2014 BCSC 390
British Columbia Supreme Court

299 Burrard Management Ltd. v. **Strata** Plan BCS 3699

2014 CarswellBC 625, 2014 BCSC 390

299 Burrard Management Ltd., Plaintiff and The Owners, Strata Plan BCS3699, Defendant

N.P. Kent J.

Heard: February 5, 2014; February 7, 2014
Judgment: March 11, 2014
Docket: Vancouver S123157

Counsel: S. Coblin, for Petitioner
M.D. Tatchell, for Defendant

Subject: Civil Practice and Procedure; Property

Table of Authorities

Cases considered by *N.P. Kent J.*:

Aegon Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 1321, 36 C.C.P.B. 161 (Ont. S.C.J. [Commercial List]) — considered

Epoch Press Inc. v. Sewak (2011), 81 C.B.R. (5th) 251, 2011 BCSC 323, 2011 CarswellBC 577 (B.C. S.C.) — distinguished

Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd. (2001), 18 B.L.R. (3d) 1, 94 B.C.L.R. (3d) 84, 2001 CarswellBC 2165, 2001 BCCA 600, 157 B.C.A.C. 291, 256 W.A.C. 291, 207 D.L.R. (4th) 353 (B.C. C.A.) — followed

Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd. (2002), 2002 CarswellBC 1423, 2002 CarswellBC 1424, 175 B.C.A.C. 160 (note), 289 W.A.C. 160 (note), 294 N.R. 400 (note) (S.C.C.) — referred to

Strata *Plan BCS 3699 v. 299 Burrard Development Inc.* (2013), 2013 BCCA 356, 2013 CarswellBC 2257, 33 R.P.R. (5th) 1, 47 B.C.L.R. (5th) 92, 341 B.C.A.C. 250, 582 W.A.C. 250 (B.C. C.A.) — referred to

Strata *Plan BCS 3699 v. 299 Burrard Development Inc.* (2014), 2014 CarswellBC 8, 2014 BCCA 8 (B.C. C.A.) — referred to

Statutes considered:

Foreign Money Claims Act, R.S.B.C. 1996, c. 155
Generally — referred to

Real Estate Development Marketing Act, S.B.C. 2004, c. 41
Generally — referred to

Strata *Property Act*, S.B.C. 1998, c. 43
Generally — referred to

s. 5 — considered

s. 6(1) — considered

s. 8 — considered

s. 16 — considered

s. 20 — considered

s. 20(2)(a)(iii) — considered

s. 28 — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009
R. 1-3 — referred to

R. 7-1 — considered

R. 7-1(10) — considered

R. 7-1(11) — considered

R. 9-7 — referred to

App. B, s. 2(2)(b) — referred to

Regulations considered:

Foreign Money Claims Act, R.S.B.C. 1996, c. 155
Foreign Money Claims Regulation, B.C. Reg. 165/96

Generally — referred to

***N.P. Kent J.*:**

1. Introduction

1 The plaintiff applies pursuant to *Supreme Court Civil Rule* 9-7 for Summary Trial of its claim against the defendant for approximately $53,000 pursuant to the certain "Assignment and Assumption Agreement" made between the parties on January 26, 2010.

2 The defendant objects to the matter proceeding by way of summary trial, claiming, among other things, further discovery process is required. It also objects to the admissibility of parts of the evidence tendered on behalf of the plaintiff and, in any event, says the contractual claim must fail on the merits.

3 For the reasons that follow I find that the plaintiff has made out its case against the defendant and that the latter has no meritorious defence. In the result, I grant judgment to the plaintiff for the amounts claimed together with the costs of these proceedings.

2. Factual Background

4 The plaintiff is the Owner Developer of The Fairmont Pacific Rim, a mixed used commercial/hotel and residential development on Vancouver's Coal Harbour waterfront. The defendant is the **Strata Corporation** established with respect to the residential portion of the development. In these reasons I will refer to the plaintiff as "299" and to the defendant as the "**Strata Corp**."

