

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clarke v. The Owners, Strata Plan VIS770*,
2010 BCSC 293

Date: 20100309
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)

Appearing on his own behalf:	P. Clarke
Appearing on her own behalf:	L. Chorney
Appearing on his own behalf:	E. Vilnis
Counsel for the Administrator: Gerry Fanaken	G.H. Dabbs
Place and Date of Hearing:	Victoria, B.C. March 3, 2010
Place and Date of Judgment:	Victoria, B.C. March 9, 2010

[1] In March 2008, I appointed an administrator to address a series of problems relating to a heritage building that had been converted into eight residential strata lots. My reasons for judgment are at 2008 BCSC 347. Mr. Fanaken was appointed administrator for a period of one year with liberty to apply for renewal. Since then, I have extended Mr. Fanaken's appointment twice. His current appointment expires March 20, 2010: see 2009 BCSC 1415. Mr. Fanaken now applies for a further six-month extension of his term to September 20, 2010. Only three of the owners support his application.

[2] Mr. Fanaken also applies for several orders respecting Strata Lot 8, one of the units. Ingrid and Mathias Kaufmann are the owners of Strata Lot 8. Neither they nor their counsel of record delivered a response to the application. Nor did they participate in the hearing. Two of the orders sought, at paragraphs 3 and 4 of the draft order attached to the notice of motion, mirror orders that I made at the time of the last extension. Those orders are found at paragraphs 3 and 4 of the order entered December 30, 2009, and read as follows:

3. The registered owners and occupants of #8 – 1001 Terrace Avenue, Victoria, British Columbia, V8S 3V2 (“Strata Lot #8”) do 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 do 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.

[3] I am satisfied on the evidence before me that the Kaufmanns are fully aware of the orders, which were first set out in my reasons for judgment released on October 15, 2009. As I set out below, the Kaufmanns did not comply with those orders for a considerable period of time after they were aware of them. There is, in the circumstances, no reason or, indeed, any jurisdiction to make the same orders on the present application.

[4] The remaining owners do not actively oppose the application for additional orders respecting Strata Lot 8, although Mr. Vilnis, at least, contends that there are less costly means remediating Strata Lot 8 to be in compliance with the City of Victoria's remedial action requirement discussed at length in my earlier reasons.

[5] The Kaufmanns live in Europe and do not currently reside in the unit. In the result, the administrator and his agent were unable to access Strata Lot 8 until February 5, 2010. I do not attribute any of the delay to the administrator. I am satisfied that he stressed the urgency of addressing the issues respecting the unit by letter to the Kaufmanns in Europe on November 4, 2009, and continued to do so thereafter. As a result of the delay, which I attribute to the Kaufmanns, the administrator was unable to obtain remedial recommendations and a preliminary report on the scope of work required until February 24, 2010.

[6] In my earlier reasons, I decided that the Strata Corporation has a duty to comply with the remedial order respecting Strata Lot 8 and to remedy its current encroachment on common property. I am advised that the other owners recently rejected the Kaufmanns' alternate suggestions for dealing with the issues. Paragraphs 5 to 8 of the proposed order reasonably address the mechanics of accessing the unit, performing the work and funding the cost by using the existing contingency reserve fund, a special levy or some combination of the two. In my view, it continues to be a matter of urgency that the corporation address the issues respecting the Kaufmanns' unit. I am satisfied that the orders sought are necessary.

[7] I am also satisfied that there is a continuing need for an administrator to address the problems with Strata Lot 8 until they are resolved. Taking into account the law set out in my earlier decisions, for that reason alone, I consider it necessary to further renew the appointment. It appears likely that it will take several months before all issues respecting Strata Lot 8 are resolved even if the Kaufmanns fully cooperate from this point forward. If they do not, there is still a possibility that further court applications will be necessary. The administrator is in a better position to deal with the issues respecting the Kaufmanns' unit than some of the owners who seem,

until very recently at best, sympathetic to the Kaufmanns' apparent wish to delay or avoid complying with the remediation order.

[8] Paragraph 9 of the proposed order entitles any owner or the administrator to apply for further directions. The earlier orders contained a similar provision and I agree that it should continue.

[9] Dr. Clarke, Mr. Vilnis and one other owner responded in opposition to Mr. Fanaken's application for reappointment. It is reasonable to assume that the Kaufmanns and one of the remaining owners support them. In part, this is because Dr. Clarke refers to representing a majority of five owners in this regard and contends, as he has previously, that the court should reinstate democratic governance by the owners. Dr. Chorney, supported by the remaining two owners, asks the court to reappoint Mr. Fanaken because they have no confidence that the majority will respect their wishes or that, if elected, they will follow the statutory requirements for the operation of a strata corporation.

[10] It is apparent, as it has been from the beginning, that the two factions remain well entrenched, although there has been some change in personnel along the way. It is further apparent that neither faction can expect to control the passage of a three-quarter vote as required to pass a special levy. This raises the distinct possibility that a new council would not be able to resolve the issues that may yet arise respecting Strata Lot 8, let alone the other significant problems discussed below. I am persuaded that a return to democratic governance, at this point, is premature, not because an administrator is more efficient, but because the owners remain in an effective deadlock and have not yet demonstrated that they are willing and able to work their own way through the various problems.

