IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dollan v. Strata Plan BCS 1589,*
2011 BCSC 570

Date: 20110502
Docket: S090359
Registry: Vancouver

Between:

459381 B.C. Ltd., Phillip Dollan and Barbara Jean Woodford

Petitioners

And

The Owners, Strata Plan BCS 1589

Respondent

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Petitioners:	G. Niemela
Counsel for the Respondent:	A.L. Baker
Place and Date of Hearing:	Vancouver, B.C. February 11, 2011
Place and Date of Judgment:	Vancouver, B.C. May 2, 2011

INTRODUCTION

[1] This petition concerns a window in a condominium unit in the False Creek waterfront development known as King's Landing. The west wall window in the den is a spandrel window. A spandrel window is opaque. You cannot see through a spandrel window. The petitioners want to replace the spandrel window with a vision glass window so that they can see through the window. The proposed change was defeated following a motion made under s. 71 of the *Strata Property Act*, S.B.C. 1998, c. 43 [*Act*], at a special general meeting of the respondent the Owners, Strata Plan BCS 1589 (the "Strata Corporation"). The petitioners seek an order against the Strata Corporation that they be at liberty to replace the spandrel window with a vision glass window. If the petitioners are successful on their petition, the cost of the replacement will be borne by the developer Concord Pacific Group (the "developer").

[2] An issue raised during the hearing of the application was whether the proposed change was a significant change within the meaning of s. 71 of the *Act*. However, since the hearing, the parties agree that the issue to be decided is whether the petitioners have been treated significantly unfairly pursuant to s. 164(1) of the *Act*, and if I should decide in favour of the petitioners, then the issue is whether the petitioners are entitled to replace the spandrel window with vision glass pursuant to s. 164(2) and/or s. 165.

[3] Sections 164 and 165 of the *Act* provide in part:

> **Preventing or remedying unfair acts**
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> **164** (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
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> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
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> > ...
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> (2) For the purposes of subsection (1), the court may
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> > (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

> (b) vary a transaction or resolution, and
>
> (c) regulate the conduct of the strata corporation's future affairs.
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> **Other court remedies**
>
> **165** On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:
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> (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules[.]

THE BACKGROUND

[4] King's Landing is located on Beach Crescent and on Homer Mews along False Creek in Vancouver. The development consists of 158 strata lots in two high-rise towers known as the West Tower and the South Tower that are connected by a low-rise tower of townhouses known as the Villas. Construction of the development began in or around 2003 and was completed near the end of 2005.

[5] The petitioner 459381 B.C. Ltd. owns an undivided one-half interest in strata lot 108 which has a civic address of 1501 – 428 Beach Crescent ("unit 1501"). The remaining undivided one-half interest is owned by the petitioners Phillip Dollan and Barbara Jean Woodford as joint tenants. The petitioners entered into an agreement with King's Landing Developments Limited Partnership on May 22, 2003 to purchase unit 1501 in the West Tower. The marketing materials detailed that the unit and similar units would have vision glass windows facing in three directions.

[6] On November 29, 2005 the petitioners completed the purchase of unit 1501. By that date a spandrel window had been installed in place of a vision glass window in the exterior west wall of the den.

[7] The millwork around the window sill and cornice was designed and constructed to accommodate privacy window coverings. The line work on the architectural drawings and the developer's marketing materials indicate that all of the windows in the den of the 01 units should be the same. The available Vancouver City Hall microfiche of the building plans also show that vision glass was the approved building design for the windows in the den of the West Tower 01 units.

[8] However, for some reason which is not in evidence, the developer installed spandrel windows on the west wall of the den in the 01 units. Floors 11 to 27 of the West Tower have 01, 02, 03, and 05 units. There are no 04 units, or floor numbers 13, 14, or 24. The 02, 03, and 05 units all have vision glass windows facing in three directions.

[9] The spandrel window is approximately seven inches from the floor, 98 inches high and 17 inches wide. The distance between the west facing spandrel window of the 01 unit and the east facing vision glass window of the 02 unit is approximately four and a half feet. The outside of the spandrel window is black. From the exterior of the West Tower, there is a vertical black stripe from floors 11 to 27, or 14 floors.

[10] At the time of closing, Mr. Dollan and Ms. Woodford included the spandrel window on their list of deficiencies. The spandrel window blocks their view to the west, and they find the spandrel unsightly. It looks as if the window is damaged and waiting to be repaired.

[11] Lance and Noriko Ewing purchased unit 2601 in the West Tower in August 2003. They were also unhappy that not all of the windows facing in three directions contained vision glass as the developer and its agents had represented to them. In November 2007 the Ewings commenced a Provincial Court action against the developer. Mr. Dollan also commenced an action against the developer in Provincial Court in November 2007. In both actions, the developer agreed to replace the spandrel window with a vision glass window, subject to Strata Council approval.

