IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VR 390 v. Harvey,* 2013 BCSC 2293

Date: 20131212
Docket: S126390
Registry: Vancouver

Between:

The Owners, Strata Plan VR 390

Petitioner

And

Wendy Joan Harvey and Douglas Michael Edgar

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 148 on December 16, 2013.

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Petitioner:	V. P. Franco
Counsel for the Respondents:	M. K. Woodall
Place and Date of Trial/Hearing:	Vancouver, B.C. July 22 - 26, 2013, July 29, 31, 2013 August 1 - 2, and September 4 and 16, 2013
Place and Date of Judgment:	Vancouver, B.C. December 12, 2013

INTRODUCTION

[1] The Petitioner ("SC") is a strata corporation established pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43, as amended ("*SPA*"). There are twelve units in the SC, and the units are in an 11-storey building, in Vancouver, B.C. The building is about 33 years old and is known as "Carlton Tower". The respondent Ms. Harvey is the registered owner of one of the units, and her common law husband is the respondent Mr. Edgar. Pursuant to s. 4 of the *SPA*, the powers and duties of the SC are exercised and performed by a council ("Council").

[2] Ms. Harvey's unit is a townhouse ("Townhouse") which occupies part of the first and second floors of Carlton Tower. I refer to Ms. Harvey and Mr. Edgar together as the "Townhouse Residents" or as "TR", although as set out below, they did not start living in the Townhouse until around June 1, 2013. Ms. Harvey has been registered owner of the Townhouse since September 2005, and the TR renovated the Townhouse over the following period of almost eight years.

[3] Unfortunately, there have already been a series of proceedings between the parties, and there are already orders relating to the ability of the TR to affect common property. One of the issues is whether the TR have breached those orders, or the SC Bylaws, or the *SPA*, or some combination of those things.

[4] The SC's position is that the TR have demonstrated an unwillingness or inability to honour the court orders, bylaws, and *SPA*, and that the only remedy which will be effective is the forced sale of the Townhouse and an order restricting the TR from occupying any part of Carlton Tower. The SC's application is for an order pursuant to s. 173 of the *SPA*, and the SC did not seek a remedy for contempt of court. Alternatively, the SC seeks a series of injunctions and other orders prohibiting the TR from altering common property and other property which is the responsibility of the SC to maintain.

[5] The Petition was heard before the Court of Appeal delivered its reasons for judgment in *The Owners Strata Plan LMS 2768 v. Jordison*, 2013 BCCA 484 ("*Jordison November 2013*"). At the hearing before me, the position of the TR was

that the court does not have the jurisdiction to make an order forcing them to sell their home; alternatively, that the court should not make such an order because of alleged bad faith by the SC both in dealings with the TR and in respect of allegedly untruthful and improper evidence presented to the court; in the further alternative, that the only misconduct of the TR is insufficient to require the making of such an order in the context of the SC's behaviour; and in the yet further alternative, that if the court were to order forced sale of the Townhouse, that the matter should be adjourned to permit the SC to restore a patio and to see if any further breaches occur.

[6] Because of the SC's allegations that the TR are unwilling or unable to comply with their duties, not only is the nature of any alleged breach relevant, but so too is some of the conduct and correspondence of the TR demonstrating their intentions. Because of the TR's allegations that the SC has acted in bad faith, some of the conduct and correspondence of the SC is relevant.

[7] The SC relies on a significant number of facts over a lengthy period, and takes the position that even minor breaches indicate the attitude of the TR and are relevant to the appropriate remedy.

[8] All of the alleged breaches relate in some way to the TR's renovations to the Townhouse. Those renovations lasted almost eight years over the period from late 2005 to May 2013. The SC's complaints relate primarily to common property adjacent to the Townhouse, including the areas I refer to as the North Deck (on the second floor and which includes the Solarium), the West Deck (also on the second floor), the Main Floor Patio, and the Main Floor Patio Garden.

[9] Although designated on the strata plan as common property, the North Deck and the West Deck are only accessible through the Townhouse or by ladder, and the Solarium portion of the North Deck is only accessible through the Townhouse. Although the Main Floor Patio and the Main Floor Patio Garden are designated on the strata plan as common property, they are in practice used exclusively by the TR.

[10] The SC relies in particular on seven alleged acts of misconduct over the period November 2010 to December 2012. In chronological order, rather than order of significance, they are as follows;

a) Reconnection of Bathroom Vent in November 2010;

b) Removal of Sealer from a Hole in a southeast wall of the Townhouse in June 2011;

c) Seamless integration of North Deck Solarium in January to September 2011,

d) Bamboo Trimming on the Main Floor Patio Garden in August 2011;

e) West Deck Drain work in April and June 2012;

f) Main Floor Patio Paving Stone Removal in April 2012; and

g) Townhouse and North Deck Heating Installation in December 2012.

[11] The SC's Petition proceeded to a hearing which occupied 10.5 hearing days. The first two days were occupied by the application of the TR for an order that significant portions of the affidavits tendered by the SC were inadmissible. The TR argued that the impugned passages were hearsay, argument, speculation, and irrelevant, and that some passages were wilfully prejudicial. The SC initially opposed this application, but during the SC's submissions, the SC agreed to argue the merits of the Petition based on versions of the SC's affidavits with many passages and exhibits deleted. However, the TR relied on some of the deleted passages in the SC's affidavits as demonstrating bad faith by the SC.

[12] The hearing day of September 4, 2013 was directed primarily to the admissibility of three affidavits sworn in August 2013 and tendered by the SC, although there was also some argument on the merits. The ruling admitting those three affidavits (with the exception of one sentence) was made on September 16, 2013, following which the TR filed a further affidavit, and the argument concluded.

[13] By the conclusion of the hearing, the evidence consisted of 27 affidavits. The longest was the first Affidavit of Dr. Wilson, which originally included 113 paragraphs of text and over 100 exhibits totalling almost 360 pages. The agreed deletions included significant deletions from that affidavit and other affidavits. Unfortunately, the affidavit evidence is detailed and confusing. Some passages in affidavits respond to portions of the evidence which were deleted by agreement. New allegations arose as the affidavits were exchanged. Several witnesses provided multiple affidavits, such as Mr. Edgar, who provided eight affidavits, and Dr. Wilson, who provided six. A number of issues initially raised by the SC in the affidavits were not pursued at the hearing of the petition.

ISSUES

[14] The issues are as follows:

a) Have the TR, or one of them, breached a court order, the *SPA*, the SC Bylaws, or some combination of those things, since the Preston Injunction Order was pronounced on March 10, 2010?

b) If so, what remedy is the SC entitled to, if any?

FACTS

[15] The facts are set out below under the following headings:

a) Building Configuration;

b) Maintenance Discussions and Envelope Repair Work;

c) June 2006 Initial Renovation Approval;

d) 2007 Lawsuit Between Parties;

e) 2008 Alteration Agreement;

f) Lawsuits and Court Orders in 2009;

g) Alleged Misconduct by Reconnection of Bathroom Vent in November 2010;

h) Alleged Misconduct by Removal of Sealer from a Hole in a Southeast Wall of the Townhouse in June 2011;

i) Alleged Misconduct by Seamless integration of North Deck Solarium in January to September 2011;

j) Alleged Misconduct by Bamboo Trimming on the Main Floor Patio Garden in August 2011;

k) Alleged Misconduct by West Deck Drain Work in April and June 2012;

l) Alleged Misconduct by Main Floor Patio Paving Stone Removal in April 2012;

m) Alleged Misconduct by North Deck and Townhouse Heating Installation in December 2012;

n) Fines; and

o) Effects of Forced Sale.

a) Building Configuration

[16] Ms. Harvey's Townhouse strata lot is about 1600 square feet in size, and is often referred to as "Unit 102" or "Strata Lot 13". The main floor of the Townhouse is about 900 square feet in size, and has common walls with the lobby and with unit 101 (which is strata lot 2). The second floor of the Townhouse is about 700 square feet in size and has common walls with unit 201. The other 11 units in the SC are about 1200 square feet in size and each occupies a single floor of the 11-storey building.

[17] No part of the Carlton Tower property has been designated limited common property. The configuration of common property surrounding the Townhouse is unusual.

[18] At Appendix A is a copy of the Ground Floor Plan dated June 4, 1984. The north and east wall of the first floor of the Townhouse is the wall which is adjacent to the unit 101 wall, and further portions of the Townhouse's east wall adjoin the lobby and include the Townhouse's front door.

[19] On the main floor, there is a patio to the north, west and south of the Townhouse ("Main Floor Patio"), and the Main Floor Patio is designated common property on the Strata Plan. The Main Floor Patio is approximately 1600 square feet in size and sits on top of the building's parkade. There is a door to the Main Floor Patio on both the north and south sides of the Townhouse, but there is no entrance from either the tower lobby or tower staircase. There is a gate on the east side of the Main Floor Patio which is presumably accessible from the common property garden area.

[20] There is landscaping to the north, west and south of the Main Floor Patio which I term the "Main Floor Patio Garden". The Main Floor Patio and the associated Garden are in practice used only by the TR and not other owners in Carlton Tower, but they remain common property and other owners may choose to enter. Mr. Edgar's evidence is that access to the Main Floor Patio and Main Floor Patio Garden is "limited to [the TR]" and that they are predominantly fenced and gated.

[21] Appendix B is a copy of the Second Floor Plan dated July 27, 1984. On the second floor, the east wall of the Townhouse is adjacent to unit 201 (which is strata lot 14, formerly 3). The common wall is beside unit 201's bathroom and hallway. The North Deck is to the north of the Townhouse, and the West Deck is to the north and west of the Townhouse. Without a ladder, the only access to the North Deck and the West Deck is through the Townhouse. The North Deck is above part of the first floor of the Townhouse, while the West Deck is above part of unit 101. Both roof decks

are designated as common property on the strata plan. The unit 301 deck is above the Townhouse roof.

[22] Ms. Harvey purchased the Townhouse in September 2005 for $610,000, with the intention of renovating it before occupying it together with Mr. Edgar as their principal residence. It was the TR's intention that the Townhouse would be the last property that they purchased. They planned to move in within about six months of purchase, although in fact it was closer to eight years before they moved in.

[23] The south edge of the North Deck is at the north edge of the Townhouse lot. In September 2005, at the time of Ms. Harvey's purchase of the Townhouse, there was a curb and sliding glass door and window at that border, although they had been removed by the time of the hearing, as discussed below. There was a structure built on the North Deck which has been referred to as a "solarium" and a "gazebo," and I will refer to it as the "Solarium". Both in September 2005 and at the time of the hearing, the Solarium consisted of a roof and a north wall and a west wall, connecting at the east to unit 201 and to the south to the Townhouse. As a result, most but not all of the North Deck was and is enclosed, and the part which was and is enclosed is the Solarium which is accessible only from the south border of the North Deck (being the north border of the Townhouse). At the time of Ms. Harvey's purchase of the Townhouse, the Solarium structure had not been approved by the City of Vancouver ("COV"), and was not in conformance with the applicable building code.

[24] The West Deck is not covered, and is separated from the Townhouse by a sliding glass door.

[25] At the time Ms. Harvey purchased the Townhouse, some of the Townhouse's plumbing was connected to unit 201's plumbing.

b) Maintenance Discussions and Envelope Repair Work

[26] Mr. Edgar deposed that when Ms. Harvey bought the Townhouse, the TR met with Dr. Slakov, who said he represented Council. Mr. Edgar deposed that Dr.

Slakov said that no one else used the Main Floor Patio, and the TR were responsible for its maintenance and upkeep, apparently including the maintenance and upkeep of the Main Floor Patio Garden. Mr. Edgar also deposed that Ms. Hyde, a member of Council, has told him that the Townhouse patio areas are "grandfathered", meaning TR residents have exclusive use of the patio areas and are responsible for maintenance. Mr. Edgar deposed that he is not aware of any other residents trying to make use of the Main Floor Patio.

