IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 3883 v. De Vuyst,* 2011 BCSC 1252

Date: 20110713
Docket: S103858
Registry: Vancouver

Between:

The Owners, Strata Plan LMS 3883

Appellant

And

Dirk C.A. De Vuyst

Respondent

Before: The Honourable Mr. Justice Kelleher

Oral Reasons for Judgment

Counsel for the Appellant:	M. Tatchell
Counsel for the Respondent:	G.S. McAlister
Place and Date of Hearing:	Vancouver, B.C. June 20, 2011
Place and Date of Judgment:	Vancouver, B.C. July 13, 2011

[1] This is an application for leave to appeal pursuant to s. 188 of the *Strata Property Act*, S.B.C. 1998, c. 43.

[2] Section 188 provides as follows:

> 188 (1) A party to an arbitration may, within 30 days after receiving the decision, appeal to the Supreme Court on any question of law arising out of the decision if
>
> (a) all of the parties to the arbitration consent, or
>
> (b) the court grants leave to appeal.
>
> (2) In an application under subsection (1), the court may grant leave, but only if it determines that
>
> (a) the importance of the decision justifies the intervention of the court and that the determination of the question of law may prevent a miscarriage of justice, or
>
> (b) the question of law is of importance to some class or body of persons of which the applicant is a member, or that the question of law is of general or public importance.

[3] The decision under appeal was made on May 3, 2010. The arbitration concerned a dispute between the Strata Corporation and the respondent, Mr. De Vuyst, over fees enacted by the Strata Corporation and against the respondent. The fees were charged under a bylaw dealing with moving in or moving out. The bylaw was passed unanimously by the owners at their Annual General Meeting in September 2002. The bylaw reads as follows:

> 19. Use of the property – Move in/out fee and procedure.
>
> (1) A non-refundable assessment of $200 will be levied on any move in and $200 will be levied on any move out. Move in/out assessments will be used to defray the costs to the strata corporation which include inspection of the common area before and after moving in, the installation of elevator pads, and the issuance of the elevator control key.

[4] Mr. De Vuyst has leased his suite to three different tenants since the bylaw came into effect in 2002. He has been assessed the $200 fee on six occasions, and the Strata Corporation claims that he owes it $1,200.

[5] Section 110 of the *Strata Property Act* prohibits the imposition of user fees for the use of common property other than as set out in the *Strata Property Regulation,* B.C. Reg. 312/2009.

[6] The exception to s. 110 is found in s. 6.9 of the *Regulation*, which provides as follows:

> 6.9 For the purposes of section 110 of the Act, a strata corporation may impose user fees for the use of common property or common assets only if all of the following requirements are met:
>
> (a) the amount of the fee is reasonable;
>
> (b) the fee is set out
>
> (i) in a bylaw, or
>
> (ii) in a rule and the rule has been ratified under section 125(6) of the Act.

[7] It is common ground that the user fee is set out in a properly enacted bylaw.

[8] The question before the Arbitrator was whether the $200 fee was "reasonable" within the meaning of s. 6.9 of the *Regulation*.

[9] The Arbitrator considered the meaning of the word "reasonable", heard submissions about it, and concluded that it meant objectively reasonable or reasonable on objective grounds. Both parties accept that interpretation.

[10] The Arbitrator went on to consider whether the fees were reasonable. In approaching that question, he accepted the submission of counsel for Mr. De Vuyst that whether the move fees were "reasonable" in 2002 should depend on (at para. 35):

> (a) prevailing market conditions at the time; and/or
>
> (b) the costs incurred by the strata corporation in facilitating moves in/out of the property.

[11] The evidence of the president of the Strata Council was as follows:

> 47. Mr. Wimmer testified about the many duties of the resident manager associated with moves in and out of the building, which duties were considered in setting the move-fees. They include: scheduling moves; putting up protective blankets in the elevator; instructing the person moving on how

> to use the elevator; assisting movers to back into the loading area; keeping watch over the back door area to ensure the security of the building; removing elevator pads; tidying the lobby area and vacuuming; changing interphone information which with the old system took as much as ½ to ¾ of ah hour. Mr. Wimmer testified that a move-in or out can take 4-8 hours and may take place over several days. If damage is noted by the resident manager then the person moving is required to pay for the cost of repairs. IF damage is not noted, there can still be wear and tear.
>
> 48. In cross examination Mr. Wimmer indicated that the resident manager is not paid extra for the work in supervising moves, but that where a move takes him into overtime, he is given time off in lieu. If the resident manager is occupied with supervising moves, he has less time for his other duties. He testified that they do not hire other people to look after moves. Mr. Wimmer indicated that at the time they set the moving fees, they did not identify the cost of moves and did not assign a dollar value to wear and tear. However, he felt that the move fee was reasonable.

[12] As far as the market conditions were concerned, Mr. De Vuyst testified about a number of comparable buildings that charged less.

[13] The Strata Corporation, on the other hand, adduced evidence from the property manager that user fees varied from between zero and $200-$250 per move at other buildings.

[14] The Arbitrator concluded that Mr. De Vuyst's evidence was more specific and more reliable than that provided by Mr. McInnis. The Arbitrator further concluded that, based on the two factors, the assessment was not "reasonable"; therefore, bylaw 19 contravened s. 6.9 of the *Regulation*.

[15] The appellant launched this application for leave to appeal on the basis that the Arbitrator committed an error of law in reaching his conclusions. It is common ground that there is no appeal in respect of issues of mixed fact and law or issues of fact.

[16] The position of the appellant is that the error of law came in not taking into account the very careful process that the owners engaged in, and that he confined a consideration of reasonableness to the objective evidence of comparable fees at other buildings and of the actual cost of a move in or move out at the Grande.

[17] There is much authority on the often difficult issue of whether a matter is a question of law or a question of fact, or a question of mixed fact and law.

[18] I have concluded that the issue here was a question of mixed fact and law. In *Housen v. Nikolaisen*, 2002 SCC 33, the Supreme Court of Canada described a question of mixed fact and law as follows at para. 26:

> [26] ... Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual.

[19] Here, the Arbitrator concluded correctly that reasonableness means objectively reasonable. He then decided that, on an assessment of the objective evidence, the fee was not reasonable.

[20] The question before this Court is not whether I agree with that conclusion.

[21] The Arbitrator was entitled to approach the question of reasonableness in the manner that he did. Reasonableness is not a question of law. The Arbitrator applied the legal standard of reasonableness to the facts before him. On that basis, he preferred the evidence of Mr. De Vuyst to the evidence of Mr. McInnis. He was entitled to do so.

[22] I conclude that there is no question of law, and that leave to appeal cannot be granted. It is so ordered.

"Kelleher J."