[12] It is common ground that the petitioners (and likewise the Ewings) are limited in damages against the developer for breach of contract, if any. Once Strata Plan BCS 1589 was filed only the Strata Council or the Strata Corporation, and not the developer, can decide what changes can be made to the windows.

[13] The windows form part of the exterior of the building and therefore form part of the common property. Under the *Act*, an owner owns the common property as a

tenant in common, but the Strata Corporation is responsible for managing and maintaining the common property for the benefit of the owners (ss. 3 and 66).

[14] Under the Strata Corporation's bylaws, any changes to common property require the written approval of the Strata Corporation. The petitioners and the Ewings therefore sought permission from the Strata Council to change the spandrel window in their unit to a vision glass window.

[15] The proposed change was discussed at a Strata Council meeting on April 22, 2008. Certain owners of the 02 units were opposed to the change because the spandrel windows in the 01 units act as a privacy screen for them. Replacing the spandrel with vision glass would result in their loss of privacy.

[16] Because the proposed change was controversial, the Strata Council decided that the proposed change was a significant change in the use or appearance of the common property under s. 71 of the *Act*, which requires a resolution passed by a three-quarters vote.

[17] Section 71 provides:

> **Change in use of common property**
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> **71** Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless
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> (a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
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> (b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

[18] On June 26, 2008 a special general meeting of the owners was held to consider the following motion:

> **BE IT RESOLVED:**
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> Whereas The Owners, Strata Plan BCS 1589 (the "Strata Corporation") has received a request from the owners of strata lots 108 and 148 to undertake a substitution of the spandrel panel for a clear glass window pane in the den on the west side of each strata lot (the "Spandrel Change");

> **AND WHEREAS:**
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> The Spandrel Change is a significant change in the use or appearance of common property, requiring the approval of the Strata Corporation by way of a 3/4 vote resolution in accordance with section 71(a) of the Strata Property Act;
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> **THEREFORE BE IT RESOLVED:**
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> As a 3/4 Vote Resolution of the Strata Corporation that the Spandrel Change be approved for each of strata lots 108 and 148, subject to the full costs of said change being the responsibility of the owner(s) of the strata lots undertaking the Spandrel Change.

[19] The minutes of the special general meeting read in part:

> **(5) CONSIDERATION OF ¾ VOTE RESOLUTION**
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> Ms. Trehearne, Council President reviewed the purpose of the Special General Meeting which is to consider a ¾ Vote Resolution, as Strata Lots #108 and #148 have requested to undertake a substitution of the spandrel glass panel to a clear vision glass panel. Described is the panel is approximately 17 inches wide and runs floor to ceiling. Approximately 24 inches away is a mirror image. The Strata Council has viewed the requested spandrel glass change as a significant change in the use of the common property. Strata Council determined that this was a privacy issue for the particular owners of the strata lots directly across, above or below. Brought forth was that if the glass would be switched to clear vision glass this would create a privacy issue that would create a significant change to owners, especially as privacy is such an important factor in society today.
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> ...
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> The Strata Corporation is dealing with the issue at hand and not what Concord did or did not install or change from original plans. Also the townhouse strata lot that had spandrel removed and glass inserted was done directly by the Developer and this change did not become before Council. The townhouse strata lot change has no privacy issue involved as the window is a street view only. Similarly, the owner of the Penthouse strata lot owns the whole floor and privacy at that strata lot was not an issue.
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> Ms. Trehearne advised that the Strata Council has discussed this topic extensively in individual discussions and in groups and is attempting to come up with what is fair to all owners.

[20] It is apparent on reading the minutes of the special general meeting that certain owners of the 01 units wanted their view, and certain owners of the 02 units wanted their privacy.

[21] The motion was defeated with 19 owners in favour and 54 owners opposed.

[22] In July 2009 the Ewings informed the Strata Council that they planned to change the spandrel window to a vision glass window. The Strata Council informed them that the change was not approved by the owners, and if they went ahead with the window change the Strata Corporation would restore the spandrel panel at their cost.

[23] In the summer of 2009 the Ewings sold their unit. By the end of January 2011, four of the 01 units and ten of the 02 units are still owned by those who purchased their units from the developer.

ARGUMENT AND ANALYSIS

[24] The phrase “significantly unfair” in s. 164 has been described in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 at para. 26, as “burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith”, “unjust or inequitable”, or unreasonable. Moreover, the word “significantly” means that a court should only interfere if the actions or decision of a strata council results in “more than mere prejudice or trifling unfairness: *Reid* at para. 27.

