

CANADA / JUDGMENT

Abdoh, v. The Owners of Strata Plan KAS 2003

2014 BCCA 270

COURT

British Columbia Court of Appeal

DECIDED

25 June 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCCA 270 Abdoh v. The Owners of Strata Plan KAS2003 COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Abdoh v. The Owners of Strata Plan KAS2003, 2014 BCCA 270 Date: 20140625 Docket: CA040922 Between: Sylviane Abdoh and Hamid Abdoh Appellants (Plaintiffs) And The Owners, Strata Plan KAS2003 and 567506 B.C. Ltd. Respondents (Defendants) And The Owners Strata Plan KAS2003 Respondent (Third Party) And Intrawest ULC formerly known as Intrawest Corporation Respondent (Fourth Party) Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Chiasson The Honourable Mr. Justice Willcock On appeal from: an order of the Supreme Court of British Columbia, dated May 9, 2013 (Abdoh v. Owners of Strata Plan KAS 2003, 2013 BCSC 817, Kamloops Registry 45919) Oral Reasons for Judgment Counsel for the Appellants: J.G. Frame Counsel for the Respondent, The Owners, Strata Plan KAS2003: S.M. Armstrong Counsel for the Respondent 567506 B.C. Ltd.: D.K. Hori Counsel for the Respondent/ Fourth Party, Intrawest ULC (via teleconference): A. Cocks Place and Date of Hearing: Kamloops, British Columbia June 25, 2014 Place and Date of Judgment: Kamloops, British Columbia June 25, 2014 Summary: The plaintiffs brought an action against a strata corporation seeking an order compelling it to enforce its by-laws and to prohibit unauthorized use of common property. Held: the claim was properly dismissed as the strata corporation could not be compelled to take action in relation to trivial breaches of by-laws.

- [1] WILLCOCK J.A.: This is an appeal from the order of Mr. Justice Meiklem, dismissing the plaintiffs' claim on summary trial for reasons indexed at 2013 BCSC 817.
- [2] The appellant plaintiffs are owners of a residential strata lot in the Fireside Lodge in the Sun Peaks ski village. Fireside Lodge is a mixed-use strata with 73 residential and 9 commercial units. One of the commercial strata lots, lot 80, is owned by a member of the Strata Corporation and leased by that owner to the respondent 567506 B.C. Ltd. for the operation of a restaurant called Powder Hounds. Powder Hounds has been a tenant since the completion of the building in 1998.

- [3] The January 1998 Strata Plan designated most of the underground floor as Limited Common Property ("LCP") for the exclusive benefit of the residential lots. Areas for a mechanical room, an electrical room, stairs, and a garbage storage room were excluded from the LCP.
- [4] On November 10, 1998, at the first Annual General Meeting of the Strata Corporation, pursuant to s. 257 of the Strata Property Act, S.B.C. 1998, c. 43, the Strata Corporation removed the LCP designation in favour of the residential owners over a specific portion of the parking floor described as "storage area." The area was re-designated as LCP storage area for the use of Powder Hounds.
- [5] At some time before November 10, the owner/developer, Intrawest, had consented to Powder Hounds placing its air conditioner condenser unit and refrigeration compressors (collectively the "Cooling Equipment") in a small area of the LCP parking area north of, and adjacent to, the LCP storage area for Powder Hounds; this area remained part of the LCP parking area designated for the residential units. The Cooling Equipment is on platforms that are bolted to the wall and roof of the parkade.
- [6] In 2006, the appellants, Mr. and Mrs. Abdoh purchased lot 34. In 2010, Mr. Abdoh was elected as one of seven Strata Council members. Conflict arose when Mr. Abdoh insisted that council did not have the authority to permit commercial users to use the LCP parking area; however, the majority of the Strata Council agreed to allow the commercial tenants and their customers to use the underground parking, permitted they did not abuse the privilege. In June 2011, Mr. Abdoh sent a letter to the Strata Corporation warning that he would initiate litigation if the Strata Corporation did not advise him of the legal basis upon which Powder Hounds had been permitted to occupy portions of the parking area and use those areas in a manner inconsistent with the 1998 LCP designation. When he did not receive a satisfactory response, Mr. Abdoh filed a notice of civil claim on July 8, 2011.
- [7] The Strata Corporation then notified the owners of commercial strata lots that due to the civil action filed against them, it would require compliance with the strata plan and bylaws and require commercial owners, tenants, employees, and customers to stop using the underground parking. Powder Hounds was required to remove all moveable chattels from the LCP area of the underground parking and the common area in the garbage room. Only the Cooling Equipment remains in place.
- [8] The chambers judge noted:
- [17] It is not in dispute that the area where the Cooling Equipment in question is located is not accessible by cars and contains other equipment for the building's heating and cooling equipment. It was never designated as a parking space and there is no evidence of any other use by the residential owners being prevented or hindered. Decision Below

