IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VR 1966,* 2017 BCSC 1661

Date: 20170921
Docket: S172978
Registry: Vancouver

Re: The Owners, Strata Plan VR 1966

In the Matter of Section 278.1 of the *Strata Property Act*, S.B.C. 1998, c. 43

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Petitioner:	V.P. Franco A. Andrisoi
Counsel for the Respondent, Christine Marie Raverty:	G.S. Hamilton
Respondent, appearing on her own behalf:	Susan Jenkins
Place and Date of Trial/Hearing:	Vancouver, B.C. August 31 and September 1, 2017
Place and Date of Judgment:	Vancouver, B.C. September 21, 2017

I. Introduction

[1] Recent amendments to the *Strata Property Act*, S.B.C. 1998, c. 43 (the *Act*) are intended to make it easier for strata corporations to wind themselves up voluntarily. Formerly, a resolution initiating the winding-up process was required to be approved unanimously and was therefore rarely achieved. Since the coming into force on July 28, 2016 of the relevant provisions of what had been known as Bill 40, however, a strata corporation may now proceed to wind itself up with a vote of 80%, provided it then obtains court confirmation. I am told that this is one of the first cases to come before the court under the newly amended legislation and the first that is contested.

[2] There are two possible routes available to strata corporations seeking to wind themselves up voluntarily: they may do so either with or without a liquidator. The advantage of using a liquidator is that the individual strata lots and common property are vested in the liquidator, who is then empowered to sell them. The process without a liquidator results in the dissolution of the strata corporation and the cancellation of the strata plan with the owners becoming tenants in common, but no sale.

[3] The new provisions governing the voluntary winding-up process using a liquidator are to be found in Division 2 of Part 16 of the *Act*. That process consists of the following steps:

> (a) passing a resolution under s. 277 at an annual or special general meeting by a margin of at least 80% to cancel the strata plan and appoint a liquidator;
>
> (b) obtaining an order of this court under s. 278.1 confirming the resolution;
>
> (c) obtaining a vesting order from this Court under s. 279, on application by the liquidator, confirming the appointment of the liquidator and vesting the individual strata lots and common

property in the liquidator for the purpose of selling them and distributing the proceeds of sale;

(d) delivering the vesting order to the registrar of titles and filing of the vesting order by the registrar under ss. 280 and 281;

(e) disposing of the property by the liquidator following approval by resolution passed by a 3/4 vote at an annual or special general meeting under s. 282; and

(f) applying for dissolution following approval of the liquidator's final accounts by 3/4 vote at an annual or special general meeting under s. 283.

[4] This is an application under s. 278.1 seeking a confirmation order, at the second stage of that process.

[5] The petitioner asserts that a qualifying resolution was passed by the requisite threshold at a special general meeting as contemplated by s. 277 and that the statutory test for confirming that resolution under s. 278.1 has been met.

[6] The application is opposed by two respondents, an owner and a tenant, who raise a number of objections to the resolution itself and the process that was followed in approving it.

[7] One of those objections is that the resolution was fatally deficient in that it did not meet the mandatory requirements of ss. 277 and 278. The alleged deficiency lies in the "interest schedule" that is required by s. 277 to be appended to and approved by the resolution. It is said to be missing one of the statutorily-mandated ingredients, although it is not alleged that the omission caused any prejudice to anyone.

[8] The deficiency is candidly admitted by the petitioner. It urges me to overlook the omission as a "rectifiable procedural irregularity" and to confirm the resolution in spite of it. I have determined that I am unable to do so.

[9] The petition must therefore be dismissed.

II. The Facts

[10] The petitioner is a strata corporation formed under s. 2 of the *Act*. It administers a condominium complex in a three-story, wood-frame building containing 36 strata lots and associated common property located at 1790 West 10th Avenue, Vancouver, and known informally as “Bel-Ayre Villa.”

