

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yamagata v. The Owners, Strata Plan NW 1546*,
2019 BCSC 286

Date: 20190306
Docket: S176103
Registry: Vancouver

Between:

Jennifer Yamagata and Dean Yamagata

Petitioners

And:

The Owners, Strata Plan NW 1546

Respondent

Corrected Judgment: The reference to counsel for the respondent
was corrected on the first page on March 11, 2019

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Petitioners:

Andrew N. Epstein

Counsel for the Respondent:

Patrick A. Williams
E. Barnes, A/S

Place and Date of Hearing:

Vancouver, B.C.
October 17 and 18, 2018

Place and Date of Judgment:

Vancouver, B.C.
March 6, 2019

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1. Introduction

[1] The petitioners own and live in a townhouse on Forest Grove Drive, in Burnaby B.C. The petitioners’ townhouse is strata lot 40 in the Respondent strata corporation (the “Strata Corporation”), which is comprised of 55 strata lots.

[2] The petitioners say that the Strata Corporation has completely failed in its duty to repair and maintain the common property. The petitioners say that, in particular, the Strata Corporation has completely failed to address severe problems with moisture and mould in attic areas, which affect the petitioners’ strata lot and other strata lots.

[3] Accordingly, the petitioners seek the following (among other items of relief):

- (a) a declaration that the Strata Corporation is in breach of its duties to repair and maintain the common property of the Strata Corporation under s. 72 of the **Strata Property Act**, S.B.C. 1998, c. 43 (the “**SPA**”);
- (b) an order pursuant s. 165 of the **SPA** requiring the Strata Corporation to perform its statutory obligations;
- (c) an order pursuant to s. 174 of the **SPA** appointing an administrator of the Strata Corporation, together with appropriate ancillary orders;
- (d) an order pursuant to s. 165 of the **SPA** authorizing the Strata Corporation to issue a special levy to the owners, based on their

respective unit entitlements, not exceeding \$250,000, with such levy to be payable in such manner as the administrator may decide; and

- (e) an order pursuant to s. 165 of the **SPA** that the Strata Corporation or the administrator continue legal proceedings (the “Negligence Action”) brought by the petitioners as plaintiffs (including their children) against Bayside Property Services Ltd., Moleski Joint Ventures and Alpine Property Services (collectively, the “Negligence Action Defendants”).

[4] The Strata Corporation says that the petitioners have failed to establish any basis for any of the relief to be granted, and, accordingly, the petition must be dismissed. The Strata Corporation acknowledges its obligation under the **SPA** to repair and maintain the common property. It says that it has acted entirely reasonably in taking steps to address the issues raised relating to moisture and mould, and that any lack of success is not due to any negligence, lack of effort or misconduct on its part. With respect to the request for appointment of an administrator, the Strata Corporation says that none of the relevant factors are present here, and the appointment of an administrator cannot be justified. Finally, the Strata Corporation says that there is no basis to order that the Strata Corporation (or administrator if appointed) continue the Negligence Action, which, at best, would benefit only the petitioners.

2. Factual background

[5] The Strata Corporation consists of two separate buildings, shown on the strata plan as “Building 1” and “Building 2.”

[6] The Strata Corporation is managed by Bayside Property Services Ltd. (“Bayside”) pursuant to the terms of an agency agreement dated April 21, 2010. Pursuant to para. 5.1 of that agreement, the Strata Corporation has given an indemnity in favour of Bayside, and it agrees to “save [Bayside] harmless from any and all claims, damages, costs and liability incurred in connection with the services provided to the Strata Corporation,” unless “such claim, damage, cost or liability is

caused by the gross negligence or wilful misconduct” of Bayside. Bayside does not manage any of the strata lots comprising the Strata Corporation.

[7] Tracy Carothers is an employee of Bayside and, in June 2013, she was appointed by Bayside as the managing agent for the Strata Corporation. Ms. Carothers explained that the managing agent for the Strata Corporation attends and prepares minutes of the meetings of the strata council (the “Strata Council”) and general meetings of the Strata Corporation. According to Ms. Carothers, these minutes form part of the business records of the Strata Corporation and must be prepared and retained as records and documents of the Strata Corporation pursuant to s. 35 of the **SPA**. Generally speaking, beginning June 1, 2013, Ms. Carothers prepared the minutes of the Strata Council meetings and the general meetings that are in evidence in this proceeding, with the exception of minutes of a meeting held June 19, 2014. Those minutes were prepared by Dana Johnson. Ms. Johnson has been a member of the Strata Council since January 2013, and, as of August 2017, was the president.

