

*Case Name:*

**Rogers v. Strata Plan No. PG 37**

**Between**

**Barry Howard Rogers and John Joseph Schlitt, Petitioners, and  
The Owners, Strata Plan No. PG 37, Orville Chester Dahl,  
Stanley James Demerchant, Brian Bon Bieker, Brad Jaman and  
Barry James Harris, Respondents**

[2010] B.C.J. No. 772

2010 BCSC 591

Docket: S40070

Registry: Nanaimo

**British Columbia Supreme Court  
Nanaimo, British Columbia**

**L. Fenlon J.**

Heard: January 19 and 20, 2010.

Judgment: April 29, 2010.

(41 paras.)

**Counsel:**

Counsel for the Petitioners: C. Wilson.

Counsel for the Respondents O.C. Dahl and S.J. Demerchant: A.M. Murray.

Counsel for Administrator Franken: G.H. Dabbs.

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**Reasons for Judgment**

L. FENLON J.:--

**INTRODUCTION**

1 This case involves a small but dysfunctional commercial **strata corporation** located in Prince George. The petitioners Barry Rogers and John Schlitt own two of the twelve units that are work bays zoned for industrial use. The respondent Stanley Demerchant owns one strata unit, and Orville Dahl effectively controls or owns the remaining nine. On December 15, 2008, the parties consented to an order appointing an administrator for the **strata corporation** (the "Consent Order").

2 The petitioners apply to extend the administrator's appointment for another year and for an order approving a special levy to pay the administrator's fees and expenses.

3 The administrator applies for an order approving a special levy to cover his unpaid fees and expenses to the end of the current term, and, if reappointed, a levy to cover the extension. The administrator also seeks directions relating to compliance with his duties under the Consent Order, and his right to retain counsel in relation to fulfilment of those duties.

4 The respondents oppose payment of expenses incurred by the administrator to retain a lawyer, and also oppose the appointment of the administrator for a second term. The respondents filed a notice of motion seeking a declaration that the administrator has not fulfilled his duties under the Consent Order, but that application was adjourned pending resolution of the petitioners' and administrator's motions now before the court.

#### **BACKGROUND**

5 The petitioner Mr. Rogers purchased his strata lot in 1992. He lives there and operates a motorcycle shop from that unit. The petitioner Mr. Schlitt purchased his unit in 1986 and leases it to tenants. The respondent Mr. Dahl began purchasing strata lots in the building in 1998, and now owns nine of the lots either directly or indirectly through his wife. He operates Dahl Contracting Ltd., which is a road grading, construction, and heavy equipment rental business. The respondent Mr. Demerchant owns a strata lot purchased in 1986 and operates a trucking business and motor vehicle inspection service from his bays. He works for Dahl Contracting Ltd. as an independent contractor.

6 The **strata corporation** retained a strata manager between 2003 and 2005. At all other times the **strata corporation** has been self-managed. It has a limited number of expenses: insurance, garbage and snow removal, and whatever repairs and maintenance need to be done. The average expense per strata lot is between \$30 and \$40 per month.

7 Although I make no findings about these events, the petitioners allege that the respondents have denied them the use of their share of common area parking, parked vehicles deliberately in front of their bays to prevent clients from having access to their units, and generally acted as though they own the common areas, ignoring oil spills and damage caused to those areas by their equipment. The petitioner Mr. Rogers alleges that Mr. Dahl intentionally ran exhaust into his unit, which made it uninhabitable for a time. There is no doubt that the parties have not been able to work cooperatively. The situation has deteriorated since 2005 when the strata manager left.

8 At some point, the petitioners stopped paying strata fees because of the problems they were experiencing, and Mr. Dahl, rather than paying his strata fees, paid the expenses of the **strata corporation** for insurance, and for garbage and snow removal. The parties agree that no proper accounting of such expenses was kept, a contingency reserve fund was not created, budgets and financial statements for the **strata corporation** were not prepared, and annual general meetings

were not held. In short, the **strata corporation** did not comply with its obligations under the *Strata Property Act*, S.B.C. 1998, c. 43 (the "Act").

9 In 2004, six years ago, the petitioners commenced this proceeding seeking a declaration, under s. 164 of the Act, that the **strata corporation**, including the council has:

acted and/or conducted itself in a manner that is significantly unfair to the Petitioners with respect to:

- (a) the failure to repair and maintain the common property and in particular, the environmental contamination to the common property;
- (b) the inequitable allocation of parking; and
- (c) the denial of the right to use the common property Equipment Compound[.]

