COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VR2122 v. Bradbury,* 2018 BCCA 280

Date: 20180710
Docket: CA45042

Between:

**The Owners, Strata Plan VR2122,
Jeffrey William Otto, Maria Paula De Jesus Machado,
Soriah Begum Kanji, Alan Paul Kostiuk,
Susan Janet Rollinson, Darcen Esau, Susan Esau,
Alan Giovanni Montero-Inglis, Grant Edmond Walter,
John Anthony Polyck, Linda Polyck**

Respondents
(Petitioners)

And

**Gloria Bradbury, Edwin Martin Cavin,
Shehnaz Hozaima Cavey and Goran Wallin**

Appellants
(Respondents)

Beverly Eileen Wake and each of the parties set out in Appendix "A" and Appendix "B" to this <u>Amended</u> Notice of Appeal

Respondents
(Respondents)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated December 22, 2017 (*The Owners, Strata Plan VR2122 v. Wake,* 2017 BCSC 2386, Vancouver Docket S176056).

Counsel for the Appellants:	K. McEwan, Q.C. S. Foweraker
Counsel for the Respondents The Owners, Strata Plan VR2122, Jeffrey William Otto, Maria Paula De Jesus Machado, Soriah Begum Kanji, Alan Paul Kostiuk, Susan Janet Rollinson, Darcen Esau, Susan Esau, Alan Giovanni Montero-Inglis, Grant Edmond Walter, John Anthony Polyck and Linda Polyck:	P.J. Roberts C.E. Chisholm
Place and Date of Hearing:	Vancouver, British Columbia March 19–20, 2018
Place and Date of Judgment:	Vancouver, British Columbia July 10, 2018

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Dickson

Summary:

Four strata unit owners appeal an order approving a resolution to wind-up the strata corporation. They also appeal ancillary orders, including approval of the appointment of a liquidator and approval of an agreement to sell the strata property to a developer. The minority owners contend the chambers judge misconstrued the winding-up provisions of the Strata Property Act and as a result made orders contrary to the express provisions of the Act. Held: appeal allowed in part. While it was open to the judge to approve the resolution to wind-up the strata and to appoint a liquidator, it was an error to confirm the liquidator's appointment and vest the property in him. The Act requires the liquidator, not the strata council, to apply for an order confirming their appointment and vesting of the strata property.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] This appeal concerns the interpretation of the voluntary winding-up provisions of the *Strata Property Act,* S.B.C. 1998, c. 43. Four owners opposing the sale of their strata corporation's property appeal a winding-up order and ancillary terms.

Background

[2] The strata corporation in issue is known as the Hampstead, a four-story residential building in Vancouver's West End, built in 1988. The Hampstead is facing increasing capital expenditures to maintain and repair its building and physical infrastructure, with anticipated costs for 2018 alone estimated to be more than $675,000, or about $20,000 for each of the 33 units.

[3] In early 2016, the Hampstead strata council began exploring the possibility of selling the entire building to a developer in light of re-zoning in the area permitting increased density. By September 2016, the owners of the strata had voted to retain a commercial real estate broker to market the property. In February 2017, the strata council reviewed the top three offers and determined the offer from Townline Ventures Inc. was the best one. The strata council then negotiated a conditional purchase and sale agreement with Townline (the "PSA"). The conditions precedent included:

- ratification by an 80% majority of the owners; and

- a court order confirming the winding-up resolution, appointment of a liquidator, and approval of the sale.

[4] Under the PSA, Townline is to pay $45.25 million for the Hampstead. The aggregate of the 2017 assessed value of all 33 strata lots was about $18.5 million. Each owner would thus receive approximately 2.5 times the assessed value of their unit, making it more attractive to sell the building as a whole rather than unit by unit.

[5] The owners held a number of meetings to review and discuss the PSA. On June 15, 2017, more than 80% voted to wind up the strata corporation and appoint a liquidator to complete the sale to Townline. An application to have the resolution and PSA approved was delayed due to a judge not being available. As a result, a second vote was held to refresh the resolution and correct a deficiency in the first resolution which had not named the liquidator who had subsequently been selected to carry out the winding-up.

The Winding-Up Order

[6] Following a three-day petition hearing, the court below approved the winding-up resolution, appointed the liquidator, approved the PSA, and made a number of ancillary orders. The judge considered the objections of four owners who adamantly opposed the sale and did not want to move, but concluded the winding-up and sale was in the best interests of a majority of the owners. A copy of the order appealed is attached to these reasons for judgment as Appendix A.

Issues on Appeal

[7] The appellants do not challenge the judge's exercise of her discretion in finding the sale to be in the owners' best interest. They contend, rather, that she erred in granting the order in the form sought by the petitioners because it does not comply with the mandatory process for a voluntary winding-up under the *Strata Property Act* and because it contains terms not authorized by the Act.

[8] The errors raised on appeal can be grouped into the following issues:

1. Did the judge misconstrue the liquidator's role on a voluntary winding-up and make orders inconsistent with the requirements of the Act?

2. Did the judge err in accepting an interest schedule which included each owner's share of gross proceeds?

3. Did the judge err in making orders approving the liquidator's expenditures in advance; and

4. Did the judge err in deeming the liquidator to have good and marketable title?

This appeal also raises the tangential issue of whether a voluntary winding-up order can be made under both Division 2 and Division 3 of the Act.

The Winding-Up Provisions of the *Strata Property Act*

[9] Before turning to the specific issues raised on appeal, it is helpful to step back and consider the relevant provisions of the Act as a whole, and in particular the amendments to the Act made in July 2016.