[8] The petitioners’ strata lot (the “Unit”) is located on levels 3 and 4 of Building 1, and is referred to as “Unit 16.” The Unit shares a common wall with strata lots 41 (Unit 13) and 49 (Unit 15). Its west wall on level 3 is a boundary with a common property breezeway, and its west wall on level 4 shares a common wall with strata lot 38 (Unit 17).

[9] The Unit and all other units except Unit 25 have attic space that is common property within the meaning of the Strata Corporation’s bylaws and the **SPA**.

[10] According to Ms. Yamagata, she and her husband purchased the Unit in June 2011, after having a home inspection done. According to Ms. Yamagata, the inspection report stated that there was no mould or excess moisture in the Unit. According to Ms. Yamagata, after purchasing the Unit, she and her husband became aware that there was minor condensation on the interior of several windows in the Unit.

[11] However, according to Ms. Yamagata, since the petitioners purchased the Unit, she has learned that the common property (in particular the attics) of the Strata Corporation has suffered from a number of defects, which Ms. Yamagata identifies as follows:

- (a) missing, incomplete or insufficient duct insulation;
- (b) improper taping and connection of vents and ducts;
- (c) obstructed or insufficient ventilation and exhaust venting;
- (d) improper installation of ventilation and soffit baffles;
- (e) wood that is wet and contaminated with mould;
- (f) insufficient air intake and air flow;
- (g) insufficient and improperly designed bathroom and exhaust fans;
- (h) missing or insufficient insulation, vapour barriers and weather stripping on attic access hatches; and
- (i) improper or insufficient materials in relation to the above features.

[12] Minutes of meetings of the Strata Council show generally how the Strata Council dealt with issues relating to the repair and maintenance of the common property in the relevant period.

[13] For example, minutes of meetings of the Strata Council from 2011 and 2013 indicate that the Strata Council considered matters relating to the repair and replacement of soffits. Minutes of meetings of the Strata Council from 2011 and 2012 indicate that the Strata Council addressed the matter of dryer vents on a number of occasions. According to minutes from a meeting in August 2011, the Strata Council directed Bayside to obtain quotes for an independent roofing company to check all dryer-vent connections from inside units as a precautionary matter to ensure that all dryer vents were properly connected following a roof

replacement. The matters were further discussed at meetings in September and November 2011.

[14] According to minutes of a Strata Council meeting on April 18, 2012, the Strata Council approved having a contractor clean dryer vents from the outside of units, and reviewed quotes for changing the dryer vent connections in the upper and lower units. According to minutes of the Strata Council meeting on June 12, 2012, when the dryer vent cleaning was being done, it was discovered that three units had dryer vents that were not properly connected.

[15] Matters relating to dryer vents and dryer vent ducting problems continued to be discussed by the Strata Council in 2013. The minutes of a Strata Council meeting on June 26, 2013 record that the Strata Council budgeted up to \$16,000 to have all attics properly inspected in order to obtain an accurate assessment of the venting and condition of each attic. The minutes of the Strata Council meeting on September 4, 2013 record that the Strata Council accepted a proposal from James Dobney Inspections (“JDI”) to inspect all of the attics. The minutes also record that once the inspections were complete, and JDI’s report was received showing the scope of repair, the Strata Council would proceed with repairs.

[16] The inspections for all but five units (whose owners did not provide access until 2014) were done in early October 2013. According to JDI’s report (the “JDI October Report”) dated October 10, 2013 (in fact, a collection of reports), the attics had a variety of problems requiring repairs, including dryer connections, venting and inadequate ventilation. The JDI October Report also noted the presence of mould, including at the Unit.

[17] The Strata Council reviewed the JDI October Report at a Strata Council meeting on October 23, 2013. The minutes record that the Strata Council was surprised at the scope of the ventilation problem, and that, of the units that were inspected, all had very poor ventilation and inadequate ducting, and less than adequate bathroom exhaust fans. Problems were compounded by owners of 15 units storing personal property in the attics. The Strata Council instructed Bayside to

obtain three quotes for the replacement of bathroom exhaust fans, and for the repair and replacement of fan and dryer vent ducting. According to the minutes, once an estimate of the scope of work and costs involved was obtained, the Strata Council intended to bring the matter forward at the next annual general meeting for the owners to consider, by special resolution, funding the necessary repairs.

[18] According to the minutes of the Strata Council meeting on December 4, 2013, seven units received notices that the attic inspectors had found mould in their attics, and that Medallion Healthy Homes (described as mould remediation specialists) would be testing in each of the seven units to determine the type of mould and establish a time-line for the clean-up. Medallion subsequently carried out an inspection of the seven units, which included the Unit.

