

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chan v. The Owners, Strata Plan BCS  
0856,*  
2017 BCSC 2240

Date: 20171206  
Docket: S157570  
Registry: Vancouver

Between:

**Siu Lin Chan**

Petitioner

And

**The Owners, Strata Plan BCS 0856**

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 26 on  
December 29, 2017

Before: The Honourable Mr. Justice Grezell

## Reasons for Judgment

Counsel for the Petitioner:

Z.C. Ng

Counsel for the Respondent:

C.E. Hunter  
A. Poezzhaeva, Articled Student

Place and Date of Hearing:

Vancouver, B.C.  
October 27, 2017

Place and Date of Judgment:

Vancouver, B.C.  
December 6, 2017

[1] The petitioner, Ms. Chan, seeks a declaration that a February 24, 2014 decision of the strata council of the building in which she resides is significantly unfair to her, an order setting aside the decision, and an order that the strata corporation use reasonable efforts, at its expense, to effect repairs to an exterior balcony wall of her strata unit.

[2] The original petition was filed on September 11, 2015. It was amended on February 24, 2017.

[3] The respondent strata corporation defends the petition on the basis that its decision was reasonable in all the circumstances.

**Background**

[4] The petitioner is the registered owner of a strata lot with a civic address of 2802-1005 Beach Avenue in Vancouver, BC. Ms. Chan’s strata unit is located close to the top of the building. It overlooks False Creek and English Bay and was described by a realtor who filed an affidavit in these proceedings as having a luxurious design, with many rooms having floor to ceiling windows.

[5] The respondent, The Owners, Strata Plan BCS 0856, is a strata corporation established pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43 [SPA]. Strata Plan BCS 0856 is a 28-story strata building called the “Alvar”.

[6] The essential facts are not in dispute. In 2011, the strata council retained RDH Building Science Inc. (“RDH”) as professional consultants to advise on various building enclosure issues, including the current condition of the original exterior wall coating.

[7] RDH established that the original coating was approaching the end of its useful service life and renewal was required. The strata council, following the recommendations of RDH, initiated plans to completely recoat the exterior of the building with an elastomeric coating, which was necessary to ensure that the building remained waterproof for an extended period of time.

[8] At an annual general meeting on November 24, 2011, the strata council passed a resolution to approve the expenditure of \$806,000 for the building envelope project, which included the recoating of the building.

[9] Ms. Chan says that information packages circulated by the strata council emphasised the importance of recoating the whole building and that once completed, “the new coating may achieve a uniform thickness and smoothness; and that the exterior of the building would ‘look virtually new again’, and the marketability and value of the individual suites and the building as a whole would be increased”: para. 9 of the amended petition.

[10] The strata council retained RDH as a consultant to prepare project specifications, organize the tendering process, recommend the successful bidder, prepare contract documents and supervise the recoating. The recoating project was awarded by RDH to Dura Seal Ltd. (“Dura Seal”).

[11] The recoating work was completed by Dura Seal between May and October of 2012.

[12] To ensure that the coating adhered properly, RDH, in accordance with industry practice, recommended that after application of the new coating, adhesion cut tests of the coating be undertaken. Accordingly, as the project progressed, approximately 50 adhesion cut tests were completed at randomly selected exterior wall locations. After confirming that the coating was adhering properly in each tested area, Dura Seal recoated the area from which the cut test was taken.

[13] One of the cut tests was taken on the exterior common property wall abutting the limited common property balcony of Ms. Chan’s strata unit.

[14] Ms. Chan says that the coating put on by Dura Seal was “inconsistent” with the original recoating in that the exterior balcony wall “appeared uneven and patchy”: (part 2, para. 16 of the amended petition).

[15] Ms. Chan says that she asked the strata council to repair the exterior balcony wall “on several occasions”, and that the “first such occasion occurred before May 1, 2013; the last such occasion occurred on February 24, 2014”: (part 2, paras. 18-19 of the amended petition).

[16] On February 24, 2014, the strata council voted unanimously that no further action be taken on the petitioner’s request to remediate the balcony wall. The petitioner says that the decision is significantly unfair to her, as the sale value of her strata unit has fallen as a result of the “defective recoating of the exterior balcony wall” (part 2, para. 17 of the amended petition).

[17] In order to address the issue of “significant unfairness” it is necessary to elaborate on the facts set out by the petitioner.

[18] In its response to the petition, the respondent says that the test cut in the common property wall abutting the limited common property balcony of the petitioner’s unit was performed in the prescribed manner, consistent with the other test cuts done on the building.

