

CANADA / JUDGMENT

Sherwood v. The Owners, Strata Plan VIS 1549

2020 BCCA 311

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 311 Sherwood v. The Owners, Strata Plan VIS 1549

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sherwood v. The Owners, Strata Plan VIS 1549,

2020 BCCA 311

Date: 20201106

Docket: CA46491

Between:

Douglas Sherwood and Rosslyn Sherwood

Respondents

(Plaintiffs)

And

Cinnabar Brown Holdings Ltd.

Respondent

(Defendant)

And

The Owners, Strata Plan VIS 1549

Appellant

(Defendant and Third Party)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated
October 7, 2019 (Sherwood v. The Owners, Strata Plan VIS 1549,
2019 BCSC 1714, Vancouver Docket S147102).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

A. Mujtabah

Counsel for the Respondent,

Cinnabar Holdings Ltd.

(via videoconference):

L.M. Hellrung

Place and Date of Hearing:

Vancouver, British Columbia

November 2, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 6, 2020

Summary:

The appeal is from an order dismissing an application to vary the order made after an 18-day trial concerning alterations made by the owner of a strata property that comprised one-half of a duplex. The alterations had an approved addition and a shed, as well as a new roof different in style from the one contemplated in the approval process. The variation contemplated in the appellant's application would have resulted in not only removal of the new roof but also removal of the addition and shed. The reasons for judgment denying the variation found that the plan would be contrary to the spirit and intent of the reasons and entered order. Held: Appeal dismissed. It was open to the judge to reach the conclusion he did, on the pleadings that did not seek that remedy, on the fact the trial reasons did not grapple with undoing the addition and

shed, and on the finding those alterations had been approved by the Strata Corporation. The basis for varying a final order is discussed.

- [1] SAUNDERS J.A.: This appeal is brought by Owners, Strata Plan VIS 1549, which I will refer to as the Strata Corporation, from the order of Chief Justice Hinkson made October 7, 2019, dismissing its application for orders varying the entered order, which I will refer to as the Order After Trial, made by Madam Justice Gray. The live issues before us are his denial of:
- a) an order that the respondent Cinnabar Brown Holdings Ltd sign the building permit application submitted by the Strata Corporation; and in the alternative
 - b) an order that if Cinnabar does not sign the building permit application by a stipulated deadline that the Strata Corporation may do so.
- [2] Each of the two orders denied is in the nature of a mandatory injunction.
- [3] Chief Justice Hinkson heard the application to vary because Madam Justice Gray retired soon after delivering her reasons for judgment. In those reasons she explained her upcoming retirement and said:
- [341] The parties have liberty to apply for any orders necessary to permit the work to be completed as soon as possible. I retired as a judge of this court effective August 31, 2017, and so further court applications should be set before another judge.
- [4] The Order After Trial did not include a term consistent with para. 341 that the parties "have liberty to apply for orders necessary to permit the work to be completed as soon as possible". Accordingly, Chief Justice Hinkson allowed Cinnabar's application to vary the Order After Trial to include such a term.
- [5] The Strata Corporation contends that in dismissing its application to vary so as to compel the signing of a building permit, the Chief Justice misapprehended the facts and misinterpreted the spirit and intent of the Order After Trial.
- [6] The source of the litigation is a duplex on a strata property with many other structures. It is located in Parksville British Columbia. The duplex is made up of Strata Lots 13 and 14. Strata Lot 13 is owned by the respondents Douglas and Rosslyn Sherwood, who have not appeared in this appeal. Strata Lot 14 is owned by the respondent Cinnabar, the holding company for a married couple, the Sharps, who represented Cinnabar in the proceedings leading to this appeal.
- [7] Chief Justice Hinkson described the background to the Strata Corporation's application before him this way:

