IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Frank v. The Owners Strata Plan LMS 355,* 2016 BCSC 1206

Date: 20160630
Docket: S152605
Registry: Vancouver

Between:

John H. Frank

Petitioner

And

The Owners Strata Plan LMS 355

Respondent

Before: The Honourable Madam Justice B. Fisher

Reasons for Judgment

Counsel for the Petitioner:	R.P. Hamilton
Counsel for the Respondent:	P. Dougan
Place and Date of Trial/Hearing:	Vancouver, B.C. June 9-10, 2016
Place and Date of Judgment:	Vancouver, B.C. June 30, 2016

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[1] In March 2004, John Frank purchased a penthouse suite in a 26-story building in downtown Vancouver, with access to a private roof deck. For many years, he enjoyed the use of this roof deck. However, he discovered that the exterior parapet walls framing the roof deck were lower than the height required under the *BC Building Code*. With the concurrence of the strata council, he began a process of obtaining the necessary permits from the City of Vancouver to install railings to the proper height. However, the matter proceeded very slowly, and by the time he obtained the necessary permits to install the railings, he was in a dispute with the strata corporation.

[2] The dispute has been ongoing for several years, but by the time this petition was heard, the primary issue was whether the petitioner (Mr. Frank) or the respondent (hereinafter the Strata Corporation) should be responsible for the costs related to the planning, design and installation of the railings.

The facts

[3] Mr. Frank's penthouse suite, located at 889 Homer Street, includes an area on the roof immediately above it designated as limited common property and identified on the Strata Plan as "roofdeck". Access to the roof deck is through a common stairway used only by the owners of the three units on the top floor, each of whom have the benefit of defined roof deck areas as limited common property.

[4] Since 2004, Mr. Frank used his roof deck for recreational purposes, as did the other top floor owners. With the knowledge and consent of the Strata Corporation, he installed cement pavers and patio furniture. This area was important to him, as his suite has no other exterior balconies.

[5] In 2005 or 2006, Mr. Frank discovered that the exterior parapet walls framing the roof deck were 9½ inches lower than the 42 inch height required under the *BC Building Code* (which is adopted in the *Vancouver Building Bylaw No. 10908*). He notified the president of the Strata Corporation, who gave him permission to obtain the necessary permits from the City of Vancouver to install railings that complied with the Building Bylaw. He proceeded to do so, but he was not familiar with the

procedures, and it was not until 2012 that he retained an architect to submit an application. In the meantime, he continued to enjoy his roof deck, as did the other penthouse owners.

[6] In May 2009, Mr. Frank became aware for the first time that there may be restrictions on the use of the roof deck. The minutes of a Strata Council meeting on May 7, 2009 included the following information:

> It has been determined that limited common property descriptions on the roof were added to facilitate private installation of mechanical systems of PH suites specifically air conditioning units. The paver stones were installed to facilitate movement of the wheel davit arms to the base locations and for access to the rope roof anchors. They were not intended to constitute patio space for those owners. In light of this information, council advised that these spaces only be used for access to mechanical equipment. The agent was instructed to advise the PH owners of this information.

[7] Despite this, the Strata Corporation took no steps to limit Mr. Frank's use of the roof deck and in October 2009 indicated that the members would support the installation of roof top railings subject to City approval and structural requirements. Mr. Frank proceeded to make inquiries of the City with the Strata Corporation's support. In 2011, the original building architect, Michael Heeney, assisted him to find a railing manufacturer to produce railings that were consistent with the building's design. In July 2012, he submitted his application to the City but there were some deficiencies in the documents. Finally, in October 2012, with the assistance of architect Allan Diamond, an application was submitted for a combined development/ building permit.

[8] In December 2012, Mr. Frank requested the Strata Corporation to provide written consent for the application as required by the City. By this time, the Strata Corporation was not prepared to support the application until various structural concerns were addressed. There followed a long series of correspondence, strata council and member meetings, the details of which are not relevant for the purpose of the orders being sought presently. Suffice it to say, Mr. Frank and the Strata Corporation did not see eye to eye on numerous issues and the Strata Corporation was often slow to respond to issues if at all.