[11] The building was built in 1974 and is, according to the petitioner, nearing the end of its life cycle. Like many wood-frame buildings of its vintage, it is showing its age. In 2015, the petitioner had to replace the waterproofing membrane of the parkade at a cost of over $500,000, necessitating a special levy in the amount of $440,000, with the remainder coming from the contingency reserve fund. That levy required the owners to pay between approximately $8,300 and $17,800 each. Although the cost was eventually paid in full, some owners had difficulty meeting the timelines stipulated for payment and had to obtain extensions.

[12] Some members of the strata council anticipate that more repairs are going to be required soon, perhaps as early as the next two years, at an estimated cost of approximately $711,880.

[13] Prompted by their concerns about the work on the building that appeared to be needed and the capacity of the owners to continue to pay for it, as well as the recent changes to the *Act* referred to at the outset of these reasons, a number of the council members embarked upon a process to consider the alternative of a winding-up and sale. They began by meeting with representatives of Colliers Macaulay Nicolls Inc. (“Colliers”), who appeared to have expertise in the area, with a view to learning more about that option. They were sufficiently impressed by what they heard at that initial meeting that they invited the Colliers representatives to a “town hall” information session for the owners in the building lobby on April 28, 2016.

[14] At that session, which most of the owners attended, the Colliers representatives told the owners that in their view the property had a value as a

redevelopment project in the $14-16 million range. By Colliers' assessment, that kind of return would yield a premium of 25-40% above the prices that the owners could expect to receive if they were to sell their units individually in the market.

[15] At a special general meeting held on May 31, 2016, the owners approved resolutions authorizing the strata council to:

> (a) investigate the option of winding-up the petitioner and selling its lands, including retaining a realtor to market the lands for sale; and
>
> (b) draw on the contingency reserve fund to pay legal expenses associated with the potential winding-up and sale option.

[16] Armed with those resolutions, the petitioner entered into a listing agreement with Colliers on or about June 14, 2016.

[17] Colliers pursued a marketing plan that called for bids to be received by September 14, 2016. By that time, four bids were received, ranging between $16 and $18.7 million. The highest bidder agreed in subsequent negotiations to increase its bid to $19 million.

[18] There followed two more information sessions for the owners, on September 27 and October 3, 2016, at which Colliers described its marketing efforts, the offers received and trends in the market.

[19] A second special general meeting was held on October 25, 2016 at which the owners approved a resolution authorizing the strata council to draw on the contingency reserve fund to pay legal fees to prepare a contract of purchase and sale and arrange for formal approval of a winding-up and sale.

[20] On or about November 25, 2016, the petitioner executed a sales contract with the successful bidder. Because the petitioner has no power to sell the individual strata lots or common property, the obligation to complete the sale was made

subject to completing the steps set out in Division 2 of Part 16 of the *Act*, including obtaining the orders sought in this proceeding.

[21] Colliers prepared further updated information for the owners in January 2017 which was distributed as part of a newsletter from the strata council on or about January 9, 2017. Another information session was held on January 16, 2017.

[22] A special general meeting was held on January 31, 2017. As required by s. 45 of the *Act*, the meeting materials, including the proposed winding-up resolution, were circulated over four weeks in advance.

[23] Attached as Schedule A to the proposed winding-up resolution was an "interest schedule" that was required to be approved as part of the resolution pursuant to s. 277(3)(e). The interest schedule listed all of the information that it was required to include except for "the estimated value of the interest of each holder of a registered charge against the land", as required by s. 278(1)(d).

[24] At the meeting, 35 of 36 eligible voters were represented in person or by proxy. Two resolutions were voted on and passed:

(a) to approve the cancellation of the strata plan and appoint a liquidator pursuant to ss. 277 and 278 (which passed with 30 of 36 votes or 83.3%); and

(b) to approve the disposition of property by the liquidator in accordance with the *Act* (which passed with 32 votes in favour).

[25] Following the meeting, the one eligible voter who had not been present has since indicated support for the resolution. Also, one of the voters who voted against the resolution has since advised that he now supports it.