[19] The response further sets out that in the fall of 2012, Mr. Tse, Ms. Chan’s husband, complained to the president of the strata council, then Mr. Hannebauer, about the appearance of the recoated test triangle. A representative of Dura Seal was requested to attend the strata unit to address the concerns. Dura Seal did so and recoated the wall.

[20] Following this, Mr. Tse complained again to Mr. Hannebauer that he was unhappy with the wall’s appearance. Mr. Hannebauer again requested that Dura Seal recoat the wall, which it did. Mr. Tse says that Dura Seal’s worker used an electric sander to sand the triangle, which exacerbated the unsatisfactory appearance of the wall, giving it a blotchy appearance (Tse affidavit, February 2016). In addition, Mr. Tse says that the worker used old paint to do the touch up.

[21] In the winter of 2012 or spring of 2013, Mr. Tse again complained to Mr. Hannebauer, who attended personally to view the wall. Mr. Hannebauer concluded

that the wall's appearance was similar to other areas from which test samples had been taken (Hannebauer affidavit, September 2014).

[22] On or about June 25, 2013, Mr. Tse attended a strata council meeting to request further remediation of the wall. Council members and the strata's property manager visited the petitioner's unit to view the wall. The strata council advised that it would discuss the petitioner's concerns and respond.

[23] On July 8, 2013 the property manager wrote to Mr. Tse advising that:

Council has considered your request to make a further attempt to correct what you perceive as a deficiency to a patio wall of your apartment (which comprises part of the common property of the building) that you say occurred during the recent building re-coat.

You have indicated that the deficiency was the result of several attempts to refinish the wall in response to your earlier requests and those attempts actually made matters worse, leaving what you view as noticeable variations in the texture of the wall surface.

You are aware council sought further professional input as to whether the wall could be re-textured with a view to obtaining a completely uniform surface. Council is satisfied that attempting to rectify any imperfections that might be present may have the unintended result of making variations in the wall surface, however slight, more noticeable to the viewer. As your experience reflects, the appearance of the wall is a highly subjective matter and as Council cannot ensure that what might be acceptable from a refinisher's or another's point of view would also be acceptable to you, Council will not authorize further work in this matter.

[Emphasis added.]

[24] In the ensuing months, Mr. Tse continued to press the strata council to remediate the wall.

[25] At a council meeting of February 24, 2014, the strata council met with representatives of RDH to discuss a number of issues arising from an "Annual Building Enclosure Review Report", in which warranty and non-warranty items relating to Dura Seal were discussed. As part of a "Correspondence Item", the wall was discussed by the council:

**Correspondent Item:** As part of the discussion with representatives of RDH, Council also reviewed a paint inconsistency identified by the Owner of Unit 2802 on the balcony of that unit. Following a thorough review of his item, it

was moved by Tobin Robbins and seconded by Najib Hatahet that as the Owner's concern is purely cosmetic in nature, not affecting the structural integrity of the building, and that RDH had advised Council that further attempts to improve the look of the surface in the affected area would not change its appearance no further action be taken on this item. The vote was unanimous. Council noted that it is the third Council to address this complaint.

[26] Tobin Robbins, the current president of the strata council, was then a member of the council. He deposed that at the meeting, he asked RDH's advice on whether the council should request that the wall again be recoated, and the response was that it did not believe any further recoating should be undertaken, "as there was no performance issue relating to the existing coating" and that there was "a good chance" that further recoating would worsen rather than improve the appearance of the wall (Robbins affidavit, July 2017). He said that it was based on this response that the strata council decided to reject Mr. Tse's request to recoat the wall a further time.

[27] Mr. Tse was advised by letter of February 28, 2014 from the property manager:

I have been requested to write to you on behalf of the Council for Strata Plan BCS-0856, The Alvar.

The Alvar Council met on February 24, 2014. During the meeting it considered your request to repair an inconsistency in the finish between repaired and non-repaired areas on a balcony wall of unit 2802.

Council reviewed your request with representatives of RDH Building Engineering Ltd. as part of that firm's Annual Building Enclosure Review. The advice received is that your concern is purely cosmetic and does not affect the structural integrity of the building. Council was also advised by RDH that further attempts to improve the look of the surface in the affected area will not change its appearance. Council also noted that this is the third Alvar Strata Council to address your complaint.

Accordingly, Council voted unanimously that no further action be taken on this matter.

[Emphasis added.]

