IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chan v. Owners, Strata Plan VR-151,* 2010 BCSC 1725

Date: 20101203
Docket: S096280
Registry: Vancouver

Between:

Katherine Ling Chan

Petitioner

And

Owners, Strata Plan VR-151

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Petitioner:	P.P. Dimitrov
Counsel for the Respondent:	R.M. Grist
Place and Date of Trial/Hearing:	Vancouver, B.C. October 18-19, 2010
Place and Date of Judgment:	Vancouver, B.C. December 3, 2010

[1] The petitioner owns a ground floor apartment in a four-storey, 40-unit strata-title building. A cedar tree growing from her outdoor patio is more than 12 metres tall−about the same height as the building. The owners of apartments above her want the tree removed, saying that it deprives them of light and views. The petitioner seeks an order barring the strata corporation from having the tree cut and a declaration that she has been treated unfairly.

[2] The issues before the court on this application are:

a. whether the strata corporation has taken or threatened any actions that are "significantly unfair" to the petitioner within the meaning of s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43 [*Strata Property Act*]; and

b. whether the strata corporation can rely on a recently enacted bylaw to demand that the petitioner's tree be cut back to an extent that will probably kill it.

[3] Whatever others may think of this dispute, it is obviously of considerable importance to those involved. The petitioner and the respondent strata corporation have, between them, filed 15 affidavits totalling more than 500 pages, while their counsel have submitted more than 600 pages of authorities. One cannot help but wonder how many other trees that represents.

Background

[4] The petitioner's building is on Wall Street in east Vancouver−a location where some properties offer panoramic views of Burrard Inlet and the north shore mountains. The strata plan was filed in 1974 and the petitioner bought her suite from a previous owner in 1990. She says one of the reasons she bought it was the presence of the cedar tree, which she says creates privacy and gives her home a "quiet, park-like quality".

[5] The strata plan defines the petitioner's unit as including the outdoor patio to a height level with her indoor ceiling, but the tree had already grown far beyond that

height when she bought the unit. If it were now to be cut back to that level, which is about one quarter of its present height, the unchallenged opinion of an arborist is that the tree would probably die.

[6] The petitioner says that at the time of her purchase, she was assured by the vendor and the realtor that the tree had the benefit of "grandfather protection" and could not be cut without its owner's consent. Under the *Strata Property Act*, all owners in the building are members of a strata corporation, which administers common property through a strata council. If such "grandfather protection" existed, it would have to flow from a decision of the strata council or a decision of the owners at a general meeting. Neither the vendor nor the realtor had authority to make representations binding on the council or the strata corporation.

[7] There is no record of any decision granting the alleged "grandfather protection" before the date of the petitioner's purchase, but neither is there any record of any concern being expressed about the tree before that time. The petitioner also says no concern was expressed in the first 16 years after her purchase, other than occasional requests for modest pruning, to which she always agreed.

[8] In late 2006, the owners of six other suites in the building signed a letter to the strata council demanding that the tree be cut down, saying it violated strata corporation bylaws. Those bylaws at the time included a provision that owners "must not permit trees and plants on their strata lot which endanger property or impede the enjoyment of any other strata lot". The six other owners complained of obstructed light and views in their own suites and expressed concern about possible root penetration into the concrete structure of the underground parking garage.

[9] In a letter dated January 29, 2007, the management company retained by the strata corporation advised the petitioner of the complaint, referred to the bylaw and stated the strata council could impose a fine of $200 for each contravention of the bylaw. The letter asked the petitioner for a response within seven days and asked

her to advise if she wished to deal with the matter in person at a strata council meeting.

[10] The petitioner's lawyer responded with a 13 page letter dated February 5, 2007 which, among other things, demanded that the council inform the complainants that there was no support for their "wild speculative claims" and that they had no legal right to a view. It demanded that a formal "grandfather" clause protecting the tree be enshrined in the bylaws. The letter also protested that two of the people who signed the complaint were strata council members while a third was the spouse of the strata council president. The respondent strata corporation says those council members subsequently recused themselves from council discussions about the tree.

[11] Although the letter from the property manager referred to a possible fine, the strata council did not take any steps to impose one. Instead, it obtained opinions from an engineer and an arborist about a number of trees on the property, including the petitioner's. The arborist concluded that the petitioner's cedar tree was not a hazard to the underground parking garage but could be at risk from winds if it was allowed to grow above the height of the building. He recommended that it be reduced in height by six feet and pruned by three feet on all sides. The engineering report concluded that the roots of the petitioner's tree and others had likely penetrated the waterproofing membrane, causing leaks into the parking garage.

