IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Owners, Strata Plan KAS 3485 v. 0703008 B.C. Ltd.,* 2011 BCSC 1655

Date: 20111202
Docket: 88626
Registry: Kelowna

Between:

The Owners, Strata Plan KAS 3485

Petitioner

And

0703008 B.C. Ltd.

Respondent

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Petitioner:	M.D. Fischer
Counsel for the Respondent:	T.T. Brown
Place and Date of Trial/Hearing:	Kelowna, B.C. August 10 and October 26, 2011
Place and Date of Judgment:	Kelowna, B.C. December 2, 2011

[1] The petitioner is a strata corporation. It was created in four phases. The first phase, and the strata corporation itself, was created by the deposit of a strata plan in the Land Title Office on July 9, 2008. The respondent is its owner developer. The owner developer deposited the second phase on August 20, 2008, and the plan creating the third phase on January 21, 2009. Each phase of the development is housed in a separate building. Phase one consists of 28 strata lots; phases two and three have 34 lots each. The first strata lot in phase one sold in September 2008. The strata corporation held its first annual general meeting on November 5, 2008. A first annual budget was adopted at that meeting. The first lot in phase two was conveyed on February 6, 2009, and the first lot in phase three was conveyed on March 27, 2009.

[2] The strata corporation did not collect strata fees in relation to the strata lots in phases two and three from the owner developer prior to February 2009. It appears that both the owner developer and the strata corporation were of the view that strata fees for units in those phases were not payable until the month following the completion of the first sale in each phase.

[3] When the sale of the first sale of a lot in phase two was about to complete, the strata corporation was asked to issue certificates setting out the state of the accounts relating to strata fees for the unit. At that point, the strata corporation's manager twigged to the problem that is at the root of this petition. The problem, from the strata manager's point of view, was that the *Act* seems to require that strata fees be paid for lots in second and subsequent phases of a phased development beginning on the first of the month following deposit of the plan that created those phases. If this interpretation of the *Act* is accurate, then the owner developer owed strata fees for all of the units in second and third phases for the period from the first of the month after deposit of the phase plan that created the phase (September 1, 2008, in the case of phase two, and February 1, 2009, in the case of phase three). The owner developer disagreed with the strata manager's interpretation of the statutory provisions and had its solicitor outline why it was of that view. The strata

manager remained unconvinced, and thus the strata corporation issued a certificate setting out the arrears of strata fees. Other sales of lots in phase two were set to close in the weeks and months following, and the same issue would arise with respect those sales. Pending a more permanent resolution, the solicitor for the owner developer gave undertakings to the solicitors for the various purchasers that he would pay any strata fees ultimately found to be owing. To fund those undertakings, he withheld from the sale proceeds an amount thought to be sufficient to cover the potential arrears. Over the next seven months, 63 sales completed. From the sale proceeds, the owner developer's solicitor has retained just over $55,000.

[4] The parties continued to attempt to resolve the issue while the sales were completing. On September 25, 2009, they reached an agreement. It is that agreement which is the subject of this petition. The petitioner seeks a declaration that the agreement is binding on the parties. At the same time, it raises several issues that cast the legality of the agreement into doubt. In the alternative, the petitioner seeks a declaration that the agreement is not binding, and if that is the court's conclusion, then it seeks various forms of ancillary relief. The respondent takes the position that strata fees were not owing for the period from the deposit of the phase plan until the date of the first sale of a lot in that phase. In the alternative, if the court determines that strata fees were payable, then the agreement should be held to be binding on the parties in spite of the possible defects to which the petitioner points.

Statutory Context

[5] The first question is whether the *Act* requires the payment of strata fees for strata units in second and subsequent phases of a phased strata development from the first of the month following deposit of the phase plan, or whether they are only payable following the first sale in the phase. To resolve this question and set the context for the other issues, a somewhat detailed examination of the legislation is necessary.

[6] The *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"), provides for the creation of strata corporations and prescribes the manner by which they are to calculate and allocate common area expenses. The phrase "common expenses" is defined in s. 1 to mean expenses:

> (a) relating to the common property and common assets of the strata corporation, or
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> (b) required to meet any other purpose or obligation of the strata corporation.

