COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NW 2364 v. The Owners, Strata Plan NW 2301*
2023 BCCA 55

Date: 20230130
Docket: CA48262

Between:

The Owners, Strata Plan NW 2364

Appellant
(Respondent)

And

The Owners, Strata Plan NW 2301

Respondent
(Petitioner)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated March 31, 2022 (*The Owners, Strata Plan NW 2301 v. The Owners, NW Strata Plan 2364*, 2022 BCSC 527, Vancouver Docket S213810).

Oral Reasons for Judgment

Counsel for the Appellant:	J.R. Shewfelt
Counsel for the Respondent:	P.J. Dougan
Place and Date of Hearing:	Vancouver, British Columbia January 26, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 30, 2023

Summary:

The parties are strata owners of side-by-side parcels of land that, for more than 30 years, have shared the use and cost of recreational amenities. The appellant gave notice that it was terminating the arrangement. A chambers judge found that the parties had entered a post-incorporation contract on the same terms as a pre-existing covenant that attached to the lands, and the appellant could not terminate the contract. The appellant appealed the Supreme Court order, arguing that: (1) the issue of a post-incorporation contract should not have been determined by way of a petition; (2) the judge erroneously granted relief on a basis that was not pleaded; and (3) he applied an incorrect legal test in finding a post-incorporation contract. Held: appeal dismissed. The appellant has not established a proper basis for interference with the judge's discretion about proceeding by way of petition and the adequacy of the pleadings. Finally, the judge did not err in finding there was a post-incorporation contract.

[1] **DEWITT-VAN OOSTEN J.A.**: This is an appeal from a Supreme Court order holding that The Owners, Strata Plan NW 2364 (the appellant), and The Owners, Strata Plan NW 2301 (the respondent), entered into and are bound by a post-incorporation contract.

Background

[2] The terms of the contract were found to be the same as the terms of a July 18, 1985 covenant (the "Covenant"), that was entered into by Lougheed Garden Estates Phase II Ltd. ("Lougheed") and the Corporation of the District of Burnaby ("Burnaby"). At the material time, Lougheed was the owner and developer of side-by-side parcels of land on which the parties' strata lots are situated. The Covenant was registered against title for each of the parcels before the lands were developed and before the strata corporations were established.

[3] The Covenant required that certain recreational amenities be built on each parcel and that the "registered owners" of the parcels share the use of those amenities, as well as the maintenance costs. Since 1993, when individual owners first began to purchase strata lots from Lougheed, the appellant and the respondent have acted in a manner consistent with the terms of the Covenant. This includes equally sharing expenses for the amenities.

[4] In March 2019, the appellant gave notice to the respondent that it no longer intended to contribute to expenses for the amenities situated on the respondent's land. It passed a special resolution to that effect. The respondent brought a petition in the Supreme Court, seeking to have the Covenant enforced, or, alternatively, a ruling that the parties had entered into a post-incorporation contract on the same terms as the Covenant.

Judgment in the Supreme Court

[5] In reasons indexed as 2022 BCSC 527, the petition judge concluded that neither party could enforce the Covenant. However, he found that they had entered into a post-incorporation contract on the same terms as the Covenant.

[6] The petition judge found as a fact that prior to the appellant providing notice of its intention to terminate, members of both strata corporations "enjoyed the facilities" on the side-by-side parcels and that the costs of the amenities were shared "in accordance with" the terms of the Covenant: at para. 62. The petition judge held that in conducting themselves this way, the parties had "acted in a manner that is wholly consistent with the Covenant from inception and until March 19, 2019, when the [appellant] issued the Notice of Termination": at para. 64.

[7] He also found that the appellant is not entitled to terminate the post-incorporation contract. There is nothing in the terms of the Covenant, which now form the basis for the contract, that contemplates termination: at para. 85. The respondent is not able to enter into "an alternative arrangement with another entity because of the interconnected nature and unique circumstances, including physical proximity": at para. 86. And, the Covenant remains attached to title for the two parcels. Termination of the post-incorporation contract would not remove the obligations to maintain the amenities built on the lands. Those obligations would continue, subject to Burnaby agreeing to an amendment of the Covenant: at paras. 88–89.

[8] In light of these factors, the petition judge concluded that it was the common intention of the parties when they entered into the post-incorporation contract that the terms of the contract would be permanent, subject to further agreement: at paras. 81, 89.

Issues on Appeal

[9] The appellant has raised three issues in the appeal. It says: (1) the question of whether there is a post-incorporation contract should not have been determined by way of a petition; (2) the petition judge erroneously granted relief on a basis that was not pleaded; and (3) he applied an incorrect legal test in finding a post-incorporation contract.

