IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan BCS3702 v. Hui,* 2023 BCSC 1420

Date: 20230811
Docket: S229039
Registry: Vancouver

Between:

The Owners, Strata Plan BCS3702

Petitioner

And

Chi Yan Hui

Respondent

Before: The Honourable Justice Blake

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	N. Baker
Counsel for the Respondent:	D. Gruber
Place and Date of Hearing:	Vancouver, B.C. April 28 and July 14, 2023
Place and Date of Judgment:	Vancouver, BC August 11, 2023

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I. INTRODUCTION

[1] This is an application brought by the respondent, Mr. Hui, for an order striking the underlying petition pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], specifically pursuant to subrules (a), (b) and (d), and for special costs.

[2] The property at issue is located at 1560 Homer Mews, Vancouver, British Columbia (the "Erickson"). Mr. Hui is the owner of Strata Lot 60 in the Erickson. He is also the president of Concord Pacific Group Inc., which later became One West Holdings Ltd., (“Concord”), who was the registered owner of the lands upon which the Erickson was built. The developer of the Erickson was The Erickson Projects Limited Partnership, an affiliate of Concord (the “Developer”).

[3] After his purchase of Lot 60, a dispute arose between Mr. Hui and the petitioners, being the owners of Strata Plan BCS3702 (the “Strata”), as to Mr. Hui’s use of additional amenities and privileges as the owner of Lot 60. Mr. Hui says as a result of owning Lot 60 he is entitled to use all of the space described as the Lot 60 Amenities, as defined below. The Strata disagrees and alleges an error with respect to the amenity spaces on level 2, being the L-2 Amenity Space, also defined below. Specifically they say that there is an inconsistency between both Development Permit No. DE408703 (the “Development Permit”) and s. 2.2(e) of the Disclosure Statement, both of which reflected that the L-2 Amenity Space was to be made available to all residents of the Erickson, and the filed Strata Plan, which shows the L-2 Amenity Space as limited common property for Strata Lot 60 (the “Alleged Error”).

[4] The Strata sought relief relating to the Alleged Error in a proceeding before the Registrar of Land Titles (the “Registrar”) and was ultimately unsuccessful. The Strata did not seek judicial review of the Registrar’s decision, but commenced this petition over three years after receiving the Registrar’s decision.

[5] Mr. Hui says the the underlying petition seeks to expropriate the L-2 Amenity Space, which he says is property reserved for his exclusive use. He

argues that the within petition is an abuse of process, and that the petition should be dismissed pursuant to Rule 9-5(1) on the grounds that:

a) the petition is a collateral attack on the Registrar's decision, or is otherwise an abuse of process contrary to the principle of *res judicata*;

b) the petition is an abuse of process because it seeks to obtain redress for a grievance against the Developer by bringing a claim against a third-party, Mr. Hui, in an attempt to avoid an expired limitation period; and

c) the petition is otherwise bound to fail because it seeks to overturn well established law that in the event of a conflict between a development permit application and a registered strata plan, the strata plan must prevail.

[6] The Strata opposes the relief sought, and argues:

a) this Court has the inherent jurisdiction to rectify what they say is the Alleged Error on the filed Strata Plan, pursuant to the equitable doctrine of rectification and s. 4 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253;

b) the Registrar did not have the authority to rectify the Alleged Error;

c) as the Registrar did not have the authority to rectify the Alleged Error, the doctrines of *res judicata* and collateral attack relied upon by Mr. Hui do not apply, and the petition does not constitute an abuse of process; and

d) in any event, there are serious issues to be tried in relation to the petition, and Mr. Hui's application to strike must fail.

II. BRIEF BACKGROUND

[7] The Erickson is a 17-storey residential building. In 2004, Concord submitted a development permit application (the "Development Application") to the City of Vancouver (the “City”) to build the Erickson. As part of the Development Application, the Developer requested that certain areas of the Development be excluded from the

computation of floor space ratio on the basis that they would be amenity spaces for the use and enjoyment of all eventual residents of the Erickson.

[8] On September 28, 2005, the Developer filed a Disclosure Statement (the “Disclosure Statement”), and attached a preliminary strata plan (the "Preliminary Strata Plan"), which indicated that:

a) the Developer may cause Concord, as the then registered owner, to designate as Limited Common Property certain areas shown on the Preliminary Strata Plan as amenity areas;

b) the Preliminary Strata Plan showed the Level 2 area of the Development as an amenity area but with the notation "LCP SL 60"; and

c) under s. 2.2(e) of the Disclosure Statement, the Developer confirmed that the "Development will comply with all building restrictions, zoning regulations, and other restrictions governing the use and development of the Development or any Strata Lot applicable at the time of the granting of the relevant permit or approval."