[12] The petitioner had the tree pruned even more than the arborist had recommended and, on June 25, 2007, the property manager confirmed that the strata council was satisfied with that pruning and no fine would be levied. But, three days later, the owners at a strata corporation general meeting approved, by the required 75 percent majority vote, a new bylaw that specifically requires owners of ground floor units to prune trees and other plants so that they do not extend beyond the boundaries of their strata lot.

[13] After that, all was quiet for more than a year, but complaints resumed in August and September, 2008. In October, 2008, the petitioner accused the property manager of conducting "an illegal search" of her property. This consisted of the

property manager and another individual leaning against her fence and looking into her patio.

[14] In November, 2008, the strata council obtained a legal opinion to the effect that the airspace above the petitioner's patio beyond the level of her own interior ceiling formed part of the strata corporation's common property. Therefore, the corporation's solicitors said the petitioner's tree was infringing on common property and the strata corporation had the right to take action to have it trimmed. A copy of the opinion was distributed to owners in March, 2009, after which more complaints were received from the owners of three suites directly above the petitioner's.

[15] At a meeting on August 5, 2009, the strata council instructed the property manager to obtain further legal advice on "a course of action to take the appropriate steps to have the tree trimmed to the property line of the horizontal plane of the ceiling" of the petitioner's suite. The petitioner was not given advance notice that the matter would be discussed at the council meeting, but received a copy of the minutes. This petition was filed on August 29, 2009 and the strata council has taken no further steps in the matter.

"Significant Unfairness"

[16] Section 164 of the *Strata Property Act* reads:

> (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
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> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
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> > (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.
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> (2) For the purposes of subsection (1), the court may
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> > (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
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> > (b) vary a transaction or resolution, and
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> > (c) regulate the conduct of the strata corporation's future affairs.

[17] The duties of strata council members are referred to in s. 31, which reads:

> In exercising the powers and performing the duties of the strata corporation, each council member must
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> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
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> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[18] The words "significantly unfair", as used in s. 164, have been defined to mean conduct that is "oppressive" or "unfairly prejudicial" including conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing or that has been done in bad faith" or is "unjust and inequitable": *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578 at para. 12, aff'd 2003 BCCA 126. A strata council has a duty to act in the interests of all owners, which may sometimes conflict with the interests of a particular owner or group of owners. Therefore, the court will only interfere if the conduct of the strata council results in something more than "mere prejudice or trifling unfairness": *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120 at para. 28. In *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791, Sewell J. said:

> [44] It is important to recognize that section 164 gives the Supreme Court the power to intervene only if there has been a significantly unfair action, threatened action or decision of the Strata Corporation in relation to an owner. In my view this means that for the section to apply some action or decision of the Strata Corporation must be the source of the unfairness complained of.
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> ...
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> [55] ... I repeat that the focus of that section is on the conduct of the Strata Corporation and not on the consequences of the conduct. There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the *SPA* itself.

[19] The petition alleges 21 separate incidents or actions, going back to 2006, that are said to amount to significantly unfair conduct. I do not intend to go through them

one by one. Some of them deal with interactions between the petitioner and individual council members, not actions by the council as such. Where activities of the council are referred to, they do not, in my view, amount to "an action, threatened action or decision" within the meaning of s. 164 of the *Strata Property Act*.

[20] The strata council received a complaint from the petitioner's neighbours, and in due course advised the petitioner of the complaint. It investigated the matter, discussed it at various times and sought legal advice. All of that is consistent with the council's duty to consider and balance the interests of all owners. Section 164 addresses actions that the council and the strata corporation ultimately decide or threaten to take, not the preliminary discussion and investigation that may or may not lead to such an action or decision. The strata corporation has not yet taken any action against the petitioner or demanded that she do anything in relation to her tree.

[21] As matters have unfolded, the only event that can now be called a decision within the meaning of s. 164 is the enactment of the new bylaw in June 2008. The only event that may amount to a threatened action is the decision of the council on August 5, 2009, to seek legal advice about how to go about enforcing that bylaw. Clearly, the council has decided that, subject to whatever legal advice it receives, it wants the tree to be pruned to the horizontal property line. However, council has not yet taken any steps to enforce the bylaw. If and when it decides to take specific steps, it will have to give the petitioner an opportunity to be heard and will have to consider her submissions in good faith. Failure to do so would, at that point, be significantly unfair.

The Strata Corporation Bylaw

[22] The real issue here is whether, as a matter of law, the new strata corporation bylaw can be enforced at all against the petitioner or whether enforcement in the circumstances would be significantly unfair. On June 28, 2007, owners at a general meeting voted to amend the bylaws by adding bylaw 45.16, which reads.

