

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thiessen v. Strata Plan KAS2162*,
2010 BCSC 464

Date: 20100126
Docket: 84536
Registry: Kelowna

Between:

**Henry Thiessen, M.L. Strantz,
Yoneko Kawamoto, and Roberta Armstrong**

Petitioners

And:

The Owners, Strata Plan KAS2162

Respondent

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

M.G. Dober

Counsel for the Respondent:

M.D. Fischer

Place and Date of Hearing:

Kelowna, B.C.
January 7, 2010

Place and Date of Judgment:

Kelowna, B.C.
January 26, 2010

[1] **THE COURT:** The petitioners own four units in a 20-unit bare land strata development. They petition the court for orders that: the Bylaws filed on June 4, 2009 (the “2009 Bylaws”), be repealed; that the Bylaws previously filed on June 1, 2006 (the “2006 Bylaws”), be filed on behalf of the owners of Strata Plan KAS2162; and for certain costs orders.

[2] The respondent concedes that the 2009 Bylaws were filed in error. It supports, according to its counsel, any order which will bring “closure and certainty” to the issues which have arisen, including an order that the 2009 Bylaws are the Bylaws, an order that the 2006 Bylaws or some other set are to be reregistered to repeal and replace the 2009 Bylaws, or an order that there be a Special General Meeting within 60 days at which the 2006 Bylaws or some other Bylaws be approved by the owners paragraph by paragraph to establish current Bylaws.

[3] The background facts are as follows. In 2001, the Strata Corporation held a Special General Meeting to consider and pass new Bylaws. The proposed Bylaws were based on the standard Bylaws under the *Strata Property Act*, S.B.C. 1998, c. 43, with additional provisions dealing with such things as restrictions on rentals, owner’s use of property and access, maintenance, and costs relating to exterior lighting and irrigation. All 20 owners were represented at the 2001 Special General Meeting. At the meeting, changes were made to proposed Bylaw 7(1)(b) and (c). The Bylaws, as amended at the meeting (the “2001 Bylaws”), were passed and were subsequently filed in the Land Title Office. In 2006, at an Annual General Meeting, the owners voted to amend the Bylaws by adding the words “hot tub” to the list of items requiring the Strata Council’s approval pursuant to Bylaw 3(3)(t). The amendment was voted upon and approved at the Annual General Meeting. After the meeting, the amendment was registered in the Land Title Office as part of a new consolidation of the Bylaws, rather than as an amendment as had been resolved and voted upon at the meeting.

[4] Ownership of several of the strata lots changed between 2006 and 2008. On the evidence, it appears that two factions of owners or at least two factions of

owners began to develop. One faction was comprised of mostly new owners. One member of that faction was and is Harvey Erickson, who is the current Strata Council president. Mr. Erickson, at a special meeting held in April 2008, took the position that any restrictions on an owner's use of his property were not enforceable and that he and other members of his faction could and would do what they pleased with their strata lots, notwithstanding any restrictions set out in the Strata Corporation's Bylaws.

[5] As a result of Mr. Erickson's claims, the Strata Corporation, the Strata Council in particular, retained counsel to provide a legal opinion with regard to the enforceability of the Bylaws and, specifically, a restriction contained in the Bylaws on an owner altering, defacing, changing, or adding to...a residence, landscaping, or common property without Council's approval. An opinion was provided to the effect that the Bylaw was indeed enforceable. However, the opinion also advised that there were several "very technical" issues with regards to the Bylaws, which legal counsel advised the Strata Council to address by seeking a curative resolution to amend all previously filed Bylaws by adopting a new consolidation in exactly the same form as was already filed in the Land Title Office.

[6] The technical issues were: (1) with regard to the 2001 Bylaws, the Bylaws as approved at the Special General Meeting included amendments, which I have mentioned, to Bylaw 7(b) and (c) which were not included in the notice package for the meeting; and (2) with regard to the 2006 amendments, adding the words "hot tub", notwithstanding that there was proper notice, and a motion for the amendment was properly voted upon and registered at the meeting, it was improperly registered as a new consolidation of the Bylaws rather than as an amendment.

[7] On receipt of the legal opinion, at the 2008 Annual General Meeting, the Strata Council brought forward a motion seeking a curative three-quarter resolution to "ratify" the Bylaws. At the instance of what I will call for the moment the "new owners' faction", the motion to ratify was postponed. At the 2008 Annual General

Meeting, a new Council was voted in and control of the Council was assumed by the new owners' faction.