[25] The petitioners point to the fact that in March 2006 the second floor picture window of a townhouse in the Villas was changed from spandrel to vision glass by the strata owner without requiring a resolution passed by a three-quarters vote approving the change. However, the Strata Corporation contends the townhouse picture window is different because it does not face another strata unit so there are no "privacy issues”, and no owner has ever complained.

[26] The petitioners also point to the fact that the West Tower penthouse does not have black spandrel covering the west facing window in the same place the spandrel windows exist on the 14 floors below. Similarly, the lobby to the penthouse elevator was changed from vision glass to spandrel without Strata Council or Strata Corporation approval and without a three-quarters vote at an annual or special general meeting. The Strata Corporation’s position is that the owner developer may have made the changes without Strata Council’s approval, but at the end of the day,

the changes do not impact on any other owner's privacy and no owner has ever complained.

[27] The Strata Corporation argues that the spandrel windows serve as a privacy screen, and that the owners of the 02 units will lose the benefit of the privacy screen if the spandrel windows are replaced by vision glass. Each strata unit owner weighs the importance of privacy and a view in different ways, but in this case the Strata Corporation, in the words of its counsel, "came down on privacy as opposed to a view".

[28] The Strata Corporation relies on the comments of Mr. Justice N. Smith in *Chan v. Owners, Strata Plan VR-151*, 2010 BCSC 1725 at para. 18 [*Chan*], to argue that the focus of a court's review of its decision must be on the conduct of the Strata Corporation in making the decision to refuse to allow the proposed change, and not on the impact that the refusal may have on the petitioners. The decision to change the vision glass to spandrel glass was a decision of the developer and not the Strata Corporation and is therefore not a decision subject to review under s. 164. Mr. Justice N. Smith stated:

> [18] The words "significantly unfair", as used in s. 164, have been defined to mean conduct that is "oppressive" or "unfairly prejudicial" including conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing or that has been done in bad faith" or is "unjust and inequitable": *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578 at para. 12, aff'd 2003 BCCA 126. A strata council has a duty to act in the interests of all owners, which may sometimes conflict with the interests of a particular owner or group of owners. Therefore, the court will only interfere if the conduct of the strata council results in something more than "mere prejudice or trifling unfairness": *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120 at para. 28. In *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791, Sewell J. said:
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> > [44] It is important to recognize that section 164 gives the Supreme Court the power to intervene only if there has been a significantly unfair action, threatened action or decision of the Strata Corporation in relation to an owner. In my view this means that for the section to apply some action or decision of the Strata Corporation must be the source of the unfairness complained of.
> >
> > ...
> >
> > [55] ... I repeat that the focus of that section is on the conduct of the Strata Corporation and not on the

> consequences of the conduct. There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the *SPA* itself.

[29] However, in *Chan* neither the strata council or the strata corporation had made a decision, demanded, or taken any action against the petitioner. The issue was whether enforcing a bylaw against the petitioner (which had not yet been enforced against her) would be significantly unfair. In *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791, the plaintiffs were complaining that the strata corporation's statutory mandated decision under s. 108 of the *Act* to assess repair costs on the various owners' respective unit entitlements was significantly unfair.

[30] However, in this case the Strata Corporation acknowledges that in discharging its statutory duties to manage, repair and maintain the common property, it "must endeavour to accomplish the greatest good for the greatest number": *Sterloff v. Strata Corp. of Strata Plan No. VR 2613* (1994), 38 R.P.R. (2d) 102 (B.C.S.C.).

[31] The challenges faced by living in close confinement with others in a high rise strata complex or "castles in the air" was discussed by Madam Justice Huddart for the Court of Appeal in *Shaw Cablesystems Ltd. V. Concord Pacific Group Inc.*, 2008 BCCA 234. In dismissing the appeal from the decision of Mr. Justice Leask, she stated:

> [9] ... [Leask J.] preferred a more democratic approach to the use of the common property than that proposed by Shaw; he wrote:
>
> > [10] In answering the two questions posed on this Rule 34 application, I am persuaded that the defendant's position is correct. Owning a strata lot and sharing ownership of the common property in a condominium development is a new system of owning property and has required the development of new mechanisms and procedures. Living in a strata development, as the Nova Scotia Court of Appeal stated [in *2475813 Nova Scotia Ltd. v. Rodgers,* 2001 NSCA 12 at

