

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clarke v. The Owners, Strata Plan VIS770*,
2009 BCSC 1415

Date: 20091015
Docket: 08-0064
Registry: Victoria

Between:

Peter Clarke, Connie Tisdall and Maria Tippett

Petitioners

And:

The Owners, Strata Plan VIS770

Respondent

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner, Connie Tisdall:

R. A. Fayerman

Counsel for the Respondents:
Ingrid Kaufmann and Mathias Kaufmann

J. J. Hanson

The Respondent, Dr. Chorney:

In Person

Counsel for the Administrator,
Gerry Fanaken:

G. H. Dabbs

Place and Date of Hearing:

Victoria, B.C.
October 2, 2009

Place and Date of Judgment:

Victoria, B.C.
October 15, 2009

[1] By orders dated March 20, 2008 and March 19, 2009, I appointed and then extended the appointment of an administrator for the respondent strata corporation. The current appointment expires on October 20, 2009. Pursuant to s. 174 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "Act"), the administrator applies for orders that:

1. The term of the administrator be extended from October 20, 2009 to March 20, 2010;
2. There be a special levy imposed in the amount of \$20,000 for the purposes of funding the expenses of the administrator;
3. The registered owners and occupants of #8 – 1001 Terrace Avenue, Victoria, British Columbia, V8S 3V2 ("Strata Lot #8"), co-operate with the administrator in taking all steps reasonably necessary to comply with the remedial action requirement dated September 18, 2008, of the City of Victoria (the "remedial action requirement");
4. The registered owners and occupants of Strata Lot #8 permit any duly authorized agent on behalf of the administrator or on behalf of the City of Victoria to inspect the interior of the premises of Strata Lot #8 and to conduct work thereon, between the hours of 9:00 a.m. and 6:00 p.m., for the purposes of effecting the remedial action requirement;
5. The costs thrown away of the application of the administrator dated June 4, 2009, and the costs of the within application be awarded against the registered owners of Strata Lot #8; and
6. Each party and the administrator be at liberty to apply to the court for further directions.

[2] The respondents, the Kaufmanns, are the registered owners of Strata Lot #8.

[3] The Kaufmanns oppose the application as does the respondent, Tisdall, another owner, and three other owners, Clarke, Vilnis and Hannah. In terms of governance, they represent a slight majority but are unable to control the outcome of a 3/4 vote on a special resolution.

[4] There are a total of eight units in the building. The three remaining owners, Chorney, Carey and Whitecross, consent to the orders that the administrator seeks. It is apparent that they constitute a minority of the owners.

[5] In my initial reasons, released March 20, 2008, found at 2008 BCSC 347, I referred to the property as a “troubled building” (at para. 1). That description is still accurate today. Overall, the owners have not made any significant progress in resolving the important issues that the strata corporation faces.

[6] On March 19, 2009, I extended the term of the administrator but not for as long as the administrator asked (19 March 2009, Victoria 08-0064). The extension sought in the present application mirrors the March application but is based on events that have occurred since then.

[7] There are considerable misunderstandings among the owners respecting the powers and duties of the administrator. Below, I discuss the legal issues relating to the appointment, powers and duties of an administrator.

[8] Section 174 of the Act governs the appointment of an administrator. The appointment must be “in the best interests of the strata corporation,” and, as a term of the appointment, the court may relieve the strata corporation of some or all of its powers and duties. In this case, the administrator was “to exercise all powers and perform all duties of the strata council for the corporation such powers and duties to be held to the exclusion of the strata council.”

[9] In *Aviawest Resort Club v. Chevalier Tower Property Inc.*, 2005 BCCA 267, at paras. 34-35, 43 B.C.L.R. (4th) 1, the Court of Appeal set the following limits on the powers of an administrator:

[34] Section 174 of the **Act** authorizes the court to appoint an administrator to exercise the powers and perform the duties of the strata corporation. He can do no more than the strata corporation could do. In particular, if the strata corporation could not act without the authority of a resolution, the administrator is equally restrained. The owners are members of the strata corporation. It is the members who vote on and pass resolutions at meetings of the strata corporation. Allowing the administrator to act without resort to the owners at all, as the impugned orders do, abrogates the rights of the owners to vote on actions requiring their authorization by resolution. The **Act** does not authorize such a result. In my view, Pitfield J. was correct when he concluded in **Toth** that the reasoning in **Cook** remains applicable under the current **Act**.

