IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638

Date: 20021128
Docket: C995663
Registry: Vancouver

Between:

Edward Taychuk and Lois Obenauer

Petitioners

And

The Owners, Strata Plan LMS 744

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 27 on July 20, 2016

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Petitioners:	J.A. Bleay
Counsel for the Respondent:	M. J. Steven
Place and Date of Hearing:	Vancouver, B.C. November 6, 2002
Place and Date of Judgment:	Vancouver, B.C. November 28, 2002

INTRODUCTION

[1] The petitioners, Mr. Taychuk and Ms. Obenauer, own Suite 1204 in a condominium building known as The Wimbledon Club. The building is a 25 storey concrete high-rise at 6188 Patterson Avenue, in Burnaby. Suite 1204 is Strata Lot 68 of LMS 744. The building has six suites on most floors, for a total of 139 units.

[2] Off and on over the last eight years, the hot water from the taps in Suite 1204's ensuite bathroom has been discoloured to a yellow-brown colour. The taps are in the bathtub and both vanity sinks. There is no suggestion that the water discolouration reflects a health risk. The discolouration appears to result from a high concentration of iron in the water. The source of the high iron concentration is not clear. Possible culprits are the municipal water system and the piping and other plumbing equipment in The Wimbledon Club.

[3] The petitioners allege that the respondent Strata Corporation has breached its obligation to repair and maintain the common property. They allege that the Strata Corporation can discharge that obligation only by ensuring that the petitioners receive clean hot water that is free from discolouration. The Strata Corporation responds by arguing that it has acted reasonably in trying to address the problem.

ISSUES

[4] The issues are as follows:

(a) Is the Strata Corporation presently in breach of its obligation to repair and maintain the common property?

(b) If not, has the Strata Corporation been in breach of that duty?

(c) If the answer to either of the two previous questions is yes, what remedy should be given to the petitioners?

(d) What order should be made as to costs?

CHRONOLOGY

[5] I will set out the chronology of events relating to the petitioners' problems with water discolouration and the steps taken by the Strata Corporation.

[6] By at least October 1994, the petitioners had complained to the council of the Strata Corporation about water discolouration problems in Suite 1204. In a letter dated October 31, 1995, an individual who worked for Cressy Development Corporation, the developer of The Wimbledon Club, said that the heat exchangers needed to be flushed periodically. He suggested that doing so might solve the water discolouration problem. He also suggested installing a drain valve.

[7] In March 1996, a consultant to the Strata Corporation suggested that the domestic hot water recirculation system could be a contributing factor to the water discolouration problem. The consultant recommended balancing the domestic hot water recirculating system to ensure adequate recirculation through all risers, and providing flow restrictors.

[8] In November 1996, the Strata Corporation flushed the system, as suggested in the letter of about one year earlier. It learned that there were no valves present for balancing the system. As a result, the Strata Corporation could not follow the consultant’s suggestion about balancing unless it installed valves. The Strata Corporation suggested that the owners pursue Cressy.

[9] In January 1997, the Strata Corporation wrote Cressy demanding rectification of the problem in a few weeks. Cressy did not solve the problem.

[10] In July 1997, the Strata Corporation caused the system to be flushed. The petitioners did not have any complaints of water discolouration for a matter of months after that. There was a further flushing, and again there were no water discoloration problems for months.

[11] In February 1998, the petitioners wrote the Strata Corporation saying that they had noticed water discolouration in the prior week.

[12] In July 1998, the Strata Corporation concluded that it would install a drain valve.

[13] In November 1998, a company working for the Strata Corporation made an attempt to adjust the domestic hot water recirculation valves. The Strata Corporation then recommended the installation of an "under-fixture water filtration system" in Suite 1204, on the basis that such a system would rectify the discolouration problem. The Strata Corporation proposed installing two units under the fixtures and proposed that the system be maintained at the expense of the petitioners.

[14] The petitioners were opposed to the under-fixture water filtration system for four reasons. First, the petitioners are both retired and did not believe they had the physical capacity to easily replace the filters, which would require replacement every few months. Second, there was some possible unsightliness associated with the fixtures. Third, the petitioners did not want the expense of replacing the filters. The expense would have been in the neighbourhood of $10 every few months. Fourth, the owners were concerned the presence of such a system would diminish the value of their unit.

[15] The parties negotiated about the Strata Corporation’s proposed under-fixture water filtration system but failed to reach any agreement. This proceeding was commenced on October 26, 1999.

