

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Azura Management (Kelowna) Corp. v.
The Owners, Strata Plan KAS 2428,
2010 BCCA 474*

Date: 20101028
Docket: CA037109

Between:

Azura Management (Kelowna) Corp.

Appellant
(Plaintiff)

And

The Owners, Strata Plan KAS 2428, Curtis Darmohray and David Osmond

Respondents
(Defendant)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Hinkson

Counsel for the Appellant:

Patrick A. Williams

Counsel for the Respondents:

Brian D. Rhodes and R. Grist

Place and Date of Hearing:

Vancouver, British Columbia
October 1, 2010

Place and Date of Judgment:

Vancouver, British Columbia
October 28, 2010

Written Reasons by:

The Honourable Mr. Justice Hinkson

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

Introduction

[1] The La Casa Resort is a bare land strata complex (the “complex”) of five hundred lots located on Okanagan Lake. Of those five hundred lots, one hundred and ten remain unsold and under the ownership of the developer of the complex.

[2] The respondent, “The Owners, Strata Plan KAS 2428”, who I will refer to in these reasons for judgment as the respondent owners, own three hundred and seventy-five of the remaining three hundred and ninety lots. Included in those three hundred and seventy-five lots are: Lot 492, a common asset laundry facility lot; lot 162, a caretaker’s cottage, and twenty-three lots described as “Green Space Lots”. Buildings will not be constructed on the Green Space Lots in accordance with the requirements of the area zoning authority, the Regional District of the Central Okanagan. Due to a direction by the chambers judge, which has not been challenged, lots 162 and 492, and the twenty-three Green Space Lots do not factor into the voting rights in issue.

[3] The appellant Azura Management (Kelowna) Corp. is the owner of the remaining fifteen lots that are not owned by the developer. These lots include: Lot 488, where a restaurant is located; Lot 491, where a theatre is located; and Lot 495 which houses a sewage treatment plant. LaCasa Management Corporation is an affiliate of the appellant and manages 108 of the cottages in the complex for the owners of those lots. Mr. Ewen Stewart is LaCasa Management Corporation’s sole director and officer. Mr. Stewart is also the appellant’s president.

[4] The majority of the respondent owners have constructed cottages on their lots, and the evidence is that by August 27, 2014, all lots other than those designated as Green Space Lots, the twenty-nine original lots which have grandfathered special privileges, and lots 488, 491, 492 and 495 are expected to have cottages built on them.

[5] The following are the relevant parts of the relevant sections of the *Strata Property Act*, S.B.C. 1998, c. 43 (the “Act”):

128 (1) Subject to section 197, amendments to bylaws must be approved at an annual or special general meeting,

(a) in the case of a strata plan composed entirely of residential strata lots, by a resolution passed by a 3/4 vote,

(b) in the case of a strata plan composed entirely of nonresidential strata lots, by a resolution passed by a 3/4 vote or as otherwise provided in the bylaws, or

(c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaws for the nonresidential strata lots.

...

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

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

(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.

...

193 (1) To create or cancel sections, the strata corporation must hold an annual or special general meeting to consider the creation or cancellation.

...

(3) The resolution referred to in subsection (2) (a) must be passed

(a) by a 3/4 vote by the eligible voters in the proposed or existing section, and

(b) by a 3/4 vote by all the eligible voters in the strata corporation.

[6] Until November 13, 2008 each of the three hundred and ninety lot owners other than the developer enjoyed the same voting rights on any proposed amendments to the Strata Corporation's bylaws; one vote per lot. The appellant had a particular vision for the development of the complex that it endeavoured to advance by proposing the election of a slate of candidates to the Strata Council of the complex. Other owners had a different view and proposed other candidates for the Council.

[7] When none of the appellant's candidates were elected, it brought a petition in the Supreme Court on November 13, 2008 seeking a declaration that section 128(1)(c) of the *Act* be interpreted to mean that all of the lots in the complex were residential lots except lot 492, owned by the Strata Corporation and three of the lots owned by the appellant, namely lots 488, 491 and 495.

