IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Santos v. The Owners, Strata Plan LMS 1509,* 2016 BCSC 1775

Date: 20160928
Docket: S161894
Registry: Vancouver

Between:

Ana Santos, Jan Karnik, Lucy Karnik, Oi Fan, David Lau, Fenton Fisher, Barbar Cruz, Rui Cruz, Maki Handa, Emmanuel Mahieu, Keely Johnson, Daniela Ciucci, Marlene Morgan, Victor Lo, Michael Golden, Marco Palmeri, Mary Eng, Isaac Cabrera, Mitzi Manansala, Dinh Trinh And Thuy Pham

Petitioners

And:

The Owners, Strata Plan LMS 1509

Respondent

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Petitioners:	W. McMillan R. Bennett
Counsel for the Respondent:	P.A. Williams
Place and Dates of Hearing:	Vancouver, B.C. July 21, 2016
Place and Date of Judgment:	Vancouver, B.C. September 28, 2016

I. INTRODUCTION:

[1] This petition is brought by owners and occupants of a large 250-unit residential strata complex known as Gardenia Villa. They seek relief pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43 ("*Act*") to address serious and long-standing water ingress problems at Gardenia Villa. Specifically, the petitioners seek:

(1) an order under s. 174 of the *Act* appointing an administrator to oversee the necessary remedial repairs; and

(2) an order under s. 165 of the *Act* that: (a) the respondent strata corporation fulfill its statutory duty to repair and maintain the building envelope and other common property; and (b) a special levy be issued for purposes of funding the repairs.

[2] The complex is located in East Vancouver and comprises eleven buildings: two large eight-storey buildings; four mid-sized four storey buildings (buildings A, B, D, E); and five small two-storey buildings (buildings F1, F2, F3, F4 and F5). The petitioners describe Gardenia Villa as the "quintessential leaky condo". There have been unsuccessful attempts to repair these buildings spanning two decades.

[3] By the conclusion of the hearing of this matter, the parties were able to narrow the issues considerably. The parties agree: (1) the common property of Gardenia Villa must be repaired and this is long overdue; (2) the Strata Corporation has an obligation to repair the building envelope as it is common property; (3) the strata corporation has breached this obligation; (4) an administrator should be appointed to oversee the repairs; (5) the method of repair should include, as stipulated in three prior building envelope assessment reports, replacing the existing face-seal cladding system with a rain-screen cladding system.

[4] The outstanding dispute between the parties turns, fundamentally, on the cost of repairing the building envelope. While the parties agree on the nature of the repairs required (e.g., the replacement of the face-seal cladding system with a rain-screen cladding system), they have not been able to agree on the amount of the appropriate levy to fund the repairs.

[5] The respondent opposes the issuance of a special levy by this Court. It submits that where a court determines the strata corporation has breached its duty of repair, the court may appoint an administrator **or** order a special levy, but it cannot and ought not do both at the same time. For the reasons articulated below, I have concluded, in light of the specific facts of this case, that it is necessary to not only appoint an administrator but to also order a special levy.

II. FACTS

[6] The material facts in this case are largely undisputed. The following facts, asserted by the petitioners in their affidavit materials and submissions, have not been controverted by the respondent.

[7] The water ingress problem at Gardenia Villa is serious and dates back to shortly after the residential complex was built in 1994. In some instances, drywall and carpets are soaked, walls and ceilings are stained, and condensation collects on window interiors. A number of units suffer from mould growth, and failed window and door seals. Several units have been tarped; some tarps have been left in place since a prior remediation attempt was abandoned in 2012. Owners complain that the mould in their homes has caused respiratory diseases and skin problems (such as eczema) as well as anxiety and stress.

[8] The petitioners also complain of depressed property values, foregone rental income, excessively high utility bills, high and recurrent maintenance expenses, inability to sell their units, and lack of access to credit because lenders have refused to accept “leaky condos” as security.

A. Remediation Attempts: 2005 - 2007

[9] Over a decade ago in 2005, the City of Vancouver ordered Gardenia Villa to take steps to remediate its failed building envelope, noting that “[s]ome of the buildings on this site show evidence of significant decay of structural members...” and “[w]ater was observed leaking out of structures in several locations and there is algae growing extensively on the building’s exterior stucco.”