[35] It may be, as was suggested in **Toth**, that the difficulties facing these parties may be resolved by applications to the court under s. 164 or s. 165 of the **Act**. ...

In *Toth v. The Owners, Strata Plan LMS1564* (19 August 2003), Vancouver L022502 at para. 21 (S.C.), Pitfield J. found that an administrator could not be permitted “to make a decision on the nature and extent of repairs, without the administrator being in any way accountable to the owners or to the court”.

[10] The effect of these decisions is that an administrator must first seek the approval of the strata lot owners whenever the strata corporation could not lawfully act without the authority of a resolution. This prevents the administrator simply imposing a special levy on the individual owners because the strata corporation would not have such a power either.

[11] What happens when the administrator fails to obtain the necessary approval of a resolution? In my initial reasons, I raised but did not decide this question. Opposing counsel did not directly confront the issue on the present application but seemed to suggest that, because their clients and other owners constitute the majority and did not approve the administrator’s recommended course of action, I should discharge the administrator.

[12] That result is not consistent with the outcome in other cases that I have now considered. I observe that counsel did not challenge the court’s power to impose a special levy, on application by an administrator, after the owners have voted down a

special resolution. In my initial reasons, at para. 49, I referred to *Strata Plan 1086 v. Coulter*, 2005 BCSC 1234, where the court exercised that power. There is, I am now aware, considerable additional precedent for the court ordering a special levy even though a special levy ordinarily requires the owners to pass a special resolution.

[13] For example, in *Ranftl v. The Owners, Strata Plan VR 672 and Wennerstrom*, 2007 BCSC 482, 71 B.C.L.R. (4th) 318, the court granted the administrator's application for a special levy to fund building envelope repairs. On a later occasion, the court ordered a special levy to cover the administrator's fees and expenses ((5 October 2007), Vancouver L042930).

[14] In other cases, the court has found the necessary authority in s. 165 of the Act.

Section 165 reads:

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;
- ...
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

Regarding s. 165, Pitfield J. in *Toth* found:

[27] It appears to me that s. 165 is sufficiently broadly worded to permit an interested person be it ... a representative of the strata council, to apply for orders with a view to breaking the impasse which faces the owners in this case.

[28] It appears to me that the application under s. 165 could seek an order that permits or indeed compels the strata corporation to perform a duty it is required to perform. ...

...

[30] The court does not appear to be constrained by paragraph (c) to act on the basis of simple majority or any other majority. The court may

decide, having regard for all of the evidence, that the wishes of the minority should be acted upon. ...

These decisions make it clear that the court has ordered special levies be imposed, either under s. 165 or otherwise, despite the special levy failing to receive 3/4 approval, so that a strata corporation can fulfill its duties.

[15] In *Enefer v. The Owners, Strata Plan LMS 1564*, 2005 BCSC 1866, 46 B.C.L.R. (4th) 384, the court authorized the strata corporation to raise \$850,000 by special levy so it would have enough money for repairs. While there was no question that the repairs were needed, the owners were deadlocked on cost and neither faction could raise the 3/4 majority. Much the same can be said in the present case having regard to the owners' failure to pass any special resolution respecting the expenditure of funds relating to building repairs.

[16] Similarly, in *Browne et al v. the Owners, Strata Plan 582*, 2007 BCSC 206, at paras. 34-36, 70 B.C.L.R. (4th) 102, Ralph J. authorized the strata corporation to issue a special assessment not exceeding the amount specified in the expert's estimate. Any additional amount needed to complete the repairs would require a 3/4 majority approval or another court order. Ralph J. was clear that the order did not limit the strata corporation's authority to determine how it would accomplish its obligation to make the repairs to the building envelope.

[17] I acknowledge that, for the most part, owners made the applications under s. 165 but I conclude that I have the same power to make an order under s. 165 upon the application of an administrator as upon the application of an individual owner. The administrator is an "interested person" within the meaning of the section. I also view the administrator's application for directions as sufficiently broad for me to address the threshold issue under s. 165(a), that is, whether the strata corporation is required to perform a duty under the Act. I observe that the parties argued that issue before me even though there is no reference in the notice of motion to s. 165.

[18] The duty arises here in the following way. A strata corporation has a duty to comply with municipal work orders. Section 83 states:

The strata corporation must comply with a requirement to do work on or to

- (a) common property, or
- (b) land that is a common asset

if the work is required by a notice or order of a public or local authority which is authorized by law to require the work, and the notice or order is given to the strata corporation. [Emphasis added.]