[8] If successful, the declaration was expected to bring about the result under s. 128 of the *Act* that any amendment to the bylaws of the Strata Corporation would require both a resolution passed by a 3/4 vote of the residential strata lot owners and a resolution passed by a 3/4 vote of the nonresidential strata lot owners, giving the appellant, in effect, a veto power over any proposed amendments to the bylaws.

[9] The chambers judge (2009 BCSC 506) granted a declaration that lots 488, 491, 492 and 495 were nonresidential lots and that all of the remaining strata lots in the complex were residential lots. He also directed that at any future annual general and special meetings of the Strata Corporation, the votes held by the strata lots owned by the Strata Corporation could not be cast by the Strata Corporation's Council on any matters or resolutions, except those that require a unanimous vote. This declaration meant that the appellant owned all of the nonresidential lots that could exercise a vote.

[10] The chambers judge ordered, however, that:

“Pursuant to Section 164(1)(b) of [the *Act*], to prevent any significantly unfair exercise of voting rights by any person who holds more than 50% of the votes in person or by proxy, any future annual general meeting or special meetings of the Strata Corporation to consider amendments to the Strata Corporation's

bylaws will be conducted on the basis that both residential and nonresidential strata lots (as those terms are defined in the *Act*) otherwise eligible to vote will vote together as a single group and not as two groups separated into residential strata lots and nonresidential strata lots”.

Issues to be Determined

[11] The question on this appeal is whether s. 164 of the *Act* can be used to overcome the effect of s. 128 of the *Act* with respect to all future voting rights of the members of a Strata Corporation on any proposed amendments to the bylaws of the Corporation.

[12] The cross appeal raises the question of whether the chambers judge erred in finding that any of the lots within the subject Strata Corporation are nonresidential strata lots.

Sections 128 and 164 of the Act

[13] Provisions in the *Act* have previously been considered by this Court in *Jiwan Dhillon & Co. v. Strata Plan LMS4385*, 2010 BCCA 324. In that case Madam Justice Saunders, for the Court, discussed the appropriate approach and standard of review at paras. 14-15:

The appeal raises the correct construction of s. 165 of the *Act*. The standard of review we must apply is correctness

...

To our knowledge this case raises the construction of s. 165 for the first time. We are, accordingly, thrown back to basic principles of statutory interpretation. It is well known that the unifying principle of statutory interpretation, as approved by the Supreme Court of Canada, is described in E.A. Driedger, *The Construction of Statutes* 2nd ed. Toronto: Butterworths, 1983:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and intention of Parliament

See *Rizzo & Rizzo Shoes (Re)*, [1998] 1 S.C.R. 27; *Bell Express Vu v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

[14] The chambers judge clearly understood the voting consequences of his declaration of residential and nonresidential lots within the complex. At para. 79 of his reasons, in reference to s. 128 of the *Act*, he said:

While I cannot assume that the legislation was meant to deal with the situation where 4 non-residential strata lots would have the same voting entitlement regarding bylaw amendment as 494 owners, I am satisfied that this is the effect of the legislation for this corporation.

[15] In response to the effect of s. 128 of the *Act* that he described, the chambers judge made the order pursuant to s. 164(1)(b) of the *Act* set out above in para. 10. The appellant's position before us was that it was not open to the chambers judge to make such an order for three reasons:

- a) That s. 164(1)(b) of the *Act* does not permit an order that will affect voting rights at any future annual general meetings or special general meetings;
- b) That s. 164(1)(b) of the *Act* does not provide the authority to the Court to make the order under appeal when:
 - (i) the Strata Corporation had not claimed such relief; and
 - (ii) an owner or a tenant has not applied for the relief; and
- c) That the order cannot be made based on only the potential that the petitioner will act in a way that will be significantly unfair or oppressive to the interests of the Strata where there is a finding that there is no evidence that the petitioner will act in other than the best interests of the Strata.