[19] In the spring of 2014, and following up on recommendations in the JDI October Report and other reports, the Strata Corporation obtained quotes for repairs and remediation from three general contractors: Moleski Joint Venture, Grantson Construction Group Inc. and Abney Roofing Ltd. Moleski and Abney specifically included mould remediation in their quotes. According to Ms. Carothers, when Grantson delivered its quote, its representative also gave her a letter that stated the severe black mould conditions on the second floor living area of the Unit were the direct result of the owners' lifestyles and living conditions.

[20] The Strata Corporation also obtained quotes for attic mould remediation from Medallion, Urban Environment and ABM Environmental Inc.

[21] At a special general meeting on April 29, 2014, the Strata Corporation sought approval from the owners of \$200,000 for funding of repairs, based on the quotes obtained. Ms. Yamagata attended the special general meeting. According to the minutes of the meeting, a representative from JDI gave a presentation and discussed the findings from the attic inspections. However, in the result, an amended resolution was passed to fund by special levy the amount of \$100,000 for attic repairs. According to Ms. Johnson, owners present at the meeting expressed the view that \$200,000 was too costly but were prepared to fund \$100,000 for the

seven worst attics (including the Unit's attic) while wanting the Strata Council to address repair of the remaining attics in a more cost-effective manner. The amended resolution was passed (27 in favour, none opposed and four abstentions).

[22] According to the minutes of the May 12, 2014 Strata Council meeting, the Strata Council tentatively selected ABM to perform the mould remediation work, beginning with the seven worst attics (including the attic for the Unit), and Abney Roofing to make repairs to the common area attics. According to the minutes, at a subsequent meeting on May 22, 2014, the Strata Council decided to hire Moleski to do both the mould remediation and the attic repairs.

[23] At an extra Strata Council meeting on June 19, 2014 (after completion of six of the seven attics that required mould remediation), the Strata Council had Jon Moleski attend to discuss both the work done in the completed attics, and the work required in the remaining attics. According to the minutes of the July 16, 2014 Strata Council meeting, as of that date, Moleski had completed mould remediation and attic repairs in the seven worst attics. The Strata Council was then looking into the possibility of having the remaining repairs completed in a more cost-effective manner. The Strata Council had received a verbal quote from Alpine Property Services, and Bayside was directed to obtain a written quote.

[24] In due course, the Strata Council retained Alpine to complete repairs on the 47 remaining attics. Work began in September 2014 and continued into October. As of the Strata Council meeting on December 1, 2014, repairs had been completed on all but one of the remaining attics, and Alpine was awaiting access to complete the last repairs. Those repairs were finally completed as of the February 26, 2015 Strata Council meeting.

[25] However, according to Ms. Yamagata, even after the work and repairs were done, she, her husband (the petitioner Dean Yamagata) and their children continued to experience a variety of "significant health problems" which Ms. Yamagata attributed to mould growth.

[26] In March 2015, the Strata Corporation hired Medallion to perform air quality testing in two units, including the Unit. The test results indicated that there were still some moisture and mould issues. As a result of this testing, the Strata Council hired JDI to return and re-inspect six attics (three done by Moleski and three done by Alpine). According to JDI's report, there were continued problems in all attics. I note that the JDI report suggested that the Yamagatas themselves were contributing to the presence of mould in the Unit (something Ms. Yamagata strongly disputed in her communications with Ms. Carothers).

[27] The minutes of the May 13, 2015 Strata Council meeting state that, based on the JDI inspections, the contractors involved would be contacted to return and make any repairs noted. The minutes also stated:

Council would like to remind Owners that lifestyle habits can greatly affect the conditions of the interior of units and common attic spaces. Dobney has suggested that Owner living conditions are contributing to moisture issues in the attics. Owners should:

- Ensure that their kitchen and bathroom exhaust fans are clean and in good working order.
- Use fans when cooking and showering, and leave fans running for an hour following use.
- Open windows and blinds/drapes to allow air flow.
- Ensure living areas and contents allow adequate air circulation throughout the unit.

[28] The minutes for the Strata Council meeting on July 9, 2015 reported concerning "Attic Treatment" that:

[Moleski] has returned to the seven attics they repaired to re-inspect and check on the condition of the attics one year after the work was completed. All seven attics are in good condition. Some moisture was present in two attics and all attics were sprayed again for mould as a precautionary measure. The contractor has agreed to return in the late fall to check the attics again as he is committed to ensuring the attics are dry. Moleski has also extended the warranty period an additional year for these attics . . .

Regarding the 47 attics repaired by [Alpine], two Council members randomly selected several attics to inspect and some were found to require minor follow-up repairs, . . . Council met with [Alpine] which has agreed to return to the attics they repaired to ensure that the problems found in those units, as well as in all attics are resolved. . . .