[10] The Act provides three procedures for terminating a strata under Part 16: 1) voluntary winding-up **without a liquidator** (Division 1: ss. 272–275); 2) voluntary winding-up **with a liquidator** (Division 2: ss. 276–283); and 3) **court ordered** winding-up (Division 3, ss. 284–285). This appeal concerns Divisions 2 and 3.

[11] Prior to the July 2016 amendments, a voluntary winding-up under Division 2 required unanimity of the owners — effectively giving every owner a veto. It required the owners to pass a unanimous resolution to wind-up the strata and appoint a liquidator on the following terms:

> 277 (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.

[12] Because the resolution required unanimity, and by definition no owners opposed the wind-up and sale of the strata, the focus of the previous regime was on the orderly winding-up of the strata through a liquidator. Section 279 required the liquidator appointed by the owners to apply to the Supreme Court for an order confirming his or her appointment within 30 days and vesting in the liquidator all of the property 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" — a document described in some detail in s. 278 of the Act. The court assessed the application to appoint a liquidator against the requirements of s. 277.

[13] Sections 280 and 281 of the Act provided for the filing of the vesting order in the Land Title Office which had the effect of cancelling the strata plan and making the liquidator the owner of all of the property of the strata corporation. Before disposing of "any land or personal property", s. 282 required the liquidator to obtain the approval of the owners by resolution passed by a three-quarter vote, without which the disposition would be void. Finally, s. 283 required the liquidator to obtain a three-quarter vote approving his or her final accounts, after which the strata corporation could be dissolved by the Registrar of Land Titles in accordance with s. 343(1) of the *Business Corporations Act,* S.B.C. 2002, c. 57.

[14] In summary, under the "unanimity regime", the liquidator was to obtain court approval of his or her appointment, effect the sale of the property, pay creditors, pay each owner their share of the proceeds of disposition in accordance with the interest schedule attached to their original resolution to wind-up, and obtain approval of his or her final accounts. It is apparent from a review of the former process that, once the challenge of achieving unanimity was met, the rest of the process was relatively

straightforward. The court's role was limited to confirming the appointment of the liquidator and vesting the land in him or her.

[15] Although the effect of the July 2016 amendments to the Act was significant, the changes to the legislation were relatively minor. The legislature simply replaced "a unanimous vote" with "an 80% vote" and added s. 278.1 which reads:

> 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.

[16] Finally, the legislature amended s. 279 by adding the underlined portions:

> 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.

[17] Under the current provisions for a voluntary winding-up, court approval of the liquidator is still required, but the court may grant the order only if satisfied that both the requirements of s. 277 and s. 278.1 have been met. Because owners and registered charge holders must receive notice of the application for court approval, dissenting parties are provided with an opportunity to appear and argue against the termination of the strata. It is at that point that the court must consider the best interests of the owners and in particular any significant unfairness to owners, charge holders or creditors, and the potential for significant confusion and uncertainty in the affairs of the strata if the winding-up resolution is approved or denied (s. 278.1(5)).

[18] While the Act does not explicitly refer to the driving forces behind a winding-up resolution, a review of the jurisprudence invoking these sections sheds some light. In the cases we were referred to, the strata corporation either solicited or received an attractive offer from a buyer wishing to purchase the strata lands as a whole for redevelopment. Most of the owners then wished to take advantage of the offer in light of their circumstances, which generally reflect those summarized in a 2015 report on strata termination by the British Columbia Law Institute:

- A strata building requires so much remedial work that it makes more sense to knock the building down and build a new one in its place than to undertake the work.

- A low-rise strata building is in an area that is rezoned to enable higher-rise developments, and there is profit to be made by the property owners in knocking down the low-rise property and building a higher-rise property in its place.
- A strata building (or buildings) [is] situated in a larger area (e.g. a few blocks) that could be redeveloped as part of a broader urban renewal project.

Discussion

[19] With this background, I now turn to the issues on appeal.

1. Did the judge err in interpreting the liquidator's role on a voluntary winding-up?

[20] The main thrust of the appellants' submissions is that the judge erred in accepting the petitioners' misinterpretation of the role of the liquidator under Division 2 and therefore made orders that were not compliant with the Act.

[21] The appellants submit the Act requires the liquidator to market and sell the property independent of the strata council and owners. They contend the strata council had no authority to sell the Hampstead, and that the court in turn had no jurisdiction under the Act to approve the sale to Townline.

[22] The starting point for the appellants' interpretation of the Act is the nature of a strata corporation. A strata corporation does not own the strata lots, or even the common property. Although the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners (s. 3), the corporation has only limited authority to contract in the names of owners. That capacity relates to contracts "in respect of its powers and duties" under the Act and the bylaws (s. 38(a)). The appellants say the strata corporation's authority to enter into contracts does not extend to contracts to sell strata lots, submitting that, if it did, there would be no need for the Act to provide for the vesting of strata lands and property in a liquidator in order to sell the strata's property (s. 279(1)).

[23] In essence, the appellants submit the strata corporation had no authority to bind any of the strata owners, including the dissenting strata owners, to the PSA.

They say only a court-approved liquidator has the authority to market and sell the strata property and enter into a binding contract.

[24] The appellants submit the role of the liquidator is clearly delineated by the Act which provides for a logical, chronological sequence described by Justice Milman in *The Owners, Strata Plan VR 1966*, 2017 BCSC 1661:

> [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.
>
> [Emphasis added.]

