IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VIS114 v. John Doe,* 2015 BCSC 13

Date: 20150107
Docket: 14-1841
Registry: Victoria

Between:

The Owners, Strata Plan VIS114

Petitioner

And

John Doe

Respondent

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Mary A.M. Brunton
Counsel for the Respondents Joanne Manley, Norma Amarilli, Hilja Lja Laukkanen, Charles Christie, Mertie Chilton, Elizabeth Widene, Anne Bateman, Glenda Robertson, Noel Robertson, Jansje Shaw, Gladys Fidler, Xiaoyu Wang:	Justin J. Hanson
Place and Date of Hearing:	Victoria, B.C. December 4, 2014
Place and Date of Oral Order/Result Given:	Victoria, B.C. December 17, 2014
Place and Date of Reasons:	Victoria, B.C. January 7, 2015

Introduction

[1] This matter involves a dispute between the owners of a strata building located on Clarence Street in the James Bay neighbourhood of Victoria, BC ("Clarence House").

[2] The concrete building was constructed in 1973 and is, therefore, over 40 years old. The building consists of 12 floors having four strata lots on each floor with each strata lot having floor space of 1,250 square feet. There are 48 residential strata lots in the building. The units on the south and east-oriented walls are designated "02" and "03". The units on the north and west-oriented walls are designated "01" and "04". So, for example, the units on the 7th floor are units, 701, 702, 703 and 704.

[3] The building itself has aged well but the building envelope has not. Some decades ago, water ingress issues were identified. Over the last few years, the strata council has attempted to address these issues. In 2008 and 2013, major remediation took place on the south and east walls to the great benefit of owners living in those units. The owners of the units on the north and west-oriented walls still continue to deal with the effects of the un-remediated side where their units are located. The petitioner strata corporation now wants to proceed with this work, which will require a special assessment, or levy, in order to fund the costs.

[4] At the most recent annual general meeting ("AGM"), the strata council failed to obtain a special majority vote by the owners as required under the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*") in order to impose the levy and proceed with the repairs to the north and west walls.

[5] In late 2013, the *Act* was amended to give the court some oversight where strata owners fail to approve a special levy for the repair and maintenance of common property in certain circumstances. I am advised by counsel that they are not aware of any decision of this court which has yet addressed this new provision in the *Act*.

[6] On December 17, 2014, I granted the relief sought in the petition with reasons to follow.

Background Facts

[7] An informal summary of water ingress problems and leaks at Clarence House indicates that these problems have existed since at least as early as the mid-1980s, when the building was about 12 years old. The problems continued to persist over the next 20 or so years, with repairs, such as caulking or window and stucco repair, being done from time to time.

[8] The first substantial effort by the strata council to address the water problems was to obtain a report from Read Jones Christoffersen Ltd. ("Read Jones"), an engineering firm. Read Jones prepared a Building Envelope Condition Assessment (the ''BECA") on April 2, 2007. In the BECA, Read Jones noted the water problems that had existed for some decades, including window leaks, water staining on the frames, damp wood frames, condensation, mildew and paint delamination. These issues were widespread. Units located on all walls of Clarence House were affected. Read Jones stated:

> The building wall cladding assembly and windows are recommended for restoration in order to eliminate distress occurring due to water ingress at the window locations and further deterioration of the existing cladding system.

[9] The BECA set out the following recommendations:

a) replacement of windows with new aluminum thermally broken windows or high performance vinyl framed windows of double glazed units with a B7 rating;

b) installation of new aluminum thermally broken or vinyl framed double glazed balcony sliding doors on the first level; and

c) installation of an Exterior Insulated Rainscreen system to the exterior walls, which would include the provision of a continuous air/vapour barrier

membrane, exterior insulation, a drainage cavity and through wall cavity flashings.

[10] Read Jones summarized its recommendations in the BECA as follows:

> It is recommended that the work be completed in the near future to reduce the moisture ingress that will continue. From an economic standpoint, current foreseeable trends indicate that restoration costs will continue to increase if repair is delayed. If restoration of the building envelope is deferred beyond a period of six months, we recommend that all exterior recesses be repaired or, at the very least, reviewed for leakage.
>
> [Emphasis added].

[11] Read Jones noted in the BECA that the estimated probable cost of completing the recommended repairs to the entire building was $5,205,000.

[12] A significant conflict, or as one owner, Dr. Gordon McIntyre, called it, a "very fractious battle", arose between the owners who were in favour of a complete remediation of the building (as recommended in the BECA) and those who were opposed and wanted to do as little repair work as possible. That conflict, or battle, continues to this day.

[13] The BECA was discussed by the owners at a Special General Meeting ("SGM") on September 13, 2007 at which time resolutions were proposed by the strata council to move forward with retaining Read Jones for preliminary work in respect of the recommended remediation. Those resolutions were defeated and the only resolution passed was to authorize the strata council's investigation of the repair of the south wall and spot repairs of other leaks, particularly on the east wall.

[14] At a later SGM held October 11, 2007, the owners ousted the entire strata council that was in favour of following the BECA recommendations and a new strata council was put into place. This move was done to stop the first strata council's proposal to move forward with the remediation of the entire building. The same resolution from September 2007 was approved in that the strata council was authorized to investigate the repair of the south wall and other leaks and to report back with a financial plan for these repairs.

[15] At a further SGM held December 6, 2007, the owners defeated a resolution to spend $52,800 on pre-construction costs with respect to the "long-overdue" maintenance and restoration of the building envelope, which was to focus on the south wall remediation and other spot leaks on the east wall. This decision was decisively and unanimously reversed shortly thereafter at an SGM held January 3, 2008. Each owner contributed $1,100 towards these costs.

[16] The south and east-facing walls of Clarence House are more directly exposed to the wind, rain and weather from the nearby Pacific Ocean.

[17] At a further SGM held on March 27, 2008, the owners approved a special resolution to raise $780,289 by special levy to "cover construction costs to remove and replace cladding and windows on the south wall and on the wall of the south-east quadrant, and complete upgraded maintenance of the entire building envelope". The cost to each owner was $16,256.

[18] Work on the south-facing wall and a section of the east-facing wall was completed by approximately the end of 2008. Morrison Hershfield Limited ("MH"), an engineering firm, supervised the work. Upgraded maintenance of the rest of the building envelope consisted of certain window caulking and spot stucco patching.

[19] The matter of the remediation of the remainder of the building does not appear to have been addressed at later Clarence House AGMs in 2009-2011.

[20] Matters did progress in April 5, 2011, when a Building Envelope Visual Review (the "Envelope Review") was prepared by MH. As part of its work, MH circulated a questionnaire to the owners, the results of which showed some water penetration in three units. A majority of the units reported issues of condensation and air leakage.

