

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Anthony v. Schnapp*,
2016 BCSC 1839

Date: 20161005
Docket: 168611
Registry: New Westminster

Between:

Louis Leonard Anthony and Audrey Joyce Anthony

Petitioners

And

**George Schnapp, Hilke Barbara Schnapp and
The Owners, Strata Plan NW2451**

Respondents

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for Petitioners:

S. Smith

Counsel for Respondents:

J. Bleay

Place and Date of Hearing:

New Westminster, B.C.
September 14, 2016

Place and Date of Judgment:

New Westminster, B.C.
October 5, 2016

OVERVIEW

[1] This case involves two strata lots that form a strata duplex located on an irregular shaped parcel of land in Surrey, B.C. There are allegations that the owners of one lot are treating their ownership like that of a traditional duplex where they are free to make any alterations they wish to one-half of the property. Unfortunately the property they are making alterations on does not belong to them but is common property. Because there are only two voters in the strata corporation, the struggle between the competing owners has prevented proper governance of the strata corporation.

PLEADINGS

[2] This is a hearing of two competing petitions. Luis Leonard Anthony and Audrey Joyce Anthony (the “Anthonys”) seek a declaration that George Schnapp and Hilke Barbara Schnapp (the “Schnapps”) have breached the provision of standard bylaw 6 and s. 71 of the *Strata Property Act*, S.B.C. 1998, c. 43 (“SPA”) by carrying on with certain works on the common property.

[3] The Anthonys seek an order that the Schnapps, at their sole cost forthwith:

- a) remove the five trees planted by them on the front portion of the common property bordering 160th Street;
- b) replant a hedge at the northwest corner of the common property along the property line adjoining the neighbouring property to the north;
- c) remove the fence constructed by them on the northwest corner of the common property;
- d) remove the enlarged parking area located at the rear of the common property adjacent to the driveway and replace the grass;
- e) remove the shed constructed by them directly to the north of the building on the common property;

- f) remove the large patio at the rear of the building adjacent to the strata lot; and
- g) remove the five raised garden beds at the northwest corner of the property and restore the grass.

(collectively, the “Alterations”)

[4] In the alternative, the Anthonys seek orders that:

- a) the strata corporation enforce standard bylaw 6 and remove the Alterations from the common property;
- b) an administrator be appointed pursuant to s. 174 of the *SPA* to carry out, on behalf of the strata corporation, the removal of the alterations and the restoration of the common property; and
- c) the Anthonys be exempt from contributing to the costs incurred by the strata corporation with regard to (a) and (b).

[5] In their petition, the Schnapps seek a declaration that the strata corporation expressly or by implication or acquiescence approved the changes to the common property made by the Schnapps including:

- a) trees planted on the front portion of the common property bordering 160th Street;
- b) a fence constructed on the northwest corner of the prior common property;
- c) the shed constructed to the north of the building;
- d) the patio constructed at the rear of the building adjacent to strata lot two, and
- e) the five raised garden beds at the northwest corner of the property.

[6] The Schnapps seek a declaration that the strata corporation has unreasonably failed to pass a three-quarter vote resolution to approve of and ratify the changes made to the common property by the Schnapps and has unreasonably failed to pass several three-quarter vote resolutions including, *inter alia*, a three-quarter vote resolution to designate certain parts of the common property as limited common property for the exclusive use of the Anthonys and the Schnapps. They submit that the failure to pass the three-quarter vote resolution was and is significantly unfair to the Anthonys pursuant to s. 164(1) of the *SPA*.

[7] The Schnapps seek an order remedying the significantly unfair actions of the strata corporation by ordering that the following resolutions be approved as if they have been passed by the strata corporation at a general meeting:

- a) the alterations undertaken by the Schnapps be ratified and approved;
- b) any alterations undertaken by the Anthony's be ratified and approved; and
- c) the strata corporation approve by a three-quarter vote resolution, pursuant to s. 74 of the *SPA*, amendments to the strata plan to designate new limited common property.

BACKGROUND FACTS

[8] Strata Plan NW2451 was filed in the Land Titles Office on September 12, 1986 and it consists of two strata lots with a duplex-style building. The Anthonys have been owners of strata lot one since 1995 and have always rented it out to tenants. The Schnapps have been owners of strata lot two since 2002 and rented it to tenants until 2013 when they moved into strata lot two.

[9] The area outside the buildings is common property and none of it has been designated as limited common property.