[25] The appellants contend the provisions of the Act underscore the significant role of the liquidator in protecting the interests of the minority owners who oppose a sale. They assert that a liquidator is not simply a conduit through which strata owners may transfer strata property. To the contrary, they say a professional liquidator is better qualified to oversee marketing and negotiations for the sale of the strata. The appellants submit putting a liquidator in charge of selling the strata avoids the actual or apparent conflicts of interest that may arise from strata council members arranging for dispositions in which they will almost always stand to benefit.

[26] In short, the appellants contend the requisite appointment of a liquidator ensures that an impartial, professional person markets the strata property and informs owners objectively about any proposed disposition before obtaining their approval to sell the strata property.

[27] The appellants further submit that as a result of the petitioners' misinterpretation of the role of the liquidator under the Act, the winding-up resolution and the order obtained in this case eliminated any meaningful role for the liquidator and collapsed and eliminated two mandatory steps intended to safeguard the interests of strata owners. First, they say the liquidator did not apply for an order confirming his appointment as required by s. 279(1); and second, the liquidator did not obtain a three-quarter vote approving the PSA. The appellants submit the language of s. 279(1) is clear: it is the liquidator and not the strata council that must "apply to the Supreme Court for an order confirming the appointment of the liquidator and vesting in the liquidator" the strata land. Similar plain language is used in relation to the liquidator's obligation to obtain a three-quarter vote approving any sale: "the liquidator must obtain the approval of the disposition by a resolution passed by a 3/4 vote … or the disposition is void" (s. 282(1)). The appellants submit the effect of the order granted by the judge approving the PSA is to pre-empt and preclude the liquidator from fulfilling the requirements of the Act.

[28] I accept that the interpretation put forward by the appellants is one possible reading of the Act, but I am not convinced that it is the correct one. In my view, the appellants' interpretation is inconsistent with the context in which voluntary windings-up occur, and does not accord with the legislative intention to provide the court with a meaningful supervisory role in protecting the interests of those opposed to the winding-up of a strata corporation.

[29] I pause at this point to recognize the diametrically opposed views of the parties on the approach to be used in interpreting the Act. The appellants say a winding-up in which there are dissenting strata owners amounts to an expropriation of property, and as such requires strict compliance by the taker with statutory requirements, relying on P.A. Côté, *The Interpretation of Legislation in Canada*, 4th

ed., (Toronto: Thomson Reuters Canada Ltd., 2011) at 511, and *Horton v. British Columbia (Ministry of Transportation and Highways)* (1991), 53 B.C.L.R. (2d) 121 (S.C.). They also rely on the following passage from Justice Milman's decision in *Strata Plan VR 1966*:

> [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…
>
> [42] ... 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.

[30] For their part, the respondents submit that a winding-up in which there are dissenting strata owners is not an expropriation of property, which by definition is the forced taking of land without the consent of an owner, citing *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 at para. 142 (per Gonthier J. dissenting on other grounds), and *A & L Investments Ltd. v. Ontario* (1997), 36 O.R. (3d) 127 at para. 23 (C.A.), leave to appeal ref'd: [1997] SCCA No. 658. They contend that because all owners have a vote on whether to wind-up the strata, and all receive compensation for their property if the wind-up occurs, the process is not comparable to a government "taking" which requires the protection of the strict interpretation articulated in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd*., [1997] 1 S.C.R. 32 at paras. 20–22.

[31] The respondents further submit there is no reason to depart from the modern principle of statutory interpretation that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament — an interpretation which emphasizes purposive analysis: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014).

[32] I agree with the respondents that the principles in *Sullivan* described above are to be applied in interpreting the legislation. But I also agree with the appellants

and Justice Milman that each requirement of the Act must be complied with. I return now to the interpretation of the provisions in issue.

[33] If the appellants' interpretation of the Act is correct, more than 80% of the owners have to agree to wind-up a strata corporation based on their hope to obtain an offer suitable to most of them. They would then sit back as the liquidator obtained a vesting order, and registered it in the Land Title Office so that he or she held title to the property, at which point the strata plan would be cancelled. The liquidator would then take charge of marketing the strata, returning to the owners with any offer the liquidator viewed as acceptable, at which point approval could be obtained by a three-quarter vote — a significantly lower threshold than an 80% majority. (A three-quarter vote is defined in the Act as three-quarter of the votes cast by those present at the time the vote is taken.)

[34] In my view, this interpretation raises a number of practical difficulties. First, all of the evidence in this case demonstrates that owners want to know precisely what a wind-up and sale would mean for each of them, both financially and personally, before they agree to wind-up the strata corporation. Second, the process contended for by the appellants would result in the cancellation of the strata plan and transfer of the property to the liquidator before the owners have made a decision to sell. If an offer acceptable to more than three-quarters of them is not forthcoming, they will have to incur the significant expense of reinstating the strata plan and having the property transferred back to them. In the interim, there would be no strata governance in place.

[35] Third, the appellants read much into the role of the liquidator which is not found in the plain words of the Act. Although the land and property of the strata must be transferred to the liquidator for the purpose of selling it, that does not require the liquidator to control the marketing of the property in order to protect the interests of those opposed to the sale. The liquidator's role is described exactly as it was when the Act required unanimity of the owners. This suggests that, as before, the liquidator's primary responsibility is to act as a conduit for the transfer of the lands and as a court-appointed and approved person responsible for making sure that

creditors and charge holders are paid out and that each owner receives the share of the net sale proceeds he or she is entitled to under the interest schedule.

