

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Richardson et al. v. The Owners, Strata Plan LMS2435 and Gooch et al. v. E.M.F. Holdings Ltd. et al.,***  
2005 BCSC 636

Date: 20050428  
Docket: L041997  
Registry: Vancouver

Between:

**Barbara Lynn Richardson and Gordon Gooch**

Petitioners

And

**The Owners, Strata Plan LMS2435**

Respondent

- and -

Docket: H970963  
Registry: Vancouver

Between:

**Gordon Frederick William Gooch and  
Barbara Lynn Richardson**

Petitioners

And

**E.M.F. Holdings Ltd., Francisco Manuel Martin Pereira and  
Citizens Bank of Canada**

Respondents

Before: The Honourable Mr. Justice E.R.A. Edwards

## **Reasons for Judgment**

Counsel for the Petitioners

G. F. Gregory

Counsel for the Respondent: The Owners,  
Strata Plan LMS2435

J. A. Bleay

Date and Place of Trial/Hearing:

April 25, 2005  
Vancouver, B.C.

[1] Two competing motions were heard together.

[2] In the first, the Owners of Strata Plan LMS 2435 (“the Owners”) apply for an order for conduct of the sale of Strata Lot 2 of Strata Plan LMS2435, in a foreclosure proceeding, to recover approximately \$35,000 in strata fees unpaid by E.M.F Holdings Ltd. (“EMF”), the bankrupt registered owner of Strata Lot 2.

[3] In the second, Barbara Richardson and Gordon Gooch, mortgagees whose interest is registered against EMF’s title (“the Mortgagees”), petition for an order appointing Mr. Gooch, or someone else the Court deems appropriate, administrator of the Strata Corporation, for the purpose of hiring consultants to “find the source of all the building envelope leaks and sewage pipe leaks” which affect Strata Lot 2 and to hire contractors to effect repairs to the common property necessary to fix any leaks identified by the consultants.

[4] The Mortgagees also seek a declaration that the Strata Corporation make a special assessment “to fund the administrator to complete the tasks” just described, and claim damages, and the right to set off unpaid fees against these damages.

[5] The Mortgagees’ position is that the Owners of the 28 residential strata lots have acted to preclude the Strata Corporation from meeting its obligation to effect necessary repairs to the common property to prevent leaks into Strata Lot 2, which is a commercial premises leased to a video store and a grocery.

[6] The Mortgagees assert that if the Owners are allowed to sell the property before the repairs are made the value of Strata Lot 2 will be reduced and the Mortgagees will suffer the loss.

[7] EMF, the developer of the property, was insolvent when the building was completed in 1996. EMF retained ownership of Strata Lot 2. The Mortgagees lent EMF money secured by their mortgage. EMF never paid its strata fees of about \$1,000 per month, some 10% of the total assessments for the building.

[8] The Mortgagees twice paid EMF's arrears of strata fees and several months' fees in advance. Their counsel argued this amounted to consideration for two contracts under the terms of which the Owners agreed to fix leaks affecting Strata Lot 2.

[9] If there were such contracts the Mortgagees may recover damages in an action for breach of contract. I express no opinion on merits of such a claim.

[10] The existence or otherwise of such contracts does not bear on the statutory power of the Court to appoint an administrator under s. 174(2) of the ***Strata Property Act*** S.B.C. 1998, c. 43 ("the ***Act***") "if, in the court's opinion, the appointment is in the best interests of the strata corporation". Under s. 174(3)(c) of the ***Act***, the Court may "order that the administrator exercise or perform some or all of the powers and duties of the strata corporation."

[11] The leading case on the appointment of an administrator to act on behalf of a strata corporation, cited by both counsel, is ***Lum v. Strata Plan VR519*** 2001 BCSC

493, in which Harvey J. set out at paragraphs 11 and 12 factors to be considered in exercising the Court's powers under s. 174 of the **Act**.

[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.

[12] The key factual issue which the several affidavits filed by the parties address is whether the Strata Corporation has responded reasonably to the many complaints of leaks affecting Strata Lot 2 made by the Mortgagees.

[13] It is clear from these affidavits the parties are far apart on the extent of the problems which are detailed in those complaints and the solutions appropriate to address such complaints as may be well founded.

[14] In *Wright v. The Owners Strata Plan # 205* (February 15, 1996) Victoria Registry No. 4165/93, Drake J. at paragraph 30, referring to the statutory duty of strata owners to repair and maintain their building, stated:

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. [emphasis added]

[15] In the present case, the Owners obtained a property inspection report in September 2004, from Best Choice Property Inspection Ltd. (“BCPI”), a member of the British Columbia Institute of Property Inspectors. The report includes the following “Component Rating System”:

**‘A’ = May not be perfect but is functional – Consider the age of the building.**

**‘B’ = Note of the presence of this item – Minor &/or possible attention may be required.**

**‘C’ = Significant concern with this component/system – Major &/or probable attention will be required.**

**‘D’ = Critical (immediate) intervention is required.**

...

Investigation techniques are used to qualify and document the findings of the inspection and are based on the **Possibility** of risk being 50% or less and the **Probability** of the risk being higher than 50%. The written report is in addition to a detailed, verbal commentary that has been given and/or offered.