Council would like again to remind all Owners that lifestyle habits can greatly affect the conditions of the interior of units and common attic spaces. . . .

[29] According to the minutes of Strata Council meetings from the fall of 2015, the Strata Council continued to follow-up with the contractors (Alpine and Moleski) concerning completion of attic repairs.

[30] However, according to Ms. Yamagata, the work done by Moleski and Alpine did not lessen the mould problems in the Unit, and she and Mr. Yamagata continued to complain to the Strata Council about mould problems in both the Unit and throughout the units in the Strata Corporation.

[31] The Strata Council minutes of a meeting on February 17, 2016 report that the Strata Council had hired an engineering firm, RDH Building Science Inc., to review the “three problematic attics” (which included the Unit’s attic) and two additional attics in order to provide a “general idea” of the condition of the attics. The minutes reported that RDH would investigate the five attics and review all of the reports prepared by previous inspectors and contractors. On completion of that review, RDH would provide a scope of work to “resolve the moisture problems and make recommendations on contractors to perform the work.”

[32] The Strata Council minutes of a meeting on April 13, 2016 included an “Attic Update,” which reported:

[RDH] reviewed five attics, including the three problematic attic spaces. Council is currently waiting for the report . . . Although anxious for the report, Council is confident that RDH is a highly reputable firm and is doing a thorough job. The outcome of this report is very important to all Strata Lot Owners, including the three most affected by the current moisture problems, and Council is committed to getting the issues resolved properly.

[33] On May 6, 2016, RDH delivered its report. According to the report, RDH visited five units, including the Unit, and reported on its observations of the unit interiors and attic spaces. Problems identified included: signs (using smoke testing) of significant leakage of air from a bathroom duct into the attic when the bathroom fan was operating; plywood sheathing in the attic that was wet to the touch; an

exhaust duct that was not connected to the bathroom fan; use of inappropriate insulation material; discontinuous vapour barriers; a disconnected dryer duct with signs (using smoke testing) of considerable leakage of humid air into the attic space under normal operating conditions; and staining on the plywood sheathing. The report included a number of “conceptual recommendations” with respect to rehabilitation activities, including a “complete and comprehensive attic remediation” for some of the attics. RDH stated that the conceptual recommendations did not provide a basis for implementing remedial work, but needed to be “developed, refined, and documented in detail” before construction work could be tendered to contractors.

[34] According to the minutes of the Strata Council meeting on June 15, 2016, the Strata Council met with RDH on May 16, 2016, announced to the owners that RDH’s report was available, and called a “Town Hall Meeting” for the owners on May 26. The minutes reported further that, at the town hall meeting, RDH explained their findings, the scope of the problems relating to the attics and answered questions. The minutes also reported that, following the town hall meeting, RDH provided the Strata Council with a proposal for their services that would be presented to the owners at an upcoming special general meeting. According to the minutes, at the special general meeting, the owners would be presented with a resolution to proceed with an “attic repair project,” and that RDH be hired to “plan and design a workable, cost effective solution to the attic remediation, complete two test attics, inspect all other attics, assist Council with hiring a qualified contractor and provide contract administration, and follow up with results from the test attics.”

[35] Ms. Yamagata continued to express her concerns and frustration about the situation through e-mail correspondence with Ms. Carothers.

[36] A special general meeting was held on July 27, 2016. According to the minutes of the meeting, a total of 21 out of 55 strata lots (and eligible voters) were represented at this meeting. The “preamble” to the resolution placed before the meeting stated in part:

. . . RDH indicated that the attic structures at Rossmoor show abnormal and premature deterioration. RDH recommends a comprehensive attic investigation, maintenance measures in all attics, and implementation of a test solution in one or two attics. The test solution would be monitored through spring 2017 to determine if it reduces or eliminates the condensation issues.

The Strata Property Act mandates that the Strata Corporation has a responsibility to maintain the Strata's common property and, at Rossmoor, the attics are common property. RDH has identified a humidity and condensation issue which affects the attic structures.

Council recommends that RDH be hired to conduct a comprehensive attic investigation, design a test solution for excess attic humidity and condensation, assist Council in hiring a qualified contractor, oversee the work performed by the contractor, and provide recommendations following results from the test attic solution.

[37] The proposed resolution sought approval by the owners of expenditure of up to \$126,000 for attic remediation and consulting services of RDH. The resolution was passed unanimously.

