

CANADA / JUDGMENT

The Owners, Strata Plan VR 840 v. Clare

2024 BCSC 2591

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DECIDED

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2024 BCSC 2591 The Owners, Strata Plan VR 840 v. Clare

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Owners, Strata Plan VR 840 v. Clare,

2024 BCSC 2591

Date: 20240202

Docket: S245337

Registry: New Westminster

Between:

The Owners, Strata Plan VR 840

Petitioner

And:

Patricia Reay Clare

Respondent

Before: The Honourable Justice Girn

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

G.S. Hamilton

Counsel for the Respondent:

K. Webber

Place and Date of Hearing:

New Westminster, B.C.

November 7, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 2, 2024

- [1] THE COURT: These are my oral reasons for judgement. Should a transcript be ordered, I reserve my right to edit for style and grammar and to insert defined terms and to include citations for all the case law and statutes that may be referred to, but the substance of my decision will not change.
- [2] This petition involves a long-running dispute between the petitioner, the Owners of Strata Plan VR 840 ("Strata Corporation") and one of its owners, the respondent, Patricia Clare. The dispute, which began in early 2015, is in relation to the respondent smoking in her unit, its impact on other owners of the Strata Corporation, and the applicability of the strata's bylaws.
- [3] The petitioner seeks a declaration that the respondent has contravened the strata corporation's bylaws, specifically, 4.1 and 46. The petitioner seeks a remedy under s. 173(1) (c) of the Strata Property Act, S.B.C. 1998, c. 43 [SPA] that the respondent be permanently removed from the residential property located at strata lot 75, which is located at 1006-150 24th Avenue, in West Vancouver in the Province of British Columbia. As well the petitioner ask that the respondent vacate her unit within 60 days of the court's order.
- [4] The petitioner also seeks an order restraining the respondent from entering the strata building or any parts of its lands and premises after the date she is ordered to vacate her unit.
- [5] As an alternative, petitioner seeks relief that the respondent be found in contempt of the Civil Resolution Tribunal default order ("CRT order") by failing to stop smoking in her unit and common areas. In the further alternative, the petitioner asks that they be granted permission to enter, investigate, and test the respondent's unit with a qualified professional to determine the presence of cigarette smoke.
- [6] The petitioner also asks the respondent to pay their reasonable legal costs for this proceeding or alternatively special costs. The respondent opposes all of the orders sought by the petitioner.

Background

- [7] The petitioner is a Strata Corporation existing pursuant to SPA. The building in question is a residential building at 150 24th Avenue in West Vancouver. It is commonly known as the Seastrand. The Seastrand has approximately 114 strata units over 16 floors. The Seastrand is located in the village of Dundarave, an affluent neighbourhood of West Vancouver.
- [8] Adjacent to the south is the Dundarave seawall, a well-used public walking path along the West Vancouver waterfront. The respondent is the owner of a unit on the tenth floor and has been there since 2001. Her unit is one of four units on this floor. Photographs submitted by the petitioner reveals that the units are closely located to one another. As well, each unit has its own mail slot on the front door.
- [9] Prior to purchasing her unit, the respondent rented at Seastrand for approximately three years. When she purchased her unit, smoking was permitted in the units. This was a factor in her decision to purchase the unit that she lives in. The respondent is also a frequent traveller and says that she is often away from her home many times of the year for periods of several days or weeks.
- [10] In April 2013, the strata's bylaws were amended. The relevant amendments were to bylaw 46, specifically 46.1, which prohibited smoking in units and common areas and grounds. From April 29, 2013, until May 11, 2021, the relevant bylaws 4.1 and 46 read as follows:

4. Use of Property

4.1 A resident or visitor must not use a Strata Lot, the common property or common assets in a way that:

- (a) causes a nuisance or hazard to another person,
- (b) causes unreasonable noise,
- (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another Strata Lot,
- (d) Is illegal, or
- (e) contrary to a purpose for which the Strata, Lot or common property is intended as shown expressly or by necessary implication on or by the Strata plan.

46. Seastrand is a non smoking building.

46.1 Smoking by residents and visitors is prohibited:

- (a) in a strata lot.
- (b) on the interior common property, including but not limited to hallways, lobbies, elevators, laundry rooms, parking

garages, electrical and mechanical rooms, stairs, storage locker areas or other enclosed common property areas.

- (c) on all exterior common property including but not limited to patios, balconies, outdoor parking areas.