Discussion

[10] I would not accede to any of these grounds of appeal.

a) Petition versus a Notice of Civil Claim

[11] In the court below, the appellant argued that had the respondent wanted to bring a claim based on an alleged post-incorporation contract, it should have started its action by way of a notice of civil claim, rather than a petition. The appellant submitted that a petition can only be used in a contractual dispute if the "sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document": R. 2-1(2)(c), *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. As the contract found to exist in this case was neither "oral" nor "written", R. 2-1(2)(c) was not properly engaged.

[12] The petition judge rejected this argument. He found that the appellant was not prejudiced by the use of a petition: at paras. 22–26.

[13] Relying upon *The Redeemed Christian Church of God. v. New Westminster (City)*, 2022 BCCA 224 [*Redeemed Christian Church*], the appellant asks that the relief granted by the petition judge be set aside on the ground that the proceeding

was improperly commenced, without prejudice to the respondent's right to commence a proper action.

[14] I would not interfere with the Supreme Court order on this basis.

[15] First, I agree with the respondent that the "principal question" in the court below was the "construction" of a "contract or other document": R. 2-1(2)(c). The respondent's claim for relief was grounded in the terms of the Covenant, which were said to bind the parties decades later, in one form or another.

[16] Second, and in any event, R. 22-7 provides a full answer to the appellant's complaint. A failure to comply with the *Rules* does not nullify a proceeding: R. 22-7(1)(a). To the contrary, a court "must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed": R. 22-7(3).

[17] As such, in cases where a proceeding has been improperly constituted, a hearing judge retains a discretion to allow the proceeding to continue: *Redeemed Christian Church* at paras. 73–77. Whether that discretion is appropriately exercised will be informed by the particular circumstances of the case: *Redeemed Christian Church* at para. 74. In my view, the exercise of this discretion attracts a deferential standard of review.

[18] In this case, the petition judge was alive to the appellant's objection (at para. 22), but was prepared to hear the respondent's claim of a post-incorporation contract within the context of the petition proceeding.

[19] He did so on the understanding that there were no "factual disputes" between the parties: at para. 25. Rather, the issue in the case was whether the facts — as accepted by the parties — bound them to a cost-sharing arrangement. The accepted facts spoke to both the Covenant and the parties' post-incorporation conduct. The issues arising from the accepted facts were inextricably intertwined.

[20] The petition judge was satisfied "there was no suggestion of surprise" in the petition proceeding and that "all arguments were fully canvassed": at para. 26. On appeal, the appellant says proceeding by petition was prejudicial. However, it is unclear whether any such prejudice was identified for the petition judge and, in any event, he found to the contrary after his assessment of the case.

[21] In these circumstances, considered as a whole, the appellant has not persuaded me that this first ground of appeal establishes a proper basis on which to interfere with the Supreme Court order.

b) Inadequate Pleadings

[22] The appellant also argued below that if the parties could not enforce the Covenant against each other, the petition should be dismissed because the respondent did not "set out by way of alternative plea the remedy of a post-incorporation contract": at para. 21.

[23] The petition judge rejected this argument.

[24] He found that the petition "sufficiently identifie[d] the matters in dispute [between the parties] and the arguments to be advanced": at para. 26.

[25] In reaching this conclusion, he referred specifically to paragraph 2 of Part 3 of the petition ("Legal Basis"), which alleged that the appellant had conducted itself in a manner consistent with having "accepted" the terms of the Covenant:

> Pursuant to *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp*., 2020 SCC 29 … the Petitioner says the Respondent Strata has objectively conducted itself to accept the terms of the Agreement and has received the benefit of the Agreement and therefore must bear the burden also.
>
> [Emphasis added.]

The term "Agreement", contained in paragraph 2, was defined elsewhere in the petition as the Covenant.

[26] Paragraph 4 of Part 3 of the petition also raised the possibility of the Covenant having formed the basis for a "contract":

> If the Agreement is considered as contract, the objective conduct of the Respondent Strata, after thirty-three years of paying for recreation facilities and using them, can hardly be construed as denying the effect of the covenant terms as contractual.
>
> [Emphasis added.]

[27] The "factual basis" of the petition included an assertion that "[f]or more than thirty years the costs [of the recreational amenities] were shared between the Petitioner and the Respondent Strata". This is post-incorporation conduct.

[28] Finally, the petition cited *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29 [*Crystal Square*] as a case the respondent would rely upon in seeking relief. *Crystal Square* makes it clear that a post-incorporation contract can flow out of objective adherence to the terms of a pre-incorporation agreement.

[29] I accept that the pleadings are not a model of clarity and that the claim for alternative relief should have been more clearly stated. However, given the parts I have referred to, I do not agree with the appellant that the petition did not plead the existence of a post-incorporation contract in "any way, shape, or form, either expressly or by inference": appellant's factum at para. 24.