[10] After moving into strata lot two, the Schnapps made a number of changes to the common property without permission of the Anthonys or the strata corporation.

The Anthonys say the changes made by the Schnapps effectively expropriated a significant portion of the common property for their own use.

[11] The Anthonys did not consent to the Alterations. The Schnapps say that the Anthonys acquiesced by their silence. I find that at times the Anthonys were silent and at times the Anthonys objected but their objections were ignored. I find that the Anthonys did not consent to any of the Alterations.

[12] Prior to the Alterations, the parties had never utilized the strata corporation to make decisions. The parties did not prepare their own bylaws and therefore this strata property is governed by the standard bylaws under the *SPA*. Bylaw 6 of the standard bylaws under the *SPA* requires the consent of strata council before carrying out alterations to common property. No such written consent from the strata corporation was ever given for the Alterations.

[13] It is the Anthonys' evidence that in the past, the Anthonys consulted with the Schnapps before undertaking any maintenance activities to the common property. It sounds like those discussions were verbal and informal. Once the Schnapps moved into strata lot two and started making the Alterations, the relationship between the owners deteriorated to the point where the Anthonys now say any alteration must be agreed to in writing pursuant to the *SPA*.

[14] When the Schnapps moved into their property they undertook some repairs to their strata lot. Black mould was discovered in the chimney of strata lot two. Repairs were required to the roof and the chimney. Mr. Schnapp informed Mr. Anthony as to his intention to effect these repairs and received no response. Subsequent repairs were required to the roof and balcony of lot two including gutter installation to prevent further damage. Mr. Anthony did not consent to this work. Mr. Schnapp says that Mr. Anthony had previously replaced the gutters on lot one.

[15] Water and drainage issues arose on the property. Mr. Schnapp hired an excavator to dig a trench and install a drain and sump pump to mitigate against water damage problems along the northwest side of property line of strata lot two in

an area to the rear of the property. The contractor removed the grass and sloped the ground away from lot two and installed a stone patio and a 12-inch sump to collect water running from the driveway toward the building area. The same contractor levelled and re-gravelled the existing parking area at the rear of the building.

[16] Mr. Schnapp says that there are further drainage problems that need to be addressed around the whole common property but no agreements can be reached.

[17] Quite a bit of evidence was led about the history of decision-making on this property. An affidavit from Mr. Will, the previous owner of lot two, was obtained. He said there was an understanding, for practical purposes, that each owner had a sphere of influence and responsibility for their portion of the property on which the strata duplex is located. The owners of lot one and two were each responsible for roughly one half of the total area of the property in which the strata duplex is located. Mr. Will said he had water and drainage issues and that he and Mr. Anthony separately addressed a maintenance issue involving the subsidence of the perimeter sidewalk on both sides and the front of the strata duplex.

[18] A previous owner of lot one constructed an outdoor deck with privacy enclosure which was subsequently removed by the Anthonys.

[19] Mr. Will made a gravel parking lot at the northwest corner of the property to provide parking for his tenants.

[20] Since owning the property, the Anthonys have undertaken repairs and maintenance to lot one including:

- a) painting;
- b) removing a wood structure from their side;
- c) arranging for tree and stump removal;
- d) reroofing;
- e) new gutter replacement and building trim replacement;

- f) placement of a fire pit;
- g) planting of hedges on the southwest corner of the property;
- h) construction of wood garden bed frames; and
- i) digging to investigate drainage issues in connection with water accumulation adjacent to lot one.

[21] At no time was written permission for alterations or changes undertaken by the Anthonys sought or given.

[22] In an effort to resolve this dispute, counsel for the Schnapps convened a special meeting of the strata corporation.

[23] The meeting was held on June 29, 2015. Present were the Schnapps and the Anthonys. The owners waived in the notice requirement in s. 45(1) of the *SPA*. They approved the agenda and agreed that Jamie Blais of Access Law Group would chair the meeting.

[24] Agenda item number one was to ratify and approve by three-quarter vote, the common property alterations undertaken by the Schnapps subject to the Schnapps agreeing in writing to take responsibility for any expenses related to the following common property alterations:

- a) tree planted in front portion of the common property bordering 160th Street;
- b) a fence constructed on the northwest corner of the common property;
- c) the shed constructed to the north of the building;
- d) the patio constructed at the rear end of the building adjacent to strata lot two; and
- e) the five raised garden beds at the northwest corner of the property.

[25] The resolution was moved by George Schnapp, there was no seconder and so no vote was taken. The same thing occurred on all of the other resolutions.