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[9] The matter became more pressing for Mr. Frank in June 2013, after he and his architect invited City officials to view the roof. What seemed like a good idea at the time, his hope was that the City would issue a compliance order requiring the safety issue to be addressed. Instead, on June 14, 2013, the City issued an order requiring Mr. Frank and the other penthouse owners to cease occupying the roof deck altogether and restore its use to comply with the approved plans of the original development permit. Apparently, railings were not required because the original development permit did not contemplate recreational use on the roof. Despite this, on June 25, 2013, the members of the Strata Corporation refused to approve a resolution restricting access to the roof deck areas, but Mr. Frank has complied with the City's order and has had no access to his roof deck since June 14, 2013.

[10] By early 2015, Mr. Frank had obtained all necessary opinions to address what he understood were the structural issues raised by the Strata Corporation. He had also developed three alternative proposals after receiving advice from City officials: (1) installation of railings using the existing access by common stairway; (2) installation using a new access by a direct stairway from Mr. Frank's unit; and (3) installation with both existing and direct access (referred to as Alternatives, 1, 2 and 3). On February 3, 2015, he delivered the opinions and proposals to the Strata Corporation and sought its involvement in determining the precise nature of the work to be done. He also raised, apparently for the first time, the issue of costs, stating his view that the Strata Corporation was responsible for the engineering and architect's costs as falling within its "obligation to provide and maintain safe and secure common property". When he had received no response by March 27, 2015, he commenced this petition.

[11] In May 2015, the Strata Corporation took the position that Alternatives 2 and 3 constituted a significant change in the use and appearance of the exterior common property which required approval by a vote of a ¾ majority of members under s. 71(a) of the *Strata Property Act,* S.B.C. 1998, c. 43 (the *SPA*). Despite his disagreement with this position, Mr. Frank delivered a draft resolution on Alternative

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2, which was put to a membership vote on June 29, 2015. The resolution was defeated, with the votes evenly divided.

[12] On August 21, 2015, the Strata Corporation provided its consent to Alternative 1 in a form acceptable to the City, but which required Mr. Frank to agree to certain terms and conditions. There were three stated conditions related to structural issues, which Mr. Frank has addressed. However, the remaining conditions relate to costs and are unresolved. The Strata Corporation seeks an indemnity from Mr. Frank in which he agrees to take responsibility for all costs related to the “common property alterations” and any future costs in connection with them.

[13] Mr. Frank decided to proceed with Alternative 1. On October 15, 2015, he delivered to the Strata Corporation the architect’s drawings in support of his application and asked for a list of any concerns. The Strata Corporation advised that it had nothing further to discuss while the application was before the City. On February 26, 2016, Mr. Frank provided the Strata Corporation with further documents that the City had requested, and again asked it to advise of any concerns so that they could be addressed within the scope of the application. He received nothing further from the Strata Corporation and on March 9, 2016, the City granted a development/ building permit for Alternative 1.

[14] Mr. Frank then requested access to the roof in order to proceed with the work, but this was apparently refused due to the parties’ disagreement about responsibility for the costs. On April 5, 2016, the Strata Corporation advised Mr. Frank that it had some concerns that it would list in the following week to 10 days. It also considered Alternative 1 to be a significant change in the use of common property, thus requiring another ¾ member vote, and it organised a special general meeting for May 17, 2016. The resolution included a requirement that the “common property alteration” comply with the Strata Corporation’s bylaws 8, 9 and 10 (which deal with alterations of strata lots and common property).

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[15] Again, Mr. Frank disagreed that a vote was required, and this time asked the Strata Corporation to withdraw the resolution. It refused to do so and the resolution was defeated.

[16] It was not until May 24, 2016 that the Strata Corporation delivered its list of concerns. Mr. Frank says that most of these are frivolous and ought to have been provided long before and during the application process, and in any event have been addressed.

[17] In early June 2016, Mr. Frank was advised by the City that the proposed work to install the railings can be carried out in compliance with the development/ building permit, and the roof deck can be occupied for construction purposes.

The issues

[18] The primary issue is whether the proposed installation of railings constitutes a “significant change in the use or appearance of common property” within the meaning of s. 71(a) of the *SPA* or a necessary repair under s. 72 or alternatively s. 71(b). If it is the former, Mr. Frank is required to obtain the approval of a special majority of the members of the Strata Corporation and may be required to pay all the costs for the design and installation. If it is the latter, no membership vote is required and it has been conceded that the Strata Corporation is required to pay the costs under its duty to repair.