10 As noted, in December 2008, the strata owners consented to the appointment of Vancouver Condominium Services Ltd., acting through Gerry Fanaken, as administrator. The appointment began on December 15, 2008, for a term of one year. The term was extended by consent to January 31, 2010. Under the terms of the Consent Order the administrator was required to:

[I]nvestigate and prepare a report to the Court with its findings and recommendations on or before March 31, 2009 regarding the following:

- i. the financial affairs of the **Strata Corporation**;
- ii. the status of contracts entered into between the **Strata Corporation** and others;
- iii. the adequacy of insurance;
- iv. repair and maintenance of the common property;
- v. parking and the use of common property; and
- vi. other matters in the discretion of the Administrator or as ordered by this Honourable Court.

11 The Consent Order also provided as follows at paragraph 1(c):

The Administrator shall be at liberty to apply to the Supreme Court for directions from time to time to assist the Administrator in the performance of the Administrator's duties and the exercise of the Administrator's powers.

12 The administrator says that he has done as much as he can do with respect to the financial affairs of the **strata corporation**, and has dealt with the strata's contracts and the adequacy of insurance. He seeks directions with respect to the obligations that he has to report findings and recommendations regarding parking, use of common property, and repair and maintenance of the property given that he has run out of funds to pay for that work, which has turned out to be more complicated than anticipated. The administrator remains prepared to take on this work if the court orders a levy payable by the **strata corporation** to cover the administrator's expenses. The administrator also seeks an order directing the **strata corporation** to pay his fees and expenses for work to the end of his current term, including legal fees.

## ANALYSIS

### 1. Administrator's Fees and Expenses, including Legal Costs

13 At the outset, the parties agreed to a special levy of \$12,000 to cover the anticipated costs of the administrator for a one-year term. However, that budget was exceeded, in part due to challenges brought by the respondents to the manner in which the administrator was fulfilling his duties. The administrator seeks the shortfall of \$10,377.59 to cover his fees and expenses to December 31, 2009. He also seeks a further \$4,000 in fees and \$8,000 to cover legal expenses and disbursements (largely relating to this application) to the end of January 2010. In total, then, in addition to the original \$12,000 levy, the administrator seeks \$22,377.59 to the end of his current extended term of January 31, 2010. If reappointed for another year, he says he will need an additional \$12,000.

14 The respondents object to the payment of this amount. They argue that fees and expenses of \$34,000 for 13 months are excessive. Further, they say that the Consent Order does not give the administrator the authority to retain legal counsel and, therefore, none of the strata owners should be required to cover those expenses.

15 With respect to the first point, I am of the view that, while the fees are higher than anticipated, they are not excessive in the circumstances of this case.

16 The respondents' main objection to payment relates to expenses incurred by the administrator to retain legal counsel. That objection is based on the respondents' insistence on the removal, from the draft consent order, of a term authorizing the administrator to retain counsel. The administrator points out that he was not a party to those negotiations and was not aware of the change to the wording of the form of order. In any event, the administrator argues that the authority to retain counsel is implicit in the Consent Order at paragraph 1(c), which gives him liberty to apply to the Court for directions, since an application to the Court cannot be made without incurring legal expenses.

17 The petitioners say that the change to the wording of the draft order was made to bring it into line with the reality that a **strata corporation** (and hence the administrator acting on behalf of the strata corporation) cannot retain counsel without a three-quarter vote at a general meeting or a court order. The administrator says that the legal costs he incurred are not of that kind. Rather, they relate to either seeking directions from the Court or dealing with the respondents' allegations that the administrator failed to carry out his duties under the Consent Order.

18 In my view, the administrator was entitled to incur legal expenses in relation to the carrying out of his duties as administrator. This is not a situation in which the administrator has purported to act on behalf of the **strata corporation** to retain counsel to, for example, commence a lawsuit against a third party, which is the type of legal retainer addressed by the amendment to the Consent Order. Section 174(4) of the Act provides that "[t]he remuneration and expenses of the administrator must be paid by the strata corporation" (emphasis added).

19 Section 174(4) is to be given a broad and liberal interpretation. In addition, paragraph 1(h) of the Consent Order states that "The Administrator's fees and disbursements shall, unless this Honourable Court otherwise orders, be paid by the **Strata Corporation** as an administrative expense of the **Strata Corporation**". Reading this together with paragraph 1(c) of the Consent Order, I am of the view that the administrator's legal fees and disbursements constitute an administrative expense. I therefore find that the **strata corporation** must pay the administrator's fees, including legal expenses, and that a special levy to cover those expenses under s. 165 is appropriate. I make this order on the basis that the administrator has agreed to seek a review of the

legal fees and disbursements under the *Legal Profession Act*, S.B.C. 1998, c. 9, if the respondents have concerns about the magnitude of those expenses.

## **2. Should the Term of the Administrator be Extended?**

**20** The Court may appoint an administrator under s. 174 of the Act if, in the Court's opinion, that appointment is in the best interests of the **strata corporation** (s. 174(2) of the Act).