46.2 All persons, Including but not limited to owners, tenants, occupants and visitors must comply with this bylaw, with the exception that the bylaw 46.1 does not apply to a smoker who was an owner, tenant or occupant residing in a strata lot in the complex at the time the bylaw passed in July 2009 and who continues to reside in the same strata lot after the bylaw was passed.

46.3 Owners, tenants and occupants who qualify for the exemption from the bylaw as described above must comply with all applicable legislation and are subject to the common law of nuisance as well as all other bylaws, including but not limited to those regarding to causing a nuisance or hazard to another person and unreasonably interfering with the rights of another person to use and enjoy the common property, common assets or another strata lot.

[11] By virtue of bylaw 46.2, bylaw 46.1 was not applicable to the respondent because hers was one of the units that was grandfathered and exempted from this change. However, even those that were exempted were still required to refrain from causing nuisance or hazard to another person or unreasonably interfering with the rights of another person to use or enjoy the common property, common assets, or another strata lot. This is set out in bylaw 46.3.

[12] Sometime in 2015, the Strata Corporation began receiving complaints from other owners with respect to the respondent's smoking within her unit and common areas. In response to these complaints from 2015 to 2018, the Strata Corporation sent numerous warning letters to the respondent advising her that she was in violation of the Strata Corporation's bylaws 4.1 and 46 and provided her opportunities to attend hearings with the strata council. The respondent failed to respond.

[13] The specific dates of these complaints are as follows:

- a) August 14, 2015 - cigarette smoke travelling from balcony into neighboring units on August 9, 10 and 13, 2015;
- b) October 14, 2015 - cigarette smoke travelling from balcony into neighboring units on October 14, 15, 2015;
- c) October 11, 2016 - cigarette smoke travelling from balcony into neighboring units on September 7, 2016;
- d) June 19, 2017 - cigarette smoking in unit and common hallway;
- e) June 22, 2017 - cigarette smoking in unit on June 21, 2017;
- f) November 17, 2017 - cigarette smoking in unit on November 14, 15, and 17, 2017;
- g) March 12, 2018 - cigarette smoking in unit on March 1, 2018;

- h) April 6, 2018 - cigarette smoking in unit on April 2, 2018;
 - i) June 22, 2018 - cigarette smoking in unit on June 21, 2018; and
 - j) November 29, 2018 - cigarette smoking on November 6, 7, 8 and 9, 2018
- [14] The petitioner was unable to obtain compliance from the respondent. As a result, on November 15, 2018, the Strata Corporation initiated a dispute notice with the Civil Resolution Tribunal ("CRT") in order to have the respondent stop smoking in her unit and on the strata property. In its dispute notice, the petitioner argued that the respondent was contravening bylaws 4.1, with her smoking thereby causing a nuisance or unreasonably interfering with the rights of others to use and enjoy, as well as bylaw 46.
- [15] On March 22, 2019, the CRT, issued a default decision and ordered the respondent to comply with the strata's bylaws 4.1 and 46 and to stop smoking in her strata lot, on common property, or limited common property. The petitioner points out that while the respondent was exempt from the smoking bylaw 46.2, the CRT's ruling was in relation to bylaw 4.1, from which the respondent was not exempted. The CRT order was filed in the New Westminster Supreme Court registry on August 14, 2019, pursuant to s. 57 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25. This allows the CRT order to have the same force and effect as if it were a judgment of the Supreme Court.
- [16] There is no dispute that on August 20, 2019, the respondent was served with a copy of the CRT default order and the order filed in New Westminster Supreme Court registry. The respondent did not take any steps to challenge the CRT default order. The respondent complied with the CRT order for a period of time. However, in and around March 2020, the petitioner alleges that the respondent resumed smoking in her unit.
- [17] From April 2020 onwards, numerous complaints from residents were once again received by the Strata Corporation in regards to this continued smoking by the respondent. On April 2nd as well as May 25, 2020, the Strata Corporation once again sent letters to the respondent advising her that she was in violation of bylaws 4.1 and 46. She was given an opportunity to attend a hearing with the strata council.
- [18] The respondent did not respond except on one occasion in July 2021. She requested a hearing, which was scheduled for December 2021. However, on November 22, the respondent cancelled the December hearing, and no further hearing was rescheduled.
- [19] The complaints continued into 2022. Numerous letters were once again sent to the respondent regarding the smoking complaints and the bylaw infractions. Fines were levied against the respondent on at least three separate occasions, which were paid by the respondent. However, that did not deter the respondent.