[26] On March 31, 2017, the petitioner commenced this proceeding seeking, among other things, confirmation of the winding-up resolution pursuant to s. 278.1.

[27] One owner, the respondent Ms. Raverty, filed a response in opposition to the petition. In that response, Ms. Raverty alleged, among other things, that the winding-up resolution was invalid for want of the missing information in the interest schedule.

[28] The petitioner, apparently recognising its error in that regard, sought to rectify it at that stage by amending the petition to add the missing value estimates to the interest schedule attached to that document. It was too late by then, however, to fix the deficient interest schedule that had been approved at the special general meeting.

III. Can the deficiency be overlooked?

[29] This application is brought under s. 278.1 of the *Act*, which states as follows:

> **Confirmation by court of winding-up resolution**
>
> **278.1** (1) A strata corporation that passes a winding-up resolution in accordance with section 277, if the strata plan has 5 or more strata lots,
>
> (a) may apply to the Supreme Court for an order confirming the resolution, and
>
> (b) must do so within 60 days after the resolution is passed.
>
> (2) For certainty, the failure of a strata corporation to comply with subsection (1) (b) does not prevent the strata corporation from applying under subsection (1) (a) or affect the validity of a winding-up resolution.
>
> (3) A record required by the Supreme Court Civil Rules to be served on a person who may be affected by the order sought under subsection (1) must, without limiting that requirement, be served on the owners and registered charge holders identified in the interest schedule.
>
> (4) On application by a strata corporation under subsection (1), the court may make an order confirming the winding-up resolution.
>
> (5) In determining whether to make an order under subsection (4), the court must consider
>
> (a) the best interests of the owners, and
>
> (b) the probability and extent, if the winding-up resolution is confirmed or not confirmed, of
>
> (i) significant unfairness to one or more
>
> (A) owners,
>
> (B) holders of registered charges against land shown on the strata plan or land held in the name of or on behalf of the strata

> corporation, but not shown on the strata plan, or
>
> (C) other creditors, and
>
> (ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners.

[30] At issue here is whether the petitioner can properly be said to have passed a valid winding-up resolution in accordance with s. 277, so as to be entitled to bring the application under s. 278.1(1)(a), when it has not complied fully with s. 278. There are a number of reasons that lead me to conclude that it cannot.

[31] First and most importantly, the legislation on its face precludes such a result. Section 277 states as follows:

> **Appointment of liquidator**
>
> **277** (1) To appoint a liquidator to wind up the strata corporation, a resolution to cancel the strata plan and appoint a liquidator must be passed by an 80% vote at an annual or special general meeting.
>
> (2) A liquidator must have the qualifications of a liquidator that are required by the *Business Corporations Act*.
>
> (3) The resolution must give the name and address of the liquidator and approve all of the following:
>
> (a) the cancellation of the strata plan;
>
> (b) the dissolution of the strata corporation;
>
> (c) the surrender to the liquidator of each owner's interest in
>
> (i) land shown on the strata plan,
>
> (ii) land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and
>
> (iii) personal property held by or on behalf of the strata corporation;
>
> (d) an estimate of the costs of winding-up;
>
> (e) the interest schedule referred to in section 278.

[32] The problem lies in the last of these requirements, the need for an approval of "the interest schedule referred to in s. 278." The essential ingredients of an interest schedule are set out in s. 278. Subsection 278(1) states in relevant part as follows:

> The interest schedule … must do all of the following:
>
> …
>
> (d) list the name, postal address and the estimated value of the interest of each holder of a registered charge against the land;
>
> …

[33] The petitioner argues that its failure to list the requisite value estimates in the interest schedule was merely a "rectifiable procedural irregularity." Such an inconsequential oversight, it is said, should not prevent the owners who voted in favour of the resolution from obtaining the requisite court confirmation to permit them to proceed with the winding-up and sale that they approved.