5 The marketing and sale of the development was governed by the *Real Estate Development Marketing* Act, S.B.C 2004, c.41, which requires each pre-sale purchaser to be provided with a Disclosure Statement in the form stipulated by the Superintendent of Real Estate. The Disclosure Statement in this case disclosed to all prospective purchasers the likelihood of "material contracts". Section 7.3 of the Disclosure Statement provided in part:

> The developer may enter into or cause the **Strata Corporation** to enter into or assume the following agreements:
>
> > A contract substantially in the form attached as Exhibit "J" with Techierge Co. (the "Techierge Contract") for the provision of computer based concierge services. It is intended that the Techierge Contract will have a term of five years; ...
> >
> > If at the time of entering such contracts the **Strata Corporation** is in existence, the developer will enter into such contracts on behalf of the **Strata Corporation**. If at the time of entering into such contracts the Final **Strata** Plan has not been filed, the developer will assign such contracts to, and the obligations of the developer thereunder will be assumed by the **Strata Corporation** upon its formation.

6 An unexecuted copy of the Techierge Contract was attached to the Disclosure Statement as Exhibit J. It was a blank standard form agreement.

7 On January 20, 2010, 299 deposited **Strata** Plan BCS3699 in the Land Title Office thereby establishing the **Strata Corp**.

8 On January 26, 2010, 299 entered into the Techierge Contract with Simplikate Systems LLC ("Simplikate"). That contract called for the provision of certain in-suite and mobile electronic concierge services to be provided to the residential development. The Contract expressly stated that 299 was contracting "for the benefit of" the **Strata Corp**.

9 At the time of its establishment, control of a **strata corporation** is vested in the owner-developer pursuant to s. 5 of the ***Strata*** *Property Act*, S.B.C. 1998, c.43 (the *"Act*"). The relevant sections of the *Act* provided as follows:

> **Owner developer's control of strata corporation**
>
> 5 (1) The owner developer must exercise the powers and perform the duties of a council from the time the **strata corporation** is established until a council is elected at the **strata corporation's** first annual general meeting.
>
> (2) In exercising the powers and performing the duties of a council, the owner developer need not comply with bylaw requirements respecting the constitution of the council or the holding or conduct of council meetings.
>
> **Owner developer's standard of care**

6 (1) In exercising the powers and performing the duties of a council, the owner developer must

(a) act honestly and in good faith with a view to the best interests of the **strata corporation**, and

(b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

10 One of the powers vested in the owner-developer under the *Act* is the **strata corporation's** capacity to enter into certain types of contracts (s. 28 of the *Act*).

11 Section 8 of the *Act* provides for the passing of resolutions before the first conveyance of a **strata** lot to a purchaser:

Passing resolutions before first conveyance

8 Before the first conveyance of a **strata** lot to a purchaser, the owner developer may pass any resolution of the **strata corporation** permitted or required by this Act or the regulations, including a resolution to amend the **strata corporation's** bylaws under section 127, without holding a special general meeting.

12 On January 26, 2010, and as had been disclosed in s. 7.8 of the Disclosure Statement, 299 in its capacity as owner-developer exercising the powers of the **Strata Corp**., caused the **Strata Corp**. to enter into an "assignment and assumption agreement" (the "AAA") pursuant to which certain specified contracts were assigned by 299 to the **Strata Corp**. and the latter agreed that the former's obligations and liabilities under those contracts "shall pass to and be assumed by the Assignee effective as and from the date of filing of the **Strata** Plan".

13 The contracts in question included an internet service contract with Shaw Cable Systems, a chilled water servicing contract with Canada Place **Corporation**, and the Techierge Contract with Simplikate. The Techierge Contract had also been executed by 299 on January 26, 2010.

14 On that same date, January 26, 2010, a written unanimous resolution was passed by the **Strata Corp**. formally ratifying and approving the AAA.