[26] The second agenda item was a resolution that the strata corporation ratify and approve by three-quarter vote, the common property alterations undertaken by the Anthonys. The resolution was moved, there was no seconder and the item was not voted on.

[27] The third item was to divide the common property into limited common property for each strata lot one and two roughly around the lines shown in a diagram that was attached to the resolution subject to preparation by a land surveyor. Further details for how to divide the property were included in agenda item number three which I will not particularize below. Again there was no seconder for the resolution and it was not voted on.

[28] The fourth agenda item was to amend the bylaws of the strata corporation by a three-quarter vote resolution to read that an owner shall repair and maintain the following items situated on the common property designated for their exclusive use:

- a) patios and decks;
- b) driveways and sidewalks;
- c) fences other than a fence dividing the two portions of limited common property;
- d) sheds and other structures situated on the limited common property; and
- e) landscaping including, but not limited to, trees, bushes, shrubs, and flowers.

[29] A further amendment was sought that no owner, tenant or occupant shall place any trampolines, tents, swings, playground equipment or similar structures in the front yard of the building.

[30] Finally, there were proposed amendments to bylaw 8 to make reference to the proposed fence that, if approved, would have divided the two areas of limited common property.

[31] Again, no one seconded the motion for item number four and it was not voted on. The special general meeting of the owners lasted 10 minutes.

[32] At no time did any party seek to empower the strata corporation to bring an action as a representative of either petitioner to pursue the relief sought in this action.

[33] I have numerous jurisdictional concerns regarding the remedies sought but before dealing with the remedies, I will consider whether the Alterations constitute alterations to common property that fall within the scope of bylaw 6 in that they have significantly changed the use or physical appearance of the common property. If I find that the Alterations have done so, I will analyse what remedies are available to an individual owner.

Do the alterations constitute a significant change in the use or appearance of common property?

[34] Section 71 of the *SPA* provides:

Change in use of common property

71 Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless

- (a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
- (b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

[35] The standard bylaws which govern the owners provides at bylaw 6:

- (1) an owner must obtain the written approval of the strata corporation before making any alterations 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 related to the alteration.

[36] In *Chan v The Owners, Strata Plan VR677*, Vancouver Registry number S115516, Mr. Justice Groves considered the meaning of significant change in the use or appearance of common property. His discussion is helpfully paraphrased by Mr. Justice Bowden in *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 at para. 19:

- 1) A change would be more significant based on its visibility or non-visibility to residents and its visibility or non-visibility towards the general public;
- 2) Whether the change to the common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units;
- 3) Is there a direct interference or disruption as a result of the changed use?
- 4) Does the change impact on the marketability or value of the unit?
- 5) The number of units in the building may be significant along with the general use, such as whether it is commercial, residential or mixed use.
- 6) Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the *Strata Property Act*.

[37] In the case before me, the alterations are highly visible to anyone coming to the property.

Garden Beds

[38] The construction of large raised garden beds does affect the use or enjoyment for the Anthonys because it appropriates the entire grassy area in the northwest corner of the property. These garden beds are large and not easily movable without emptying the soil. They overtake the entire corner of the lot which is common property.

[39] Some courts have decided that decoration of property with plants and shrubbery did not constitute a significant change to common property: *Reid v. The*

Owners, Strata Plan LMS 2503, 2001 BCSC 1578, aff'd 2003 BCCA 126, leave to appeal refused [2003] SCCA 500. To be clear, that case dealt with potted cedar trees and shrubs that could be moved to various locations. The court did order the strata council to take steps to ensure the trees were placed in a location which did not obstruct another owner's view.

Fruit Trees

[40] I find that the planting of fruit trees on the front lot appropriates that area which is common property. These are not moveable potted plants but trees that are planted in the lawn and occupy one half of the front lawn.

Fence

[41] The Anthonys objected to a fence being installed on the north side of the property. Mr. Schnapp did ask Mr. Anthony and Mr. Anthony did not consent to a fence because the fence would be inconsistent with the cedar hedges which are planted around the remainder of the perimeter of the property. Mr. Schnapp ignored Mr. Anthony and built a fence anyway.

[42] The building of fencing is highly visible and changes the aesthetic theme of the property which is surrounded by a cedar hedge. There is no explanation for why the Schnapps could not have continued the cedar hedge along this portion of the perimeter. The existence of the fence aesthetically affects the enjoyment of the Anthonys.

