

CANADA / JUDGMENT

Hadley v. Seacrest Apartments Ltd. et al.

2005 BCSC 1476

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1476 Hadley v. Seacrest Apartments Ltd. et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hadley v. Seacrest Apartments Ltd. et al.,

2005 BCSC 1476

Date: 20051019

Docket: L041346

Registry: Vancouver

Between:

Eleanor L. Hadley

Appellant

And

Seacrest Apartments Limited,

Stephen Sherwin and Lela Billows

Respondents

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Appellant appearing on her own behalf

E. Hadley

Counsel for the Respondents

K. Fast

Date and Place of Trial/Hearing:

July 15, August 5, & October 7, 2005

Vancouver, B.C.

I. NATURE OF APPLICATION

- [1] This is an appeal from a judgment of the Provincial Court of British Columbia, Small Claims Division, pronounced April 23, 2004, wherein the court dismissed the plaintiff's claims for nuisance, breach of contract, and breach of fiduciary duty. The appellant appeals pursuant to section 12 of the Small Claims Act, R.S.B.C. 1996, c. 430, claiming that the trial judge did not properly consider the facts and did not fairly apply the law.

II. FACTUAL BACKGROUND

- [2] The appellant, Eleanor Hadley, became a shareholder and lessee of suite 205, Seacrest Apartments in Vancouver, British Columbia, on January 1, 1981. According to the agreement and lease (the "agreement") dated December 15, 1980, the apartment building was owned and operated by Seacrest Apartments Ltd. ("Seacrest"). Under the agreement, Ms. Hadley became a shareholder of Seacrest by acquiring one-twentieth of the company's authorized shares. Among other things, article 1 of the agreement provided:

The Lessee shall pay to the Lessor a monthly assessment during the first fiscal year hereof (unless the Lessor shall change the date of its fiscal year) the sum of _ (\$_). In the manner and at the times more particularly set out in clause 1 of Article IV hereof, and commencing on the _ day of ____ AD 19 __. The said monthly assessment as herein before declared shall, for the purposes of the Lessor and of these presents, be deemed to be and is hereby declared to be the "Basic Rate" and in respect of any and all future assessments to be made by the Lessor against the Lessee, the amount of such assessment shall be determined at a rate equal to the percentage which the "Basic Rate" bears to the gross amount required by the Lessor in each fiscal year.

- [3] By section 101 of the Articles of Association of Seacrest, the board of directors is empowered to levy a yearly assessment against each shareholder for his proportionate share of all carrying charges on the company's property. Additional assessments in any given year require ratification by two thirds vote of the members of a meeting. Section 93 of the Articles of Association provides;

It is hereby declared that the sole object and purpose of the Company is to maintain and operate the apartment building... . All expenses, taxes, mortgage indebtedness, maintenance and operation of the Company's apartment building shall be met and paid for by assessments made against the shareholders of the Company in proportion to their shareholdings, or in proportion to the class or type of occupancy held by the shareholders respectively.

[4] Section 94 says:

A Lease shall entitle the shareholder to the use and occupation of the respective apartment for the duration of the Company's corporate life, subject however to the terms, conditions and stipulations more particularly set out and declared in the said Lease

[5] The directors proposed to change the basis of proportionality of the assessment and gave notice to the members of a meeting. The notice proposed a resolution for "changes to articles of association of Seacrest ". On December 1, 1997, the resolution was passed at a meeting of the members to effect a change in the calculation of the basic rate based on the square footage of the members' units. The original basic rate was based on a variety of factors, such as view, square footage, etc., but the details of how those factors were assessed for each suite are no longer available. The resolution was to take effect on January 1, 1998. The resolution sought to replace article 1 of the agreement and lease with the following:

The "Basic Rate" monthly assessment being based on each suite's square footage in proportion to the building as a whole is hereby declared to be _% (\$_). And in respect of any and all future changing of assessments to be made by the Lessor against the Lessee the amount of such assessment shall be declared at a rate equal to the percentage which the "Basic Rate" bears to the gross amount required by the Lessor in each fiscal year.