[16] In regard to the first argument raised by the appellant, while I am not prepared to rule out the possibility that the affairs of a Strata Corporation might become so polarized that it could not effectively operate without the regulation of all of its future voting by a court pursuant to s. 164, that section must be read in conjunction with ss. 128 and 193. Section 128 recognizes that different uses of lots within a Strata Corporation may invoke different interests, and that those interests must be separately recognized for the purpose of voting on proposed bylaw amendments. In *Butterfield v. The Owners Strata Plan LMS 1277*, 2000 BCSC

1110, Mr. Justice Preston recognized that one of the purposes of s. 128 was to “protect” residential and nonresidential groups from each other.

[17] In the event that the different interests warrant the creation or cancellation of specific sections for voting purposes, s. 193 sets out the procedure to be followed, and if the necessary votes cannot be obtained under s. 193(3) because of significantly unfair or oppressive voting by the nonresidential lot owners, then s. 164 may provide a remedy to the residential lot owners. Where a specific statutory provision provides a means to achieve a certain result, a party seeking that result must attempt that result through the legislated mechanism available before it can seek redress from the Court; see for example *Owners of Strata Plan NW2212 (Re)* 2010 BCSC 519 at paras. 34-37.

[18] Given my views set out below on the other reasons argued by the appellant, I do not consider that it is necessary to say any more about the first reason advanced by the appellant to disturb the challenged order of the chambers judge.

[19] I agree with the second proposition argued by the appellant, that in order to provide the Supreme Court with jurisdiction to make an order under s. 164 of the *Act*, one of two actors must bring an application to the Court. Subsection 164(1) identifies these as either an owner or a tenant. Although the appellant can be seen, at a minimum, as the representative of strata lot owners, it did not bring any application for an order pursuant to s. 164 of the *Act*. Further, as an application can only be brought by an owner or tenant, I do not need to address the appellant’s argument that the order made by the chambers judge was not sought by the Strata Corporation. As there was no application for the order made by any owner or tenant there was no jurisdiction for the order made by the chambers judge under s. 164 of the *Act*, and I conclude that it must be set aside.

[20] The third reason argued by the appellant also necessitates the result that the order concerning the voting rights of the lot owners must be set aside. To found jurisdiction for an order under s. 164 of the *Act*, something more than the potential for oppressive conduct is required. The section requires the likelihood of an

exercise or a threatened exercise of voting rights that will be used in a manner that will be significantly unfair, and that was not found by the chambers judge in this case. At para. 83 of his reasons, the chambers judge found:

In this context, I am satisfied that the term "significantly unfair" used in s. 164(1)(b) of the *Act* encompasses potentially oppressive conduct. While there is nothing in evidence which would allow me to conclude that Azura would act other than in accordance with the best interests of the Corporation, I am satisfied that the potential to do so is sufficient to require an order to be made pursuant to s. 164(1)(b) of the *Act*.

[21] I am unable to agree that an order can be made under s. 164 of the *Act*, where there is no evidence that supports a finding that a person holding more than 50% of the votes would act other than in accordance with the best interests of the Corporation.

[22] The result of the order of the chambers judge, if allowed to stand is to eliminate the appellant's voting rights provided by s. 128 of the *Act*, and to place the appellant in the position of having to bring an application under s. 164 each time there is a threat of oppressive conduct by the strata lot owners whose vision of the complex differs from that of the appellant. Given the apparent disagreement between at least these two factions of strata lot owners in the complex, the same potential exists that the appellant's opponents will vote their residential lot share entitlements in a manner oppressive to the appellant, which, following the logic applied by the chambers judge, would require an order preventing that exercise of the opposing voting rights. I am unable to accept that this is what s. 164 was intended to accomplish. I conclude that s. 164 was intended to address cases where it is more probable than not that those owners with 50% or more of the votes will act in a way that will be significantly unfair or oppressive to the interests of other owners in the complex.

[23] I would therefore set aside the order of the chambers judge that the residential and nonresidential lot owners in the complex vote together as a single group.

The Classification of the Lots in Issue

[24] The appellant's success on its appeal does not resolve the matters in issue before us, because if the chambers judge wrongly found that there were two classes of lots in the complex, the appellant would enjoy no veto power with respect to bylaw amendments.

[25] The Strata Corporation's bylaws have never provided for any differentiation in the classification of the various strata lots.