[38] The minutes of the Strata Council meeting on August 18, 2016 report that RDH had been hired to "design a solution to resolve the problem of moisture in attics and implement that solution in two test attics." The Unit was one of the two test attics chosen. According to the minutes of the Strata Council meeting on October 26, 2016, another town hall meeting was held on October 24, 2016, and at that time, RDH gave a PowerPoint presentation and answered questions concerning "the process and potential solution to the attic moisture problem." Based on the recommendation of RDH, the Strata Council chose Common Ground Construction Ltd. to carry out the work required.

[39] On February 3, 2017, the petitioners filed the Negligence Action. The named plaintiffs are the petitioners and Ms. Yamagata as litigation guardian for the petitioners' three children. Many of the facts set out in the "Factual Basis" of the petition are also found in "Part 1: Statement of Facts" in the notice of civil claim filed in the Negligence Action. In the Negligence Action, the petitioners allege that they (and the other plaintiffs) have suffered loss and damage as a result of the negligence, negligent inspection and misrepresentations of the Negligence Action

Defendants. Among other things, the petitioners allege that the Negligence Action Defendants breached duties (including a duty to warn) owed to them (and the other plaintiffs) in connection with the “Strata Remediation” (that is, the work done by Moleski and Alpine) in relation to the Unit (including the attic), and their breach of duties caused or contributed to continued mould growth and resulting damage to the plaintiffs.

[40] The minutes of the Strata Council meeting on February 16, 2017 reported that Common Ground was in the process of completing work in the two test attics (which included the Unit’s attic), and that RDH would be monitoring those attics (as well as a “control” attic) over the remaining winter months and into the spring. RDH was to report its findings to the Strata Council. The minutes of the Strata Council meeting on April 6, 2017 reported that Common Ground had completed the two test attics and that RDH had installed their monitoring equipment in the test attics and the control attic. The minutes also reported that Common Ground was proceeding with repairs in the remaining attics.

[41] RDH provided its report to the Strata Council on July 11, 2017. RDH reported that, after repairs (including, in the Unit, air sealing at potential areas of air infiltration from the Unit into the attic) were completed, it had installed sensors in the two test units and the control unit and their attics. RDH reported that the sensors were installed to collect data for the period between March 29 and June 12, 2017. In the “Summary,” RDH stated in part:

In general, the repair strategies implemented in unit 6 and unit 16 have been effective. By relative comparison of data, [an] electric heater in the attic space would likely minimize formation of condensation on the roof sheathing surface, and implementation of air sealing would likely reduce condensation risk even further; thereby, reducing the conditions required for mould growth. However, further monitoring of the attic conditions in colder weather during winter months is recommended to confirm these findings.

Prior to widespread implementation of the repair strategies to any other problematic attics . . . , it is recommended that monitoring be completed in the winter of 2017-2018 to confirm these findings, as well as better evaluate the energy consumption demand of heaters in colder months.

[42] RDH reported further to the Strata Council on May 24, 2018, after (according to the report) carrying out further monitoring from October 17, 2017 to March 17, 2018. RDH reported that, based on the results of visual observations and the monitoring studies conducted in the attics, the repair strategies implemented in the test units appeared to have been successful in addressing the ongoing moisture issues in the attics of those units.

[43] Based on this report from RDH, the Strata Council instructed Ms. Carothers to have several attics tested for mould. According to Ms. Carothers, Sterling IAQ Consultants Ltd. was retained and conducted mould testing in the attics of six different units, including the Unit. The results were set out in Sterling's report dated July 16, 2018. The Unit's attic had total spores per cubic meter of 997.5, compared with the outdoor airborne mould spore result (used for control) of 2,354.1 per cubic meter. Based on the report, the Unit's attic had the lowest count of the five units tested. The attics of two units (Unit 15 and Unit 55) had results for total spores per cubic meter that were considerably higher than the outdoor count. Sterling cautioned with respect to all of the airborne mould spore results that the results were considered unacceptable and not within industry standards for living or occupied spaces.

[44] Ms. Carothers explained that, because of heightened mould results in Units 15 and 55, the Strata Council instructed her to request that Sterling do further testing of those units. According to its report dated August 24, 2018, Sterling carried out air sampling in each unit from the room in which the hatch to the attic was located. Ms. Carothers explained that this report noted that the interior living areas of both Units 15 and 55 were well within the acceptable range and the mould measurement was lower than the outside air mould count. According to Ms. Carothers, on that basis, the Strata Council determined that there was no need to test the interior living area of the Unit and there was no need to conduct any further remediation.

[45] Between October 2013 and July 2017, the Strata Corporation spent approximately \$180,000 on attic inspections, consultations, repairs, remediation and mould testing.