[10] In response, RDH Building Engineering Ltd. (“RDH”) was retained to prepare a building envelope assessment report.

[11] RDH’s report, dated August 18, 2006 (“RDH Report”), noted widespread water ingress and elevated moisture levels inside the Gardenia Villa buildings. It recommended a comprehensive remediation program that included replacing the buildings’ existing face-seal cladding with a rain-screen system.

[12] The respondent did not implement the recommendations of the RDH Report and, in 2007, a group of owners filed a petition seeking the appointment of an administrator with powers to pass a special levy for the purpose of funding the necessary repairs. Mr. Justice Truscott dismissed the petition, finding that Gardenia Villa’s “salvage value” (i.e. its expected sale price if purchased by a developer for demolition and redevelopment) might be less than the cost of the recommended work which at that time was estimated to be approximately $40 million. However, Truscott J. also noted, during the course of his reasons for judgment, that a similar application in the future might succeed on new evidence.

[13] Notably, almost ten years have elapsed since that petition and Gardenia Villa continues to face serious water ingress problems. The petitioners now rely on an expert report that speaks to an estimated cost of repair of less than half the estimated $40 million cost of repair advanced before Truscott J.

B. “The Stucco Doctor” Repair: 2008 - 2012

[14] Following the dismissal of the petition in March 2008, the owners authorized a $10 million special levy, payable by quarterly instalments over four years, for the purpose of carrying out building envelope and rot repairs.

[15] Gardenia Villa hired a contractor operating as “The Stucco Doctor” to carry out the work. The Stucco Doctor installed new flashing on existing windowsills, and resurfaced part of the existing stucco finish. However, a rain-screen system was not installed.

[16] The special levy funds ran out in 2012 before the work was completed. In April of that year, the owners of Gardenia Villa defeated a resolution that would have raised an additional $5 million to complete the project. The vote was 40 in favour, 122 against. The Stucco Doctor then abandoned the project; its work remains unfinished.

[17] In 2013, a building envelope assessment was commissioned and Levelton Engineering issued a report ("Levelton Report"). Like the RDH Report before it, the Levelton Report recommended that the existing face-seal cladding be replaced by a rain-screen system.

[18] The respondent did not act upon the recommendations of the Levelton Report.

C. Latest Attempt at Remediation: The BC Building Science Report

[19] In 2014, the respondent hired BC Building Science Ltd. to carry out a third building envelope assessment for Gardenia Villa.

[20] The resulting report, dated April 17, 2015 ("BC Building Science Report"), identified five principal causes of the ongoing water ingress issues:

(a) The exterior wall cladding was constructed using a face-seal system, that, if perforated, allows water to enter but not to escape, leading to rot and decay of wood components, and corrosion of steel components.

(b) The windows and door systems are "very poor and low functioning" in regard to condensation resistance and water leakage resistance.

(c) The waterproofing systems of a number of balconies and walkways is poor, and is nearing the end of its useful life.

(d) The roof systems are at or nearing the end of their useful life, and need to be replaced.

(e) The interior ventilation system does not circulate fresh air effectively, amplifying the effects of condensation and seepage.

[21] The BC Building Science Report identified two options for carrying out the remediation: Strategy A and Strategy B. The petitioners summarized Strategy A and B as follows:

(a) Strategy A would involve comprehensively replacing all building envelope elements at an estimated cost of $16,827,000. The existing face-seal cladding would be replaced with a rain-screen system.

(b) Strategy B would involve a more limited repair of only those areas deemed especially urgent, as well as the targeted refurbishment of the existing face-seal cladding. In contrast to Strategy A, Strategy B does not include replacing the face-seal cladding with a rain-screen system. It is similar in scope to the largely ineffective work done by The Stucco Doctor between 2008 and 2012. The estimated cost of Strategy B is $9,939,000.

[22] The BC Building Science Report strongly recommended the Strategy A repairs over the Strategy B repairs for the following reasons:

(a) The comprehensive replacement of the existing face-seal cladding with a rain-screen system (as in Strategy A) provides much greater assurance of long-term success than the targeted repair of the existing face-seal system (as in Strategy B).