I point out as well that, upon receipt of a notice from the City of Victoria (the “City”), the Kaufmanns, as owners of Strata Lot #8, are also responsible for the required repairs to their strata lot under s. 84. If the Kaufmanns maintain their refusal to comply, the strata corporation may do the required work to unit #8 and charge the Kaufmanns under s. 85.

[19] Finally, I observe that, under s. 173, the court may, on application by the strata corporation:

- (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;
- (b) order an owner, tenant or other person 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).

Accordingly, if the Kaufmanns refuse to permit authorized agents to enter Strata Lot #8 for the remedial work that is required, the court may order them to stop contravening the Act which requires the strata corporation and the owners to comply with a municipal work order. Once again, in my view, the administrator would be bound to bring such applications, as needed, before the court.

[20] It also follows that the power of the court to appoint an administrator under s. 174, to be effective, must include the power to order a special levy to pay the expenses associated with the appointment if the owners fail to approve the required funding. Section 174(4) states that “[t]he remuneration and expenses of the

administrator must be paid by the strata corporation.” [Emphasis added.] Since this a duty of the strata corporation, s. 165 may be triggered if required.

[21] The conclusions in the cases discussed above are sensible. There would be little point in appointing an administrator to deal with a dysfunctional building only to have the administrator paralyzed by the owners’ inability to agree on important issues. The Act provides for a democratic process, but, when it fails, protection for the owners lies in the two-step process that is envisaged. First, the administrator must seek a 3/4 majority whenever a special resolution is required. If, however, the special resolution fails, the second step is for the administrator to apply to the court under s. 165, or otherwise, for orders or directions to ensure that the strata corporation addresses all issues in respect of which it has a duty.

[22] Without the availability of the second step, there would be no effective means to address the continuing dysfunction. The protection for the owners, at the second step, regardless whether they are part of the majority, is to appear on the application to support or oppose the application.

[23] Before turning to the actual application, I wish to address another apparent misunderstanding on the part of at least two owners. The Kaufmanns and Mr. Hannah have refused to pay the special levy that I earlier ordered respecting the expenses of the administrator. I view that default very seriously. As I have pointed out, the strata corporation has a duty to pay the expenses.

[24] Dr. Kaufmann went so far as to write an email stating his willingness to pay the special levy, as well as his delinquent strata fees, “immediately if Mr. Fanaken is removed as an administrator.” This is a thinly veiled threat not to pay if he does not get his way.

[25] I do not want there to be any misunderstanding. The special levy is the result of my express order; all owners, including the Kaufmanns and Mr. Hannah are fully responsible for their proportionate share under the order regardless whether I terminate or extend the appointment of the administrator. As well, all owners are

proportionately responsible under the Act for the expenses that the strata corporation has a duty to pay.

[26] This has another significant implication. Under the by-laws adopted by the strata corporation, these owners are currently ineligible for election to the strata council or to vote at any annual or special general meeting, except in limited circumstances requiring a unanimous vote. In the present circumstances, their assertions about their ability and willingness to participate in effective governance in the interests of the strata corporation ring hollow.

[27] I turn next to the test for renewing the appointment of an administrator. It is essentially the same as the test for the initial appointment set out in *Lum et al. v. The Owners, Strata Plan VR519*, 2001 BCSC 493, in which Harvey J. identified the following factors as relevant, at paras. 11 and 12:

11. ...
 - (a) whether there has been established a demonstrated inability to manage the strata corporation,
 - (b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to the affairs of the strata corporation,
 - (c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,
 - (d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,
 - (e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

In addition, there is always to be considered the problem presented by the costs of involvement of an administrator.

12. I also take into consideration the comments of Huddart, J. in *Cook [v. Strata Plan N-50]*, [1995] B.C.J. No. 2882 (S.C.), *supra*, that the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.

[28] Since the last hearing in March 2009, the administrator attempted, unsuccessfully, at a special general meeting on May 28, 2009, to secure special resolutions requiring approval by 3/4 of the owners, including the following:

1. The approval of a special levy of \$6,000 for the cost of an engineering firm to develop a less costly approach to resolving the building envelope issue in light of the owners' earlier rejection, in February 2009, of a resolution calling for a special levy of \$1,400,000 for building repair and rehabilitation; and
2. The approval of a special levy of \$10,000, except as against the owners of Strata Lot #8, for the cost of initiating legal proceedings against the owners of Strata Lot #8 in relation to the City's remediation order requiring the restoration of Strata Lot #8 to code-compliant condition before September 20, 2009.