- [20] At its annual general meeting held on April 27, 2022, the owners approved a resolution to enforce the CRT order against the respondent in Supreme Court. The Strata Corporation argues that it has incurred legal expenses to remedy the respondent's contempt of the CRT order, which includes filing of the CRT order and this proceeding. It seeks to have the respondent pay for these expenses.
- [21] The respondent acknowledges that she smoked in her unit but says that since February 2022, she no longer smokes in her unit or on the property grounds. She notes that she now leaves the property grounds to smoke. In her response, the respondent says that the initiating dispute notice for the CRT dispute was not personally served on her and that she only became aware of the CRT claim when she was served with a copy of the default decision made in the CRT claim, which had been filed in the Supreme Court registry.
- [22] Unfortunately, I am only able to proceed on the basis of what was found in the CRT, which is that the adjudicator specifically noted that the respondent has received the dispute notice and did not respond to it by the deadline set out in the tribunal's rules. Other than the respondent's assertion, I have no objective evidence that contradicts the findings of the CRT adjudicator.
- [23] It is also not disputed that after being served with the CRT order, the respondent failed to seek a judicial review of the CRT decision or to have the default order set aside. The respondent argues that the CRT order should be set aside because the petitioner obtained the order at least in part by misrepresenting its claim. Namely, she argues that she could not breach bylaw 46 by operation of bylaw 46.2, and therefore the petitioner misrepresented its claim to the CRT and obtained a default order on this basis.
- [24] The difficulty with this argument is the CRT order found that the respondent not only breached bylaw 46 but also bylaw 4.1. The respondent was not exempt from this particular bylaw. The arguments made by the respondent in respect of the CRT order cannot succeed in this petition. The time has come and gone when the respondent ought to have made this argument. As I have noted, she did not seek judicial review of the CRT order. I am unable to address the issue of setting aside the CRT order in this hearing.
- [25] Accordingly, I must decide two issues in regards to the remedies that the petitioner seeks. At the outset of the hearing, the petitioner advised that they are not seeking both remedies. However, I will address both.

Can the court make an order under s. 173(1)(c) of the Strata Property Act?

- [26] The parties do not dispute that s. 173(1)(c) of SPA allows for the court to make any orders it considers necessary to give effect to an order under s. 173(1)(a) and (b). The parties do not dispute it can be properly made under s. 173(1)(c). The Strata Corporation seeks to have the respondent permanently removed from her unit which she owns because of her continued non-compliance. The petitioner argues that she is simply a bad neighbour and stress the impact of second-hand smoke on the others who live around her.

- [27] In support of their position, the Strata Corporation relies on *The Owners Strata Plan LMS 2768 v. Jordison*, 2013 BCSC 487, affirmed, 2013 BCCA 484. The petitioner says it would be reasonable to give the respondent six months to leave the building and get her affairs in order.
- [28] The respondent submits that if the court were to make an order under this section, it will cause her undue hardship. The effect of such an order sought by the petitioner would simply result in her having to sell her unit. The respondent is an elderly woman in her 70s who has lived in this building for more than 20 years. I accept that she has built her support network and social community in the area and that her medical service providers are also in the area. This includes her family physician and pharmacy, who are walking distance to her home.
- [29] I also accept that it will be very difficult for her to relocate in the current housing market in the Lower Mainland. In my view, the order sought by the petitioner under SPA is too harsh. In *Jordison*, the Court of Appeal noted that the order made by the trial judge was appropriate under the section. However, the court also noted that the case was an extreme one in which the sale of the *Jordison* unit was the only way to resolve the problem. In my view, this is not an extreme case, and I am not prepared to make such an order. I must stress the fact that I have declined to make such an order does not preclude the petitioner from seeking this remedy in the future.

Is respondent in contempt of court?

- [30] The petitioner argues that the respondent is contempt of court because she continues to smoke in her unit in breach of the CRT order. As noted above, the petitioner argues that even if the respondent was exempt from the change in the bylaws in regards to bylaw 46, the CRT also found her in breach of bylaw 4.1, and specifically addresses causing a nuisance or hazard to another person or unreasonably interfering with the rights of another person to use and enjoy the common property.
- [31] The court has inherent jurisdiction to enforce its processes, including the power to impose penalties for contempt of court: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156. I note also that Rule 22-8 of the Supreme Court Civil Rules also deals with contempt of court.
- [32] In *Carey v. Laiken*, 2015 SCC 17, Justice Cromwell summarized the purpose of contempt of court as follows:
- [30] Contempt of court "rest[s] on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect": *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931. It is well established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order": *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 35, cited in *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 20.

