

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VIS 1437 v.
Abolins,*
2018 BCSC 2422

Date: 20181207
Docket: 18-4510
Registry: Victoria

2018 BCSC 2422 (CanLII)

Between:

The Owners, Strata Plan VIS 1437

Petitioner

And:

Aina Ann Abolins and Lucy Abolins

Respondents

Before: The Honourable Mr. Justice Punnett

Oral Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:

T.W. Morley

For the Respondents:

No one appearing

Place and Date of Hearing:

Victoria, B.C.
December 4, 2018

Place and Date of Judgment:

Victoria, B.C.
December 7, 2018

[1] The petitioner seeks various orders relating to the inspection of the respondents' strata unit for infestation by bed bugs. The respondents have filed a response in which they raise several issues; however, the respondents failed to appear for the hearing. I was satisfied on December 4th that they had received notice of and knew the date and time set for the petition's hearing. While the matter was set for 10:00 a.m., it did not proceed until after 11:00 a.m., and they still had not appeared. As a result, the hearing proceeded in their absence.

Background

[2] The Owners, Strata Plan VIS 1437, Channel View Manor (the “Strata Corporation”) was created with the deposit of Strata Plan 1437 in the Land Title Office at Victoria, British Columbia, on July 26, 1985. Channel View Manor (the “Manor”) consists of the common property and 32 strata lots. The Strata Corporation exercises its powers and duties through a council under the *Strata Property Act* (the “Strata Council”).

[3] The Strata Corporation has bylaws that apply to all owners, tenants and visitors.

[4] The respondents, Aina Ann Abolins and Lucy Abolins, own and usually reside in Unit 407 of the Manor. The legal description of Unit 407 is:

Strata Lot 25 Section 18 Range 5 Chemainus District Strata Plan 1437
together with an interest in the common property in proportion to the unit
entitlement of the strata lot as shown on Form 1.

[5] On June 23, 2018, the Strata Council was informed that bed bugs had been discovered in one of the units.

[6] On June 25, 2018, a technician from Orkin Canada Pest and Termite Control inspected Unit 309 and determined that there were, in fact, bed bugs present.

[7] On June 28, 2018, Orkin returned and sprayed Unit 309 and installed bags on the mattress and box spring in that unit. Orkin also inspected Unit 307, but detected

no bed bugs. Orkin recommended that their personnel return on July 11, 2018, to conduct a follow-up inspection and to also inspect adjacent units.

[8] On July 5, 2018, the Strata Council provided general information to all the residents that bed bugs had been found in the manor (the “Special Notice”) and the Strata Council also informed the owners of Units 207, 209, 307, 309, 407, and 409 that an exterminator would attend on July 11, 2018, to inspect those units.

[9] On July 9, 2018, a copy of the Special Notice was provided to the respondents. On July 10, 2018, the Strata Council received a letter from the respondents stating that they were refusing entry to Unit 407 by any inspector to inspect for bed bugs.

[10] On July 11, 2018, Orkin returned and inspected Units 207, 209, 307, 309, and 409. They were refused entry to Unit 407. During this inspection, Orkin found no bed bugs, but it did re-treat Unit 309 as a precaution.

[11] On July 12, 2018, the owner of Unit 307 reported finding three bed bugs in Unit 307. Orkin attended that unit and did a full spray.

[12] On July 13, 2018, there was a meeting of the Strata Council. At that meeting, the Strata Council discussed the fact bed bugs had been found in Units 307 and 309. Council resolved, firstly, that a warning letter regarding the contravention of a bylaw be sent to the owners of Unit 407; secondly, that a notice be sent to all owners with an update regarding the situation with the bed bugs; and thirdly, that a letter be sent to the owners of Unit 407 requesting that entry to their unit be provided to Orkin on July 17, 2018, at 9:00 a.m. The letter, dated July 14, 2018, was provided to the respondents. It informed them that the Strata Council was requesting access to their unit on that date and at that time.

[13] On July 17, 2018, the Strata Council received a further letter from the respondents stating that they would hire their own contractor to inspect their unit for bed bugs. On July 27, 2018, Island Pest Control inspected Unit 407 and confirmed in writing that two bed bugs were found and removed from that unit. Their written

confirmation did not address whether they inspected the whole of Unit 407, nor did it report on the significance of finding two bed bugs on a bed and mattress.