[21] MH noted in the Envelope Review that the un-rehabilitated walls (north and west) were clad in an exterior insulation finishing system ("EIFS") that incurs a high risk of water entry in high exposure environments. MH recommended action as follows:

> Our review found that following nearly 40 years of service the EIFS cladding installed at Clarence House [is] approaching the end of its service life. However, given the age of the building and the limited accounts of water ingress reported by the owners it appears that, at this time, the wall assemblies have the ability to manage/balance periods of increased wetness and drying circles preventing any significant leaks. It is possible that leakage is being concealed by interior finishes and furniture, regular review of perimeter walls should be completed by tenants to review for any signs of water ingress.
>
> Given the level of damage observed/reported throughout this review, it is MH's opinion that complete rehabilitation should be considered within the next 5 years. It is possible the system can last longer, however this should be confirmed via continuous monitoring and yearly reviews by a qualified building envelope consultant.
>
> If rehabilitation work is delayed it is necessary to recognize that the face-sealed EIFS walls have a higher risk of water ingress as the system ages. Given the durability of the concrete construction used throughout the building (including the infill walls) the risk of water ingress is predominantly isolated to damage of the interior finishes.
>
> [Emphasis added].

[22] MH similarly noted that the single pane window assemblies were approaching the end of their usable service life, which was likely causing heat loss, condensation and damage to interior finishes. MH recommended that the remaining windows be replaced at the same time as the wall cladding.

[23] By the time of the February 2012 AGM, the strata council had met to evaluate the Envelope Report and it reported to the owners that it would be necessary to repair the caulking on the building exterior in 2012. However, the council noted that it was awaiting a depreciation report. At the February 2013 AGM, nothing had been done, however, the council notified the owners that the "present condition of the east wall envelope require[d] immediate attention".

[24] On March 1, 2013, MH presented its depreciation report (the "Depreciation Report"). This was the type of report that section 94 of the *Act* (enacted in December 2011) mandated was to be obtained by the strata corporation on or before December 14, 2013. Section 94 requires that a strata corporation obtain, from a qualified person, a depreciation report estimating the repair and replacement cost for major items in the strata corporation and the expected life of those items. In that

respect, a depreciation report allows a strata corporation to undertake long term planning for the repair and maintenance of common property and repairs. The content of a depreciation report is mandated by the *Strata Property Regulation*, B.C. Reg. 43/2000, s. 6.2.

[25] MH described its objective in preparing the Depreciation Report as, in part, to provide a schedule for the anticipated repair and replacement of common element items. The Depreciation Report forecast that the cladding issue would have some impact on the reserve/contingency fund over the next 10 years. MH stated that the east wall remediation should be considered within the next year and was, therefore, more urgently required than the other walls. MH noted:

> EIFS Cladding Replacement: Given the level of damage observed/reported throughout this and previous reviews it is MH's opinion that the rehabilitation of the east elevations EIFS cladding should be considered within the next year. For the remainder of the building (north and west elevations) we recommend that the rehabilitation of the EIFS cladding should be considered within the next 5 years. It is possible the system can last longer; however this should be confirmed via continuous monitoring and yearly reviews by a qualified building envelope consultant. For the purposes of this study replacement has been assumed at year 5 (2018).

[26] As noted by the petitioner strata corporation, it would have been apparent that MH's comment in the Envelope Review in 2011 that replacement of the cladding should be considered "within" five years had, in reality, resulted in only delaying the remediation of at least the east wall for approximately two years beyond that date. By the spring of 2013, immediate remediation of the east wall was required.

[27] The respondent owners, who oppose the relief sought here, assert that the Depreciation Report did not call for the *immediate* replacement of all remaining original walls. That is true, but that assertion is misdirected in light of the purpose of the report. As argued by the petitioner strata corporation, it is of critical importance to understand the limits of MH's review in preparing the Depreciation Report. In the Depreciation Report, MH stated, at section 1.5, that it was not intended to provide an in-depth assessment of the repair items. Further, MH had not undertaken a physical

review of the systems at that time but noted that it had done so earlier in April 2011, which had resulted in the Envelope Review.

[28] At a SGM held April 30, 2013, two resolutions were considered by the owners: Resolution A was to raise $2,662,844 by special levy to complete the renewal of the remaining three walls; and, Resolution B was to raise $1,105,566 by special levy to complete the renewal of the east wall only. Resolution A was defeated, attaining only 58% majority instead of the required 75%. Resolution B was approved by a 79% majority. Each owner contributed $23,033 for these repairs.

[29] Following the April 2013 SGM, the remaining east wall remediation that had been started in 2008 was largely completed by approximately the end of 2013. The north and west walls remained un-remediated.

[30] Accordingly, by the end of 2013, each of the 48 owners at Clarence House had contributed $40,389 for the remediation of the south and east walls (cladding and windows) together with various interim maintenance of the un-remediated north and west walls, which included stucco and caulking repair.

[31] Further efforts continued to obtain approval to commence the remediation of the north and west walls into 2013-2014.

[32] At the AGM held February 19, 2014, Dr. McIntyre became president of the strata council. As a result of his earlier initiative, at that meeting, the strata council recommended that they proceed with the north and west wall remediation as recommended by MH. The council presented a resolution to raise $1,755,744 by special levy for that purpose, payable in two installments: $1,000 due November 3, 2014 and the remainder by March 2, 2015 (the "Resolution"). This would have required a payment by each owner of $36,578.

[33] The Resolution was defeated, as it only received a majority vote of 63%. The vote was such that 27 owners voted in favour and 16 owners opposed. Apparently, three votes were not cast.

[34] The present proceeding is to obtain approval of the Resolution such that the strata council may proceed as if the Resolution was passed by the owners.

The Legislation

[35] The application is brought by the strata corporation on behalf of the strata corporation: the *Act*, ss. 4, 26.

[36] Strata council members have a statutory duty to act honestly and in good faith with a view to the best interest of the strata corporation and the strata council must exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances: the *Act*, s. 31.

[37] The strata corporation is responsible for managing and maintaining common property and common assets and it has a statutory duty to repair and maintain common property and common assets: the *Act*, ss. 3, 72. It is undisputed here that the building envelope comes within the definition of "common property" either pursuant to the definition found in the *Act* or, alternatively, by way of a bylaw passed by the strata corporation that it is property that the strata corporation is responsible to repair and maintain.

[38] It is not uncommon for strata corporations to raise money from the owners to fund extraordinary repairs that might be necessary from time to time and that cannot be funded by the usual monthly strata fee charged to the owners. That is what occurred to some extent in years past with respect to Clarence House. In that event, the strata corporation may impose what is called a special levy. In accordance with the *Act*, s. 108(2)(a), the strata council may impose a special levy only if approved by a resolution passed by a 3/4 (75%) vote at an annual or special general meeting. In this case, the strata council failed to obtain that level of support for the Resolution.