[19] In the petition, Mr. Frank seeks a declaration that the Strata Corporation’s actions are significantly unfair to him within the meaning of s. 164 of the *SPA*, a declaration that the installation of safety railings does not require the approval of the members of the Strata Corporation under s. 71(a), and orders that will enable him to have the necessary work carried out with the costs to be borne by the Strata Corporation. He also seeks compensatory damages for the loss of use of the roof deck, punitive damages and special costs, but these monetary matters were adjourned pending my determination of the primary issue.

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The *Strata Property Act* and the Strata Corporation's Bylaws

[20] Section 164 of the *SPA* permits an application by an owner for an interim or final order considered necessary to prevent or remedy a "significantly unfair" action or decision of a strata corporation in relation to the owner. Under subsection (2), the court has the authority to direct or prohibit an act of the strata corporation, vary a transaction or resolution, and regulate the conduct of the strata corporation's future affairs.

[21] Sections 71 and 72 of the *SPA* address the strata corporation's duties in relation to "significant" changes and repairs to common property. The relevant portions provide:

> 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 ¾ 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.
>
> 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…

[22] The Strata Corporation's Bylaws address "alterations", repairs and maintenance of limited common property. Generally, an owner is required to pay the costs for alterations and regular repair and maintenance, and the strata corporation is required to pay for certain kinds of repairs.

[23] Under s. 9 of the Bylaws, an owner who wishes to make or authorize an alteration to common property or limited common property must obtain prior written approval of the strata corporation. In doing so, the owner must provide detailed

plans and obtain all necessary permits from the City or other governmental authority. Most relevant to this case is s. 9.3:

> The strata corporation may require, as a condition of its approval, that the owner agree, in writing, to certain terms and conditions, including, not exhaustively, the following:
>
> (a) that alterations be done in accordance with the design or plans approved by the strata council or its duly authorized representatives;
>
> (b) that the standard of work and materials be not less than that of the existing structures;
>
> (c) that all work and material necessary for the alterations be at the sole expense of the owner;
>
> (d) that the owner from time to time of the strata lot receiving the benefit of an alteration to common property, limited common property or common assets must, for so long as he or she remains an owner, be responsible for all present and future maintenance, repairs and replacements, increases in insurance, and any damage suffered of cost incurred by the strata corporation as a result, directly or indirectly, of the alterations to common property, limited common property or common assets;
>
> (e) that the owner and any subsequent owner who receives the benefit of such alteration, must, with respect only to claims or demands arising during the time that they shall have been owner, indemnify and hold harmless the strata corporation, its council members, employees and agents from any act and all claims and demands whatsoever arising out of or in any manner attributable to the alteration. Any costs or expenses incurred by the strata corporation as the result of such claim or demand will be the responsibility of the owner from time to time of the strata lot who has benefited from the alteration and the said costs or expenses incurred must be charged to that owner and shall be added to the strata fees of that owner …

[24] Under s. 12.1(a) and (b) of the Bylaws, the Strata Corporation is responsible for repairing and maintaining common assets and common property but under s. 4.1, an owner is required to repair and maintain limited common property, except for repair and maintenance that is the strata corporation's responsibility. Under s. 12.1(c), the strata corporation is required to repair and maintain limited common property with respect to:

> (i) repairs and maintenance that in the ordinary course of events occur less often than once a year, and
>
> (ii) the following, no matter how often the repair or maintenance ordinarily occurs …
>
> B. the exterior of a building;

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C. patios, stairs, balconies and other things attached to the exterior of a building …

E. fences, railings and similar structures that enclose patios, balconies and yards …

[25] In essence, a “significant change in the use or appearance of common property” requires the approval of a special majority of members of a strata corporation under s. 71(a) of the *SPA*, and where the significant change is to limited common property, the costs will generally be borne by the owner who obtains the benefit of the change. However, where an immediate change is required for safety purposes, a vote is not required under s. 71(b) and the change is generally considered to be the responsibility of the Strata Corporation as a repair issue. Similarly, if the change is not “significant” it must still be determined whether it is an alteration under s. 9 of the Bylaws or a repair under s. 72 of the *SPA* and s. 12.1(c) of the Bylaws.