[14] On August 7, 2018, the Strata Council resolved to inform the respondents that it required them to consent to a further inspection and spraying of Unit 407, and that a subsequent further inspection was to occur two weeks after the spraying to confirm that there had not been a re-infestation. The Strata Council informed the respondents it required the respondents to consent to Orkin inspecting and spraying Unit 407 on August 13, 2018, at 9:00 a.m.

[15] On August 13, 2018, a representative of the Strata Council and a representative of Orkin unsuccessfully attempted to gain access to Unit 407. On August 13, 2018, because there was no access to the unit of the respondents to inspect for bed bugs, the Strata Council authorized Orkin to spray the common area outside Unit 407.

[16] The owners of Units 405 and 409 authorized Orkin to spray within their units, and particularly the baseboards of the walls those units share with Unit 407. Because of that spraying, the owners of Units 405 and 409 were advised to stay out of their homes for six to eight hours.

[17] On September 6, 2018, the Strata Council provided an offer to the respondents regarding the conduct of an inspection of Unit 407. The terms of that offer included the following:

- The inspection of Unit 407 was to occur on September 24, 2018.
- The inspection would be conducted by one company retained by the owners, Unit 407, and one company retained by the Strata Council.
- The cost of the company retained by the owners of Unit 407 would be borne by them, and the cost of the company retained by the Strata Council would be borne by the Strata Council.

- Both the owners of Unit 407 and the Strata Council were to receive copies of all reports created by the pest control companies and both the owners of Unit 407 and the Strata Council were entitled to ask questions and receive answers from the pest control companies.
- A representative of the Strata Council could wait in the common property outside of Unit 407 during the inspection, but the owners did not have to permit that representative to be inside Unit 407 during the inspection.
- If the pest control companies confirmed bed bugs were located in Unit 407, then the pest control companies would determine the appropriate method of eliminating bed bugs in Unit 407.
- If the pest control companies could not decide on an appropriate method, then a third pest control company selected by the pest control companies would determine the appropriate method of eliminating bed bugs in Unit 407.
- The owners of Unit 407 were to agree to consent to performing the appropriate method of eliminating bed bugs in Unit 407, as determined by the process proposed in the offer.

[18] On September 10, 2018, the respondents rejected that offer and informed the petitioner they would not negotiate and that resolution would require the involvement of a court.

[19] The petitioner's concern regarding the bed bugs possibly being present in Unit 407 is because they understand bed bugs are parasitic insects which feed on human blood, usually biting when a person is asleep. Several health issues may arise from bed bug bites, including skin rashes, itching, psychological effects, and allergic symptoms. The life span of a female bed bug is approximately nine months, and a female bed bug can lay four to five eggs per day and as well a single pregnant bed bug can be responsible for an entire infestation in a matter of weeks.

[20] Because of those concerns and the involvement with the respondent owners, the petitioner seeks the following relief:

1. A declaration that the Respondents, by refusing to permit an inspection of Unit 407, have created a nuisance to the Petitioner's enjoyment of the common property;
2. A declaration that the Respondents, by refusing to permit an inspection of [their unit], have unreasonably interfered with the ability of the Strata Corporation to perform its statutorily mandated responsibility to repair and maintain common assets and common property;
3. A mandatory injunction compelling the Respondents to permit entry and inspection of Unit 407 by an organization licensed, [under] the *Integrated Pest Management Act* ... to provide a service respecting pesticide;
4. A mandatory injunction compelling the Respondents to permit the performance of a reasonable pest management plan, prepared by a person or organization licensed under the *Integrated Pest Management Act*, to occur in [their unit];
5. The Respondents [to be found] joint and severally liable for the payment of damages to the Petitioner as compensation for expenses incurred arising from [their] refusal to permit entry and inspection of [their unit]; and
6. The Petitioner [to be] entitled to the costs of the petition.

