IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coyle v. McGuire,*
2024 BCSC 1875

Date: 20241010
Docket: 230970
Registry: Victoria

Between:

Marylou Coyle, Michael Brent Furdyk, and Charles Gorrie

Petitioners

And

**Roger McGuire, James Allard, Mark Stevens, Gerald Hauck,
and Victoria Regent Hotel Ltd.**

Respondents

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Petitioners:	T. Morley
Counsel for the Respondents Roger McGuire, James Allard, Mark Stevens, and Gerald Hauck:	A. Bookman S. Lundy
Counsel for the Interested Party, The Owners, Strata Plan VIS 962	B. Scheidegger
Place and Date of Hearing:	Victoria, B.C. August 15-16, 2024
Place and Date of Judgment:	Victoria, B.C. October 10, 2024

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Introduction

[1] The applicants and personal respondents to this petition, McGuire, Allard, Stevens, and Hauck, apply to dismiss the petition under Rule 9-5 of the *Supreme Court Civil Rules*. The petitioners (the “Coyle Petitioners’) cross-apply to amend the petition; to add new, additional petitioners; and for leave permitting any party of record to serve interrogatories.

[2] The Coyle Petitioners are owner-occupants of units in Strata Plan VIS 962, a residential building in Victoria, British Columbia (the “Strata”). A majority of the Strata’s units are in a rental pool operated by the respondent Victoria Regent Hotel Ltd. (“VRH”), and VRH leases common property from the strata corporation, The Owners, Strata Plan VIS 962 (the “Corporation”). A minority of the units are generally owner-occupied, and do not participate in the rental pool. The applicants (the “2020 Council”) were members of the strata council in 2020. (The applicants were all elected to the strata council in January 2020; McGuire and Hauck resigned from the strata council in January 2021, while Allard and Stevens remained on the strata council and were subsequently re-elected).

[3] The Coyle Petitioners have settled their claims against VRH, and the proposed amendments to the within petition, Petition #3, reflect that no remedy against VRH is being sought.

[4] This is at least the third petition to be filed in this Court by owner-occupants of the Strata in recent years concerning governance of the Strata and the Corporation’s contractual relationship with VRH.

History of the Petitions

Petition #1

[5] Petition #1 was commenced by three other owner-occupants –Rochette, Tennant, and Podgorenko (the “Rochette Petitioners”) – against three former strata council members (the “2019 Council”) and the Corporation, by way of a petition filed in September 2019. The details of that dispute are set out in the September 2021

reasons of Madam Justice MacDonald in *Rochette v. Bradburn*, 2021 BCSC 1752 [*Bradburn*]. That decision concerned the Rochette Petitioners' application for orders adding the 2020 Council as respondents, and converting Petition #1 to an action and transferring it to the trial list; and, a cross-application by the 2019 Council to dismiss Petition #1.

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[6] Justice MacDonald dismissed the application to add the 2020 Council as respondents, finding that the pleadings did not disclose a cause of action. She ordered Petition #1 to be converted to an action (the "2019 Action"). The 2019 Action was later settled as between the Rochette Petitioners and the 2019 Council. The trial of the 2019 Action against the remaining defendant, the Corporation, was to have commenced on August 19, 2024; I am advised it was adjourned generally on the first day of trial.

Petition #2 and Petition #3

[7] The Rochette Petitioners then commenced Petition #2 against the 2020 Council, by way of a petition filed February 17, 2022. The background is set out in the reasons of Mr. Justice Harvey dismissing Petition #2, in *Rochette v. McGuire*, 2024 BCSC 112 [*Rochette*].

[8] Petition #2 was initially set to be heard on January 17, 2023. One week prior to that scheduled hearing, counsel for the Rochette Petitioners – also counsel for the petitioners in the within petition, the Coyle Petitioners – wrote to opposing counsel, stating he suspected that if the Court were to dismiss Petition #2, there was a "very high likelihood" that another owner would bring his or her own claim against the 2020 Council; he understood there were unit owners other than the Rochette Petitioners who "believe that something improper occurred between January 2020 and January 2021".

[9] The hearing of Petition #2 was then adjourned by consent. On March 20, 2023, the Coyle Petitioners, represented by the same counsel as the Rochette Petitioners, filed Petition #3.