[34] The petitioner notes that there is no evidence of anyone having been prejudiced by the omission, or that it had any distorting impact on the vote. It says that the other information that was included in the interest schedule (i.e., the name and address of the charge holder and the registration number of the charge) was sufficient to allow those owners who might have been interested to procure the information themselves and arrive at their own estimates. Indeed, they would be in a better position than the strata council to do so. The only value estimate that the strata council could have prepared would have been based on the instruments registered on title, which might not reflect the true value of the charge.

[35] In any event, any harm that may have been caused by the omission was, it is argued, cured when the petition was amended following the vote to add the missing value estimates to the interest schedule attached to that document.

[36] I am unable to accede to those submissions. To overlook the deficiency as the petitioner urges would be to rewrite the legislation. The legislature has determined that the value estimates are one of the essential ingredients in a valid winding-up resolution. There is therefore no mechanism in the *Act* to "rectify" their omission, regardless of whether it may have caused prejudice or not.

[37] The legislature has, moreover, specifically identified which of the requirements in the legislation can be overlooked. In s. 278.1(2), reproduced above, the legislature has seen fit to clarify that a failure to comply with s. 278.1(1)(b) – i.e.,

the 60-day deadline for bringing the confirmation application – does not prevent the strata corporation from applying under s. 278.1(1)(a) or affect the validity of a winding-up resolution. There is no such clarification or discretion conferred to overlook a failure to comply with ss. 277 or 278, which strongly implies that such a deficiency does indeed preclude a valid application from being made under s. 278.1(1)(a) and does indeed affect the validity of the winding-up resolution.

[38] Ms. Raverty argues that the process of appointing a liquidator following anything less than a unanimous vote leads to an involuntary taking of the homes of the dissenting minority. Legislation permitting such a result must, as a matter of statutory interpretation, be complied with strictly: *Horton v. British Columbia (Ministry of Transportation and Highways)*, 1991 CanLII 1108 (B.C.S.C.), (1991), 53 B.C.L.R. (2d) 121 (S.C.); Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Ltd., 2011) at p. 511; *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell Limited, 1969) at pp. 251-2.

[39] The petitioner disagrees with the suggestion that a strict construction is called for in this context. It argues that a voluntary winding-up and liquidation in the strata property context is different in principle from an expropriation, in that the owners have agreed to subordinate certain of their individual property rights to the will of the majority. It cites in this regard *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12 (at paras. 3 and 4, per Cromwell J.A., as he then was) and *McRae v. Seymour Village Management Inc.*, 2014 BCSC 714.

[40] In the latter case, which concerned an application under the *Partition of Property Act*, R.S.B.C. 1996, c. 347 to sell certain “common-law” strata units over the objections of dissenting owners , Fenlon J. noted (at para. 44) that:

> … forced sale of co-owned property has been part of our law for a very long time. Shared ownership has advantages. It permits those who might not otherwise be able to own a home to do so, but it also has significant disadvantages – a forced sale by the other co-owners is one of them.

[41] While I agree that the application of the rule calling for a strict construction of expropriation statutes must be sensitive to the context, and in this case one must account for the shared ownership regime and the strong majority support for the winding-up resolution demonstrated by the vote, that context does not change the fact that this is still an involuntary taking of a home. It must, at a minimum, be done according to law. This is not a case in which there is an ambiguity in the legislation. The legislation is clear. What I am being asked to do here is to ignore a clear, mandatory provision in the legislation, rather than to resolve an ambiguity.

[42] I also appreciate that this is not a case like *Horton* in which the disqualifying deficiency can be shown to have directly prejudiced the respondent raising the objection. Nevertheless, all of the owners, including dissenting owners like Ms. Raverty, have an interest in seeing that the proposed winding-up and liquidation proceed in a fair and orderly manner, according to law.