[39] Pursuant to s. 165 of the *Act*, this Court has ordered a strata corporation to perform its duty to repair and maintain common property in accordance with the *Act* where the strata council did not proceed due to a failure to obtain the special majority vote: *Browne v. Strata Plan 582*, 2007 BCSC 206. In *Browne*, just as here, it

was apparent that the building envelope was in need of substantial repair but the strata council failed to obtain the special majority vote to proceed: paras. 25, 29. In that case, the court authorized the issuance of a special levy to pay for the repairs: para. 35.

[40] Section 173(2)-(4) of the *Act* are the new provisions which have been in force since December 12, 2013:

> 173 …
>
> (2) If, under section 108(2)(a),
>
> > (a) a resolution is proposed to approve a special levy to raise money for the maintenance or repair of common property or common assets that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise, and
> >
> > (b) the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4 vote required under section 108(2)(a),
>
> the strata corporation may apply to the Supreme Court, on such notice as the court may require, for an order under subsection (4) of this section.
>
> (3) An application under subsection (2) must be made within 90 days after the vote referred to in that subsection.
>
> (4) On an application under subsection (2), the court may make an order approving the resolution and, in that event, the strata corporation may proceed as if the resolution had been passed under section 108(2)(a).

[41] Accordingly, the *Act* now allows the court to approve a resolution in certain circumstances where there was a failure to obtain the special majority vote. The preconditions to the court considering such an application are:

a) at least 51% of the owners vote in favour of the resolution;

b) the levy is for maintenance or repair of common property or common assets; and

c) the maintenance or repair is necessary to:

   i. ensure safety, or

   ii. prevent significant loss or damage, whether physical or otherwise.

[42] In this case, it is conceded that preconditions (a) and (b) are satisfied. The respondent owners, who opposed the Resolution and continue to do so here, dispute that the strata council has satisfied the precondition in (c)(i) or (ii).

[43] In *Castillo v. Castillo,* 2005 SCC 83 at para. 23, the court cited *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 17 and stated "legislative history, Parliamentary debates and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight". Accordingly, the *Hansard* debates can provide helpful insight into the background and purpose of statutory amendments. Both sides of this issue rely on statements found in *Hansard*.

[44] The amendments to the *Act* were introduced to the Legislature by way of the *Strata Property Amendment Act, 2009*. In the *Hansard* debate of March 31, 2009, the Honourable Colin Hansen (then Minister of Finance and Deputy Premier) stated:

> The amendments will strengthen fiscal stability and accountability in strata corporations by requiring depreciation reports and audited financial statements. The requirements for depreciation reports will help strata corporations understand the magnitude of future costs of replacing or repairing depreciated assets.
>
> …
>
> Finally, this bill enhances consumer protection by giving owners, former owners and potential purchasers greater rights to access additional information by ensuring that special levies are managed with the same diligence as a strata corporation's contingency reserve fund and by providing a new court remedy to approve a special levy to raise money for the maintenance and repair of common property or assets where a majority of owners vote in favour of the special levy even though it did not receive the support of three-quarters of the owners, as currently required under the act.
>
> [Emphasis added].
>
> (British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 38th Parl., 5th Sess., Vol. 41, No. 6 (31 March 2009) at 1025 (Hon. Colin Hansen)).

[45] On September 24, 2009, the Honourable Rich Coleman (then Minister of Housing) stated:

> Finally, this bill enhances consumer protection. It gives owners, former owners and potential purchasers greater rights to access additional information. It ensures that special levies can't be mingled with other strata funds and are only invested in appropriate, insured accounts. It allows the

> courts to break a deadlock when the strata can't quite get a three-quarter vote needed to make a crucial repair via a special levy.
>
> [Emphasis added].
>
> (British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard),* 39th Parl., 1st Sess., Vol. 3, No. 5 (24 September 2009) at 1635 (Hon. Rich Coleman)).

Discussion

[46] I agree with the respondent owners that, as a starting point, a strata corporation needs the special majority vote by the owners in order to approve such extraordinary repairs. This is dictated by the *Act*. The ability of the court to negate that requirement arises only in certain circumstances, again as dictated by the *Act*, s. 173(2). Of critical importance on this application is the requirement that the maintenance or repair be "necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise".

[47] In my view, the strata corporation bears the onus of meeting that test on a balance of probabilities.

(a) The Engineering Evidence

[48] There is no dispute about the expert engineering reports that are in evidence, particularly the evidence from Read Jones, MH and the professional engineer in charge of preparing MH's various reports, a principal at MH, Craig Labas.

[49] The case authorities establish that, in determining the reasonableness of the actions of a strata corporation, the court will typically consider the professional advice that a strata council receives from its engineers regarding the timing, extent and method of repairs: *Tadeson v. Strata Plan NW 2644,* [1999] B.C.J. No. 3091 at para. 6, 30 R.P.R. (3d) 253 (S.C.); *Browne* at para. 31; *Oldaker v. Strata Plan VR 1008*, 2007 BCSC 669 at para. 56; *Kayne v. Strata Plan LMS 2374*, 2013 BCSC 51 at paras. 183-191.

[50] In *Browne*, the strata council was not opposed to the rehabilitation of the building envelope. The court agreed and while it approved of the repairs, the court

left the strata council with the discretion to act based on the recommendations of the engineers. The court stated:

> [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.

[51] In this case, the strata corporation agrees with the recommendations of Read Jones and MH and wishes to proceed with remediation of the north and west walls at this time.

[52] Turning to those recommendations, I have outlined the course of the various expert reports from 2007 to this time. The respective pro and anti-remediation camps have, however, vastly different views on the meaning of those reports.

[53] The respondent owners submit, and I agree, that a factor to be considered by the court on an application under s. 173(2) of the *Act* will be the professional advice received by a strata council. However, I part company with the respondents when they argue, citing *Tadeson*, that the court should only exercise its discretion under s. 173(2) where the engineering evidence clearly establishes that the repairs are *immediately necessary* to ensure safety or prevent significant loss or damage.

[54] To the same effect, the respondent owners say that the repairs must be "crucial", quoting Minister Coleman from *Hansard*, above.

[55] This argument arises from a conflation of the requirements under s. 173(2) without another section of the *Act*. The respondent owners argue that the language of s. 173(2) is almost identical to s. 98(3) of the *Act*, which deals with unapproved "immediate" and "necessary" expenditures. Section 98(3) reads:

> (3) The expenditure may be made out of the operating fund or contingency reserve fund if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise.