[36] Fourth, there is in my view no reason that a liquidator must be engaged to avoid conflicts of interest arising in the disposition of the strata property. The strata council is made up of strata owners, all of whom have a vested interest in obtaining a provident sale that will maximize benefits. To the extent that a strata council can obtain a higher price for the sale of the strata property, that benefit accrues to all owners whose interests are determined in accordance with the entitlements specified in the Act. To the extent that any members of the strata council have arranged terms that particularly benefit them, the opponents can bring that to the court's attention on the application for approval of the winding-up.

[37] Nor does a liquidator necessarily have special abilities to facilitate the marketing and sale of a property as the appellants assume. There is no requirement that a liquidator must be a "professional". The effect of incorporating s. 327 of the *Business Corporations Act* is only to preclude appointment of a liquidator who is under the age of 18, incapable of managing their own affairs by reason of mental infirmity, an undischarged bankrupt, or someone who has been convicted of a fraud-related offence, or does not reside in British Columbia.

[38] In addition, there is no reason to assume that a liquidator would bring any particular expertise to the marketing of the property. A liquidator, like the owners themselves, would likely engage the services of professional realtors in order to maximize the exposure of the property and obtain the best bid.

[39] Finally, the fundamental premise of the appellants' interpretation is that only the liquidator has the capacity to enter into a binding contract of sale, and then only after the property is vested in him or her by registration of the court order with the Registrar of Land Titles. While it is correct that the consolidation and vesting of all of the property in the liquidator is a necessary step in the transfer of legal title, in my view that does not mean the strata council has no legal capacity to enter into a contract which is subject to agreement of the owners. Under s. 2(2) of the Act, a strata corporation has the power and capacity of a natural person of full capacity

and, accordingly, may enter into contracts. Section 38(a) provides the strata corporation with authority, in addition to its capacities under any other enactment, to enter into contracts in respect of its powers and duties under the Act.

[40] In the present case, the strata council agreed to sell the property to Townline if a number of conditions precedent were met, including the PSA being approved and ratified by a resolution passed by 80% of all owners at a special general meeting. It follows that the PSA does not bind the strata council to sell what it does not own. The conditions in the PSA tie disposition of the property to compliance with the requirements of the Act for transfer of title.

[41] In my view, it is significant that the interpretation contended for by the appellants would prevent the court from affording meaningful protection to the dissenting owners, creditors, and charge holders. When the amendments were introduced in the Legislature, the Minister of Housing referred to the requirement for court approval and said this "is so the courts can ensure that the interests of any dissenting owners and charge holders are considered." If the owners' resolution is not made in the context of an existing offer, then as the judge below noted "court oversight for the dissenting owners is limited to basically approving the liquidator and not much more" (at para. 122). How is the court to determine, under s. 278.1(5), whether a winding-up of the strata is in the best interests of the owners and other interested parties without knowing on what terms and when the property would be sold and thus how the winding-up and disposition would affect each of the opponents?

[42] Having said that, I would agree with the appellants that the Act requires the liquidator to apply for approval of his appointment and the vesting order. The liquidator is assuming important responsibilities and should be before the court seeking its approval. The court must be able to determine that the liquidator is qualified and suited to carry out these responsibilities. I see nothing in the Act that would prevent the liquidator from bringing that application at the same time the strata corporation applies for approval of the winding-up resolution, with the preliminary issue of the adequacy of the winding-up resolution necessarily to be determined first.

[43] I would also agree with the appellants that the liquidator is required by the Act to obtain a final three-quarter vote approving the disposition of any property, including the property subject to the PSA, absent which the disposition would be void. That step may appear unwarranted or cumbersome where the owners have already voted by more than 80% to approve the winding-up resolution based on a particular purchase and sale agreement. There is no doubt that in most cases it would be more efficient to have the owners approve a particular offer as part of the winding-up resolution before obtaining court approval of the resolution as the parties did here. But it is not the role of the court to ignore the words of the statute and create a "better" scheme.

[44] Section 282 requires the liquidator to obtain a three-quarter vote at some point before he disposes of the property. Although that has not been done in the present case to date, in my view nothing precludes it from occurring before the transfer of title to Townline.

[45] The appellants contend the court's approval of the PSA conflicts with s. 282 and the subsequent three-quarter vote by the members to approve the sale. I would not interpret the provisions that way. Although court approval is not required and the Act makes provision for the liquidator to simply obtain the vote of the owners, in my view the strata council's decision to obtain court approval of the sale to fulfill a condition precedent of the PSA is not inconsistent with the liquidator also obtaining a vote prior to disposition. Court approval does not compel the strata to transfer the property — it is neither an order for sale nor a vesting order, but rather a balancing of the competing interests at stake in a proceeding before it. In that regard it is closely related to the Court's oversight of the winding-up in furtherance of its obligation under the Act to protect the interests of those opposing the winding-up. That approval does not in my view make the owners' final vote immediately prior to disposition redundant, especially if the vote is viewed as a final check and opportunity for the owners to reconsider the decision to complete the sale.

[46] Finally, in my view the Act does not compel the liquidator to register the vesting order in the Land Title Office immediately upon it being made; the legislature

did not include a period within which that step must be taken. Accordingly, I see nothing inconsistent with the liquidator registering the order immediately before title to the strata is to be transferred to the purchaser.

