

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Browne et al. v. The Owners, Strata
Plan 582,***
2007 BCSC 206

Date: 20070214
Docket: S065622
Registry: Vancouver

Between:

**Christina Mary Browne, Richard James Ouston, Kari Kristensen, also known
as Kari Delansen, Zeus Bailey and Anja Wilke and Alan Siu Lun Ho, Donna E.
Rainford-Moore, Daniel Vernon Jones, Chloe Lorraine Indyke, Glenn Viney,
Maureen Viney, Karen Mary Moffitt, Jennifer Elisabeth LaPierre, Angela
Buehrle, Wayne P. Gatley, Gloria L. Gatley and Terence Van Der Woude**

Petitioners

And

The Owners, Strata Plan LMS 582

Respondent

Before: The Honourable Mr. Justice Bryan F. Ralph

Reasons for Judgment (In Chambers)

Counsel for the Petitioners

Richard A. Fayerman

Counsel for the Respondent

David A. Riddell

Date and Place of Hearing:

December 7, 2006
Vancouver, B.C.

[1] The petitioners are some of the registered owners of strata lots in Strata Plan LMS 582 ("Strata Plan"). The respondent is the strata corporation, established as provided for in the ***Strata Property Act***, S.B.C. 1998, c. 43, of which the petitioners and all other owners of strata lots in the strata corporation are members. The strata

corporation consists of 39 units in a four storey wood-framed building on East Georgia Street in Vancouver. It was built in 1992. The building envelope is part of the common property of the strata corporation and suffers from water penetration damage and is in need of repair. The damage to the building envelope has in turn caused localized damage to individual units.

[2] Some steps have been taken to address the localized problems, but the owners have been unable to agree on a more extensive plan for addressing the problem. This disagreement has given rise to the petition now before the court. It is clear from the material before the court that the absence of a resolution has caused substantial discord amongst a number of the owners.

[3] The petitioners seek a number of orders that would lead to an order compelling the repair of the building envelope and the authorization to issue a special assessment to the owners to enable the repair.

Background

[4] Individual units have had water ingress problems since at least 2002. At a special general meeting on August 22, 2003, the owners voted in favour of an expenditure of \$30,000 for repairs, \$20,000 of which was to be by special levy. The special levy required and obtained approval from more than $\frac{3}{4}$ of the owners.

[5] In a report to the property manager in September 2003, a firm of consulting engineers carried out a site review and observed what they considered to be a “consistent link between the poor existing envelope details and the water ingress

issues currently being reported.” The firm recommended that a building envelope consultant carry out an in depth building envelope assessment and develop a priority list to address any remedial repairs.

[6] In February 2004 the owners passed a resolution which required approval of $\frac{3}{4}$ of the votes cast at a special general meeting. This resolution approved an expenditure of \$67,000 for the purpose of completing the exterior and interior building repairs.

[7] In August 2004 a different firm of consulting structural engineers provided a report, which included a recommendation that a building envelope survey be conducted.

[8] At a special general meeting of the owners on January 10, 2005, the owners considered a resolution to spend a further \$15,000 from the contingency reserve fund for the purpose of obtaining an engineering report. The resolution failed to obtain the necessary approval of $\frac{3}{4}$ of the votes cast.

[9] On February 2, and on March 8, 2005 the City of Vancouver Building Inspector wrote to the strata corporation ordering it to retain the services of a building envelope consultant and to have a report submitted to the Licences and Inspections Department by April 8, 2005. The letter stated that failure to comply with the order may result in the laying of charges and the imposition of fines. The strata council proceeded to retain the firm of Morrison Hershfield (“MH”) to carry out a building envelope condition assessment. The assessment report was delivered June 23, 2005.

[10] The report categorized the remediation work as immediate, medium-term and long-term. "Medium-term work" was described in part as work that could be deferred "to the next two to five years without major consequences." "Long-term work" was described as work "that can be deferred until the renewal of the assembly to meet good construction practice."

[11] The report included a "Summary of Probable Current Costs" made up of immediate costs of \$561,000 and medium-term costs of \$941,000. Long term work and costs were not detailed in the summary.

[12] The report noted that it is sometimes cost effective to schedule tasks earlier than necessary. It also noted that while deferring rehabilitation assemblies may provide a cost saving, there are also risks of additional damage leading to increased repair costs in the future.

[13] On August 11, 2006 MH prepared an update to its June 2005 report. In doing so, it revised the probable current costs of immediate work to \$691,000 and medium-term costs to \$1,112,000.

