

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rochette v. Bradburn*,
2023 BCSC 1657

Date: 20230921
Docket: S194145
Registry: Victoria

Between:

**Sylvie Rochette, Jim Tennant, and
Laura Podgorenko**

Plaintiffs

And

**Bruce Bradburn, Arthur Roberts, Mary Matchett, and
The Owners, Strata Plan 962**

Defendants

Corrected Judgment: The cover page of the Reasons for Judgment has been
corrected on October 3, 2023

Before: Master Harper

Reasons for Judgment

Counsel for the Plaintiffs:

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Bradburn, Arthur Roberts, and
Mary Matchett:

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Strata Plan 962:

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Place and Date of Hearing:

Victoria, B.C.
September 13, 2023

Place and Date of Judgment:

Victoria, B.C.
September 21, 2023

Introduction

[1] The defendant, The Owners, Strata Plan VIS 962 (the “Strata Corporation”), seeks an order pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules* striking out the notice of civil claim as against it on the basis that it discloses no reasonable claim.

[2] The dispute is between strata plan owners who live full-time in their suites and strata plan owners who rent out their suites. The background to the litigation is set out in the reasons for judgment of Justice D. MacDonald (indexed at 2021 BCSC 1752) and will not be repeated here.

Application to Strike

[3] The test on an application to strike is summarized in *Lavery v. Community Living British Columbia*, 2022 BCSC 739 as follows:

[15] The test under Rule 9-5(1)(a) is whether it is “plain and obvious” that the plaintiffs’ claims disclose no reasonable cause of action (*Hunt v. Carey*, [1990] 2 S.C.R. 959 at 980).

[16] The pleadings are assumed to be true, and no evidence is admissible. However, if allegations in the pleadings are based on assumptions and speculation, they need not be taken to be true (*Hunt* at para. 972; *Edmond v. British Columbia*, 2013 BCSC 1102 at para. 52; *Drummond v. Moore*, 2012 BCSC 496 at para. 18).

[17] Pleadings will be struck if they do not establish a cause of action, do not advance a claim known in law, or are without substance because they are groundless and fanciful (*Dempsey et al v. Envision Credit Union et al.*, 2006 BCSC 750 at para. 17). As stated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 19:

[19] The power to strike out claims that have no reasonable prospect of success is a valuable house-keeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

Analysis

[4] In Part 3, Legal Basis of its notice of application, the Strata Corporation makes only one legal argument in one short paragraph. It says:

The thrust of the Plaintiffs’ claim appears to be that the Strata Corporation had a legal duty to bring proceedings against the Personal Defendants. There

is no such duty. Section 33 of the *Strata Property Act*, S.B.C. 1998, c. 43 allows an owner to bring a proceeding for a council member's breach of s. 32, and that is what the plaintiffs have done in this case.

[5] The legal basis in the notice of application is inadequate. Our courts have long commented on the problems posed by inadequate notices of application and application responses: *Zecher v. Josh*, 2011 BCSC 311 at paras. 29–34; *Dupre v. Patterson*, 2013 BCSC 1561 at paras. 45–56 and many other similar cases. I considered dismissing the Strata Corporation's application with liberty to re-apply, but was persuaded that I should "muddle through" and hear the application.

[6] Because of the inadequacies of the notice of application, I have relied mainly on counsel's oral submissions.

[7] The Strata Corporation's argument, as I understand it, is that the notice of civil claim does not set out any material facts to found a claim for damages.

[8] The plaintiffs say that if there are drafting defects, they can be remedied.

[9] The plaintiffs' claim against the Strata Corporation is in negligence. The plaintiffs are entitled to bring such a claim. Section 2(2) of the *Strata Property Act* states that a strata corporation has the power and capacity of a natural person of full capacity. Section 163 of the *Strata Property Act* states:

163 (1) The strata corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the strata corporation.

(2) An owner may sue the strata corporation.

[10] As with any claim in negligence, the essential elements must be pleaded. In the present case, the claim in negligence is adequately pleaded (at least to the standard required to survive an application to strike) in that the plaintiffs plead a duty of care, standard of care, and breach of the standard of care. However, the pleading is deficient in that there are no facts to support a claim for damages and no legal basis on which the damages claim is being advanced. The plaintiffs claim only special costs in the relief sought section.

[11] The plaintiffs plead three separate causes of action.

Strata Corporation's Failure to Manage the Common Property

- a) Duty of Care: the Strata Corporation has an obligation to act for the benefit of the owners.
- b) Standard of Care: the Strata Corporation has a statutory obligation to manage and maintain the common property.
- c) Breach of Standard of Care: the Strata Corporation entered into or renewed an agreement with a commercial tenant to lease portions of the common property for an amount below fair market value and in direct opposition to a resolution of the owners.

Strata Corporation's refusal to properly investigate complaints of malfeasance and misfeasance

- a) Duty of Care: The Strata Corporation has an obligation to act for the benefit of the owners.
- b) Standard of Care: The Strata Corporation has an obligation to properly investigate complaints of misfeasance and malfeasance.
- c) Breach of Standard of Care: The Strata Corporation never contested or challenged the Nov 28 Opinion.

Strata Corporation's failure to manage its common assets (chose in action)

- a) Duty of Care: The Strata Corporation has an obligation to act for the benefit of the owners (Legal Basis, para. 1 and 8);
- b) Standard of Care: The Strata Corporation must manage and maintain the common assets (which are statutorily defined to include personal property) of the strata corporation (Legal Basis, para. 8);
- c) Breach of Standard of Care: The Strata Corporation attempted to dispose of a common asset (chose in action) unreasonably (Statement of Facts, para. 17) and unlawfully (Reply, para. 1, 2); and [...]

[12] The drafting error in each of the three claims is in failing to set out the material facts in support of a claim for loss or expense. I think the plaintiffs meant to plead that they were compelled to incur legal expenses and pursue this litigation

against the personal defendants because the Strata Corporation refused to protect itself. That is a claim for pecuniary damages, not a claim for special costs.

[13] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties. Special costs are not compensatory; they are punitive: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 56.

[14] It appears that the plaintiffs acknowledge that they should plead a pecuniary loss, however, in their application response, the plaintiffs also say that they are claiming special costs due to the litigation misconduct of the Strata Corporation. The court cannot resolve a party's drafting issues and it is not the court's role to draft pleadings.

[15] Although I agree with the Strata Corporation that the facts supporting a claim for damages is not pleaded properly, this error can be rectified by an amendment to the notice of civil claim. Counsel for the plaintiffs suggested in oral submissions some proposed wording. It would have been helpful to have the suggested wording in writing and as part of the application response, but I have some sympathy for the plaintiffs who, on reading the notice of application, might reasonably have no clear idea what the Strata Corporation's argument was. If a responding party to an application to strike acknowledges that the claim is deficient and should be amended, it is best practice to attach a proposed amended pleading to the responding materials, or, at the very least, provide the proposed amendments to the applicant and to the court.

[16] The plaintiffs acknowledge that their claim for legal fees incurred as a result of the alleged negligence of the Strata Corporation may be a novel claim, but a novel claim is not, in and of itself, a reason to strike the claim.

[17] I have concluded that the Strata Corporation's application should be dismissed on the basis that the plaintiffs should have leave to amend the notice of civil claim to properly plead their damages claim. The deadline for filing and serving

the amended notice of civil claim is 30 days from the date of the release of these reasons. Whether the amended notice of civil claim will be a proper pleading remains to be seen.

[18] There has been mixed success on this application. Each party will bear their own costs.

“Master Harper”