The result of the resolution would change each individual's lease agreement so that the maintenance fees would now be charged based upon the square footage of each suite.

[6] As a result of this change, Ms. Hadley's monthly maintenance fee was increased from \$101.44 to \$127, which increased her share of Seacrest's total annual maintenance costs from 3.91% to 4.9%. The Board of Directors then filed the resolution with the Ministry of Finance and Corporate Relations after December 1, 1997. The Ministry sent it back to the Board on January 2, 1998, indicating that there was no requirement to file with the Registrar of Companies.

[7] On September 13, 1997, the Board of Directors decided to relocate the dryer vent for the building from inside the building to a location outside of the building, which happened to be underneath Ms. Hadley's dining room window. How the Board came to that decision is unclear, but they were told by a building inspector that the dryer vent had to be relocated because it was a Building Code violation to have the dryer vent inside the building.

[8] There is one dryer in the building which serves 20 suites. Ms. Hadley alleged that the emissions from the dryer vent interfered unreasonably with her quiet use and enjoyment of her apartment, as well as adversely impacting upon the property value. The appellant brought in a building inspector and a real estate agent, but neither had any negative reports on the effect of the dryer emissions. The person who occupies the suite right next to the appellant testified that she had lived in the unit for eight months and did not even know that a dryer vent was right under her window. She swore that she often opened the window to get fresh air. The person who lived directly above the appellant's suite for 20 years stated that he

had his window open throughout the year and had never made any complaints about the dryer vent. Both of the witnesses swore that the location of the dryer vent had not impacted their ability to enjoy their suites in any manner.

- [9] The medical health officer for the Vancouver and Richmond Health Board, Dr. Blatherwick, wrote to the appellant on December 11, 1997 and stated:

The air vent is not a health hazard. Where it was venting before was a problem. Where it is now is not a problem. It is not a problem with one exception. It is a problem for you.

A further letter from Dr. Blatherwick, sent on October 16, 2002 stated:

Dear Mr. Sherwin, I personally inspected the dryer vent at the back of Seacrest Apartments. This was done after an environmental health officer had already done an inspection. We both concluded that the dryer vent met the Building Code, did not pose a health hazard. Our last visit to this address was in August, 2002 .

- [10] The appellant's complaints regarding the dryer vent were uncorroborated. Also, other apartments in the neighbourhood were shown to have similar vents outside residential windows.
- [11] The appellant also alleges that the respondents breached their fiduciary duty by harassing her with letters, and interfering with her use and enjoyment of her property by refusing to repair or maintain the ventilators in her kitchen and bathroom, by shutting off her heat in the summer months, and by refusing to prune the trees outside her window. In particular, a letter which was sent by the Board of Directors to its shareholders, dated November 2, 2002, implied that the appellant was mentally ill and physically dangerous. The respondents state that this letter was sent out as a last resort because the appellant's behaviour was out of control. The respondents' evidence is that they attempted to remedy the situation by fining the appellant and attempting to talk to her; but, she continued to yell at shareholders to stop using the laundry room and posted letters around the building.
- [12] The trees that the appellant wanted pruned belonged to the neighbouring property, Cardero Apartments. Cardero Apartments authorized the Board to prune the trees. The Board rented equipment and pruned the trees on two occasions. According to the evidence of the vice-president of Seacrest, the appellant did not request further pruning.
- [13] With respect to the ventilation, the vents in the apartments are set on a timer which keeps the vents on between 6:00 a.m. and 11:00 p.m. According to the evidence of the vice-president, the vents are loud and some residents find it difficult to sleep with vents on throughout the night. There have been no other complaints from residents with respect to the ventilation being turned off during the night.
- [14] The trial judge dismissed the appellant's claims for breach of contract, breach of fiduciary duty, and nuisance.