[47] In short, while I agree with the appellants that the mandatory requirements of the winding-up process must be complied with, in my view they do not prevent the strata council or the liquidator from going beyond the minimum requirements, as for example, in obtaining court approval of a particular agreement, as long as those steps are not inconsistent with the provisions of the Act.

2. Did the judge err in accepting as compliant an Interest Schedule which includes each owner's share of gross proceeds?

[48] As part of the winding-up resolution, s. 277 requires the owners to approve the interest schedule mandated by s. 278:

> 278 (1) The interest schedule must meet any requirements as to form and content that are required by this Act and the regulations, and must do all of the following:
>
> (a) state whether the strata corporation holds land in its name, or has land held on its behalf, that is not shown on the strata plan;
>
> (b) identify land shown on the strata plan and land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, by legal description sufficient to allow the registrar to identify it in the records of the land title office;
>
> (c) list the name and postal address of each owner;
>
> (d) list the name, postal address and the estimated value of the interest of each holder of a registered charge against the land;
>
> (e) list 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;
>
> (f) list each owner's share of the proceeds of distribution in accordance with the following formula:
>
> $$\frac{\text{most recent assessed value of an owner's strata lot}}{\text{most recent assessed value of all the strata lots in the strata plan, excluding any strata lots held by or on behalf of the strata corporation}}$$
>
> …

[49] The interest schedule attached to the wind-up resolution contained columns A through G in this format:

A	B	C	D	E	F	G
Strata Lot No.	**Unit No.**	**Parcel Identifier Legal Description**	**Registered Owner**	**Address**	**Percentage (%) of Interest on Destruction**	**Share of Gross Sale Proceeds**
1	108	010-123-456	Jane Doe	1188 Cardero Street	2.5514403%	$1,154,526.75
2	109	010-123-457	John Doe	1188 Cardero Street	3.2647462%	$1,477,297.67

[50] The appellants submit the Act does not authorize an interest schedule containing a “Column G” that defines owners’ shares of gross sale proceeds under the PSA. They submit that including such information may have improperly induced owners to vote for a winding-up resolution by connecting the vote to a distribution of that sum of money. They further submit the information is misleading because the liquidator is required to prepare accounts detailing the payment of all liabilities and the distribution to any strata owner cannot be determined until those duties have been fulfilled and the net sum remaining to be distributed determined.

[51] I note the appellants did not raise this argument in the hearing below. As a result, there was no evidence led on either side as to the reliance, or lack of reliance of owners upon Column G. Although generally a new argument will not be considered on appeal, I will address it because in my view it cannot succeed in any event.

[52] It is not in dispute that the interest schedule sets out the information required by s. 278 of the Act. The inclusion of additional information which exceeds the requirements of the Act does not in my view amount to non-compliance. Each owner would in any event “do the math” upon receiving the interest schedule, determining his or her share based on the percentage given and the purchase price.

[53] Nor would I accede to the appellants' submission that the information in Column G is misleading. First, the column refers to "gross" proceeds, and second, the resolution included the following information which plainly identifies expenses to be paid from gross sale proceeds:

> 4. The Owners approve the estimated costs of the winding are [sic] estimated as follows:
>
> (a) legal fees (including conveyancing fees) approximately $4,000 per strata lot (which includes the liquidator fees);
>
> (b) real estate agent's commission (0.75% of purchase price plus GST);
>
> (c) appraisal (if required) ($5,000); and
>
> (d) court fees payable to province ($3,000).
>
> …
>
> 6. Pursuant to section 278 of the *Strata Property Act*, the Owners approve the disbursement of the net sale proceeds pursuant to the percentages set out in Part 1, Column F of the Interest Schedule.
>
> [Emphasis added.]

[54] In addition, the expenses associated with the winding-up and sale had been discussed extensively at earlier meetings. In these circumstances, it is unlikely that owners would have expected to pocket the gross proceeds figure identified in Column G.

3. Did the judge err in making orders approving the liquidator's expenditures in advance?

[55] Section 283 requires owners to approve the liquidator's final accounts by a three-quarter vote before the Registrar winds-up the strata corporation. Section 277(3)(d) also requires strata owners to approve estimated wind-up costs. The appellants' complaint is that the Act does not authorize the strata owners to resolve, and the court to order, that the strata owners can dispense with approval of the final accounts.

[56] In my view the resolution and the order do not go so far as to waive the requirements of s. 283. No reference is made to either final accounts or s. 283 of the Act. Rather, the resolution avoids the necessity of calling a special general meeting of all of the owners each time an actual cost varies from the estimate provided.

Before the strata corporation can be dissolved, the liquidator is still required to apply to the court to be discharged in accordance with the applicable provisions of the *Business Corporations Act*. The liquidator's application for dissolution of the strata corporation to the Registrar cannot be filed without being accompanied by a Certificate of Strata Corporation stating that the final accounts referred to in the application have been approved by a resolution passed by a three-quarter vote of the owners at an annual general meeting or special general meeting. In short, the resolution and order do not, in my view, exempt the liquidator from complying with the Act.

4. Did the judge err in deeming the liquidator to have good and marketable title?

[57] Section 280(1) and (2) of the Act provide as follows:

> 280 (1) The liquidator must deliver a certified copy of the vesting order under section 279, accompanied by the interest schedule, to the registrar.
>
> (2) The registrar must file the order and interest schedule if satisfied that
>
> > (a) the legal description of the land in the interest schedule is sufficient to allow the registrar to identify it in the records of the land title office, and
> >
> > (b) the liquidator will have a good, safeholding and marketable title to the land.