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<u>The development of 889 Homer Street and the legal documents</u>

[26] The evidence uncovered by the parties shows that the original development permit issued by the City to the developer on February 27, 1990 did not contemplate the use of the roof as a roof deck for the three penthouse units. This is implicit by the fact that the parapet walls on the roof did not comply with the 42 inch railing requirement for recreational use under the *Vancouver Building Bylaw*. It is also implicit in the original Disclosure Statement filed by the developer on August 23, 1991, which designated all of the area on the roof as common property.

[27] However, the Disclosure Statement was amended after the development permit was issued, on December 23, 1991, when specified areas on the roof were designated as limited common property for each of the penthouse units. There are no documents that explain the reason for this change, but there is evidence from the architect who worked on the original plans. In an affidavit sworn May 20, 2016, Michael Heeney deposed that, based on his review of a page of the architectural plans, “the roof of the Development was designed as a service zone for maintenance and was not intended to be occupied for any other purpose”. He added

that the developer created areas of limited common property after the plans were prepared “to allow the owners of the top floor units … to install and maintain their own custom HVAC systems”.

[28] Despite this, the Strata Plan, which was filed in the Land Title office on April 9, 1992, designated the limited common property areas on the roof as “roofdeck”. There is no explanation as to how this occurred and there is no documentation, other than one page from the architectural plans, which clearly confirms Mr. Heeney’s evidence.

[29] From the start, it appears that the Strata Corporation was unaware of any restrictions on the use of the roof and the penthouse owners used their limited common property as they wished. Despite receiving information in May 2009 about restrictions on the use of the roof, the Strata Corporation continued to allow Mr. Frank and the other penthouse owners to carry on as they had before. However, as a result of Mr. Frank’s diligence, the City’s June 14, 2013 order to vacate the roof put a stop to this long-standing recreational use.

The positions of the parties

[30] Mr. Frank relies on the designation of the limited common property associated with his unit and identified as “roofdeck” on the Strata Plan filed in the Land Title Office. He says that this document is paramount and confers on him as owner an equitable interest or something approaching a beneficial interest to fully occupy, use and enjoy that space. He submits that the installation of railings for safety purposes is the duty of the Strata Corporation to repair under s. 72 of the *SPA,* as to do so will allow him to exercise his right to use and enjoy his limited common property, something he has not been able to do since June 2013.

[31] Mr. Frank’s position is that the Strata Corporation’s refusal to perform its duty to repair is tantamount to depriving him of his use and enjoyment of his limited common property and is thus a form of expropriation or wrongful denial of his equitable rights. This, he says, amounts to conduct that is significantly unfair within the meaning of s. 164 of the *SPA*.

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[32] The Strata Corporation says that the installation of railings on the roof constitutes a significant change in the use of Mr. Frank's limited common property that requires a membership vote by special majority under s. 71(a) of the *SPA*. It relies on the fact that the restrictions on the use of the roof are consistent with the building's original design and in compliance with the original development permit. Because the Strata Corporation cannot be ordered to repair the parapet walls on the roof, this is neither a necessary immediate change under s. 71(b) nor a repair issue under s. 72.

[33] The Strata Corporation's position is that the change is significant because a development permit is required before the work can be done and the cost may be significant, and because the change is for the sole benefit of Mr. Frank, he should be responsible for all costs associated with its design and implementation. Alternatively, even if the change is not significant, it is still an alteration of limited common property and not a repair, such that Mr. Frank is required to pay for it under s. 9 of the Bylaws.

<u>**Alteration or repair?**</u>

Common property and limited common property

[34] Section 71 deals with "significant" changes in the use or appearance of common property. There is a high threshold for making such changes given the requirement for a ¾ special majority vote by the members of the Strata Corporation. "Common property" is broadly defined in s. 1(1) of the *SPA* as "that part of the land and buildings shown on a strata plan that is not part of a strata lot".

[35] This case involves not just common property, but limited common property, important, in my view, to the analysis required here. "Limited common property" is defined in the *SPA* as "common property designated for the exclusive use of the owners of one or more strata lots". Thus, as Burnyeat J. observed in *Mott v. Leasehold Strata Plan LMS 2185 UBC Properties Inc.*, [1998] B.C.J. No 2730 (S.C.) once common property has been designated as limited common property, the other owners in the strata corporation no longer have the right to use and enjoy that

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space. Such a designation confers on the owner a substantial degree of control and something approaching a beneficial or equitable interest: see *Mott* at para. 59; *Moure v. Strata Plan NW 2099*, 2003 BCSC 1364 at para. 22; *Chow v. Strata Plan NW 3243*, 2015 BCSC 1944 at para. 19. This is particularly so where the designation was made in the original strata plan, as under s. 75(1) of the *SPA,* such a designation can only be removed by a unanimous vote of the members of the strata corporation under s. 257 (subject only to a limited relaxation of unanimity in s. 52). This is clearly a higher threshold than the ¾ vote required for significant changes to common property, as it gives the owner of limited common property an effective veto over any change to it.