15 As of January 26, 2010, the **Strata Corp**. became contractually bound to both the Techierge agreement with Simplikate and to the indemnity obligation to 299. The latter is found in para. 3 of the AAA and provided as follows:

The Assignee [**Strata Corp**.] covenants with the Assignor [299] to indemnify the Assignor [299] against all actions, suits, costs, expenses, charges, damages, losses, claims and demands for or on account of or in any way arising out of the Contracts [including the Techierge Contract] from and after the date of the filing of the **Strata** Plan.

16 Section 16 of the *Act* requires the owner-developer to hold the first annual general meeting of the **Strata Corp**. within a certain period of time. Section 20(2)(a)(iii) of the *Act* requires the owner-developer to "place before the meeting and give the **Strata Corp**. copies of ... all contracts entered into by or on behalf of the **Strata Corp**.".

17 The evidence on this application clearly demonstrates the property manager of the complex had a copy of the Techierge Contract, the invoices generated under same, and the communications respecting the commissioning and functionality issues of the system following installation. Indeed, the property manager participated in many of these communications directly with Simplikate.

18 It appears, however, that contrary to the requirements of s. 20 of the *Act*, 299 in its capacity as owner-developer, may not have formally placed the AAA before the first annual general meeting and may not have formally given the **Strata Corp**. a copy of the AAA at that time.

19 The first annual general meeting was held on April 27, 2010 at which time control of the **Strata Corp**. was transferred from 299 to the newly-elected **strata** council. Within a short time, a dispute between the parties arose over the allocation of

"shared expenses" under a Reciprocal Easement Agreement ("REA") as between the residential owners and the hotel portion of the development.

20 On April 3, 2012, the **Strata Corp**. launched a petition against 299 seeking production of certain documents they believe were relevant to the development and allocation of the shared expenses. That petition was heard on June 7, 2012, a decision was rendered, and an appeal ensued: see ***Strata*** *Plan BCS 3699 v. 299 Burrard Development Inc.*, 2013 BCCA 356 (B.C. C.A.) and 2014 BCCA 8 (B.C. C.A.).

21 On April 30, 2012, counsel for 299 wrote to the **Strata Corp**. as follows:

> The recent legal action commenced by the Owners, **Strata** Plan BCS 3699 (the "**Strata Corporation**") against 299 Burrard Development Inc. et al. has reminded us that we had not previously provided to the **Strata Corporation** certain of the documentation required under s. 20 of the ***Strata*** *Property Act* (the "*Act*") prior to the first annual general meeting. In that regard, we enclose a document book for delivery to the **Strata Corporation** containing the documents, to the extent in our possession, together with certain of the documents registered in the Land Title Office, all as described in the index to the enclosed document book.

22 One of the documents enclosed was the AAA executed January 26, 2010.

23 In the meantime, Simplikate had not been paid by either 299 or the **Strata Corp**. for any amounts owing under the Techierge Contract. On June 8, 2011, a formal demand letter was sent to both 299 and "the Fairmont Pacific Rim Attn: Property Manager". In that correspondence, the Florida lawyers for Simplikate referenced the Techierge Contract and demanded $13,125 claimed to be overdue pursuant to same. It also threatened litigation in Florida in the event of non-payment.

24 The demand letter was forwarded by 299 to the **Strata Corp**. with an inquiry, "can you please advise why the **strata** is not paying them?"

25 On June 20, 2011 the property manager replied directly to Simplikate acknowledging receipt of the latter's statement of account dated May 16, 2011 in the amount of $13,125.00 and advising,

> the invoices issued "Fairmont Pacific Rim" and detailed on the statement dated 5/16/12 (sic) are not approved by the **Strata Corporation** for payment.

26 Simplikate followed through with its threat and issued an action in the Florida court naming 299 as the defendant. Attached to the pleading was the Techierge contract and the unpaid invoices that were the subject matter of the claim. The amount claimed was $21,000 plus interest, attorneys' fees and costs.

27 On October 11, 2011, after being served with the Florida lawsuit, 299 forwarded it to the **Strata Corp**. stating: "We have received this document. Can you advise why the **strata** is not paying? It is their obligation to do so."