[9] The Disclosure Statement also identified other common property as being general common property for the use and benefit of all owners. For example, the Disclosure Statement lists a theatre, swimming pool, exercise room, and other amenities as being general common property (the "Shared Amenity Spaces"). None of the Shared Amenity Spaces appear on Level 2 of the Erickson.

[10] Mr. Hui entered into a Purchase and Sale Agreement dated October 4, 2005 with the Developer to purchase Lot 60 and the limited common property associated with Lot 60. The terms of that agreement are not known to the Strata. This was after the Development Application was filed, but before the Development Permit was issued.

[11] Lot 60 is the penthouse unit in the Erickson. It constitutes the entire top two floors of the Erickson. In addition to the fee simple land making up Lot 60, Mr. Hui says that the owner of Lot 60 is entitled to additional amenities and privileges consistent with the ownership of a luxury penthouse condominium, including:

a) a private, street accessible entrance and lobby area comprising almost all of Level 2 of the Erickson;

b) a private parking area; and

c) a private elevator connecting the Private Lobby, the Private Parking Area, and Lot 60

(collectively, the "Lot 60 Amenities").

Mr. Hui says the Lot 60 Amenities were expressly described as being for the sole use and benefit of the owner of Lot 60 in the Disclosure Statement.

[12] On November 17, 2005, the City issued the Development Permit which included a number of conditions concerning the amenity spaces. Specifically, the Development Permit included the following conditions concerning the amenity spaces therein, including the amenity spaces on level 2 (the “L-2 Amenity Space”):

a) that the amenity areas shall not be put to any other use, except as described in the approved application for exclusion;

b) access and availability for the use of all amenities located in this project shall be made to all residents of the building; and

c) the amenity spaces and facilities approved as part of this Development Permit shall be provided and thereafter be permanently maintained for use by residents/users/tenants of this building complex.

[13] The Development Permit included the following condition:

> 012 Amenity areas of approximately 10,156 square feet, located Level Pl, 1, and 2 and excluded from the computation of floor space ratio, shall not be put to any other use, except as described in the approved application for the

> exclusion. Access and availability of the use of all amenity facilities located in this project shall be made to all residents, occupants and/or commercial tenants of the building;
>
> [Emphasis added.]

[14] On January 22, 2010, Concord filed Strata Plan BCS3702 for the Erickson (the "Strata Plan") in the Land Title Office. The Strata Plan includes a notation of "LCP SL 60" on the L-2 Amenity Space; describes the Private Lobby as limited common property for the sole use and benefit of the owner of Lot 60; and denotes the large open spaces on Level 2 as "Penthouse Lobby/Amenities". The City signed the Strata Plan, and did not take issue with the description of the L-2 Amenity Space. It is this Strata Plan that the Strata says was filed in error.

[15] After discovering the Alleged Error, the Strata asked the City to send an inspector to assess the building's compliance with the terms of the Development Permit. The City did so and, following the inspection, a City Inspector concluded that the Erickson was not in proper compliance. On August 24, 2017, the City Inspector wrote to the Strata, confirmed that there was a violation of s. 6.2 of City of Vancouver, Bylaw No. 3575, *Zoning and Development By-law* (the "By-Law"), and of the conditions of the Development Permit, and that an application to retain the current use of the Private Lobby "may be considered" upon application for a Minor Amendment to the Development Permit.

[16] On January 17, 2018, the Strata applied to the Registrar for a declaration that the designation of the Private Lobby as limited common property was an error and asked for correction of that error by the Registrar.

[17] The Strata acknowledged in that application that the Registrar had the jurisdiction to grant this remedy based upon the evidence put forward.

[18] Both Mr. Hui and the Strata tendered affidavit evidence, and written submissions, in the proceeding before the Registrar. The Registrar issued a decision dated March 29, 2019, in which he determined he had the jurisdiction to consider the issues raised by the Strata in their application and to grant the relief

sought, if satisfied there was an error in the Strata Plan (the "Registrar's Decision"). However, the Registrar concluded that the Developer's intention was to designate the Lot 60 Amenities for the exclusive benefit of the owner of Lot 60, and concluded:

> I have received no evidence of an erroneous measurement, or defect, or omission in the Strata Plan. What I have received is evidence that essentially all of the space on the second level was intentionally designated as limited common property for the benefit of Strata Lot 60 and that sheet 7 of 25 intentionally described the two large open spaces on that level as "Penthouse Lobby/Amenities". The evidence presented indicates that there is complete consistency between the preliminary strata plan, the Strata Plan and Disclosure Statement and the disclosures made therein, from the inception of the Erickson to date. The sworn affidavit of Gary Sundvick, the land surveyor who prepared the Strata Plan, confirms that the Strata Plan he signed accurately reflected the intent of the developer at all times.
>
> The facts do disclose an issue between the Owners, Strata Plan BCS3702 and the Respondent, but it is an issue that arises from the non-compliance with one of the terms of the Development Permit issued by the City of Vancouver. The fact that there is a discrepancy between the term of that Development Permit and the designation of the 2nd level amenities shown on the Strata Plan does not mean there is an error in the Strata Plan; the inconsistency does not demonstrate that there was an error in a registered strata plan given the evidence demonstrates actions and decisions that consistently reflect the developer's intention that the private entrance and private lobby would be amenities for the exclusive use of the Respondent, the purchaser of the penthouse unit Strata Lot 60.
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> [Emphasis added.]

[19] On August 27, 2021, the City issued an order to the Strata advising that:

> On July 26, 2021, City staff inspected the above-cited property and reported that the 2nd floor amenity area(s) has been restricted for the exclusive use by one (1) strata lot owner, in violation of the conditions of Development Permit No. DE408703 and in contravention of Zoning and Development By-law No. 3575 (the By-law).

Specifically, the City was of the opinion that the Strata was in contravention of ss. 6.1, 6.2 and 6.3 of the Bylaw, which requires buildings to comply with the conditions of a development permit. The City required the Strata to, within 30 days of the date of the order, either apply for the necessary permits to maintain the L-2 Amenity Space for the exclusive use of one strata lot owner, namely Mr. Hui, or restore access to the L-2 Amenity Space to all residents/users/tenants of the Erickson.

[20] In 2021 or early 2022, Concord applied for an amendment to the Development Permit to change the use of the L-2 Amenity Area, which the City appears to have denied in April 2022.

[21] The Strata did not seek judicial review of the Registrar's Decision. Rather, they filed the within petition on November 9, 2022.

III. ISSUES

[22] The issue that I must determine is whether the applicant has established that it is appropriate to strike the petition pursuant to Rule 9-5(1) of the *Rules*.

IV. APPLICABLE LEGAL PRINCIPLES

[23] Mr. Hui relies upon Rule 9-5(1)(a), (b) and (d).

[24] The Court may strike a claim under Rule 9-5(1)(d) if it is an abuse of process. Evidence is admissible on an application to strike pursuant to Rule 9-5(1)(d). Abuse of process is a flexible doctrine, allowing the court to dismiss claims if its process is being used for improper purposes. It is a flexible doctrine "unencumbered by specific requirements": *Krist v. British Columbia*, 2017 BCCA 78 at para. 52 [*Krist*]. The categories of abuse of process are open: *Chernen v. Robertson,* 2014 BCSC 1358 at para. 29. As eloquently summarized by Justice Baker in *Babavic v. Babowech*, [1993] B.C.J. No. 1802, 1993 CarswellBC 2950 [*Babavic*]:

> [18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. …

[25] As explained in *Krist*, the abuse of process doctrine is designed to prevent actions that violate principles of judicial economy, consistency, finality and the integrity of the administration of justice: at para. 52. It prevents re-litigation, essentially for the purpose of preserving the integrity of the court's process. Collateral attack is one application of the larger doctrine of abuse of process, and to determine whether a claim constitutes a collateral attack one should inquire into whether the claim, or any part of it, is an appeal of an order: *Sood v. Hans*, 2023 BCCA 138 at para. 51–58. The doctrine of abuse of process also encompasses the doctrine of ulterior or improper purpose, and the principle of *res judicata*: see *1125003 BC Ltd. V. The Owners, Strata Plan KAS 1886*, 2022 BCSC 1142 at para. 26; *Babavic* at paras. 17–18.

[26] The Court may also strike a claim pursuant to Rule 9-5(1)(a). No evidence is admissible on such an application: Rule 9-5(2). The test is whether it is "plain and obvious", assuming the facts pleaded to be true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or is certain to fail. This is a high threshold: *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at paras. 20–22. Where a petition is brought, since a petition is not required to include a cause of action, the question is whether the petition discloses the type of claim that may be brought by petition: *E.B. v. Director of Child, Family and Community Services*, 2016 BCCA 66 at para. 42. I take this to mean that in the case of a petition, the test is whether it is "plain and obvious", assuming the facts set out are true, that the petition does not disclose the type of claim that may be brought by way of petition, has no reasonable prospect of success, or is certain to fail.