(b) The risks inherent to Strategy B (namely, that it will not fix the water ingress problems) are not justified by the difference in cost with Strategy A.

(c) Targeted repairs to building envelope components (as in Strategy B) often trigger the need to carry out further,

unanticipated repairs, thus increasing the cost. Because of this, it is better to remediate the building envelope comprehensively (as in Strategy A) than in a targeted manner.

(d) Many of the cladding components at Gardenia Villa are at or near the end of their useful life and will require replacement in the near future. It will be far more cost-effective to replace them all at once (as in Strategy A), than to replace them as and when they fail over the next few years.

(e) The actual cost to repair the roof will be less if done in conjunction with removing and replacing the face-seal cladding (as in Strategy A) than if done without removing the existing cladding (as in Strategy B).

(f) The per-unit cost to access, remove, and repair or replace the windows and doors (required by both repair strategies) will be far less if done when the new rain-screen is being installed (as in Strategy A), than if done in a targeted repair with the existing face-seal in place (as in Strategy B).

(g) The windows and doors cannot be replaced (as required by Strategies A and B) without risking further damage to the surrounding face-seal cladding.

(h) Removing the existing face-seal cladding (as in Strategy A) would allow as yet undiscovered areas of water ingress to be identified and addressed in a more controlled and cost-effective manner than if the existing cladding were simply patched *in situ* (as in Strategy B).

(i) Obtaining financing for comprehensive renewal work such as that envisioned in Strategy A is often easier and less costly than for targeted repairs, as envisioned in Strategy B.

[23] Strategy B was only included in the BC Building Science Report after Gardenia Villa's president, at the time of the report's commissioning, reviewed the first draft and expressly requested that a lower cost, secondary plan be provided as an option to the strata owners. Strategy B was then added to the final draft.

D. The Strategy A and Strategy B Resolutions

[24] On June 23, 2015, the respondent convened a special general meeting ("SGM") to vote on whether to proceed with either the Strategy A or the Strategy B repairs set out in the BC Building Science Report.

[25] The owners voted on five special resolutions, each of which would have authorized a special levy to fund one of the two repair strategies, over differing lengths of time. The owners voted on: whether to carry out Strategy A repairs over three, five, or seven years; and also on whether to carry out the Strategy B repairs over two or four years.

[26] The owners defeated each of the five special resolutions. While quite a number of owners voted in favour of the Strategy A, the total vote in favour of Strategy A did not satisfy the three-quarter majority special resolution requirement of the *Act*. The owners showed virtually no support for the Strategy B repairs. The results of each of the votes were as follows:

(a) The resolution to fund the Strategy A repairs over 3 years was defeated by a vote of 48 in favour, 99 opposed.

(b) The resolution to fund the Strategy A repairs over 5 years was defeated by a vote of 49 in favour, 100 opposed.

(c) The resolution to fund the Strategy A repairs over 7 years was defeated by a vote of 47 in favour, 90 opposed.

(d) The resolution to fund the Strategy B repairs over 2 years was defeated by a vote of 15 in favour, 125 opposed, and 4 abstentions.

(e) The resolution to fund the Strategy B repairs over 4 years was defeated by a vote of 0 in favour, 125 opposed, and 6 abstentions.

[27] To date, none of the necessary repairs of the common property which were recommended in the BC Building Science Report have been authorized. Gardenia Villa remains in a state of disrepair.

III. THE APPOINTMENT OF AN ADMINISTRATOR UNDER THE ACT

[28] Section 3 of the *Act*, places the responsibility on the strata corporation to manage and maintain common property for the benefit of the owners. Section 72(1) of the *Act* expressly provides that the strata corporation must repair and maintain common property and common assets. As set out above, it is accepted among the parties that the building envelope is common property, that the strata corporation must attend to these repairs, and that these repairs are long overdue. Further, the parties agree that Mr. Gioventu, the Executive Director of the Condominium Home Owners Association, should be appointed as the administrator for the purpose of overseeing the necessary remedial repairs to the building envelope and other common property as required.