[56] Both sections refer to the use of funds (one funded and one yet to be funded) that were not approved by the owners in the normal fashion called for by the *Act*. Both refer to actions that may be taken by the strata corporation "to ensure safety" and "to prevent significant loss or damage, whether physical or otherwise". One difference is that the power under s. 98(3) is constrained by s. 98(5) which requires that the expenditure not exceed the "minimum amount needed to ensure safety or prevent significant loss or damage."

[57] The respondent owners submit that the same test should apply to s. 173(2) as in s. 98(3). Further, they say that the requirement of an expenditure not exceeding the minimum amount needed to ensure safety or prevent significant loss and damage can be met through the caulking and maintenance program currently in place and in use on the north and west walls and that this can be done until at least 2017.

[58] In my view, it is illogical to analogize the situation addressed in s. 173(2) with that addressed in s. 98. In the first place, as argued by the strata corporation, s. 98 deals with unauthorized expenditures whereas s. 173(2) addresses a situation where a clear majority vote has been received, but not the special majority vote. Accordingly, the premise is that the expenditures have been considered by the owners but the special majority vote was not obtained to proceed. In addition, s. 98 is clearly intended to address urgent situations given the reference to the immediacy of the expenditures being necessary. This is confirmed by reference to the requirement in s. 98(5) that only the minimum amount need be spent. No such limits are imposed or limiting language used in s. 173(2).

[59] Accordingly, under s. 173(2), the requirement is only whether the repairs and maintenance are "necessary" to ensure safety or prevent loss and damage.

[60] In any event, the respondent owners submit that the evidence and expert opinions of MH, the strata corporation's engineers, do not establish that the full remediation is necessary to ensure safety or prevent significant loss or damage *at this time*. They say that the engineering evidence and expert opinions demonstrate that the repairs can wait until at least 2017 and perhaps even beyond.

[61] In particular, the respondent owners point to the Envelope Review in April 2011, which included a statement (cited above) that remediation "should be considered within the next 5 years" (i.e., by 2016). MH's opinion was repeated in the Depreciation Report with a reference to it being "possible" that the system could last longer. In further support, they refer to a revised draft of a schedule to the Depreciation Report dated May 30, 2014 that refers to the un-remediated walls having an "estimated remaining life" of three years (i.e., to 2017).

[62] The respondent owners say that there is still approximately $40,000 on hand to complete spot repairs of the north and west wall from the amount previously authorized in 2013 ($100,000).

[63] In my view, Mr. Labas' first affidavit was quite unequivocal in stating that the system had failed and that water ingress was occurring. He did not wade into the more contentious issue as to when the remediation should occur, since he quite correctly considered this was a decision within the purview of the strata corporation. But he did not shy away from commenting on the ongoing problems that would be experienced by owners in the event of a delay in remediation. These problems included not only damage to the interior finishes, but also ongoing water issues such as condensation and mold as well as cost issues.

[64] In August 2014, Mr. Labas was cross examined on his first affidavit. I do not consider that he was shaken in his evidence which, in substance, is that while the remediation may be delayed, significant issues will have to be addressed in the meantime by those owners affected. Chris Raudoy, a principal at MH and a building science consultant, said as much in his report to the strata corporation on April 3, 2014.

[65] If there was any debate about the true import of Mr. Labas' evidence, his final evidence on the subject is contained in his second affidavit, which was sworn after his cross-examination. He concluded:

a) the cladding on the un-remediated elevations is past its useful service life;

b) in his opinion, maintaining the cladding is "becoming less effective" and the durability of the last repairs to the cladding lasted only three years (hence the updated estimate in the amendment to the Depreciation Report to 2017);

c) the strata should consider replacing the un-rehabilitated portion of the cladding "sooner rather than later"; and

d) MH does not support ongoing interim maintenance due to the lack of durability of such repairs.

[66] In my view, the strata corporation has taken reasonable and timely steps over the years, based on sound engineering advice, to address the water ingress problems in accordance with its statutory duty to repair. Those steps included: obtaining the BECA in 2007; repairing the south wall and the southeast quadrant of the east wall in 2008; obtaining the Envelope Review in 2011; obtaining the Depreciation Report in March 2013 which recommended the immediate remediation of the east wall; and, completing the remediation of the east wall in 2013.

[67] Further, I agree that the engineering evidence overwhelmingly also supports that remediation of the north and west walls is now necessary. This recommendation has been extant for over seven years now, since the BECA was received. The later reports from MH, whether the Envelope Review or the Depreciation Report as amended, all support this same conclusion.

[68] The respondent owners refer to the comments of the court in *Weir v. Strata Plan NW 17,* 2010 BCSC 784, where Mr. Justice Josephson addressed the duty of a strata corporation to repair and maintain common property:

> [23] There is little issue regarding the law. The respondent has a fundamental duty to repair and maintain its common property: s. *72* of the *Act; Royal Bank of Canada v. Holden* [(1996)], 7 R.P.R. (3d) 80, [1996] B.C.J. No. 2360 (S.C.). In performing that duty, the respondent must act reasonably in the circumstances: *Wright v. Strata Plan No. 205,* 20 B.C.L.R. (3d) 343, [1996] B.C.J. No. 381 (S.C.), aff'd (1998), 103 B.C.A.C. 249, 43 B.C.L.R. (3d) 1032. Furthermore, the starting point for the analysis should be deference to the decision made by the strata council as approved by the owners: *Browne v. Strata Plan 582,* 2007 BCSC 206.
>
> …
>
> [28] In resolving problems of this nature, there can be "good, better or best" solutions available. Choosing an approach to resolution involves consideration of the cost of each approach and its impact on the owners, of which there is no evidence before the court. Choosing a "good" solution rather than the "best" solution does not render that approach unreasonable such that judicial intervention is warranted.

[69] There is really no debate as to whether remediating the north and west walls is a “good, better or best” solution. Simply put, it needs to be done and it is necessary in the sense that this repair is the only effective way to stop the water ingress problems on those walls. Mr. Raudoy’s April 3, 2014 report confirmed:

> [T]he remaining original building envelope assemblies at Clarence House have surpassed their service life. The only way to effectively eliminate water ingress and moisture accumulation is to remediate the remainder of the building[.]

[70] This is not a matter of avoiding this cost altogether through patchwork repairs.

[71] As for the timing issue, I interpret MH’s opinions as supporting any decision of the strata corporation to proceed with the remediation now, although Mr. Labas notes that it is not his role as a consultant to advocate for or against any decision particularly as to when such repairs should be undertaken. However, after a full consideration of the matter, the strata corporation has concluded, I think reasonably, that the time to proceed is now.

(b) Is There Risk to Safety or Significant Physical Loss or Damage?

[72] The evidence is overwhelming that owners with north and west-facing walls are continuing to suffer with issues concerning water ingress, extensive condensation and mold due to the failure of the cladding and window systems. This

is so despite the odd repairs which have been done to these walls over the years. The issues have not abated in the least.