As is apparent from the terms of the orders that the administrator seeks, his present focus is on the second issue. The administrator seeks no order respecting the broader building repair issues at this time.

[29] As I stated in my previous reasons, unit #8 extends into common property resulting in non-compliance with existing zoning. The strata corporation has a duty to rectify the situation independent of the Kaufmanns' obligation. The matter is further complicated in that a firewall was breached in the process of extending the unit. This gives rise to a serious safety issue that the strata corporation also has a duty to address. In addition, the strata corporation's insurance coverage may be at risk. As a result, the strata corporation, and now, the administrator on its behalf, has a duty to address these issues. Ignoring them is not an option.

[30] The administrator is not only obligated to address these issues but also required, as a court-appointed officer, to report to the court and seek directions if he is unable to carry out his duties. The majority of the owners complained that the administrator's expenses are too high and also criticize him for acting against their

wishes in applying to the court. These complaints and criticisms are without merit. The administrator complied with his duties in taking the steps that he has. There is no doubt that the cost of the administration, including the involvement of counsel for the administrator, has increased, but that is largely the result of the majority owners failing to accept the implications of the court appointment of an administrator.

[31] Returning to the problems respecting Strata Lot #8, the extension of the unit into common property has led the City to maintain, with apparent justification, that the strata corporation and all individual owners are responsible for the remediation order to the extent that the order requires work to be done within the common property of the strata corporation. This raises the specter of the strata corporation and the owners incurring additional expenses, directly and indirectly, if the City enforces its remediation order. Those owners in opposition to the present application seem willing to gamble that the City will not enforce its order. I think that is very doubtful.

[32] To this point, the City has not taken action to enforce its remediation order and is awaiting the outcome of the present application. There is little doubt that it will proceed with action, given the nature of the underlying problems, if I do not grant the orders sought.

[33] I do not accept the suggestion by some owners that the administrator is acting as the agent of the City. That contention overlooks the obligation to comply that s. 83 imposes on the strata corporation.

[34] The Kaufmanns continue to cling to the notion that the problems with the City can be resolved by rezoning the building to render their extended suite compliant. This solution requires the approval of each individual owner and the City. Neither approval is achievable.

[35] The Kaufmanns originally pressed for a change in zoning to legitimize the encroachment on common property, but the evidence satisfies me that that has no prospect of going forward. In spite of that, the Kaufmanns appear to have now

persuaded a majority of the owners to join them in resisting all attempts to enforce the City's remedial action requirement.

[36] The Kaufmanns also complain that the City and the administrator have unfairly targeted unit #8 while they ignore known problems with other non-compliant units. It is true that there are also problems associated with illegal enclosures of decks in other units but there is no suggestion that any of those involve common property.

[37] In my view, the administrator is correct in stating that the strata corporation does not have any duty to intervene in those issues at this stage. I also observe that the City has not issued any remedial orders respecting those suites. This may indicate that the City does not consider there to be any safety issue associated with the enclosures.

[38] The majority of the owners say that there is no stalemate justifying the continuing appointment of an administrator. There is no question that the court must respect the statutory scheme for the democratic governance of strata corporations, but it should not ignore the practical limitations of democracy in small buildings such as the present.

[39] In *Ranftl*, there were five owners of a six-unit building. In the present case, there are eight units and owners. In any strata corporation, major repairs or other construction work usually requires 3/4 of the owners to pass a special resolution for the imposition of a special levy on the owners. There is an understandable resistance on the part of individual owners to agree to such large expenditures, but the solution is not to stick one's head in the sand and hope that the problem goes away.

[40] Too often, as was the case here when I appointed Mr. Fanaken, the owners divide into factions that render cooperative communication and decision-making impossible. This is very problematic in small buildings. In *Ranftl*, the court recognized that democracy and majority rule might amount to little more than

abstractions in such circumstances. Given the need for approval by 3/4 of the owners, democracy in small buildings may equal “either paralysis or oppression” (at para. 31). That description is apposite.

[41] If, as the majority of the owners say, they are now in a position to control the outcome of strata council elections, subject to the Kaufmanns and Mr. Hannah first rectifying their defaults, what confidence do I have that they will then act in the best interests of the strata corporation and cause it to perform its duties as they are required to do?