Law

[21] Firstly, with respect to jurisdiction, I raised with counsel for the petitioner whether this court should hear the application, or whether it was a matter for the Civil Resolution Tribunal. Section 189.6 of *Strata Property Act*, S.B.C. 1998, c. 43, provided:

- 189.6 (1) If the Supreme Court determines that all matters in a proceeding before it are within the jurisdiction of the civil resolution tribunal, the Supreme Court must dismiss the proceeding unless it is not in the interests of justice and fairness for the civil resolution tribunal to resolve the dispute.
- (2) When deciding whether it is in the interests of justice and fairness for the civil resolution tribunal to resolve a dispute under this section, the Supreme Court may consider the following:
- (a) whether the use of electronic tools in the process of the civil resolution tribunal would be unfair to one or more parties in a way that cannot be accommodated by the civil resolution tribunal;

- (b) whether an issue raised by the dispute is of such public interest or importance that the dispute would benefit from being resolved by the Supreme Court to establish a precedent;
- (c) whether an issue raised by the dispute relates to the constitution or the *Human Rights Code*;
- (d) whether an issue raised by the dispute is sufficiently complex to benefit from being resolved by the Supreme Court;
- (e) whether all of the parties to the dispute agree that the dispute should be resolved by the Supreme Court;
- (f) whether the claim should be heard together with a claim currently before the Supreme Court.

[22] Given the risk of continued problems with bed bugs in the Manor, it is in the interests of justice and fairness that this Court exercise jurisdiction. In addition, the respondents have not raised jurisdiction as an issue and have sought relief in this Court. They also indicated they would see the petitioner “in court” instead of agreeing to any resolution.

[23] I am satisfied that the parties agree that the dispute should be resolved in the Supreme Court (*The Owners, Strata Plan VR 855 v. Shawn Oaks Holdings Ltd.*, 2018 BCSC 1162 at paras. 54-58).

[24] A strata corporation is responsible for the management and maintenance of the common property and common assets of the corporation (*Strata Property Act*, s. 3). A strata corporation may sue as representative of all owners respecting the interpretation and application of the *Strata Property Act* or the corporation's bylaws (s. 171(1)).

[25] Section 173(1) of the *Strata Property Act* permits the Supreme Court to make an order compelling an owner to perform a duty he or she must perform under the *Act*, and make any other orders it considers necessary to give effect to an order. Section 2(1) of the Strata's Bylaws states that:

An owner must repair and maintain the owner's strata lot ...

[26] Section 3(1) of the Bylaws states that:

An owner ... must not use a strata lot ... in a way that

... causes a nuisance or hazard to another person, [or that]
... unreasonably interferes with the rights of other persons to
use and enjoy ... another strata lot ...

[27] Section 133(1) of the *Strata Property Act* authorizes a strata corporation to do what is reasonably necessary to remedy a contravention of its bylaws, including doing work on or to a strata lot.

[28] Procedurally, the petitioner must proceed by petition because the application is authorized by an enactment to be made to the court and the principal question is the construction of the bylaws.

[29] Given the presence of a pest in Unit 407, as defined in the *Integrated Pest Management Act*, the respondents must consent to permitting the provisions of a pest management plan prepared by a licensed person to occur in their unit. The *Integrated Pest Management Regulation*, B.C. Reg. 604/2004, s. 5(1)(e), states that using a pesticide for the management of pests inside rooms used as living accommodation, or in areas to which more than one occupier has access in a multi-residence building on private land and containing at least four separate units, is a prescribed use.

[30] Section 4(1) of the *Integrated Pest Management Act* states that a person must not use a pesticide for a prescribed use unless the person holds the required licence and complies with the terms and conditions attached to that licence.

[31] The respondents' Response raises several issues, but their primary objection is to the use of pesticides should bed bugs be found in their premises. That does not explain why they refuse to permit inspection. The lack of cooperation by the respondents in permitting the inspection of their premises, in my view, reveals a misunderstanding of the nature of strata residency and the compromises owners agree to when they become residents in such facilities. The bylaws of a strata corporation are established and exist so the property owners can live in common. Living in a strata necessarily involves a surrender of some degree of proprietary independence. Owners of units are subject to the collective bylaws and rules.

Owners, however, also benefit from such bylaws as they provide a measure of control over their own environment (*The Owners, Strata Plan NW 1815 v. Aradi*, 2016 BCSC 105 at para. 43).