- [1] The litigation in this case arose over the reconstruction of the roof of one-half of a duplex resulting from an effort to add about 34 square feet of living space and a shed to a strata unit in Beach Acres Resort in Parksville, B.C. The defendant, Cinnabar Brown Holdings Ltd. ("Cinnabar"), completed the extension of its side of the duplex, but construction stopped when it was thought that the roof placed on its side of the duplex did not comply with the relevant building permit.
- [2] The plaintiffs brought claims in negligence against Cinnabar and The Owners, Strata Plan VIS 1549, the strata corporation, consisting of all the owners of the strata lots in Beach Acres ("BA Strata Corporation").
- [3] After 18 days of trial, Madam Justice Grey issued reasons for judgment, indexed at 2018 BCSC 890, dismissing the claim in negligence, but finding that the roof built by Cinnabar was not built in accordance with the building permit and the approvals granted by the Beach Acres strata council.
- [4] At paras. 215 - 216 and 223 of her reasons for judgment, under the heading "What Did the BA Strata Corporation Approve at the AGM 2012?", Gray J. found:

215 The BA Strata Corporation says that ... all the owners approved at the AGM 2012 was the changing of about 34 square feet of [limited common property] into habitable area for each of the strata lots by the relocating of the exterior wall on to the [limited common property]. The BA Strata Corporation describes this as an approval "in principle" or an approval of the "concept". As I understand it, the position of the BA Strata Corporation is that the AGM 2012 approved the October 2012 Joint Proposal generally, but left the details to be determined as the [Beach Acres strata council] saw fit.

216 In my view, the resolution as passed is determinative.

223 As a result, Cinnabar was required to cause the work to be done in compliance with the Sharp February 2013 [Building Permit]. That required the work to be done "in accordance with the plans and specifications submitted and approved", which were the attached February 2013 Plans showing a Two-Slope Roof Design.

- [5] At para. 285, Gray J. addressed the structural changes to Cinnabar's addition and shed, concluding:

285 The BA Strata Corporation, jointly with Ms. Sharp, proceeded to seek a [building permit] which would permit the work to increase the post strength, other remedial work necessary to preserve the Sharp [strata lot], and the removal of the chimney enclosure, all the while permitting Ms. Sharp to obtain the approved shed. This [building permit] was not obtained until summer 2015, whereupon the remedial work was performed.

- [6] Gray J. made the following orders, none of which contemplate the removal of the addition or the shed that Cinnabar built:

1. All claims of the Sherwoods against the Strata Corporation alleging that the actions or conduct of the Strata Corporation were significantly unfair in relation to the Sherwoods be and are hereby dismissed;
 2. All claims of Cinnabar Brown against the Strata Corporation alleging that the actions or conduct of the Strata Corporation were significantly unfair in relation to Cinnabar Brown be and are hereby dismissed;
 3. The claim of the Sherwoods that Cinnabar Brown negligently breached a duty of care owed by Cinnabar Brown to the Sherwoods be and is hereby dismissed;
 4. If the Sherwoods, Cinnabar Brown and the Strata Corporation do not, within 60 days of the date of this order, make an agreement which will result in the removal of the as-built roof (the "as-built roof") atop Strata Lot 14, District Lot 123, Nanoose District, Strata Plan 1549 ("strata lot 14") and the construction of a same roof over strata lot 14 and Strata Lot 13, District Lot 123, Nanoose District, Strata Plan 1549 ("strata lot 13") then the Strata Corporation is hereby ordered to take all reasonable steps required to remove the as-built roof and replace it with a roof similar to the roof which existed atop strata lot 14 before the as-built roof was built (the "work"), including:
 - a) make application for a building permit for the work within 90 days of the date of this order, and
 - b) complete the work within 90 days of receiving the building permit.
 5. The Sherwoods pay to the Strata Corporation the costs of this proceeding;
 6. Cinnabar Brown pay to the Sherwoods the costs of this proceeding, including as a disbursement the costs which this order requires the Sherwoods to pay to the Strata Corporation.
- [8] We are informed by counsel that the costs required to be paid by Cinnabar currently are in excess of \$200,000.
- [9] The order made thus absolves the Strata Corporation of unfairness and negligence to the Sherwoods, but imposes a burden on the Strata Corporation to provide the Sherwoods a remedy in respect to the duplex, indeed if read consistently with the variation that is sought, a greater one than was sought by them, as I will explain.
- [10] The critical portion of the Order After Trial, for purposes of this appeal is para. 4:
4. If the Sherwoods, Cinnabar Brown and the Strata Corporation do not, within 60 days of the date of this order, make an agreement which will result in the removal of the as-built roof (the "as-built roof") atop Strata Lot 14, District Lot 123, Nanoose District, Strata Plan 1549 ("strata lot 14") and the construction of a same roof over strata lot 14 and Strata Lot 13, District Lot 123, Nanoose District, Strata Plan 1549 ("strata lot 13") then the Strata Corporation is hereby ordered to take all reasonable steps required to remove the as-built