[43] *Horton* was a judicial review of an expropriation. McColl J. declared the expropriation to have been a nullity by virtue of the failure of the expropriating authority to follow the requisite steps set out in the legislation. One of those was a requirement to serve the respondent personally with a formal "notice of intention" if they were proceeding by way of a "linear development" – an expedited process allowing for a shorter timeline. The expropriating authority had instead sent a "notice of approval of expropriation" by registered mail, which purported to have immediate effect. McColl J. concluded the judgment as follows:

> It was argued that in a linear development, such as the subject one, persons in the position of the petitioners have suffered no real prejudice by the failure to follow the proper procedure. That assumes that in any event the expropriation is or was inevitable, in which case the only issue is one of compensation, a separate process under the *Act*. I do not agree. Clearly the requirement to provide notice of intention was purposeful. There are any number of reasons why the legislature saw fit to establish notice of intention as a separate procedure: to allow the property owner to seek legal advice as to the appropriateness of the expropriation; to permit the property owner to get his or her affairs in order, such as removal of buildings or livestock or chattels from the affected area; are but two that come quickly to mind. I am sure there are others. In the present case that purpose is utterly defeated by the contemporaneous notice of approval of expropriation. If the legislature

> had intended that effect, better words could have been chosen to leave no doubt on the subject.
>
> It follows from this that I have found the expropriation in question to be a nullity. The respondent entered upon the lands of the petitioners in early November. That constitutes a continuing trespass and the petitioners are entitled to a declaration to that effect and the costs of this application.

[44] In this case, the legislated requirement to list the value estimates in the interest schedule was likewise "purposeful" in the same sense. That purpose appears, moreover, to involve more than just avoiding the kind of prejudice that the petitioner refers to.

[45] In seeking to discern the intent of the legislature in requiring value estimates to be listed in the interest schedule, I begin with the observation that value estimates are not required in the parallel provision in *Division 1* of Part 16, i.e., s. 273(1)(c). That provision deals with voluntary winding-ups *without* a liquidator, where a "conversion schedule" rather than an interest schedule is to be appended to and approved by the winding-up resolution.

[46] The distinction predates the enactment of the Bill 40 amendments. In the report of the British Columbia Law Institute leading to the promulgation of Bill 40, i.e., the "*Report on Terminating a Strata*," BCLI Report No. 79, February 2015, the authors describe the rationale for the distinction as follows (at p. 27):

> (d) Interest Schedule
>
> The interest schedule is this procedure's equivalent to the conversion schedule. It provides the roadmap for how the strata's property will be converted from strata-titled ownership to property held by the liquidator for the purpose of ratable distribution to the owners [citing s.278].
>
> Most of the information required under the interest schedule is the same as that required under the conversion schedule [citing ss. 273(1)]. The interest schedule also relies on the same conversion formula using assessed value of strata lots or, if assessed value is unavailable, appraised value [citing ss. 273(2)].
>
> The only significant difference between the two is that the interest schedule requires more information on creditors. Unlike the conversion schedule, the interest schedule requires the listing of "the name, postal address and interest of each creditor of the strata corporation who is not a holder of a registered charge against the land" [citing ss. 278(1)(e)]. Such a requirement is not necessary for the conversion schedule because these creditors will not be in existence if the strata corporation is proceeding by way of voluntary

> winding up without a liquidator. In a corporate winding up, a liquidator typically takes "more elaborate steps to identify creditors" than would be seen in a voluntary winding up without a liquidator [citing Andrew J. McLeod & Ian N. MacIntosh, *British Columbia Business Corporations Act & Commentary* (Markham , ON: Lexis Nexis Canada, 2011) at 55].

[47] Another difference between a conversion schedule and an interest schedule is the requirement in s. 278(1)(d), at issue here, to list the value estimates, which is another piece of "information on creditors" required in the latter but not the former. The interest schedule is designed to include that additional information in order to serve as the liquidator's "roadmap" for the ratable distribution of the proceeds of sale to the owners and their creditors.