[8] A Special General Meeting was called by the new Strata Council, not to vote on the curative resolution which had been postponed, but rather to vote on a new proposed consolidation of Bylaws which removed nearly all of the restrictions on use and conduct contained in the 2001 and 2006 Bylaws. The motion did not pass at the Special General Meeting.

[9] At the 2009 Annual General Meeting, the Strata Council included the motion for the curative resolution on the agenda. That motion also failed to pass.

[10] After that motion failed, the Strata Council took the position that the failed motions meant that the Strata Corporation's Bylaws would be repealed and replaced with the standard Bylaws under the *Strata Property Act*. The property manager, who was in attendance at the meeting, accepted that suggestion. One of petitioners objected and demanded that the Strata Council obtain a legal opinion before acting on its position. The Strata Council called for a bare majority vote on seeking a legal opinion and that vote was defeated. Consequently, the Strata Council filed in the Land Title Office the standard Bylaws and certified that they were approved by a three-quarter resolution at the 2009 Annual General Meeting, which was not true.

[11] After the filing of the 2009 Bylaws, one of the petitioners sought a legal opinion and then advised the Strata Council of that opinion, to the effect that there was considerable doubt about the enforceability of the 2009 Bylaws. He sought a response by August 25, 2009. The Strata Council called an emergency meeting and made an appointment with the Strata Corporation's counsel who confirmed that the filing of the 2009 Bylaws was a problem. That counsel was then asked to determine whether the filing of the 2009 Bylaws could simply be cancelled or withdrawn without a court order or the filing of a new Form 1 with Bylaws attached. The day after the meeting with counsel and before an opinion had been received on possible cancellation of the 2009 Bylaws, this petition was filed. It was subsequently determined that the 2009 Bylaws could not be cancelled without a court order or a

further Form 1. Finally, in terms of background facts, I will say that before the petition was heard, the Strata Council called a Special General Meeting for December 15, 2009. At that meeting, a proposed set of Bylaws was voted upon. The required three-quarter majority vote was not obtained and therefore those Bylaws were defeated. At this time, it appears, and all parties agree, that neither faction is able to marshal the necessary three-quarter majority to cure or resolve the current impasse.

[12] With that background, I turn to the law. Both parties agree that I have jurisdiction pursuant to s. 154 of the *Strata Property Act* to cure the current impasse. It is also common ground that it is in all the parties' interests that I do so.

[13] With regard to the enactment of Bylaws by a Strata Corporation, all Strata Corporations must have Bylaws (*Strata Property Act*, s. 119). The Bylaws are the standard Bylaws under the *Act*, except to the extent that different Bylaws are filed in the Land Title Office (*Strata Property Act*, s. 120). Amendments to Bylaws must be approved at an Annual General Meeting or a Special General Meeting by a resolution passed by a three-quarter vote (*Strata Property Act*, s. 128(1)). Before a meeting at which a resolution to pass or amend Bylaws is to be voted upon, two weeks' notice of the meeting must be given, and the notice must include the proposed wording of the Bylaws or amendment to the Bylaws. Where notice is not given or not properly given, it may be waived in writing by all persons entitled to notice. Where two or more persons share one vote, all of them must consent to the waiver of notice (*Strata Property Act*, s. 45). Despite those provisions, amendments may be made to proposed wording if the amendments do not substantially change the resolution and are approved by a three-quarter vote before the vote on the resolution takes place (*Strata Property Act*, s. 50(2)).

[14] Before Bylaws can be found valid and binding, there must at least be a minimum compliance with the requirements of the *Strata Property Act* (*Strata Plan NW 499 v. Louis Estate*, [2009] B.C.J. No. 219 (C.A.) at para. 17).

[15] The 2009 Bylaws, without a doubt and as now conceded by even the respondents whose council initially took the position that they were valid and filed

them in the Land Title Office, are invalid and not enforceable. They cannot be, in my view, the Bylaws of the Strata Corporation.

[16] With regard to the 2006 Bylaws, it is clear that on proper notice, a three-quarter vote on an amendment to the Bylaws passed. However, there was no notice, no resolution, and no three-quarter majority vote to file consolidated Bylaws rather than simply the amendment. Consequently, in my view, the 2006 Bylaws cannot on their face be said to be the Bylaws of the Strata Corporation; although, in my view, the effect of the amendment, namely, to require Strata Council's approval before the installation of hot tubs, is valid and enforceable. There was compliance with the *Act* in terms of notice and the vote, and the only error was the form by which the registration of the amendment was made, namely, attached to a Form 1 with the 2001 Bylaws in a consolidated form rather than as a standalone amendment.