[73] It is undisputed that many owners have suffered damage to the interior of their units arising from these issues that were identified as early as the BECA in April 2007 and also the Envelope Review in April 2011. There are many stories told in the affidavits sworn both in support of and in opposition to this application. I will not recount them all in detail but I will review a few situations in order to illuminate the issues.

[74] Dr. McIntyre and his wife, Teresa Preston, live in unit 201. They have experienced, and continue to experience, water leaks and condensation. They have had water pouring down their windows and water puddling on the sills. The condensation is so bad at times that they cannot see out the windows. Ice forms on the inside of the windows in the winter. As a result, the windows sills have been damaged and their interior renovation, completed in 2008, has been compromised.

[75] Dr. McIntyre states that, in his view, the condition of the north and west walls is currently the same or worse than the south and east walls before they were remediated. This evidence is challenged somewhat by Mr. Labas in that he would not be recommending a "smoothing" of the timeline in terms of eventual remediation if the north and west walls were in the same condition as the south and east walls prior to their remediation. However, as Mr. Labas himself points out, MH has not conducted any physical inspection of the cladding for some years and it has no idea as to the level of water ingress at this time.

[76] Ms. Preston states that, to her knowledge, all units on the east wall were affected by water damage to some degree, although some were worse than others. In contrast, some respondent owners on the east wall (Charles Christie, Diane Brown and Glenda Robertson) say that they had not experienced any problems with water prior to the east wall remediation. This, however, did not prevent the east and south wall remediation from being done on a somewhat urgent basis in 2013 based on MH's recommendations.

[77] There is some evidence that various respondent owners on the north and west walls in "01" or "04" units (Jansje Shaw, Anne Bateman, Joanne Manley, Noel Robertson, Xiaoyu Wang and Elizabeth Widene) have not experienced any, or as much, condensation or leaking issues as other owners on those walls have experienced. I did not take the strata corporation's submissions to be that every unit was having such problems or, if so, that all were occurring to the same degree. Even so, this evidence does not detract from the severe impact that this issue is having on many owners on the north and west walls, all pointing to the need for remediation.

[78] Further, it is not uncharitable to describe the respondent owners' response to such issues (such as condensation, pooling of water and interior damage) as simply "just deal with it". The respondent owners point to Mr. Labas' comment that owners can take steps to reduce the amount of condensation on their single pane windows and also, they point to similar recommendations from the Home Owners Protection Office.

[79] Perhaps the most serious issue that has been raised is that of mold.

[80] Dr. McIntyre has had recurrent mold problems in his unit 201 since 2008 and he and Ms. Preston have attempted to deal with them as best they can.

[81] The Martins live in unit 501 which fronts the north and west walls. Like many of the Clarence House owners, Dorothy and Richard Martin are seniors, being 70 and 86 years old respectively. Mrs. Martin has a respiratory problem and Mr. Martin has chronic obstructive pulmonary disease. Like many owners, for the last 20 years since they bought their unit, they have struggled with condensation and water pooling off the windows. Towels are placed to catch the moisture freeze in the winter.

[82] At the February 2014 AGM, the matter of a potential mold problem in unit 501 was raised. As a result of concerns, Pacific Environmental Health and Safety ("Pacific") was hired to determine the potential presence of fungal contamination from water ingress in the Martin's unit. Pacific prepared a report dated February 18,

2014. Although there is some indication that the sample was somewhat overestimated, Pacific found sufficient spore clusters such that "many individuals with sensitivities will experience symptoms". Pacific recommended that the Martins consult a physician concerning occupancy of their unit until the mold was remediated.

[83] The medical evidence from Mrs. Martin's doctor was not particularly conclusive regarding the effect of the mold on her medical condition or health generally. This goes to the weight of her evidence: *Kayne* at paras. 149-152. However, with respect to Mr. Martin, Dr. Mark Sherman, after having reviewed Pacific's report, stated that, in his opinion:

> The indoor spore concentration of fungi such as cladosporium and aspergillus is significantly higher than normal and has a definite risk to the wellbeing and health of Mr. Martin, likely exacerbating his delicate cardiopulmonary health.

[84] Mr. and Mrs. Martin had to vacate their unit for approximately five weeks while the strata corporation arranged at its cost to scrape, clean and paint the window sills in the unit. However, the Martins were required to pay $5,000 to sterilize and remediate the master bedroom. They still deal with condensation issues to this day.

[85] The respondent owners attempt to minimize this issue by stating that only two units have been affected by mold and that it is "very easy to treat". The evidence suggests otherwise but, even if true, it is cold comfort to Dr. McIntyre, Ms. Preston and the Martins who are dealing with these issues on a regular basis and where mold issues are likely to affect their health. In Mr. Martin's case, it is beyond likely, given his doctor's note.

[86] The further response to the mold issue is that there is no evidence that Ms. Preston and Mrs. Martin's health has been affected by what the respondent owners describe as "small areas" of mold. They argue that, as stated in Pacific's report, condensation off the windows was suspected to be the likely source of moisture promoting mold growth in unit 501. All of this leads back to the respondent

owners' argument that the owners having problems should "just deal with it". To add insult to injury, Ms. Robertson, who is apparently warm, dry and mold-free in unit 1102, states that this can be done "at little or no cost to the home owner". I take that to mean that she is content for these owners to suffer the consequences (both health and cost wise), but she is not.

[87] Not all of the owners on the south and east walls are content to leave their neighbours in this state while they reap the benefits of the 2008 and 2013 east and south wall remediation.

[88] Russell Calnan is a co-owner of unit 403. He indicates that, prior to 2013, his unit experienced water leaks, condensation and mold. In cold weather, ice would form on the interior of his single pane windows. Since the remediation of the east wall, he and his partner have enjoyed the benefit of not dealing with these problems. Frances Tausig in unit 402 was in the same condition but is now free of water leaks and risks of mold. Both express the very neighbourly sentiment that they wish to have the entire building remediated so that the other owners can be rid of the same problems they dealt with for years.

[89] The issues of mold growth and damage to the interiors of the north and west facing walls in Clarence House are real. These are not trifling or unimportant issues.

[90] I find that there is ongoing physical loss or damage, and that there will be future physical loss or damage, to the common property of Clarence House and to the property of the owners on the north and west wall units, all arising from the failure to proceed with the proposed remediation. Despite the submissions of the respondent owners who attempt to minimize such damage, I find that it is significant. In addition, I find that the failure to proceed with the remediation has resulted in risks to the safety of the residents of Clarence House, particularly the elderly ones, as it relates to mold growth, such as is evident in the case of Mr. Martin.

[91] I conclude that it is necessary to complete the remediation of the north and west walls of Clarence House to ensure the safety of the residents and prevent such significant physical loss and damage.