[29] The appointment of an administrator is governed by s. 174 of the *Act* which provides that this Court may appoint an administrator to exercise the powers and perform the duties of the strata corporation if, in this Court's opinion, such an appointment is in the best interests of the 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.
>
> [Emphasis added]

[30] In discerning whether the appointment of an administrator is in the best interests of the strata corporation, the reasons of the Court in *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493 are instructive. In that case, Harvey J. sets out a number of relevant factors which inform the exercise of the court's discretion:

> [11] In my view after reviewing the authority available, bearing upon this question, factors to be considered in exercising the Court's discretion whether the appointment of an administrator is in the best interests of the strata corporation include:
>
> (a) whether there has been established a demonstrated inability to manage the strata corporation,
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> (b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation,
>
> (c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,
>
> (d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,
>
> (e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.
>
> In addition, there is always to be considered the problem presented by the costs of involvement of an administrator.

[31] The petitioners submit that the factors outlined in *Lum*, at para. 11(c), (d) and (e), apply to the facts of the instant case. The respondent acknowledges that there is a dispute between factions within the strata corporation that has led to an inability to manage and govern the necessary repairs to the common property at Gardenia Villa and, accordingly, it agrees to the necessity of appointing an administrator.

[32] In light of the admitted dispute between competing groups, the inability of the strata corporation to effectively implement and oversee these repairs over the course of two decades, and the consequent protracted delay in repairing the common property, it is patent that the appointment of an administrator is in the best interests of the strata corporation. I so order.

IV. THE ISSUANCE OF A LEVY ORDER UNDER THE ACT

[33] Under s. 165 of the *Act*, this Court may exercise its discretion to issue a special levy. The authority to do so is found in ss. 165(c).

[34] Section 165 states:

> **Other court remedies**
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> 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]

[35] Under ss. 108(2)(a) of the *Act*, a special levy must be approved by a resolution passed by 3/4 vote at an annual or general meeting of the owners. Nonetheless, in *Tadeson v. Strata Plan NW 2644*, [1999] B.C.J No. 3091 (S.C.), a special levy was ordered, pursuant to ss. 165(c), in circumstances where the owners failed to pass a 3/4 majority vote resolution to fund common property repairs. Macdonald J. reasons:

> [15] The failure of the respondent strata corporation here is not due to any neglect on its part. That failure results from the refusal of the respondent owners to authorize the work, and the special assessment necessary to carry it out. But it remains, so far as the petitioners are concerned, a failure to fulfill a clear statutory obligation.

[36] The issuance of a special levy order in the absence of the requisite 3/4 majority vote, where a strata corporation fails to fulfil its statutory obligation, has come to be known as a “Tadeson Order”.

[37] In *Toth v. The Owners, Strata Plan LMS1564* (19 August 2003), Vancouver L022502 (S.C.), Pitfield J. addresses the scope of this Court's remedial authority under s. 165:

> [27] It appears to me that s. 165 is sufficiently broadly worded to permit an interested person… to apply for orders with a view to breaking the impasse which faces the owners in this case.
>
> [28] It appears to me that the application under s. 165 could seek an order that permits or indeed compels the strata corporation to perform a duty it is required to perform.
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> …
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> [30] The court does not appear to be constrained by paragraph (c) to act on the basis of simple majority or any other majority. The court may decide, having regard for all of the evidence, that the wishes of the minority should be acted upon.
>
> [Emphasis added]

[38] In *Clarke v. The Owners Strata Plan* VIS770, 2009 BCSC 1415, the Court considers *Toth* and similar decisions such as *Aviawest Resort Club v. Chevalier Tower Property Inc.*, 2005 BCCA 267 and *Ranftl v. The Owners, Strata Plan VR 672 and Wennerstrom*, 2007 BCSC 482. The Court concludes:

> These decisions make it clear that the court has ordered special levies be imposed either under s. 165 or otherwise, despite the levy failing to receive 3/4 approval, so that a strata corporation can fulfill its duties.