[33] It is well established that the purpose of a contempt order is first and foremost a declaration that the party has acted in defiance of a court order: *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, as cited in *Bell ExpressVu Limited Partnership v. Corkery*, 2009 ONCA 85.

[34] In *Carey*, the court outlined that the test for civil contempt has three elements, each of which must be established beyond a reasonable doubt:

- a) the order alleged to have been breached must state clearly and unequivocally what should and should not be done.
- b) the party alleged to have breached the order must have had actual knowledge of it; and
- c) that the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do what the order compels.

See also *Lee v. Weidner*, 2019 BCCA 326, at para. 44.

[35] In the case at bar, I have no difficulty concluding that the first and second elements of contempt are satisfied. In my view, the order clearly and unequivocally sets out what the respondent should not do. The respondent's actions after being served with the CRT order demonstrates that she understood the order because she actually ceased smoking for a period of time. Paragraph 10 of the CRT order states that the respondent was ordered to comply with bylaws 4.1 and 46 and to stop smoking in the respondent's strata unit and on the common property. There is nothing ambiguous about this order.

[36] There can be no doubt that the respondent had actual knowledge of the order. On August 20, 2019, she was served with a copy of the CRT default order and the order filed in the New Westminster Supreme Court registry. This is not disputed by her.

[37] The respondent argues that there is doubt that her conduct constitutes contempt of court beyond a reasonable doubt. I disagree. With respect to the third element, I am satisfied that the respondent intentionally breached the CRT order. In this respect, there is ample evidence. I will begin with the respondent's own evidence.

[38] In her affidavit, she deposes that she stopped smoking in her unit and on common property. As well, since February 2022, she leaves the property when she needs to smoke. She further deposes the following:

Before I stopped smoking at Seastrand, I took precautions to lessen and mitigate the effect of my smoking on other residents at Seastrand. For example, I would smoke on my enclosed balcony and use an ashtray so that ash would not fall onto other balconies. I would cover vents and other openings that could allow cigarette smoke to escape CSL 75.

I would also only smoke inside my unit and not on the exterior common property surrounding the building.

- [39] There is also ample direct and circumstantial evidence from various owners in regards to the respondent's actions. The respondent argues that she is prejudiced in attempting to answer the evidence of the petitioner because the affidavit evidence fails to set out dates of the alleged actions that are alleged to constitute contempt. In my view, this argument must fail.
- [40] I note the following evidence.
- [41] Mr. Hatch, who lives on the eleventh floor immediately above the respondent's unit, deposes that on September 4, 2022, at approximately 10:00 a.m. he smelled cigarette smoke emanating into his unit. When he went onto his balcony, he looked over his railing to the respondent's balcony. He observed smoke coming from the respondent's balcony. While the respondent's balcony is enclosed by glass, he could see smoke coming out of one of its open sliding windows. He made the same observations on November 15, 2022, and March 2, 2023. These were direct observations made by Mr. Hatch that have not been rebutted.
- [42] There is also circumstantial evidence from Christina Simmons. She is the owner of one of the units on the same floor as the respondent's. Ms. Simmons deposes that during the month of September 2022, she smelled cigarette smoke in the common property hallway outside the respondent's front door. She notes that the smoke odour is strongest directly outside the respondent's front door and decreases in intensity when she walks away from the respondent's front door. She also notes that she has never smelled cigarette smoke outside any of the other units on the floor. She also notes that she is aware that the other residents on this floor do not smoke.
- [43] Debbie Evans also resides on the same floor as the respondent. She deposes that she has been working from home since September 2022 and since then, she often smells cigarette smoke and heavy doses of perfume in the common property hallway and into her apartment.
- [44] Two other residents who also reside on the same floor state that cigarette smoke fills the air in the common hallways on their floor, and smoke seeps through the mail slots into their units. Given that there are only limited number of units on this floor, I am satisfied a reasonable inference that can be drawn that the smoke is coming from the respondent's unit, especially in light of her admission that she smoked in her unit up until February 2022.
- [45] In my analysis, I have also considered the evidence of Mr. McKenzie from ABF Environmental Inc. who conducted an air quality assessment on the tenth floor on September 20, 2022. While he found that tobacco smoke odours were not detected in the common hallways when he conducted his testing, he also noted that once smoking stops and the area is aired out, then the parameters can return to normal.