[27] Sometime after September 2005, the SC discovered that apparently minor leakage required about $300,000 in building envelope rehabilitation to common property, including the exterior walls and windows of the Townhouse, the North Deck itself, the West Deck itself, and the sliding doors from the Townhouse to the North Deck and the West Deck. Most of the rehabilitation work affected only the Townhouse.

[28] The SC raised the funds for the building envelope rehabilitation by special levy and entered into a contract with Morrison Herschfield Managers Inc. ("MH") for the work.

c) June 2006 Initial Renovation Approval

[29] The TR sought approval from the SC for renovations. The SC (by its property manager, IJM Properties Ltd.) sent the TR a letter dated June 22, 2006 ("June 2006 Approval Letter"). The June 2006 Approval Letter includes the following:

> ... the [SC] has decided as follows:
>
> 2. Replacement of plumbing, including separating the plumbing for suites 101 and 201 has been approved.
>
> 3. Coring for new gas and domestic water services has been approved. Extra cores were approved on the patio for improved drainage.
>
> 4. [Ms. Harvey] may upgrade the exterior windows and doors in the [Townhouse] from the building standard at their cost.
>
> ...
>
> 6. At this time, the [SC] has not approved the lowering of the sill height on the sliding glass doors or the door from the dining room to the patio. There are implications for the heating system which are not acceptable to the [SC] and concern for water ingress should there be a significant snow buildup and

> melt. In order to consider this further, the [SC] would require that a mechanical engineer be retained to report on the effect on the heating system of the proposed changes. It was also noted that there have been considerable problems in the past with heating in [the Townhouse] and the changes that were made by the [SC] had improved the situation. [The SC is] therefore loathe to permit changes that might result in further problems with lack of sufficient heat in the suite.
>
> ...
>
> 8. The [Solarium] may be demolished and rebuilt at the cost of [Ms. Harvey] but only after approval of the plans by the [SC]. This will also likely require a change to the strata plan which will require the approval of the owners at a general meeting.
>
> 9. Remediation of the membrane of the [North Deck] will be at the cost of [Ms. Harvey], depending on the design of the new solarium.
>
> 10. Enclosure of the [West Deck] has been approved in principal. Plans must be submitted to the [SC] for approval prior to any work commencing. However all work related to the enclosure of the [West Deck] will be the responsibility of [Ms. Harvey]. Again, this enclosure has implications for the unit entitlement and may require a change to the strata plan which will require the approval of the owners at a general meeting.
>
> 11. All work to be carried out in [the Townhouse] must have a building permit in place prior to commencement of the work, if one would normally be required by the [COV].
>
> 12. All building plans and design changes to the common property must be approved by the [SC] prior to the commencement of work.
>
> We trust you will find the foregoing to be acceptable and look forward to receipt of plans for approval of the [SC] in due course. ...

[30] MH did some work on the decks in September 2006 but stopped to allow Ms. Harvey and the SC to resolve what upgrades might be included in the rehabilitation work at Ms. Harvey's expense. For example, Ms. Harvey wished to lower door sills from twelve to three inches to accommodate French doors. Ms. Harvey and the SC did not reach an agreement at that time.

[31] MH resumed major building envelope repair work on February 22, 2007.

d) 2007 Lawsuit Between Parties

[32] On February 23, 2007, Ms. Harvey commenced arbitration under the *SPA*, by giving the SC notice that she intended to submit to arbitration the dispute about the manner in which the remediation of the Townhouse was to proceed. Her particular

concern was determination of what work was to be done at her expense and what she must pay for it.

[33] Ms. Harvey commenced proceedings in this court and applied for an injunction restraining MH from continuing the rehabilitation work pending the result of the arbitration. The injunction application proceeded to hearing on March 5, 2007.

[34] E.R.A. Edwards J. dismissed Ms. Harvey's application for an injunction. The order ("E.R.A. Edwards 2007 Order") is explained in reasons for judgment dated March 8, 2007 in *Harvey v. Strata Plan VR 390*, indexed at 2007 BCSC 333. The reasons for judgment include the following:

> [14] The strata corporation is obliged to maintain and repair the common property for the benefit of all owners, even if that common property is exclusively or primarily used by only one owner. Here, all but a very small portion of the rehabilitation work directly affects only [the Townhouse]. That small portion of the rehabilitation work is repair of the exterior wall of adjoining unit 101, which is leaking.
>
> ...
>
> [16] If there were no rehabilitation work to be done the petitioner could not alter either her own strata lot or the common property except in accordance with the strata corporation Bylaws which provide:
>
> **Use of Property**
>
> COMMON AREAS
>
> 3 (3) An Owner shall not:
>
> ...
>
> (4) permit the exterior of the building to be altered by painting wood, ironwork, concrete or other parts exterior (sic) of the building at the strata lot.
>
> ...
>
> **Obtain approval before altering a strata lot**
>
> 5 (1) An owner must not do any act or permit any act to be done or alter or permit to be altered his strata a lot in any manner, which will alter the exterior appearance of the building comprising the strata lots;
>
> (2) An owner must obtain the written approval of the strata corporation before making an alteration or renovation to a strata lot that involves any of the following:
>
> (1) the structure of the building;

(2) chimneys, stairs, balconies or other things attached to the exterior of a building;

(3) doors, windows and skylights on the exterior of a building, or that front on the common property;

...

(6) those parts of the strata lot which the strata corporation must insure under section 149 of the Act.

(3) The strata corporation must not unreasonably withhold its approval under subsection (2), but may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration and to submit the design and specifications for such alterations or renovations to the strata council for approval.

(4) Any alteration or addition made by an owner without such approval may be restored or removed by the strata council or its duly authorized representative or representatives and any costs incurred by the Strata Corporation as a result thereof shall forthwith be paid by such owner to the Strata Corporation.

Obtain approval before altering common property

6 (1) An owner must obtain approval of the strata corporation before making an alteration to common property, including limited common property, or common assets.

(2) The Strata Corporation may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.

...

[34] As noted above, I am prepared to assume there is a dispute between the parties susceptible to arbitration under Division 4, for purposes of determining whether an injunction should be granted, which is equivalent to a "serious issue to be tried" between the parties.

[35] I must then consider whether [Ms. Harvey] will suffer irreparable harm if the injunction is not granted. Some cases indicate this consideration is subsumed into an assessment of the balance of convenience.

[36] I cannot conclude that failure to grant the injunction will result in irreparable harm to [Ms. Harvey]. Although it would no doubt be more practical and cost effective for the upgrades to be done in conjunction with the rehabilitation work, that is not to say they cannot be done with approval of the [SC] after the rehabilitation work is completed. [Ms. Harvey] may persuade the arbitrator that the [SC] unreasonably refused to approve the upgrades in a timely way and should therefore compensate [Ms. Harvey] for the additional expense of doing the upgrades after the rehabilitation work rather than doing both simultaneously.

> [37] The balance of convenience clearly favours the [SC] continuing with the rehabilitation work now underway, particularly since the costs of stopping the work now are unknown.
>
> [Underlining Added.]

e) 2008 Alteration Agreement

[35] The parties entered into a written agreement made effective June 13, 2008 ("2008 Alteration Agreement"). It refers to a number of changes that the TR would be making to the Townhouse, including installation of French doors with the TR paying the difference between what the SC would otherwise supply and the cost of such doors.

[36] It also includes these terms which relate to the present issues:

> 1. In this Agreement:
>
> ...
>
> (b) **Owners' Alterations** means those modifications to the common property in or immediately adjacent to the Townhouse to be done at the request of and full financial obligation of the [TR], and subject to approval by the [SC], and, in particular, are identified as:
>
> ...
>
> (i) the installation of a new heating system (the "Heating System") for the Townhouse; and
>
> (ii) any alterations including renovation or build-out to repair or enclose the Second Floor Decks [being the North Deck with the Solarium and the West Deck],
>
> (as particularized on Schedule "A");...
>
> (f) **Second Floor Decks** means the North and West deck common property to be designated as limited common property, subject to the approval of the owners at a general meeting, solely accessible from the 2nd floor of the Townhouse as shown on Schedule "B";
>
> ...
>
> 4. The [TR] acknowledge and agree that any change to the Heating System may result in reduced or excessive heat in the Townhouse.
>
> (i) The [TR] acknowledge and agree that [SC] approval of the Heating System is subject to [SC] acceptance of 1) a Townhouse specific engineering (sic) relating to a heating upgrade supply and installation plan, and 2) a professional engineer's certificate in respect of said plan which also specifically indicates that such engineering relating to a

heating upgrade supply and install plan will have no adverse effect on the high rise heating system; and

(ii) The [TR] acknowledge and agree that [SC] approval of any alterations including renovation or build out to repair or enclose the Second Floor Decks is subject to [SC] acceptance of 1) a Townhouse specific engineering supply and installation plan for build out of the Second Floor West and/or North deck(s), and 2) the proposed new build out to enclose the West and/or North deck(s) will also require approval by the [SC] by ¾ vote at a general meeting before the [TR] may proceed.

5. For greater certainty the alterations including renovation to otherwise repair and totally rebuild the North Deck/Solarium area, in its present configuration, does not require approval by the [SC] by ¾ vote at a general meeting before the [TR] may proceed, but does require approval by the [COV] evidenced by issuance to the [TR] a building permit in consideration of same.

...

10. The [TR] covenant and agree with the [SC] from the date of this Agreement:

(a) that prior to any application for building permits to the [COV], and prior to the commencement of the Owners' Alterations ..., the [TR] must submit to the [SC] detailed plans and specifications for the Owners' Alterations ..., satisfactory to the [SC] for approval by the [SC], acting reasonably, ...

Schedule A provides that the TR "wish to proceed with the supply and install of an upgraded heating system to the entire Townhouse", and that the TR "wish to improve and enclose the Second Floor Decks."

[37] In other words, the 2008 Alteration Agreement contemplated that the TR might change the heating system in the entire Townhouse, in which case the approval by the SC was subject to the SC accepting both a plan and an engineer's certificate as set out in item 4(i). The 2008 Alteration Agreement appeared to contemplate that all the work would be approved at once, and item 10(a) required SC approval prior to commencing Owners' Alterations, including installation of the Heating System.

[38] Further, the 2008 Alteration Agreement contemplated the possibility that the TR would do some or all of the following work on the decks: (a) enclose the West

Deck; (b) "build out" the North Deck; and (c) repair the North Deck. Because there was an existing Solarium on the North Deck, the reference to "build out" appears to be a reference to expanding the enclosed portion of the North Deck.

[39] With respect to enclosing the West Deck or building out the North Deck, the 2008 Alteration Agreement requires a) the SC to accept a plan and b) approval by a ¾ vote at a general meeting of the SC.

[40] With respect to simply repairing or rebuilding the North Deck in its existing configuration (that is, instead of expanding or "building out" the enclosed portion of the North Deck), the 2008 Alteration Agreement provides that the SC must accept the plan, but instead of a ¾ vote at a general meeting, the TR must provide a COV building permit.

f) Lawsuits and Court Orders in 2009

[41] On July 24, 2009, the SC commenced a proceeding against the TR in this court under Action No. S-095494 ("First SC Proceeding"). The SC sought orders to permit MH to complete certain work, including installing exterior windows and doors to the Townhouse.

[42] On July 24, 2009, Boyd J. made an order ("Boyd July 2009 Injunction") in the First SC Proceeding, without notice to the TR, which included the following terms:

> THIS COURT ORDERS THAT:
>
> 1. That, until the final disposition of this proceeding or further Order of this Court, each of the [TR], by themselves or by their respective agents, servants or employees, be restrained from demolishing, altering or removing any part of the common property of the [SC] or any part of a strata lot that the [SC] is required to repair and maintain pursuant to the [SC]'s bylaws;
>
> 2. That, if the [TR] or either of them demolishes, alters or removes any part of the common property of the [SC] or any part of a strata lot that the [SC] is required to repair and maintain pursuant to the [SC]'s bylaws any peace officer and member of the Vancouver Police Department is authorized to arrest and remove [Ms. Harvey or Mr. Edgar or both TR].
>
> 3. That, the [TR] or either of them, may apply to this Court to set aside or vary the Order sought upon giving 2 days' notice to the [SC]'s solicitors of their intention to do so...
>
> [Underlining Added.]