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[10] Both Petition #2 and #3 allege the 2020 Council were in breach of ss. 31 and 32 of the *Strata Property Act*, S.B.C. 1998 c. 43 [*SPA*], through their failure to disclose conflicts of interest respecting the Corporation's renewal of a common area use agreement with VRH, and the 2020 Council's granting, on behalf of the Corporation, a release of claims against the 2019 Council in the 2019 Action. As was the case with Petitions #1 and #2, Petition #3 is brought under s. 33 of the *SPA*, which affords unit owners the right to bring claims against strata council members for breach of s. 32. It provides:

> 33(1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 vote at an annual or special general meeting.
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> …
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> (3) If, on application under subsection (1), the court finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into, the court may do one or more of the following:
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> > (a) set aside the contract or transaction if no significant injustice will be caused to third parties;
> >
> > (b) if the council member has not acted honestly and in good faith, require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;
> >
> > (c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

The two petitions advance different theories as to the 2020 Council's liability. The proposed amendments to Petition #3 that are before me advance yet a further theory.

[11] Petition #2 was heard before Justice Harvey August 21-24, 2023. At that time, Petition #3 was set to be heard during the assize week of October 10, 2023. In the interim between the filing of Petition #3 in March 2023 and the hearing of Petition #2 in August 2023, the Coyle Petitioners took no steps to obtain an order that those two petitions be heard together. A case planning conference in Petition #2 was heard before Master Harper (as she then was) on July 20, 2023, and in their case plan

proposal the 2020 Council proposed that a case management judge be assigned to manage those two petitions together. That proposal was opposed by the Rochette Petitioners (who, as I have noted, were represented by the same counsel as the Coyle Petitioners). The request for case management was refused by the Chief Justice, as communicated to counsel by way of a memorandum dated August 8, 2023.

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[12] Justice Harvey, in his lengthy and thoroughly considered reasons for judgment in *Rochette*, declined to strike the petition as a whole as an abuse of process, but allowed in part the respondent's application, ordering that certain portions of the petition be struck. He then dismissed Petition #2 in its entirety on its merits.

[13] Justice Harvey had before him the within petition (which he refers to in his reasons as "*Coyle*"). Justice Harvey noted the parallels between Petitions #2 and #3. He described the factual matrix underlying the two proceedings as "near identical". Referring back to the reasons in *Bradburn*, he said:

> [88] Recalling MacDonald J. disallowed the proposed amendment alleging collusion between the 2019 and 2020 Councils, the pleadings in *Coyle* mirror, in large measure, the inferences that I am asked to draw from the evidence before me.

He noted, at para. 93, that certain allegations in *Coyle* "…underlie the submissions of counsel for the petitioners…".

[14] In dismissing the petition, Harvey J. found that the pleadings in Petition #3 "revert to the conspiracy theory sought to be included in the amended pleadings in *Bradburn*" (para. 237). He found that the submissions made before him by the Rochette Petitioners "align more closely with the pleadings in *Coyle* than those here" (para. 238). As to the merits of the alleged conflict of interest of the 2020 Council, he characterized it as hinging on "unproven supposition", and called it a "quantum leap" (para. 212). As to the allegation in both petitions that the 2020 Council had obtained a monetary benefit from the aforementioned common area use agreement renewal and the release of claims against the 2019 Council (an allegation the Coyle

Petitioners now seek to retract by way of the proposed amendment, substituting a new theory of the 2020 Stata Council having obtained an indirect benefit), Harvey J. found "not a scintilla of evidence" (para. 200).

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[15] The lead petitioner Ms. Coyle explains in her third affidavit in the present proceeding, filed July 26, 2024, the reasons why she did not become, and would not have wanted to become, a petitioner in Petition #2 once she learned it was extant. She further notes that there were differences between Petition #2 and Petition #3, which she explains on this basis:

> That is because the instructions to counsel were different and is another reason why I would not have wanted to become a party to *Rochette v. McGuire* more than a year after it had started and when it was scheduled to be heard.

[16] Asked during the hearing of these applications to elaborate on what it was that prevented the Rochette Petitioners and the Coyle Petitioners from bringing all of the allegations of conflict of interest against the 2020 Council before the same Court so they could be dealt with at the same time, counsel replied that the core reason was that the two sets of petitioners had retained the same counsel, but were giving different instructions. If the positions of the parties were in fact inconsistent, the petitioners clearly ought to have been represented by separate counsel.