> para. 5], combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times. The council meeting of a strata corporation, while similar in some respects to a corporate annual general meeting, also resembles the town hall meeting of a small community. Stratas are small communities, with all the benefits and the potential problems that go with living in close collaboration with former strangers. In the circumstances, I believe the court should be slow to find absolute rights in individual owners that cannot be modified by the considered view of the majority of owners, controlled by judicial supervision where appropriate.
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> ...
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> [24] As is apparent from the scheme of the *Act*, its purpose is to create condominiums and to enact a total body of law to permit this new arrangement and application of property rights. To permit more concentrated and efficient use of land resources, this new type of property ownership met the need for a means of providing fee ownership to people wishing to own their own home, as land became less available and more expensive with increased post-war urbanization.
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> [25] As J.C. Cowan (later Cowan J.) noted in a lecture he gave shortly after the introduction of the new strata title concept to British Columbia (since published as "Strata Titles" in K.C. Woodsworth, ed., *British Columbia Annual Law Lectures, 1968* (Vancouver, B.C.: Continuing Legal Education)), the condominium or strata title concept permits us to "legally build and own 'castles in the air'." One of the important objects of the *Act,* like its predecessors, is to provide a framework of rules for group living in those castles, most often in one building. The primary feature of those rules is that no one person possesses or can possess exclusive control of the building and that, generally speaking, the majority rules. No owner has complete freedom of action within their own unit or within the common property.

[32] One of the problems that comes with living in an urban condominium development, rather than say a house on a large lot, or in a castle surrounded by high walls and a moat, is the loss of privacy. At the special general meeting on June 26, 2008 Strata Council President Deborah Trehearne stated that 01 unit residents looking out of a vision glass window (instead of the existing spandrel window) would be able to see into three 02 units: one unit across, one unit up, and one unit down. Mr. Dollan disagrees. He says that because of a concrete barrier located every two floors, 01 and 02 unit owners are able to see into one unit across and one unit up or down. However, he can also see into various other units in the West Tower from the balcony and from the interior of the unit through the windows if the blind and curtains

are not drawn in the other units. The distance between the South and the West Towers is close enough that he can see clearly into all of the 02 units and the main bedroom and ensuite bathrooms of the 03 units in the South Tower.

CONCLUSION

[33] I conclude that the petitioners have been treated significantly unfairly pursuant to s. 164. The decision of the Strata Council and the Strata Corporation in refusing or not allowing the change from a spandrel window to a vision glass window is significantly unfair to the petitioners. The decision is not one that accomplishes the greatest good for the greatest number.

[34] The Strata Corporation in carrying out its statutory mandate must fairly balance the competing tensions between those who want their view and those who want their privacy. Nothing in the *Act* guarantees either a view or privacy, but the *Act's* Schedule of Standard Bylaws provides as follows in s. 3(1)(c):

> **Use of property**
>
> **3** (1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that
>
> ...
>
> (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot[.]

[35] Although the Strata Corporation argues that it was the developer that decided to change the window from vision glass to spandrel, the petitioners and others who purchased 01 units from the developer still got less than they bargained for: they have a window that blocks their view from the inside to the outside; and the owners of the 02 units got more than they bargained for: they have the benefit of a privacy screen that blocks the view inside from the outside. But the privacy screen is not in or a part of the 02 unit, but in or a part of the 01 unit.

[36] The original purchasers of the 01 units and the 02 units both knew or ought to have known from looking at the strata plans that the distance between their windows was close and that the windows were to be vision glass windows. However, whether

or not the current owners of the 02 units were the original purchasers, the 02 unit owners have both a privacy screen at the expense of the 01 unit owners and a view. The 01 unit owners, and more particularly the petitioners, have no view from the spandrel window and a privacy screen they do not want. To allow the 02 units the benefit of a privacy screen that is in reality a window in an 01 unit, deprives the 01 unit owners' use and enjoyment of the window as a window.

[37] I question but do not decide whether the proposed change was a significant change in the use or appearance of common property within s. 71 of the *Act*. The spandrel window is a window. It may act as a privacy screen but it remains a window.

[38] The Strata Corporation does not dispute that the spandrel window was designed during the course of construction to accommodate window coverings. There is nothing to suggest that the windows in the 02 units could not be covered with window coverings or blinds or that the windows do not already have existing coverings or blinds. One of the 01 unit owners wanting to change the spandrel window suggested at the special general meeting that "[o]wners may close blinds if their Strata Lot requires privacy".

[39] Allowing the petitioners to change the spandrel window to vision glass would allow the 01 unit and the 02 unit occupants to a view outside the window, and to privacy by closing blinds or coverings when the occupants want privacy. This would in my view accomplish the greatest good for the greatest number.

[40] Having concluded that the petitioners were treated significantly unfairly, I find that they are entitled to replace the spandrel window with vision glass, and to costs.

"Loo J."