[43] There was a second order made in the First SC Proceeding on October 28, 2009 by Russell J. ("Russell October 2009 Injunction"). It was also made without notice to the TR. It included the following:

> THIS COURT ORDERS THAT:
>
> 1. That, until the final disposition of this proceeding or further Order of this Court, each of the [TR], by themselves or by their respective agents, servants or employees, be restrained from interfering with or impeding the [SC], and its agents from undertaking repairs to common property in order to stop the leakage of water into Strata Lot 2 [Unit 101] (the "Repair Work");
>
> 2. That, if the [TR] or either of them interferes with or impedes any part of the Repair Work, any peace officer and member of the Vancouver Police Department is authorized to arrest and remove [Ms. Harvey or Mr. Edgar or both TR];
>
> 3. That, the [TR] or either of them, may apply to this Court to set aside or vary the Order sought upon giving 2 days' notice to the [SC]'s solicitors of their intention to do so ...
>
> [Underlining Added.]

[44] The SC and the TR consented to a third order in the First SC Proceeding ("Consent December 2009 Access Order"). The Consent December 2009 Access Order is dated December 21, 2009, and includes the following:

> THIS COURT ORDERS THAT:
>
> 1. That the [TR] permit the [SC], on 48 hours' written notice by the [SC], which notice may be delivered via email to the [TR], provide access to [the Townhouse] to permit representatives of the [SC], its engineering consultant, [MH], and its contractors to complete the following work:
>
> (a) Installation of the exterior-facing windows of [the Townhouse]; and
>
> (b) Completion of the exterior wall (metal studs, insulation, densglass sheathing and stucco);
>
> (the "Work").
>
> 2. That, if the [TR] or either of them fail to comply with the aforementioned order, the representatives of the [SC], its engineering consultant and its contractors are entitled to enter the [Townhouse]:
>
> (a) by removing the temporary hoarding on the exterior of the [Townhouse]; or
>
> (b) with the assistance of a locksmith,
>
> provided that, during the time that the representatives of the [SC], its engineering consultant and its consultants are undertaking the Work, and at its completion, representatives of the [SC], its engineering consultant and its

> contractors secure the [Townhouse] and provides [Ms. Harvey] with any new key to the [Townhouse].
>
> [Underlining Added.]

[45] The SC made a further application in the SC First Proceeding, seeking an injunction restraining the TR from interfering with work on the common property. The application was heard on March 3, 4, and 5, 2010 by Preston J. The SC was represented by legal counsel, and Mr. Edgar appeared on behalf of himself and Ms. Harvey.

[46] Preston J. pronounced oral reasons for judgment on March 10, 2010 ("Preston Injunction Reasons") which are not indexed, and which include the following:

> [4] [Carlton Tower] was built approximately 30 years ago. It developed water ingress problems. The [SC] sought professional advice concerning remediation of the building envelope to deal with the problems. It eventually obtained an estimate of $257,000 for the work necessary. The project architect, Mr. Pierre Gallant deposes:
>
> > The Recommended Work should have taken approximately 3 months and $257,000 to complete. However, 3 ½ years later, the work is not complete and the [SC]'s costs have significantly increased, in large part due to the lack of cooperation and ongoing demands from the [TR], particularly Mr. Edgar. Construction and consultant's costs to date are now in the range of $330,000 and the Recommended Work (the scope of which is now expanded due to additional work done by Mr. Edgar) still has a further 3 - 4 months to complete.
>
> [5] Mr. Edgar is critical of the choice by the [SC] of a targeted repair approach, rather than a complete remediation. Mr. Gallant estimates that the full remediation would be approximately 20 times as expensive as the targeted repair decided upon by the [SC].
>
> [6] I am satisfied that most of the difficulty that has frustrated the [SC] in its attempts to bring the work to a timely conclusion has resulted from difficulties in dealing with the [TR]. They own a townhouse unit which is structurally part of the strata building. It is in a unique position among the strata units in the building in that it is particularly affected by the building envelope remediation.
>
> ...
>
> [14] It is an alleged breach of the [Consent December 2009 Access Order] that forms the subject of this application.
>
> [15] When the contractors who were to carry out the work at the [Townhouse] on February 1, 2010 [arrived], [Mr. Edgar] refused to grant them

unimpeded access to the [Townhouse]. He repeatedly said they could only do the work covered by the [Consent December 2009 Access Order]. I am satisfied that it was clear to the [SC] representative present that Mr. Edgar meant that work could only proceed in accordance with Mr. Edgar's interpretation of the [Consent December 2009 Access Order]. He made it abundantly clear during these proceedings that that was indeed what he meant. Mr. Edgar takes the position that the workmen were preparing to do work that he claims he has the exclusive right to do under an agreement and under the [Consent December 2009 Access Order]. The [Consent December 2009 Access Order] is silent on the point.

...

[18] Owners who feel that a strata corporation is not carrying out its obligations under the *Act* may apply to this court pursuant to s. 165.

[19] In this case, the [SC] has exclusive jurisdiction over work done on the common property. The whole history of these proceedings has been characterized by the [SC] ceding its exclusive right to portions of the work to the [TR] at [the TR]'s request. Contrary to Mr. Edgar's contention that he has made almost all the concessions, it is the [SC] that has done so. Mr. Edgar refers to the battle between him and the [SC] as a David and Goliath battle. Dealings with the [TR] have become increasingly difficult, and now the problems are intractable. I am satisfied that the reason for this is the manner in which the [TR], particularly Mr. Edgar, have dealt with the [SC]. The other residents in the strata have been put to monumental expense as a result of the actions of Mr. Edgar. He is unwilling to acknowledge that the process of dealing with common property repairs involves some give and take between the [SC] and the owner and that his interests are not the only ones to be considered. Mr. Edgar seeks agreements with the [SC] concerning the nature of the repairs to be made. He is energetic, and I am satisfied, relentless. If an agreement is not forthcoming, he implies agreement, often in the face of obvious documentation to the contrary.

...

[21] At the time that the [Consent December 2009 Access Order] was made, Mr. Edgar had the permission of the [SC] to do certain work with relation to some steel stud framing in the bedroom of [the Townhouse] The permission was revoked by letter dated January 14, 2010...

[22] Mr. Edgar had removed all of the steel studs in the common property wall without authorization. He was in the habit of doing unauthorized work to the common property, either claiming that he had authorization or that it was necessary and reasonable for him to do it.

[23] I have no difficulty concluding that Mr. Edgar breached the terms of the [Consent December 2009 Access Order].

[24] Any order to have a chance of success will have to enable the work to proceed without the necessity of cooperation by the [TR]. Accordingly, the [SC] is to have unfettered access to the [Townhouse] for the purpose of completing all of the repairs to the common property. ...

...

> [26] I have concluded that Mr. Edgar will continue to interfere and impede the remedial work if he has access to the [Townhouse] while the work is being done. He is to absent himself from the [Townhouse] until the work to be performed by the [SC] is complete.
>
> [Underlining Added.]

[47] The order made in the Preston Injunction Reasons was entered March 19, 2010 ("Preston Injunction Order"). It repeated the terms of the Consent December 2009 Access Order and added terms including the following:

> 3. If the [TR] or either of them
>
> (a) impedes or attempts to impede the representatives of the [SC], its engineering consultant or its contractors from entering the [Townhouse] as permitted by this Order, or
>
> (b) interferes, or attempts to interfere, with the Work, by directing or purporting to direct any of the [SC]'s consultants or contractors; and
>
> any peace officer and member of the Vancouver Police Department is authorized to arrest and remove the [TR or either of them].
>
> 4. The Respondent, Douglas Edgar, must absent himself from the [Townhouse] when the [SC]'s engineering consultants and/or contractors are undertaking the Work;
>
> 5. The Respondent, Douglas Edgar, is to arrange to have the two exterior doors delivered to the [Townhouse] and stored therein with [in] 48 hours of the pronouncement of this order;
>
> ...
>
> 7. [E]ither party may apply to the Court on an emergency basis upon two hours' notice to the other party or parties by e-mail to their e-mail address(es)[.]
>
> [Underlining Added.]

[48] The SC applied for special costs of the proceedings leading to the Preston Injunction Order, and that application was heard by Preston J. on April 9, 2010. Ms. Franco, counsel for the SC on the application before me, was also counsel for the SC in the special costs application. Mr. Woodall, counsel for the TR before me, was also counsel for the TR in the special costs application.

[49] Preston J. held that the SC was entitled to special costs. His reasons for judgment are dated May 20, 2010 and indexed as 2010 BCSC 715 ("Preston Costs Reasons"). The Preston Costs Reasons include the following:

[7] Edwards J. noted [in the reasons for judgment resulting in the E.R.A. Edwards Order] that all of the upgrades discussed between the [SC] and the [TR] involved common property, not their strata lot. He denied their application for an injunction.

[8] The [TR] [, after the E.R.A. Edwards Order was pronounced,] undertook significant unauthorized work on the common property of the [SC]. They removed brick pavers and concrete topping from the patio adjacent to [the Townhouse], altered landscaping on the common property, and removed Densglass panels and steel studs from the exterior wall of the [Townhouse].

[9] In February 2009, Mr. Edgar disrupted a water dam installed by the [SC]'s consultant to undertake water testing on a common property membrane. He expressed the view that there was no reason to maintain the dam.

[10] On July 24, 2009, the [SC] applied for an order enjoining the [TR] from undertaking any further work on the common property. Madam Justice Boyd ordered [in the Boyd July 2009 Injunction] that:

> ... until the final disposition of this proceeding or further Order of this Court, each of the [TR], by themselves or by their respective agents, servants or employees, be restrained from demolishing, altering or removing any part of the common property of the [SC] or any part of a strata lot that the [SC] is required to repair and maintain pursuant to the [SC]'s bylaws.

[11] Since that order, the [TR] have damaged the Densglass panels on the exterior of the [Townhouse]; removed the steel studs in the exterior wall of the downstairs bedroom of the [Townhouse]; torn holes in the waterproofing membrane on the south-west corner of the [Townhouse], and installed two pipes through the exterior walls of the [Townhouse].

[12] On October 26, 2009, one of the other owners of a strata unit notified the [SC] that there was a significant water leak into her unit. As a result of investigations made at the instance of the [SC], contractors attended at the building to repair the leak or leaks. Mr. Edgar pushed the ladder employed by one of the workers to gain entry to the common property deck. It fell, preventing the worker from gaining entry to the deck. The police were called. They declined to interfere. Mr. Edgar disputes that the worker was endangered.

[13] On October 28, 2009, Madam Justice Russell granted [the Russell October 2009 Injunction] restraining the [TR] from interfering with or impeding the repairs to the unit affected by the leaks.

[14] On December 18, 2009, the [TR] and representatives of the [SC] met to negotiate a consent order to permit the work to the building envelope to proceed. The meeting resulted in a consent order (the [Consent December 2009 Access Order]). At the time the [Consent December 2009 Access Order] was entered into, it is common ground that the [SC] had agreed to permit the [TR] to undertake, at their own expense, the replacement of some steel studs in the wall of one of the rooms in the [Townhouse].

[15] A further meeting between representatives of the [SC] and Mr. Edgar took place on January 8, 2010. At that meeting, the [SC] representatives

learned that the [TR] had removed all the steel studs in the exterior wall of their downstairs bedroom. At the meeting, Mr. Edgar indicated that he wanted to remove the concrete wall that the studs had rested on and that he would be claiming the cost of the curb work and steel stud work from the [SC].

[16] The [SC] revoked its permission for Mr. Edgar to do the steel stud work on the downstairs bedroom by letter dated January 14, 2010 which read in part as follows:

> Council will authorize your completion of the framing work except for the ground floor bedroom, which will be completed by the contractor for the [SC] and the cost charged to the owner of suite 102 [the Townhouse] due to previous unauthorized removal of the studs.