3. Discussion and analysis

[46] I will first address whether the petitioners have demonstrated that the Strata Corporation has breached its duty to repair and maintain the common property, so as to justify the remedies being sought under s. 165. In my view, the petitioners have failed to do so. I will then deal, relatively briefly, with the petitioners' request for the appointment of an administrator and for an order that the Strata Corporation continue the Negligence Action.

(a) The duty to repair and maintain common property

[47] There is no dispute that the Strata Corporation must repair and maintain common property and common assets: see s. 72(1) of the **SPA**. There is also no dispute that the attics, roofs and exterior of the two buildings comprising the Strata Corporation are common property.

[48] If it is shown that the Strata Corporation has breached its obligation under s. 72(1) of the **SPA**, then a remedy may be ordered under s. 165, which provides:

Other court remedies

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

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

[49] The relevant legal principles that apply when it is asserted a strata corporation has failed in its duty to repair and maintain common property and

common assets are conveniently summarized by N. Brown J. in *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74, beginning at para. 55:

[55] In *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784, Josephson J. neatly summarized the relevant legal principles regarding the duty of a strata corporation to repair and maintain common property:

[23] There is little issue regarding the law. The respondent has a fundamental duty to repair and maintain its common property: s. 72 of the *Act*; *Royal Bank of Canada v. Holden*, 7 R.P.R. (3d) 80, [1996] B.C.J. No. 2360 (S.C.). In performing that duty, the respondent must act reasonably in the circumstances: *Wright v. Strata Plan No. 205*, 20 B.C.L.R. (3d) 343, [1996] B.C.J. No. 381 (S.C.), aff'd (1998), 103 B.C.A.C. 249, 43 B.C.L.R. (3d) 1. Furthermore, the starting point for the analysis should be deference to the decision made by the strata council as approved by the owners: *Browne v. Strata Plan 582*, 2007 BCSC 206, 70 B.C.L.R. (4th) 102.

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

...

[28] In resolving problems of this nature, there can be “good, better or best” solutions available. Choosing an approach to resolution involves consideration of the cost of each approach and its impact on the owners, of which there is no evidence before the court. Choosing a “good” solution rather than the “best” solution does not render that approach unreasonable such that judicial intervention is warranted.

[29] In carrying out its duty, the respondent must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: *Sterloff v. Strata Corp. of Strata Plan No. VR 2613*, 38 R.P.R. (3d) 102, [1994] B.C.J. No. 445 and *Browne*.

[30] The course of action chosen by the respondent may or may not resolve the problems. If it does not, further remedial work, including separation of the two drainage systems, may be required. The respondent acknowledges that it will undertake that remedial work if it proves reasonably necessary.

[31] It may even prove to be the case that the approach of the petitioner is the wiser and preferable course of action. Again, that does not render the approach of the respondent unreasonable.

[32] Disagreements between strata councils and some owners are not infrequent. However, courts should be cautious before inserting itself into the process, particularly where, as here, the issue is the manner in which necessary repairs are to be effected.

[56] The Owners are entitled to rely upon and be guided by professional advice from professionals: see *Oldaker*. And, “[s]hould it turn out that those they hire to carry out work fail to do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances”: *Wright v. The Owners, Strata Plan #205* (1996), 20 B.C.L.R. (3d) 343 (S.C.) [*Wright*], at para. 30.

[57] The presence of a problem within a strata unit standing alone does not prove liability. As stated in *Wright* at para. 30:

[30] The defendants are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying out their statutory duty: and therein lies the test to be applied to their actions.

[50] The petitioners say the Strata Corporation has failed to repair and maintain the common property, as demonstrated by the results of the various inspections, reports and recommendations available to the Strata Council, beginning (at the latest) with the JDI October Report. The petitioners say further that the Strata Corporation has failed to pass a special resolution authorizing and funding remediation work sufficient to remedy the defects identified in the common property. The petitioners say that, since the Strata Corporation has failed to fulfill its statutory duties to repair and maintain the common property, and has failed to pass the appropriate special resolution, the court should make a “Tadeson” order, requiring the Strata Corporation to fulfill its statutory duties and issue a special levy to fund the work: see *Tadeson v. The Owners, Strata Plan NW 2644*, 1999 CanLII 6999, [1999] B.C.J. No. 3091 (S.C.), at B.C.J. paras. 12-16. The petitioners say (citing *Santos v. The Owners, Strata Plan LMS 1509*, 2016 BCSC 1775, at paras. 33-40) that, although s. 108(2) of the *SPA* ordinarily requires a special levy to be approved by a three-quarters majority vote at a meeting of owners, the court may order that a strata corporation issue a special levy without any vote or approval.