roof and replace it with a roof similar to the roof which existed atop strata lot 14 before the as-built roof was built (the "work"), including:

- a) make application for a building permit for the work within 90 days of the date of this order, and
- b) complete the work within 90 days of receiving the building permit.

[11] While this appeal is between the Strata Corporation and Cinnabar, the underlying dispute is between the Sherwoods and Cinnabar. In 2012, the Sherwoods and the Sharps decided to add living space to their units from limited common property of the Strata Corporation. To proceed with the additions the owners required approval of the Strata Corporation. The proposal advanced by the Sherwoods and the Sharps presented alterations that contemplated a two-slope roof (replacing the single-slope roof that was on the duplex) extending over the added space and allowing for a shed desired by the Sharps to be built along the side wall of the duplex unit.

[12] The Strata Corporation gave approval subject to certain conditions.

[13] The Sherwoods have not made alterations to their portion of the duplex. Cinnabar has completed the shed and addition of about 34 square feet of living space, relocating a portion of the eastern wall and adding some new southern wall for that purpose. As part of these alterations it constructed a new roof extending over the existing and added space. This new roof over Strata Lot 14 has a single slope, not the two-slope roof originally contemplated in the Sherwood/Sharp application for approval, and has a different facial elevation and pitch from the roof over Strata Lot 13. Its roof print also differs from that of Strata Lot 13 because it does not have a 'cut out' over the small patio on the limited common property that is now incorporated into the structure.

[14] The Sherwoods objected both to the changes made to Lot 14 and to the Strata Corporation's role in the changes. They commenced a petition against the Strata Corporation and Cinnabar. The petition was converted to an action. In the new pleading, subsequently amended, the Sherwoods sought a declaration that the Strata Corporation was derelict in its duties under the bylaws of the Strata Corporation and the provisions of the Strata Property Act, S.B.C. 1998, c. 43, an order requiring the Strata Corporation to perform duties required of it by the bylaws of the Strata Corporation and by the Strata Property Act, a declaration that the Strata Corporation had been unfair to them, a declaration absolving them from costs of the Strata Corporation consequent on their complaints against the Strata Corporation, and an order that the Strata Corporation be required to remove the alterations to common property and Strata Lot 14 they said had not been approved and to construct the approved roof (that is, the two-slope roof). They also sought, in the alternative, an order that Cinnabar be required to remove such alterations and to construct the approved roof, an order that the Strata Corporation be required to remove any alteration that would prevent the Sherwoods from building the approved roof atop Strata Lot 13, in the alternative an order that Cinnabar be required to remove such alterations that would prevent them from building the approved

roof atop Strata Lot 13, damages, costs and other relief.