[17] With regards to the 2001 Bylaws, it is common ground that at the Special General Meeting, an amendment of substance was made to one portion of the Bylaws dealing with entry onto the strata lots by the Strata Corporation in emergencies, for the purpose of maintenance, and on reasonable notice for inspection. Although all 20 owners were represented at the meeting and the three-quarter vote on the Bylaws as amended passed, it is conceded that no written waivers of notice were obtained as required by the *Act*. The amendments, in my view, were technical and relatively minor.

[18] There is no evidence to suggest that the amended provisions, which are Bylaw 7(1)(b) and (c), as I said earlier, have ever been contentious in the eight or nine years they have formed part of the Bylaws registered at the Land Title Office. However, clearly, the amendments were not properly dealt with before the three-quarter vote was taken at the 2001 meeting. Every other part of the 2001 Bylaws was passed by the three-quarter vote required and after proper notice of the proposed wording of the Bylaws was given. All of the owners were, as I have said earlier, present or represented at that meeting. One of the two petitioners swore an affidavit indicating that the 2001 Bylaws passed unanimously, while one of the other

owners says that he abstained from voting on the 2001 Bylaws. Every owner who has acquired one of the strata lots since the 2001 special general meeting, at least until the 2009 Bylaws were wrongfully filed, had been on notice of the terms of the 2001 Bylaws.

[19] It is clear that there is no point in ordering that the issue of the Bylaws be returned to the Strata Corporation to be debated and voted on by the current owners. The owners are, it appears to me and appears to be conceded, at loggerheads and neither of the two general factions has been able to garner a three-quarter vote with regard to the Bylaws since at least 2008.

[20] Under all of the circumstances of this case and considering all of the evidence filed in the proceedings and the submissions made by counsel, which I will pause to note have been most helpful to me, I will order that the 2001 Bylaws, with Bylaw 7(1)(b) and (c) omitted and the 2006 amendments with respect to hot tubs added, will be filed in the Land Title Office as the Bylaws of the Strata Corporation. The deleted provisions, namely, Bylaw 7(1)(b) and (c), may, not must, be addressed at the Annual General Meeting or a Special General Meeting in accordance with the *Strata Property Act*.

[21] I turn now to the issue of costs. The petitioners say that they should be awarded special costs for both pre-litigation and litigation matters and that they should not have to contribute to the Strata Council's costs. The petitioners allege that the "respondent's faction" or the "Erickson faction" as they sometimes refer to the majority owners as, have acted improperly throughout in an effort to defeat the portions of the Bylaws which impose restrictions on an owner's use of property or on an owner's conduct. They point to the refusal to pass a curative resolution which was only needed to address the technical flaws in past procedures which I referred to earlier. They make the point that they were forced to bring this matter to court as a result of the other faction having wrongfully filed the standard Bylaws, without first seeking a legal opinion which the petitioners advised them to obtain.

[22] The respondent says in defence of the petitioners' costs application that the Strata Council is not legally trained, that the members of the Council are volunteers, and that they filed the 2009 Bylaws on the advice of the Strata Corporation's property manager. The respondent says that given the division amongst the owners, this matter had to be brought to court in any event. The Strata Corporation also points to the short timeframe within which they were given to respond before the petition was actually filed.

[23] I have concluded that although this litigation has been somewhat hard-fought, including with reference to the positions taken by each side on the interim application brought before the court in December, there has not been what I would call reprehensible conduct on the part of the respondent. However, the petitioners, by bringing this petition, did what the Strata Council ought to have done in the first instance. Further, the Strata Corporation, albeit in part based on the advice of the Corporation's manager, wrongfully filed the 2009 Bylaws, and the owners as a whole defeated a motion to expend funds to get legal advice prior to the filing of the standard Bylaws.

[24] Taking into account all of the evidence, I am satisfied that equity requires that I order and I do order that the petitioners' legal expenses, including their pre-litigation expenses, be paid by the respondent.

[25] However, I will not make any order exempting the petitioners then from paying their proportionate share of the total costs; that is, I intend each owner of the Strata Corporation to pay its or his or her proportionate share of both the petitioners' and the respondent's legal expenses.

[26] That concludes my decision. Is there anything arising?

[27] MR. FISCHER: No, My Lady, thank you.

[28] MR. DOBER: My Lady, I would just like to -- it is Mr. Dober for the petitioners. I would just like to bring to the court's attention that there was a Rule 37(e) offer to

settle made on November 12, 2009. I do not know if that is of any interest to this court given its decision.