[16] It appears that the parties negotiated further in the year 2000 but again without reaching agreement.

[17] In April of 2001, the Strata Corporation received a report from Keen Engineering Co. Ltd., a firm of consulting professional engineers. Keen recommended replacing and calibrating balancing valves and ball valves in the 11th floor ceiling of items that would be serving the 12th floor. Keen said this should solve the water discolouration problem. The work was apparently performed.

[18] In October of 2001, Keen provided a final report. Keen was of the view that installing some new valves and balancing other existing valves had worked. There

had been no discolouration observed in the prior three weeks. By this point, the Strata Corporation had paid $6,000 for investigative costs and $5,000 for the work recommended by Keen.

[19] By April 2002, there were intermittent water discolouration problems in Suite 1204. For example, there was a problem on April 24, although not on April 22, 23, 25 or 29. The Strata Corporation speculated, with some support by experts, that water discolouration at this point could have been the result of problems in the domestic water supply, rather than the problems which had caused the earlier discolouration problems.

[20] In late 2001 and early 2002, the parties had without prejudice communications about resolving the issues. Such communications are not relevant or admissible in a matter such as this.

[21] In July of 2002, the owners were still experiencing some water discolouration. It was not as significant or as frequent as the water discolouration problems in the prior years. The owners had lost confidence in their domestic water and used bottled water for drinking water and boiled other water for purposes such as for brushing their teeth.

[22] In July 2002, people working for the Strata Corporation did plumbing work on the circulating pumps and heat exchangers. This was done because one unit was not receiving enough hot water.

[23] In July 2002, Mr. Hughes, the principal of Keen, was of the view that the water discolouration problem was solved. He thought that there would occasionally be problems arising in Suite 1204 for environmental reasons such as heavy waterfall.

[24] On September 25, 2002, people working for the Strata Corporation removed three hot water heaters on the system serving Suite 1204 and replaced them with one new larger heat exchanger. This work cost $27,000.

[25] In its report of October 18, 2002, Keen reviewed reports of water testing. Samples taken prior to September 25, 2002 from the petitioners' ensuite had high iron content. Mr. Hughes said that this suggested that the problems were in the building rather than from the domestic water supply. He recommended annual balancing of the newly installed balancing valves. He also said that the recent replacement of the hot water heater might be helpful.

[26] At the time of the hearing on November 6, 2002, water discolouration had not been observed in Suite 1204 for about a week. Mr. Hughes was of the view that it was not uncommon for a suite at the bottom of a riser system, like suite 1204, to occasionally experience high levels of discoloured water for a few seconds at times when the plumbing fixture has not been used for extended periods of two or three days duration. Mr. Hughes attributed this to the collecting of sediment.

ANALYSIS

A. Is the Strata Corporation presently in breach of its obligation to repair and maintain the common property?

[27] Section 72(1) of the *Strata Property Act*, S.B.C. 1998, c. 43, provides that the Strata Corporation must repair and maintain common property and common assets. That is subject to by-laws but there are no relevant by-laws in this case.

[28] The phrase “common property” is defined in s. 1(1) of the *Act*. It includes “pipes...and other facilities for the passage or provision of water” if they are located in certain places. Here, the pipes are connected to the pipes that service all the units, and so they are intended to be used in connection with the enjoyment of another strata lot. Therefore these pipes are subject to the duty to repair and maintain.

[29] I adopt the definition of “repair” found in *Burns v. National Coal Board,* [1957] S.C. 239 (Scot.), which was cited with approval in *Sterloff v. Strata Corp. of Strata Plan No. VR 2613*, [1994] B.C.J. No. 445:

> It is true that the primary meaning of the word “repair” is to restore to sound condition that which has previously been sound, but the word is also properly

> used in a sense of to make good. Moreover, the word is commonly used to describe the operation of making an article good or sound, irrespective of whether the article has been good or sound before.

[30] The obligation to repair and maintain must be interpreted with a test of reasonableness. I quote from *Wright v. Strata Plan No. 205* (1996), 20 B.C.L.R. (3d) 343, [1996] B.C.J. No. 381, (B.C.S.C.) aff'd (1998), 43 B.C.L.R. (3d) 1 (B.C.C.A.), at paras. 29 and 30:

> As appears from the record of its proceedings the Council was at all times alive to its repair and maintenance responsibilities; and throughout the period of the plaintiff's ownership of her strata lot took steps to remedy the defects which she drew to its attention...
>
> The defendants are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying out their statutory duty; and therein lies the test to be applied to their actions. Should it turn out that those they hire to carry out work fail to do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances: and in this instance I have to say that the defendants did just that. They cannot be found to have been negligent.