- [15] Cinnabar filed a third party notice against the Strata Corporation seeking indemnity from the Strata Corporation for damages or costs ordered against it, a declaration that the Strata Corporation had acted and conducted itself in an unfair manner towards it, a declaration that the Strata Corporation had approved alterations for Strata Lots 13 and 14 (subject to signing an alteration and indemnity agreement) which included a single-slope roof design, an injunction restraining the Strata Corporation from removing the newly constructed single-slope roof of Strata Lot 14, and certain ancillary orders.
- [16] The Strata Corporation has imposed continuing accumulating fines on Cinnabar in respect of the alterations to Strata Lot 14. Those fines are the subject of other proceedings in the Supreme Court of British Columbia.
- [17] In addition to those portions of the reasons for judgment already replicated in the quotation from Chief Justice Hinkson's reasons for judgment, Madam Justice Gray, referring to the new roof as the As-Built Sharp Roof, said:
- [267] The Sherwoods argue that the BA Strata Corporation did not act sufficiently quickly and aggressively to force Cinnabar to build a roof with a Two-Slope Roof Design, and to force Cinnabar to correct structural issues with the Sharp SL which arose in October 2014. The Sherwoods also argued that the BA Strata Corporation acted significantly unfairly in denying Mr. Sherwood's proposed amendment at the SGM September 2014.
- [269] As discussed above, the As-Built Sharp Roof does not comply with the Sharp A&I Agreement. In addition, since I have concluded that it does not comply with the approval by the BA Strata Corporation, it contravenes BA 2003 Bylaws 4 and 5.
- [330] Ms. Sharp argued that the As-Built Sharp Roof should remain. Her submissions suggested that a One-Slope Roof Design is a preferable design, because it permits a higher ceiling in the kitchen, and because the cost of rebuilding would be wasted.
- [331] The flaw in that argument is that it is not for Ms. Sharp or the court to determine what is the best roof design. In this case, the Two-Slope Roof Design was approved through the execution of the Sharp A&I Agreement, which required compliance with the Sharp February 2013 [building plan].
- [332] While the BA Strata Corporation could have chosen to approve the As-Built Sharp Roof, it has not done so. It was and is entitled to insist that owners comply strictly with the terms of an A&I Agreement. Insisting on such compliance may provide a deterrent to other owners from performing work which has not been approved as required.
- [333] Another complication in this case is the fact that the construction in question relates to a duplex, and the Sherwoods and the Sharps intended to build at different times and using different workers. The City's [building plan] process apparently requires separate BPs for separate units, and provides permission for building rather than requiring building.

- [334] The BA Strata Corporation has a legitimate concern to avoid two different styles of roof on the Duplex. It is therefore troubling to order it to build a Two-Slope Roof Design on the Sharp SL.
- [335] Hopefully, this Court's determination that the BA Strata Corporation has not approved a One-Slope Roof Design will enable the parties to make reasonable agreements for the future.
- [336] These reasons for judgment have concluded that the As-Built Sharp Roof does not comply with the approval granted by the BA Strata Corporation. As a result, the Sherwoods are entitled to an order requiring the Sharps to correct the As-Built Sharp Roof, and if the Sharps fail to do so in a reasonable time, the BA Strata Corporation must do so.
- [338] The matter is further complicated if the Sherwoods no longer wish to renovate the Sherwood SL. The two sides of the Duplex will look different because only the Sharp SL will enclose the additional part of the patio.
- [339] The parties should have a reasonable opportunity following the release of these reasons for judgment to enter into an agreement which will result in removal of the As-Built Sharp Roof and the construction of a roof which is the same over both sides of the Duplex.
- [340] If the parties have not reached such an agreement within 60 days following the release of these reasons for judgment, the BA Strata Corporation is required to take all reasonable steps to obtain the necessary [building plan] to remove the As-Built Sharp Roof and replace it with a roof similar to the Original Roof. The BA Strata Corporation must seek a [building plan] within the following 30 days, and must construct in accordance with it within 90 days after receiving such a [building plan].
- [Emphasis added.]
- [18] Subsequent to release of the reasons for judgment, Cinnabar filed a notice of appeal of the Order After Trial, but that appeal has been abandoned. The Strata Corporation did not appeal the order. Nor did the Sherwoods. Accordingly the order of Justice Gray has been unchallenged in this court. In May 2019 the Sherwoods applied for an order that the Strata Corporation is in contempt of the Order After Trial, but that application has not proceeded.
- [19] In September 2019 Cinnabar applied for an order to include a "liberty to apply" term in the Order After Trial, and for an additional term allowing the Strata Corporation to approve the new roof. Chief Justice Hinkson dismissed Cinnabar's application in relation to the new roof and, as I have said, did grant the inclusion of the liberty to apply term in the Order After Trial. Also in September 2019, the Strata Corporation applied for the order described earlier.
- [20] In dismissing the Strata Corporation's application, Chief Justice Hinkson considered the correct approach to interpreting the order he was asked to vary, quoting this portion of para. 53 of *Yu v. Jordan*, 2012 BCCA 367:

the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

- [21] In respect to proposed variations related to obtaining a building permit, Chief Justice Hinkson observed that the object of the proposed variations was to obtain the approval of a building permit "that would require the removal of all of the addition and the shed that Cinnabar built, rather than just the roof portion". He said this work would include the restoration of the "relocated east side wall of Cinnabar's strata unit to its original location and the removal of the new shed built by Cinnabar", and said:
- [21] such a building plan would be contrary to the spirit and intent of the reasons and the entered order of Gray J., and would effectively give the BA Strata Corporation relief that was not given to them by Gray J.
- [22] In the result, the BA Strata Corporation's application for the third and fourth variations sought is dismissed.
- [22] I turn now to the appeal.
- [23] On this appeal both the Strata Corporation and Cinnabar apply to admit fresh or new evidence. The evidence advanced by the Strata Corporation is from an engineer explaining in detail how it is that the new roof on Strata Lot 14 cannot be replaced by a roof of the former style without removing the new exterior east wall, extended south wall, and shed. The evidence advanced by Cinnabar describes events before the trial and after the trial including after the order of Chief Justice Hinkson.
- [24] The test for fresh evidence is that described in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. In my view, the fresh evidence should not be admitted on this appeal. The evidence sought to be advanced by the Strata Corporation could have, with due diligence, been placed before the Chief Justice (indeed before the trial judge). In any event, as will become apparent in the discussion of the issues, I am not persuaded that the affidavits sought to be adduced are critical to the results of this appeal, for the reason that Chief Justice Hinkson's reasons for judgment demonstrate that he was alive to this factual circumstance (in his para. 19). Likewise, the evidence advanced by Cinnabar is either repetition of earlier submitted evidence, and thus, too, is not critical to the appeal, or concerns steps taken after the order appealed in respect of the alterations, an issue that is beyond this appeal.
- [25] I turn to the order made. As in all appeals we must start with a recognition of our proper role as described in jurisprudence. On questions of law we ask whether the judge was correct. On questions of fact or mixed fact and law we ask whether the judge made an obvious and material (palpable and overriding) error: *Housen v. Nikolaisen*, 2002 SCC 33. On

issues involving the exercise of judicial discretion, we must ask whether the judge acted on a wrong principle or failed to give weight or sufficient weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 54.