[39] The decision in *Clarke* is also instructive in that the Court appointed an administrator and later, following an application brought by the administrator, also issued a special levy. The Court reasons as follows:

> [20] It also follows that the power of the court to appoint an administrator under s. 174, to be effective, must include the power to order a special levy to pay the expenses associated with the appointment if the owners fail to approve the required funding. Section 174(4) states that "[t]he remuneration and expenses of the administrator must be paid by the strata corporation." [Emphasis added.] Since this is a duty of the strata corporation, s. 165 may be triggered if required.
>
> [21] The conclusions in the cases discussed above are sensible. There would be little point in appointing an administrator to deal with a dysfunctional building only to have the administrator paralyzed by the owners' inability to agree on important issues. The Act provides for a democratic process, but, when it fails, protection for the owners lies in the two-step process that is envisaged. First, the administrator must seek a 3/4 majority whenever a

> special resolution is required. If, however, the special resolution fails, the second step is for the administrator to apply to the court under s. 165, or otherwise, for orders or directions to ensure that the strata corporation addresses all issues in respect of which it has a duty.
>
> [Emphasis added]

[40] In the instant case, the democratic process has been engaged previously and special resolutions have failed. The owners now seek protection through the issuance of a special levy order by this Court so that long overdue repairs can be made to common property at Gardenia Villa. Of significance, these resolutions failed even though the owners accepted the recommendations of the BC Building Science Report (as well as two previous reports) that such common property repairs are necessary.

[41] In *Enefer v. Strata Plan LMS 1564*, 2005 BCSC 1866, Taylor J. also issued a special levy in circumstances where he found the repairs were necessary but the owners were in a deadlock position. There were competing factions in *Enefer* that prevented each faction from raising the requisite majority support. Of significance, both the petitioners and the respondent acknowledge there are also competing factions in the instant case. Moreover, there is clearly a deadlock and an inability to agree among the owners of Gardenia Villa in regard to the amount of the levy that ought to be approved to fund the necessary repairs.

[42] In *Browne et al v. The Owners of Strata Plan 582*, 2007 BCSC 206, a levy order was issued when the owners, as in this case, took some steps to address water damage but were not able to agree on a more extensive plan to fix the problem. The difficulties in *Browne*, as in this case, also included the fact that although motions for special levies to carry out building envelope repairs were put to the owners, the necessary 3/4 majority vote was not obtainable.

[43] The respondent submits that the appointment of an administrator will sufficiently address and remedy the problems faced by Gardenia Villa such that the issuance of a levy is unnecessary. It argues that Mr. Gioventu is very respected and capable, and would work effectively in consulting with and reporting to the owners while facilitating a democratic resolution without the imposition of a levy.

[44] The petitioners submit that the democratic deadlock cannot be remedied by the appointment of an administrator. They argue that past conduct and continuing conflict among competing groups of owners, coupled with the pattern of failed attempts to affect repairs and approve levies, have resulted in years of inaction and unacceptable living conditions for the residents of Gardenia Villa. They assert this state of affairs will continue indefinitely in the absence of a court ordered levy, even after an administrator is appointed.

[45] The petitioners further submit that the appointment of an administrator and the issuance of a *Tadeson Order* are needed remedies under the *Act* that address very different root causes of the strata corporation's failure to fulfill its obligation. That is, while the *Tadeson Order* is the appropriate tool where the failure is caused by the owners' refusal to pass a resolution needed to impel the strata owners to action, the appointment of an administrator is the appropriate tool if the failure is caused by mismanagement or executive dysfunction. They submit that in the instant case legislative deadlock and executive dysfunction are both contributing causes of the strata corporation's failure to fulfil its duty to repair common property such that both a *Tadeson Order* and the appointment of an administrator are needed and warranted.

[46] On the facts before me, I am satisfied that competing factions among the owners, which both parties readily admit, have contributed not only to the governance difficulties surrounding the building envelope repairs but also to the legislative deadlock in approving the levy needed to fund the repairs. A deadlock has prevented both a simple and 3/4 majority to vote in favour of a special levy.

