IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.,* 2010 BCSC 1811

Date: 20101216
Docket: S099090
Registry: Vancouver

Between:

The Owners, Strata Plan NES 97

Plaintiff

And

Timberline Developments Ltd.

Defendant

Before: The Honourable Mr. Justice Harris

Reasons for Judgment

Counsel for Plaintiff:	Allyson L. Baker
Counsel for Defendant:	J. A. Hall
Place and Date of Trial:	Victoria, B.C. December 6, 2010
Place and Date of Judgment:	Vancouver, B.C. December 16, 2010

Introduction

[1] This matter comes before me as a summary trial. The plaintiff is a Strata Corporation located at Fernie Alpine Resort in Fernie, British Columbia commonly known as "Timberline Lodges". The defendant is the owner developer of Timberline Lodges.

[2] The plaintiff's claim is brought pursuant to s. 227 of the *Strata Property Act*, SBC 1998, c. 43, as amended (the "*Act*"). That section applies to so-called "phased developments". It provides for the sharing of expenses attributable to "common facilities" between a strata corporation and the owner developer during the build out phase of the development. Thus, at any given time, expenses are allocated as if the development were completed. Each owner of an existing strata lot pays a proportional share of the expenses and the owner developer pays the balance as a proxy for the strata lots that have not yet come into existence.

[3] The plaintiff applies for judgment alleging that the defendant has failed to pay its share of expenses during the material period attributable to hot tubs, elevators and laundry facilities (the "Facilities") at Timberline Lodges. The Facility expenses form the subject matter of this litigation. The defendant applies for judgment dismissing the claim on the basis that the section does not apply to any of the Facilities said to be common facilities and that, in any event, there is no proper proof of the expenses.

Background

[4] Timberline Lodges consists of 175 strata lots constructed in six buildings over 11 phases over an 18 year period.

[5] Included in the Timberline Lodges complex are a total of six hot tubs, each associated with a particular lodge; elevators in each of four lodges, namely the last four to be built; and a common laundry room in each of three of the lodges. The plaintiff's position is that these Facilities are "common facilities" for the purpose of allocating expenses pursuant to s. 227 of the *Act*. The defendant's position is that it

is not responsible for the expenses because the Facilities are not “common facilities” or “major facilities” within the meaning of the *Act*.

[6] The material period of the claim is December 10, 2003 through February 1, 2008. Expenses incurred prior to December 10, 2003 are statute barred owing to the expiry of the applicable limitation period. The claim is cut off at February 1, 2008 because that is the date on which all phases of the phased strata plan were deposited in the Land Title Office.

[7] Each of the owners of Timberline Lodges has a right to use the Facilities. However, the extent to which a particular owner of a strata lot in one of the lodges would choose to use a hot tub associated with another lodge is not clear.

[8] During the material period the expenses associated with the Facilities have been paid for by the owners solely in accordance with the relative unit entitlement of each deposited strata lot. In practice, this means that the expenses have been shared among owners of strata lots as they have existed from time to time.

[9] The defendant, in its capacity as owner developer, has not contributed to the expenses associated with the Facilities, according to the formula found in s. 227 of the *Act*.

Issues

[10] The issues before the court are as follows:

1. Are the Facilities, which form part of the common property of Timberline Lodges, "common facilities" within the meaning of s. 217 of the *Act*?

2. If the Facilities are common facilities, is the defendant liable to contribute to them pursuant to s. 227 of the *Act*?

3. If the defendant is liable to contribute to the expenses of the common facilities, what is the amount of the defendants required contribution?

Positions of the Parties

[11] In brief, the plaintiff submits that the Facilities fall within the definition of a "common facility" within the meaning of s. 217 of the *Act.* That section provides:

> In this Part, "common facility" means a major facility in a phased strata plan, including a laundry room, playground, swimming pool, recreation centre, clubhouse or tennis court, if the facility is available for the use of the owners.

[12] The plaintiff submits that the Facilities qualify as facilities according to the ordinary dictionary definition of the word as "an amenity or service which enables something to be done". There is, however, no definition of the word "major". For the purpose of s. 217, "common facility" is a facility that is "important, large, serious or significant" thereby excluding "minor" facilities. The plaintiff further argues that the Facilities qualify as "major".