[14] At a special general meeting of the owners held December 8, 2005, a resolution to approve a special levy in the amount of \$561,000 to carry out the immediate work that had been identified in the initial MH report failed to receive the required $\frac{3}{4}$ of the votes cast. The vote was 16 in favour, 15 opposed, and one abstention. Another special general meeting to consider resolutions to proceed with the work described in the MH report was set for March 22, 2006. Although it is not clear that it had the authority to do so, the strata council cancelled the meeting. In a

memorandum to strata owners dated March 16, 2006, the President of the strata acknowledged that the water ingress problem was "real" and that the owners had to come to a decision on how to get the repairs done properly while keeping the repair costs down. The memorandum proposed an "action plan", which included the obtaining of a second opinion on the building repair and a special general meeting in late April.

[15] A further special general meeting was held May 10, 2006. Two motions put to the meeting were defeated and a third was withdrawn after discussion. The first motion sought to have the strata corporation proceed with phases 1 and 2 of the MH report. The second sought to have the corporation proceed with phases 1, 2 and 3 of the report. The third sought approval to spend up to \$5000 to obtain a review of the MH report by a qualified engineering firm.

[16] The current President of the strata corporation, Mr. Lee, has sworn an affidavit that includes a history of the difficulties faced by the strata corporation since he became President in December 2005. The difficulties include the fact that although motions to seek special levies to carry out building envelope repairs have been put to the owners, the necessary approval by $\frac{3}{4}$ of the votes has not been obtainable.

[17] One of the concerns raised by Mr. Lee was that no second opinion on the problems in the building envelope had been obtained. A "second opinion" was prepared for the strata corporation by Levelton Consultants Ltd. ("Levelton") on

December 5, 2006. That report formed part of the evidence in the hearing of this petition and is essentially a review of the MH report.

[18] Levelton's opinion is that the methodology proposed by MH is "generally technically sound". It says that the MH approach is workable, but not the only approach that should be considered by the strata corporation. It considers the safest alternative for the strata corporation to be the full renewal of the entire building envelope. It proposed a further option for phasing the work by using a "vertical slices" repair approach that would repair the areas that experienced the most damage. Levelton strongly recommended against the option of localized repairs and stated:

Ultimately, the course of action chosen by the Client will have to balance the cost of the solution with the risk of a reoccurrence of the failure of the building envelope.

[19] In a response to the Levelton report MH stated:

MH agrees with Levelton that full remediation will provide the Owners with the best performing building. This is also likely to be the most cost effective option if the entire building is to be eventually remediated. However, if the Owners can not afford the cost of the entire project at this time, a phased approach can be adopted.

The position of the petitioners

[20] The petitioners seek a declaration that repairs to rehabilitate the building envelope as recommended by MH are required. They say that the strata corporation should be ordered to proceed with the repairs forthwith, and that the strata council should be authorized to issue a special assessment not exceeding \$1,803,000 to

finance the repairs. The amount of \$1,803,000 is based on the estimated cost of phases one and two of the revised MH report.

[21] In addition, the petitioners seek an order under section 164 of the ***Strata Property Act*** to prevent “significantly unfair” action by the strata corporation.

[22] The petitioners also seek special costs of this proceeding against the owners who did not vote in favour of either of the two resolutions put to the special general meeting on Many 10, 2006, to proceed with phases one and two or phases one, two and three as set out in the MH report.

The position of the respondent

[23] The respondent says that the declaration sought by the petitioners contains within it a misinterpretation of what was recommended by MH in its report. It says that, while the petitioners are seeking a full renewal of the entire building envelope, MH has proposed options that call for consideration and evaluation by the strata corporation before a course of action is taken.

[24] The respondent does not oppose a declaration that repairs to rehabilitate the building envelope are required. It says, however, that because there are options as to the appropriate course of repair, the strata corporation should be permitted to exercise its discretion to select the most appropriate option having regard to its obligations. For that reason the respondent says that the court should not fix the amount of the special assessment as the amount will be dependent on the repair

option the strata corporation concludes is the most appropriate in all the circumstances.

[25] The respondent says that there is no basis to make an order under s.164 of the **Strata Property Act**. It says that it has not taken any unfair action. What has transpired has been the result of a strong division of opinion among owners which has prevented the obtaining of the necessary ¾ majority vote in favour of a special levy to fund the repairs.

Analysis

[26] Under s. 72(1) of the **Strata Property Act**, the strata corporation must repair and maintain common property and common assets. The building envelope in this case is common property.