- [9] The Abdohs sought, among other things, a declaration stating that no commercial strata unit owner is allowed to make use of the parking area designated as LCP, with the only exception being the entitlement of the owners of strata lot 80 to use its designated storage area; and an order that the Strata Corporation and its council stop permitting, and take reasonable steps to prevent, owners of commercial units from possessing, occupying, or using the parking area designated as LCP for the residential strata units.
- [10] The judge described the plaintiffs' position when the matter came on for hearing on March 8, 2013, in the following terms:
- [24] The plaintiffs submit, correctly, that the Strata Corporation has no authority to grant a lease or licence over an area designated as LCP and has a duty to manage and maintain common property for the benefit of the owners. They argue that failures or refusals of the strata council and the Strata Corporation to enforce its bylaws, the Strata Plan and the provisions of the Act, constitute breaches of ss. 3, 26 and 31 of the Act, which the court should prohibit pursuant to ss. 164 and 165 of the Act.
- [11] In relation to ss. 164 and 165, the provisions of the Strata Property Act, which enable owners to seek the assistance of the court when the Strata Corporation is not acting in their interests, the judge held:
- [26] In my view, s. 164 of the Act is not applicable to this application, because the plaintiffs do not allege, nor is there any evidence of, any significantly unfair action or threatened action of the Strata Corporation or strata council in relation to the plaintiffs. Section 165 is the appropriate section to invoke on this application, and it empowers the court to order a strata corporation to perform a duty it is required to perform under the Act, the bylaws or the rules, or to stop contravening the Act, regulation, its bylaws or the rules, (a "rule" being defined in s. 1 of the Act as a rule of the strata corporation made under s. 125 or s. 197).
- [12] Section 165 of the Strata Property Act reads as follows: 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:
- (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
 - (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules; I make any other orders it considers necessary to give effect to an order under paragraph (a) or (b). [Emphasis added.]
- [13] In considering whether the court should exercise the discretionary power to come to the aid of the owners, the judge noted the peculiar circumstances of this case:
- [35] I do not agree with the characterization of the Strata Corporation's position in respect of the Cooling Equipment as advocating an ability to permit non-compliance. The measured approach taken in that regard was not necessarily inconsistent with the Strata Corporation's

responsibility to manage the common property for the benefit of the owners, and the individual council members' standard of care set out in s. 31 of the Act, considering the lengthy tenure of Powder Hounds in strata lot 80, Powder hounds' reliance (unfounded though it may be in law) on the original consent of the owner/developer in 1998 before the first strata council was elected, the absence of any complaints about the presence of the Cooling Equipment until 2011, the significant problems and costs associated with relocating the Cooling Equipment, and the absence of any effect on the use or enjoyment of the LCP by any of the residential owners.

[36] The Corporation's bylaws do prohibit the use of common property for any purpose contrary to its intended use. I accept that ss. 3 and 26 of the Act, read together imply a duty on the part of the Strata Corporation to enforce the Corporation's by-laws, (notwithstanding the absence of any express provision to that effect), but given the provisions of s. 31, enforcement vigour must be tempered with prudence and good faith. [Emphasis added.]

[14] The application was dismissed for reasons set out at para. 40:

[40] I do not hold that a de minimus argument would necessarily assist Powder Hounds, or the owner or tenant of strata lot 80, if the Strata Corporation, acting through the strata council, decided to enforce the bylaws in the case of the Cooling Equipment, but I find that the de minimus principle applies to the plaintiffs' complaints in respect of the Strata Corporation's acquiescence in the continued placement of that equipment, in the circumstances of this case. Unlike the initial inaction of the Strata Corporation respecting unauthorized parking, the effect of this inaction is of trifling consequence to any of the 73 residential owners of the LCP parking area.