Generally, at the time of the creation of a strata corporation, the owner developer is its only member. Part 3 of the *Act*, comprised of ss. 6 through 25, deals with the obligations of the owner developer and the transition of responsibilities from the owner developer to the third-party owners of units in their capacity as members of the strata corporation. By s. 7 of the *Act*, the owner developer is obligated to pay the strata corporation's expenses from the date of the corporation's creation until the first of the month following the completion of the first sale of a lot in the development. This is sometimes referred to as the "initial period". Given that the owner developer is required to pay all of the expenses during the initial period, the *Act* does not oblige the strata corporation to have a budget either estimating those expenses or allocating them among units.

[7] Once there has been a sale of a strata lot, s. 13 of the *Act* requires that the owner developer establish an interim budget covering the 12-month period that begins on the first of the month following the sale of the first strata lot. This is sometimes referred to as the "interim period". Section 13(2) of the *Act* provides that the interim budget must include:

> (a) the estimated operating expenses of the strata corporation for the 12 month period,
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> (b) the contribution to the contingency reserve fund for the 12 month period, which must be at least 5% of the estimated operating expenses, and
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> (c) each strata lot's monthly share of the estimated operating expenses and contribution to the contingency reserve fund, calculated in accordance with section 99.

Section 14(2) provides that the owners of lots in the strata corporation must pay their share of the estimated monthly operating expenses during the interim period.

[8] The phrase “operating expenses” is not defined in the *Act* but they consist, for the most part if not entirely, of the common expenses. Common expenses are divided into two categories: those that occur annually or more frequently, and those that occur less often than annually. The former are paid from the corporation’s operating fund; the latter are paid from the corporation’s contingency reserve fund. Section 92 of the *Act* provides that:

> **92** To meet its expenses the strata corporation must establish, and the owners must contribute, by means of strata fees, to
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> (a) an operating fund for common expenses that usually occur either once a year or more often than once a year, and
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> (b) a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur.

[9] Sale of the first strata lot also gives rise to an obligation on the part of the owner developer to hold the first annual general meeting of the strata corporation (s. 16). The first annual general meeting must be held during a six-week period that begins either nine months after the sale of the first strata lot, or once a majority of the lots have been conveyed, whichever is sooner. At the first annual general meeting, the members of the strata corporation are required to elect a council and approve a budget (the “first annual budget”). The budget must contain comprehensive information relating to the contingency reserve fund and the operating fund for the period covered by the interim budget (s. 21(3) of the *Act*, and ss. 3.3 of the *Strata Property Regulation*, B.C. Reg. 43/2000).

[10] Section 93 of the *Act* requires the strata corporation to fix the amount of the annual contribution to the contingency reserve fund. Section 3.4 of the Regulations provides a formula for setting that amount. The formula varies according to the amount in the contingency reserve fund as of the first annual budget and the estimated operating expenses as set out in the interim budget. The first annual budget (and all subsequent budgets) must set the amount of each strata lot’s monthly contribution to the operating fund and the contingency reserve fund

(collectively the strata fees) (s. 21(3) of the *Act* and ss. 3.3(1) and 6.6(f) (g) of the Regulations).

[11] Section 99 of the *Act* specifies how the contributions by the members to the operating fund are to be calculated. Generally, the amount is based on the percentage of the unit entitlement that the member has in the development. Section 100 of the *Act* permits strata corporations to vary the default method of calculating contributions to the operating fund, but variations are only permitted if the members unanimously decide to make such a change at an annual or special general meeting.

[12] In summary, for non-phased developments, the *Act* requires the owner developer to pay the operating expenses until just after the first sale of a strata lot to a third party. Following that first sale, the owner developer must establish an interim budget, which must contain an estimate of the anticipated annual operating expenses. For those expenses occurring less frequently than annually, a contingency reserve fund is established with the owner developer making an initial contribution equal to at least 5 percent of the estimated annual operating expenses. This interim budget remains in effect for 12 months. During that period owners, including the owner developer to the extent that it owns lots in the development, are required to contribute to the contingency reserve fund and the operating fund by way of monthly strata fees, which are based on the estimates in the interim budget and their unit entitlement. The interim budget must include a statement of those anticipated monthly fees. In addition, during the period covered by the interim budget but within the window set out in the *Act*, the owner developer is obliged to call the first annual general meeting. One of the items of business at the annual general meeting must be the adoption of a first annual budget. It must set out the anticipated operating expenses for the next 12 months. Once adopted, the budget becomes “the first annual budget” and the basis for calculating the members’ strata fees for the ensuing year.