[32] In my view, the Strata Council's obligation to manage and maintain the common property includes responsibility to protect that common property from harm, which includes insects and pests. That common area includes the floors, walls, and ceilings that form the boundary between strata lots. As noted, s. 3(1) of the Strata Council's Bylaws states an owner cannot use a strata lot in such a way that they cause a nuisance or hazard or interfere with the other owners' use and enjoyment of their strata lots. In addition, under s. 8 of the Bylaws, the Strata Corporation must repair and maintain all common assets and common property on behalf of the petitioner. The *Strata Property Act* defines common property as "that part of the land and buildings ... that is not part of a strata lot," including walls, and facilities for the passage of water, sewage, electricity, and other similar services located in a floor, wall, or ceiling (s. 1).

[33] The respondents' behaviour ignores their obligations as owners and interferes with the rights of other owners. The evidence is that bed bugs have been found in other units, that controlling them requires the use of pesticides, and that such pesticides are used by professional licensed pest control individuals in compliance with the *Integrated Pest Management Act* and its regulations.

[34] To perform this responsibility, the Strata Corporation requires the legal authority to perform preventive acts such as controlling pests. In *The Owners, Strata Plan NW 1815 v. Aradi*, Justice Harris summarized the applicable provisions as follows:

[28] Under the Act, where a strata owner does not comply with the bylaws, the strata corporation is authorized to fine the owner, remedy the contravention, or deny access to a recreational facility.

Enforcement options

129.(1) To enforce a bylaw or rule the strata corporation may do one or more of the following:

- (a) impose a fine under section 130;

- (b) remedy a contravention under section 133;
- (c) deny access to a recreational facility under section 134.

(2) Before enforcing a bylaw or rule the strata corporation may give a person a warning or may give the person time to comply with the bylaw or rule.

[29] In the event that the imposition of a fine does not cause an owner to comply with the bylaws, the strata corporation is entitled to seek an order of the court under s. 173(1) that the owner or other person perform a duty he or she is required to perform under the bylaw and/or that the owner or other person stop contravening the bylaws.

...

Other court remedies

173.(1) On application by the strata corporation, the Supreme Court may do one or more of the following:

- (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;
 - (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules;
 - (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).
- (2) If, under section 108(2)(a),
- (a) a resolution is proposed to approve a special levy to raise money for the maintenance or repair of common property or common assets that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise, and
 - (b) the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4 vote required under section 108 (2)(a),

the strata corporation may apply to the Supreme Court, on such notice as the court may require, for an order under subsection (4) of this section.

(2.1) Section 171 (2) does not apply to an application under subsection (2).

(3) An application under subsection (2) must be made within 90 days after the vote referred to in that subsection.

(4) On an application under subsection (2), the court may make an order approving the resolution and, in that event, the

strata corporation may proceed as if the resolution had been passed under section 108(2)(a).

[35] The owners have validly given notice to the respondents of the need for inspection and possible treatment of their unit to address pests. I am satisfied the respondents have violated the Strata Council's Bylaws by their conduct.

[36] The issue then is whether I should exercise my discretion under s. 173 of the *Strata Property Act*.

[37] In my opinion, the concerns of the strata are reasonable. Infestation by bed bugs is a situation requiring resolution. Their presence raises issues of comfort and health. In addition, the threat of their continued presence and potential reproduction is a legitimate concern. The owner of Unit 409 deposes that the precautionary spraying has caused her the inconvenience of having to vacate her home for six hours, and that further such spraying will be necessary every two months because of the risk of bugs accessing her premises from the respondents' premises. She also states she is bothered emotionally by her inability to control the need for such measures due to the conduct of the respondents.

[38] In *Aradi*, Harris J. also considered the exercise of judicial discretion under s. 173 of the *Strata Property Act*.

[55] In considering whether to exercise my discretion to grant the relief sought by the petitioner under s. 173 of the *Act*, the respondent asserts that I should apply the considerations established by the Supreme Court of Canada in *R.J.R. - Macdonald*. He provided no authority for the application of this test in the exercise of the court's discretion under s. 173.