Issues

[15] The Abdohs argue the judge erred: in treating the use and occupation of LCP by Powder Hounds as a matter of bylaw enforcement; in considering the relative benefits and inconvenience to them and to Powder Hounds from the use of the LCP by Powder Hounds; in holding that the Abdohs had a lesser right than the Strata Corporation to enforce their proprietary rights to the LCP; and by referring to s. 52 of the Strata Property Act when considering whether the Strata Corporation breached its statutory duty in dealing with Powder Hounds' use of the LCP.

[16] The Abdohs seek leave to adduce new evidence on appeal: the minutes of the October 5, 2013, Special General Meeting for Strata Plan KAS2003; the minutes of the December 7, 2013, Annual General Meeting for Strata Plan KAS2003; and a copy of the sketch plan prepared by surveyors that is referenced in both these Annual and Special General Meetings. Discussion

[17] The Abdohs do not dispute that the Strata Corporation must have some discretion to exercise in relation to whether to act and how to act in response to perceived contraventions of the Strata Property Act, the by-laws or its rules. That discretion is reflected in the Strata Property Act, which makes it clear that the Strata Corporation may remedy a contravention

of its bylaws and rules, but must act reasonably in doing so. Strata corporation may remedy a contravention 133 (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including

- (a) doing work on or to a strata lot, the common property or common assets, and,
 - (b) removing objects from the common property or common assets.
- (2) The strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under section 130. [Emphasis added.]

[18] The Abdohs therefore came before the court seeking to challenge the exercise of discretion by the Strata Corporation.

[19] In my view, the judge did not err in concluding that the overriding responsibility of Strata Council members to act honestly and in good faith with a view to the best interests of the Strata Corporation, and to exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances, must inform the obligation to see that the Strata Corporation is doing what it is obliged by law to do.

[20] In determining whether to come to the Abdohs' aid, the judge referred to the scheme for reconciling individual and collective rights in the Strata Property Act. He considered:

- a) the number of owners seeking relief;
- b) whether the order sought was in the best interests of the Strata Corporation; and
- c) whether inaction would unfairly prejudice the applicants.

[21] In my opinion, these are all appropriate considerations.

[22] The judge properly concluded that the contravention of the Strata Property Act or by-laws, if there was one, was of a trifling nature; the Strata Corporation therefore had no duty to demand removal of the Cooling Equipment or to take action to have it removed.

[23] In my view, the judge cannot be said to have erred in characterizing the contravention to be of a trivial nature, one that a council, acting reasonably in the interests of all owners might have decided to ignore without unfairly prejudicing anyone.

[24] The courts may properly consider a contravention of a statute, by-law, or rule to be so trifling as to not warrant the court's concern. The court is not bound to strictness at once harsh and pedantic in the application of statutes. The law permits the qualification in the ancient maxim *De minimis non curat lex*, per Sir W. Scott in *The "Reward"* (1818), 2 Dods. 265, 165 E.R. 1482, applied in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, in turn applied in *British Columbia Lottery Corp. v. Vancouver (City)* (1997), 46 B.C.L.R. (3d) 24, upheld in (1999), 61 B.C.L.R. (3d) 202 (C.A.). See also for the application of this maxim in various circumstances, *Would v. Herrington*, [1932] 4 D.L.R. 308, [1932] 2 W.W.R. 385 (Man.

C.A.); *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52; *H.M.T.Q. for B.C., as represented by the Minister of Forests et al v. Tnasem Logging Ltd.*, 2006 BCCA 546; and *Grohmann v. Grohmann* (1991), 62 B.C.L.R. (2d) 264 (C.A.).

[25] In my view, the judge did not err in applying the doctrine here.

[26] Having said that, it is not necessary to address the question whether the equipment in question should have been considered to be a fixture and to have become the property of the strata owners.

[27] In the event, it is also unnecessary to address the application to adduce new evidence, which is not of assistance in determining the critical question.

[28] I would dismiss the appeal.

[29] SAUNDERS J.A.: I agree.

[30] CHIASSON J.A.: I agree.

[31] SAUNDERS J.A.: The appeal is dismissed. "The Honourable Mr. Justice Willcock"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/CA/14/02/2014BCCA0270.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/abdoh-v-the-owners-of-strata-plan-kas-2003-2014>

Prepared on 27 October 2026 · Esheria