[17] Mr. Edgar refused to allow the [SC]'s contractor access to the [Townhouse] on the day agreed upon for the commencement of the work.

[18] On March 10, 2010, after a three-day hearing, I found that Mr. Edgar was in breach of the terms of the [Consent December 2009 Access Order], and ordered the work to proceed with the [SC]'s contractor replacing the steel studs in the exterior wall of the downstairs bedroom of the Townhouse.

[19] On this application, Mr. Edgar submits that he was justified in interfering with the work of the [SC] by making alterations to the common property because, in his opinion, the work being done by the [SC]'s contractor was defective. Additionally, he contends that the [SC] had no right to abrogate their contract with him concerning his workmen replacing the steel studs in the downstairs bedroom. He did not contend that he was not in breach of the Consent [December 2009 Access] Order, as that matter had been adjudicated on. However, he argued that, as a lay litigant, it was not so unreasonable for him to believe that the Consent [December 2009 Access] Order permitted him to have his workmen complete the stud work in the downstairs bedroom as to attract an award of special costs.

...

Discussion

[22] In this case, the proceeding before me sought only injunctive relief to enable the [SC] to proceed with necessary repairs to the condominium building. The dispute between the parties that gave rise to the [SC]'s application for injunctive relief had led to earlier proceeding before Edwards J. Those proceedings form a necessary background to these proceedings. It should have been clear to Ms. Harvey and Mr. Edgar that certain rules apply in the conduct of the affairs of a strata development that create a distinction between common property and the property of the owners of the individual strata units. Those rules are set out both in the Strata Corporation bylaws and in the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"). The framework provided by the *Act* and the bylaws provides mechanisms by which disagreements are to be resolved.

[23] Viewed in that context, the actions of the [TR] in wilfully altering the common property of the strata without the permission of, or notice to, the [SC] are a fundamental and flagrant breach of their obligations as owners. This behaviour continued after an injunction was obtained to restrain it. Mr.

> Edgar's actions in preventing [an SC] workman from accessing common property by pushing down his ladder required a further application and a further injunction. That did not end the pattern of conduct that he displayed throughout.
>
> [24] The effect of Mr. Edgar's campaign of guerrilla warfare against the [SC] has had profound effects on his fellow owners. Costs of the necessary repairs have escalated dramatically and the remediation has been delayed. On March 2, 2010, the project architect, Mr. Gallant deposed:
>
> > The Recommended Work should have taken approximately 3 months and $257,000 to complete. However, 3 1/2 years later, the work is not complete and the [SC]'s costs have significantly increased, in large part due to the lack of cooperation and ongoing demands from the [TR], particularly Mr. Edgar. Construction and consultant's costs to date are now in the range of $330,000 and the Recommended Work (the scope of which is now expanded due to additional work done by Mr. Edgar) still has a further 3-4 months to complete.
>
> [25] Mr. Edgar is the kind of neighbour for whom fences were developed. In the context of a strata development of the type that binds the other strata owners to Mr. Edgar and Ms. Harvey, traditional fences have been replaced by a carefully-developed set of rules embodied in the [SC] Bylaws and in the *Act*.
>
> [26] An ever-increasing portion of our urban population resides in strata developments. The conduct of the [TR] flouts the rules regulating civilized behaviour in the context of a strata environment. It is properly characterized as reprehensible conduct.
>
> [27] The [SC] is entitled to special costs of this proceeding.
>
> [Underlining Added.

[50] The SC and the TR agreed that the special costs were $70,000, and the TR paid the $70,000 to the SC.

g) Alleged Misconduct by Reconnection of Bathroom Vent in November 2010

[51] This complaint relates to a vent which runs between the Townhouse and unit 201. Unit 201 and some or all of the second floor of the Townhouse were once a single unit, but they had been separated into two units by 2005.

[52] In around November 2010, a plumber working for the SC was replacing the hot and cold water pipes in the Townhouse and found that the Townhouse's pipes were joined to unit 201's pipes. The plumber began isolating the water lines between

unit 201 and the Townhouse. While doing so, Mr. Edgar and the plumber discovered that the bathroom vent was joined between the two units as well.

[53] Mr. Edgar spoke to the SC plumber about isolating the bathroom vents. Mr. Edgar telephoned the SC's property manager, Mr. MacKay, and suggested removing the vent as part of the overall project of isolating all utilities. Mr. MacKay agreed that Mr. Edgar could remove it.

[54] MH then became involved, and initially devised a plan to redirect the venting, but later concluded that was not workable to do so. Mr. Mackay wrote the TR a letter dated November 2, 2010, which included the following:

> The strata council has reviewed your proposal for installation of bathroom venting ...
>
> ... the isolation of services included the main vent stack which was removed during the course of isolating the domestic water supply. The fact that the vent pipe now has to be reconnected to the vent in suite 201 is unfortunate and the strata corporation is prepared to have that work completed. ... the strata council has declined to carry out the replacement of the drains but is pleased to complete reconnection of the main vent stack.
>
> We have made arrangements with Spears to complete reconnection of the main vent to suite 201 on Tuesday, November 9, 2010 at approximately 12 noon. Will trust you will be available to provide access to suite 102, but if not, would you please propose another time on Tuesday or Thursday after 11:00 a.m.
>
> [Underlining Added.]

[55] The TR did not facilitate the work being done by the SC's contractor Spears. Instead, on or about November 23, 2010, Mr. Edgar directed his own plumber to complete the tie-in of the vent work. The vent was apparently reconnected and passed inspection.

h) Alleged Misconduct by Removal of Sealer from a Hole in a Southeast Wall of the Townhouse in June 2011

[56] In late June 2011, Mr. Edgar noticed a hole in an exterior-facing concrete wall in the south-east corner of uit 201. The hole appears on photographs to be about an inch in diameter. It had loose debris in it. Mr. Edgar pushed the debris out to see if

he could determine the reason for the hole and determine whether he could use it for a security system.

[57] The SC initially complained that Mr. Edgar drilled the hole, but after the exchange of affidavits, the SC modified its complaint to be only that Mr. Edgar removed the sealer from the hole.

i) Alleged Misconduct by Seamless integration of North Deck Solarium in January to September 2011

[58] As stated above, at the time that Ms. Harvey purchased the Townhouse, the Solarium existed on the North Deck. It had an external wall, sliding door, windows, and a new sill or curb to keep water out. It was fully incorporated into the living area of the Townhouse, and had electric heating, insulation, drywall, electrical lighting, electrical outlets, carpet, and carpet underlay. At the time that the TR saw it before the purchase, it was being used as a bedroom, and apparently had been used as interior living space for some time. However, it continued to be designated as common property on the strata plan, and there was a curb and sliding door along the border between the Townhouse and the North Deck.

[59] Despite the reference in the 2008 Alteration Agreement (in the definition of Second Floor Decks) that the North Deck and West Deck were "to be designated as limited common property, subject to the approval of the owners at a general meeting", and despite the fact that the decks are accessible only either by ladder or from the inside of the Townhouse, both the North Deck and the West Deck remain common property.

[60] At some point between Ms. Harvey's acquisition of the Townhouse in 2005 and the hearing of the petition, the TR removed the curb and sliding glass door which was on the south edge of the Solarium, at the border with the north edge of the Townhouse lot. At that time, that curb and sliding glass door were "internal" in the sense that the Solarium was enclosed, but "external" in the sense that they were at the border between the Townhouse and common property as shown on the strata plan.

[61] At some point, the TR did drywall, stud, installation, and drywall work in the Solarium.

[62] There is a dispute in the affidavits about what work was done to the Solarium and when. Ms. Franco, on behalf of the SC, urged me to accept Dr. Wilson's evidence and disregard Mr. Edgar's evidence, saying that Mr. Edgar's evidence was inconsistent with contemporaneous documentation. I am not able to make a finding on this point in the face of the conflicting evidence.

j) Alleged Misconduct by Bamboo Trimming on the Main Floor Patio Garden in August 2011

[63] The SC complains that the TR trimmed bamboo on the Main Floor Patio Garden in August 2011. Initially, the SC claimed that the TR had removed bamboo, but at the hearing, the SC accepted that the bamboo was simply trimmed.

[64] Mr. Edgar deposed that the bamboo plants were pruned, but that not a single stock was removed. He deposed that, due to years of neglect by the SC, the bamboo had become overgrown and unsightly, and the planting appeared to have been random and not planned. However, neither of the TR told the SC that they were concerned about the bamboo or asked the SC for permission to prune it prior to doing so.

[65] Mr. Edgar also deposed that he understood that it was the responsibility of the TR to maintain the Main Floor Patio Garden, because they were the only owners to benefit from it.

[66] Dr. Wilson, on behalf of the SC, essentially conceded that the SC has not been doing ongoing landscaping of the Main Floor Patio Garden. He gave a number of reasons, primarily relating to construction work either for the building envelope remediation or the Townhouse renovations, and to the cost of appropriate work.

[67] The SC fined Ms. Harvey $200 on October 4, 2011, regarding allegedly unauthorized removal of landscaping. Ms. Harvey has not paid the fine.

k) Alleged Misconduct by West Deck Drain work in April and June 2012

[68] The TR admit that they performed work on the West Deck. Mr. Woodall argued on behalf of the TR that the TR's West Deck work was justified, or at least their misconduct was mitigated, by the SC's slow response to Mr. Edgar's report of a leak.

[69] Mr. Edgar sent an email on March 9, 2012 to individuals including a member of Council which included the following:

> I will arrange for at least the West deck leak to be remediated should I not have a fast and easy plan by any of you "consultants and experts" [on] or before the close of business next Wednesday, March 15, 2012.
>
> Would I be working on common property? The answer is yes. However, in the absence of a clear and reasonable action plan - and given the cost of your delays to deal with this and other leaks - we are satisfied that we can mitigate our damages and a court of law will agree with our assessment and resultant actions.
>
> Actually, I would prefer to do this work as most of the MH and IJM work in the past has been either sub-standard, non-code, or deficient. I can not begin to tell you the evidence that supports my well-thought conclusions.
>
> [Underlining Added.]

[70] The SC responded with an email dated March 27, 2012, which set out two options, both of which included the SC's workers doing work, and stating that the SC could not authorize the TR to work on common property. The email included the following:

> The Strata Council can never authorize you or your contractors to work on common property.
>
> As per [the Boyd July 2009 Injunction] it states "the Respondents, by themselves or by their respective agents, servants or employees, be restrained from demolishing, altering or removing any part of the common property of the Strata Corporation or any part of a strata lot that the Strata Corporation is required to repair and maintain"[.]
>
> The Strata Council has been in touch with Tek and have been advised that a quote will be forwarded to us.
>
> The Strata Corp. will be responsible for repairing the leak in the membrane and repairing the drain pipe within Unit 102.
>
> We have been advised that the drain pipe was enclosed in the wall, not visible, was original construction and approved as such. Therefore the Strata has no responsibility for changing the location of the drain.

> You have acknowledged in your Dec. 23, 2011 email that this issue is part of "the owner's COV permit."
>
> The Strata Council proposes the following.
>
> The Council will obtain a quote for your requested work.
>
> Option 1. Move the drain as close as possible to the chimney. Tek or their contractors will be responsible for all the work. Their contractors will perform all the work. They will control and coordinate the coring and repair of the membrane. This will not compromise our warranty. We are advised a 2 1/2 or 3 1/2 inch wide core is possible. A scupper will also be required at the side. We will have a better idea of the scope of the work once the quote is received. Please notify the Strata Council the size of the coring you prefer.
>
> You may indicate your preferred location of the drain but it may vary according to the underlying structures within the deck.
>
> Once the quote has been received we will forward the pricing to you. If you still wish to proceed with moving the drain you will immediately give IJM Properties the required funds and the Strata Council will then proceed with your desired changes.
>
> The Council will contract the drain pipe changes within Unit 102 to Xpert plumbing who may have to view the area to be changed ahead of time. When access is required we will contact you.
>
> Option 2. If you decide not to move the drain or if the funds are not received by IJM Properties in the stated time, the Strata Council will authorize Tek to repair the leak in the membrane and Xpert [Plumbing] will correct the negative slope in the drain pipe and replace the defective clamp on the down pipe.
>
> Tek has advised us that they are prepared to complete this work very quickly.
>
> Mr. Edgar will absent himself from Unit 102 once access has been granted. Once the work has been completed, Mr. Edgar will be notified so he may secure the Unit. Mr. Edgar is forbidden by [the Preston Injunction Order] from "interfering or attempting to interfere, with the Work, by directing or purporting to direct any of the Strata Corporation's consultants or contractors"[.]
>
> [Underlining Added.]