[56] I note that in the cases of *The Owners Strata Plan LMS 2768 v. Jordison*, 2012 BCSC 31, rev'd in part 2012 BCCA 303, and *The Owners Strata Plan LMS 2768 v. Jordison*, 2013 BCSC 487, aff'd 2013 BCCA 484, neither this Court nor the Court of Appeal referred to the *R.J.R.-Macdonald* case or suggested such an analysis be used. However, Mr. Justice Hall did confirm that "the language contained in ss. 173(a) and (b) empowers a court to order mandatory or prohibitory relief of an injunctive nature".

[57] While I am not persuaded that the *R.J.R.-Macdonald* test is directly applicable to s. 173 of the *Act*, it is well-established that the court's discretion must be exercised judiciously - having regard to the evidence, the legislative scheme and the applicable case law. In that regard, Madam Justice

Fitzpatrick in *The Owners, Strata Plan VIS114 v. John Doe*, 2015 BCSC 13 considered the exercise of discretion under s. 173(2) of the *Act*:

[135] Section 173(2) is a new tool available to strata corporations to seek court intervention in appropriate circumstances. I would not, however, expect that court intervention would be appropriate simply because there is a dispute. Clearly, the test under s. 173(2) must be met before the court's discretion can be exercised. Importantly, there must be issues of safety or in the event of loss or damage, that loss or damage must be "significant." Further, the court's discretion is only to be exercised in appropriate circumstances and in accordance with the overall objectives in the *Act*.

[Emphasis added.]

[58] Mr. Justice Cullen, as he then was, in *The Owners v. Grabarczyk*, 2006 BCSC 1960, affirmed the significance of the authority of a strata corporation to seek a court order where there are continuing violations of the bylaws. In that case, the learned judge rejected the respondent's suggestion that the delay of the strata corporation in bringing the proceedings and the improvement in the noise situation should persuade him not to exercise his discretion to make an order under s. 173. He noted the many warnings the respondent had received and the duty of the court to protect the rights of others under the *Act* and bylaws.

[59] Further, in *Abdoh v. The Owners of Strata Plan KAS 2003*, 2014 BCCA 270, the Court of Appeal reviewed the decision of the chambers judge not to exercise its discretion under s. 165 of the *Act*. I note that s. 165 is similar in its wording to s. 173, although it affords a remedy to strata owners as opposed to the strata corporation. On appeal Mr. Justice Willcock commented on the considerations applied by the chambers judge:

[19] In my view, the judge did not err in concluding that the overriding responsibility of Strata Council members to act honestly and in good faith with a view to the best interests of the Strata Corporation, and to exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances, must inform the obligation to see that the Strata Corporation is doing what it is obliged by law to do.

[20] In determining whether to come to the Abdohs' aid, the judge referred to the scheme for reconciling individual and collective rights in the *Strata Property Act*. He considered:

- a) the number of owners seeking relief;
- b) whether the order sought was in the best interests of the Strata Corporation; and
- c) whether inaction would unfairly prejudice the applicants.

[21] In my opinion, these are all appropriate considerations.

[22] The judge properly concluded that the contravention of the *Strata Property Act* or by-laws, if there was one, was of a

trifling nature; the Strata Corporation therefore had no duty to demand removal of the Cooling Equipment or to take action to have it removed.

[Emphasis added.]

[60] I conclude from these authorities that the court has a broad discretion under s. 173 of the *Act*. The exercise of its authority is to be guided by a consideration of the scheme of the legislation, its overall objectives, and the circumstances giving rise to the application. The interests of the strata corporation must be balanced against the interests of the owner or other person against whom the order is sought, within this legislative context.

[39] There is no suggestion the Strata Corporation is not acting in good faith. It is entitled to enforce its bylaws. The concerns of the Strata Corporation are well founded. The presence of bed bugs in more than one unit raises concerns regarding a further infestation of the units. Failing to deal with the respondents' unit undermines the Strata Corporation's attempts to resolve the situation.

[40] I conclude the petitioner is entitled under s. 173 of the *Strata Property Act* to a declaration that the respondents have contravened the Bylaws by not permitting inspection of their unit. I order that the respondents cease and desist from contravening the Bylaws by refusing entry for the purposes of inspection for pests.