[13] The regime for the collection of operating expenses is somewhat more complicated if the development is a phased one. In a phased development, the first phase is governed by the regime noted above. Second and subsequent phases are created with the deposit of second or subsequent strata plans. Once deposited, the strata corporation created by the deposit of a second or subsequent phase is amalgamated with the corporation created by the deposit of the initial plan (s. 228 of the *Act*).

[14] As to the calculation of the members' contributions to the operating fund and contingency reserve fund in phased developments, the *Act* differentiates between strata corporations that have held a first annual general meeting and those that have not when the second or subsequent phase is deposited. In the matter at hand, the second phase of the development was deposited before the first annual general meeting, and the third phase was deposited after that meeting.

[15] Part 13 of the *Act* deals with phased developments and consists of ss. 217 to 238. Section 218 provides that the provisions of the *Act* apply to phased developments save to the extent the Regulations provide otherwise. Section 13.4 of the Regulations deals with the owner developer's obligations in relation to financial matters in the context of phased developments. Section 13.4 provides as follows:

> **13.4** (1) The requirements of Part 3 of the Act apply to the first phase of a phased strata plan.
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> (2) The requirements of Part 3 of the Act do not apply to a phase other than the first phase of a phased strata plan except as set out in this section.
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> (3) If the first annual general meeting of the strata corporation established by the deposit of the first phase of a phased strata plan has not yet been held at the time that a new phase is deposited, the requirements of Part 3 of the Act apply to the new phase as if it were the first phase of a phased strata plan, but
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> (a) in respect of the application of sections 7 to 14 and 16 of the Act, the reference to the first conveyance of a strata lot must be interpreted as a reference to the first conveyance of any strata lot in the strata plan,
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> (b) in respect of the application of section 12 of the Act, the owner developer is not required to establish a separate contingency reserve fund for the new phase, but must pay the required amount into the

contingency reserve fund of the strata corporation established by the deposit of the first phase of the phased strata plan,

(c) in respect of the application of section 13 of the Act, the interim budget referred to in section 13 (1) (a) of the Act must be for the 12 month period following the deposit of the new phase rather than for the 12 month period following the first conveyance of a strata lot to a purchaser,

(d) in respect of the application of section 14 of the Act, the period referred to in section 14 (1) must be interpreted as the period following the deposit of the new phase until the annual general meeting required under section 230 of the Act, and

(e) in respect of the application of sections 20 (2) (a) and 22 (b) of the Act, the reference to the annual general meeting in those sections must be interpreted as a reference to the annual general meeting required under section 230 of the Act.

(4) Subject to subsection (5), if the first annual general meeting of the strata corporation established by the deposit of the first phase of a phased strata plan has been held at the time that a new phase is deposited, sections 6 (2), 12, 13, 14, 18, 20 (2) (a) and (3), 22 (b) and 23 of the Act apply to the new phase as if it were the first phase of a phased strata plan, but

(a) in respect of the application of section 12 of the Act, the owner developer is not required to establish a separate contingency reserve fund for the new phase, but must pay the required amount into the contingency reserve fund of the strata corporation established by the deposit of the first phase of the phased strata plan,

(b) in respect of the application of section 13 [which obligates the strata to create an interim budget] of the Act, the interim budget referred to in section 13 (1) (a) of the Act must be for the 12 month period following the deposit of the new phase rather than for the 12 month period following the first conveyance of a strata lot to a purchaser,

(c) in respect of the application of section 14 of the Act, the period referred to in section 14 (1) must be interpreted as the period following the deposit of the new phase until the annual general meeting required under section 230 of the Act, and

(d) in respect of the application of sections 20 (2) (a) and 22 (b) of the Act, the reference to the annual general meeting in those sections must be interpreted as a reference to the annual general meeting required under section 230 of the Act.