[13] Moreover, whether a particular "facility" will be considered a "common facility" within the meaning of s. 217 is qualified by the phrase "if the facility is available for the use of the owners". It is submitted that this phrase indicates that the owners must have the right of access to and the use of the facility in question, which in this case, they do.

[14] The plaintiff asserts that the particular illustrations provided within the statutory definition are nothing more than examples of the type of facility that would be considered a "major facility", but are not intended to provide an exhaustive list of them. The plaintiff submits that the common thread running through the examples is that each of them is an "optional" and not a standard, essential or necessary element of a development.

[15] The plaintiff says that the Facilities qualify as "common facilities". On a plain interpretation of the words of s. 227, the owner developer is required to contribute to those expenses in accordance with the governing formula until all phases of a phased strata plan have been deposited.

[16] The defendant submits first that the meaning and application of s. 227 should be interpreted in accordance with the objects and purpose of the statutory scheme.

Common sense and logic indicate a clear purpose of s. 227. It is to ensure that the early purchasers, in a phased development project, are not unfairly burdened with the operating and maintenance costs of major facilities that are constructed to a capacity (like a swimming pool or clubhouse), yet is ultimately intended for the entire build out development.

[17] The defendant argues that in the present case there is no evidence that the first purchasers in the first lodge constructed were unfairly burdened by the operating and maintenance costs associated with hot tubs. As each lodge was constructed, a hot tub associated with it was built. The only expenses incurred with respect to hot tubs were those expenses associated with the hot tubs built for the particular lodge that had been constructed. Early purchasers were not therefore in fact required to pay expenses for a facility that had been built in anticipation of its use by all of the ultimate owners once the development was complete. In these circumstances, s. 227 has no application. Hot tubs cannot be regarded as "major facilities" pursuant to s. 217 of the *Act* and therefore are not "common facilities" for the purpose of s. 227.

[18] The defendant also says that the elevators cannot be regarded as "common facilities" because they do not fit within the terms of the statutory definition. The examples given in s. 217 are primarily recreational in character; by contrast the elevators are standard features of a multi-storey development analogous to stairways or hallways.

[19] The defendant further submits that the laundry facilities do not qualify as "common facilities". The common laundry facilities exist only in some but not all of the lodges. The expenses relate to the purchase of new washers and dryers by the plaintiff after it requested the owner remove the existing washers and dryers from certain lodges. In substance, the plaintiff is seeking to have the owner developer pay for the investment costs of a business operation conducted by the plaintiff. That falls, it is submitted, outside the purpose and object of the section.

[20] Finally, the defendant submits that the plaintiff has not properly proven its damages.

Analysis

[21] I agree that the rationale for the enactment of s. 227 and s. 217 of the *Act* is to achieve a scheme allocating expenses for certain kinds of facilities between owners who purchase strata lots early in the development of a project and the owner developer who is in effect a proxy for persons who will become owners in the future, sometime after the common facilities have been built. An obvious example would be where a large swimming pool is built that is intended to benefit all of the eventual owners of the strata corporation, but the pool is built when only 10% of the strata lots have been completed. In those circumstances, it is fair to allocate the burden of the expenses between the 10% of the existing owners and the owner developer standing in effect as a proxy for the 90% of the strata lots yet to be created.

[22] While it is appropriate that the rationale underlying the sections be taken into account in their interpretation, it is not appropriate to do so at the expense of the plain language of the sections. I agree with the submission of the plaintiff that fairness in allocating the burden may not be the only purpose underlying the enactment. As counsel submitted, another purpose is ensuring certainty, even if that comes at the price of rough justice. The circumstances to which the section could apply are complex and varied. It may not be possible to craft a legislative rule that is responsive to all of the potential nuances that can arise in a phased development. In such circumstances, effect must be given to the plain wording of the section. Its application cannot be distorted in an effort to respond equitably to complex nuanced situations. That is what the defendant is asking me to do here.

[23] On that basis, the critical question is whether the Facilities are "common facilities". To qualify the facilities must be "major", be "available for the use of the owners" and all be of similar type to those illustrated by the examples set out in the section.