[42] Counsel for the Kaufmanns contends that I must not assume that a new strata council will mismanage the affairs of the strata corporation, but what if the evidence supports, as it does here, that the Kaufmanns consistently resist any steps to resolve the problems associated with their unit? I have no confidence that will change.

[43] It is suggested that Dr. Kaufmann, if elected, would recuse himself from any decision-making respecting Strata Lot #8 but that is the most immediate issue requiring action. Regardless of the make-up of the strata council, any decision-making by the new council aimed at resolving the problems with unit #8, or otherwise, will likely still require a 3/4 vote of the owners. Neither side to the dispute has any prospect of delivering a 3/4 vote as that requires at least six votes to pass. This is, in the continuing climate of distrust, impossible.

[44] More likely, the new strata council will decide not to act and adopt a wait and see attitude. Such inactivity would be a dereliction of duty. It also risks significant unfairness, and perhaps oppression, to the three minority owners who want to address the issue of the remediation of Strata Lot #8 now.

[45] Counsel for the Kaufmanns and for Ms. Tisdall both contend that the minority owners have remedies available under ss. 164 and 165 of the Act to ensure fairness, but s. 165, as I have pointed out, is also available to the administrator. I see no utility in forcing the minority owners to apply for the same remedies under s. 165.

[46] Under the administrator, the strata corporation is prepared to do its duty subject to seeking the court's intervention where necessary. While it would have been preferable for the administrator to also seek an order compelling the strata corporation to perform its duties, s. 165(c) is broad enough to encompass the orders sought by the administrator respecting unit #8 in the present case. Alternatively, s. 173 permits the orders directly against the owners and occupants of the unit.

[47] As Pitfield J. pointed out in *Toth*, the court may decide to grant an order under s. 165 if, having regard to all the evidence, the wishes of the minority should be acted upon. In my view, this is such a case. The minority accepts the recommendations of the administrator and the recommendations are consistent with the strata corporation's duty. The views of the majority, on the other hand, are, unfortunately, incompatible with that duty.

[48] I am persuaded to grant the orders largely as set out in paragraphs 1 to 4 inclusive and 6 of the draft order. I am satisfied that the strata corporation has a duty to fund the expenses of the administrator and to comply with the City's remedial order respecting Strata Lot #8 and the encroachment on common property.

[49] Paragraph 5 of the application relates to delay occasioned entirely at the instance of the Kaufmanns. It would be unfair to saddle the remaining owners with those particular costs. I grant the application against the owners of Strata Lot #8 for the costs thrown away on the adjournment of the June application. I fix those costs, as a lump sum, at \$250 inclusive of any taxes and disbursements.

[50] The administrator also seeks the costs of the contested hearing of the application against the owners of Strata Lot #8 but four other owners contested the application as well. It would be unfair to order that the Kaufmanns are solely responsible for such costs and equally unfair to order costs against the other owners when they had no notice of the claim. In the circumstances, I decline to award any costs apart from the thrown away costs referred to in the paragraph immediately above. This means that the strata corporation will bear the expenses relating to the contested application.

[51] Accordingly, I order that:

1. The term of the administrator be extended from October 20, 2009 to March 20, 2010;
2. There be a special levy imposed in the amount of \$20,000 for the purposes of funding the expenses of the administrator;
3. The registered owners and occupants of #8 – 1001 Terrace Avenue, Victoria, British Columbia, V8S 3V2 (“Strata Lot #8”), co-operate with the administrator in taking all steps reasonably necessary to comply with the remedial action requirement dated September 18, 2008, of the City of Victoria (the “remedial action requirement”);
4. The registered owners and occupants of Strata Lot #8 permit any duly authorized agent on behalf of the administrator or on behalf of the City of Victoria to inspect the interior of the premises of Strata Lot #8 and to conduct work thereon, between the hours of 9:00 a.m. and 6:00 p.m., for the purposes of effecting the remedial action requirement;
5. The lump sum costs of \$250 inclusive of any taxes and disbursements thrown away of the application of the administrator dated June 4, 2009, be awarded against the registered owners of Strata Lot #8;
6. The application against the owners of Strata Lot #8 for the costs of the application otherwise is dismissed; and
7. Each owner and the administrator shall be at liberty to apply to the court for further directions.

“R.W. Metzger, J.”
for The Honourable Mr. Justice Macaulay