[71] Instead of accepting one of the two options offered by the SC, Mr. Edgar arranged for his own workers to move the drain and do work on the West Deck. Mr. Edgar sent an email dated April 10, 2012, to the SC which includes the following:

> Further to your March 27 email and my April 1, 2012 reply attached, we now confirm that new work has been performed in the last few days regarding the joint West deck leaks and drainage initiative. We are now pleased to confirm that based on prior discussions and agreements - and with an eye toward economy and expeditiousness, new work and material procured includes:
>
> 1) the old, non-COV code, and poorly positioned drain assembly has been removed and its drain core has been filled;

2) the old, non-COV code drain plumbing tie-in to garage drainage has been removed; this drain is now out of service;

3) a new, COV code, and properly positioned drain core has been drilled;

4) a new, COV coded drain assembly and plumbing tie-in materials have been purchased;

5) and, due to necessity as well as convenience and economy, a new scupper has also been drilled (also in consideration of COV code as well as our engineering professional's suggestions.

This effectively completes all required concrete coring and procurement of drainage materials. At the request of the COV plumbing inspector, this activity will conveniently form part of the Owners' plumbing permit notwithstanding that this activity mostly takes into account COV plumbing drainage code contraventions that are the responsibility to the Strata Corp.

[Underlining Added.]

l) Alleged Misconduct by Main Floor Patio Paving Stone Removal in April 2012

[72] In or about April 2012, there were concrete paving stones ("Pavers") on the Main Floor Patio. They were laid on the ground, and were not adhered to it. They were about 18" by 18" by 1.5" in size, and Mr. Edgar estimated their cost at $3 to $6 per Paver.

[73] Mr. Edgar moved six of these Pavers without seeking or obtaining SC approval. He used them as ballast for a blue tarpaulin. He installed the tarpaulin with ropes, putting it up after a rainstorm when there were serious water leaks. The tarpaulin created a dry work space which was used by workers acting on behalf of both the TR and the SC.

[74] The removal of the Pavers exposed the underlying membrane protecting the parking garage and part of the Townhouse, making it more vulnerable to damage.

[75] The SC wrote the TR on April 20, 2012, claiming payment of a fine for moving the Pavers.

[76] Mr. Edgar removed the tarpaulins on July 24, 2013, during the period that the Petition was being heard. Dr. Wilson deposed that, after the tarpaulin was removed,

he observed a broken Paver and several paint-stained Pavers. Mr. Edgar deposed that he did not break the Paver or spill the paint on the Pavers.

[77] By the conclusion of the hearing, the SC had not yet replaced the Pavers.

m) Alleged Misconduct by North Deck and Townhouse Heating Installation in December 2012

[78] The SC's position is that the TR installed heating in the North Deck and Townhouse without the SC's approval. The TR's position is that the SC approved heating for the entire Townhouse and the Solarium.

[79] As stated above, the 2008 Alteration Agreement contemplated that the TR might change the heating system in the entire Townhouse, in which case the approval by the SC was subject to the SC accepting both a plan and an engineer's certificate as set out in item 4(i). The 2008 Alteration Agreement appeared to contemplate that all the work would be approved at once, and item 10(a) required SC approval prior to commencing Owners' Alterations, including installation of the Heating System.

[80] The TR provided the SC with both a plan and an engineer's certificate by sending them to the property manager on November 14, 2012. The SC requested further information, and received all of that by November 28, 2012.

[81] Mr. Edgar deposed as follows in para. 20 of his Affidavit No. 4:

> The [Council] has never identified to me any deficiency or shortcoming in the drawings and information they were provided by our engineer, or in the project described in those plans. In particular, the plans show radiant heating system being installed in the entire solarium, including the portion that used to be outside but is now inside. The [Council] has never said that the plan, or the project it describes, is not acceptable because it includes the entire solarium. As a result, the requirements of the [2008 Alteration Agreement] were met.
>
> [Underlining Added.]

[82] This paragraph indicates that Mr. Edgar has missed the point, either by mistake or by design, that the 2008 Alteration Agreement requires the TR not only to

send a plan and an engineer's certificate to the SC, but also to obtain the approval of the SC before proceeding. The requirements of the 2008 Alteration Agreement would not be met until the SC approved the plan and engineer's certificate as set out in 4(i) of the 2008 Alteration Agreement.

[83] There was correspondence between the Council and Mr. Edgar about what was required next. The Council took the position that the parties should enter into a new alteration agreement, which does not appear to have been necessary in light of the 2008 Alteration Agreement.

[84] Mr. Edgar deposed as follows at para. 22-24 in his Affidavit No. 4:

> ...On 30 November 2008 Mr. MacKay sent another e-mail, reiterating that approval had not been granted for the heating system. I found myself in a dilemma. I had a choice of either signing a new alteration agreement, which imposed liabilities in perpetuity even though that was not required by the [2008 Alteration Agreement]; or I risked being taken to court if I had the specialized construction crew begin the work when they were available without another alteration agreement.
>
> [23] On 2 December 2012 I wrote to the [Council] pointing out that we already had an alteration agreement, the [2008 Alteration Agreement]. ...
>
> [24] The [Council] did not reply to that letter until 11 December 2012 ... This was almost a month after our engineer originally sent his certificate to the [Council]. The [letter from the Council] acknowledged that the [2008 Alteration Agreement] was an alteration agreement, so the [Council] dropped that new demand. However, the [Council] still did not give approval for the installation of the heating system, despite the engineer's warning about the risk of losing our specialized construction team until the new year. Instead, the [Council] imposed yet another new condition, that we get a building permit for the work on the [Solarium] and the [North Deck]. The [Council] also threatened legal action ...

[85] Mr. Edgar did not have the approval of the Council for the heating installation. He should have delayed the work until he obtained approval from the Council pursuant to the 2008 Alteration Agreement.

[86] Mr. Woodall referred in argument to the Council not having the "courtesy to provide express authorization", saying that after the TR's engineer provided some clarification requested by the SC, "the [Council] did not ask any further questions or raise any objections on engineering grounds." Again, this misses the point. The TR

were not entitled to imply agreement by the SC. The TR were not entitled to assume that the absence of questions meant the presence of consent.

[87] Dr. Wilson's Affidavit No. 4 at para. 16, sets out that Council approved the installation of the heating system within the boundaries of the strata lot, but not on the North Deck.

[88] Mr. MacKay sent the TR a letter dated February 18, 2013, stating that the heating installation was made without prior approval, and inviting the TR to answer the complaint or request a hearing. The letter does not explain that Council approved the installation within the boundaries of the Strata lot.

n) Fines

[89] The SC fined Ms. Harvey on various dates for various acts of alleged misconduct. As at February 5, 2013, the SC claimed about $22,400 in unpaid fines from Ms. Harvey.

o) Effects of Forced Sale

[90] Mr. Edgar deposed that the Townhouse purchase price in 2005 was $610,000, and that the construction costs were over $250,000, for a total invested by one or both of the TR of about $860,000. Mr. Edgar estimated that the market value of the Townhouse in March 2013 was about $2.2 million. At that time the Townhouse had been vacant for about 7.5 years.

[91] Mr. Edgar deposed that a forced sale would trigger a capital gain. He estimated that the capital gain would be about $1.34 million, and would attract tax of about $335,000.

[92] Mr. Edgar deposed that in March 2013, the Townhouse was not in saleable condition, and that the SC had still not completed all the work on the exterior and interior that it is required to do.

ANALYSIS

a) Alleged Misconduct

[93] As stated above, the SC relies in particular on seven alleged acts of misconduct over the period November 2010 to December 2012. In chronological order, rather than order of significance, they are as follows;

a) Reconnection of Bathroom Vent in November 2010;

b) Removal of Sealer from a Hole in a southeast wall of the Townhouse in June 2011;

c) Seamless integration of North Deck Solarium in January to September 2011;

d) Bamboo Trimming on the Main Floor Patio Garden in August 2011;

e) West Deck Drain work in April and June 2012;

f) Main Floor Patio Paving Stone Removal in April 2012; and

g) Townhouse and North Deck Heating Installation in December 2012.

i) *SPA*

[94] Sections 1(1), 3, 26, 72, 129, 130, 133 and 173 of the *SPA* are as follows:

> **1** (1) In this Act:
>
> ...
>
> **"common property"** means
>
> (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
>
> (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
>
> (i) within a floor, wall or ceiling that forms a boundary
>
> (A) between a strata lot and another strata lot,

(B) between a strata lot and the common property, or

(C) between a strata lot or common property and another parcel of land, or

(ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;

...

"limited common property" means common property designated for the exclusive use of the owners of one or more strata lots;

...

Responsibilities of strata corporation

3 Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

...

Council exercises powers and performs duties of strata corporation

26 Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

...

Repair of property

72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

(2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of

(a) limited common property that the owner has a right to use, or

(b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

(3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.

...

Enforcement options

129 (1) To enforce a bylaw or rule the strata corporation may do one or more of the following:

(a) impose a fine under section 130;

(b) remedy a contravention under section 133;

(c) deny access to a recreational facility under section 134.

(2) Before enforcing a bylaw or rule the strata corporation may give a person a warning or may give the person time to comply with the bylaw or rule.

Fines

130 (1) The strata corporation may fine an owner if a bylaw or rule is contravened by

(a) the owner,

(b) a person who is visiting the owner or was admitted to the premises by the owner for social, business or family reasons or any other reason, or

(c) an occupant, if the strata lot is not rented by the owner to a tenant.

(2) The strata corporation may fine a tenant if a bylaw or rule is contravened by

(a) the tenant,

(b) a person who is visiting the tenant or was admitted to the premises by the tenant for social, business or family reasons or any other reason, or

(c) an occupant, if the strata lot is not sublet by the tenant to a subtenant.

...

Strata corporation may remedy a contravention

133 (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including

(a) doing work on or to a strata lot, the common property or common assets, and,

(b) removing objects from the common property or common assets.

(2) The strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under section 130.

...

Other court remedies

173 On application by the strata corporation, the Supreme Court may do one or more of the following:

(a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;

> (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules;
>
> (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

ii) Bylaws

[95] The SC's Bylaws include sections 5 and 6, quoted in the reasons for judgment of E.R.A. Edwards quoted in paragraph 34 above. Bylaws 7(1) and (2) and 8(1) are as follows:

> **Permit entry to a strata lot**
>
> 7 (1) An owner, tenant, occupant or visitor must allow a person authorized by the strata corporation to enter the strata lot
>
> (1) in an emergency, without notice, to ensure safety of prevent significant loss or damage, and
>
> (2) at a reasonable time, on 28 hours written notice,
>
> to inspect, repair or maintain common property, common assets and any portions of a strata lot that are the responsibility of the strata corporation to repair and maintain under these bylaws or insure under section 149 of the Act.
>
> (2) The notice referred to in subsection (1) (2) must include the date and approximate time of entry and reason for entry.
>
> ...
>
> 8 (1) The Strata Corporation must repair and maintain all of the following:
>
> (1) common assets of the strata corporation;
>
> (2) common property that has not been designed as limited common property; ...

iii) Order

[96] The First SC Proceeding has not been finally disposed of, and as a result, the Boyd July 2009 Injunction (set out in paragraph 42 above) remains in effect. The order provides that the TR are restrained from altering any part of the common property of the SC.

iv) Reconnection of Bathroom Vent in November 2010

[97] Mr. Edgar's reconnection of the bathroom vent in November 2010 was a breach of the Boyd July 2009 Injunction, because it was an alteration of a vent for the passage of gas, which vent was intended to be used in connection with the enjoyment of both the Townhouse and unit 201. It was therefore an alteration of common property, as defined in the *SPA* definition of common property s. 1(1)(b)(i).