[27] Section 165 of the **Strata Property Act** provides:

On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

- (a) order the strata corporation to perform a duty it is required to perform under this Act, the regulations, the bylaws or the rules;
- (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[28] Irrespective of whether there has been dissension among owners with respect to proceeding with the repair, the corporation's obligation to maintain the

common property continues. As Macdonald J. observed in ***Tadeson v. Strata Plan NW 2644*** (1999), 30 R.P.R. (3d) 253, 94 A.C.W.S. (3d) 1017 (B.C.S.C.) at para.15:

The failure of the respondent strata corporation here is not due to any neglect on its part. That failure results from the refusal of the respondent owners to authorize the work, and the special assessment necessary to carry it out. But it remains, so far as the petitioners are concerned, a failure to fulfill a clear statutory obligation.

[29] The petitioners have demonstrated that the building envelope of their strata property is in need of substantial repair. It is also clear that confining repairs to a program of localized repairs is considered risky by MH and is strongly recommended against by Levelton.

[30] Despite the petitioners' submission that any order should require that repairs be those "recommended by Morrison Hershfield", there is more than one option open to the strata corporation in responding to the damage. In ***Sterloff v. Strata Corp. of Strata Plan No. VR 2613*** (1994), 38 R.P.R. (2d) 102, 46 A.C.W.S. (3d) 550 (B.C.S.C.), the court held that it should not interfere with a strata corporation's discretion as to how it managed its repair and maintenance obligations, provided it acted in the best interests of all the owners. In the present application the strata corporation is entitled to determine which actions to take in order to meet its statutory obligation. It has the benefit of both the MH and the Levelton reports in doing so. The reports deal not only with the repair options, they also serve as significant evidence of the extent of the damage which exists.

[31] I am satisfied that there must be an order under section 165 of the ***Strata Property Act*** that the strata corporation perform its statutory obligation to repair the

building envelope. In performing its obligation the strata corporation must have regard to the observations and recommendations contained in both the MH and Levelton reports.

[32] It is not clear to me what additional benefit an order under section 164 of the **Strata Property Act** would provide in this case, but the petitioners, in my opinion, have not made out a case for making such an order. Rather than demonstrating that the strata council has acted in a significantly unfair manner in relation to the petitioners, the evidence is that the council has lacked authority to take any significant action in the absence of a special levy approved at a special general meeting by $\frac{3}{4}$ of the owners.

[33] The petitioners also seek, and are entitled to, the additional remedy of a declaration that repairs to rehabilitate the building envelope are required. In my view, however, it is not appropriate to include as part of the declaration the sought after additional words of "as recommended by Morrison Hershfield" for the reasons I have given above.

[34] It is necessary to consider whether the court in directing the strata corporation to proceed should authorize and empower the strata corporation to issue a special assessment to the owners to a monetary limit. The strata corporation has opposed such an order on the ground that the petition linked the amount of \$1,803,000 to the MH estimate of the cost of carrying out the work described as "immediate" and as "medium term".

[35] In my view, it is open to the court to authorize and empower the strata corporation to issue a special assessment to an amount “not exceeding” \$1,803,000 without restricting the corporation’s authority to determine a repair program that will accomplish its statutory obligation. There will therefore be an order that to finance the building repair work the corporation is authorized to issue a special assessment to the owners, based on their respective unit entitlement, not exceeding \$1,803,000 and payable in such manner as the strata council may decide.

[36] Should the strata corporation find that more than \$1,803,000 is necessary for them to meet their statutory obligations to repair the building envelope, it is open to them to return to the court and petition for a special assessment to the owners in the required extra amount, if agreement cannot be obtained from the owners.

[37] In summary, the following orders are made:

1. The court declares that repairs to rehabilitate the building envelope are required.
2. Pursuant to section 165 of the ***Strata Property Act***, the strata corporation must perform its statutory obligation to repair the building envelope.
3. In carrying out its obligation, the strata corporation must have regard to the observations and recommendations contained in the MH and Levelton reports.
4. to finance the building repair work the corporation is authorized to issue a special assessment to the owners, based on their respective unit entitlement, not exceeding \$1,803,000, and payable in such manner as the strata council may decide.

[38] Costs were claimed by the petitioners but not spoken to. The appropriate order would appear to be that the respondent pay the petitioners’ costs on Scale B

and that the petitioners be exempted from payment of any special assessment levied by the strata corporation necessary to pay such costs. If counsel wish to make submissions they may do so in writing.

“Bryan F. Ralph, J.”
The Honourable Mr. Justice Bryan F. Ralph