[58] The appellants submit the court had no authority to declare that upon vesting of title in the liquidator, the liquidator would have "good, safeholding and marketable title to the Hempstead lands", without a separate inquiry by the Registrar. The appellants submit this order ignores a clear requirement that the Registrar be satisfied that the liquidator has a good, safeholding and marketable title to the land, and his or her inquiry should not be usurped by the court.

[59] In my view the Act does not require the Registrar to conduct an inquiry, but rather to be satisfied that the person transferring the property has the right to do so. It seems to me there could be no better way to satisfy the Registrar than by providing a court order confirming that the liquidator holds the lands and has the right to transfer good title. That is a matter particularly within the knowledge of the court, given the requirements of the *Strata Property Act* and the court's task of

vesting the property in the liquidator under s. 279 of the Act. Accordingly, absent the concerns raised in this case about the need for the liquidator to apply for approval and vesting orders, I see no reason why this aspect of the order could not be made.

Use of Division 2 and Division 3

[60] The petitioners in the court below applied under both Division 2 (voluntary winding-up with a liquidator) and Division 3 (court ordered winding-up). Only a strata corporation may apply for a winding-up order under Division 2, but Division 3 permits an owner, a mortgagee of a strata lot, or "any other person the Supreme Court considers appropriate" to apply. The petitioners in this case included both the strata corporation and a number of individual owners and relied on both Divisions of Part 16. In the court below and on appeal, the parties focused on Division 2, which applies to a voluntary winding-up with a liquidator.

[61] The respondents supporting the winding-up contend that both paths to a winding-up are open to them, and to the extent that the order obtained does not comply with the Act, the judge exercised her discretion under Division 3 to dispense with those requirements. I would not accede to that submission for the reasons that follow.

[62] Division 3 is comprised of two sections:

> 284 (1) An owner, a mortgagee of a strata lot or any other person the Supreme Court considers appropriate may apply to the Supreme Court for an order winding up the strata corporation.
>
> (2) On application by a person referred to in subsection (1), the court may make an order appointing a liquidator to wind up the strata corporation.
>
> (3) In determining whether to make an order under subsection (2), the court must consider
>
> (a) the best interests of the owners, and
>
> (b) the probability and extent, if the liquidator is appointed or not appointed, 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.
>
> 285 Division 2 applies to a winding up under this Division except that the Supreme Court
>
> (a) may vary or dispense with any of the provisions in Division 2,
>
> (b) may impose any conditions and give any directions that it thinks fit for the purpose of the winding up,
>
> (c) has for the purposes of this Division the powers referred to in section 160, and
>
> (d) may vary its order.
>
> [Emphasis added.]

[63] The respondents rely on the underlined portions of the section above, but the judge did not expressly vary or dispense with the specific provisions of Division 2 now in issue. Although she referred to the application being brought under both divisions, she focused her analysis on Division 2. On the record before us it cannot be assumed the judge waived compliance with specific requirements of the Act. The judge did not address that question, other than in relation to the failure to include the liquidators name in the original resolution — an omission which was rectified in the second resolution before her.

[64] In light of the conclusion I have reached on this issue it is not necessary to address the propriety of using both Divisions. I note, however, that prior to the amendments to the Act, court-ordered winding-up was used when a strata corporation became dysfunctional, and the owners did not agree on a winding-up: *Buchanan v. S.P. VR 1411*, 2008 BCSC 977. I see no reason why changing the level of support required to wind up a strata voluntarily from unanimity to 80% should alter the fundamental scheme of the Act. In my view, if at least 80% of the owners of a strata vote to wind-up, the provisions of Division 2 govern, and the owners are bound by its requirements.

[65] In summary on this issue, even if it were open to the petitioners to apply under both Divisions 2 and 3, I find no basis to conclude the judge dispensed with the requirement that a liquidator must apply to the court for approval of his appointment and vesting of the property.

Disposition

[66] In my respectful view, the judge erred in appointing the liquidator, vesting the property in him and making orders ancillary to his role when the liquidator had not applied for that relief as required by the Act. In the result, I would allow the appeal in part and set aside paragraphs 3, 4, 5, 6, 7, 11 and 12. Given that success on the appeal is divided, I would have the parties bear their own costs of both the appeal and the hearing below.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Dickson"

Appendix A

NO. S-176056
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *STRATA PROPERTY ACT*, S.B.C. 1998, c.43

and

IN THE MATTER OF THE APPLICATION FOR THE WIND-UP OF STRATA PLAN VR2122

BETWEEN:

THE OWNERS, STRATA PLAN VR2122, JEFFREY WILLIAM OTTO, MARIA PAULA DE JESUS MACHADO, SORIAH BEGUM KANJI, ALAN PAUL KOSTIUK, SUSAN JANET ROLLINSON, DARCEN ESAU, SUSAN ESAU, ALAN GIOVANNI MONTERO-INGLIS, GRANT EDMOND WALTER, JOHN ANTHONY POLCYK and LINDA POLYCK

PETITIONERS

AND:

BEVERLY EILEEN WAKE and each the parties set out in Appendix "A" and Appendix "B" to this Petition

RESPONDENTS

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE MADAM JUSTICE LOO) TUESDAY, THE 22ND DAY OF DECEMBER, 2017.