[47] The strata corporation is required to repair the building envelope and other common property; accordingly, pursuant to ss. 165 (a) of the *Act*, this Court orders that it must do so. Further, in regard to the special levy, as the Court reasoned in *Toth*, and as accepted in *Clarke*, ss. 165(c) does not require that a majority of owners approve a levy before a court can exercise its discretion to grant this remedy. The clear and plain language of this subsection of the *Act,* particularly in light of its purpose as a remedial provision aimed at addressing a strata

corporation's failure to perform a statutory duty, grants this Court a broad discretion where the strata corporation fails to fulfill its statutory obligation to repair common property. Such discretion is not constrained by the requirement of a bare majority or by a 3/4's majority vote of the owners. Indeed, this Court has the express authority to make "*any* order it considers necessary" to give effect to an order under ss. 165(a). In my view, the issuance of a special levy in this case is necessary to give effect to the order under ss. 165(a) that the strata corporation must perform its duty of repair under the *Act.*

[48] The evidence establishes that the strata corporation's failure to repair the building envelope has spanned the course of many years. Further delay and further votes will not remedy the deadlock and may serve to exacerbate an already untenable situation. In the context of this case, without the issuance of a special levy order, even the appointment of a very able administrator is, in my view, unlikely to remedy the deadlock. The administrator will most probably be dealing with the same owners, the same factions and the same dynamic of conflict among them.

[49] The respondent also argues that the statutory scheme does not permit this Court to order a special levy in this case because the *Act* does not permit *both* the appointment of an administrator and the issuance of a special levy. While the respondent concedes that this Court has the authority to grant a special levy under ss. 165(c) in some cases, it submits that there is no case law which supports both of the orders in question being granted together. The respondent relies on the decision in *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784, at paragraph 24:

> [24] Where the court determines that the strata council has breached its duty under s. 72 of the *Act*, the court may grant a mandatory injunction pursuant to s. 165 or appoint an administrator to perform the role of the strata council pursuant to s. 174.
>
> [Emphasis added]

[50] The reasoning in *Weir* is distinguishable. The petitioners in *Weir* were not seeking a special levy arising out of a legislative deadlock among owners, as is the case here. Rather, the petitioners in *Weir* sought an order requiring the strata council to investigate and repair the water damage and, in the alternative, sought the

appointment of an administrator. The Court was not being asked to address the question of whether the *Act* granted courts the authority or jurisdiction to appoint both an administrator and to issue a special levy concurrently. This issue was simply not before the Court in *Weir* and it did not rule on the issue. As such, the reasoning in *Weir* did not necessarily preclude both remedies being granted concurrently.

[51] The respondent further argues that to order a special levy at the same time as the appointment of an administrator would fetter the discretion of the administrator since the administrator would simply be a project manager without engineering or construction expertise. Far from compromising the role of the administrator, in light of the facts of this case, the issuance of a special levy will address the administrative deadlock that has plagued Gardenia Villa for years, freeing the administrator to oversee and administer the necessary repairs as required. Further, in doing so, the administrator is free to seek the assistance of engineering and construction experts, as needed and as prudence may require.

[52] The respondent also attempts to distinguish the decision of this Court in *Clarke.* Specifically, the respondent argues as follows:

> It is submitted that the *Clarke* decision with respect to s. 165 is no longer necessary, due to the enactment of s. 174(7) of the Act on December 11, 2009. It is submitted that this subsection is intended to do what was necessary in the *Clarke* situation and should be applied to the present situation.
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> Section 174(7) provides as follows:
>
> > 174(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, a 3/4 vote or a unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[53] The respondent argues that ss. 174(7) was enacted after the *Clarke* decision was rendered and submits that once Mr. Gioventu is appointed, he should engage the democratic process and hold another vote. Further, the respondent argues that this vote should be held in light of another report by a Mr. Brian Lee. The strata

council has retained a Mr. Brian Lee, an engineer with MGH Consulting Inc., to prepare a report that reviews the two most recent engineering reports (i.e., the Levelton and BC Building Science Reports) and to address the scope of work and expected costs. It submits that the BC Building Science Report may not present the most economic repair, based upon the scope of work and the financial ability of the owners to fund the repair. The respondent argues that this question is one for the administrator to investigate and determine, as Strategy A of the BC Building Science Report may be too onerous and another repair strategy may be more palatable. At the time of the hearing of this application, it was anticipated that Mr. Lee's report would be prepared by the end of August 2016.