(5) If the strata corporation established by the deposit of the strata plan for the first phase of a phased strata plan has approved a budget at an annual general meeting before the deposit of a new phase, sections 6 (2), 12, 13, 14 (1) to (3) and (6) to (8), 20 (2) (a) and (3), 22 (b) and 23 of the Act, as modified under subsection (4) of this section, apply to the new phase as if it were the first phase of a phased strata plan, with the following changes:

> (a) the interim budget referred to in section 13 (1) (a) of the Act must be based on the budget approved by the strata corporation;
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> (b) the owner developer must calculate the contribution to the contingency reserve fund required under section 12 of the Act as a percentage of the estimated annual operating expenses as set out in the interim budget for the new phase of the strata plan only;
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> (c) in addition to the copy of the interim budget required to be delivered under section 13 (1) (b) of the Act, the owner developer must deliver a copy of the most recent strata corporation budget to each prospective purchaser of a strata lot in the new phase before the prospective purchaser signs an agreement of purchase and sale.
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> (emphasis added)

Thus s. 13.4(3) deals with phases which are deposited before the strata corporation has held its first annual general meeting; s. 13.4(4) and (5) deal with phases created by the deposit of plans after the first annual general meeting if a first annual budget was adopted at that meeting.

[16] The combined effect of s. 13.4(3) of the Regulations and Part 3 of the *Act* is that upon the deposit of a new phase, the owner developer is required to prepare an interim budget (s. 13(1)(a) of the *Act* and s. 13.4(3)(c) of the Regulations) which is to cover the 12-month period following the date of the deposit of the phase plan. Strata fees based on the estimated common expenses in the interim budget become payable in relation to units in the newly created phase, beginning on the first of the month following deposit of the plan (s. 13.4(3)(d) of the Regulations and s. 14 of the *Act*). The monthly contributions for all owners are recalculated based on the new estimates in the interim budget and the new unit entitlement totals and s. 99 of the *Act*.

[17] For phases deposited after the strata corporation has held a first annual general meeting at which a first annual budget has been adopted, ss. 13.4 (4) and (5) govern the manner in which the provisions of Part 3 of the *Act* apply. One important difference in the treatment of operating expenses in these circumstances is that the *Act* attempts to respect the budget adopted at the prior annual general meeting. Sections 13.4(4) and (5) trigger an obligation by the owner developer to prepare another interim budget. As with phases deposited before a strata

corporation has held an annual general meeting, there is no need to create another or a separate contingency reserve fund. The interim budget which the owner developer is required to create must be "based on the budget approved by the strata corporation" at the first or most recent annual general meeting (s. 13.4(5)(a)). The ongoing contributions to the contingency reserve fund and the operating fund by members are based on the new interim budget.

[18] The end result is an interim budget for the first phase after sale of the first lot. It will have the expenses estimated for that phase and may have estimates for the yet to be created phases. In addition to the estimated operating expenses, it will set the required lump sum contribution to the contingency reserve fund on the part of the owner developer. The members of the strata are required to contribute monthly to the operating fund and the contingency reserve fund according to their unit entitlements. When the next phase is deposited, the owner developer must prepare another interim budget dealing with the same matters, except the estimates will be different in that they will be for all phases of the development deposited to that point. If the second or any subsequent phase is deposited after the strata corporation has held its first annual general meeting, the *Act* attempts to respect the budget adopted at the annual general meeting by requiring that the new interim budget, which the owner developer must prepare, be based on the budget adopted at that annual general meeting. This new interim budget otherwise functions and is prepared as the other interim budgets are. The owner developer estimates the operating expenses for the new phase and adds them to the expenses budgeted for earlier phases for which a first annual budget has been adopted. The owners (including the owner developer to the extent it owns lots in the development) are required to pay monthly strata fees based on the new interim budget for the balance of the budget year.

[19] At the end of the period covered by the interim budget for the last phase, the strata would be in a position to adopt a comprehensive budget for the entire development.

[20] Based on the foregoing, I am of the view that the strata manager's position regarding the start date for strata fees in the second and third phases of this development is correct. The plan for phase two was deposited on August 20, 2008. There ought to have been an interim budget prepared for the 12 months beginning September 1, 2008. Strata fees should have been paid for the lots in phase two based on the interim budget until the first annual general meeting in November 2008. The budget approved at the first annual general meeting should have taken account of the first two phases. As for phase three, it was created on January 29, 2009. Another interim budget should have been prepared, and strata fees based on that budget (which would, in turn, be based on the first annual budget adopted at the November 2008 annual general meeting) were then payable in relation to the lots in that phase until the next budget adopted by the members at an annual or special meeting.