[16] Of the 28 components rated in the report, none received a “D” rating, two received an “A” rating, five received a “C” rating and the other 21 received a “B” rating.

[17] The BCPI report does not estimate the cost of any repairs.

[18] The competing affidavits of Mr. Gooch, Mr. Pereira and Ms. Manaquil filed by the Mortgagees, and Mr. O’Hearn filed by the Owners, indicate strong disagreement over the extent to which problems associated with components given “B” and “C” ratings in the BCPI report are significant or have been satisfactorily rectified.

[19] On the basis for my assessment of these affidavits, I am not persuaded that the Owners through the Strata Corporation have “done all that can reasonably be done to in the way of carrying out their statutory duty”.

[20] That duty is imposed by s.72 of the **Act** which provides:

72(1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

[21] Before 2000, the predecessor section 34(1) of the **Condominium Act** RSBC 1996, c. 65 (repealed) imposed a similar duty:

34(1) A strata corporation must do all of the following:

...

(d) keep in a state of good and serviceable repair and properly maintain common property, common facilities and assets of the strata corporation;

[22] Failure by the Strata Corporation to meet these statutory duties exposes the Owners to potential litigation and an award of damages for failing to effectively address the problems identified in the BCPI report and any other building repair issues of which they were or are aware.

[23] Obtaining the BCPI report was an appropriate but not a sufficient response to the Mortgagees' complaints. Once alerted there were problems rated "B" and "C" by the BCPI report, the Owners had a duty to do all that was reasonable to address them.

[24] The next appropriate step was to obtain a professional assessment by recognized engineering experts of the extent and cost of the necessary repairs and to effect any such repairs either from the contingency fund or by special assessment.

[25] The fact the residential strata lots are unaffected by the problems disclosed in the BCPI report may explain, but does not excuse, any disinclination of the Strata Corporation to expend funds to deal appropriately with the problems identified in the BCPI report.

[26] The Owners have a lien against the title to Strata Lot 2 which gives priority to their claim for strata fees above even the unpaid municipal taxes. Any reluctance they may have to do their duty cannot be based on a risk that those fees will ultimately go uncollected.

[27] On the other hand, as their counsel pointed out, the Strata Corporation and the Owners are not going to go away and will remain vulnerable to a claim for damages for failing to do their duty.

[28] I accept that the Mortgagees are vulnerable to a loss if the Owners are granted conduct of sale and sell the property at a price reduced by their own failure to do their duty.

[29] I therefore adjourn the Owners' application for conduct of sale, with liberty to reapply if the Mortgagees do not meet the condition specified below.

[30] I find it is not in the best interests of the Strata Corporation or the Owners to be exposed to a continuing claim for damages for failure to meet the statutory duty to repair.

[31] I find that a conflict of interest between the majority of owners of residential strata lots, whose lots are unaffected by leaks and the Mortgagees whose interest in the commercial Strata Lot 2 is affected by leaks, has resulted in a "struggle" between two "groups" akin to that noted in para. 11(d) of the reasons of Harvey J. in ***Lum***, cited above.

[32] I am mindful of the consideration that "the democratic government of the strata community should not be overridden by the Court unless it is absolutely necessary."

[33] I am also mindful that this is a relatively small Strata Corporation and the Owners are entitled to keep expenses to a minimum.



[34] I am disinclined to appoint Mr. Gooch as the administrator of the Strata Corporation, even for limited purposes, because he will be perceived by the Owners as someone preoccupied with his own, rather than the Strata Corporation's interests.

[35] I am disinclined to impose the expense of an administrator on the Strata Corporation for the limited purpose for which an administrator is immediately required, namely to engage an expert consultant to investigate the Mortgagees' complaints and report on, and estimate the cost of, any necessary repairs.

[36] I direct that the Mortgagees pay their outstanding strata fees and subsequent monthly assessments into the trust account of Mr. Bleay, the Owners' lawyer. If the Mortgagees fail to do so, the Owners may renew their application for an order for conduct of sale of Strata Lot 2.

[37] I direct that the expense of engaging an expert consultant for the purpose set out above be paid from the funds deposited in Mr. Bleay's trust account.

[38] I adjourn the Mortgagees' application for the appointment of an administrator for the purpose of engaging such expert in order to spare expense and because no person other than Mr. Gooch was suggested.

[39] If counsel for the Owners and Mortgagees cannot agree on the expert to be engaged and the terms of the engagement, either may apply to the Court for a specific administrator to be appointed for the purpose of engaging the expert.

[40] Once the expert's report is before it, the Strata Corporation must take appropriate steps to meet its statutory duty to repair and maintain the common

property. Failure to do so will provide a basis for the Mortgagees to renew their application for the appointment of an administrator for that purpose.

[41] Money held in trust by Mr. Bleay may be paid to the Strata Corporation with the agreement of counsel for the Mortgagees, or by further order of the Court.

[42] Since I have only adjourned the two applications on conditions, I make no order as to costs at this stage of the proceedings.

[43] In order not to prevent the parties getting before a judge quickly should it be necessary to renew either application, I will not seize myself of either application.

“E.R.A. Edwards, J.”  
The Honourable Mr. Justice E.R.A. Edwards