[98] The SC's property manager authorized the disconnection of the bathroom vent, and advised the TR that the SC had made arrangements for the reconnection. Instead of cooperating with the SC's arrangements for the reconnection, the TR arranged for their own workers to reconnect it.

[99] Fortunately, the work appears to have been done adequately. However, the TR's performance of this work was in breach of a court order, and not authorized by the SC.

v) Removal of Sealer from a Hole in June 2011

[100] I do not accept that Mr. Edgar's removal of sealer from a hole in a southeast wall of the Townhouse in June 2011 was a breach of a court order, the *SPA*, or the SC Bylaws. The hole appears to be about one inch in diameter, and Mr. Edgar's evidence is that he "pushed out debris". The SC argued that there was sealer in addition to debris, but there was no evidence that sealer was in place at the time. Removal of the debris is too trivial to constitute a breach.

vi) Seamless Integration of North Deck Solarium

[101] I am unable to make a finding about the timing of the alteration to the North Deck Solarium in the face of the conflicting evidence, and as a result, cannot determine whether the TR breached their obligations by performing work in the Solarium.

vii) Bamboo Trimming in August 2011

[102] The TR argued that pruning bamboo was not an "alteration" of common property because it was not permanent. Mr. Woodall referred to *The Owners, Strata Plan LMS 4255 v. Newell*, 2012 BCSC 1542. In that case, an owner placed an air conditioning unit and a hot tub on a strata lot. The relevant bylaws prohibited making an alteration to common property without council's written permission. Adair J. concluded that the owner had not breached the bylaw, writing as follows at para. 90:

> [90] On the facts before me, I find that none of the hot tub and air conditioning units is an "alteration" to common property. None were designed to be permanent, and the fact that a crane was required to hoist the hot tub up to its current home is not determinative. I find there has been no breach of Bylaw 6(1).

[103] In this case, the bamboo plants themselves are common property. As a result, altering the plants is altering common property.

[104] Mr. Edgar's trimming of bamboo on the Main Floor Patio Garden in August 2011 was a breach of the Boyd July 2009 Injunction, because it was an alteration of the Main Floor Patio Garden, which is part of the common property of the SC. The TR ought to have complied with the court order strictly on its terms. Even if the SC told the TR in 2005 that they could maintain the Main Floor Patio Garden, the later Boyd July 2009 Injunction superseded any such arrangements.

[105] It would have been far better for Mr. Edgar to have sought permission from the SC to perform gardening work. It would have been far better if the SC had arranged gardening for the Main Floor Patio Garden. The bamboo has grown back and there is no lasting consequence of this misconduct.

viii) West Deck Drain Work in April and June 2012

[106] Mr. Edgar's drain work on the West Deck in April and June 2012 was a breach of the Boyd July 2009 Injunction, because it was an alteration of the West Deck, which is part of the common property of the SC.

[107] Mr. Woodall argued that this breach of a court order was justifiable, or at least its significance was mitigated, by the SC's slow response to Mr. Edgar's complaint of a leak.

[108] That is not an acceptable excuse. The TR should have obeyed the Boyd July 2009 Injunction. If the SC was too slow to respond to a complaint of a leak, the TR ought to have applied to vary the Boyd July 2009 Injunction, or taken other appropriate steps.

ix) Main Floor Patio Paving Stone Removal in April 2012

[109] As with pruning bamboo, Mr. Woodall argued that moving Pavers was not sufficiently permanent to constitute "altering" common property.

[110] The Pavers themselves are common property, and altering their placement is altering common property.

[111] Mr. Edgar's removal of six Pavers from the Main Floor Patio in April 2012 was a breach of the Boyd July 2009 Injunction, because it was either an alteration of the Main Floor Patio or a removal of part of it.

[112] It appears that the Pavers can be replaced simply and inexpensively. Mr. Edgar removed the Pavers in April 2012, and by the time of the hearing over a year later, the SC had not replaced them. There is no evidence of any impact on the membrane covering the building envelope or any other lasting impact.

x) Townhouse and North Deck Heating Installation in December 2012

[113] Mr. Edgar's installation of heating in December 2012 in the Townhouse was a breach of the 2008 Alteration Agreement. That agreement required the TR to do more than simply provide the SC with both a plan and an engineer's certificate as set out in item 4(i). That section also required the TR to obtain the acceptance of the SC of those items.

[114] Mr. Edgar suggested that the Council acted inappropriately in failing to provide a response to his heating installation plan before his workers arrived on December 3, 2012. Mr. Edgar did not provide the Council with all the material until November 28, 2012.

[115] In the circumstances that Council consists of a group of volunteers who typically meet monthly, Mr. Edgar's suggestion that Council should have provided approval in a week is simply unreasonable, and is not an acceptable excuse for failure to comply with the terms of the 2008 Alteration Agreement. Mr. Edgar ought to have waited until he had the necessary SC approval before arranging for the commencement of work.

[116] This breach of the 2008 Alteration Agreement, regarding the Townhouse but not the North Deck, was not a breach of the Boyd July 2009 Injunction, because it did not affect common property. In addition, Council approved the installation within the boundaries of the strata lot (but not on the North Deck).

[117] The TR's installation of heating on the North Deck was a breach of the 2008 Alteration Agreement for the same reasons as discussed regarding the Townhouse generally.

[118] In addition, because the North Deck is property designated as common property under the strata plan, the TR's installation of heating on the North Deck was alteration of SC common property, and therefore a breach of the Boyd July 2009 Injunction.

b) Remedy

[119] The SC's position is that the TR have demonstrated an unwillingness or inability to honour the court orders, bylaws, and *SPA*, and that the only remedy which will be effective is the forced sale of the Townhouse and an order restricting the TR from occupying any part of Carlton Tower. Alternatively, if the court does not order a forced sale of the Townhouse, the SC seeks a series of injunctions.

[120] The SC claims this remedy under s. 173 of the *SPA*. The SC chose to seek a remedy under the *SPA*, rather than seeking relief on the basis of contempt of court orders.

[121] As stated above, the Petition was heard before the Court of Appeal delivered its reasons for judgment in *Jordison November 2013*. At the hearing before me, the position of the TR was that the court does not have the jurisdiction to make an order forcing them to sell their home; alternatively, that the court should not make such an order because of alleged bad faith by the SC both in dealings with the TR and in respect of allegedly untruthful and improper evidence presented to the court; in the further alternative, that the only misconduct of the TR is insufficient to require the making of such an order in the context of the SC's behaviour; and in the yet further alternative, that if the court were to order forced sale of the Townhouse, that the matter should be adjourned to permit the SC to restore a patio and to see if any further breaches occur.

[122] It was unnecessary to invite the parties to make further submissions following the release of *Jordison November 2013* because of the thoroughness of the parties' submissions regarding the prior decisions involving the Jordisons.

i) Whether the court has the jurisdiction to order a forced sale

[123] In *Jordison November 2013*, the Court of Appeal upheld the order of Blair J. forcing an immediate sale of Ms. Jordison's condominium unit pursuant to s. 173(c) of the *SPA*.

[124] The Jordisons' improper conduct included using obscene language and making obscene gestures, interfering with the activities of others, spitting at other residents, and creating unacceptably loud and unnecessary noise in their unit. The Jordisons were held to have caused a nuisance or hazard to other people in their strata corporation, to have caused unreasonable noise, and to have unreasonably interfered with the rights of other residents to use their units and the common property. The Jordisons' actions were held to have constituted an assault on other residents who had been subject to the Jordisons' misbehaviour for years. The

Jordisons were held to have disobeyed the injunction intentionally, wilfully, and in a blameworthy fashion. The Jordisons' behaviour persisted despite a mandatory injunction requiring them to comply with the *SPA* and the strata corporations Bylaws and Rules.

[125] As set out above, section 173 of the *SPA* provides as follows:

> **Other court remedies**
>
> **173** On application by the strata corporation, the Supreme Court may do one or more of the following:
>
> (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;
>
> (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules;
>
> (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[126] In *Jordison November 2013*, Donald J.A., on behalf of the court, wrote as follows at paras. 21, 22, and 27:

> [21] From this analysis I derive two points: that an order under subsection (c) must be in aid of the subjects mentioned in (a) and (b) and it is appropriate for the court to exercise its injunction power to achieve that purpose.
>
> [22] What if an injunction is ignored, as in the present case? I think it must follow that the court can take the next step and enforce compliance with the order. If the objects of the injunction, having regard to the subject matter of s. 173(a) and (b) cannot be realized other than by a forced sale, then a court must be empowered by subsection (c) to take this final step. Otherwise, the enforcement process would be stymied.
>
> ...
>
> [27] It is apparent from the language of s. 173 that the Legislature intended by subsection (c) to empower the Supreme Court to make such orders as will be effective in accomplishing the objects mentioned in subsections (b) and (c). According to *Jiwan*, this includes injunctive orders. In an extreme case, which this is, where the subjects of the order have demonstrated an unwillingness to comply with an injunction, the court must have the ability to go to the terminal remedy of sale in order to fashion an effective remedy for the other strata owners. The appellants have repudiated the cooperative foundation of strata living and their intolerable behaviour has brought about the forced sale. There was ample evidence before the judge that only a sale would resolve the problem. In my opinion, he was correct in interpreting subsection (c) as authorizing such an order.

[Underlining Added.]

[127] In summary, s. 173(c) of the *SPA* gives the court the power to order the forced sale of a condominium unit in an extreme case, when the owner has breached an injunction and only a sale will resolve the problem.

ii) Whether the SC acted in bad faith

[128] Mr. Woodall argued on behalf of the TR that the SC acted in bad faith in several ways:

a) by complaining about the TR removing Pavers, but failing to take any steps to replace them in the period of over a year between April 2012 and August 30, 2013;

b) by failing to approve the TR's proposed new heating system;

c) by permitting a member of Council to meet with COV in an effort to undermine the TR's efforts to either rebuild the Solarium in its present configuration or expand it pursuant to the 2008 Alteration Agreement;

d) by levying fines for which there was no legal basis; and

e) by leading false evidence through Dr. Wilson's Affidavits.

[129] I deal with each of this assertions separately.

a) by complaining about the TR removing Pavers, but failing to take any steps to replace them for more than a year

[130] The SC did not replace the Pavers for over a year. However, the TR did not commence living in the Townhouse until about June 1, 2013, and the tarpaulin was not removed until July 24, 2013. While the SC could have replaced the Pavers earlier, their failure to do so does not constitute bad faith in this case.

b) by failing to approve the TR's proposed new heating system

[131] As discussed above, in the circumstances that the Council consists of a group of volunteers who typically meet monthly, and that Mr. Edgar did not provide all the material to Council until November 28, 2012, Mr. Edgar's suggestion that Council should have provided a response to his heating installation plan before Mr. Edgar's workers arrived on December 3, 2012, is unreasonable.

[132] Council did not provide the approval before the work was performed. Council approved the heating installation within the strata lot boundary, but the TR had already performed the work in the Townhouse and on the North Deck.

[133] The SC's request for another alteration agreement was likely the result of failing to review the 2008 Alteration Agreement. The SC did not persist in requiring an alteration agreement after Mr. Edgar reminded them of the existing 2008 Alteration Agreement.

[134] The Council did not act in bad faith by failing to approve the TR's proposed new heating system before the TR did the work.

c) by permitting a member of Council to meet with COV in an effort to undermine the TR's efforts to either rebuild the Solarium in its present configuration or expand it pursuant to the 2008 Alteration Agreement

[135] The evidence shows that Dr. Wilson met with a representative of the COV concerning the ambit of the building permit for renovations to the Townhouse. Representatives of the COV wrote some letters to the parties concerning the building permit, but the letters do not clarify the requirements for a building permit for work on the Solarium.