The Agreement

[21] As noted above, during the spring and summer of 2009, the parties continued their discussions regarding whether strata fees were payable in relation to lots in the second and third phases following deposit of the plans. They agreed to disagree and chose instead to resolve the issue by entering into an agreement dated September 25, 2009.

[22] The solicitor for the owner developer took the position that if the owner developer was obliged to pay strata fees from the first of the month after the deposit of the phase plan, then the strata corporation was responsible for the operating expenses for the phase as and from the same date. Those costs were significant. Whatever the merit of this position, the strata corporation wished to avoid that outcome, and the owner developer wished to be relieved of the obligation to pay strata fees. These goals are reflected in the recitals and the substance of the September agreement. The recitals include the following:

> F. The Strata Corporation desires not to incur the cost of management of common property in various phases of the strata development until construction has been complete and occupancy permits have been issued relating to each respective phase.

> G. The Developer agrees to remain liable for and to complete construction and undertake all necessary maintenance of common areas in all phases of the [development] until such time as occupancy permits have been issued for strata lots adjacent to the common areas in question at the cost of the Developer in lieu of strata fees.

[23] Paragraph 1 of the agreement provides that the owner developer is to complete construction of the common areas in phase two and all subsequent phases at its sole cost. Once construction is complete and an occupancy permit is issued for the strata lots adjacent to the common areas, the owner developer is obliged to "turn over the completed common property to the management and control of the Strata Corporation". Paragraph 3 of the agreement provides that:

> 3. All liability for, and costs of construction and maintenance of common areas for the 2nd and subsequent phases of the [development] shall be at the cost of the Developer in lieu of strata fees until the first of the month following the date on which occupancy permits are issued for strata lots adjacent to such common areas.

[24] The agreement was signed on behalf of the strata corporation by Brett Wike, a member of the strata council. Although there is no suggestion that the council did not know that the agreement was being concluded, neither the council nor the membership of the strata corporation were given an opportunity to review or approve it prior to Mr. Wike executing it.

[25] There are two issues affecting whether the petitioner and respondent are entitled to a declaration that the agreement is binding. The first relates to ss. 99 and 100 of the *Act*, and the second relates to the fact that the agreement was not approved by the strata corporation either before or after Mr. Wike signed it. The issues are related.

[26] Section 99 of the *Act* fixes the formula by which owners are required to contribute to the operating fund and the contingency reserve fund. The formula is that each owner is required to pay that portion of the total of these two funds that the owner's unit entitlement is to the total unit entitlement in the strata. A strata corporation can choose to use another formula to calculate contributions but only if the other method of calculation is unanimously adopted at an annual general

meeting or a special general meeting (s. 100). The first question that arises is whether the agreement, properly understood, amounts to a variation of the formula for the calculation of strata fees. On the one hand, if the strata corporation was simply contracting out of all common operating expenses for the phase, it might be argued that no strata fees were payable by any lot owners. Viewed in that way, the default formula set out in the *Act* might be said to still apply, but when applied, the result is that no strata fees are payable because there are no operating expenses. That may be a tenable position if the strata fees for the phase were to be based only on the expenses arising in relation to that phase, but that is not what the *Act* envisages, nor what the budget of the strata development reflected. The operating expenses are those of all phases in the development as of the date of the passage of the interim budget. Thus, it seems to me that the agreement does purport to derogate from the formula in s. 99.

[27] Deviations from the default formula for the calculation of strata fees are only permitted if they are approved by a unanimous vote taken at a special or annual general meeting (s. 100). No such vote was held in this case, and thus the agreement is illegal in the sense that it does not comply with s. 99 of the *Act*. The parties argue that by application of s. 30 of the *Act*, it is open to the court to hold that the agreement is binding and lawful.