Drainage Issues, Trench and Patio

[43] I find there were reasonable grounds to believe that the digging of the trench on the north side of the property was necessary to ensure safety or prevent significant loss or damage to the property. I appreciate that this language from s. 71 of the *SPA* governs the actions of the strata corporation and does not appear in bylaw 6. However, I find it to be a helpful guide for evaluating whether or not the strata corporation should reasonably consent to the work done on common property by owner if asked.

[44] The Schnapps have filed an affidavit from Mr. Will, the previous owner of lot two and an affidavit from Mr. Neetz, their contractor. They both speak of drainage problems on the property. Mr. Neetz investigated the drainage problems at the request of the Schnapps and he decided that it would be necessary to install 80 metres of four-inch drainage pipe along the entire northwest side of the property line of strata lot two as well as in the area to the rear of the property on the northwest side just adjacent to the back door of the unit. It was apparent to him as a contractor, with experience in dealing with property drainage issues, that this area of the property had significant water drainage issues. The area of the lawn that was adjacent to the back door of unit two was a muddy area that sloped down towards the building and water was pooling along the foundation. Based on his assessment and recommendation, he levelled the ground and sloped it away from the building. To ensure the area remains sloped away from the building, Mr. Neetz built a stone patio and drainage pipe was also installed underneath the patio together with a 12-inch sump at the rear of the patio for the purpose of collecting water running from the driveway toward the building.

[45] Mr. Neetz swears this was done in an effort to reduce any further water damage to the building and foundation. I accept this evidence and I find that the building of the trench, adding drainage pipes, the sump and leveling the property adjacent to the back door of unit two and building a concrete patio were not in contravention of s. 71 but were necessary to prevent damage.

Enlarged Parking Area

[46] This is an item included in the definition of Alterations. Apparently Mr. Neetz brought additional gravel to the property and leveled out and enlarged an existing parking area on the north side of the property where the Schnapps park their trailer. I do not find leveling an existing parking spot to be a significant change unless it overtakes a significantly larger area of common property. That evidence is not before me and so on this evidence, I find that the leveling of the exiting parking area is not a significant change.

Shed

[47] The property had two sheds which are situated on the north side of the property and are identical. Mr. Schnapp constructed a third shed on the north side of the property which is considerably larger than the existing two sheds. This was done without the Anthonys' consent. The new shed is built on a concrete pad and is located between the Schnapps' old shed and their back door which leads to their patio. The new shed is located on common property but so close to strata lot two that I find it highly unlikely that the Anthonys would ever occupy that side of the lot for any reason. It's not clear to me that the shed is even visible from their side of the lot, however, I am relying on black-and-white photographs and I could be incorrect.

[48] This occupation of the common property is distinguishable from the fruit trees and the garden boxes because of its location. It is not interfering with the other owners' use of common property.

Financial Impact

[49] I am not aware of any financial impact of the Alterations on the value of the property.

Conclusion on Alterations

[50] The garden beds, fruit trees and fence are significant changes to the use and appearance of the common property. The trench, drains, pumps and patio are necessary repairs. The shed and leveled parking area are not significant changes.

[51] I have reviewed the affidavits filed by the Anthonys and the Schnapps and it is clear that the Schnapps have treated all of the common property on the north side of the property as limited common property for their own use and that they did not get the consent of the Anthonys or the strata corporation to make these alterations to the common property. The Schnapps say they have not caused any damage to the Anthonys. I disagree. Although they have taken good care of the common property they have expropriated common property on the north side for their exclusive use and this has caused damage to the Anthonys.

[52] I have considered how the strata corporation governed itself in the past. I agree that it governed itself in a much less formal style. Discussions were had between owners and decisions were made without conflict. Mr. Schnapp says this created an expectation of informality. That may be true but surely it did not create an expectation that he could do whatever he wanted with the common property even in the face of objection from another owner. Unfortunately informal structure no longer works for these owners. Given the breakdown of the relationship between the owners, it is apparent to me that formal structure needs to be followed.

[53] It is also clear that this strata corporation is dysfunctional given that there are only two votes and the owners are deadlocked.

Can individuals bring a cause of action against another individual relying on the SPA?

[54] In this case, both parties have named the owner of the other strata lot and they both rely on certain sections of the SPA. The claims they bring against the strata corporation are brought pursuant to ss. 71, 163, 164 and 165 of the SPA.