[15] The trial judge found that the Board of Directors altered the basic rate in accordance with the powers granted in the Articles of Association of Seacrest. Section 219 of the Company Act, R.S.B.C. 1996, c. 62 did not apply to this case because the basic rate was governed by the agreement, not the Articles. More specifically, at para. 27 of the trial judgment, he held:

[27] This position [appellant's position] cannot prevail for the following reasons:

1. Section 219 of the Company Act refers to the effective date for changes to articles of a company by way of a special resolution. In this case the change was on the basic rate that was stipulated in the agreement and lease and not on the Memorandum of the articles of association of the company.
2. Even if the filing requirement applies due to the interdependence of the two documents, there is nothing in the Company Act that would nullify the effect of the special resolution on the existing shareholders of the company.
3. Furthermore, the default in this instance was certainly not intentional. The special resolution as filed by Mr. Sherwin as the president of the Board of Directors with the Ministry of Finance and Corporate Relations, and was returned on January 2, 1998, without any instructions for filing with the Registrar of Companies.
4. Pursuant to the provisions in the agreement and lease and the article of association, Ms. Hadley was duly notified of the special resolution before the annual general meeting. The claimant, together with 18 other shareholders of the company participated in the general meeting and presumably had discussions and then voted on the resolution.

[16] The trial judge held that the appellant's complaints with respect to the interference caused by the dryer vent were not corroborated by any witnesses and were not supported by objective evidence. The trial judge concluded that the appellant put herself in a hostile environment as a result of her own actions and that the respondents were not liable for any actions that they took in order to remedy the situation.

III. APPELLANT'S POSITION

[17] The appellant submits that the trial judge erred in his judgment due to failure to consider the evidence, failure on the findings of fact and failure to apply the law properly. The appellant has argued that the trial judge did not properly apply the objective test for nuisance and therefore erred in finding that the emissions from the dryer vent did not constitute a nuisance. The appellant further submits that the trial judge erred in finding that the respondents did not commit a breach of contract or a breach of fiduciary duty in altering Seacrest's basic rates, and that the trial judge erred in finding that the respondents did not commit a breach of fiduciary duty with respect to their hostile actions against her. Finally, the appellant has argued that the agreement constitutes a contract between her and Seacrest, and that it is not a part of the Articles of Association. Therefore, she argues, a special resolution passed by the members of the company cannot alter the terms of the lease

without her consent. The breach of the contract claimed by the appellant is based on the contention that the agreement is a stand alone document and bears no relevance to the Articles of Association. She has also argued, in the alternative, that if the resolution was a special resolution to amend the articles of association, it is invalid pursuant to section 219 of the Company Act.

IV. RESPONDENTS' POSITION

- [18] The respondents submit that the trial judge did not err in finding that the emissions from the dryer vent beneath the appellant's window did not constitute nuisance. The respondents say that the trial judge correctly found that the appellant's complaints with respect to the interference caused by the dryer vent were not corroborated by any witnesses and were not supported by objective evidence. The respondents submit that there was ample evidence before the court to support the trial judge's finding of fact on this issue.
- [19] The respondents submit that the trial judge did not err in finding that the respondents did not commit a breach of contract in altering Seacrest's basic rates and that the trial judge did not err in finding that Seacrest's maintenance fees were validly altered.
- [20] The respondents submit that the trial judge did not err in finding that the respondents did not breach the fiduciary duties they owed to the appellant as a Seacrest shareholder.