[54] In this context, the respondent submits that s. 174(7) should be read together with paragraphs 21 and 22 of the *Clarke* decision; these paragraphs of *Clarke* are reproduced below for ease of reference.

> [21] The conclusions in the cases discussed above are sensible. There would be little point in appointing an administrator to deal with a dysfunctional building only to have the administrator paralyzed by the owners' inability to agree on important issues. The Act provides for a democratic process, but, when it fails, protection for the owners lies in the two-step process that is envisaged. First, the administrator must seek a 3/4 majority whenever a special resolution is required. If, however, the special resolution fails, the second step is for the administrator to apply to the court under s. 165, or otherwise, for orders or directions to ensure that the strata corporation addresses all issues in respect of which it has a duty.
>
> [22] Without the availability of the second step, there would be no effective means to address the continuing dysfunction. The protection for the owners, at the second step, regardless whether they are part of the majority, is to appear on the application to support or oppose the application.

[55] I do not accept the respondent's argument that the remedial approach in *Clarke*, including that Court's application of s. 165, is rendered superfluous or "no longer necessary" due to the passage of ss. 174(7). Indeed, ordering a special levy is necessary where requiring another vote would likely lead to yet another administrative deadlock and another court application. As discussed below, Mr. Lee's report may or may not be of assistance to the administrator although the administrator is free to review its contents should he consider it appropriate and prudent to do so.

[56] It is noteworthy that both s. 165 and s. 174 are remedial in effect and are situated within Part 10 of the *Act*, which deals with "Legal Proceedings and Dispute Resolution". Both provisions provide the Court with a discretionary power to provide remedies on an application to the Court. These sections provide distinctive remedies to address different disputes affecting a strata corporation. In this case, appointing an administrator to remedy executive dysfunction while also issuing a special levy to remedy legislative deadlock would give effect to the remedial purpose of these provisions and would, in my view, be in the best interests of the strata corporation. In reading the *Act* as a whole, it is clear that these are not mutually exclusive remedies and that there is nothing to prohibit this Court from ordering these remedies concurrently.

[57] The respondent also attempts to distinguish the prior decisions of this Court which order special levies on the basis that they predate ss. 173(2) of the *Act*. The respondent argues:

> Section 173(2) of the Act provides a mechanism in which a strata corporation can apply to court for an order approving a resolution for a special levy. This section was enacted December 12, 2013. It is important to note this date. It is submitted that the court decisions that pre-date this amendment can be explained due to the lack of such a provision.
>
> Among other things, in order for s. 173(2) to be invoked, a resolution must have received a majority of votes cast in favour, but short of the ¾ vote required for a special levy pursuant to s. 108(2)(a) of the Act. This section was not available to the Strata Corporation due to the most favourable vote being 34.3% in favour.

[58] The respondent submits that before s. 173(2) was enacted, if a special levy to repair a building could not be passed with a 3/4 vote, owners could commence a court application for an order that an administrator be appointed to direct such repair or request a *Tadeson Order* or special levy. The respondent argues, however, that this new provision effectively replaces a *Tadeson Order* proceeding*;* that is, owners can now seek a remedy from this Court to approve a special levy, providing that more than half the votes cast on a resolution to approve the levy are in favour of the levy.

[59] While I agree that s. 173(2) provides an additional remedy to owners who are seeking approval of a levy in circumstances were a 3/4 vote is defeated but where a bare majority approves the levy, I do not accept that that the enactment of this provision circumscribes the authority and the discretion of this Court to issue a special levy in the proper circumstances, even if less than a bare majority of owners approve the levy. In this regard, the reasoning in cases such as *Clarke* and *Toth* remains compelling. Put differently, the broad remedial powers of the Court under the *Act* have been expanded rather than constrained by the enactment of s. 173(2).

[60] Having determined that a special levy order is appropriate in this case, the question arises as to the appropriate amount of the levy. The Strategy A Repairs, set out in the BC Building Science Report, are estimated to cost $16,827,000 and are based on a rain-screen cladding system. The Strategy A option sets out a sum of $12,616,000 for costs for the known scope of work. The remaining balance is based on contingencies, other project soft costs and taxes. The $16,827,000 figure does not include the administrator's fees.