(c) Is There Risk of "Other" Significant Loss or Damage?

[92] The *Act* does not define what types of "other" loss or damage might be considered by the court under s. 173(2). Certainly the reference must be to non-physical loss or damage and, in my view, this can be broadly defined.

[93] The strata corporation alleges that the "other" loss or damage relates to: firstly, the loss of value of the units; secondly, the potential waste of money spent on further "spot" repairs to the north and west wall pending a full remediation which is required but may or may not happen in the future; and thirdly, the likelihood of increased costs when the remediation does take place.

[94] The evidence supports that all of the units at Clarence House are significantly de-valued. Robert Starr is an experienced licensed realtor working in the Victoria area. His expert testimony was unchallenged, or at least unchallenged by any contrary expert evidence. Mr. Starr stated:

a) he looked at sales data in the last two years, which indicated that eight Clarence House units were put on the market during that period;

b) most of the eight units were taken off the market after an extended period of time, ranging from 70 days to 20 months;

c) despite the average selling price for condominium units in the James Bay area of 99% of their assessed BC Assessment value, a recent Clarence House sale was at 72% of assessed value; and

d) he has been attempting to sell a unit at Clarence House for all of 2013. The unit has not sold and Mr. Starr attributes this to the Depreciation Report and the building envelope issue which result in prospective purchasers "simply walk[ing] away."

[95] Mr. Starr's opinion is that, despite the appeal of the Clarence House units:

> The building envelope issues at Clarence House are, in my view, likely the most significant factor which has [led] to both the great difficulty in selling a unit and the significant devaluations of the units as demonstrated with relevant [Multiple Listing Service] data.

[96] Other anecdotal evidence is consistent with Mr. Starr's opinion. Mrs. Martin says that the BC Assessment value of her unit has, over the last three years, dropped from $422,000 to $389,000. Ms. Manley, in unit 904, says that the BC Assessment value of her unit has, over the last three years, dropped from $456,000 to $420,0000. Thomas Maxwell reports a loss in value over the four years since he purchased unit 801 from $450,000 to $310,000 (or $140,000).

[97] Firstly, the respondent owners submit that there is no evidence that the strata corporation is facing significant loss or damage, as opposed to the individual strata owners in respect of the value of their lots. This argument is easily disposed of. The decrease in value arises from the building envelope which is "common property". Every strata owner has an undivided interest in the common property as part of their unit entitlement: the *Act*, s. 66. The strata corporation does not own the common property, but only manages and maintains it: the *Act*, s. 3. Accordingly, any decrease in value in the common property is directly translated to a decrease in the value owned by that strata owner.

[98] I reject the respondent owners' submissions that s. 173(2) was intended to deal with significant loss or damage to the strata corporation and not to individual owners. As I have said, a strata corporation does not own the common property and may, but does not usually, own individual strata lots. To restrict the type of loss or damage to the type contended by the respondent owners is nonsensical.

[99] Secondly, the respondent owners submit that the expert opinion put forward by Mr. Starr is not compelling. I disagree. It is sufficiently detailed in respect of the market response to Clarence House and its water problems. No contrary expert evidence was presented nor was Mr. Starr cross-examined on his affidavit.

[100] Ms. Robertson filed an affidavit raising certain issues arising from Mr. Starr's evidence. As far as I am aware, she is not a licensed realtor who has the qualifications and expertise to address the valuation issues.

[101] Thirdly, the respondent owners submit that Mr. Starr's evidence as to the devaluation of individual strata lots as a result of the un-remediated north and west walls should not be taken into account by the court in the exercise of its discretion because the alleged losses are purely speculative and would only affect owners who want or have to sell between 2014 and when the strata corporation's north and west walls are remediated. However, Mr. Starr's evidence as to the loss of value is not speculative and it supports that this loss in value has already occurred.

[102] Further, the respondent owners' argument is extremely short-sighted. At this time, there is no clear path as to when the strata corporation might be able to obtain the special majority for such repairs, if ever. In the meantime, all the owners, no matter what walls their units face, will bear the consequences of this uncertainty. That will inevitably result in a unit remaining unsold or, if sold, discounted at a price to reflect the possibility of a special levy being imposed for these repairs. No owner would escape the financial consequences of this uncertainty beyond perhaps those who have no intention of leaving in the near term. The result would be to strip most owners of flexibility in the sale of their units.

[103] Another fundamental aspect of future loss or damage arises from the further "interim maintenance" that the respondent owners propose be paid to fix any problems on the north and west walls as they arise. The strata corporation's assertion, which is supported by the evidence of various owners, is that this is a waste of money for all owners. They say that this is simply, as the saying goes, paying good money after bad, in that these interim repairs are not durable and are not a long lasting-solution to the water ingress problems.

[104] John Roberts owns a caulking business and he provided services to Clarence House from time to time. Of late, he did so in the fall of 2013. He states that further

money for these types of repairs would not be money well spent since they would not solve the problems. He suggested a full remediation of the building.

[105] Mr. Robert's view is supported by the opinion of Mr. Labas. Mr. Labas states:

> At Clarence House, it is my opinion that sealant related maintenance is no longer able to effectively control or prevent water ingress. My opinion is based on lack of durability that any additional sealant applications would provide[.]
>
> …
>
> I have the same opinion regarding the window systems on the un-remediated walls at Clarence House.

He also states that delaying the remediation of the north and west walls will very likely add to the overall costs, due to the costs of interim measures and mobilization and de-mobilization costs which would be incurred for interim maintenance.

[106] Finally, Mr. Labas' major point, with which the petitioner strata council agrees, is that all this interim work will be for naught. Mr. Labas says that, even after all of this, the remediation will still be required "if the goal is to stop the ongoing condensation and water leak issues." In other words, the owners are only delaying the inevitable and, by doing so, exposing themselves to further costs beyond what would otherwise be the case if steps are taken now to fix the problems.

[107] I agree with the strata corporation's view that it is a waste of money to continue to pay for spot repairs that do not address the root causes of the harm experienced. This compelling argument is well-supported by the experts. The owners are already stretched in their resources, having paid for the previous assessments, and future expenditures must be with a view to getting full value for monies spent.

[108] On the third aspect of this loss and damage, Mr. Labas also states that, if the remediation is delayed, there is likely to be greater cost in completing the remediation, in that cost estimates inevitably rise with the passage of time.

[109] As with my previous conclusion, I agree with the strata corporation that it is necessary to complete the north and west wall remediation in order to prevent this other loss or damage, whether arising from the devaluation of the units, either specifically or generally, the loss that will occur in the event of needless repairs that do not solve the problem and finally, the escalation of costs in the future. Again, I also conclude that this potential loss and damage is significant.