[28] In May 2014, Mr. Tse served the strata corporation with a notice of claim in Small Claims Court demanding that the strata council recoat the wall. The action

was dismissed on September 8, 2014 for lack of jurisdiction. Mr. Tse sought to appeal the dismissal but his application was dismissed on November 24, 2014.

[29] Mr. Tse retained LDR Engineering Group (“LDR”) to conduct a visual review of the vertical painted exterior wall surface. The review was conducted on November 25, 2015. The relevant portions of the Review read:

- We suspect the original concrete wall had a textured finish (i.e. not smooth) (Figure 1); however, possibly due to the preparation of the wall surfaces during the re-painting activities (i.e. removing existing painting or materials which were poorly adhered) and by sanding / grinding down the surface of the wall when returning to re-paint the location of the cut test, various locations of the wall surface lost some of the texture. (Figure 2).
- During our visit, we still did observe slightly raised edges where the Owner indicates the cut test was performed (Figure 2).
- The termination of the paint onto the urethane membrane substrate below is inconsistent (i.e. the paint was not terminated along a clean straight line where it laps onto the urethane membrane below) (Figure 3).

The Owner's main concern is the inconsistent texture of the painted surface along the vertical wall surface running along one side of the balcony. Such an inconsistent texture is not unusual when removing poorly adhered paint and concrete sacking during re-painting activities. The inconsistent texture was likely compounded further when they returned to paint and blend the location of the cut test into the field of the wall. These concerns appear to be aesthetic only in nature (i.e. cosmetic), not affecting the performance of the building enclosure, which is consistent with the comments documented in the Strata minutes for the February 24, 2014 meeting.

Also, applying enough paint to the concrete surface to provide a consistent textured surface (i.e. many multiple coats likely required) may affect the performance of the wall assembly (i.e. vapour permeability and may cause the paint or underlying materials to de-bond from the concrete substrate). However, it is possible to improve the uniformity of appearance of the finish on the vertical wall surface, refer to the two Options below.

Option 1: Grind down and remove the existing paint and the texture of the existing concrete substrate (i.e. provide a flat, un-textured, finish to the wall surface). Once the texture and paint is removed, the wall can be repainted.

Option 2: Remove the existing paint and apply a painted stucco finish or painted concrete parging to the concrete substrate (i.e. providing a consistent texture to the vertical concrete surface).

The un-textured (Option 1) or the textured (Option 2) finishes may not match the texture of the finish beyond the balcony. All materials should be applied per good practise and the manufacturer’s recommendations.

[30] Mr. Tse asked LDR to provide a cost for each option. The first option was costed at \$1,450, and the second at \$1,784, both plus GST.

[31] In addition, Mr. Tse asked a real estate consultant, Ms. Mu, to assess the marketability of unit 2802. Ms. Mu viewed the balcony and deposed that the paint deficiency on the southern wall of the balcony was “conspicuous and can easily be seen, as soon as a person opens the door separating the living room from the balcony” (Mu affidavit, February 2016). She was further of the view that the “paint deficiency presents a blotchy, repaired appearance, which would convey the impression that unit 2802 is an unit which has undergone repair on account of age.” She opined that this “impression is discordant with the rest of unit 2802, which as mentioned offers a luxurious design”, and that this “may increase the difficulty of selling unit 2802 in the future, especially when unit 2802 would normally appeal to a market of luxury buyers.” It was her opinion that “a potential buyer of unit 2802 would likely use the paint deficiency as a bargaining point to lower the selling price of unit 2802.” Ms. Mu was unable “to quantify the price reduction which may result.”

[32] The respondent retained Mr. Bruce Warner, a realtor with Macdonald Realty, who had been selling real estate for 30 years in the west side of Vancouver, which includes the area where the Alvar is located. He deposed that he viewed the exterior common property wall abutting the limited common property balcony of the petitioner’s unit as well as that of two other units which had been subject to remediation work by Durra Seal. It was his opinion the petitioner’s balcony “looked better” than the other two units. He also opined that the appearance of the wall would not affect unit 2802’s sale price. He disagreed with the opinion of Ms. Mu, deposing that the “minor deficiency of the nature alleged by Mr. Tse and described by Ms. Mu would not in my experience have any impact on the sale price of this unit” (Warner affidavit, July 2017).



## Discussion

### **The Applicable Law**

[33] The petitioner has applied for a declaration that the strata council's decision of February 24, 2014 to deny the petitioner's request to repair the coating on the exterior balcony wall of the petitioner's unit is significantly unfair, pursuant to s. 164 of the SPA.