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[36] The importance of the rights designated in the strata plan was recognized in *Chow* and *Re Owners of Strata Plan NW 2212*, 2010 BCSC 519.

[37] In *Chow*, despite evidence that a limited common property designation in the strata plan may have been made in error, the court refused to grant relief under s. 164 of the *SPA* for the strata corporation’s failure to amend the strata plan after it was unable to obtain a unanimous vote under s. 257. The strata plan had designated seven covered parking spaces as limited common property for the exclusive use of the adjacent lots but the original disclosure statement did not include such designations, and all seven spaces had historically been used as visitor parking. The court held that none of this could affect the status of the registered strata plan absent the required approval to remove the designation of limited common property.

[38] In *Re Owners of Strata Plan NW 2212*, the boundaries of limited common property designations for private yard areas did not conform to the strata plan, and the cost to move fences, hedges and encroaching parking stalls was substantial. The strata corporation’s application to dispense with the need for a unanimous vote to change those designations was denied, the court confirming the corporation’s responsibility (under the Bylaw equivalent to s. 12.1 here) to make the necessary changes to conform to the strata plan absent a unanimous agreement to amend the

designations. The affected owners were entitled to “conformity to the strata plan and to the full benefit of their limited common property”: see para. 46.

[39] The Strata Corporation submitted that in the circumstances here, the original intention of the developer, which is implicit in the development permit, should inform the use of the limited common property, not the strata plan. It says that s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, which provides that an indefeasible title is conclusive evidence of ownership (relied upon by the court in *Chow*), is not absolute, but subject under paragraph (h) to “the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title”.

[40] I cannot accept this submission. First, the strata plan, when deposited in the land title office, is the document that establishes title to each strata lot (s. 239), and each indefeasible title for a strata lot must contain a reference to the owner's share in the common property (s. 251). Moreover, Part 8 of the *Land Title Act*, which applies to the *SPA* by virtue of s. 3, provides a process for the registrar to cancel or alter plans, which I assume would be the way for a person to exercise the right set out in s. 23(2)(h). Simply providing for such a right does not, in my view, diminish the import of s. 23(2).

[41] Second, the original development permit for 889 Homer Street was issued on August 28, 1990, before the developer changed the roof designations from common property to limited common property, and there is nothing on the face of this document that indicates what uses are permitted. It would be untenable for this kind of document to take precedence over the strata plan. The strata plan is the only document that affords reliable information on its face about the strata lots and their adjoining common property and limited common property.

[42] In this case, not only did the original Strata Plan designate the roof area as limited common property for the exclusive use and enjoyment of Mr. Frank’s unit, it also specified the area as “roofdeck” with no indication of any restrictions on that use.

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"Significant change in the use or appearance of common property"

[43] In *Chan v. The Owners, Strata Plan VR677* (February 2, 2012), Vancouver Registry No. S115516 (B.C.S.C.), this court considered the meaning of "significant change in the use or appearance of common property" under s. 71 of the *SPA* and developed a non-exhaustive list of objective and subjective factors to be considered. These were well-summarized 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*.

[44] These factors provide a helpful guide in structuring an analysis but each case will of course turn on its own facts. It is also important to note that these cases deal with common property, not limited common property. In my view, all relevant factors must be assessed in the context of the more particular interest conferred by a designation of limited common property.

[45] In *Chan*, the addition of a door from a common property hall into a strata unit and the exchange of an exterior door for a window that was below street level were not considered to be significant changes, as they did not interfere with the use and enjoyment or the marketability of other strata units and were minimally visible to other strata members. In *Foley*, the extension of a roof deck and the addition of a

new railing on the exterior of a four-story building were considered to be significant changes. The railing was visible from the street and the extension adversely affected two other owners and likely enhanced the value of the owner's unit. In addition, the fact that the owner had ostensibly incorporated a portion of common property into his private area was considered to be a significant change in itself.