[51] However, in my view, based on the principles summarized in *Leclerc* and the history of the Strata Council’s dealings with the attic problems (as reviewed above), the petitioners have failed to show that the Strata Corporation has breached its obligation to repair and maintain the common property.

[52] The Strata Council retained JDI in late 2013 to inspect the attics. Based on the JDI October Report, the Strata Council obtained quotes to carry out necessary repairs and also for mould remediation, in particular in the seven units (including the Unit) identified as having the worst problems. In April 2014, the owners were asked to approve funding of \$200,000 at a special general meeting. However, the owners decided that funding of \$100,000 would be approved to address the seven worst attics, while looking for a more cost-effective solution for repairs to the remaining attics. In May 2014, armed with the quotes for work and in the light of the funding that had been approved at the special general meeting, the Strata Council chose Moleski to carry out both the repairs and mould remediation on the seven worst attics (which included the Unit).

[53] The petitioners imply that Moleski was not a suitable choice because it was not a mould remediation specialist, and that the work Moleski (and later Alpine) was retained to do was limited, while a broader scope of work (more in keeping with what was described in some of the quotes received by the Strata Council in the spring of 2014) was required to address the problems that needed to be addressed. However, the obligation of the Strata Corporation is to act reasonably in the circumstances, and choosing a “good” solution, rather than the “best” solution does not render the Strata Corporation’s approach unreasonable. After repairs and remediation were done by Moleski, the Strata Corporation then considered whether a more cost-effective approach could be taken with respect to repairs of the remaining attics, and decided to retain Alpine (in place of Moleski) to do that work. The petitioners have not shown that this decision, in the circumstances, was unreasonable.

[54] In 2015, the Strata Corporation, with the assistance of Medallion and JDI continued to review the effectiveness, in terms of dealing with the problems identified, of the work that had been done by Moleski and Alpine. When, on following up with Moleski and Alpine, the Strata Council was not satisfied that the problems had been appropriately addressed, it retained RDH to provide further advice and recommendations. A further special levy was sought and obtained at the

special general meeting on July 27, 2016, with the owners voting unanimously in favour.

[55] Between October 2013 and July 2017, the Strata Corporation spent substantial sums on attic inspections, consultations, repairs, remediation and mould testing. The work recommended by RDH and carried out by Common Ground, based on the monitoring done by RDH beginning in 2017 and continuing into 2018, appears to have been effective. Based on the results of the testing done by Sterling in July and August 2018, the Strata Council made the decision that there was no need to conduct any further remediation.

[56] The petitioners say that the results of testing done by Sterling in July and August 2018 support their position that the problems – in particular, the problems with mould contamination in relation to their Unit – have not been sufficiently addressed. However, in my view, the petitioners have failed to show that the Strata Council's decision not to conduct any further remediation was unreasonable, and they have failed to show that the Strata Corporation have acted unreasonably in all the circumstances. The fact that the petitioners do not agree with the Strata Council's approach, or its conclusion that, for the time being, nothing further needs to be done in terms of remediation, does not mean that the Strata Corporation has failed in its duty to repair and maintain the common property. To paraphrase the observation of Josephson J. in *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784, at para. 31, even if it may prove to be the case that the petitioners' approach is the wiser and preferable course of action, that does not render the approach of the Strata Council unreasonable.

[57] Accordingly, I find that the petitioners have failed to show that the Strata Corporation breached its obligation under s. 72(1) of the **SPA** to repair and maintain the common property, and have failed to show that an order under s. 165 is justified.

(b) The appointment of an administrator

[58] Given my conclusion that the petitioners have failed to show a breach of s. 72(1), my discussion of whether there are grounds for the appointment of an administrator will be brief.

[59] Section 174 of the **SPA** provides in relevant part:

Appointment of administrator

174 (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.

(2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.

(3) The court may

- (a) appoint the administrator for an indefinite or set period,
- (b) set the administrator's remuneration,
- (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and
- (d) relieve the strata corporation of some or all of its powers and duties.

(4) The remuneration and expenses of the administrator must be paid by the strata corporation.

...

[60] The leading case setting out the factors to be considered in relation to the appointment of an administrator is ***Lum et al. v. The Owners, Strata Plan VR519***, 2001 BCSC 493. There, Harvey J. said, at paras. 11-12:

[11] In my view after reviewing the authority available, bearing upon this question, factors to be considered in exercising the Court's discretion whether the appointment of an administrator is in the best interests of the strata corporation include:

- (a) whether there has been established a demonstrated inability to manage the strata corporation,
- (b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation,

- (c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,
- (d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,
- (e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

In addition, there is always to be considered the problem presented by the costs of involvement of an administrator.