[55] It is the strata corporation and not the other property owner who is liable under s. 71 of the SPA and the remedies under s. 165 only relate to the strata corporation. In order to bring the claim pursuant to these provisions, the Anthonys need to establish that it was the strata corporation which breached the SPA in some way.

[56] Pursuant to *Hamilton v. Ball*, 2006 BCCA 243 [*Hamilton*], it is possible for an individual owner to bring an action against another owner of a strata property regarding *harm* to common property. The harm alleged by the Anthonys is the appropriation of property they hold as a tenant in common. That is a different claim than claiming that the alterations were done without written consent. The requirement of written consent arises out of the statute and the statute only applies to the strata corporation.

[57] Section 71 of the SPA provides:

Change in use of common property

71 Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless

(a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

(b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

[Emphasis added]

[58] Section 163 notes that a strata corporation may be sued regarding common property:

Strata corporation may be sued

163 (1) The strata corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the strata corporation.

(2) An owner may sue the strata corporation.

[Emphasis added]

[59] These sections do not apply to this situation because it cannot be said that the strata corporation made a significant change in the use or appearance of the common property. I find support for my conclusion that ss. 71 and 163 do not apply. In *Wong v. AA Property Management Ltd.*, 2013 BCSC 1551, where Mr. Justice Jenkins said in paragraph 35 that the standing or capacity of an individual owner to sue the strata corporation of which that owner is a member is limited by the SPA to two possibilities. Firstly, an owner may sue the strata corporation under s. 164 of the SPA in cases where the actions of the strata corporation have been "significantly unfair" to the plaintiff as opposed to other owners. Secondly, following the decision in *Hamilton*, an owner may sue in common law where a third party causes injury to the parties proportional share of common property.

[60] Section 164 of the SPA provides for an oppression type remedy against a strata corporation and states:

Preventing or remedying unfair acts

164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

- (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
- (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

- (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
- (b) vary a transaction or resolution, and
- (c) regulate the conduct of the strata corporation's future affairs.

[Emphasis added]

[61] This section is described by the authors of the *British Columbia Strata Property Practice Manual* published by The Continuing Legal Education Society of British Columbia as a powerful tool for strata lot owners who are unhappy with their treatment by a strata corporation or those who control its actions. Section 164 has some application if I find that an order is necessary to prevent or remedy a significantly unfair act of a person who holds 50% (or more) of the votes and to regulate the conduct of the strata corporation's future affairs.

[62] Significant unfairness has been defined by the courts as oppressive conduct and unfairly prejudicial conduct or conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing or has been done in bad faith: *Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335 at paras. 96 to 99 and *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126.

[63] Section 164 does apply in this case as it relates to the voting rights exercised at the special general meeting. The Anthonys and the Schnapps are persons who hold 50% or more of the votes. Each assert that the other has conducted themselves in an oppressive and unfairly prejudicial manner. The Schnapps say it was unfair of the strata corporation to fail to ratify the Alterations. By their failure to second the motion, I surmise that the Anthonys would say the opposite. If the strata corporation

had ratified the Alterations they would say that it was significantly unfair to them to permit the Schnapps the right to unilaterally alter common property or to do so with the knowledge of the Anthony's disapproval.

[64] Each owner used their 50% vote resulting in a deadlocked meeting. The deadlocked meeting is unfair to both owners and not in the best interest of the strata corporation which will never be able to resolve disputes unless its conduct is regulated for future affairs.

[65] Section 165 provides the Court with the ability to make an order against a strata corporation rather than an individual owner, as it states:

Other court remedies

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

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

[Emphasis added]

[66] The *British Columbia Strata Property Practice Manual* says that s. 165 allows an owner, tenant, mortgagee or other interested person to bring an application to compel a strata corporation to follow the SPA. It provides an important mechanism for the court to craft orders that are flexible and meet the particular needs of the situation. Effectively s. 165 is a form of injunction.

[67] The possible range of applications is broader in s. 165 than under s. 164(a). Section 164 is aimed more at actions of the strata corporation. Section 165 may be used to address the failure to act as well as a wrongful act. It is not necessary to find a strata council has acted significantly unfairly in order to invoke s. 165. It is enough to find the strata corporation had a duty to do something and has not performed a duty.

CONCLUSION

[68] I find that the Schnapps made significant changes in the use or appearance of common property without the consent of the strata corporation. This was a breach of bylaw 6. The strata corporation has failed to take action. The strata corporation had a duty to control the use of the common property and neglected to do so. It neglected to do so because it only has two members and cannot pass a resolution given that they are in conflict with one another.

