Condominium Home Owners Association of British Columbia
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Website: www.choa.bc.ca / Toll-free: 1.877.353.2462
Bulletin: 200-210

The Case of the Valid Common Property Lease

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Written by: Adrienne Murray / Hamilton & Company

When developing a strata corporation, developers will often lease areas of common property such as parking areas, storage lockers or roof tops to a related company. The related company then controls the use of the common property. In respect of parking areas and storage lockers the related company will usually assign or sublease individual parking spaces or storage lockers to purchasers. Roof tops are often subleased by the related company to telecommunication companies. In all cases, any payment that is received as a result of the sublease or assignment is retained by the related company.

Strata councils often question whether such leases are valid and enforceable. A recent British Columbia Supreme Court decision[1] has considered the issue and clarified the circumstances under which such leases will be found to be valid and enforceable against a strata corporation.

In the *Marshall Mountain* case the court was required to determine the validity of a roof top lease.

In *Marshall Mountain*, the developer, Marshall Mountain Homes, entered into a lease of the common property roof top with Marshall Mountain Telecom Ltd. ("Telecom") a company related to the developer. The lease permitted Telecom to install, construct, maintain and operate telecommunications equipment and to bring vehicles, machinery, equipment and tools onto the property for that purpose. The lease also permitted Telecom to assign its rights to a third party.

Before the telecommunications equipment could be installed, Telecom was required to obtain a development permit from the municipality. However, the municipality required the strata corporation to either sign the development application or provide a letter confirming that Telecom was authorized to submit the development application. The strata corporation refused. The strata corporation advised that the lease was not valid or enforceable against the strata corporation. Telecom then applied to the court.

The strata corporation argued that the lease was not valid because, by entering into the lease, the developer breached its fiduciary duty to the strata corporation. The Judge acknowledged that a developer owes a fiduciary duty to strata lot purchasers. Prior to the filing of the strata plan, the developer owes a common law duty to purchasers. Once the strata plan is filed, section 6 of the *Strata Property Act* requires a developer to act honestly and in good faith with a view to the best interests of the strata corporation. The issue that that the Judge was required to consider was whether entering into a contract for its own benefit was a breach by the developer of its duty to act in the best interest of the strata corporation.

Prior decisions have commented that a developer is prevented from entering into transactions with itself for

[1] *Marshall Mountain Telecom Ltd. v. The Owners, Strata Plan EPS 4044*, 2019 BCSC 1180

its benefit as a developer to its detriment as owner. However, in *Marshall Mountain* the Judge stated that a developer "is not necessarily in breach of its fiduciary duty by engaging in transactions for its own benefit, provided that the owner-developer acts in adherence to the development plans described in the disclosure statement, and prospective purchasers have notice of the developer's intention".

The Judge found that one of the relevant factors in determining whether there has been a breach of the developer's fiduciary duty is what notice has been given to purchasers by way of the disclosure statement or registration of encumbrances on title under the *Land Title Act.*

The Judge stated that "there is no breach of fiduciary duty where the developer has merely 'organized the affairs of the strata corporation in a manner anticipated by the disclosure statement and agreed to by the purchasers'".

The Judge held that "an owner-developer who fairly discloses its intention to enter into transactions for its own benefit would not for that reason alone be found to have breached its fiduciary duty to strata unit purchasers".

The Judge was then required to determine whether the disclosure made by the developer was adequate. Although the disclosure statement indicated that a telecommunications lease on common property was a potential encumbrance, the disclosure statement did not attach a copy of the lease. The strata corporation argued that reference to the encumbrance alone was insufficient to alert purchases to the full intrusion upon their interests. The Judge disagreed and held that the disclosure statement provided fair notice to purchasers that the developer reserved the right to enter into a telecommunications lease on the common property.

Additionally, the Judge considered that the lease was filed at the land title office and registered on the title to the property that was to be subdivided prior to the registration of the strata plan. In other words, because it was registered before the filing of the strata plan the lease was listed on the common property index for the strata corporation at the time title of a strata lot was transferred to each purchaser. The Judge noted that each strata title purchaser was at liberty to search the title in the course of the conveyancing process prior to completion.

For purchasers of commercial strata lots, for which a disclosure statement is not required, the notice in respect of leases of common property will likely only be discovered by means of a search of the title to the common property prior to the completion of the conveyance. Thus, such a search is particularly important for the purchasers of commercial strata lots.

The strata corporation in *Marshall Mountain* also argued that even if the lease was valid, it was not enforceable against the strata corporation, as the strata corporation was not a party to the lease. The strata corporation argued that the lease was a positive covenant and thus unenforceable. The Judge held that landlord/tenant arrangements are in a different class from other decisions considering positive covenants. The Judge also noted that the lease provided that the obligations created by the roof top lease run with the land and bind the subdivided parcel and that the obligations would automatically be assumed by the strata corporation. The Judge rejected the strata corporation's argument that the lease was unenforceable as a positive covenant. The Judge concluded that the lease was enforceable. The Judge then ordered the strata corporation to sign the documents required by the municipality to complete the application for the development permit.

Although some transactions, such as leases of common property, entered into by developers of strata corporations appear to be in a developer's interest rather than the interest of a strata corporation, the *Marshall Mountain* case confirms that such transactions will nonetheless be valid and will not be found to be in

breach of a developer's fiduciary duty to the strata corporation if the developer has given prospective purchasers notice of the transaction, either through the developer's disclosure statement or by registration on the title of the land prior to the filing of a strata plan.

Although the *Marshall Mountain* decision establishes the general requirements regarding validity and enforceability, strata corporations with questions regarding the enforceability of a lease of common property should obtain legal advice that is specific to the particular circumstances and terms of the lease.