> 1. (a) Owners of ground floor strata lots shall be subject to paragraph (b), required to regulate the size of trees or plants on the strata lot and

must prune any trees or plants on the strata lot, at their own risk and expense, so that they do not extend beyond the boundaries of the strata lot, or cause damage to the structure of the building or fencing. Owners must ensure that any tenants comply with this bylaw.

(b) No trees or plants shall be permitted to extend beyond the boundaries of the strata lot but the trees or plants must otherwise be pruned by the owner to the specific height and width restrictions as determined by a qualified arborist retained by the strata corporation.

2. (a) In the event the strata council or 75% of owners, on the advice of a qualified arborist, a structural engineer; or in their sole discretion, as the case may be, determines that a tree or plant on a strata lot is a nuisance, a hazard or a danger to property including, without limitations, a strata lot or common property, the strata council shall, at the strata council's discretion, demand, in writing that:

(i) the owner prune the tree or plant at the owner's expense as required; OR

(ii) the owner remove the tree or plant at the owner's expense as required in which case strata council may, at its sole discretion, replace the tree or plant at the strata corporation's cost, with something suitable to the strata council and the owner; OR

(iii) the owner allow a contractor approved by the strata council to enter the strata lot and prune or remove the tree or plant at the strata corporation's expense if the tree or plant is in contravention of these bylaws at the time these bylaws are filed in the Land Title Office or is in contravention at any time thereafter.

(b) if the tree or plant is not removed or pruned, at the owner's expense within 14 days of the date of the written demand, the owner shall be liable to a fine of $200.00 for a contravention of this bylaw and for every seven days that the contravention continues thereafter.

3. Any damage to property caused by a tree or plant determined to be a nuisance or hazard shall be at the liability of the owner of the strata lot on which the tree is growing.

[23] Under the *Strata Property Act*, a change to the bylaws requires a three-quarter vote of owners attending or represented at the meeting. Thirty three owners attended the general meeting and bylaw 45.16 was adopted by a vote of 25 to 8. The requirement for adoption by a three-quarter vote was therefore met. The petitioner attended the meeting and was presumably one of the eight contrary votes.

[24] The petitioner argues that her neighbours have no legal right to the protection or preservation of their views. *In Honigman v. Clements*, [1980] B.C.J. No. 1087, a

case dealing with the erection of a high fence that blocked part of a neighbour's view, the court said:

> [9] In my opinion there is no easement for view recognizable at law and as of this stage of the development of the law of nuisance the Courts have not recognized any right of action based on interference with a view. There is nothing in the evidence which would indicate that there is an agreement or understanding between the parties that no such fence would be erected, nor is there anything to indicate that such fence was erected as a result of maliciousness on the part of the defendant.

[25] While a property owner is not bound at common law to preserve a neighbour's view, that passage makes clear that property owners can assume such duties to one another by contract. It would therefore be open to owners in a strata corporation to agree, by enacting a bylaw, not to do anything that interfered with each other's views.

[26] In any case, bylaw 45.16 says nothing about the protection of views. On its face, its purpose is to prevent the intrusion of residents' plants onto the common property of the strata corporation. On that point, the petitioner argues that the tree is growing on her private property and, although it extends beyond the boundaries of her lot, it is merely growing into a "column of space" that does not form part of the common property.

[27] Under s. 3 of the *Strata Property Act*, a strata corporation is responsible for "managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners." The *Strata Property Act* defines common property as including "that part of the land and buildings shown on a strata plan that is not part of a strata lot." I have been referred to no statutory or case authority that directly addresses the status of air space in a context similar to what is now before me.

[28] The legislation in force at the time this strata plan was created was the *Strata Title Act*, S.B.C. 1966, c. 46, which contained a similar definition of common property. In *Daon Development Corp. v. West Vancouver (District)*, [1975] 1 W.W.R. 615, the court considered what was then relatively new legislation in the context of a

dispute over the tax assessment of strata lots on upper floors. In the course of that judgment, the court said:

> [15] ... In law, the word "land" is capable of including in its meaning not only the surface but an indefinite extent upward or downward. There is no difficulty, therefore, in the concept of a parcel of land several levels above the surface bounded by the walls, floor and ceiling of the strata lot.

[29] This common law concept of air space forming part of land was recognized by the legislature in 1978 with the enactment of Part 9 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*Land Title Act*] (formerly R.S.B.C. 1979, c. 219). That Part includes s. 139, which states: "air space constitutes land and lies in grant".