**21** The test for renewing the appointment of an administrator is the same as the test for the initial appointment. Factors to be considered in exercising the Court's discretion in determining whether the appointment is in the best interests of the **strata corporation** include:

- (a) whether there has been established a demonstrated inability to manage the **strata corporation**;
- (b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to the affairs of the **strata corporation**;
- (c) whether the appointment of an administrator is necessary to bring order to the affairs of the **strata corporation**;
- (d) whether there is a struggle within the **strata corporation** among competing groups such as to impede or prevent proper governance of the **strata corporation**;
- (e) whether only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the **strata corporation**;
- (f) the costs of involving an administrator;
- (g) the democratic governance of the strata community, which should not be overridden by the court except where absolutely necessary.

*(Lum v. Strata Plan VR519, 2001 BCSC 493 at paras. 11-12, 104 A.C.W.S. (3d) 208; Cook v. Strata Plan N-50 (1995), 60 A.C.W.S. (3d) 1072, [1995] B.C.J. No. 2882 (S.C.))*

**22** I begin by considering what the administrator was appointed to do in the first place, what he has accomplished, and what remains to be done. The primary obligations of the administrator were: first, to identify the contracts to which the **strata corporation** was a party; second, to report on the adequacy of the **strata corporation's** insurance; third, to sort out the financial affairs of the **strata corporation**; fourth, to address parking issues and use of common property; and fifth, to address repair and maintenance of the common property.

### **(a) Identification of Strata Contracts**

**23** The administrator has determined that the contracts to which the **strata corporation** is a party include insurance and garbage removal contracts.

### **(b) Insurance**

**24** The administrator determined that the appropriate insurance was in place at the time of his appointment in 2008, and he has arranged similar insurance for the 2009/2010 fiscal year.

**(c) The Financial Affairs of the Strata Corporation**

25 The administrator has put in place a contingency reserve fund, established a budget, set the strata fees payable by each of the owners, and dealt with a bank account that had been frozen for some time. However, the administrator has not been able to sort out the accounting matters between Mr. Dahl and the **strata corporation**. Because the owners had not been paying strata fees, Mr. Dahl covered the expenses for garbage and snow removal, as well as insurance. He claims to be owed \$34,140, against which his strata fees would be offset. The administrator was unable to determine the amount owing to Mr. Dahl (although that was one of the primary reasons Mr. Dahl consented to the appointment of the administrator) because Mr. Dahl had not kept the underlying receipts to support the expenses claimed. The administrator has taken the accounting as far as he can; he says a third party accountant will be required to sort out the amount due to Mr. Dahl.

26 Mr. Dahl, who would be responsible for 9/12 of the cost of an accountant, takes the practical view that this step should not be taken as it is likely that the cost of hiring an accountant will exceed the amount owing to him. Similarly, while the respondents are not entirely satisfied with the manner in which the administrator has determined what the petitioners owed for strata fees, they are willing to accept those findings.

27 In these circumstances, I am of the view that the administrator is no longer required to address financial issues. The contingency reserve fund has been created and funded with the money that was on deposit in the previously frozen bank account. A budget that was accepted by all owners has been established. Strata fee payments are up to date. The only remaining issue is the determination of the amount owing to Mr. Dahl, which is not a matter that the administrator is willing or able to resolve.

**(d) Parking and Use of Common Property**

28 The primary issue in relation to parking arose from a long-standing dispute over what the parties referred to as the "equipment compound": a vacant, fenced area that the respondents viewed as falling outside of the common property. That dispute was resolved in July of 2009, after a series of investigations into the title. The respondents acknowledged on that date that the equipment compound does indeed form part of the common property as the petitioners have asserted from the outset.

29 The remaining parking issue relates to the petitioners' allegation that the respondents are not allocating parking on common property fairly. The petitioners argue that allocation of space in the equipment compound, clean-up of the equipment compound (which is cluttered with dead equipment owned by the respondents), and parking in front of the strata units are all matters that the administrator has yet to address by way of report and recommendation. The administrator acknowledges that this work has not been done, in part due to a lack of funding, but also because these matters are squarely in issue in these proceedings and, failing agreement of the parties, will ultimately have to be resolved by the Court. For example, the administrator points out that part of the petitioners' claim is for damages relating to the respondents' *de facto* expropriation of the equipment compound space, a matter that the administrator cannot address.

30 At a meeting in 2003, all of the strata members, including the petitioners, agreed that the common area for parking should be allocated in accordance with the holdings of each of the owners. In my view, a direction from the Court that this resolution should be carried out would be more

effective than retaining an administrator to prepare a report and recommendation that may not be acted upon in any event.