ON THE PETITION and the Notice of Application filed November 22, 2017 coming on for hearing at Vancouver, B.C., on Monday, the 4th day of December, 2017, Tuesday, the 5th day of December, 2017 and Friday, the 8th day of December, 2017, on hearing Peter J. Roberts, counsel for the Petitioners, G. Stephen Hamilton, counsel for the Respondents, Gloria Bradbury, Edwin Martin Cavin, Shehnaz Hoziama Cavey, and Goran Wallin, and Kieran Siddall,

counsel for Townline Ventures Inc., and on hearing each of the Respondents Beverly E. Wake, B. Douglas Cameron, Raul Figueroa and Sina Nowroozi, in person, and upon reading Affidavit #1 of J.W. Otto, sworn June 26, 2017, Affidavit #1 of C. Ballantyne, sworn June 27, 2017, Affidavit #1 of S. Hozaima Cavey, made July 27, 2017, Affidavit #1 of G. Wallin, made July 27, 2017, Affidavit #1 of G. Bradbury, made July 28, 2017, Affidavit #1 of N. Quo, made July 28, 2017, Affidavit #1 of L. Nakamura, made July 28, 2017, and Affidavit #1 of E. Cavin, made July 31, 2017, Affidavit #2 of F. Lane, made August 8, 2017, Affidavit #3 of F. Lane, made August 8, 2017, Affidavit #2 of J. W. Otto, made August 8, 2017, Affidavit #1 of P. Machado, made August 8, 2017, Affidavit #2 of C. Ballantyne, made August 11, 2017, Affidavit #1 of A. Hamian, made August 15, 2017, Affidavit #4 of F. Lane, made August 15, 2017, Affidavit #1 of A. Kostiuk made August 23, 2017, Affidavit #3 of J. W. Otto, made November 22, 2017, Affidavit #2 of G. Bradbury, made November 27, 2017, Affidavit #3 of C. Ballantyne, made November 28, 2017, and Affidavit #5 of F. Lane, made November 29, 2017, and Affidavit #6 of F. Lane, made December 8, 2017 AND JUDGMENT being reserved to this date:

THIS COURT ORDERS that:

1. The petitioners are at liberty to amend the petition on the terms set out in their Notice of Application filed November 22, 2017 and the petition be and is hereby amended accordingly.

2. The resolution passed at the special general meeting of the strata corporation, The Owners, Strata Plan VR2122, held on November 21, 2017 at which it was resolved to:

(a) approve the voluntary winding-up of strata corporation, The Owners, Strata Plan VR2122, and its dissolution;

(b) approve the appointment of John McEown, CA-CIRP, of Boale, Wood & Company Ltd, of 1140-800 West Pender Street, Vancouver B.C., V6C 2V6 to wind up the strata corporation, The Owners, Strata Plan VR2122;

(c) cancel Strata Plan VR2122;

(d) dissolve the strata corporation, The Owners, Strata Plan VR2122;

(e) confirm the Interest Schedule to be applied pursuant to section 278 of the *Strata Property Act* (the "**Interest Schedule**");

(f) approve the estimate of costs of winding up of the strata corporation, The Owners, Strata Plan VR2122; and

(g) surrender to the Liquidator each owner's interest in:

(i) the land shown on Stata Plan VR2122, including the common property (the "**Hampstead Lands**"); and

(ii) the personal property held by or on behalf of the strata corporation, The Owners, Strata Plan VR2122 (the "**Strata Personal Property**"),

be and is hereby confirmed.

3. John McEown, CA-CIRP, of Boale, Wood & Company Ltd, of 1140-800 West Pender Street, Vancouver B.C., V6C 2V6, be and is hereby appointed the Liquidator of the strata corporation, The Owners, Strata Plan VR2122 (the "**Liquidator**"), upon the filing of a certified copy of this order in the Land Title Office pursuant to paragraph 5 of this Order.

4. The Liquidator shall incur no liability or obligation as a result of its appointment or the carrying out of the terms of this Order, save and except for:

(a) gross negligence or wilful misconduct on his part; or

(b) amounts in respect of obligations imposed on liquidators by applicable legislation.

5. Upon the filing of a certified copy of this order in the Land Title Office, the interest of each of the Petitioners and the Respondents set out on Appendix "A" to the Petition (collectively, the "**Strata Owners**") in:

(a) the Hampstead Lands; and

(b) the Strata Personal Property.

shall be and is hereby surrendered to and vested in the Liquidator, subject to the mortgages, assignments of rent and liens registered on title to Strata Lots 1 to 33 of the Hampstead Lands and as set out in Appendix "B" to the Petition.

6. It is hereby declared that, upon the surrender to and vesting in the Liquidator of title to the Hampstead Lands, it has been proven to the satisfaction of the court on investigation that the Liquidator has good, safeholding and marketable title to the Hampstead Lands.

7. The authority and powers of the Liquidator shall include:

(a) to be paid reasonable remuneration out of the proceeds of any sale of the Hampstead Lands or the Strata Personal Property, subject to the right of any party to assess that remuneration;

(b) to employ or retain such other professional services or advisors as are reasonably necessary for the winding up of the strata corporation, The Owners, Strata Plan VR2122, the cancellation of Strata Plan VR2122 and the marketing and sale of the Hampstead Lands and the Strata Personal Property, including legal counsel, realtors and appraisers;

(c) to publish a notice in compliance with section 331 of the *Business Corporations Act* in the Gazette and a newspaper circulating in the Vancouver area;

(d) to deal with creditors of the strata corporation, The Owners, Strata Plan VR2122, including the payment, compromise or settlement of any claims by those creditors;

(e) to pay costs, charges and expenses properly incurred and to be incurred in relation to the winding up of the strata corporation, The Owners, Strata Plan VR2122 and the cancelation of Strata Plan VR2122;

(f) to market and negotiate the sale of the Hampstead Lands and the Strata Personal Property;

(g) to sell the Hampstead Lands, subject either to the requirements of section 282 of the *Strata Property Act* or further order of the court;

(h) to distribute the proceeds from the sale of the Hampstead Lands and the Strata Personal Property in accordance with the Interest Schedule; and

(i) at the sole discretion of the Liquidator, to seek further orders or directions as may be necessary from the Court.