[41] The petitioner, as noted earlier, also seeks a declaration of nuisance based on the refusal by the respondents to permit inspection, which has resulted in a need for precautionary spraying of additional common properties and Units 405 and 409. The petitioner submits this has unreasonably interfered with the petitioner's enjoyment of the common property and the use of Units 405 and 409.

[42] As noted above, s. 3(1) of the *Bylaws* prohibits an owner, tenant, occupier, or visitor using a strata lot in a manner that is a nuisance or hazard to another person. Nuisance arises where a person's enjoyment of his or her land is unreasonably interfered with. That interference must be substantial. In my view, the need for repeated spraying of adjacent areas and at least two of the units in the Manor, and the resulting vacancy of those premises for six to eight hours at a time qualifies as substantial. The cost and inconvenience and the stress to the other residents is not trivial.

[43] The petitioner also seeks a mandatory injunction, firstly to compel the respondents to permit entry and inspection of Unit 407, and secondly to compel the respondents to permit the performance of a reasonable pest management plan.

[44] As noted above in *Aradi*, s. 173 gives the Court discretion to be exercised in appropriate circumstances and in accordance with the overall objectives in the *Act*. The discretion is a broad one. In my view, a mandatory injunction compelling access to the premises is appropriate. In addition, a mandatory injunction requiring compliance with a pest management plan is also appropriate, as it flows from the ordered inspection. For one not to follow the other would further delay and prejudice the petitioners. As a result, the two mandatory injunctions sought are granted.

[45] The refusal of the respondents to permit entry and inspection of their premises has resulted in the petitioner incurring additional costs and expenses. Those expenses consist of the cost of having Orkin attend at adjacent suites to provide perimeter services and conduct inspections. As well, costs were incurred in anticipation that the respondents would comply with s. 7(1) of the Bylaws, which requires an owner to allow a person authorized by the Strata Corporation to enter the strata lot on 48 hours' written notice for inspection purposes. The total costs incurred were alleged to be some \$787.50. The petitioner seeks damages in this sum, emphasizing that it is not a fine.

[46] The petitioner seeks an order for its costs. It does so on the basis that, unless otherwise ordered, costs of a proceeding must be awarded to the successful party. The petitioner, however, submits that s. 133 of the *Strata Property Act* displaces the *Supreme Court Civil Rules* on special costs. Section 133 of the *Act* states:

- 133. (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including
 - (a) doing work on or to a strata lot, the common property or common assets, and,
 - (b) removing objects from the common property or common assets.

(2) The strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under section 130.

[47] In *The Owners, Strata Plan NWS3075 v. Stevens*, 2018 BCSC 1784, the issue of claiming actual legal costs was addressed by the court as follows:

[78] As I have indicated, prior to the SPA, s.127 of the *Condominium Act* was interpreted as requiring a Strata to bring an action in debt to recover legal fees after a judgment established bylaws had been contravened rather than seeking recovery by way of a costs award (*Hill* at para. 11). It read:

Violation of bylaws

127. (1) An infraction or violation of these bylaws or any rules and regulations established under them on the part of an owner, the owner's employees, agents, invitees or tenants may be corrected, remedied or cured by the strata corporation.

(2) Any costs or expense incurred under subsection (1) by the corporation

(a) must be charged to that owner, and

(b) must be added to and become a part of the assessment of that owner for the month next following the date on which the costs or expense are incurred, but not necessarily paid by the corporation, and become due and payable on the date of payment of the monthly assessment.

(3) The strata corporation may recover from an owner by an action for debt in a court of competent jurisdiction money which the strata corporation is required to expend as a result of an act or omission by the owner, the owner's employees, agents, invitees or tenants, or an infraction or violation of these bylaws or any rules or regulations established under them.

[Emphasis added.]

[79] In contrast, s. 133 does not require a debt action and is essentially silent on the procedure for recovery of the reasonable costs of remedying a contravention. Section 133(2) simply provides that a strata “may require” that those reasonable costs be paid by the person who may be fined for the (actual) contravention under section 130. In the absence of a power to impose a lien (ss. 116 and 118) or a fine (s. 130) for the costs of remedying a contravention, it appears the only way to “require” an owner to pay, is by “suing” or making an application pursuant to ss. 171(1) and 173(1). They provide:

Strata corporation may sue as representative of all owners

171. (1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:

- (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
- (b) the common property or common assets;
- (c) the use or enjoyment of a strata lot;
- (d) money owing, including money owing as a fine, under this Act, the bylaws or the rules.