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[46] Both *Chan* and *Foley* considered *Reid v. Strata Plan LMS 2053*, 2003 BCCA 126, where decorative changes such as potted plants and shrubs placed on common property were not considered to be significant, and *Sidhu v. The Owners Strata Plan VR1886*, 2008 BCSC 92, where the addition of vents by a dry cleaner in the exterior walls of the building did constitute a significant change.

[47] *Foley* is superficially similar to this case, but there are important differences: the owner essentially appropriated a larger area of common property on the roof for his own use when he extended his deck, which likely increased the value of his unit; the use of the extended roof area affected two neighbours with additional noise and reduced privacy; and the railing was entirely visible from the street since the building had only four stories.

[48] Here, the roof deck is limited common property designated for Mr. Frank's unit, and by installing railings on the parapet walls of the building, he is not extending the area to which he is entitled under the Strata Plan. The railings will impact the marketability of his unit by *restoring* the value of the recreational use he formerly enjoyed for many years and reasonably understood was permitted. Mr. Frank's use of the roof deck has not affected any other strata units and the other penthouse owners have not objected. The railings, which will be consistent in design with all other railings on the building, will only be visible to the other penthouse owners and are not at all visible to the public given that the building has 26 stories.

[49] In the context here, the fact that a development permit is required does not in itself render the installation of railings to be a significant change. For years, the Strata Corporation was unaware of any restrictions on the use of the roof and allowed recreational use for the penthouse owners. Even when it received

information about restrictions in May 2009, the Strata Corporation continued to allow Mr. Frank and the other penthouse owners to use their roof deck areas. It was only the City's order to vacate on June 14, 2013 that effected a change of use, and even after this, the members of the Strata Corporation refused to approve a resolution restricting access to the roof deck areas. Importantly, the development/ building permit Mr. Frank obtained authorizes the corrective measures required to bring his roof deck into compliance, not only with the *BC Building Code* but also with the Strata Plan.

[50] In all of these circumstances, it is my view that the installation of railings does not constitute a significant change in the use of Mr. Frank's limited common property. Nor does it constitute a significant change in the appearance of the limited common property, as the railings will be consistent with all other balcony railings on the building and in any event, they will visible only to the penthouse owners who access their own roof areas. This latter point was essentially conceded by the Strata Corporation in argument.

[51] Therefore, a ¾ vote at a special general meeting is not required under s. 71(a).

[52] I will add that even if the work constitutes a significant change in use, I would consider s. 71(b) to permit such a change to be made without a vote. This subsection permits a strata corporation to do so if there are reasonable grounds to believe that immediate change is necessary to ensure safety, a matter conceded to fall under the duty to repair. I would not accede to the Strata Corporation's submission that no immediate change is necessary because the condition of the roof area is as it was designed. An immediate change is necessary in order to make the roof deck safe for the use specified in the Strata Plan and to restore Mr. Frank's ability to use and enjoy his limited common property, all of which is now authorized by a new development/ building permit with a 6 month expiry date from March 9, 2016.

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The duty to repair

[53] Despite my finding that the proposed change is not significant, I must still determine whether the installation of the railings is a matter that falls within the Strata Corporation's duty to repair limited common property. If it does, then the Bylaws contemplate that the costs will be borne by the Strata Corporation, not Mr. Frank.

[54] It is not disputed that a strata corporation's duty to repair has been interpreted broadly. In *Mott*, Burnyeat J., referred to *Manton v. York Condominium Corp. No. 461* (1984), 49 O.R. (2d) 83 (Dist. Ct.), where the obligation to "maintain" was found to be broad enough to include the obligation to correct a structural defect, and the words "maintain" and "repair" were broad enough to include alterations of the finish or appearance of the railings, floors or ceiling of a balcony. Both cases cited *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337 (C.A.) at 341:

> The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

[55] See also: *Elahi v. Owners, Strata Plan VR 1023*, 2011 BCSC 1665 at para. 32.

[56] In *Guenther v. Owners,Strata Plan KAS431*, 2011 BCSC 119, repairs were required to balconies which had been damaged from water ingress that stemmed in part from substandard initial construction. Barrow J. concluded that the strata corporation had a duty to repair under a provision of its Bylaws that imposed the obligation to repair railings and similar structures that enclose balconies (essentially the same as s. 12.1(c)(ii)(E) of the Bylaws in this case). In doing so, he held (at para.