8. The sale of the Hampstead Lands to Townline Ventures Inc. (the "**Purchaser**") pursuant to the terms of the Purchase and Sale Agreement between the Purchaser and The Owners, Strata Plan VR2122 dated for reference March 27, 2017 as amended, (the "**Purchase & Sale Agreement**") be and is hereby approved.

9. The Interest Schedule attached to this Order as **Schedule "A"** be and is hereby approved and that Interest Schedule shall be the interest schedule for the purposes of sections 278 and 280 of the *Strata Property Act* and shall be used to determine each individual Strata Owners' share of the proceeds of distribution on the winding-up of Strata Plan VR2122, including the proceeds of sale of the Hampstead Lands and the Strata Personal Property.

10. Pursuant to section 100(4)(a) of the *Land Title Act*, R.S.B.C. 1996, c.250, it is hereby ordered that the consents of the owners in fee simple of each of the strata units comprising the Hampstead Lands and each holder of a registered charge on title to any of the strata units comprising the Hampstead Lands are deemed to have been obtained and such consent be and is hereby otherwise dispensed with for the purposes of filing any reference plan or an explanatory plan with the Land Title Office in relation to the Hampstead Lands.

11. If necessary and at the direction of the Liquidator, all or a part of the proceeds from the sale of the Hampstead Lands and the Strata Personal Property shall be paid into an interest bearing trust account held by counsel for the Petitioners, Lawson Lundell LLP, and shall be paid out as directed by the Liquidator in accordance with the Interest Schedule.

12. Upon closing in accordance with the terms of the Purchase & Sale Agreement, it is ordered that the sale proceeds, including deposits and after adjustments, shall be paid by or on behalf of the Purchaser to Lawson Lundell LLP in trust and may be paid out or dealt with by Lawson Lundell LLP in the following manner in accordance with the terms of this Order and at the direction of the Liquidator:

(a) Firstly, in payment of all matters of adjustment with respect to the sale of the Hampstead Lands, including without limitation outstanding water and sewer rates, and interest and penalties thereon owing in connection with the Lands (the "**Adjustments**") and, in the event any owner(s) is responsible for all or a part of the Adjustments paid pursuant to this subparagraph, then the amount of the Adjustments attributable to that owner(s) and paid from the sale proceeds (the

"**Individual Adjustment**") shall be deducted from that portion of the sale proceeds otherwise to be paid to that owner(s);

(b) Secondly, in payment of any legal fees, including disbursements and taxes, real estate commission, appraiser's fees and other similar expenses incurred by the Petitioners in relation to this proceeding and the sale of the Hampstead Lands;

(c) Thirdly, the remainder of the sale proceeds shall be divided rateably among the owners of the Hampstead Lands in accordance with their entitlement under the Interest Schedule and, in advance of any payment to the owners;

(i) any Individual Adjustments paid on behalf of the particular owner(s) shall be deducted from the individual entitlement of the particular owner(s);

(ii) in the case of any owner(s) with mortgages and/or other financial charges or encumbrances registered on title to their interest in the Hampstead Lands, payment of the outstanding balance on such obligations shall be made to each of the mortgagees and/or creditors (as the case may be) from the individual entitlement of the particular owner(s); and

(iii) the remainder of the sale proceeds attributed to a particular owner(s) shall be paid to that owner(s) or as directed in writing by that owner(s).

13. By consent, the Petitioners and Respondents Gloria Bradbury, Edwin Martin Cavin, Shenaz Hoziama Cavey, and Goran Wallin may apply to the court to make further submissions respecting costs of this proceeding (the "**Costs Application**"), provided the application is filed within 14 days of the disposition of the appeal of this Order by the Court of Appeal (the "**14 Day Time Period**"). If none of the parties file the Costs Application within the 14 Day Time Period, the Respondents Gloria Bradbury, Edwin Martin Cavin, Shenaz Hoziama Cavey, and Goran Wallin shall pay to the Petitioners costs of this proceeding at scale B following assessment or agreement between the parties..

14. The Petitioners are entitled to recover the remainder of their costs of this proceeding, on a solicitor and client basis, from the proceeds of the sale of the Hampstead Lands, including any deposit and such costs shall be paid from, and form a charge upon the proceeds of the sale of the Hampstead Lands.

15. Endorsement as to the form of this Order by any party appearing in person at the hearing be and is hereby dispensed with.

16. The parties to this proceeding are at liberty to apply to Court for such further and other directions and orders as may be necessary to carry out the full purpose and intent of these Orders.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Peter J. Roberts
COUNSEL FOR THE PETITIONERS

G. Stephen Hamilton
COUNSEL FOR THE RESPONDENTS, GLORIA BRADBURY, EDWIN MARTIN CAVIN, SHEHNAZ HOZIAMA CAVEY AND GORAN WALLIN

Kieran Siddall
COUNSEL FOR TOWNLINE VENTURES INC.

BY THE COURT

REGISTRAR

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