[61] The petitioner has asked for a special levy award of $20 million. However, the evidentiary record before me does not support levying an additional $3,173,000 million sum above the $16,827,000 amount set out in the BC Building Science Report. Accordingly, this Court authorizes a special levy to the maximum amount of $16,827,000. The administrator's fees will be allowed in addition to the $16,827,000 ceiling. The question of the quantum of the additional administrator's fees is addressed in further detail below.

[62] Mr. Gioventu is directed to proceed with the Strategy A repairs set out in the BC Building Science Report as he sees fit. In setting the ceiling of the special levy at a maximum of $16,827,000, the Court is cognizant of the respondent's legitimate concerns regarding the cost of the necessary repairs. Mr. Gioventu is not bound to expend this maximum amount if he determines the necessary repair work can be done effectively for less, providing the rain-screen cladding system is properly implemented.

[63] Further, Mr. Gioventu may consider but is not constrained by the contents of Mr. Lee's report, nor should the commencement of the repair work be hampered by any delay in the completion of Mr. Lee's report should it not be completed at the time of this judgment. Mr. Gioventu is, of course, free to consult with and communicate with strata owners as he sees fit in regard to the timing and scheduling of repairs and levy assessments; however, the decisions in this regard are his to make.

V. DISPOSITION

[64] As stated above, the respondent strata corporation is ordered to fulfill its duty under the *Act* to repair and maintain the building envelope and other common property. The method of repair shall be based on a rain-screen cladding system, taking into account, as the administrator sees fit, the recommendations in the BC Building Science Report relating to Strategy A. This Court further orders a special levy to a maximum amount of $16,827,000 for the costs of the necessary repairs; this ceiling does not include the administrator's fees, which may be levied in addition to this maximum amount.

[65] The parties each requested and agreed to a number of terms relating to the appointment of Mr. Gioventu as administrator. The following agreed terms are acceptable to the Court, and the Court so orders:

1. Tony Gioventu shall be appointed as administrator of The Owners, Strata Plan LMS1509, pursuant to s. 174 of the *Act*, to exercise the powers and perform the duties of the strata corporation and its council, subject to the democratic requirements of the *Act*, for the sole purpose of ensuring the strata corporation discharges its obligation under ss. 72(1) of the *Act* to repair and maintain the envelope of the strata corporation buildings and other common property that requires such maintenance and repair;
2. The administrator shall be appointed for a term running two years from the date of this order and he or any of the parties may apply to court to shorten or extend this term;
3. The administrator shall be reimbursed by the strata corporation in the amount of $175.00 per hour, as well as $40.00 an hour for word processing and $40.00 an hour for bookkeeping and at cost for out of pocket expenses and disbursements;

4. The strata corporation shall provide access to all information, records and documents requested by the administrator, and provide such authorizations as are requested by the administrator to obtain information, records and documents held by third parties that relate to the strata corporation;
5. The administrator may retain the necessary professionals, including independent legal counsel, for opinion, advice and services in respect of his duties with respect to fulfilling the terms of this Order;
6. No person shall issue any legal process related to this appointment against the administrator, or any employee, agent or representative of the administrator, without leave of the court;
7. The strata corporation, at its own expense, shall add the administrator as a named insured on its errors and omissions insurance policy;
8. The strata corporation shall provide the administrator with at least seven days' advance notice of all general meetings, strata council meetings and meetings of committees authorized by the strata council, and the administrator is at liberty to attend said meetings;
9. The administrator and each party is at liberty to apply to court for further directions to be provided to the administrator.

[66] Mr. Gioventu shall have the authority to proceed with his administrative duties as set out above.

[67] The petitioners claim costs against the respondents on a full indemnity basis. In my view, this is not a case where costs on a full indemnity basis are warranted. The respondent shall pay the petitioners' costs on Scale B. Further, the petitioners shall be exempted from the payment of any special assessment that is levied by the strata corporation for purposes of paying for the costs of these proceedings.

"MORELLATO, J."