6) that the obligation to repair “extends to making good or sound that which was previously good or sound and that which may never have been good or sound”. The fact that the parapet walls on the roof of 889 Homer Street are not high enough for safety purposes is roughly analogous to “that which may never have been good or sound”.

[57] The Strata Corporation submitted that the addition of the railings is not a necessary repair but a change (even if not significant), not to comply with the original development permit or the *BC Building Code*, but for the benefit of Mr. Frank. On this basis, the Bylaws provide that the Strata Corporation may approve such changes on the condition that they must be paid for by Mr. Frank.

[58] Again, I cannot accept this submission. I consider the addition of the railings to be a necessary repair in order to bring Mr. Frank’s roof deck into compliance with the Strata Plan. This is in effect what the strata corporation was required to do in *Re Owners of Strata Plan NW 2212*: the affected owners were entitled to “conformity to the strata plan and to the full benefit of their limited common property”. Moreover, as noted above, the development/ building permit issued on March 9, 2016 expressly authorizes the corrective measures required to bring the roof deck into compliance with both the *BC Building Code* and the Strata Plan. This will benefit not only Mr. Frank, but also the Strata Corporation, as addressing the safety issue will inevitably reduce the risk of third party liability associated with persons using the roof of the building.

[59] This necessary repair is of the kind contemplated in s. 12.1(c)(i) and (ii) of the Bylaws as one that “in the ordinary course of events occurs less often than once a year”, as well as one involving parapet walls on the exterior of the building and “railings and similar structures” that enclose patios and balconies. Consequently, the costs should be borne by the Strata Corporation.

“Significantly unfair”

[60] Section 164 of the *SPA* is remedial and similar to the oppression remedy in company law. Its intent is to allow the court to interfere where the conduct of the

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strata corporation through its majority decision-making process becomes oppressive or significantly unfair to a minority: see *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. "Significantly unfair" has been interpreted to mean something more than mere prejudice or trifling unfairness: *Reid; Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120. This standard recognizes that strata corporations must often exercise discretion in making decisions that affect owners, and sometimes their duty to act in the best interests of all owners conflicts with the interests of one owner or a group of owners. At the same time, the court must be able to look beyond decisions which have been approved by a majority.

[61] In *Dollan,* Garson J.A. (for the majority) referred to the jurisprudence in corporate oppression cases. In the leading case, *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, the court emphasized that the oppression remedy gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair, and in doing so, "should look at business realities, not merely narrow legalities" (at para. 58). It established a two-part test to assess an oppression claim (at para. 95):

> (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[62] The reasonable expectation of a party is a question of fact to be examined objectively and in the context of the nature of the relationship between the parties: see *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173 at paras. 49-50.

[63] Relying on these principles, Garson J.A. set out a two-step test for an owner seeking redress under s. 164 of the *SPA* (at para. 30):

> 1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
>
> 2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

[64] Mr. Frank submitted that he had a reasonable expectation that he had the right to use and enjoy his limited common property as a roof deck and that this expectation was violated by the Strata Corporation's failure to cooperate in the development permit application and its refusal to perform its duty to repair, thus denying him the right to use and enjoy his limited common property.

[65] The Strata Corporation submitted that Mr. Frank had no such reasonable expectation given the actual legal realities of the roof area as evidenced by the original intentions of the City, the architect and the developer, and the situation is not significantly unfair to him.

1. Did Mr. Frank have reasonable expectations?

[66] When Mr. Frank purchased his unit in 2004, he understood, from his observations of the roof deck and the unrestricted designation in the Strata Plan filed in the Land Title Office, that he was entitled to use and enjoy his limited common property on the "roofdeck". With the approval of the then president of the Strata Corporation, he added cement pavers and patio furniture, and enjoyed using his roof deck for many years.

[67] It was not until May 2009 that the Strata Corporation learned of possible restrictions on the use of the roof. Yet, it continued to allow Mr. Frank and the other penthouse owners to use their roof deck areas. It was not until June 14, 2013, when the City made the order to vacate the roof, that a change of use was effected. Even then, the members of the Strata Corporation subsequently refused to approve a resolution restricting access to the roof deck areas.