(d) Other Considerations

[110] Even if the statutory test (necessary repairs to ensure safety or prevent significant loss or damage) is met, the court may consider other factors in deciding whether it will exercise its discretion in granting relief under s. 173(2).

[111] One of those considerations may be the financial ability of the owners to pay any special levy: *Oldaker* at para. 72. In *Weir*, the court in para. 28 referred to a strata corporation considering the "impact on the owners". Further, in *Weir*, the court stated:

> [29] In carrying out its duty, the respondent must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: *Sterloff v. Strata Corp. of Strata Plan No. VR 2613* [(1994), 38 R.P.R. (2d) 102], [1994] B.C.J. No. 445 and *Browne*.
>
> [Emphasis added].

[112] Many of the respondent owners state in their evidence that, having paid substantial special levies in the past, they have been financially drained. Some say that they would find it difficult, if not impossible, to pay a further $36,578 in 2015.

[113] They say that the remediation would be expensive in comparison to the other "good" option available which is far less costly. They point to the Depreciation Report which estimates the cost of sealing the north and west walls at approximately $110,000 over three years, at a cost per owner of less than $840 per annum.

[114] Finally, the respondent owners say that the Depreciation Report identifies that other expensive repairs, such as the roof membrane, elevator, heating and fire

suppression systems, may become necessary in the next few years. If those repairs are also necessary, it would add to their financial burden.

[115] It is a truism to say that any homeowner would care to avoid expensive repairs to the structure of his or her house, townhome or condominium. But the sad fact of life is that home ownership comes with a price, if that homeowner wishes the home to stay in the same relative state as when they purchased it. A homeowner who ignores necessary repairs usually does so at her peril and she will usually suffer the consequences at a later time. Clarence House is no exception, as its history makes clear.

[116] I acknowledge that the further special levy will be significant and difficult for some owners, including some of the respondent owners. However, this is but one factor in the overall consideration. Clearly there are owners here of differing financial means. Some may have the cash, some may have to borrow, some may have to liquidate capital assets or some may have to do a combination of these. If none of these are available, then the unit may have to be sold. It remains the case, however, that the matter must be looked at globally and no one owner's personal situation should dictate the result here.

[117] There is clearly a substantial majority of the owners who have recognized the need for the special levy and are prepared and able to respond to their financial obligations if the Resolution is passed.

[118] Finally, the respondent owners submit that the court should not intervene in this case because of the Depreciation Report. The Depreciation Report must be disclosed to a potential purchaser. As such, I agree with the respondent owners that the fairly newly mandated Depreciation Report represents a form of enhanced consumer protection which would provide a potential purchaser with some information regarding the state of the building and which major repair costs might be expected to be completed. Having reviewed this information, a purchaser should be in a position to make an informed decision as to whether or not to buy a strata unit.

[119] This interpretation is supported by the comments of Ministers Hansen and Coleman as found in *Hansard* from 2009.

[120] The respondent owners argue that the Depreciation Report was intended to prevent purchasers from being surprised by unexpected repair costs. They point to the evidence of the respondent, Ms. Wang, who purchased her unit in November 2013, after the Depreciation Report was obtained and after the repairs to the east wall had been authorized and substantially completed. The allegation is that she was "surprised" by the move to have the north and west walls and windows remediated, although I note that her affidavit does not say that. Nor does she comment on the price, likely discounted, that she paid to purchase the unit in light of the issues identified in the Depreciation Report.

[121] The respondent owners argue that, based on the Depreciation Report, Ms. Wang would have expected that the special levies for the repair or replacement of the north and west walls were at least four years away. However, this is a substantial overstatement of what is stated in that report. In particular, replacement of the cladding was recommended to be considered "within the next 5 years". Replacement of the cladding was "assumed" by Mr. Labas to be taking place in 2018.

[122] I conclude that Ms. Wang would have been well aware of the water ingress issues and the ongoing recommendations of MH to replace the cladding on the north and west wall. She would have had no reasonable expectation, based on the Depreciation Report, that replacement was needed no earlier than 2018.

[123] In my view, no consumer protection issues arise in this case.

(e) Final Observations

[124] The evidence establishes that Clarence House has been struggling with water ingress issues for decades. The engineering advice, as evidenced by the BECA from April 2007, identified the critical deficiencies on each of Clarence House's four wall elevations and it was recommended that total remediation be completed "in the

near future". During its later involvement in the remediation of Clarence House, MH has also consistently described the fundamental construction deficiencies and their effects.

[125] As I stated above, I have no hesitation in finding that the repairs to the building cladding are "necessary". Completing those repairs would be in accordance with the strata corporation's statutory duty to repair the common property in accordance with the *Act*.

[126] The various strata councils at Clarence House have attempted to address these water issues over the years in what can only be described as a very challenging environment. The challenge has arisen by reason of the clear conflict within the owner group as to what repairs should be effected and when. The strata councils have met that challenge reasonably over the years by doing what they can when authorized to act by way of special majority votes at various meetings. When the resolutions failed, they attempted to alleviate the issues where the special majority did not approve the proposal. It is apparent, however, from the circumstances relating to the remediation of the south and east wall in 2013 that the special majority vote was only obtained in light of what could be described as a "crisis" situation.

[127] The time has come to address the timeliness of further repairs to Clarence House as have been recommended for over seven years. While there is no particular "crisis" situation here, I consider that the substantial majority vote at the February 2014 AGM stands as a clear signal that most of the owners wish to embark upon these needed repairs in a more orderly fashion than what has occurred in the past.

[128] I have found above that, without the remediation to the north and west walls of Clarence House, there is a risk to an owner's safety and also a risk of significant loss or damage to the owners, whether that be physical or otherwise. The evidence establishes that many owners on the north and west walls have experienced and

continue to experience substantial issues that affect or damage their property and negatively impact their health and the enjoyment of their strata units generally.

[129] I have considered the voting history in this matter and, in particular, the votes that were taken at the February 2014 AGM. A substantial majority of the owners (63%) voted in favor of the remediation. As such, the strata council was 12% short of obtaining the special majority that it needed to proceed in accordance with the *Act.* This was, however, an increase in support from the earlier vote in 2013 where only 58% voted in favour of proceeding with the entire remediation, rather than just the east wall.

[130] The force of the vote must be reckoned with but it has been met by the compelling evidence presented here by the strata corporation. That vote cannot overwhelm the risks to safety and loss or damage as contemplated by s. 173(2) of the *Act*. Nor does it obviate a consideration of the other factors, such as general unfairness, which apply here.

[131] It is not entirely clear from the evidence who voted against the Resolution. There are no clear north/west and south/east owner voting blocs that apply here. Rather, the voting lines are blurred in that some north/west owners oppose the remediation for various reasons; conversely, some south/east owners support the remediation for various reasons. In the latter case, this "we are all in this together" view was best expressed by Ms. Tausig in unit 402 who stated:

> I hope that the owners on the west side of the building who are experiencing similar problems to those we used to have will soon be able to have their side of the building restored. While such repairs are expensive and disruptive, I believe they benefit the entire building in terms of comfort, health and marketability of units.