...

Other court remedies

173. (1) On application by the strata corporation, the Supreme Court may do one or more of the following:

- (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;
- (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

...

[Emphasis added.]

[80] Under s. 1, a "suit" means any kind of court proceeding and to "sue" means [to bring] any kind of court proceeding which is defined in Rule 1-1 of the *Civil Rules* to mean "an action, petition proceeding and a requisition proceeding".

[81] Since the enactment of the *SPA* there appears to be some confusion, reflected in the pleadings and materials of the Strata here, about the relationship between "costs" pursuant s. 133 and Rule 14-1 of the *Civil Rules*, and the recovery of costs provided for in a strata bylaw. The issue was considered in *Blackmore et al. v. Owners, Strata Plan VR-274*, 2004 BCSC 1121 at paras. 62-69. The case involved a review of an arbitrator's decision to award the strata solicitor-client costs in a dispute with an owner about a bylaw created pursuant to s. 133. Justice Goepel as he then was, explained:

[62] In justifying the cost award under the bylaw, the arbitrator referred to *Strata Plan VR243 v. Hornby*, [1986] B.C.J. No. 2353 (S.C.) (QL) and *Hill v. Strata Plan NW 2477*, [1995] B.C.J. No. 1906 (S.C.) (QL) as authority for the proposition that a strata corporation may claim actual legal expenses incurred. Those cases arose under s. 127 of the *Condominium Act*, R.S.B.C. 1979, c. 61, the predecessor to s. 133 of the Act. In both cases, the strata corporation sued the owner after the litigation to which the costs related had concluded to recover its actual legal costs. The cases are distinguishable from this situation where the strata corporation seeks to recover its legal expenses not in a separate proceeding but as "costs".

[63] The strata corporation points to *Canadian Imperial Bank of Commerce v. Charbonnages de France International S.A.* (1996), 42 C.B.R. (3d) 163 (B.C.C.A.) as support for the arbitrator's decision to award costs based on the bylaw. In that case, the bank had demanded payment under the terms of a credit agreement and when payment was not forthcoming, it obtained judgment against the appellants in the amount owing. The bank then brought a second claim seeking to recover certain additional amounts, including its enforcement costs. The claim for enforcement costs was founded on the following contractual provision:

The guarantor shall from time to time upon demand by the fiscal agent on behalf of the lenders forthwith pay to such agent all expenses (including legal fees) incurred by the lenders and such agent in the enforcement against the guarantor of any of the lenders' rights hereunder.

The Court of Appeal awarded special costs based on that term.

[64] *Charbonnages* appears to be contrary to an earlier Court of Appeal decision: *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.* (1995), 3 B.C.L.R. (3d) 309 (C.A.). That case concerned a lease agreement which contained the following provision:

All costs, expenses, and expenditures including, without limitation, the complete legal costs incurred by the Landlord as a result of any default by the Tenant shall forthwith on demand be paid by the Tenant as Additional Rent together with interest, at the rate specified in Section 4.08(e), from the date any such costs, expenses, and expenditures are incurred by the Landlord until the same are fully paid and satisfied.

[65] Having succeeded in its claim, the landlord sought special costs based on the aforementioned provision. The Court rejected the claim. Madam Justice Southin observed at [paras.] 18-19:

There, the agreement specified a scale of costs provided by law and provided for those costs to be taxed by the district registrar, and if this agreement had said the respondent was entitled to special costs to be taxed, there would be no difficulty in our making such an order. But it does not. It does not embody any term used in the Rules.

As I understood him, counsel for the respondent invited us to make the order because special costs are bound to be less than what the respondent is entitled to recover under the covenant. My difficulty is that I do not consider it is proper to proceed upon any such assumption. It is not for us to construe the covenant or predict what the result would be of an assessment of special costs. Thus I would not make the order sought.

[66] The Court went on to hold that if the landlord wanted the benefit of that contractual provision it should bring a separate proceeding.

[67] It is difficult to reconcile the two decisions. Although *Charbonnages* is the more recent decision, *P & T Shopping Centre* is a considered decision on the very point in issue.