(e) **Repairs and Maintenance**

31 The final obligation of the administrator under the order was to address the repair and maintenance of the common property. The petitioners put into evidence compelling photographs showing what appear to be oil spills on the common property, particularly in the equipment compound, as well as damage to the asphalt due to the heavy equipment operated by the respondents.

32 The respondents say that this is an industrially-zoned building, and that some oil leakage as well as wear and tear on the asphalt is to be expected. Without determining these issues, it is apparent that there remains a dispute between the parties as to what repairs need to be done, and in particular whether environmental remediation should be undertaken. The respondents take the position that if oil spills are an environmental issue, that should be dealt with if and when the property is sold. The petitioners do not wish to leave this matter unresolved. They see the environmental issues as an outstanding potential liability of unknown magnitude and, further, one that is entirely due to the respondents' failure to clean up oil spills caused by their equipment.

33 The administrator was ordered to report and make recommendations in relation to the disputed repairs, maintenance, and environmental issues. But again, apparently due to a shortage of funds and ongoing disputes between the parties, he has not completed that report. Further, the environmental impact dispute and the dispute over repairs and maintenance are raised by the petitioners in the pleadings and, failing agreement of the parties, will ultimately have to be resolved by this Court. In my view, the most that the administrator can do if reappointed would be to retain both an environmental consultant to prepare a report and a consultant to determine what repairs are required to the building and to the common areas.

34 The petitioners say that without the administrator in place, the strata council, which is controlled by the respondents, will not take the necessary steps to have this work done. However, the administrator can do no more than retain experts or consultants that the **strata corporation** can retain directly. The administrator's involvement in the process will add a layer of expense and, ultimately, he can do no more than report and recommend. At that point, the strata council must still make a decision to vote on a special levy to fund the work the consultants determine needs to be done. Given the history of these parties, it is unlikely that this will occur in a cooperative manner. Ultimately, the parties will be left with recourse to the courts for an order under s. 165 of the Act.

35 In considering whether it is in the best interests of the **strata corporation** to reappoint the administrator, I also take into account the expense of that appointment. The total strata fees for the 12 units are approximately \$480 per month. The administrator has cost the **strata corporation** \$34,000 over the past 13 months, or more than \$2,600 per month.

36 The petitioners say that failure to extend the appointment of the administrator will result in continued oppression and stalemate between the parties. They say that the best predictor of future behaviour is past behaviour. The respondents, on the other hand, have borne the brunt of the expense of the administrator. They say that they are not inclined to fall back into the patterns of the past. They note that the budget is in place, as is the contingency reserve fund, and they are in a good position to move forward in compliance with the Act. There is merit to the respondents' submission.

37 Having considered all of the above, and in particular the expense of an administrator, and the inability of the administrator either to resolve matters directly in issue in these court proceedings or undertake the work that the petitioners wish to have done, I am of the view that the administrator's term should not be extended. Rather, the owners should be given an opportunity to try to administer to the **strata corporation** in compliance with the Act.

38 The parties agree that the Court has the ability to make orders under s. 165 to address some of the petitioners' concerns, although the motions did not expressly seek that relief. I therefore make the following orders:

1. The strata council is to retain a consultant to determine what repairs are required both to the buildings and the common property;
2. This strata council is to retain an environmental consultant to determine what work, if any, needs to be done to bring the common areas into compliance with the *Environmental Management Act*, S.B.C. 2003, c. 53;
3. The strata council is to allocate to each of the petitioners 1/12 of the equipment compound and 1/12 of the common parking area near the bays on a fair and equitable basis (i.e., taking into account ease of access both to the strata unit and to the entrance to the equipment compound);
4. The strata council is to comply with the Act, and is to ensure that strata fees are collected, an annual general meeting is held, a budget is prepared each year, and a contingency reserve fund is maintained.

39 If the parties are unable to resolve the matters outstanding between them, the petitioners have available to them the remedy of setting their petition down for hearing to pursue their claims which are based on the alleged oppressive conduct of the respondents.

### CONCLUSION

40 In summary, in addition to the orders made above, I dismiss the petitioners' application to extend the appointment of the administrator. I order a special levy of \$22,377.59 to cover the fees and expenses of the administrator to January 31, 2010. The application of the administrator for a declaration that he has met his obligations under the Consent Order is adjourned generally and should be heard at the same time as the respondents' cross-application for a declaration to the contrary. I seize myself of those applications should they be set for hearing, which may be conducted by videoconference. I also seize myself of any further applications arising out of the orders I have made; I am not seized of the hearing of the petition generally.

41 As success has been divided, the petitioners and respondents are to bear their own costs. The administrator's costs have already been addressed through the order for a special levy.

L. FENLON J.

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