[26] The stated intention of the developer of the complex in its Initial Development Permit was to create what were described as "tourist cabins" in the various strata lots. Those structures were defined in a zoning bylaw as buildings "with a maximum size off 100 m2, designed and built as an independent and separate housekeeping establishment that is not used for residential purposes, but may include separate kitchen and sanitary facilities, provided for the exclusive use for tourists for temporary occupancy based on rental periods of less than one month".

[27] Over the period of time that the complex has existed, however, this has not been the practice. Instead of renting the structures on their lots, some strata lot owners have used their lots for their own occupancy.

[28] A Form W Schedule of Voting Rights was filed by the developer in the Land Title Office on August 8, 2002. Although it listed all 495 lots referred to as nonresidential, the preamble to the form stated that "The strata plan is composed of 6 Nonresidential strata lots, and 489 residential strata lots".

[29] In the "Consolidated and Seventh Amendment of the Disclosure Statement" dated May 11, 2007, the Developer described the development as one of 495 strata lots, 491 for residential purposes and 4 for non-residential purposes, and described lots 488, 491, 492 and 495 as the nonresidential lots. In the same document, the developer stated that "Pursuant to Section 53(1) of the *Strata Property Act*, each

Strata Lot will have one (1) vote. Accordingly there is no form W filed in the Land Title Office”.

[30] On July 16, 2008 Ewen Stewart filed a Form W Schedule of Voting Rights in the Land Title Office that described in its preamble, “The Strata plan is composed of 500 nonresidential strata lots” and listed each as nonresidential. In his affidavit in support of the appellant’s petition Mr. Stewart explained that he filed the form without realizing that the change had been made to the preamble from the earlier Form W filed in August 2002.

[31] At para. 74 of his reasons for judgment, the chambers judge correctly observed that:

Section 1 of the *Act* defines “residential strata lot” as meaning a strata lot “... designed or intended to be used primarily as a residence” and “bare land strata plan” as meaning: (a) a strata plan on which the boundaries of the strata lots are defined on a horizontal plane by reference to survey markers and not by reference to the floors, walls or ceilings of a building, or (b) any other strata plan defined by regulation to be a bare land strata plan”.

[32] He then concluded that the Strata Corporation was one composed partly of residential strata lots and partly of nonresidential strata lots, reasoning at para. 76 that:

(a) The May 11, 2007 “Consolidated and Seventh Amendment of the Disclosure Statement”, filed by the Developer, stated that 495 strata lots were for residential purposes, and four were for non-residential purposes. The strata lots “presently being retained or utilized for non-residential purposes” were described as being Strata Lots 488, 491, 492 and 495;

(b) The “Schedule of Voting Rights” filed in the Land Title Office indicates that the strata plan is composed of six nonresidential strata lots, and 489 residential strata lots. However, the same Schedule lists Strata Lots 488, 491, 492 and 495 as being “nonresidential”;

(c) In a June 19, 2008 Disclosure Statement, Azura made an offering regarding Strata Lots 496, 497, 498, 499, 500 and 501 which described Strata Lots 488, 491 and 495 as being used for “non-residential or multi-family purposes”.

[33] At para. 77 the chambers judge continued:

I find that there are four nonresidential strata lots: 488 (a restaurant); 491 (a theatre); 495 (sewage treatment plant); and 492 (caretaker's cottage). Azura owns Strata Lots 488, 491 and 495. Strata Lot 492 is presently owned by the Developer.

[34] The reference to strata lot 492 as the caretaker's cottage is clearly in error, as that strata lot is, as I have stated above, a common asset laundry facility lot owned by the Strata Corporation. The erroneous reference by the chambers judge was obviously inadvertent, as the laundry facility was correctly described by the chambers judge at paras. 25-29 of his reasons for judgment, and does not affect the outcome of the cross appeal.

[35] While the respondent owners argued that other strata lots should also be classified as nonresidential, the lots proposed were all owned by the Strata Corporation, and thus would be entitled to no vote on any future bylaw amendment. I will not, therefore comment on whether the chambers judge should have included any other lots as nonresidential.