[68] In this case, as in *P & T Shopping Centre*, the bylaw does not embody any term used in the *Rules of Court*. Further, the bylaws contemplate that the owner will be assessed first and only if the assessment is unpaid can the strata corporation commence an action to recover the amount owing. That was the process followed in both *Hornby* and *Hill*. There has been no assessment under the bylaw in this case ...

[Emphasis added.]

[82] Justice Goepel chose to follow *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.* (1995), 3 B.C.L.R. (3d) 309 (C.A.), which was recently cited with approval in *Trenchard v. Westsea Construction Ltd.*, 2017 BCCA 352. At para. 8, the Court of Appeal explained that a party cannot merely claim solicitor-client costs authorized by a bylaw or contractual provision as court costs. Instead, the party must elect either to sue for the costs in a separate proceeding and forego its court costs, or accept the Court's jurisdiction to decide upon the appropriate costs under the *Civil Rules*:

[8] There are two cases from this Court that are relevant to Westsea's claim. In *P & T Shopping Centre Holdings Ltd.* the plaintiff sought special costs relying on a covenant in the lease. The Court said that the lessor had two options and had to make an election, either to seek party and party costs under the tariff, or to seek costs under the lease. If it sought costs under the Lease it had to follow the following procedure:

...

[22] The respondent's remedy is to send to the appellant a statement setting out its claim under the clause and demanding payment and, if the appellant refuses to pay, to sue for those costs as unpaid rent. As to what the appellant should do, *Re Holliday and Godlee, supra*, may give it a clue.

...

(See also *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2018 BCSC 66 at para. 385; *AMT Finance Inc. v. Gonabady*, 2010 BCSC 278; *Wild Dunes Holdings Inc. v. Hackett*, [1999] B.C.J. No. 372 at paras. 10, 13; *B.U.K. Investments Ltd. v. Ken Pappas*, 2002 BCSC 161 at paras. 28-32; *Halle v. Ritchie*, 2008 BCSC 1452 at paras. 63-67; and *Aspen Enterprises Ltd. v. Quiding*, 2009 BCSC 50 at paras. 20-23).

[83] This same point was made in *Cheung v. The Owners, Strata Plan VR1902*, 2004 BCSC 1750. There, citing *Blackmore*, Justice Gerow refused

to order special costs under a bylaw which permitted recovery of the strata's legal costs by way of an assessment, noting there had been no assessment.

[84] In light of these authorities and in the absence of submissions addressing the issue, I will not consider the Strata's "legal charge back" bylaw as a basis for recovering its "actual legal costs" in this proceeding any further.

Discussion

[85] Here the Strata first sought recovery of its reasonable expenses including legal expenses relying upon s. 133, in its petition at the petition hearing. The Strata then asked for the same relief in its notice of application. In the meantime, the CRT refused to determine Ms. Stevens' claim against the Strata related to the same or similar expenses.

[86] The first question is: Does s. 173 allow for such an application? I am satisfied the answer is yes.

[87] Section 173 expressly permits a strata to make applications for orders requiring an owner to perform a duty required by the SPA, the bylaws or the rules, as well as to stop contraventions of the same. Again, s. 133 allows a strata to require an owner to pay the reasonable costs of remedying a contravention. Although it is unclear if requiring an owner to pay gives rise to a "duty" under the SPA, it would be incongruous to impose upon a strata the burden of suing separately for the costs of remedying a contravention associated with an application to stop an owner from contravening, particularly in light of the purpose of s. 133 identified by *Baettig*. It is also significant that the Strata's application was brought in a petition proceeding and the petition itself sought recovery of legal costs under the section.

[48] I am satisfied the petitioner is entitled to its costs, including special costs, the reasonableness of which, including the reasonable costs of remedying a contravention of its Bylaws, should, in my view, be directed to the Registrar as was done in the *Stevens* case at paras. 89 and 90.

[49] I appreciate that the petitioner sought an award of damages in a specific amount arising from the costs it has incurred as a result of the respondents' actions. However, that, in my view, is more appropriately addressed before the Registrar, and recovery can be sought in an amount approved by the Registrar at that time.

"The Honourable Mr. Justice Punnett"