IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Owners, Strata Plan KAS 3267 v. Smith,*
2011 BCSC 387

Date: 20110331
Docket: 83919
Registry: Kelowna

Between:

The Owners, Strata Plan KAS 3267

Petitioner

And

Robert Stewart Smith, Lombard General Insurance Company of Canada, Trak Energy Corporation and Super-Save Enterprises Ltd.

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 27 on April 5, 2011

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Petitioner:	R.H. Sommery, Agent for J.A. Bleay
Counsel for the Respondent R.S. Smith:	D. Spelliscy
Place and Date of Hearing:	Kelowna, B.C. March 9 and 10, 2011
Place and Date of Judgment:	Kelowna, B.C. March 31, 2011

Introduction

[1] The claimants are the owners of the strata development. They are seeking payment of certain strata fees from the individual respondent Mr. Smith. The owners seek declarations that the liens they have lodged against two of the respondent's strata lots and against the proceeds of sale from a third lot are valid charges. The owners seek a 30 day redemption period with respect to those charges.

[2] Mr. Smith opposes the application. He is seeking an order that the resolution upon which the owners rely is significantly unfair to him and is, pursuant to s. 164 of the *Strata Property Act,* null and void.

The Facts

[3] At all material times the respondent Mr. Smith was the guiding mind of 0718698 B.C. Ltd. That company and another company controlled by a couple named Barones were the partners in a joint venture that went by the name Happy Valley Resort Joint Venture. Happy Valley undertook the development of a residential strata project located in Lake Country, B.C. The project involved the construction of numerous residential units together with various common area spaces and amenities. The developer initially anticipated that the complex would be complete in June 2007. The developer encountered various difficulties in the course of construction with the result that the complex was not, in fact, finished on schedule.

[4] In September 2007 the developer still held the titles to the strata units. Many of the lots had been committed for sale to purchasers well ahead of completion of the residential units and completion of the common area amenities. The individuals who intended to buy those units were agitating for completion of their residences. The developer was concerned that the purchasers would repudiate their contracts. The developer was therefore motivated to placate the purchasers. To that end, the developer decided to relieve purchasers who completed their contracts to buy lots of the burden of having to pay strata fees that accrued in advance of an occupancy permit being granted for the purchaser’s unit. The developer also decided to give

those purchasers a sliding-scale discount for the period between their getting an occupancy permit and the completion of parking, driveways, common facilities and amenities. To give effect to that plan, the developer, through Mr. Smith, caused the Strata Corporation to pass a resolution. The resolution was passed on September 15, 2007. The terms of that resolution were:

> 1. That…during the construction period, the following Reductions in Strata Fees shall apply:

Status of Project	Percentage Reduction
Prior to Occupancy Permit being granted for Owner's Unit	100% Reduction
After Occupancy Permit for Unit but prior to completion of parking and driveways	30% Reduction
After completion of parking and driveways, but prior to completion of…common facilities and amenities	10% Reduction
Full completion of project	No Reduction

> 2. Strata Fees shall not commence until the later of:
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> a) the first day of the first full month following the date of issuance of an Occupancy Permit for the unit, or
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> b) the date which is 20 days after the issuance of the aforesaid Occupancy Permit.
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> Rationale: To recognize that Owners should not be charged for amenities that are not available to them.
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> 3. The Developer will determine when the project has been fully completed and accordingly, when the reductions of strata fees will cease, but at a date no later than March 15, 2008.

[5] The parties refer to the September 2007 resolution as "the developer's resolution".

[6] Between September 15, 2007 and August 1, 2008, numerous contracts to purchase strata lots were completed and the titles to those lots were transferred by the developer to their purchasers. Some of those units did not have occupancy permits when they were first transferred to their new owners. Those owners relied on the developer's resolution and received forgiveness of the strata fees that they, as

the unit's owners, would otherwise have had to pay. Occupancy permits were eventually issued for the units, but in some cases the permits arrived ahead of completion of the common area amenities and parking facilities. Pursuant to the developer's resolution, the owners of the units with permits received forgiveness of a portion of the strata fees that they, as owners, would otherwise have to pay.

[7] On April 1, 2008 the discounts ceased and as of that date all owners who had occupancy permits paid their full strata fees. Some units did not yet have occupancy permits by April 1, 2008. The owners of those units continued to be relieved of paying any strata fees until they in fact received occupancy permits.