[36] The respondent owners also argued that properties used by guests on a transient basis could not be classified as "residential", citing *Winchester Resorts v. Strata Plan KAS 2188*, 2002 BCSC 1165 at para. 16 and *Muir et al v. 403570 B.C. Ltd.*, 2003 BCSC 575 at paras. 39-43 in support of their submission.

[37] In *Winchester*, the owners of three strata lots sought to create an exclusive fishing lodge with bedrooms and common living and eating areas on two of their three lots. The Strata Corporation passed a bylaw precluding the use of any of the lots in the strata for commercial use. Mr. Justice Blair found that the transient nature of the guests who would be staying in the proposed resort made the fishing lodge more akin to a hotel and therefore did not support a residential classification.

[38] In *Muir*, a motel was converted into a strata corporation in an area where the zoning bylaws prohibited residential use. The developer advised the city that the owners would be renting out their units and therefore use would still be commercial, but the owners were under the impression they could live in the units themselves for

extended periods of time without renting. Mr Justice Blair found that the owners of the strata units were precluded by the applicable zoning bylaw from permanently residing in their units as this would be residential use. Mr. Justice Blair also found that the previous use as a motel with daily rentals in the summer and monthly rentals in the winter was nonresidential use. That reasoning does not assist the respondent owners here, as the use of the strata lots in this case is more akin to the use of the units in *Muir* after the conversion.

[39] Further, in *The Owners, Strata Plan NW 499 v. Louis*, 2009 BCCA 54, this Court held that it was not uncommon for people to have more than one residence and that it could not be disputed that each such place was a residence of its owner or that the owner was resident in each place. Therefore, both an individual's home or apartment and an individual's cabin or getaway cottage can be classified as a residence.

[40] The respondents also relied upon the decision in *Butterfield v. The Owners, Strata Plan NW 3214*, 2000 BCSC 1110, where Mr. Justice Preston concluded at para. 20:

The provisions of s. 51 are applicable to strata plans which have both residential and nonresidential lots as part of their definition in the strata plan. That is not the case here. In the circumstances before me, the strata unit owned by Ms. Butterfield has received zoning permission under the Richmond bylaws for a caretaker's suite. That does not make it a residential strata lot for the purposes of the *Condominium Act*.

[41] That reasoning does not assist the respondents. The zoning of the complex here permitted both cabins and dwelling units. While both Schedules of Voting Rights list the individual lots as all nonresidential, the August 8, 2002 Schedule of Voting Rights stated that the strata plan of the complex was composed of both residential and nonresidential strata lots, and the Consolidated and Seventh Amendment of the Disclosure Statement identified the lots found by the trial judge to be nonresidential lots as nonresidential lots.

[42] In my view, it was open to the chambers judge, on the evidence in this case, to find that the lots in the complex in this case which enjoyed voting rights, other than the four that he found to be nonresidential lots, were residential lots.

[43] Finally, the respondent owners also argued that the chambers judge erred in failing to consider the impact of his decision on existing owners who had, until his decision, voted collectively on the bylaws of the Strata Corporation. In support of their submission, the respondent owners referred to *The Owners Strata Plan LMS 1934 v. Westminster Savings Credit Union et al.*, where Madam Justice Morrison emphasized the importance of an owner's understanding of the rights he or she acquires as a result of buying into a strata corporation.

[44] The evidence before the chambers judge in this case was that the standard form Agreement of Purchase and Sale of the developer that each purchaser was to sign provided:

1.7 Disclosure Statement

The Buyer acknowledges that the Buyer has received and has been given an opportunity to read the Disclosure Statement with respect to the Development (as amended) and that the execution of this Agreement constitutes a receipt in respect thereof.

[45] In the result, the owners must be taken to have read and understood the contents of the Disclosure Statement and thus appreciated that there were two types of lots in the complex.

[46] The decision of the chambers judge was a determination of how the lots should be classified. If the owners had previously proceeded on a mistaken basis, that cannot, in my view, mean that once raised, the correct classification of the lots can be avoided.

[47] I would therefore dismiss the cross appeal.

“The Honourable Mr. Justice Hinkson”

I agree:

“The Honourable Madam Justice Rowles”

I agree:

“The Honourable Mr. Justice Lowry”