

CANADA / JUDGMENT

Wang v. The Owners, Strata Plan LMS 2970

2020 BCCA 367

COURT

British Columbia Court of Appeal

DECIDED

11 December 2020

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2020 BCCA 367 Wang v. The Owners, Strata Plan LMS 2970 COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Wang v. The Owners, Strata Plan LMS 2970, 2020 BCCA 367 Date: 20201211 Docket: CA46147 Between: Yi Wang Appellant (Plaintiff) And The Owners, Strata Plan LMS 2970 Respondent (Defendant) Before: The Honourable Chief Justice Bauman The Honourable Madam Justice Dickson The Honourable Mr. Justice Hunter On appeal from: An order of the Supreme Court of British Columbia, dated May 14, 2019 (Wang v. The Owners, Strata Plan LMS 2970, 2019 BCSC 1374, Vancouver Docket S194743). Oral Reasons for Judgment The Appellant, appearing in person (via videoconference): Y. Wang Counsel for the Respondent (via videoconference): L. von Bloedau Place and Date of Hearing: Vancouver, British Columbia December 11, 2020 Place and Date of Judgment: Vancouver, British Columbia December 11, 2020 Summary: Appeal from an order of the Supreme Court dismissing the appellant's application for leave to appeal from a decision of the Civil Resolution Tribunal. The chambers judge had declined to grant leave under s. 56.5 of the Civil Resolution Tribunal Act on the basis that the proposed appeal did not engage a question of law. Held: Appeal dismissed. The chambers judge did not err in dismissing the appellant's application. The appellant's proposed appeal did not raise a question of law.

- [1] BAUMAN C.J.B.C.: The main issue on this appeal is whether Ms. Wang should have been granted leave to appeal a decision of the Civil Resolution Tribunal ("CRT") to the Supreme Court of British Columbia ("Supreme Court").

Background

- [2] Ms. Wang had a dispute with her strata corporation over its insurance coverage, which she brought to the CRT for resolution. She submitted her notice of dispute in 2018.
- [3] Ms. Wang's central complaint involved the strata corporation's addition of "Employee Dishonesty - Including Property Manager and Elected Officer Theft" coverage for the 2016-2019 insurance years. She alleged that this coverage added strata council members as insureds under the strata corporation's insurance policy.

- [4] In Ms. Wang's view, council members cannot add themselves as insureds against risk of theft because they are not "employees," and because they cannot use insurance coverage to protect themselves from the consequences of stealing from a strata corporation. In doing so, they contravened the Strata Property Act, S.B.C. 1998, c. 43 [SPA]. Ms. Wang claimed that the coverage was proof of the council members' intention to steal from the strata corporation, as it was only added after Ms. Wang conducted a "surprise audit" of the strata corporation's financial documents (on her own undertaking).
- [5] The CRT dismissed Ms. Wang's claim. It concluded that Ms. Wang misunderstood the purpose of the coverage, which is to protect the strata corporation from theft by a council member or a property manager.
- [6] The evidence before the CRT included the wording of the insurance policies and a letter from the strata corporation to Ms. Wang.
- [7] For each insurance year, the policy defines "employee" to include any elected officer of the insured. The CRT was satisfied that council members fall within the insurer's definition of "employee," given their status as elected officers.
- [8] The strata corporation's letter to Ms. Wang explains that the purpose of the coverage is to protect the strata from theft by a council member or a property manager, not to indemnify council members or property managers who steal from the strata corporation.
- [9] On this evidence, the CRT was satisfied that the strata corporation is authorized to obtain the coverage by virtue of s. 152 of the SPA, which states that a strata corporation may obtain optional insurance for perils or liabilities that are not otherwise mandatory under the SPA. The CRT found no evidence that any of the strata council members acted negligently or otherwise contravened s. 31 of the SPA, which imposes a standard of care on strata council members. Therefore, the CRT concluded that the strata corporation was not in breach of the SPA by arranging for the coverage.
- [10] Ms. Wang disagreed with the decision and wished to pursue an appeal to the Supreme Court.
- [11] At the time Ms. Wang filed her notice of dispute with the CRT, s. 56.5 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 [CRTA] (now repealed) provided the Supreme Court with limited jurisdiction to hear appeals from the CRT: 56.5 (1) Subject to this section, a party that is given notice of a final decision in a strata property claim may appeal to the Supreme Court on a question of law arising out of the decision.
- (2) A party may appeal to the Supreme Court only if
- (a) all parties consent, or
- (b) the court grants leave to appeal.
- (3) A party may not file an appeal under subsection (1) later than 28 days after the party is given notice of the final decision.

