

CANADA / JUDGMENT

The Owners, Strata Plan VIS4686 v. Craig

2017 BCSC 1871

COURT

Supreme Court of British Columbia

DECIDED

25 August 2017

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Owners, Strata Plan VIS4686 v. Craig,

2017 BCSC 1871

Date: 20170825

Docket: 14-0853

Registry: Victoria

Re Strata Plan VIS4686

In the matter of amending the Bylaws of Strata VIS4686 pursuant to the

Strata Property Act, S.B.C. 1998, c. 43 and the Owners, Strata Plan VIS4686

Between:

The Owners, Strata Plan VIS4686

Petitioner

And

Yvette Craig, Robert Garry, Nova Pacific Care Homes

Limited Partnership, and Alison Investments Ltd.

Respondents

Before: The Honourable Mr. Justice G. R. J. Gaul

Oral Reasons for Judgment on Costs

In Chambers

Counsel for the Petitioner:

R.S. Margetts, Q.C.

Counsel for the Respondent Yvette Craig:

M.A.M. Brunton

Counsel for the Respondent Robert Garry:

J. Hanson

Place and Date of Trial/Hearing:

Victoria, B.C.

August 25, 2017

Place and Date of Judgment:

Victoria, B.C.

August 25, 2017

- [1] THE COURT: By notice of application filed 6 June 2017, the petitioner seeks an order that their costs associated with the hearing of their petition be paid by the respondents Ms. Craig and Mr. Garry. Although an order for special or increased costs is sought in the alternative, counsel for the petitioner indicated during his submissions that this relief was not being pursued.
- [2] The background facts and history of this matter are set out in my reasons for judgment reported at 2016 BCSC 90. For the purposes of these reasons I will briefly summarize those facts.
- [3] The dispute between the parties relates to a four-level multi-unit condominium building known as the "Camelot" that is located in the James Bay neighbourhood of Victoria. As I noted in my reasons for judgment, the Camelot was developed in the 1990s as a supportive living residence for senior citizens. From its inception it was foreseen that the strata council would contract with a third party to provide defined support services to all of the Camelot's residents and in this regard it came to be known and referred to as a "Care-a-Minium". The costs of these services would be paid by the strata and then recovered from the owners of units via an additional service fee.
- [4] The respondents Ms. Craig and Mr. Garry each own a condominium unit in the Camelot and they object to the strata council's attempt to collect the service fee.

- [5] The parties could not resolve their disagreement and consequently on 4 March 2014 the petitioner filed what became known as the original petition. That petition was served on Ms. Craig and Mr. Garry, not as formal respondents, but simply to give them notice of the proceedings.
- [6] The relief sought in the original petition included:
- i. An order that the bylaws of the strata corporation be amended "in accordance with the resolution to adopt a flat fee formula for that portion of the common expenses of the strata arising out of the provision of services pursuant to the strata bylaw section 116, and voted upon on December 5, 2013, attached hereto as Schedule A, as though no dissenting votes had been cast"; and
 - ii. An order directing the Registrar of Land Titles "to deposit the amended bylaws at issue herein upon filing of the amended bylaws and a copy of the entered order."
- [7] The legal foundation for this relief was identified in the original petition as ss. 52 and 100 of the Strata Property Act.
- [8] On 31 March 2014, Ms. Craig filed a response to the original petition. In doing so, she became a party of record pursuant to Rule 1-1 of the Supreme Court Civil Rules. Mr. Garry did likewise on 24 April 2014. That is, he filed a response and in doing so became a party of record.
- [9] On 22 September 2014, the petitioners filed an amended petition wherein it sought additional relief. That new relief included paragraph 2(a), a declaration that Bylaw 116 was valid and of force and effect on the strata owners. This bylaw authorized and required the strata corporation to retain a third party to provide support services to the residents of the Camelot. The amended petition also included paragraph 2(b) which related to the costs of the proceedings.
- [10] The amended petition relied as a legal foundation on ss. 52, 100, as well as s. 91 and 171 of the Strata Property Act.
- [11] At the hearing of the amended petition before me on 3 and 4 March 2015, the first part of the relief sought in the petition, that is the relief sought in the original petition, was adjourned generally. That left the additional relief outlined in the amended petition, that is paragraphs 2(a) and (b), before the court.
- [12] After a somewhat convoluted process that included a lengthy discourse between the court, counsel, and Ms. Craig, who was self-represented at that point, it was determined that only issues 2(a) and (b) would be addressed at the hearing.
- [13] At the conclusion of my reasons for judgment, I gave the parties leave to make submissions on the issue of costs. That brings us to the present application.
- [14] I start my analysis with Rule 14-1(9) of the Supreme Court Civil Rules. That rule reads:

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

- [15] In determining an award of costs in *The Owners, Strata Plan NW 2787 v. Gorman*, 2014 BCSC 247, Madam Justice Maisonville explained at paragraph 13:
- [13] While the Court has the discretion to displace the usual order, that discretion must be exercised judiciously. As noted by Sinclair Prowse J., in *Veltheer v. Prachnau* [citation omitted], costs are, "driven by fairness. Generally speaking, the successful party is awarded costs unless there are reasons of fairness that would cause the Court to depart from that general rule" . . .
- [16] As a result of Ms. Craig's and Mr. Garry's responses to the original petition, the plaintiff amended the relief it was seeking and filed its amended petition. This was designed to address the concerns raised by the respondents Ms. Craig and Mr. Garry about the viability of Bylaw 116.
- [17] The petitioner argues the risk of being held liable for the costs of an opposing party encourages all parties to act reasonably and practically when they are embroiled in litigation. Citing such case authorities as *Gagne v. Sharpe*, 2015 BCSC 154, the petitioner says it should be awarded its costs not only because it was the successful litigant but also because the positions adopted by the respondents were not reasonable in the circumstances.
- [18] The respondents Ms. Craig and Mr. Garry object to the court awarding the petitioner its costs. Even if it can be said that the petitioner was successful, in that they obtained the relief they were seeking, the respondents argue the court should not follow the ordinary rule on costs because the petitioner did not appear in court with clean hands. In making this point, the respondents point to a number of irregularities in the conduct of the strata council, particularly the lack of a clear resolution authorizing its counsel to seek the relief articulated in the petition and the amended petition. In essence the respondents maintain that the strata council knew or ought to have known that it was acting without authority when it directed its legal counsel to file the petition and then the amended petition.
- [19] The respondents also point to what they say was the confusion that arose at the outset of the hearing, especially with respect to determining who counsel for the petitioner was actually representing and what portions of the amended petition were actually before the court.
- [20] I have already noted in my reasons for judgment that there were irregularities in the manner in which the strata council collected the service fees. I also find that the nature of the hearing in March of 2015 changed at the last minute, without any prior consultation with Ms. Craig or counsel for Mr. Garry. Having said that, I am satisfied that all parties knew precisely what was before the court and understood what the court would be deciding at the conclusion of the hearing.

- [21] I reject the suggestion that Ms. Craig was disadvantaged in any way at the hearing, because of her status as a self-represented litigant. I say without any hesitation that she is an articulate, intelligent, focused, and driven person. These are all admirable qualities. While she is not as well versed in the law as counsel are, she acquitted herself extremely well when she appeared before me in March 2015. More importantly, I am satisfied she was not prejudiced in any way by her status as a self-represented litigant. If there was any disadvantage, it resulted from her own conscious decision to represent herself. When her dispute with the strata council first arose, she and Mr. Garry retained the same legal counsel. However, Mr. Craig chose not to have this counsel represent her at the hearing of the amended petition. She clearly knew how retain counsel and how to obtain legal advice. For whatever reason, she chose not to do so. Given that decision, it rings hollow for her now to say she needed legal assistance in order to represent herself properly when she appeared before the court in March of 2015.
- [22] At first blush, petitioner's submissions on this application appear compelling. The issue before me is a simple one: costs must go to the successful party, unless the court otherwise orders. The petitioner was the successful party in that the court granted the relief it was seeking. Therefore it should get its ordinary costs.
- [23] The difficulty I have with those submissions is that the manner in which the successful result was achieved colours the question of whether the respondents should have to pay the petitioner's costs.
- [24] The strata council had a serious problem and it related to the collection of service fees. It tried to rectify that situation by resolution, but it could not muster the unanimity that was required. That is, Ms. Craig and Mr. Garry dissented, as they were entitled to do. The petitioner then sought the authority to launch an action to get the resolution approved. A resolution was passed and the action was started; that is, the original petition. It was only after the respondents had filed their respective responses to the petition that the petitioner filed its amended petition.
- [25] While there is no useful purpose at this point for me to opine on whether the relief sought in the petition and amended petition was the relief that the strata council's resolution authorized, I will say that it is at least arguable that it was not. However, that argument was not pursued when this matter came before me in March of 2015 and consequently the issue is now moot.
- [26] The respondents underscore the fact that they are not asking me to reconsider my decision based on a lack of jurisdiction. They are simply saying that this is one facet or factor relating to the petitioner's conduct that I can and should consider when deciding the issue of cost and whether the petitioner is entitled to theirs.

- [27] There is no evidence before me to support a finding that the strata council or Nova Pacific, a respondent who supported the petitioner's argument, acted maliciously or in bad faith. As such, I reject the assertion that the petitioner appeared before me in March of 2015 with unclean hands.
- [28] However, the fact of the matter is, but for the respondents' responses, the question of the validity of Bylaw 116 would not have been put before the court. I accept the submission Ms. Craig and Mr. Garry that the issue that was before me in March 2015 had a novel twist to it. Not the fact that the court was being asked to judicially consider or interpret a strata bylaw, but the fact that the bylaw related to service fees being charged to all of the owners of units in this "Care-a-Minium".
- [29] In addition to this unique facet of the issue that was before me, there was, as I previously noted, a somewhat convoluted manner in which the March 2015 hearing began. I wish to be clear, that is not meant to be a professional criticism of the petitioner's counsel at the time. Yet the fact remains it was unclear at the start of the hearing who the petitioner was, what relief was specifically being sought and what legal authority there was for seeking it. Things eventually got sorted out, after great effort, and the hearing continued and was completed.
- [30] I have considered the jurisprudence that has been given to me on this application. I have reviewed all of the materials and I have considered the submissions made by counsel. In my respectful view, given the manner in which the issues came before the court, the way in which they were addressed during the hearing, and what I find is the genuine interest all parties had in having the novel question resolved, I find it would be fair and appropriate to depart from the ordinary rule relating to costs and order that the parties bear their own costs of the hearing.
- [31] I therefore order that the parties will bear their own costs of the March 2015 hearing. I will make a similar order with respect to costs of today's hearing.
- [32] I thank all counsel for their helpful submissions.

"G. R. J. Gaul J."

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