[8] By July 18, 2008, all of the units in the complex, other than those intended to be owned by Mr. Smith and the Barones, had an occupancy permit. As of August 1, 2008, every unit in the complex, again with the exception of the units that Mr. Smith and the Barones intended to acquire, began to be assessed their full strata fees.

[9] Although Mr. Smith maintains that the development was not finished as of August 1, 2008, the evidence shows that it was completed to a degree sufficient to end the "construction period" that was contemplated by the developer's resolution. The two most compelling pieces of evidence bottoming that conclusion are that after August 1, 2008 the developer did not offer continuing discounts to the owners and that after that date no purchaser complained about having to pay full strata fees.

[10] The "construction period" contemplated by the developer's resolution therefore ended as of August 1, 2008.

[11] As noted, by October 1, 2008 every unit in the complex other than units 99, 94 and 146 and the two units that the Barones intended to acquire was finished and occupancy permits had been issued. The Barones obtained title to their two units in or about October 2008. The Barones received occupancy permits for their units sometime well after October 1, 2008. When asked by the Strata Corporation, the Barones agreed to pay strata fees on those units as of October 1, 2008.

[12] On October 1, 2008 Mr. Smith caused the developer to transfer title to units 99, 94 and 147 to himself. Mr. Smith waited until December 15, 2009 to bring units 94 and 146 to the stage where occupancy permits were issued for them. Mr. Smith waited until January 6, 2010 to bring unit 99 to the stage where an occupancy permit was issued for it. Mr. Smith took the position with the Strata Corporation that the developer's resolution was still in effect after October 1, 2008 and that he was therefore exempt from paying strata fees for his three units for the period between his acquisition of the units and the issuance of occupier's permits for those units. The periods of exemption he claimed were from October 1, 2008 to December 15 2009 for units 94 and 146, and from October 1, 2008 to January 6, 2010 for unit 99.

[13] In May 2009, the Strata Corporation took the position that Mr. Smith was not entitled to a discount on or relief from strata fees on his three units. The Corporation demanded that Mr. Smith pay strata fees on those units for the period commencing when he took title to the units, i.e.: October 1, 2008. Mr. Smith refused to pay. The Corporation then took steps to file liens against the titles to Mr. Smith's three units and it commenced these proceedings.

[14] In addition to not paying strata fees for the periods October 2008 to December 2009, Mr. Smith also refused to pay any strata fees after January 2010. Mr. Smith took the position that he was entitled to require the petitioner to allocate any fees he paid after January 2010 to fees accruing as of that date. The petitioner did not accept Mr. Smith's demand.

[15] When this matter first came on for hearing in July 2010, it became clear that the Corporation had sought payment of strata fees from Mr. Smith from the date that he had taken title to his units but that the Corporation had not made like demands of the owners whose strata fees were abated prior to August 1, 2008. It seemed, therefore, that the Corporation was seeking fees from Mr. Smith on the basis of his taking title to the units but was content to allow other owners the benefit of the developer's resolution. That raised a question of fairness. The matter was adjourned so that the Corporation could address that issue.

[16] On October 8, 2010, the Corporation's council passed a resolution. That resolution provided for retroactive assessment of strata fees for all owners as of the date they took title to their units. The October 2010 resolution effectively erased the developer's resolution. According to the Corporation's property manager, 75 owners in addition to Mr. Smith are affected by the October 2010 retroactive resolution. The amount owed by those owners pursuant to the retroactive resolution ranges from $269 to $1,300; the average amount dunned to each owner is $450. Commencing the week of March 2, 2011, the Corporation began to issue demands to those 75 owners, requiring them to comply with the retroactive resolution.

[17] The Corporation currently seeks a variety of relief against Mr. Smith, the most significant of which are personal judgment against Mr. Smith for the unpaid fees, a declaration that the fees comprise a charge against the unit titles, that Mr. Smith be permitted 30 days to redeem the charge or the Corporation be free to sell the units, and special costs.

[18] Mr. Smith has applied for an order that the October 2010 resolution is *ultra vires* the Corporation and its council. He relies on s. 164 of the *Strata Property Act*. Mr. Smith maintains that the only fair way for the Corporation to assess strata fees is by commencing its claim as of the date that each unit received its occupation permit.