[29] THE COURT: What I will say to you, Mr. Dober, is if there are matters of which I am not aware that you think should be taken into account with respect to costs, I am happy to have you and Mr. Fischer discuss that offer, see whether you have any -- come to any agreement with respect to the import of that offer, if any, on the issue of costs, and if you cannot come to an agreement, I would simply say phone the trial coordinator, tell her that you need to have -- that you wish to make costs submissions, and normally what I would direct is either a 30- or 60-minute telephone conference or written submissions with respect to costs.

[30] So, if either of you wish to address that issue with me, I will hear submissions. If I hear nothing from the two of you, then the order that I have just made with respect to costs will stand, and I will give you 30 days to contact the trial coordinator, because obviously if I am going to hear about the offer, I am going to need to see it and so this morning is not the time to deal with that, but you and Mr. Fischer should have communication. If that does not resolve, if an impasse arises between the two of you with respect to the import of the offer within the 30 days, you can contact the trial coordinator. If we hear nothing, the order I have just made should stand.

[31] MR. DOBER: Okay.

[32] THE COURT: All right.

[33] MR. DOBER: Thank you, My Lady. If I may clarify the order, both the petitioners' legal fees and respondent's legal fees are to be grouped, and the Strata Corporation as a whole is to distribute those funds in accordance with unit entitlement to each of the owners?

[34] THE COURT: Yes, in whatever way the Strata -- any other costs of the Strata Corporation are divided.

[35] MR. DOBER: Now, can you give us any clarification as to whether it be contingency reserve funds may be used for that purpose?

[36] THE COURT: Well, given the order I have made, I am not sure that there is an issue between the two of you about that, and the issue that I understood existed in the past with respect to the contingency reserve fund related to your clients' view that they should be exempted from having to pay any costs -- any of the Strata Council's or the Strata Corporation's costs and, consequently, your issue relating to the fact that the contingency reserve fund was contributed to *pro rata* by your clients and so it should not be used to spend the funds. Given the order that I have made, it does not strike me that the issue with respect to the contingency fund is an issue any longer, at least not for the reasons that it was earlier in the litigation, in December. So that is something, again, I would invite the two of you to talk about. If you have an impasse, that issue can come back before me as well.

[37] MR. DOBER: Yes, My Lady. The petitioners agree with that statement. I think the issue is if the respondent's legal fees have now already been paid from the contingency reserve fund, and the petitioners have to fund their legal fees out of their own pocket, and I would ask for some direction that the contingency reserve funds that are in place be used to pay the petitioners' legal fees to obtain that parity as well as the --

[38] THE COURT: If there are sufficient funds there, then, in my view, that is probably what should happen. If there are not, then there is going to have to be a collection by way of a special levy or something of that nature, but if for any reason you are not -- if there is any sort of delay or any sort of issue that arises with respect to payment of the petitioners' costs, you are very much at liberty to simply phone the trial coordinator. You do not need to file any motions. It should be done in a way that is expedient and inexpensive to the extent that is possible for everybody.

[39] So, just pick up the phone, call the trial coordinator, and I will get on the phone with you, or if you indicate you want to just provide some written submissions

because that is more efficient from your perspective, that is fine, as well. I will make myself available to hear any issues that the two of you cannot work out.

[40] MR. FISCHER: My Lady, Matthew Fischer here, speaking on behalf of the respondent, I understand that you are not actually ordering that there be a special levy in a particular amount. Therefore, I --

[41] THE COURT: I could not possibly do that. I do not know -- I cannot at this point in time even begin to guess what the costs are nor what is in the contingency reserve fund. I expect that you and Mr. Dober will be able to deal with this matter, but if there needs to be some sort of special levy to pay costs, then that should happen very promptly which --

[42] MR. FISCHER: Yes, My Lady, so is the --

[43] THE COURT: -- was the order I have made.

[44] MR. FISCHER: Yes, My Lady, I am just clarifying so that my friend and I -- that it would be in the normal course of approving something like this by special general meeting with proper notice. Is that your intention?

[45] THE COURT: Well, there is -- it is -- because I have court ordered it, I do not know what the impact of that is. It is not as if the owners of the Strata Corporation could defeat the intent of my order by refusing to pass a resolution.

[46] So, the two of you should apply your minds to what should happen, and if there is an impasse between the two of you, you should let me know, and sooner rather than later, because the petitioners -- unless there is an appeal, a successful appeal, to my order, the petitioners have to be reimbursed for the costs that they have spent.