) applies only if
>
> (a) common facilities have been constructed in the existing phases, or
>
> (b) the strata corporation has become contractually obligated to contribute toward the operating costs of common facilities on a separate parcel.
>
> (5) On application by the strata corporation, the Supreme Court may determine whether the owner developer's election not to proceed is unfair to the strata corporation.
>
> (6) If the court determines that the election is unfair, the court may make one or both of the following orders:
>
> (a) that the owner developer complete whatever common facilities the court considers equitable;
>
> (b) that some or all of the security provided for the common facilities be paid as provided by the court.
>
> (7) An agreement referred to in subsection (3) must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, and for the purposes of that 3/4 vote, the owner developer is not an eligible voter.

[15] The Strata Corporation has applied for a remedy under this provision but it is not presently being actively pursued.

[16] The appellants contend that neither the Strata Corporation nor the owners have any proprietary interest in the Phase II lands following the election not to proceed with the Phase II development. The Strata Corporation's remedy is under s. 235 for loss of benefits resulting from that election. The appellants contend that the s. 235 remedy displaces any other remedies that might otherwise be applicable.

Alternatively, if the s. 235 remedy is not exclusive, they say that any further remedy would sound in damages only and there is no foundation for a claim of constructive trust against the Phase II lands.

[17] The chambers judge summarized the argument to be advanced by the Strata Corporation in support of a constructive trust as along these lines. The owners bought their units on the basis of disclosure that the Phase I development would be followed by a second phase conferring significant benefits to them. Odyssey breached its obligations to them by failing to disclose that it knew that the Phase I Tower had leakage problems. Further, Odyssey's negligence impaired the owners' investments and the concealment of the facts impaired their ability to minimize their eventual losses.

[18] The submissions before the chambers judge also included the allegation that Odyssey failed to disclose when it sought extensions that it had transferred the Phase II lands to another company by an unregistered instrument. However, it was apparently not drawn to the chambers judge's attention that there is no reference to this allegation in the statement of claim.

[19] The chambers judge quoted extensively from the reasons of McLachlin J. (now C.J.C.) in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at paras. 34, 36 and 43, in support of the proposition that constructive trusts are a flexible remedy available for wrongful acts like fraud and breach of duty of loyalty, as well as for unjust enrichment and corresponding deprivation, all "under the broad umbrella of good conscience". The chambers judge noted that the litigation was at an early stage. He

concluded that it was premature to inquire into the merits of a constructive trust claim beyond deciding that the facts as pleaded were capable of supporting an argument at trial that a constructive trust is an appropriate remedy.

[20] The appellants rely on the four conditions outlined by McLachlin J. in *Soulos*, at para. 45, which "generally should be satisfied" for a constructive trust remedy. They were stated as follows:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

The appellants contend that the pleadings fail to satisfy any of these four conditions. The right of election was clearly disclosed in every disclosure statement and Odyssey followed the correct statutory procedures in obtaining extensions and finally giving notice of election not to proceed with Phase II. Odyssey had no equitable obligations to the owners. It was not their agent, and there was no legitimate reason to extend any remedy beyond the terms of s. 235 or, at most, beyond damages.

[21] The argument for the owners appears to be that Odyssey may have followed the statutory formalities but it concealed underlying facts to the prejudice of the owners that can only be effectively redressed by imposing a constructive trust on the lands from which the owners expected to derive a benefit. The conduct of Odyssey as determined at trial may bear on the question of whether it has obtained a benefit connected to the Phase II lands through deception of the owners that will support a constructive trust in good conscience.

[22] The difficulty for the owners' submission is that the material facts as presently pleaded do not support a claim arising from concealed transfer of the Phase II lands, in circumstances that essentially would be characterized as equitable fraud. Such an allegation requires a specific pleading. At present there is no reference to a concealed transfer in the statement of claim.

[23] Apart from the concealed transfer matter which has not been pleaded, I do not think that the other claims for negligence or misrepresentation of the Phase II development can support a constructive trust remedy. Those claims cannot meet the four conditions set out by McLachlin J. in *Soulos.* Accordingly, I would strike paragraphs 166 and 167 of the amended statement of claim and subparagraphs 173(d) and 173(e) of the prayer for relief. Subject to further Supreme Court order, I would give the respondent leave to apply in Supreme Court within 60 days to amend the statement of claim to plead further material facts in support of a constructive trust claim against the Phase II lands, leaving it to the judge hearing the application to determine the sufficiency of the proposed amendment to support the claim and renewal of prayers for consequent relief.

[24] In the result I would allow the appeal to the extent of striking paragraphs 166, 167 and 173(d) and (e) of the amended statement of claim, with leave to the respondent to apply to amend as stated above. Otherwise I would dismiss the appeal. In view of the divided success, all parties should bear their own costs of the appeal.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Groberman"