- [46] In all of the circumstances, I am satisfied the respondent has engaged in an intentional act in breach of the CRT order. Based on all of the evidence, including the admissions of the respondent and the other strata residents, I am satisfied beyond a reasonable doubt that the respondent is guilty of contempt of court.
- [47] At the conclusion of the hearing, I invited the parties to provide written submissions in respect of what sentence the court ought to impose if the respondent is found guilty of contempt. The petitioner proposes that the penalty phase of the contempt hearing should be adjourned in order for the respondent to purge her contempt by completing a period of 12 months probation. The respondent agrees with this and the terms of the probation, which I will outline shortly.
- [48] The petitioner also asks that if the court has reasonable grounds to believe that the respondent has failed to comply with any of the probation terms, that the petitioner may apply to the court on two business days' notice to the respondent for an order permanently removing the respondent from her unit and to restrain the respondent from entering her unit or any part of the lands and premises comprising the strata.
- [49] The respondent argues that this is contrary to the petitioner's original position that the court's ability to permanently order the respondent to vacate her unit arose from s. 173 of SPA and not from the court's ability to pronounce a penalty for contempt. I agree. I decline to make this order as part of the penalty for contempt of court.
- [50] As I have noted, the petitioner has other avenues, including another application under s. 173 should the need arise. Accordingly, I will suspend the passing of sentence and place the respondent on probation for 12 months with the following conditions:
1. The respondent shall not smoke in her unit, which is specifically SL 75, or anywhere on the petitioner's common property or limited common property.
 2. The respondent must allow the petitioner access to SL 75 on two occasions during the period of probation with 24 hours written notice being given to the respondent for the purpose of the petitioner conducting air quality testing in SL 75.
 3. The petitioner will give written notice to the respondent by email at an email address to be provided by the respondent within seven days of the date of this order.
 4. The respondent shall pay to the petitioner within seven days of the date of this order a deposit in the sum of \$2,000 to be applied to the cost of air quality testing in SL 75. If the petitioner does not conduct air quality testing during this probation period, the deposit made by the respondent or any portion thereof must be returned to her within seven days after the expiry of the probation order.
 5. The results of any testing will be provided to the respondent after the petitioner's receipt of the testing results within seven days.

Costs

- [51] Now I will deal with costs. Given that I declined to make an order under s. 173(1)(c) of SPA, I will address costs as it relates to contempt of court. The petitioner submits that special costs ought to be awarded to them because the respondent has demonstrated a serious disregard for the health and well being of her neighbours by continuing to smoke after she received complaints about her smoking and after she was ordered by the CRT to stop smoking. She has failed to accept responsibility for her actions and instead has unreasonably resisted the order from the CRT and subsequent proceedings in Supreme Court, all of which created unnecessary and unfair expenses for her neighbours.
- [52] The petitioner says that while the respondent's good behaviour over the next 12 months may be relevant to the kind of sanction the court imposes for her contempt, the petitioner submits that an award of special costs for the steps taken to have the respondent found in contempt and to bring her into compliance with the court's order should be payable now as her future compliance with the court order does not negate the court's long-standing practice of awarding special costs to a successful applicant in civil contempt proceedings.
- [53] They rely on *I Buy Beauty LLC v. Dong*, 2023 BCSC 1352, at para. 30. Justice Riley noted the following in respect of special costs in contempt hearings:
- [30] There is a long-standing practice of awarding special costs to a successful applicant in a civil contempt proceeding: *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 20. The justification for this approach would appear to be twofold. First, contempt of a court order is by its very nature reprehensible conduct, which is the "signal feature of a special costs award". Second, a party who obtains a court order should be entitled to have it obeyed without further personal expense: *Langford (City) v. Dos Reis*, 2004 BCCA 460 (Chambers) at para. 28. Although there does appear to be some discretion to depart from this long-standing practice, it would appear that this discretion is exercised sparingly.
- [54] In my view, both of these are present in this case. I am satisfied that the respondent's continued conduct was reprehensible, and the petitioner, having gone to the trouble and expense of obtaining an order from the CRT and then registering that order in Supreme Court to protect their interest should be entitled to have the order obeyed without further expense.
- [55] While there is wide discretion on the court to consider the making of a partial award for special costs if it would be disproportionate, I decline to do so. I am satisfied that the petitioner is entitled to special costs which are referred to the registrar.
- [56] Following the period of probation, I order that the parties shall schedule a hearing before me to complete the sentencing phase of this order. I also will make an order that I am seized of this proceeding and any other hearings that the petitioner may bring prior to the expiry of the probationary period.

"Girn J."

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