[30] Part 9 of the *Land Title Act* deals with the creation of air space parcels that can be treated as land for all purposes. It also sets out specific requirements for an air space plan. The petitioner argues that no air space plan meeting the requirements of Part 9 has ever been filed and there is no defined air space that belongs to the strata corporation. I do not accept that argument, for two reasons. The strata plan at issue here was created four years prior to the enactment of Part 9 and could not be expected to comply with its specific provisions. In any case, s. 3 of the *Land Titles Act* expressly limits the application of part 9 where property is subject to the *Strata Property Act*:

> 3 (2) Part 9 of this Act applies to the *Strata Property Act* only to the extent expressly stated in the *Strata Property Act* or in Part 9.

[31] The strata plan includes the outdoor patio as part of the petitioner's strata lot. If it defined the patio with reference only to its surface dimensions, the petitioner might have a valid claim at common law to ownership of the airspace directly above it to at least whatever height her tree might be able to reach. However, the strata plan also specifically defines an upper boundary to the patio space−the height level with the indoor ceiling of the petitioner's suite. The air space above that upper limit clearly does not belong to the petitioner, but neither does it form part of any other strata lot. The units above the petitioner, at that point, do not extend beyond the outer wall of the building.

[32] Although that air space does not form part of any strata lot, it could have if, for example, the building had been built on a larger "footprint" or if an extension had been built at some point. In that sense, it is no different than the air space above the lawn in front of the building. Because it could form part of one or more strata lots, but does not, this air space must be regarded as land "shown on a strata plan that is not part of a strata lot". It therefore meets the definition of common property.

[33] The creation of bylaws governing the use of common property is at the core of a strata corporation's function and bylaw 45.16 was validly enacted for that purpose. As Pitfield J. said in *Parlett v. Owners SP LMS 2706*, 2000 BCSC 1565:

> [36] ... Strata lot owners are not permitted to do with common property that which they might do were they sole owners of the common property. The inability to accommodate all individual wishes is the inevitable result of community living.

[34] The petitioner further argues that the strata corporation did nothing about her tree for many years and is therefore barred from taking action now by the equitable doctrine of laches or equitable estoppel. The doctrine of laches may be applied in some circumstances where the party seeking a remedy has acquiesced in the existence of a situation and not asserted its rights for some period of time. However, it cannot be used to prevent a strata corporation from fulfilling its statutory duty to administer common property for the benefit of all of its members: *York Condominium Corp. No. 288 v. Harbour Square Commercial Inc.*, [1988] O.J. No. 2852 (Dist. Ct.) at paras. 45-47.

[35] Even if the strata corporation had at some point specifically permitted the petitioner's tree to extend into common property−the "grandfather" provision that the petitioner believed to have existed−such permission could only be given on a temporary, revocable basis. Section 76 of the *Strata Property Act* specifically limits the ability of a strata corporation to grant exclusive use of common property to an individual owner:

> (1) Subject to section 71, the strata corporation may give an owner or tenant permission to exclusively use, or a special privilege in relation to,

> common assets or common property that is not designated as limited common property.
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> (2) A permission or privilege under subsection (1) may be given for a period of not more than one year, and may be made subject to conditions.
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> (3) The strata corporation may renew the permission or privilege and on renewal may change the period or conditions.
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> (4) The permission or privilege given under subsection (1) may be cancelled by the strata corporation giving the owner or tenant reasonable notice of the cancellation.

[36] It would therefore be beyond the legal ability of the strata corporation to grant the permanent protection the petitioner seeks for her tree. There are conflicting views among owners about how certain common property is to be used and the strata corporation, at some point, had to make decision that resolved that conflict one way or the other. The corporation made that decision by enacting bylaw 45.16.

Summary and Conclusion

[37] In summary, I find that no action taken by the strata corporation or council to date has been significantly unfair to the petitioner within the meaning of s. 164 of the *Strata Property Act*. I also find that strata corporation bylaw 45.16, which requires plants to be trimmed back to the boundaries of the strata lot in which they are growing, was validly enacted by the strata corporation and may be applied to the tree at issue.

[38] Having said that, any specific steps the strata corporation may take to enforce its bylaw will still be subject to review under s. 164. In that regard, I note again that this tree was permitted to grow far beyond the boundaries of the petitioner's strata lot long before the present bylaw was enacted and, indeed, long before the petitioner acquired her unit. Trimming such a large tree to the extent now required by the bylaw, or removing it entirely, is likely to be an expensive undertaking. It may be significantly unfair for the strata corporation to impose that cost, or the cost of suitable replacement planting, entirely on the petitioner. In the absence of evidence of the specific costs and options involved, I express no conclusion on that point, but mention it for the guidance of the parties in their future dealings.

[39] Of course, these reasons address only the rights and duties of the parties under the strata corporation bylaws and the *Strata Property Act*. There may be other provisions, such as City of Vancouver bylaws, that will be relevant to the ultimate fate of the petitioner's tree. Those matters are not before me.

[40] The petition is dismissed with costs.

"N. Smith J."