[24] Counsel for both parties argued different positions regarding whether the status of a facility as a common facility could be determined by approving officers, requirements to post security in respect of their anticipated construction or descriptions of the common areas contained in disclosure statements. In my view, whether or not a facility is a common facility is not determined by any of the above. Rather, whether a facility is a common facility is determined by reference to the applicability of the statutory definition.

[25] In my view, hot tubs in a ski lodge are major facilities in the sense that they are important or significant to the facility. Hot tubs enhance the recreational amenities of the ski lodge in the same way that in a warm climate a tennis court associated with each lodge or centralized tennis courts in a development would. Facilities like this are optional and are important or significant to the owners in enhancing the overall quality of the development.

[26] The hot tubs are also available for the use of the owners. Even if owners tend to use the hot tub associated with their own lodge, there is nothing to prevent them using other hot tubs. The evidence suggests that when it is convenient or desirable to do so, owners or guests at Timberline Lodges may choose to use any of the hot tubs. What is critical, however, is that the owners have the right to use them.

[27] As a result, I conclude that the hot tubs are "common facilities" within the meaning of s. 217 and that by application of the plain language of s. 227, the owner developer must contribute to the expenses attributable to them during the material time.

[28] The operative language in s. 227 is that the expenses are "attributable to the common facilities". In my view, expenses include repair, maintenance, refurbishment and replacement attributable to wear and tear. What constitutes legitimate expenses should not be narrowly construed. If a common facility requires replacement, it is no answer to say that the replacement involved an upgrade of the facility, as happened here in respect of two of the hot tubs.

[29] On the evidence I am persuaded that the expenses that were associated with the replacement of two of the hot tubs were properly the consequence of wear and tear over time. Facilities can be expected to have a natural life and at some stage their replacement is necessary. Here the replacement of one tub proved to be relatively expensive and involved an upgrading to relevant contemporary standards. The replacement of the hot tubs caused expense that is properly regarded as "attributable" to the common facility. I, therefore, reject this ground of the defendant's objection to a liability to contribute to the expenses.

[30] I also find that the estimate of the expenses as set out in affidavit number two of Mr. Sinclair is a reasonable estimate of expenses attributable to the hot tubs. I appreciate that the estimate is based on a number of assumptions, but that does not render it a guess. In my view, given the nature of the expenses in issue, it is inevitable that any estimate would require assumptions to be made. Determining the expenses is not a matter of nice or scientific calculation. Although I accept that certain of the assumptions underlying the calculations may be subject to some criticism, such as the treatment of costs associated with evaporation of water from hot tubs, the overall position taken in the calculations is somewhat conservative. I allow the expenses attributable to the hot tubs in the amounts claimed.

[31] I reject the amount claimed in respect of expenses attributable to the laundry facilities. The laundry rooms are by definition common facilities if they are available for the use of the owners. In 2005, washing machines and dryers were replaced. The cost of doing so is claimed. The question is whether those costs are expenses attributable to the common facilities.

[32] Replacement of the washers and dryers became necessary when the existing washers and dryers were removed by the property manager on the termination of its contract. I am not satisfied that the replacement of the washers and dryers was "attributable" to the common facilities within the meaning of the section. Rather, their replacement is attributable to a business dispute between the plaintiff and its property manager. I dismiss this aspect of the plaintiff's claim.

[33] Finally, I turn to the question of the elevators. I have concluded that the elevators are not common facilities within the meaning of s. 217 of the *Act*. In my view, elevators are not an optional facility within a multi-storey building. Rather, they are simply a standard means of access with a similar functional status to hallways and staircases. As I suggested to counsel during their submissions, elevators are simply staircases without the effort. I have concluded that elevators do not fall within the class of facilities illustrated in s. 217. The plaintiff's claim is dismissed in respect of expenses attributable to the elevators.

Conclusion

[34] The plaintiff is entitled to judgment for expenses attributable to the hot tubs as claimed. The plaintiff’s claim for expenses attributable to the laundry facilities and the elevators is dismissed. As success is divided my tentative view is that each party should bear its own costs, but counsel may make brief written submissions on costs if they choose.

“Harris J.”