[12] I also take into consideration the comments of Huddart, J. in **Cook**, supra, that the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.

[61] The petitioners have failed to show a demonstrated inability to manage the Strata Corporation, and have failed to show that the appointment of an administrator is necessary to bring order to the affairs of the Strata Corporation. On the contrary, the evidentiary record shows that the members of the Strata Council worked diligently and conscientiously to deal with difficult issues. The petitioners have failed to show evidence of a “struggle” among competing groups within the Strata Corporation such as to impede or prevent proper governance. On the evidentiary record, the Unit was not the only unit with significant problems in its attic, although it was one of the worst. However, the petitioners appear to be the lone complainants. Moreover, the owners demonstrated strong support for funding of necessary work (based on the results of the special general meetings), and voted unanimously (with no abstentions) in favour of the special levy at the July 2016 meeting.

[62] There is a further problem with this part of the relief requested by the petitioners.

[63] The petitioners propose the appointment of Mr. Boon Sim as administrator. Ms. Yamagata says that she has communicated (through her counsel) with Mr. Sim at Sutton Select Property Management, which she describes as a “managing broker who has direct experience as an administrator” under the **SPA** “where a strata corporation has breached its duty to repair.” Ms. Yamagata says further that:

If the court determines that it is in the best interests of the Strata to appoint an administrator, Mr. Sim has agreed to act as administrator on the terms requested in Part 1 of the Petition . . . , at a rate of \$225/hour.

[64] There is no affidavit from Mr. Sim. Other than what Ms. Yamagata says in her affidavit (and the source of her information is not clearly stated), there is no evidence before the court of Mr. Sim’s qualifications or experience that might make him a suitable candidate to act as administrator. There is no evidence of what Mr. Sim would do for \$225 an hour. Even if the appointment of an administrator might be appropriate, there is little in the evidence based on which the court could come to a reasoned decision about whether Mr. Sim should be appointed.

[65] The petitioners’ request for the appointment of an administrator (and ancillary relief) is refused.

(c) Continuation of the Negligence Action

[66] The petitioners seek an order under s. 165 of the **SPA** that the Strata Corporation (or the administrator if appointed) continue the Negligence Action.

[67] Pursuant to s. 171 of the **SPA**, a strata corporation may sue as representative of all owners. The section provides in relevant part:

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:

. . .

- (b) the common property or common assets;
- (c) the use or enjoyment of a strata lot;

. . .

(2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.

(3) For the purposes of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter.

. . .

(5) All owners, except any being sued, must contribute to the expense of suing under this section.

...

[68] The petitioners say that they commenced the Negligence Action to obtain compensation for damages caused to them as owners of strata property, and that the Negligence Action seeks damages arising from property damage to the Unit's attic, which is common property. The petitioners say that the damages claimed in the Negligence Action arose as a result of the Strata Corporation's failure to maintain the common property, as required by s. 72. They say that an order that the Strata Corporation continue the Negligence Action is necessary to adequately compensate the owners for the damages resulting from the Strata Corporation's failure to comply with s. 72. The petitioners say that an order whereby the Strata Corporation continues the Negligence Action would allow the owners to be fairly compensated jointly by the responsible parties.

[69] The Strata Corporation says that s. 165(c) is not available as a legal basis to grant the relief sought because the petitioners have failed to establish a breach of the **SPA**. The Strata Corporation says further that, even if s. 165(c) were available to the petitioners, the requirements of s. 171(2) should not be overridden, since continuing the Negligence Action does not result in the Strata Corporation no longer (allegedly) contravening the **SPA**. The Strata Corporation says in addition that continuing the Negligence Action will not compensate the owners, since they are not plaintiffs in the Action, and any continuation of the Negligence Action would be solely on behalf of the petitioners as plaintiffs. The Strata Corporation says that any "new" claim by the Strata Corporation on behalf of all owners would in any event be barred by the **Limitation Act**, S.B.C. 2012, c. 13 (a proposition the petitioners dispute). The Strata Corporation also says that there are no allegations in the Negligence Action of gross negligence or wilful misconduct on the part of Bayside, and, based on the agency agreement, if the Strata Corporation were to continue the Negligence Action, it would be suing itself.

[70] It is unnecessary for me to express any opinion on the limitation issue, and I decline to do so. However, since I have concluded that the petitioners have failed to demonstrate a breach by the Strata Corporation of its obligation to repair and maintain the common property, and given the other problems identified by the Strata Corporation in making the order sought respecting the Negligence Action, I find that the petitioners have not established that this relief can be justified.

4. Summary and disposition

[71] In summary, the petition is dismissed, with costs to the Strata Corporation.

“ADAIR J.”