[34] Section 164 reads:

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

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

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

(a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

(b) vary a transaction or resolution, and

(c) regulate the conduct of the strata corporation's future affairs.

[35] In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 [*Dollan*], the Court of Appeal reviewed the law concerning the test required to be met to establish significant unfairness, at para. 30:

[30] In the case of a strata unit owner seeking redress under s. 164, I would adapt the test, suggested by Greycliff J. [in *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173 at paras. 47-50] slightly to the context of s. 164 and articulate it in this manner:

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?

### Application of the Significant Unfairness Test

[36] There is little doubt that Ms. Chan and Mr. Tse considered the balcony repair performed by Dura Seal to be defective. I accept that they also considered the repair as detracting from the attractiveness of their strata unit. Ms. Chan and Mr. Tse's subjective feelings alone, however, do not answer the question of whether they have satisfied the first part of the test for whether the strata corporation has engaged in significantly unfair conduct.

[37] In answering the first question posed by *Dollan*, I must have regard to the views of others who viewed the repair work. First, all agree that the deficiency to the wall is cosmetic only. The recoating is effective in acting as a sealant to the ingress of moisture. RDH had reported to the strata council that any further attempts to improve the appearance of the wall may worsen rather than improve the appearance of the wall. LDR's report agreed with this opinion. RDH also opined that further coating may have the effect of creating a greater degree of variation in finish between the wall and adjacent areas.

[38] What evidence is there of the nature of the cosmetic deficiency in the wall? How significant was the deficiency? I have recited Mr. Tse's views and the opinion of Ms. Mu. There are others who do not view the deficiency in appearance in the same manner.

[39] As mentioned above, Mr. Hannebauer deposed that he viewed the subject wall at the petitioner's unit at Mr. Tse's invitation. He concluded that the appearance of the common property wall abutting Mr. Tse's unit "looked similar" to his own common property balcony wall from which a test sample had also been taken. He deposed that he and his wife sold their unit in June 2015, and he had no reason to believe that the appearance of the exterior property wall of his unit affected the price realized "in any way".

[40] The degree of the alleged cosmetic deficiency does not appear in the photographs annexed to the petitioner's material to be significant. It is difficult to see

any noticeable defect in the photograph. The LDR report refers to “slightly raised ridges” and an uneven line in the joint between the two surfaces.

[41] I do not accept Ms. Mu’s opinion that the value of Ms. Chan’s unit has been or is likely to be affected by the work done. Ms. Mu’s opinion is not supported by the necessary certification requirements for evidence of expert witnesses under Rule 11-2 of the *Supreme Court Civil Rules*. On the other hand, Mr. Warner’s opinion that the wall’s appearance will not affect the market price of the unit is accompanied by the certification required by the *Rules*.

[42] It is relevant to these proceedings that there were some 50 test samples taken throughout the building and no other strata owner complained about the recoating project or about the appearance of the test triangles after the recoating.

[43] Thus, viewed objectively in the circumstances, and with regard to the evidence, the subjective expectations of Ms. Chan and Mr. Tse with respect to the wall repair were not reasonable. The petitioner has failed to meet the first part of the significant unfairness test.

[44] Regardless, I will consider the second part of the significant unfairness test, which is whether the strata council’s actions were “significantly unfair”. Simple unfairness is not sufficient. As set out in *Dollan*, at para. 31, significant unfairness involves conduct that is “burdensome, harsh, wrongful, lacking in probity or fair dealing or has been done in bad faith”.

[45] I cannot find that the strata council’s conduct in this case amounts to significant unfairness under the above definition. The strata council responded to Mr. Tse’s concerns not once but twice by requesting two recoatings of the cut test area, attempting to resolve what Mr. Tse saw as a cosmetic defect.

[46] Mr. Tse was permitted to address the strata council after these recoatings to express his concerns. After listening to his complaints, and considering the opinion of RDH, the strata council voted on whether to attempt further remedial work. In unanimously declining to do so, the strata council was acting in the best interests of

all of the strata members. It cannot be said that the decision was harsh or burdensome, or lacking in probity. The actions of the strata council suggest that it attempted to address the petitioner's concern fairly.

[47] The evidence is clear that a further recoating may well impair the integrity of the wall. Further, while the cost to effect the remediation sought by the petitioner was not significant, an issue referred to by counsel for the petitioner in argument, the strata council's response was not inappropriate in the sense of being harsh, wrongful or taken in bad faith.

[48] For the above reasons, the petition is dismissed. As the successful party, the defendant strata council is entitled to recover its costs of this application.

"Greyell J."