28 The **Strata Corp**. switched property managers effective September 1, 2011, although the transition started throughout the earlier part of the summer of 2011. In the course of taking over the property management functions, the new manager ("AWM") inherited a number of issues, one of the first of which was "the dissatisfaction of the defendant and its **strata** council with the Techierge system set up by the plaintiff with Simplikate."

29 From September through to the end of October 2011, there ensued a variety of communications between the property manager, 299, and Simplikate regarding the perceived issues with the Techierge system. In one such communication dated October 31, 2011, the property manager had "dug through the files" and had found various communications on the issues as well as "the contract/agreement".

30 In one email exchange between 299 and the **Strata Corp**., the former stated:

> Not sure what the **strata** really wants, all I know is that we have received a civil action from Simplikate for non-payment of fees (that the **strata** was to pay) that we will have to defend, simply because it is our name on it. I will then have to go after the **strata** for this, as this is clearly identified in the disclosure statement.

The property manager replied, saying in part:

> Now of course none of this means that the **strata** is able to forget any obligations it may have here. The issue is that there seems to have been promises of greater serviceability but I am still trying to gather that. I appreciate you expect me to have responses to all of this fast, but I am dealing with an issue I inherited and others that I in turn have to discuss this with to get backup information and understanding.
>
> I told the **strata** that it is likely any defence by the builder will include a third party action to include the **strata**. They told me fine ...

31 299 decided to settle the Simplikate claim, and on November 30, 2011 paid Simplikate US$18,325.

32 Of course, settlement of the claim did not mean cancellation of the Techierge contract. That contract continued to exist and monies continued to accrue due under same.

33 By letter dated April 10, 2012, 299 demanded through counsel that the **Strata Corp**. pay the said US$18,325. That letter enclosed a copy of both the Techierge agreement and the AAA "for your ease of reference". The letter also stated:

> There remains US$23,625 owing for the period from August 2011 to present and payments will continue to accrue due each month until the end of the contract at the rate of $2,625 per month.

34 The present litigation was instituted by 299 on May 4, 2012. It pleads the Techierge Contract, the AAA, and the **Strata** Corp.'s alleged defaults. It alleges that, in addition to the US$18,325 that 299 had paid to Simplikate, "the Techierge Contract has not been terminated and the monthly fee continues to accrue ... the current amount owing to Simplikate from August 1, 2011 to present May 1, 2012 is US$26,250".

35 The notice of civil claim seeks as relief "a declaration that [299] is authorized to terminate the Simplikate contract on behalf of the defendant" as well as damages for breach of contract, and special costs.

36 In its response to civil claim, the **Strata Corp**. pleads, among other things:

- the AAA was never delivered or otherwise provided to the defendant in accordance with the requirements of the *Act*;
- 299 did not elicit action from the **Strata Corp**. in response to the Simplikate action but chose to resolve it "without the participation or input of" the **Strata Corp**.;
- the Techierge system is not now and never has been fit for its intended purpose;
- 299 has not acted equitably "and therefore is barred from relying on equity";
- 299 has not discharged its "fiduciary duty" to the **Strata Corp**.; and
- 299 "was not authorized and had no authority either at law or in equity to compromise the rights of the defendant."

37 On May 2, 2012, counsel for 299 wrote to counsel for the **Strata Corp** as follows:

> In any event, the contract remains in place and the **strata** continues to refuse to pay Simplikate for its ongoing services. It is only a matter of time before another lawsuit is commenced. It is in both parties' interest that the Simplikate contract be terminated immediately so that costs do not continue to accrue. As your client is the Assignee of the contract, we request

> authorization to terminate the agreement with Simplikate on its behalf. This will crystalize the amount in dispute and mitigate any further losses to either party, regardless of the ultimate outcome of the litigation.

38 In due course, counsel for the **Strata Corp** advised that his client "takes no position on your client's intention to terminate the Simplikate contract". On July 9, 2012, 299 issued to Simplikate a notice cancelling the Techierge contract.