[28] Section 30 of the *Act* provides:

> **30** (1) The validity of a contract made or a certificate issued by the strata corporation is not affected by
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> > (a) a defect in the appointment or election of the council member or officer who makes the contract or signs the certificate on behalf of the strata corporation, or
> >
> > (b) a limitation on the authority of the council member or officer to act on behalf of the strata corporation.
>
> (2) A person who knew or ought reasonably to have known of the defect or limitation at the time the person made a contract with or received a certificate from the strata corporation may not rely on subsection (1) to bind the strata corporation with respect to the contract or certificate.

I am not persuaded that this section operates to validate or protect this agreement. On the face of it, there is or was no defect in Mr. Wike's "appointment or election" nor was there a limitation on his authority to act on behalf of the strata corporation. He had as much authority as any council member. The validity of this agreement, or more precisely its lawfulness, turns not on any question of apparent authority, but rather on whether it conforms to ss. 99 and 100 of the *Act*. Further, even if the execution of the agreement might be characterized as merely being in excess of the authority Mr. Wike had to act for the strata corporation, s. 30 is not available if the owner developer either "knew or ought reasonably to have known" of the limitation on that authority (s. 30(2)). Here, the owner developer was a member of the strata corporation until at least the end of 2009. It knew, or ought reasonably to have known, there had been no vote by the strata corporation on the issue of the calculation of strata fees. It must be taken to have known of that because it would have received notice of any meeting at which such a motion was to be considered.

[29] Finally, I note that when the strata corporation was given an opportunity to ratify the agreement at the February 7, 2010 annual general meeting, it declined to do so. Why it declined is not revealed in the evidence.

Conclusion

[30] In conclusion, the orders sought in paragraphs 1 to 5 of the petition are not granted. There will be a declaration that the agreement of September 25, 2009, is not "valid, lawful or binding".

[31] The petitioner seeks the following ancillary orders (as excerpted from its petition to the court):

> 7. An order that the Respondent produce financial records for phases 2 and 3 referred to in sections 21 and 23 of the *Strata Property Act*, as well as the Regulations and deliver those to the solicitor for the Strata Corporation within 21 days of the date of this order.
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> 8. An order that the Petitioner perform an accounting of the strata fees owing by the Respondent for phases 2 and 3 and create an accounting of the monies owing by the Respondent for the interim period.

> 9. An order that the Respondent pay strata fees and other monies owing the Petitioner for strata lots related to phase two and 3, as per its statutory duty, less amounts already collected by the Petitioner within 30 days of the delivery of the accounting to the Respondent.
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> ...
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> 10. ...[D]irection from the Court with respect to the appropriate course of action and an order for such further and other relief or direction as this Honourable Court may deem just.
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> …
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> 11. An order dispensing with the need to personally serve all current and/or former owners and other parties who may have an arguable interest in the proceeding with a copy of the Petition and other materials filed with respect to this matter, or any Court Order arising from this action - or in the alternative an order that such documents may be delivered and/or served substitutionally on each current and former owner by delivering each such document to each current owner of each respective strata lot in accordance with section 61 of the *Strata Property Act*.
>
> 12. An order that each Party bears its own costs.

[32] There will be an order in the terms sought in paragraphs 7 and 8. There will also be an order that the owner developer pay the strata fees owing as calculated by the petitioner in accordance with the foregoing orders. The parties have liberty to apply in the event they are unable to reach an agreement on the precise amount the owner developer owes. I have in mind, in addition to any other problems that may arise, the owner developer's assertion that, in addition to amounts it may have already paid by way of strata fees, it has paid other amounts that are properly the responsibility of the strata corporation, both before and after the September 25, 2009 agreement was reached.

[33] Next, I will not make the order sought in paragraph 11 of the petition, at least not now. I do not know what the implications of the foregoing orders will be for the current and former owners of lots in the strata corporation. I will hear further from counsel once the necessary accounting has been done and deal with whether an order in the terms of paragraph 11 of the petition should be made.

[34] Finally, I will hear from the parties on the question of costs.

[35] It is my expectation that any issues relating to accounting directions, service on current or former owners of lots, and costs will be dealt with together. In an effort to keep costs to a minimum, I will deal with these matters in a summary way. I will hear from the parties by telephone at a time to be arranged through the manager of Supreme Court Scheduling, after which I will fix the manner by which these remaining issues are to be addressed.

"G.M. Barrow, J."
The Honourable Mr. Justice Barrow