[31] Counsel for the petitioners argues that, in the absence of proof that the water discolouration has been solved once and for all, the Strata Corporation is in breach of its obligations. Counsel for the Strata Corporation argues that its obligation is no more than to do what is reasonable to repair and maintain the common property and that it is doing so and has done so throughout the period in question.

[32] There is little evidence concerning on which dates the water discolouration has occurred and whether it stops after a certain amount of water has flowed out the faucet. Ms. Obenauer deposed on November 4, 2002 that she had not noticed discolouration for five or six days. This suggests that there has been some discolouration since the September 25, 2002 replacement of the heat exchanger. However, there is not enough information available to determine whether this could be one of the occasional problems Mr. Hughes predicted in July relating to environmental reasons such as heavy waterfall, or a continuation of some other problem.

[33] It is for the petitioners to establish that there is a breach of the *Strata Property Act*. The *Act* does not provide that the Strata Corporation must guarantee that water is never discoloured. The Strata Corporation is obligated to act reasonably to maintain and repair the pipes, including making good plumbing which is causing water discolouration.

[34] If pipes caused a serious and imminent health risk, a Strata Corporation might be obligated to take immediate steps to solve the problem. Where the problem is aesthetic only, as is the case here, it is reasonable for the Strata Corporation to take more time. In either case, the Strata Corporation is entitled to rely on reasonable expert evidence.

[35] In this case, Mr. Hughes' opinion of July 2002 is that the problem has been solved. He also suggests that replacement of the water heater may be helpful, and that has now occurred.

[36] On the evidence available before me, it appears that the Strata Corporation is presently acting reasonably with respect to its duty to repair and maintain the common property in respect of water discolouration in Suite 1204. The evidence does not demonstrate persistent water discolouration problems which are incompatible with Mr. Hughes' opinion. Accordingly, the petitioners' application for a declaration that the Strata Corporation is presently in breach of its duty to repair and maintain the common property and an injunction in respect of that is dismissed. The petitioners have liberty to apply should water discolouration problems return.

B. Has the Strata Corporation been in breach of its duty to repair and maintain the common property?

[37] In my view, the Strata Corporation failed to meet its obligation to repair the common property for part of the last eight years.

[38] The evidence in respect of 1994 and 1995 is sparse. There is insufficient evidence to allow me to determine whether there was breach of duty in that period.

Since the petitioners bear the onus of proving any breach, I find that the Strata Corporation did not breach its duty in 1994 and 1995.

[39] In 1996, the Strata Corporation engaged experts and was looking for solutions. While it is difficult to impose a precise time period during which the Strata Corporation ought to have acted, particularly without details of the degree and amount of discolouration, I am unable to conclude that the Strata Corporation was in breach in 1996.

[40] The Strata Corporation took steps in 1997 including the flushing of the system. For a time, that appeared to fix the problem. It appears to me that the steps taken by the Strata Corporation in 1997 were reasonable.

[41] In 1998, the Strata Corporation installed the drain valve and adjusted the domestic hot water circulation valves. It appears that the problem was still not solved at this time although the Strata Corporation followed expert advice.

[42] In late 1998, the Strata Corporation proposed installing an "under-fixture water filtration system". It was very contentious whether the Strata Corporation was acting reasonably in making that proposal. In my view, it was not reasonable for the Strata Corporation to offer this option only if the owners would pay for filter replacement and arrange for replacement to be done. The Strata Corporation has the duty to repair and maintain, and cannot force owners to assume its duty. If there were such a system, the Strata Corporation would have to repair and maintain it by replacing the filters. While the parties could have negotiated an arrangement by which the owners would be responsible to maintain the part of the common property accessible in the suite, it was not reasonable for the Strata Corporation to require that the owners assume that obligation.

[43] There was a dispute in the evidence about whether Mr. Hughes said that the filters were not a viable method of solving the ongoing water discolouration problems. While the owners say that they heard Mr. Hughes say that, Mr. Hughes

denies saying that. Mr. Hughes deposed that he said another method might work which would avoid the use of the filters.