[68] It was Mr. Frank's diligence that brought the non-compliance issue forward, as he had obvious concerns about safety. When he first raised this with the Strata Corporation, he received support for his initiative to obtain the required permits to address his concerns, and this support continued for a number of years. It was not until late 2012, after Mr. Frank had finally retained an architect and submitted an application to the City, that the Strata Corporation essentially reversed its position of support.

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[69] I do not agree with the Strata Corporation's submission that Mr. Frank's expectations must be assessed in the context of the "actual legal realities" of the roof area and the original intentions of the City, the architect and the developer. Those realities were not evident to Mr. Frank, or to other top floor owners, or even to the Strata Corporation for many years, nor were the intentions ever clearly identified. Even now, the original intentions have only been discerned by inference from the documents. Whether or not one characterizes this situation as an error, it is my view that Mr. Frank's expectations must be assessed on the basis of the concrete information available to him and the conduct of the Strata Corporation in relation to his use of his roof deck over the years in question. Per *BCE*, these "business realities", rather that the "narrow legalities", should be the proper focus.

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[70] In these circumstances, I am satisfied that Mr. Frank had a reasonable expectation that he had the right to use and enjoy his limited common property as a roof deck.

2. Were Mr. Frank's expectations violated by action that was significantly unfair?

[71] The evidence supports Mr. Frank's submission that the Strata Corporation failed to cooperate in the application process, and given my conclusion that the work to be done is a necessary repair of the kind contemplated in s. 12.1(c) of the Bylaws, it follows that this failure, along with the Strata Corporation's actions in requiring a ¾ majority vote and a condition that Mr. Frank bear all costs, have been significantly unfair. These actions have prevented or delayed Mr. Frank from taking the necessary steps to restore his limited common property as a roof deck.

[72] I will deal first with the effect of requiring a vote under s. 71(a) of the *SPA*. In the circumstances here, where the primary benefit from the addition of railings on the roof was Mr. Frank's, the chances of obtaining the support of ¾ of the members were likely slim. In June 2015, after Mr. Frank provided the Strata Corporation with the three alternatives for his access to the roof, it insisted on putting Alternatives 2 and 3 to a vote. After this was defeated, the Strata Corporation provided its consent

to Alternative 1 in a form acceptable to the City, albeit with terms and conditions, and this allowed the application to proceed.

[73] The inference from this is that the Strata Corporation did not consider Alternative 1 to be a significant change in use or appearance. However, it later insisted on putting Alternative 1 to a ¾ vote as well. It did so in May 2016, despite Mr. Frank's strong objection, and predictably, the resolution did not pass.

[74] From early 2015, after Mr. Frank provided the Strata Corporation with all the information about Alternatives 1, 2 and 3, it was unresponsive to his requests to provide input into the work to be done, and this became even more pronounced later in 2015 after Mr. Frank decided to proceed with Alternative 1. The Strata Corporation refused to provide any comments or concerns during the application process. It was not until late May 2016 that it provided a list of concerns (most if not all which had been substantially addressed by Mr. Frank), and this was under the terms of a consent order. It also refused to allow Mr. Frank access to the roof for the purpose of beginning the work authorized by the development/ building permit.

[75] Finally, the Strata Corporation's insistence about costs is clearly contrary to what I have determined is its duty to repair under s. 72 of the *SPA*.

[76] In my view, all of this conduct was obstructive to Mr. Frank in his pursuit of an application to the City to bring the roof deck into compliance with safety requirements and the Strata Plan, and was a violation of his reasonable expectation that he had the right to use and enjoy his limited common property as a roof deck.

Orders

[77] Some of the orders sought by Mr. Frank are no longer necessary since he has already obtained a development/ building permit.

[78] There will be a declaration that:

(a) the Strata Corporation's actions as described herein are significantly unfair to Mr. Frank; and

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(b) the addition of railings and related safety measures on the roof deck fall within the Strata Corporation's duty to repair and do not require the approval of ¾ of the members of the Strata Corporation under s. 71(a) of the *SPA*.

[79] There will be an order that the Strata Corporation perform its duty to repair in relation to the work which has been authorized by the development/ building permit issued by the City of Vancouver on March 9, 2016.

[80] I also expect the Strata Corporation to provide Mr. Frank access to the roof area so that he can facilitate the implementation of the installations.

[81] The issues of damages and special costs as sought in paragraphs 10-12 of the petition may be spoken to.

"Fisher J."

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