Discussion

[17] The doctrine of *res judicata* promotes the public interest in legal disputes being resolved efficiently and conclusively, and the interests of individual persons in limiting their exposure to litigation. In *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180, at para. 25, Madam Justice Newbury adopted the following description of the public policy considerations underlying the doctrine, from Spencer Bower and Turner, *The Doctrine of Res Judicata* (4th ed., 2009):

> Two policies support the doctrine of res judicata estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:
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> > The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in

> an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

[18] The doctrine of *res judicata* is manifest in two aspects or forms: issue estoppel; and the broader form of cause of action estoppel: *Cliffs Over Maple Bay*, paras. 27-28. Cause of action estoppel arises to prevent parties who have litigated causes of action in a prior action, or persons with whom those parties are in privity of interest, from advancing a new action based on claims or causes of action that are not separate and distinct, but ought to have been dealt with in the prior action and could have been through the exercise of reasonable diligence: *Grandview v. Doering*, [1976] 2 SCR 621, 61 DLR (3d) 455; 1975 CanLII 16.

[19] In *Revane v. Homersham*, 2006 BCCA 8, Mr. Justice Mackenzie commented on the importance of the finality of legal disputes to the application of cause of action estoppel. He wrote:

> [16] The authorities emphasize the importance of final judgments. Southin J.A. in *D.K. Investments* [*Ltd. v. S.W.S. Investments Ltd.* (1990), 44 B.C.L.R. (2d) 1 (C.A.)] at p. 20 referred to "the profoundly important principle that it is in the interest of the community (and of the litigants) that there be an end to litigation." Doherty J.A. in *Tsaoussis* [*(Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.). at pp. 264-65 was equally emphatic:
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>> Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.
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>> The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment

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> has been entered and has either not been appealed, or all appeals have been exhausted.
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> [17] These passages confirm that cause of action estoppel is not merely a technical rule resting on expediency and arcane legal history. It goes to the heart of a system of civil justice that strives for the truth of the matter but recognizes that perfection is an unattainable goal and finality is a practical necessity.

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[20] Both the allegations in Petition #3 as it is currently framed, and those set out in the proposed amendments, are barred through cause of action estoppel. Petitions #2 and #3 are so closely related that they ought to have been litigated in the same forum. The fact that the Coyle Petitioners were not parties to Petition #2 is irrelevant. They are in privity of interest with the Rochette Petitioners. Both sets of petitioners are unit owners in the Strata. The causes of action advanced by those two sets of petitioners do not arise out of injury or loss personal to them, but derive solely from the right they all have in common under s. 33, as unit owners, to bring a claim based on alleged breaches of duties that strata council members owe to the strata corporation and the unit owners as a whole.

[21] The Coyle Petitioners knew that Petition #2 was extant prior to it being heard by Harvey J. They could have taken steps to have their petition heard at the same time. Through their failure to do so, they have put the 2020 Council to the burden of defending themselves a second time. This is an abuse of process.

[22] The petition is dismissed.

[23] As stated by Justice MacKenzie in *Hollander v. Mooney*, 2017 BCCA 238 at para. 79:

> … Conduct that is an abuse of process is, by its nature, reprehensible and deserving of rebuke.

On that basis, I award special costs to the respondents, McGuire, Allard, Stevens, and Hauck.

[24] The Corporation also seeks an award of special costs.

[25] The remedies sought by the Coyle Petitioners in Petition #3 as originally filed included the setting aside of both the common area use agreement between the Corporation and VRH, and the Corporation's release of strata council members. Given the Corporation's interest in those remedies, the Corporation filed a response to this petition as an interested party. The amendments to the petition sought by the Coyle Petitioners on the present application would have withdrawn the claims for those two forms of relief. The Corporation participated in this hearing, supporting the 2020 Council's application to strike, and opposing certain of the amendments sought. The Corporation submits that it continues to have an interest in the within proceedings on the basis that the 2020 Council have sought indemnity from the Corporation under the Corporation's bylaws. The Corporation's submissions at the hearing were of value.

[26] The Corporation's filing of a response to petition and its participation in the hearing were reasonably necessary to advance its interests. The Corporation, though not a party of record, is a party entitled to costs: *Manufacturers Life Insurance Company v. Dahl*, 2005 BCSC 1800. To further serve as denunciation of the Coyle Petitioners' conduct, those costs shall also be assessed as special costs.

"A. Saunders J."

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