- (4) The court may grant leave to appeal under subsection (2) (b) if it determines that it is in the interests of justice and fairness to do so.
- (5) When deciding whether it is in the interests of justice and fairness to grant leave, the court may consider the following:
 - (a) whether an issue raised by the claim or dispute that is the subject of the appeal is of such importance that it would benefit from being resolved by the Supreme Court to establish a precedent;
 - (b) whether an issue raised by the claim or dispute relates to the constitution or the Human Rights Code;
 - (c) the importance of the issue to the parties, or to a class of persons of which one of the parties is a member;
 - (d) the principle of proportionality. [Emphasis added.]
- [12] Ms. Wang attempted to invoke s. 56.5(2)(a) by emailing her strata corporation on 8 April 2019, requesting its consent to appeal the CRT's decision to the Supreme Court. She wrote, "If I don't hear back from you via email by 5:00 PM Wednesday, April 10, 2019, I will consider you have given consent to the appeal." The strata corporation did not reply.
- [13] Ms. Wang applied to the Supreme Court on 23 April 2019 for directions as to the conduct of the appeal, proceeding on the basis that the strata corporation had given its implied consent. I will address the propriety of this approach later in my reasons.
- [14] The chambers judge found the strata corporation had not consented to the appeal. In any event, the judge declined to grant leave to appeal, concluding that Ms. Wang had not raised a requisite question of law. In reviewing the reasons of the CRT, the judge found that on each issue the CRT had either made factual determinations on the basis of the evidence before it or applied an undisputed legal standard to the facts to reach a conclusion. By way of example, the judge found that the CRT, in reaching its conclusion on whether the insurance coverage could apply to employees, had simply construed the policy document and had applied the policy's own definition. In his view, this was at best a question of mixed fact and law.
- [15] For the reasons that follow, I would dismiss the appeal.

Analysis

- [16] As excerpted above, s. 56.5 of the CRTA provides for an appeal only on a question of law. This threshold must be met for an appeal to proceed. If the appeal is not on a question of law, then the appeal cannot be heard on its merits, and it is unnecessary to consider whether the appeal was consented to or whether the judge should exercise her discretion to grant leave.

- [17] Allard v. The Owners, Strata Plan VIS 962, 2019 BCCA 45 is the leading case on the interpretation of s. 56.5. Madam Justice Kirkpatrick provided the following guidance (at para. 20) from the Supreme Court of Canada in Canada (Director of Investigation & Research) v. Southam Inc., [1997] 1 S.C.R. 748 at para. 35: Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.
- [18] At all stages of this proceeding, Ms. Wang's case has been driven by her assumption that the strata corporation's insurance policy insures council members as individuals. All of the issues raised by Ms. Wang are premised on this assumption.
- [19] On the evidence, the CRT found that the impugned coverage does not add insurance protection for strata council members as individuals. Instead, it provides the strata corporation with insurance protection from theft by a council member or a property manager. The strata corporation is authorized to have such coverage by virtue of s. 152 of the SPA.
- [20] This was a question of mixed fact and law. Questions of mixed fact and law involve applying a legal standard to a set of facts: Housen v. Nikolaisen, 2002 SCC 33 at para. 26. Here, the CRT assessed the evidence, made findings of fact, and applied a legal standard to the facts.
- [21] Ms. Wang's appeal therefore relied on a question of mixed fact and law, which does not meet the s. 56.5 threshold requirement for the appeal to be on a question of law. On this basis, the appeal is barred from proceeding to a hearing on its merits.
- [22] For the sake of completeness, however, I will address Ms. Wang's submissions on the issue of whether the parties consented to the appeal.
- [23] Ms. Wang's position is that the strata corporation, by virtue of its silence in the face of her demand for consent, gave its implied consent to her appeal of the CRT's decision, and so the matter should proceed to a hearing pursuant to s. 56.5(2)(a). Ms. Wang's position is that by failing to apply the test for implied consent, the judge erred in law.
- [24] As I have mentioned, Ms. Wang's putative appeal was not on a question of law, and so the matter is barred from proceeding to a hearing on its merits, regardless of whether the parties consented to the appeal.
- [25] Even if Ms. Wang had appealed on a question of law, implied consent has no place in this context. Here, implied consent, much like acquiescence, requires more than mere silence. Generally, for acquiescence to be made out in the context of civil procedure, there must be evidence of some positive acts or words that demonstrate that the party approved of what was being proposed. I would go further and say that where there is a statutory right of appeal by consent of the parties, that consent must be clear and unequivocal. It cannot be implied in the manner Ms. Wang suggests.

- [26] I would dismiss the appeal.
- [27] DICKSON J.A.: I agree.
- [28] HUNTER J.A.: I agree.
- [29] BAUMAN C.J.B.C.: The appeal is dismissed. [Submissions re: respondent seeking special costs]
- [30] BAUMAN C.J.B.C.: I would not entertain special costs. The conduct of Ms. Wang on this appeal is not similar to the conduct in which special costs in previous appeals have been allowed, but I would allow the strata corporation its ordinary costs of the appeal.
- [31] DICKSON J.A.: I agree.
- [32] HUNTER J.A.: I agree.
- [33] BAUMAN C.J.B.C.: The appeal is dismissed. Costs follow the cause. "The Honourable Chief Justice Bauman"

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Prepared on 25 October 2026 · Esheria