[48] The legislation treats the value estimates as one of the essential components of that roadmap. The legislature has thereby required that the liquidator be instructed by the owners through their vote as to the amounts that are estimated to be owing to their creditors. The approval of the winding-up resolution with its appended interest schedule is the only opportunity that the owners have to give the liquidator that instruction before his or her appointment.

[49] If an owner finds an error in the value estimates or in any of the other items listed in the proposed interest schedule before it is approved, it can still be fixed prior to the approval vote by way of an amendment to the resolution under s. 50. Once the liquidator is appointed, however, he or she must ultimately distribute the proceeds of sale "as set out in the interest schedule" pursuant to s. 279. The interest schedule referred to in s. 279 is obviously the one approved by the owners in the winding-up resolution, not a subsequently amended one that might later come to be attached to the petition.

[50] Section 279 states as follows:

> **Vesting order**
>
> 279 (1) Within 30 days of being appointed, the liquidator must apply to the Supreme Court for an order confirming the appointment of the liquidator and vesting in the liquidator
>
> (a) land shown on the strata plan,
>
> (b) land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and

> (c) personal property held by or on behalf of the strata corporation
>
> for the purpose of selling the land and personal property and distributing the proceeds as set out in the interest schedule.
>
> (2) The court may grant the order if satisfied that
>
> (a) the requirements of section 277 have been met, and
>
> (b) if the strata plan has 5 or more strata lots, the winding-up resolution under section 277 has been confirmed by an order of the court under section 278.1.
>
> (3) For the purposes of subsection (1), the liquidator is appointed on the date the winding-up resolution under section 277
>
> (a) is passed, if the strata plan has fewer than 5 strata lots, or
>
> (b) is confirmed by an order under section 278.1, in any other case.
>
> [Emphasis added.]

[51] It follows that the value estimates approved as part of the interest schedule are an essential term of the liquidator's mandate, rather than just another source of information that might affect the vote. Without them, the winding-up resolution is not validly approved. In other words, this was not just a mere "procedural irregularity" but an omission of substance.

[52] Finally, the petitioner argues that the deficiency in the interest schedule does not oust my jurisdiction to confirm the resolution, the exercise of which is to be governed only by the factors that the court is directed to consider in s. 278.1(5). None of those factors, it can be argued, depend *directly* on the petitioner's compliance with s. 278, and therefore I may, in weighing those factors, overlook the omission and confirm the winding-up resolution in spite of it.

[53] That is not true, however, of the application that must invariably be made at the third stage of the process if the petitioner is successful in having the liquidator appointed under s. 278.1(4). Once the liquidator is appointed, he or she must apply to this Court within 30 days for a vesting order under s. 279. The court can only make a s. 279 order if, among other things, it is satisfied that the requirements of s. 277 have been met: s. 279(2)(a). Thus, the exercise of the court's jurisdiction under s. 279 depends directly on the petitioner's compliance with s. 277, which includes, via s. 277(3)(e), a requirement to comply with s. 278.

[54] Returning, in light of that, to the factors that must inform the exercise of my discretion on this application under s. 278.1(5), it cannot be in the "best interests of the owners" and would cause "significant confusion and uncertainty in the affairs of the strata corporation or of the owners" if this Court were to confirm a winding-up resolution under s. 278.1(4) knowing in advance that the liquidator will be unable to meet the test he or she must meet to obtain the required order under s. 279. Even assuming, therefore, that I was restricted in the exercise of my discretion to the considerations enumerated in s. 278.1(5), the application must still fail.

IV. Conclusion

[55] In the result, I am unable for the reasons set out above to make the order sought under s. 278.1(4) confirming the winding-up resolution.

[56] Having reached that conclusion, it is unnecessary to address the other grounds that were advanced by the respondents to refuse the application. They are best left to future cases in which the facts will be different and the issues raised are not moot, as they are here.

[57] The petition is dismissed.

"Milman J."

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The Honourable Mr. Justice Milman