[136] While Dr. Wilson spoke to a representative of the COV, there is no basis for concluding that Dr. Wilson was wrongfully attempting to undermine the TR's efforts to rebuild or expand the Solarium pursuant to the 2008 Alteration Agreement. It is equally likely that Dr. Wilson was trying to ensure that there was proper compliance

with the COV requirements. The SC did not act in bad faith by permitting Dr. Wilson to speak to a representative of the COV.

d) by levying fines for which there was no legal basis

[137] As discussed above, I have concluded that some of the TR's conduct was in breach of the Boyd July 2009 Injunction, the *SPA*, and the Bylaws, but not all the conduct which was the subject of argument or fines.

[138] It is not necessary to review all the fines levied by the SC. There is no evidence that the SC levied the fines for any improper purpose. The SC did not act in bad faith by levying fines.

e) by leading false and wilfully prejudicial evidence through Dr. Wilson's Affidavits

[139] There are several places in Dr. Wilson's original affidavit where he made statements of fact about things that he did not personally observe. For example, he stated that Mr. Edgar caused flooding by leaving a hose running on a balcony, but Dr. Wilson did not see that occur. A witness should not state a fact in an affidavit unless that witness has personal knowledge of the fact.

[140] What Dr. Wilson stated appears to be what he believed to be true on the basis of inferences he drew from what others told him. This created problems. Ultimately, it turned out that no one saw Mr. Edgar leave a hose running on a balcony or cause flooding. Dr. Wilson's evidence ought to have been limited to admissible evidence, being essentially relevant evidence about what Dr. Wilson saw, heard, and did.

[141] In this case, Dr. Wilson provided later affidavits which set out what he was told by others, which had led him to draw the erroneous inferences. Dr. Wilson should have provided evidence in that form initially. His failure to do so resulted in more affidavits being exchanged than should have been necessary. This increased the time required for the court and the parties to deal with this case.

[142] However, there is no evidence suggesting that Dr. Wilson intentionally provided the court with misleading evidence. It is more likely that his affidavits included inadmissible evidence through ignorance of the law relating to admissible evidence. I decline to conclude that Dr. Wilson or the SC acted in bad faith by filing Dr. Wilson's affidavits in their original form including extensive inadmissible passages.

f) Summary concerning alleged bad faith by the SC

[143] In summary, the SC has not acted in bad faith. As a result, it is not necessary for me to resolve the interesting question of whether the court has the discretion to deny an order for forced sale under s. 173(c) of the *SPA* if a strata corporation has acted in bad faith.

iii) Whether the misconduct of the TR is sufficient to require a forced sale

[144] The TR have breached the July 2009 Boyd Injunction in several ways. As stated in the Preston Injunction Reasons at para. 19, "Mr. Edgar is ...relentless... [I]f an agreement is not forthcoming, he implies agreement, often in the face of obvious documentation to the contrary."

[145] The most serious breaches were the West Deck drain work in April and June 2012, and the North Deck heating installation in December 2012. The other proven breaches were the reconnection of the bathroom vent in November 2012, the bamboo trimming in August 2011, and the Main Floor Patio paving stone removal in April 2012.

[146] Most citizens would honour the SC Bylaws without the need for a court order. Most citizens would honour a court order, particularly after paying $70,000 in special costs relating to the order. These factors suggest that a strong remedy is necessary.

[147] The question for the court, as discussed above regarding *Jordison November 2013*, is whether only a forced sale will be effective in ensuring that the TR stop contravening the *SPA* and the SC Bylaws.

[148] The TR's breaches all relate to the TR's renovations, which appear now to be substantially completed. The SC has a legitimate interest in any work on common property, because the SC is responsible under s. 72 of the *SPA* to repair and maintain the common property. Most of the breaches relate to work on property which is designated as common property on the strata plan, and therefore property for which the SC has responsibility. This is the case even though most of the breaches relate to common property which in fact is used essentially by the TR (being the North Deck and Solarium, the West Deck, the Main Floor Patio, and the Main Floor Patio Garden). It was not clear why those areas remain common property, rather than becoming limited common property as contemplated in the 2008 Alteration Agreement for the North Deck and West Deck.

[149] The evidence did not establish that the SC suffered damages arising from any of the TR's breaches of the Boyd July 2009 Injunction since the Preston Injunction Order. It is possible that problems will appear later, since that is the nature of construction issues. The members of Council have also been put to far greater trouble dealing with the TR over their renovations than would have been the case if the TR had honoured their obligations.

[150] Is it appropriate in this case to force the TR to sell the Townhouse? Doing so may trigger a significant tax obligation in the amount of about $350,000. It will also deprive the TR of their home, which they renovated for almost eight years at a cost exceeding $250,000, and which they intended would be the last home they purchased.

[151] The SC chose not to pursue contempt proceedings. Had they done so, the court might have ordered that the TR pay a fine or serve a period of imprisonment for breach of the Boyd July 2009 Injunction. The fine might have been significant, in light of the extended period during which the TR have defied the Boyd July 2009 Injunction, the *SPA*, and the Bylaws, and in light of the TR's persistence despite paying $70,000 in special costs. An order made in contempt proceedings might have had the effect of persuading the TR to comply with the Boyd July 2009 Injunction.

[152] An order for forced sale of one's home is a severe and extreme remedy. The TR's wrongful conduct has been continuing and in knowing disregard of the court orders. For example, Mr. Edgar's email of March 10, 2012, threatening to do work on the West Deck acknowledges that it would be work on common property.

[153] It is apparent that the relationship between Mr. Edgar and members of Council is characterised by hostility. Some of this appears to be the reasonable reaction of Council members to Mr. Edgar's continued disregard for the court order, the *SPA*, and the bylaws, compounded by his voluminous and often sarcastic email communications.

[154] However, all the misconduct related to renovation work in the Townhouse which has been completed, with the possible exception of the bamboo trimming. The opportunity for friction between the SC and the TR is now significantly diminished. The Townhouse is a separate unit, although it is connected to common property. There is no evidence of the TR engaging in ongoing intolerable behaviour like creating unacceptable loud and unnecessary noise as in *Jordison November 2013*. The need for future interaction between the TR and Council should be limited to items such as maintenance and repair.

[155] I am not prepared to make an order for forced sale of the Townhouse at the present time. The court should first have the opportunity to punish the TR for contempt. If the TR persist in breaching any court order following such punishment, it may be appropriate for the court to order the forced sale of the Townhouse.

[156] The existing Boyd July 2009 Injunction has continued in effect. It refers to continuing until final disposition of the First SC Proceeding or further order of the court, while it appears that the First SC Proceeding will not be proceeding to final disposition. It is appropriate to replace the Boyd July 2009 Injunction with an order in this proceeding.

[157] The SC is entitled to the declarations it seeks regarding the breaches of the Bylaws and the Boyd July 2009 Injunction. It is also appropriate to replace the

existing orders from 2009 with a single order now. It is appropriate to make orders in an effort to ensure that the TR complies with the Bylaws.

[158] The terms of the Boyd July 2009 Injunction requires variance to provide that there will be a permanent order rather than an interlocutory order. Modest changes in drafting will clarify that the order affects any property designated on the strata plan as common property, which includes limited common property as defined in the *SPA*. If property is later designated as limited common property, and the parties wish to permit the TR to alter it, the parties can enter into a written agreement about that. It is also appropriate to modify the terms to a permit the parties to make written agreements enabling cooperation over other matters, such as work on the North and West Decks and gardening on the Main Floor Patio Garden, even if the relevant areas are not designated as limited common property.

[159] The terms of the Russell October 2009 Injunction and the Consent December 2009 Access Order and the Preston Injunction Order may not be required any longer, but if they continue, they too should be phrased in terms of permanent orders. There should be a further order permitting the SC to obtain entry to the Townhouse pursuant to the terms of Bylaw 7, in light of the TR's conduct.

[160] One issue which should be resolved between the parties out of court if possible is how to deal with gardening in the Main Floor Patio Garden. I suggest that the parties consider entering into a written agreement concerning who will be responsible for watering, weeding, removal of unwanted plants, and installation of new plants and who will bear the related expense. Without such an agreement, the TR are restrained from doing those acts so long as the Main Floor Patio Garden remains common property, because they would constitute altering the common property.

ORDERS MADE

[161] The SC is entitled to a declaration that the TR have breached the July 2009 Boyd Injunction as summarized in paragraph 145 above. Unless the parties agree to changes or wish to make submissions about the form of order, the additional orders

are as follows, with the SC to have the right to vary items 2 and 3 by deleting the passages commencing with the words "and replaced by the following" if they are no longer required:

> 1. The Order of Madam Justice Boyd in the proceeding between the Owners, Strata Plan VR 390 v. Harvey and Edgar, S-095494, Vancouver Registry ("First SC Proceeding"), pronounced and entered on July 24, 2009, is set aside and replaced by the following:
>
> > a) The [TR], acting either personally or through agents, servants or employees and acting either singly or together, are restrained from demolishing, altering or removing any part of the property designated as common property on the strata plan of the [SC] or any part of a strata lot that the [SC] is required to repair and maintain pursuant to the [SC]'s bylaws, unless acting pursuant to the written permission of the Council for the SC, signed by at least two members of the Council;
> >
> > b) If the [TR] or either of them, acting either personally or through agents, servants or employees and acting either singly or together, demolishes, alters or removes any part of the property designated as common property on the strata plan of the [SC] or any part of a strata lot that the [SC] is required to repair and maintain pursuant to the [SC]'s bylaws without the written permission of the Council for the SC referred to above, any peace officer and member of the Vancouver Police Department is authorized to arrest and remove [Ms. Harvey or Mr. Edgar or both TR];
>
> 2. The Order of Madam Justice Russell in the First SC Proceeding, pronounced and entered on October 28, 2009, is set aside and replaced by the following:
>
> > a) The [TR], acting either personally or through agents, servants or employees and acting either singly or together, are restrained from interfering with or impeding the [SC] and its agents from undertaking repairs to common property in order to stop the leakage of water into Strata Lot 2 [Unit 101] (the "Repair Work");
> >
> > b) If the [TR] or either of them, acting either personally or through agents, servants or employees and acting either singly or together, interferes with or impedes any part of the Repair Work, any peace officer and member of the Vancouver Police Department is authorized to arrest and remove [Ms. Harvey or Mr. Edgar or both TR];
>
> 3. The consent order in the First SC Proceeding dated December 21, 2009, and the Order of Mr. Justice Preston pronounced March 10, 2010, and entered March 19, 2010, in the First SC Proceeding, are set aside and replaced by the following:
>
> > a) The [TR] must permit the [SC], on 48 hours' written notice by the [SC], which notice may be delivered via email to the [TR], provide access to [the Townhouse] to permit representatives of the [SC], its engineering consultant, [MH], and its contractors to complete the following work:

(i) installation of the exterior-facing windows of [the Townhouse]; and

(ii) completion of the exterior wall (insulation, densglass sheathing and stucco); (the "Work").

b) If the [TR] or either of them fail to comply with the aforementioned order, the representatives of the [SC], its engineering consultant and its contractors are entitled to enter the [Townhouse]:

(i) by removing the temporary hoarding on the exterior of the [Townhouse]; or

(ii) with the assistance of a locksmith,

provided that, during the time that the representatives of the [SC], its engineering consultant and its consultants are undertaking the Work, and at its completion, representatives of the [SC], its engineering consultant and its contractors secure the [Townhouse] and provide [Ms. Harvey] with any new key to the [Townhouse].

c) If the [TR] or either of them, acting either personally or through agents, servants or employees and acting either singly or together,

i) impedes or attempts to impede the representatives of the SC, its engineering consultant or its contractors from entering the [Townhouse] as permitted by this order, or

ii) interferes, or attempts to interfere, with the Work, by directing or purporting to direct any of the [SC]'s consultants or contractors;

any peace officer and member of the Vancouver Police Department is authorized to arrest and remove [Ms. Harvey or Mr. Edgar or both TR];

d) The Respondent, Douglas Edgar, must absent himself from the [Townhouse] and all property designated as common property on the strata plan when the SC's engineering consultants and/or contractors are undertaking the Work;