[44] It is not necessary for me to try to resolve that conflict in the affidavits. If the Strata Corporation had expert evidence that the under-fixture system would solve the problem and was the only solution suggested by the experts, and if the Strata Corporation had stated it would pay for the new filters and do all filter replacement work, the Strata Corporation may have discharged its obligation to repair and maintain by making such a proposal. However, that did not occur.

[45] During 1999 and 2000, the Strata Corporation took no further steps either to change its offer relating to the under-fixture water filtration system or to find any other solution.

[46] As a result, the Strata Corporation was in breach of its duty during the second half of 1999 and all of 2000. Had it spent some time in early 1999 seeking another solution different from the under-fixture water filtration system, it may have satisfied its obligations.

[47] By 2001, the Strata Corporation had retained an expert to assist it. The chronology of what occurred in 2001 and 2002 demonstrates that the Strata Corporation has followed expert advice and taken steps reasonably promptly. Accordingly, I do not find any breach during the period commencing in January 2001.

C. What remedy are the owners entitled to as a consequence of the fact that the Condominium Corporation has been in breach of its duty to repair and maintain?

[48] The owners are entitled to a declaration that the Condominium Corporation was in breach of its duty to repair and maintain during the period July 1, 1999 through December 31, 2000.

[49] The petitioners also seek an order that they be exempt from paying any share of special assessments to raise funds to repair and maintain the common property

hot water supply. Had the Strata Corporation acted reasonably throughout, I would have no doubt that the petitioners should pay their fair share of costs to repair and maintain. In light of the period of breach of that duty, should the owners be exempt from paying their proportionate share?

[50] I have concluded that the petitioners are not entitled to that remedy. Section 167(2) of the *Strata Property Act* provides that the expense of defending a suit brought against the Strata Corporation is shared by the owners except that an owner who is suing a Strata Corporation is not required to contribute. There is no section suggesting that the petitioners should be exempt from paying their proportionate share of expenses which benefit them. One would expect such a section to be found in the *Strata Property Act* if that remedy would be appropriate.

[51] The petitioners are urging this remedy essentially to punish the Strata Corporation for its lack of diligence. There is no evidence that the work would have been cheaper had it been performed earlier or that the owners have suffered in any financial way from the continued water discolouration problems.

[52] In these circumstances, I am not willing to order that the owners be exempt from paying their proportionate share of any special assessments to raise funds to repair and maintain the common property hot water supply. I will order pursuant to s. 167(2) of the *Act* that the petitioners are exempt from paying any of the expenses of the respondent in defending this proceeding.

COSTS

[53] The petitioners seek special costs or costs on a solicitor and own-client basis. They argue that they should obtain special costs to put them into the position they ought to have been in had the Strata Corporation acted properly. The petitioners say that if the Strata Corporation had acted reasonably, the petitioners would not have been required to incur any legal expense.

[54] The flaw in this argument is that special costs are only available in a limited number of circumstances. For example, they may be ordered if improper allegations

of fraud have been made, or a proceeding has been brought for an improper motive or a proceeding has been improperly conducted. Special costs should not be ordered just because a claim has failed or been found to have little merit. See *Garcia v. Crestbrook Forest Industries Ltd. (No. 2)* (1994), 119 D.L.R. (4th) 740 (C.A.).

[55] Ordinarily even successful litigants are forced to bear some of the costs of their litigation. It could be argued that litigation between owners and strata corporations ought to be treated differently from other litigation, because the resources of a single owner would rarely equal the resources of all the other owners. However, that would be a departure from the general law. The *Act* simply provides that an owner is not required to contribute to the expenses of the litigation and does not provide for payment of special costs when a Strata Corporation has been unsuccessful in litigation. In these circumstances, I must apply the general law.

[56] This has been a matter of ordinary difficulty and importance. The respondent did not make improper allegations, proceed with improper motive, or conduct the proceeding improperly. In all the circumstances, even though the petitioners have not been entirely successful, I order that they are entitled to their costs on the tariff basis at Scale 3.

[57] In summary, I declare that the Strata Corporation was in breach of its obligations to repair and maintain common property during the period July 1, 1999 through December 31, 2000, that the petitioners have liberty to apply should water discolouration problems return, that the petitioners are exempt from paying any of the expenses of the respondents in defending this proceeding, and that the petitioners are entitled to costs at Scale 3.

"Madam Justice Gray"