[132] The anti-remediation forces are, no doubt, of various stripes. Nevertheless, I am satisfied that the evidence shows that, generally speaking, these owners are quite prepared to prioritize their own pocketbooks while enjoying the comfort of their units, rather than relieve their neighbors from their soggy existence along the north and west walls.

[133] The anti-remediation forces appear to be well-entrenched as is evidenced by the fractious voting on this issue since 2008. Given the difficulty in selling units at Clarence House, I consider, as does the strata corporation, that there is a significant risk that these forces may continue to hold sway at the meetings in terms of voting against the remediation for many years to come. In the meantime, many owners of units on the north and west walls will suffer the consequences. Indeed, the conditions are likely to get worse over time.

[134] I agree that the court should not lightly interfere with strata corporation matters. The *Act* addresses the governance of a strata corporation and its operations and intervention by the court will be the exception rather than the rule. Disputes or disagreements amongst owners are not uncommon and the *Act* provides for the resolution of those disagreements and disputes, usually by the voting process at meetings.

[135] Section 173(2) is a new tool available to strata corporations to seek court intervention in appropriate circumstances. I would not, however, expect that court intervention would be appropriate simply because there is a dispute. Clearly, the test under s. 173(2) must be met before the court's discretion can be exercised. Importantly, there must be issues of safety or in the event of loss or damage, that loss or damage must be "significant". Further, the court's discretion is only to be exercised in appropriate circumstances and in accordance with the overall objectives in the *Act*.

[136] There is merit in the petitioner's argument that to delay the remediation is fundamentally unfair. Half of the owners in Clarence House live in relative comfort while the other half does not. The strata corporation argues:

> The majority of owners at Clarence House want to pay once, now, for the proper remediation of the remaining walls. They want to regain the value of their units now; and, they do not want to continue to pay for 'band-aid' repairs and then still have to pay [a] large special levy in the future that will, no doubt, cost more than the current estimate of the project costs for the remediation of the north/west walls. The majority of owners are entitled to enjoy the benefits of common property that has been maintained in accordance with the *Strata Property Act* to the benefit of all owners.

[137] The remedy under s. 173(2) of the *Act* was designed to address the very situation that is currently faced by the owners of Clarence House. A solid majority of the owners support the efforts of the strata corporation to comply with its statutory duty to repair. This duty remains despite the opposition of the anti-remediation forces: *Browne* at para. 28; *Kayne* at para. 190. Those efforts by the strata corporation have been undertaken with the issues of water ingress, safety and the prevention of significant loss or damage to the owners in mind.

[138] To allow a small minority of owners to thwart those efforts in these circumstances would be unfair to all owners, but, in particular, to those on the north and west walls of Clarence House who are continuing to suffer while others do not. In similar circumstances, the court did order the strata corporation to proceed with like repairs, although the court relied on other provisions of the *Act* in doing so: see *Tadeson* and *Browne*.

The Voting Issue

[139] In the alternative, the respondent owners argue that, if the requirements of s. 173(2) are met, the Resolution should be declared null and void because the strata corporation failed to properly administer a secret ballot when one was called for by the chair of the strata corporation at the February 2014 AGM.

[140] The respondent owners rely on *Imbeau v. Strata Plan NW971,* 2011 BCSC 801. In that case, the chair of a strata corporation had decided, in accordance with the bylaws, to hold a secret ballot. The vote was not conducted by secret ballot and the vote and passing of the resolution were declared by the court to be null and void.

[141] Mr. Christie's evidence is that Veysie Floyd, an owner, called for a show of hands vote, but the chair refused and ruled that a secret ballot should take place. Mr. Robertson in unit 1101 states that a secret ballot was called for, but he does not say who called for it, or what happened thereafter.

[142] There are difficulties with this evidence in that Mr. Christie's evidence as to Veysie Floyd's statements at the AGM is hearsay. Veysie Floyd did not provide any

evidence to the same effect. Nor did any other respondent owner, even Mr. Christie, indicate in their affidavits that they knew about the calling of a secret ballot and that they registered an objection when it did not occur.

[143] In any event, Mr. Maxwell was the president of the strata council until February 2014 and acted as chair of the February 19, 2014 AGM. His evidence completely contradicts that of Mr. Christie and Mr. Robertson. Mr. Maxwell states that all votes taken on important resolutions at a SGM or AGM were taken in the same manner, with ballots circulated, marked by the owners and then collected and counted by volunteers. Mr. Maxwell also states that at no time since he has been an owner at Clarence House (2010) had there ever been a request for a secret ballot. Nor had any owner ever objected to the balloting system during that time or, in particular, at the February 2014 AGM.

[144] Dr. McIntyre's evidence supports that of Mr. Maxwell in terms of the previous history of voting and what happened at the February 2014 AGM.

[145] The respondent owners argue that the vote was intended to be secret regardless of whether an owner requested a secret ballot or not. There is simply no evidence or even inference to support that statement. There was nothing to distinguish the manner of voting on the Resolution from the voting on the many other resolutions that had been proposed and, for the most part, defeated in years past, relating to the remediation of the building envelope.

[146] Further, despite suggestions to the contrary from Mr. Christie, it is quite clear that the owners fully understood the import of the Resolution on which they were voting. In many cases, they were aware of the actual wording of the Resolution.

[147] I find as a fact that Mr. Maxwell, as chair of the February 2014 AGM, did not call for a secret ballot on the Resolution. Accordingly, these circumstances are entirely distinguishable from those found in *Imbeau.*

[148] I conclude that no issues arise relating to voting on the Resolution. There is no basis upon which to declare the voting, and hence the Resolution, null and void.

Disposition

[149] The petition is granted and the Resolution is approved such that the strata corporation may proceed as if the Resolution was passed. Counsel agreed at the close of the hearing that, if the relief sought was granted, the approval of the Resolution should be subject to an amendment that will allow full payment by the owners of the special levy on or before March 2, 2015, rather than the installments previously proposed. That is so ordered.

[150] The parties agree that the issues considered on this application are novel. In addition, it is quite evident that all of the owners are involved in a close-knit community where they have shared interests, including important monetary ones. It is time for these owners to put their differences aside and put their collective shoulders to the wheel, at least financially, to resolve the water ingress problems of *all* the owners so that they might all benefit, whether directly or indirectly, in the future.

[151] In these circumstances, I make no award in respect of the costs of the petition at this time. If any party wishes to raise the matter, then written submissions should be delivered to the court within 30 days of receipt of these reasons.

"Fitzpatrick J."