4. a)The [TR] must permit any person authorized by the [SC], at a reasonable time, on 48 hours' written notice by the [SC], which notice may be delivered via email to the [TR], to have access to [the Townhouse] to inspect, repair or maintain common property, common assets and any portions of a strata lot that are the responsibility of the SC to repair and maintain under its Bylaws or insure under section 149 of the *SPA*, so long as the notice includes the date and approximate time of entry and reason for entry;

b)The [TR] must permit the [SC], together with anyone authorized by the SC, in an emergency, without notice, with access to [the Townhouse] to inspect, repair or maintain common property, common assets and any portions of a strata lot that are the responsibility of the SC to repair and maintain under its Bylaws or insure under section 149 of the *SPA*;

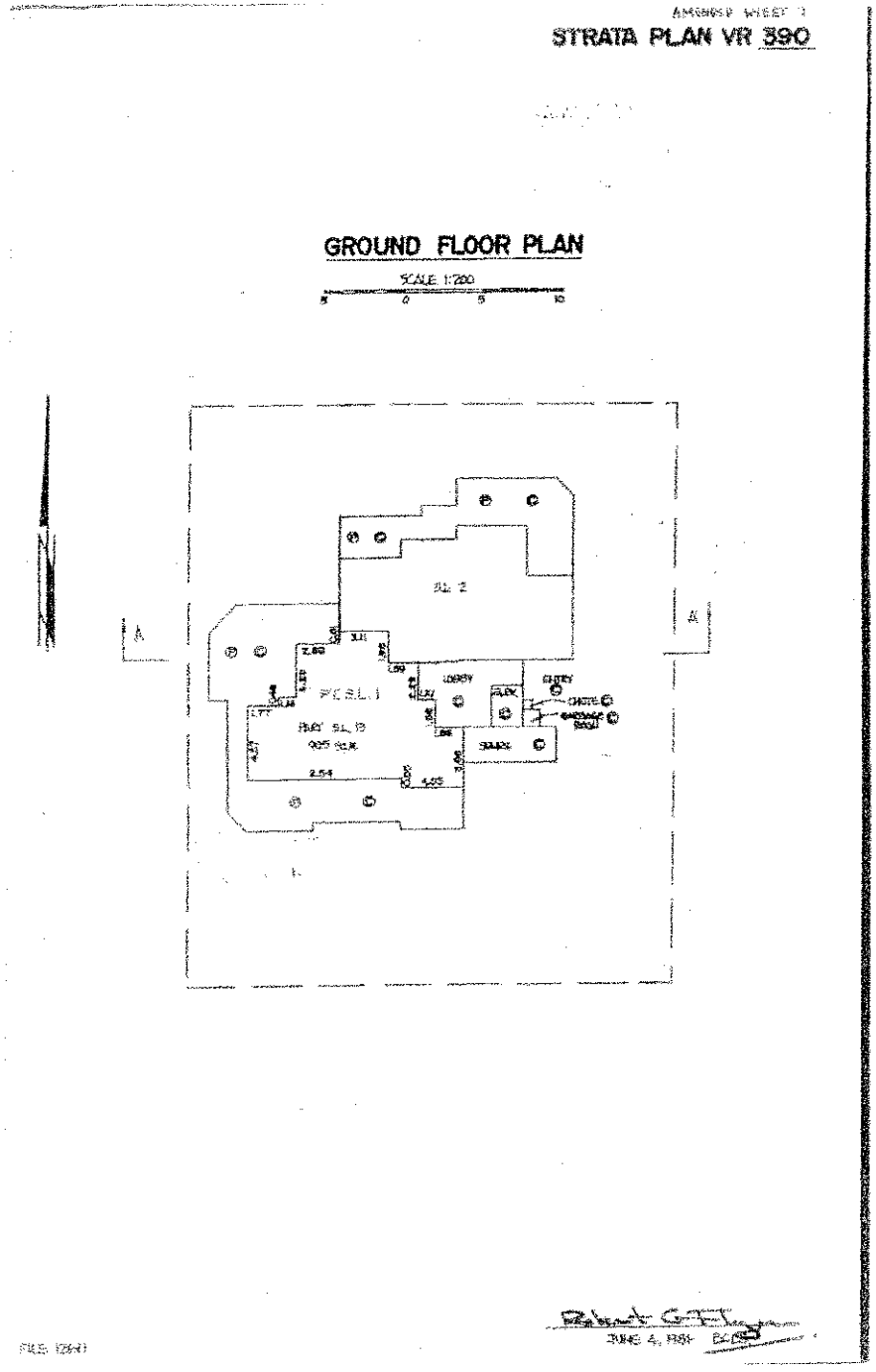
c) If the [TR] or either of them fail to comply with the aforementioned order, the representatives of the [SC], its engineering consultant and

> its contractors are entitled to enter the [Townhouse] with the assistance of a locksmith, provided that, during the time that the representatives of the [SC], its engineering consultant and its consultants are undertaking the Work, and at its completion, representatives of the [SC], its engineering consultant and its contractors secure the [Townhouse] and provide [Ms. Harvey] with any new key to the [Townhouse];
>
> d) If the [TR] or either of them, acting either personally or through agents, servants or employees and acting either singly or together, impedes or attempts to impede the representatives of the SC, its engineering consultant or its contractors from entering the [Townhouse] as permitted by this order, any peace officer and member of the Vancouver Police Department is authorized to arrest and remove [Ms. Harvey or Mr. Edgar or both TR]; and
>
> e) The Respondent, Douglas Edgar, must absent himself from the [Townhouse] and all property designated as common property on the strata plan at any time that the SC or anyone authorized by the SC obtains access to the Townhouse or adjacent common property pursuant to the terms of this Order.

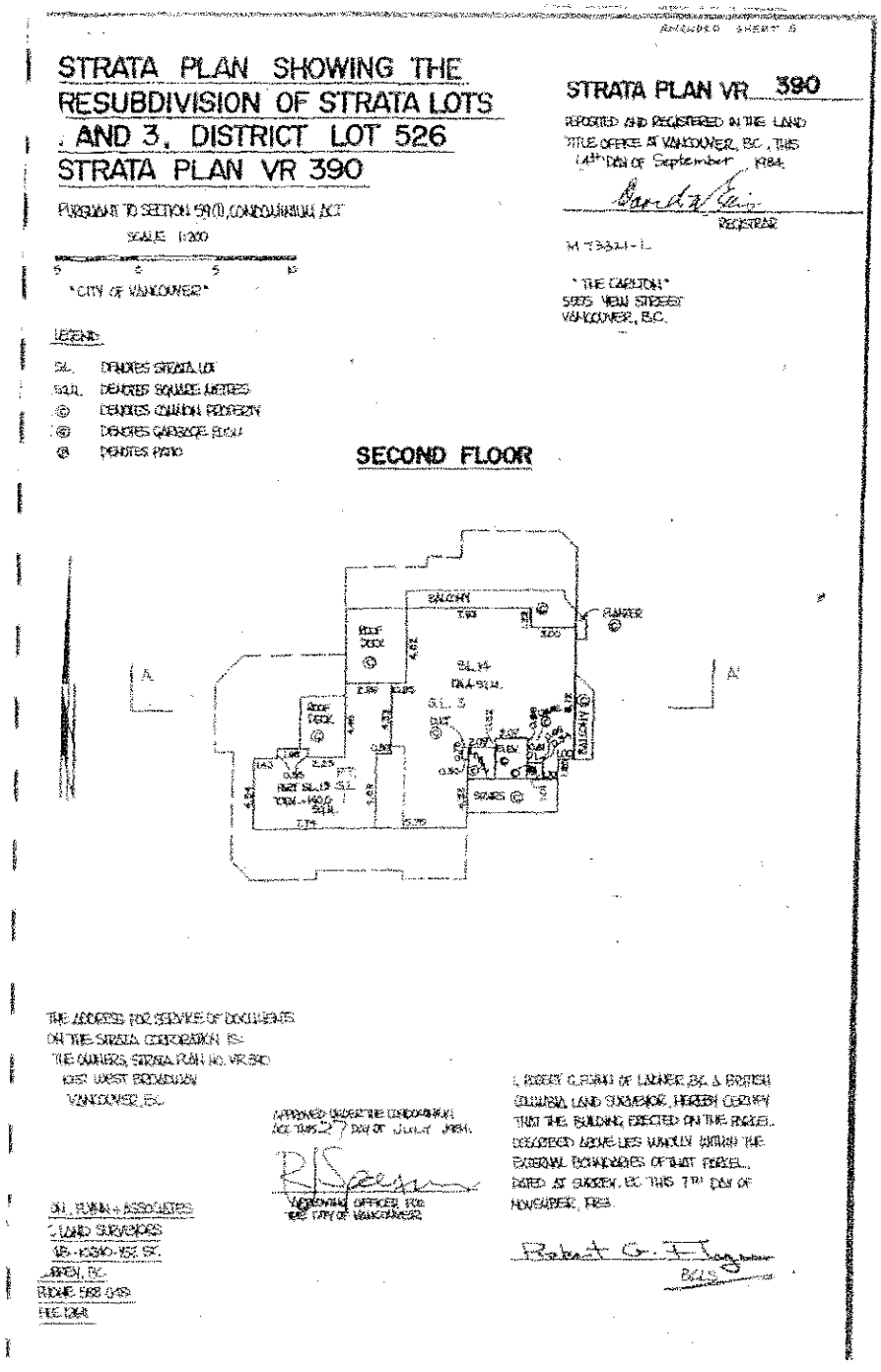
[162] I anticipate that the parties will have lengthy submissions on the issue of costs. Unless the parties are able to resolve the issues of the form of order and of costs by agreement, I ask that counsel estimate the length of time required for submissions and request a hearing of suitable length before me through the Court Registry.

"Gray J."

Appendix "A"



Appendix "B"



STRATA PLAN SHOWING THE RESUBDIVISION OF STRATA LOTS 2 AND 3, DISTRICT LOT 526 STRATA PLAN VR 390

PURSUANT TO SECTION 59(1), CONDOMINIUM ACT

SCALE 1:200

"CITY OF VANCOUVER"

STRATA PLAN VR 390

DEPOSITED AND REGISTERED IN THE LAND TITLE OFFICE AT VANCOUVER, B.C., THIS 14th DAY OF September 1984.

REGISTRAR

"THE CARLTON"
5685 MAIN STREET
VANCOUVER, B.C.

LEGEND

S.L. DENOTES STRATA LOT
SQ.FT. DENOTES SQUARE METRES
C DENOTES COMMON PROPERTY
G DENOTES GARBAGE ROOM
P DENOTES PATIO

SECOND FLOOR

THE ADDRESS FOR SERVICE OF DOCUMENTS ON THE STRATA CORPORATION IS:
THE OWNERS, STRATA PLAN NO. VR 390
1057 WEST BROADWAY
VANCOUVER, B.C.

APPROVED UNDER THE CONDOMINIUM ACT THIS 27 DAY OF JULY 1984.

VERIFICATION OFFICER FOR THE CITY OF VANCOUVER

I, ROBERT G. FERRIS OF LADNER, B.C. A BRITISH COLUMBIA LAND SURVEYOR, HEREBY CERTIFY THAT THE BUILDING ERECTED ON THIS PARCEL DESCRIBED ABOVE LIES WHOLLY WITHIN THE EXTERNAL BOUNDARIES OF THAT PARCEL. DATED AT LADNER, B.C. THIS 7TH DAY OF NOVEMBER, 1983.

B.C.L.S.

R. G. FERRIS + ASSOCIATES
LAND SURVEYORS
#8 - 4380 - 152 ST.
SURREY, B.C.
PHONE 588 0411
FILE 1068