[27] Finally, the Court may strike a claim pursuant to Rule 9-5(1)(b). Evidence is admissible on such an application, and the applicant must establish that the petition "is unnecessary, scandalous, frivolous or vexatious": Rule 9-5(1)(b). A court may strike a claim if "it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the

court's time and public resources": *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 65–66.

V. ANALYSIS

[28] A central issue between the parties is the respective jurisdictions of the Registrar and this Court to determine whether an error has occurred in a registered strata plan, and to remedy an error if one is found to exist.

[29] In the underlying petition, the Strata seeks rectification from this Court of the Strata Plan, to bring it into compliance with the Development Permit and s. 2.2(e) of the Disclosure Statement and to reflect that the L-2 Amenity Space is to be available to all residents of the Erickson. The Strata argues that Mr. Hui mischaracterizes their petition. They say they do not seek to show an error between the Development Permit and the Strata Plan; rather they rely upon the Development Permit as proof of the Developer's intention of having the L-2 Amenity Space designated as common property for the use of all residents of the Erickson. They argue this is an important distinction, and supports a determination that it would be inappropriate to strike the petition pursuant to Rule 9-5(1).

[30] Before considering whether it is appropriate to grant Mr. Hui's application to strike, it is necessary to consider the broad principles of rectification. Rectification is an equitable remedy within the broader doctrine of mistake that allows the court to vary the terms of a legal instrument under its equitable and inherent jurisdiction: *Canada (Attorney General) v. Fairmont Hotels Inc.,* 2016 SCC 56 at para. 38 [*Fairmont*]. This recent decision of the Supreme Court of Canada is the leading case on the issue of when rectification is allowed.

[31] Rectification has been described as a "potent remedy", to be used with great caution: *Fairmont* at para. 13. The purpose of rectification is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions. It is an equitable remedy "designed to correct errors in the recording of terms in written legal instruments": *Fairmont* at para. 38. If, by either a mistake or an error, a legal instrument does not accord with the true agreement it was intended

to record, then a court may exercise its equitable jurisdiction to rectify the subject legal instrument, and ensure it accords with the parties' true agreement: *Fairmont* at para. 12.

[32] Rectification may be available where a mutual mistake is made, or where a unilateral mistake is made. Counsel for the Strata confirmed that they allege the Developer made a unilateral mistake in filing a Strata Plan that did not comply with the Development Permit, and failing to file an amended Disclosure Statement.

[33] *Fairmont* deals with the situation of unilateral mistake as follows:

> [15] In *Performance Industries* (at para. 31) and again in *Shafron* (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is *unilateral* — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in *Performance Industries* and *Shafron*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In *Performance Industries* (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).

[34] The test for rectification requires the court to assess the true intention of the parties. For rectification to be available, it is necessary to identify a "true agreement" which precedes (and is not accurately recorded by) the written instrument. That agreement may be oral, and need not itself have contractual force: *Fairmont* at para. 58.

[35] Justice Jackson in *Phaneuf v. 0896459 BC Ltd.,* 2022 BCSC 1706 at paras. 30–31, citing *Fairmont* at para. 38, sets out that in the case of a unilateral mistake, the party must first prove on a balance of probabilities the prerequisites applicable to mutual mistake, being: there was a prior agreement whose terms are definite and ascertainable; the agreement was still in effect at the time the written legal instrument was executed; the written legal instrument fails to accurately record the agreement; and if rectified, the instrument would carry out the parties' prior

agreement. She then went on to set out the additional factors the party seeking rectification must prove in the case of unilateral mistake:

> [31] In cases of unilateral mistake, in addition to proving the prerequisites applicable to mutual mistake, the party seeking rectification must also prove on a balance of probabilities that: 1) the other party knew or ought to have known about the mistake; and 2) permitting them to take advantage of the error would amount to fraud or its equivalent: *Fairmont* at para. 38. In this context, fraud does not mean the tort of deceit or fraud in its strict legal sense, but rather fraud in the "wider sense". This refers to circumstances where the Court is of the opinion that it would be unconscientious for the person to avail themselves of the advantage obtained, which can involve all kinds of unfair dealing and unconscionable conduct in matters of contract: *Performance Industries Ltd. v. Sylvan Lake Gold & Tennis Club Ltd.,* 2002 SCC 19 at para. 39 [*Performance Industries]; Fhami v. Redekop*, 2020 BCSC 630 at para. 147, citing *Coast Mountain aviation Inc. v. M. Brooks Enterprises ltd.,* 2014 BCCA 133 at para. 23.
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> [Emphasis added.]