- [26] This appeal is resolved, in my view, on a proper understanding of the request to vary the entered Order After Trial, in the context of the principle of finality.
- [27] In *Chand v. Insurance Corporation of British Columbia*, 2008 BCCA 559, this court considered a court's power to vary an order. Madam Justice Kirkpatrick first stated the general principle that once an order is entered, the court is *functus officio*. Exception is made under the slip rule of the Supreme Court Civil Rules (Rule 13-1(17)), a rule that includes matters that should have been but were not adjudicated, and also the inherent jurisdiction of the court where the entered order contains an error "in expressing the manifest intention of the Court": *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142. It is accepted that a variation cannot be used to amend or alter a substantive finding (*Chand* para. 44). Mr. Justice Donald described the approach generally taken to variations in *Booty v. Hutton*, 2009 BCCA 29, where as a single judge he said in respect to an appeal of a refusal to vary an order:
- [14] [the appellant] has appealed the wrong order instead of appealing the substantive order, he appealed the refusal to vary that order. The only issue that can arise in respect of the latter is whether the order conformed with the reasons
- [28] At the hearing of the appeal we were referred to *Buxton v. Carriss* (1959), 17 D.L.R. (2d) 173 (B.C.S.C.), wherein the court varied a final judgment in a Families Compensation Act case, to substitute for a monetary award terms creating a trust of an income earning property, thereby to avoid the negative consequences to the widow and dependant children of the judgment debtor's bankruptcy. The order was explained as "giving assistance in working out a judgment", and appears to have been viewed as consistent with the intention of the court to ensure its object and purpose would be carried out. The variation was not opposed by the trustee in bankruptcy.
- [29] *Buxton* is a fine example of parties acting without dissent, in the interests of justice, to achieve the objects and purpose of an original order, but it stands in the climate existing in that case of consensus on the appropriate solution for what was considered a frustrated initial order. I do not consider it advances the orders sought by the Strata Corporation, which must be measured against the principles I have discussed.
- [30] Where, as here, the judge has expressly provided for liberty to apply for further orders, it must be taken that the orders contemplated would be consistent with the reasons for judgment and the order issued. In particular it is not an end run around an appeal of the order to alter its substance.

- [31] Any order, in turn, must be interpreted in the manner described in Yu: by reference to the pleadings, the language of the order, and the circumstances in which the order was granted. The circumstances include the reasons given by the judge in making the order.
- [32] Last, it must be recognized that a decision whether to vary an order engages judicial discretion, as does the issuance of a mandatory injunction (absent a statutory provision mandating the order).
- [33] At the hearing of the appeal both parties appearing made full submissions on the intent of para. 4 of the Order After Trial, and in particular the words "similar to the roof which existed atop strata lot 14 before the as-built roof was built". The import of the Strata Corporation's submissions is that even the approved alterations enclosing the limited common property as living space and the shed would be removed, and that the roof would revert to its original design without consideration of a two-slope roof, found by the judge to have been approved and which had been sought by the Sherwoods in their amended notice of civil claim.
- [34] Chief Justice Hinkson concluded that this plan "would be contrary to the spirit and intent of the reasons and the entered order" of Justice Gray. It was open to him, in my view, on pleadings that did not seek removal of the addition and shed, on reasons for judgment of the trial judge that did not grapple with undoing the addition and shed, and on the finding of the judge that those alterations to Strata Lot 14 had been approved by the Strata Corporation, to reach the conclusion he did. On that conclusion the proposed variation was not available.
- [35] I would add to these comments reference to s. 165 of the Strata Property Act. That section provides for a court order that the Strata Corporation perform a duty required by the Act, its bylaws or its rules. It is not clear to me to what degree the parties have considered, or addressed in court, the implications of that section for a case in which the Strata Corporation has given approval for at least some of the structure proposed to be removed.
- [36] In reaching my conclusion, I recognize that the parties are still at liberty to apply to vary the order, so long as it accords with the substance of the reasons of the judge. It is not for the court to say what such might be, whether, for example, a variation to allow replacement of the new roof with one that already has been approved and that was sought at the beginning of the litigation, or another structural solution that would on inspection satisfy the criteria for variation. What can be said, now, is that I see no basis to interfere with the Chief Justice's conclusion on the application that was before him.
- [37] With thanks to counsel for their submissions, I would dismiss the applications to adduce fresh and new evidence in this court, and I would dismiss the appeal.
- [38] DICKSON J.A.: I agree.
- [39] HUNTER J.A.: I agree.
- [40] The applications to adduce fresh and new evidence are dismissed, and the appeal is dismissed.

"The Honourable Madam Justice Saunders"

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