[30] Nor am I persuaded that in responding to the petition, the appellant was deprived of a fair opportunity to respond to the issue of a post-incorporation contract. On appeal, the appellant has not identified, in any concrete way, what it would have done differently had the issue of a post-incorporation contract been more clearly stated. It says it may have called evidence about the fact that not every term of the Covenant was active as between the parties. However, the petition judge was already aware of that fact. He understood, for example, that a parking-related provision had not been actively engaged between the parties: at para. 63. There was also evidence from the respondent's property manager that the tennis courts on the appellant's lands had "fallen so into disrepair as to be unusable".

[31] Assuming for present purposes that this Court applies a correctness standard to its review of a decision about the sufficiency of pleadings (see the discussion in *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at paras. 41–47), I agree with the petition judge that the pleadings sufficiently identified the matters in dispute. In my view, read generously and as a whole, the petition provided adequate notice to the appellant that as an alternative to enforcement of the Covenant, the respondent was alleging that the parties had entered into a post-incorporation contract on the same terms as the Covenant.

c) Existence of a Post-Incorporation Contract

[32] As its third ground of appeal, the appellant contends that the petition judge erred in his analysis of whether a post-incorporation contract exists on the facts of this case.

[33] The petition judge held that *Crystal Square* established the proper analytical framework for assessing this aspect of the respondent's claim. The appellant accepts the applicability of *Crystal Square* and says the petition judge rightly decided, with reference to that decision, that the Covenant was not enforceable by either of the parties.

[34] However, specific to the existence of a post-incorporation contract, the appellant says *Crystal Square* is not dispositive and the petition judge erred in finding to the contrary.

[35] In that case, the Supreme Court accepted that strata corporations can enter into a post-incorporation contract based on their conduct. To determine whether a contract exists, a court must examine how each party's conduct would appear to a reasonable person standing in the position of the other party: at para. 33. As explained by Justice Côté, writing for the majority (at para. 37):

> … The test is objective, and the offer, acceptance, consideration and terms may be inferred from the parties' conduct and from the surrounding circumstances.
>
> [Emphasis added.]

[36] The appellant says *Crystal Square* does not apply here because there is no "functional degree of symmetry between [the Covenant] and the alleged terms of subsequent contact": appellant's factum at para. 51. From the appellant's perspective, the pre-incorporation circumstances in this case were fundamentally different from the ones at issue in *Crystal Square* and the petition judge erred in describing the two cases as "wholly analogous": at para. 64. In particular, the Covenant did not "anticipate or facilitate the assumption of the obligations therein by subsequent purchasers or parties": appellant's factum at para. 40.

[37] In my view, this submission is without merit.

[38] The terms of the Covenant expressly contemplated that the obligations embodied therein would "enure to the benefit of and be binding upon the respective successors and assigns of [Lougheed]": 2022 BCSC 527 at para. 4. Those obligations included that the registered owners of each parcel of land (successors to Lougheed), were duty bound to each other to equally share the costs of maintaining the amenities.

[39] In any event, as I read *Crystal Square*, it is not a legal pre-requisite to the formation of a post-incorporation contract that the terms of a covenant or other pre-incorporation agreement on which the contract is based, expressly anticipates or provides for the assumption of obligations by successors or assigns.

[40] Instead, the *Crystal Square* analysis is focused on whether the parties at issue independently "entered into a new contract on the same terms as those of the pre-incorporation contract": at para. 25 (emphasis added). What matters is evidence of an "outward manifestation of assent by each party such as to induce a reasonable expectation in the other": *Crystal Square* at para. 33, citing S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017) at p. 25 (emphasis added). For this reason, presumably, the intentions of the parties to the pre-incorporation contract cannot be determinative of the issue: *Crystal Square* at para. 34. The

"parties to the pre-incorporation contract are strangers to the post-incorporation contract": *Crystal Square* at para. 34.

[41] The petition judge was satisfied that the uncontradicted evidence in this case established the requisite "outward manifestation of assent" by each of the parties to the terms of the Covenant, including the equal sharing of expenses: at paras. 58–64. This was a finding of fact or, at the very least, a finding of mixed fact and law after an assessment of the petition record, and is subject to a deferential standard of review: *Housen v. Nikolaisen,* 2002 SCC 33, at paras. 8–10.

[42] In my view, the appellant has not established an error in principle that would displace this deferential standard and justify setting aside the Supreme Court order.

Disposition

[43] For these reasons, I would dismiss the appeal.

[44] **SAUNDERS J.A.**: I agree.

[45] **FITCH J.A.**: I agree.

[46] **SAUNDERS J.A.**: The appeal is dismissed with thanks to counsel.

"The Honourable Madam Justice DeWitt-Van Oosten"