V. ANALYSIS

- [21] The standard of review on a question of fact or inference of fact, is that, for the appellant to succeed, she must demonstrate that the trial judge made a palpable and overriding error in respect to the facts in issue (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 19 and 25 [*Housen*]; *Hua v. Optimum West Insurance Co.* (2005), 37 B.C.L.R. (4th) 232, 2005 BCCA 123 at paras. 20-23). Mr. Justice Romilly revisited this standard recently in *Legrady v. Custom House Currency Exchange Ltd.*, 2005 BCSC 802, where after stating the principles from *Housen*, he referred to recent rulings from the Supreme Court of Canada on this issue and said at paras. 13-14:
- [13] This standard has more recently been applied by the Supreme Court of Canada in the case of *R. v. Clark*, [2005] S.C.J. No. 4, 2005 SCC 2, where Fish J. stated at para. 9:

Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

- [14] This court has also had numerous occasions to specifically consider the appropriate standard of review in regards to appeals from the Provincial Court. In the case of *Stewart v. Strutt*, [1998] B.C.J. No. 636, Blair J. refused to overturn the findings of a small claims trial judge stating at para. 10:

In an appeal on the record, I would normally have to determine that the learned trial judge was clearly wrong in his apprehension of the facts or in his application of the law before I would be prepared to intervene. I cannot on the record conclude that the trial judge was wrong. He had the unique opportunity at trial to assess the witnesses and their evidence, an advantage not available on a review based on the record, and I am reluctant to disturb his findings of fact based, as they are, on the evidence and his assessment of the witnesses who appeared for both the claimants and the respondent.

- [22] In my view, the trial judge correctly found that the appellant's complaints with respect to the nuisance caused by the dryer vent were not supported by any objective evidence. The only evidence with respect to the nuisance that the dryer vent causes are the uncorroborated complaints of the appellant. The owners of the suites right next to and above the appellant had testified that the location of the dryer vent and the emissions from it had not been a concern. Furthermore, there is evidence that many buildings in the area have dryer vents installed in the same location.
- [23] With respect to Ms. Hadley's claims that the individual respondents committed a breach of fiduciary duty when they attempted to change the agreement; were hostile towards her; issued fines and liens against her; and restricted the appellant from full participation in the shareholders meetings, the trial judge's finding that the individual respondents acted within their ambit as directors and officers of the Board of Directors and did not breach their fiduciary duty to the appellant is supported by the evidence. In particular, the minutes of the meeting of December 1, 1997 reveal that the process was carried out in an open, fair, and democratic manner, even though there may have been open hostility demonstrated at the meeting.
- [24] With respect to the November 2, 2002 letter, the trial judge found that the appellant had created an environment of hostility and that the Board of Directors and shareholders were at a loss as to how to continue to approach the situation. This is supported by the evidence. Although the letter is harsh, I do not find the conduct of the Board actionable. Compassion, understanding and patience have not characterized the parties' relationship. The appellant is elderly and these matters have been extremely stressful and unfortunate for her.
- [25] With respect to the allegations of breach of contract against the company for altering the base percentage fees, the trial judge's findings were correct. The Articles of Association of Seacrest authorize the Board of Directors to alter the basic rate provided that changes are within the scope of sections 93 and 94.

[26] The directors chose to change the nature of the proportionality assessment by consensus of the members achieved at a meeting on December 1, 1997. The board erred in its description of the proposed changes as a "change to Articles of Association of Seacrest ". Apparently, the agreements and leases had candidly become known as the "articles" without discrimination to the articles of association of Seacrest. The changes were not, however, to the articles of association but to the agreements which were standardized to all shareholders. The resolution was not a special resolution of Seacrest to change the articles of association. It did not require filing with the Registrar of Companies and was appropriately rejected.

VI. CONCLUSION

[27] The judgment, in conjunction with the trial transcript, shows that the trial judge preferred the evidence of the respondents to that of the appellant. As a result, I can find no palpable or overriding error that would require me to disturb the judgment. The trial judge's conclusions with respect to the nature of the resolution, that it affected the agreement and lease only and received proper approval, was correct. The appeal is dismissed. In all of the circumstances, there will be no order for costs unless the respondent applies for same.

"J.R. Dillon, J."

The Honourable Madam Justice J.R. Dillon

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