39 On October 25, 2012 Simplikate issued a second action in Florida seeking judgment for US $34,125.00 plus interest, attorneys fees and costs. This represented the amounts due under the contract for the period August 1, 2011 to August 1, 2012.

40 Counsel for 299 forwarded the lawsuit to counsel for **Strata Corporation**:-

> attached is a copy of the claim that has been filed against our client by Simplikate in respect of the additional unpaid portions owing pursuant to the Techcierge contract. I confirm your clients are responsible for all liability under this action pursuant to the assignment and assumption agreement entered into on January 26, 2010. Please advise how your clients intend to deal with this, or if they intend to deal with it at all? If I do not hear from you by November 2, 2012 our clients will proceed to deal with this action without further input from your client. Any amounts paid by our client in respect of this action, including any legal fees or interest will be added in the amounts being claimed by our clients against yours in action # S123157.

41 Counsel for the **Strata Corp** responded to this communication advising that the position set out in his client's response to civil claim "remains unchanged and applies with equal vigor to this latest claim".

42 In January 2013, 299 settled the second Simplikate lawsuit by paying the sum of $34,125.00 in exchange for a mutual general release.

43 In the present action, 299 claims the settlement monies from the **Strata Corporation** along with the further sum of US $4,499.55 which it had paid to legal counsel retained in the US to deal with the Florida litigation and a settlement.

44 In due course, the action proceeded to the summary trial application which took place before me on February 6 and 7, 2014.

3. The Strata Corp's Objections to the Summary Trial Proceeding

45 The **Strata Corp**. objected to the claim proceeding by way of a summary trial primarily on the basis that there had been insufficient document disclosure by 299 and that the matter "should proceed only after proper disclosure and with opportunity for discovery or cross-examination on affidavits".

46 The **Strata Corp**. points out, quite rightly, that 299 has a positive obligation under Rule 7-1 to disclose all documents in its possession or control that might be used to "prove or disprove a material fact". They say this should have included the pleadings filed in the American litigation, any affidavits exchanged between the parties, correspondence and documents exchanged between the parties regarding positions taken, the settlement process, and the like.

47 Of course, if the **Strata Corp**. took issue with the adequacy of the 299 document production, it could have, and should have, availed itself of the demand procedures set out in Rule 7-1(10) and (11). It has not done so.

48 Likewise, the plaintiff has had ample time to undertake examination for discovery of 299 to extract whatever additional information it required in respect of the latter's dealings with the Florida litigation and the settlement of the Simplikate claims. Again, no such discovery has been undertaken and no adequate excuse has been provided.

49 Similarly, the **Strata** Corp.'s complaints that the affidavit material filed by 299 contains "inadmissible statements" which are argumentative, misleading, improperly based on information and belief, and the like, is also no basis on which to divert this summary trial process into a full trial. The Court is quite capable of ignoring inappropriate material and giving the appropriate weight to that part of the material that offends any law of evidence.

50 It must not be overlooked that this law suit seeks judgment of only approximately $53,000. While this does not diminish the importance of the case to the parties, it must not be forgotten that the object of our rules of procedure is to secure "just, speedy, and inexpensive" determination of every proceeding on its merits, having regard to the amount involved, the importance of the issues, and the complexity of the proceeding: Rule 1-3. If the facts necessary to decide the issues can be found on the whole of the evidence and if fairness can be achieved, as I believe both can, then resolution of this dispute by way of summary trial is appropriate.

4. The Substantive Issues

A. Enforcement of the Indemnity

51 The plaintiff's submissions can be succinctly summarized as follows:

• The AAA was properly executed on behalf of the **Strata Corp**. and is a valid and binding contract which should be enforced in accordance with its terms.

• The enforceability of the agreement is in no way affected by any oversight in presenting a copy to the owners at the first annual general meeting, and there is simply no evidence that in executing same, the owner-developer was doing anything other than acting honestly and in good faith with a view to the best interests of the **Strata Corp**.

• The indemnity is drafted in plain English, and clearly captures the law suits and claims made by Simplikate pursuant to the Techierge Contract.