[11] This primarily leaves the question of whether Mr. Fanaken should continue as the administrator or whether I should appoint a new person in his place. Dr. Clarke refers to my earlier comments that the administrator should attempt, among other things, to mediate resolutions between the owners and points out that Mr. Fanaken has failed to do so and has acknowledged that he is not a qualified mediator.

Unfortunately, Dr. Clarke has interpreted my earlier comment too literally. I did not mean to suggest that the administrator should formally conduct mediations; rather, I hoped that he could use his experience to assist the owners in understanding the obligations of the Strata Corporation and to guide them to sound determinations. The fact that Mr. Fanaken has not fully succeeded may be as much or more a commentary on the attitudes of some owners as on his lack of skill.

[12] One of the other significant problems facing the Strata Corporation relates to the leaky condition of the building envelope. This problem is compounded by the age and heritage designation of the structure and results largely from the shoddy planning and workmanship at the time of the original conversion. Further changes by individual owners since may have added to these difficulties. It seems likely that the cost of repairs will be very significant. An initial estimate was well over \$1,000,000. Informally, the owners suggested last spring that they might agree to a solution costing about \$500,000.

[13] In January 2010, Mr. Fanaken brought forward a special resolution seeking to raise and spend \$6,000 for “the purpose of proceeding with the development of the alternative rehabilitation program by a professional qualified consultant”. Mr. Fanaken understood, and his minutes reflect, that all of the owners voted against the resolution. Accordingly, Mr. Fanaken decided not to seek the court’s direction to proceed.

[14] Dr. Clarke challenged the accuracy of the minutes and, apparently, he recently succeeded in obtaining amendments that indicate the vote did not proceed but was adjourned pending the preparation of a report by Mr. Vilnis, to be accompanied by estimates. Further, Dr. Clarke says that he intends to vote in favour of the resolution. Dr. Chorney is also supportive of the resolution so long as the consultant is identified.

[15] It is not necessary for me to decide if Mr. Fanaken misunderstood the outcome of the January 28, 2010, meeting resulting in a misleading error in the minutes. Assuming that he misunderstood the outcome, it appears that at least

some of the owners are willing to re-visit the special resolution and, hopefully, if so, all the owners can move forward on the issue. If less than three-quarters of the owners support the resolution or its replacement, the administrator will then decide whether to apply for an order. In that regard, it appears prudent and responsible to me that the administrator engage the services of an appropriate consultant to determine the scope of work and to assist in the process of selecting the contractor rather than just accepting an estimate.

[16] I accept that Mr. Vilnis is an architect, although he practiced in another province, and that he takes a different view. If he has a proposal, the owners should consider it, but he should not object to it being reviewed by an independent professional, taking into account the heritage nature of the building and local compliance standards. Similarly, if Dr. Chorney receives the report that she recently commissioned, that information should be freely shared. It does not necessarily follow that the person who Dr. Chorney consulted must become the consultant.

[17] If necessary, the court, on further application, can address any deadlocks over the selection of a consultant or the cost and scope of work to be done. An experienced administrator is necessary, in my view, to assist the owners and the court in addressing these issues in an organized and mutually respectful way.

[18] As Dr. Clarke correctly predicted during his submission, I have not, to this point, lost confidence in Mr. Fanaken as the administrator. In my view, changing administrators would add unnecessarily to the cost of the administration and would likely impede progress on the issues respecting Strata Lot 8. To this point, Mr. Fanaken's recommendations concerning the building envelope have been reasonable but slow in coming. Hopefully, he will not have to devote as much time to resolving the issues respecting Strata Lot 8 and can now devote more time to the building envelope issue.

[19] Mr. Vilnis also opposes the reappointment of Mr. Fanaken. Much of his submission mirrors that of Dr. Clarke's and has been addressed above. In addition, Mr. Vilnis contends that it is unfair that Mr. Fanaken is using "strata funds" to apply

for reappointment. This contention ignores s. 174(4) of the *Strata Property Act*, S.B.C. 1998, c. 43, which requires the Strata Corporation to pay the remuneration and expenses of the administrator. As I stated in my earlier reasons, the court has the power to order such payments by imposition of a special levy on the owners if necessary.

[20] Nonetheless, I take into account that this administration has been extremely costly for the Strata Corporation and, ultimately, the individual owners. A significant part of the cost is no doubt attributable to the numerous court applications that the administrator has had to make and retain counsel for. That is unfortunate but necessary. The terms of the original appointment entitle the administrator to engage the services of professionals, including counsel, as necessary in respect of his duties. Finally, I observe that the terms of appointment also permit any party to require the administrator to submit any disputed account for approval by the Registrar.

[21] I am persuaded that I should also grant the orders set out at paragraphs 1 and 2 of the draft form of order. I reappoint Mr. Fanaken as administrator for an additional term from March 20, 2010 to September 20, 2010, and order the imposition of a further special levy on the owners in the amount of \$20,000 to fund the administrator's expenses.

[22] I close these reasons by expressing a hope that the administrator will not find it necessary to apply for a further extension. That will depend, of course, on how matters progress between now and September.

“M.D. Macaulay, J.”
The Honourable Mr. Justice Macaulay