Discussion

[19] Mr. Smith's arguments concerning s. 164 are, with the greatest of respect, a red herring. This is not a case that must be decided on principles of fairness. This case must be decided upon the facts that pertained on the ground in 2007 and 2008.

[20] Those facts are that in September 2007 the developer, through Mr. Smith, caused the Corporation to pass a resolution that relieved unit owners from liability for strata fees during the "construction period". The resolution provided that during the construction period the owners would receive relief from all fees ahead of their receipt of an occupancy permit for their unit. The resolution stipulated that the construction period would end no later than March 15, 2008. The evidence in the

case made it clear that the construction period extended beyond March 15, 2008, but that the construction period came to an end by August 1, 2008.

[21] Because the developer's resolution was limited in effect to the construction period and because the construction period undoubtedly ended as of August 1, 2008, the developer's resolution must have ceased to have any effect after August 1, 2008. It follows that from August 1, 2008 on, the default provisions of the *Strata Property Act* applied and strata fees were payable as of the day that the unit's title was registered in the name of its owner.

[22] Mr. Smith became registered as owner of units 99, 94 and 146 on October 1, 2008. He acquired his titles after the construction period was over. His liability for strata fees commenced on October 1, 2008. The Corporation is entitled to an order accordingly.

[23] Whether the strata corporation's October 2010 retroactive resolution is fair or unfair is a question that may be raised by the owners affected by it. Mr. Smith is not among that number. That is because the developer's resolution had ceased to be effective by the time that Mr. Smith took title to his lots. It follows that the retroactive resolution does not affect his interests. Mr. Smith has no standing to complain about the retroactive nature of the resolution, and the outcome of any dispute over it would not affect the fees that Mr. Smith is liable to pay for his units.

[24] The strata corporation is entitled to personal judgment against Mr. Smith for the unpaid strata fees accruing on strata lots 94 and 146 from October 1, 2008 to the present, and on strata lot 99 from October 1, 2008 to the date that Mr. Smith transferred that lot to a third party purchaser. The corporation's liens registered against those three lots are valid, and in the case of lot 99, the lien secures the corporation's claims with respect to the lot's purchase funds. The redemption amount and the personal judgment against Mr. Smith as of March 29, 2011 is $29,898.23 plus costs as set out below. The redemption period will be 30 days from the release of these reasons. The corporation will be at liberty to apply for an order

for sale of the lots in the event that the lots are not redeemed before the redemption period expires.

Costs

[25] The strata corporation seeks special costs against Mr. Smith. The corporation argues that Mr. Smith deliberately delayed getting occupancy permits for his units in order to avoid paying strata fees. The corporation started this proceeding after those permits were issued. The corporation's position is, therefore, based upon Mr. Smith's pre-litigation behavior.

[26] The general rule is that pre-litigation behavior should not be a factor when considering an award of special costs. As with all rules, it has its exceptions. In *Nygard International Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.), cited with approval in *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2009 BCCA 275, the Court of Appeal held that it may be possible for pre-litigation conduct that is reprehensible and deserving of rebuke to bottom an award of special costs. However, as Lambert, J.A. said *Sun Life Assurance Co. v. Canada v. Ritchie* [2000 BCCA 231, 76 B.C.L.R. (3d) 93] at paragraph 54:

> [54] Special costs are usually awarded only in relation to misconduct in the course of the litigation itself. However, there may arise circumstances where special costs may be awarded because of reprehensible conduct giving rise to the litigation, *particularly where the fruits of the litigation do not provide any appropriate compensation in relation to the reprehensible conduct…*
>
> (*emphasis added*)

[27] Mr. Smith's conduct was, I agree, cynical and manipulative, but that conduct gave rise to nothing more than a claim for payment of money. That money will now be paid. In my view, the fruits of this litigation, being judgment for money owing, will provide full compensation of the corporation's loss. This is not one of those unusual circumstances where reprehensible pre-litigation conduct gives rise to a need to add special costs to the claimant's recovery in order to redress something lacking in the main award. The claimant is entitled to court order interest on the monetary portion of its claim.

[28] The corporation is, of course, entitled to its costs on Scale B throughout.

"P.J. Rogers J."
The Honourable Mr. Justice Rogers