• A reasonable settlement of a compelling claim does not constitute a "voluntary payment" of a sort which might otherwise render an indemnity unenforceable.

• The **Strata Corp**. was fully advised of the Simplikate claims and elected not to intervene ... they are now estopped by their conduct from invoking "voluntariness" or prejudice to subrogation rights as a basis for denying indemnity.

52 For their part, the **Strata Corp**. seeks to avoid indemnity on various grounds:

(1) The **Strata Corp**. was never provided with the AAA as required by the *Act* and this breach of duty by 299 makes it inequitable for the indemnity to be enforced in the circumstances of this case.

(2) Failing to dispute the third party claim leads to an inference of unreasonableness which in turn justifies a conclusion that the 299 payment to Simplikate was a voluntary payment, a complete defence in equity to the indemnity claim.

(3) 299 had a duty to consult with the **Strata Corp**. before settling the claims by way of a process which compromised or impaired the indemnitor's equitable rights of subrogation.

53 Both parties rely heavily on *Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd.*, 2001 BCCA 600 (B.C. C.A.), leave to appeal refused (2002), [2001] S.C.C.A. No. 621 (S.C.C.). The case involved contracts to provide logging services related to a certain tree farm licence. The head contract was between the licence holder and Pat Carson Bulldozing and it required Pat Carson to indemnify the licence holder against any loss "caused by or arising from the acts or defaults" of Pat Carson or its sub-contractors.

54 Pat Carson then entered into a sub-contract with Falls Creek Falling Contractors pursuant to which the latter agreed to perform falling and bucking operations on the land in question. That sub contract also contained a fairly comprehensive indemnity clause pursuant to which Falls Creek agreed to indemnify and save harmless Pat Carson "from and against any and all claims, demands, actions, causes of actions, damage, loss, cost, charges and expenses suffered or incurred by [Pat Carson]... caused in any way by or arising out of the acts or defaults of [Falls Creek]."

55 It turns out that some of Falls Creek's cutting operation took place outside the approved boundaries of the Tree Farm licence, thereby constituting a trespass on the neighbouring property. As a result of the trespass, various remediation procedures were implemented at a cost of approximately $198,000. The licence holder charged Pat Carson this amount by invoking the indemnity provision in the head contract and withholding such sum from monies otherwise due to Pat Carson. Pat Carson in turn charged the $198,000 to Falls Creek pursuant to the indemnity provision in the sub contract.

56 Falls Creek objected to the payment claiming, among other things, that the licence holder was contributorily negligent in respect of the loss for failing to provide appropriate supervision. It also disputed the reasonableness of the amount claimed.

57 The dispute proceeded to arbitration and the arbitrator ruled that the indemnity provision in the sub contract was indeed triggered in the circumstances. The question before the Court of Appeal was whether the arbitrator erred in law by "determining the amount of indemnity awarded without proof establishing the propriety in law and in fact of the amount claimed".

58 The majority of the Court of Appeal held that the language of the indemnity provision was broad and inclusive and that the plain meaning of the words used in the clause was inescapable. It stated;