[69] I conclude that I have the jurisdiction under s. 165 to order the strata council to effect the following changes:

- a) The strata corporation should order the Schnapps to remove the fence and replace it with a cedar hedge. The Schnapps should be ordered to remove the fruit trees. The Schnapps should bear the cost of these projects.
- b) The drainage along the north side of the property should remain as should the drainage behind the back door of the property and the concrete patio.
- c) The garden beds should be moved off the northwest grassy corner. If there is sufficient room on the patio some of the garden beds could be moved there onto the patio.
- d) The strata corporation should consider allowing the large shed to remain in place and to permit a similar storage shed to be constructed on the south side of the property adjacent to strata lot two.
- e) The enlarged parking area should remain in place.

[70] Under s. 164, I find it necessary to make orders to regulate the conduct of the strata corporation. Without intervention, no resolutions can be passed.

APPOINTMENT OF AN ADMINISTRATOR

[71] Section 174 of the SPA says:

Division 3 — Administrator of Strata Corporation**Appointment of administrator**

174 (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.

(2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.

(3) The court may

- (a) appoint the administrator for an indefinite or set period,
- (b) set the administrator's remuneration,
- (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and
- (d) relieve the strata corporation of some or all of its powers and duties.

(4) The remuneration and expenses of the administrator must be paid by the strata corporation.

(5) The administrator may delegate a power.

(6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.

(7) Unless the court otherwise orders, if, under this Act, a strata corporation must, before exercising a power or performing a duty, obtain approval by a resolution passed by a majority vote, 3/4 vote, 80% vote or unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[72] In *Andrews v. Leno*, 2003 BCSC 431, the court allowed an application by the petitioner owners of half of a strata duplex against the petitioner owners to vary an order appointing an administrator pursuant to s. 174 of the *SPA*. The parties in that case were all individuals and the court noted that they had never complied with the *SPA* but still found they could receive relief pursuant to it.

[73] In *Lum et al v. The Owners, Strata Plan VR519*, 2001 BCSC 493, Mr. Justice Harvey concluded that factors to be considered in exercising the court's discretion whether the appointment of administrators is in the best interest of the strata corporation include:

- (a) whether there has been established a demonstrated inability to manage the strata corporation;
- (b) whether there has been a demonstrated substantial misconduct mismanagement or both in relation to the affair strata corporation;
- (c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation
- (d) whether there is a struggle among competing groups within a strata corporation such as to impede or prevent proper governance of the strata corporation; and
- (e) whether only the appointment of an administrator has any reasonable prospect to bring order to the affairs of the strata corporation.

[74] I find that the factors set out in paragraphs (a), (c), (d) and (e) apply in the case before me. Therefore I conclude that it is in the best interest of the strata corporation to appoint an administrator to exercise the powers and perform the duties of the strata corporation. I recognize that this represents a serious interference with the democratic governance of the strata community, however, that democratic process has now collapsed. The expense involved in appointing an administrator will be considerable and so hopefully this will influence the owners to arrive at a consensus to avoid this considerable expense.

[75] The first task of the administrator will be to oversee the repairs to the common property which I have listed above and to address outstanding costs for repairs effected by each of the owners.

[76] I am therefore granting the order to appoint an administrator to effect these changes and to deal with other ancillary issues where decisions are outstanding.

[77] There are outstanding costs for repairs made by the Schnapps to the strata lot which need to be considered and allocated. The Anthonys may have also incurred repair costs to the strata lot that may need to be allocated.

[78] A further issue which I am assigning to the administrator is the consideration of whether or not to pass a resolution to amend the bylaws to designate certain parts of the common property as limited common property for the exclusion of the Anthonys and the Schnapps. This should be considered, together with the

consideration of whether it is possible to subdivide the property into two separate lots. This decision is beyond the scope of the legal argument I heard on this petition but I find it is something that should be considered by the owners as a possible resolution to an ongoing dispute. If these owners were each given the authority to manage one side of the property, I think there would be fewer disputes.

[79] In applying to appoint an administrator, the Anthonys did not provide any affidavit material from a proposed administrator and therefore this matter needs to be addressed to finalize the terms for the appointment of an administrator. I direct counsel for both petitioners to arrange a further hearing before me and to provide affidavit evidence from proposed administrators setting out what their fees are and the proposed detailed terms of their appointment so that I can provide a more detailed direction to the administrator

“Young J.”