> [38] I agree with Madam Justice Newbury that this appeal turns on the particular wording of the indemnity clause in the Subcontract. In my respectful view, however, the plain meaning of the words used is inescapable. The arbitrator found that the trespass would not have occurred but for the breach of contract by Falls Creek. It follows that the trespass necessarily "arose out of" and was "caused in some way by" the default of their contractual obligation. Falls Creek argues that the Subcontract indemnity only covered legal liabilities that were specifically proven by Pat Carson. In my opinion, this interpretation is at odds with the broad and inclusive language of the indemnity clause. While the words "loss", "cost" and "expense" may have been intended by the parties to cover only determined liabilities, the words "claims" and "demands" must have been intended to cover circumstances where the claim of a third party (in this case TimberWest) was disputed. Clause 9.1 specifically refers to "any and all" claims and demands, and not just reasonable amounts. The breadth of the indemnity is also evidenced by the Preamble, which identifies one of the purposes of the Subcontract as indemnifying the Contractor "with respect to any and all damages it might suffer arising out of any default by the Subcontractor in this agreement".
>
> [39] It was the Falls Creek fallers who logged outside the authorized area. The fault of Falls Creek supervisors contributed to the fallers' trespass by failing to give the fallers the map with the revised boundaries. While the quantum of the loss to which Falls Creek's fault contributed remains in issue between Falls Creek and TimberWest, it remains one indivisible loss claimed. The issues between Falls Creek and TimberWest are whether the quantum of the loss claimed is reasonable and whether fault on the part of TimberWest through negligent instruction was also a contributing cause of the loss. If TimberWest's fault did contribute, should the loss be apportioned between TimberWest and Falls Creek based on comparative fault? In my view, the amount withheld is clearly a claim or demand within the meaning of "any and all claims, demands ... caused in any way by or arising out of the acts or defaults of [Falls Creek]" in the indemnity clause. The amount at issue has been withheld from Pat Carson by TimberWest without Pat Carson's agreement. I do not think it can be characterized as a voluntary payment by Pat Carson.
>
> [40] In summary, I think that the arbitrator and the appeal judge were right to conclude that the withholding of funds by TimberWest was a "claim ... arising out of the acts or defaults of the Subcontractor" within the meaning of clause 9.1(a). It follows that Pat Carson proved that it was exposed to the liability for which it seeks reimbursement, and that Falls Creek was *prima facie* obligated to indemnify Pat Carson for that amount. The amount withheld by TimberWest was not a voluntary payment, nor was it transformed into such by Pat Carson's decision not to dispute the claim.

59 The indemnity obligation in the AAA also uses broad and inclusive language the plain meaning of which is inescapable and which squarely applies to the Simplikate claims for the amounts due under the Techierge contract. The clause states the **Strata Corp** is to indemnify 299 against "all actions, suits, costs, ... charges, ... claims and demands for or on account of or in any way arising out of the [Techierge contract]". Both the initial lawsuit instituted by Simplikate and the subsequent claim

for the balance due under the contract are clearly captured by the language of this clause and absent any other legal defence to the indemnity claim the **strata corporation** is liable to 299.

60 The legal defences the **Strata Corp** purports to invoke to the indemnity claim are that:

- The **Strata Corporation** was never provided with the AAA at the first Annual General Meeting as required by the **Strata** Property Act and it is inequitable that the indemnity provision be enforced;
- the payment the 299's payments to Simplikate were voluntary payments which do not trigger the indemnity; and
- the settlement of the claim with Simplikate impaired the **Strata Corp's** equitable rights of subrogation thereby rendering the indemnity provision unforceable.

61 In my view, none of these arguments have merit.

62 It is true that the **Strata** Property Act required the Owner Developer to place before the first Annual General Meeting of the **Strata Corporation** all contracts entered into or on behalf of the latter. That would include the AAA and the Techierge contract.

63 However, there is nothing in the Act which stipulates that non compliance with Section 20 of the Act renders such contracts unenforceable as a matter of law. To the contrary, the Act expressly authorizes the Owner Developer to enter into such contracts on behalf of the **Strata Corporation**. Here, the contract was properly executed and was formally ratified by a resolution of the **Strata Corporation**. Under basic principles of contract law, the contract is clearly enforceable in accordance with its terms.

64 I might add, there was not a shred of evidence that in entering into this contract or, indeed, in entering into the Techierge contract for the benefit of the **Strata Corporation**, the Owner Developer was acting dishonestly or in bad faith. To the contrary, both the Techierge contract and the possible assignment and assumption of same were expressly disclosed in the Disclosure Statement. Further, the Techcierge contract and the various invoices pursuant to same were in the property manager's file throughout. In my view, the equities of the situation clearly favour enforcement of the indemnity.

65 Nor is it correct to characterize 299's settlements with Simplikate as a "voluntary payment". While Simplikate may not have been in the advantageous position of the license holder in the *Falls Creek* case where they could withhold sums otherwise due to 299, the Technierge contract very clearly imposed the obligation to pay the monthly fee until the contract was terminated and Simplikate sued 299 in the Florida courts to collect the amounts in question. Faced with such strong claims, it was sensible and reasonable for 299 to settle same as best they could, albeit for what appears to be relatively modest discounts. The plain language of the indemnity provision captures the amounts paid in settlement of the sums due under the Techierge contract.

66 The **Strata Corp** argued that 299 had an obligation to dispute the Simplikate claim. The dispute would presumably be based upon the suggested dissatisfaction of some of the residents with the operation of the Technierge system.

67 It may be that in some cases a failure to dispute a weak claim may lead to a inference of unreasonableness and possibly justify a conclusion that payment of such claim should be categorized as "voluntary" and therefore outside the reach of any indemnity clause.

68 However, the **Strata Corp** has not produced any meaningful evidence to prove the Techierge system was not working. The Techierge contract itself does not appear to contain any express warranties respecting performance or customer satisfaction. There was little evidence to suggest 299 had any reasonable legal basis upon which to dispute the Simplikate claims, and it is not appropriate to characterize settlement of the claims as being purely voluntary in nature.

69 The **Strata Corp** also raises impairment of subrogation rights as a basis for avoiding the indemnity liability.

70 Payment of an indemnity obligation does indeed give rise to equitable subrogation and the ability of the indemnitor to step into the indemnitee's shoes to pursue recovery from third parties. Here, however, no such third parties had been identified. The ability to contest the Simplikate claim because of perceived "deficiencies in the Techierge system" is not a matter of subrogation

but rather a defence to the primary claim that is the subject matter of the indemnity. In any event, the existence of any such "deficiencies" and the merits of any such defence are simply not demonstrated on the evidence.

5. Conclusion and Costs:

71 In the result, I conclude that the indemnity is enforceable in accordance with its terms and that 299 is entitled to judgment against the defendant for the full amount claimed. Since the claim is in US dollars, for the purposes of judgment, the amount shall be converted into Canadian currency pursuant to the provisions of the *Foreign Money Claims Act*, R.S.B.C 1996, c.155 and the *Foreign Money Claims Regulation*, B.C. Reg 165/96.

72 299 also claims that the indemnity clause entitles it to be awarded costs of these proceedings as special costs on a full indemnity basis. It points out that, although the indemnity clause does not expressly refer to recovery of solicitor/client or substantial indemnity costs in the event of enforcement proceedings are necessary, no such "magic words" are required and points to *Epoch Press Inc. v. Sewak*, 2011 BCSC 323 (B.C. S.C.) as authority for such proposition.

73 The *Epoch* case involved a credit agreement pursuant to which the defendant agreed to pay interest on the account and also to "assure full responsibility for costs incurred, including legal fees or collection of the account". The court referred to a number of other authorities to the effect that no "special formula" was required and that exposure to special costs in the enforcement litigation "falls to be determined on the basis of the language used" (citing *Aegon Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 1239 (Ont. S.C.J. [Commercial List]) at para 8).

74 The *Epoch* case is distinguishable in so far as the credit agreement under consideration made express reference to payment of legal fees and collection of the account. I note that the indemnity clause in the *Aegon case* also made reference to "reasonable legal fees" as did some of the other cases referred to in the *Epoch* ruling.

75 In my view, the indemnity in this case cannot be stretched to encompass a covenant to pay solicitor/client or special costs for any indemnity enforcement proceedings. There is no reference to such costs in the actual indemnity. Further, the indemnity only applied for expenses "in anyway arising out of the [Techierge contract]".

76 While the attorney's fees incurred in Florida to dispute and settle the Simplikate lawsuits are properly captured by the indemnity, it cannot be said that the present indemnity enforcement proceedings "arise out of the Techierge contract". At best, there is ambiguity on this point which in all the circumstances is appropriately resolved in favour of the **Strata Corp**.

77 Costs are therefore awarded to 299 to be assessed under scale B.

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