[36] The Strata's position is that the Strata Plan is inconsistent with the Development Permit and s. 2.2(e) of the Disclosure Statement, both of which reflected that the L-2 Amenity Spaces were to be made available to all residents of the Erickson. They say that rectification of the Strata Plan is an available remedy for this Alleged Error, which, if granted, operates retrospectively to the date the Strata Plan was created and filed: *Entwistle v. The Owners, Strata Plan EPS 3342,* 2019 BCSC 1311 at paras. 30–32 [*Entwistle*]; *Chow v. The Owners, Strata Plan NW 3243*, 2017 BCCA 28 at para. 24 [*Chow*].

[37] In *Chow,* the Court of Appeal discussed how the issue of a unilateral error or mistake ought to be fully addressed:

> [28] Had the issue been fully addressed, one might expect to have seen an explicit effort to grapple with the relevant evidence. The issue was whether the strata plan, as deposited, erroneously described the parking stalls as limited common property. The disclosure statement filed by the developer a year earlier than the plan described the stalls as visitor parking. A disclosure statement is a document required to be filed by statute, and purchasers are entitled to rely on it. Material changes to a development require an amendment to the disclosure statement: *Woo v. Onni loco Road Five Development Limited Partnership*, 2014 BCCA 76. A change to these parking spots from common to limited common property would, it was accepted, have required the filing of an amended disclosure statement. … All

> of these issues need to be weighed and assessed to determine the fundamental question whether the strata plan contained an error.

[38] A significant amount of time during argument was taken up with whether the Registrar had the necessary jurisdiction to determine whether it was appropriate to rectify the Strata Plan in all of the circumstances.

[39] The Registrar's jurisdiction flows from s. 14.12 of the *Strata Property Regulation*, B.C. Reg. 43/2000 [*Regulation*], which provides:

> **Correction of errors**
>
> **14.12** (1) In this section:
>
> **"error"** means any erroneous measurement or error, defect or omission in a registered strata plan;
>
> **"registered strata plan"** includes any document, deposited in the land title office, that
>
> (a) is referred to in section 245 (a) or (b) of the Act,
>
> (b) forms part of a strata plan under the *Condominium Act*, R.S.B.C. 1996, c. 64 or a former Act, or
>
> (c) amends or replaces a document referred to in paragraph (a) or (b).
>
> (2) If it appears to the registrar that there is an error in any registered strata plan, the registrar may give notice or direct that notice be given to any person, in the manner and within the time determined by the registrar, and the registrar, after considering submissions, if any, and examining the evidence, may correct the error.

[40] In *Entwistle,* Justice Sewell considered the Registrars jurisdiction under s. 14.12 of the *Regulation* and reviewed the relevant caselaw, finding that s. 14.12*:*

> [45] … does not expressly grant exclusive jurisdiction to the Registrar to correct errors or to determine whether an error has been made. It is limited by its express terms to correcting errors in strata plans and does not address the elements of rectification. While the regulation does authorize the Registrar to conduct a limited inquiry, it does not vest authority in the Registrar to compel evidence or order cross-examination.

[41] Justice Sewell determined that this Court and the Registrar have concurrent jurisdiction to determine whether an error has occurred in a registered strata plan and to rectify that error—the Registrar's jurisdiction is found in s. 14.12 of the *Regulation* and the court's jurisdiction is found in its equitable jurisdiction to rectify

documents: *Entwistle* at para. 51. The jurisdiction of the Court cannot be said to be dependant on the decisions of the Registrar whether to assume jurisdiction: *Entwistle* at para. 54. He went on to determine that it is "not appropriate for the Registrar to adjudicate upon contested rights of parties for the determination of which it would be necessary to receive and weigh evidence": *Entwistle* at para. 56, relying upon *Heller v. Registrar, Vancouver Land Registration District*, [1965] S.C.R. 229, 1963 CanLII 39 [*Heller*].

[42] In summary, Sewell J. in *Entwistle* at paras. 45–46 confirmed the appropriate jurisdiction of the Registrar to rectify strata plans under s. 14.12 of the *Regulation*, and clarified:

a) section 14.12 of the *Regulation* is limited to correcting errors in strata plans and does not address the elements of rectification;

b) the regulation only authorizes the Registrar to conduct a limited inquiry, it does not vest authority in the Registrar to compel evidence or order cross-examination;

c) the court's jurisdiction to rectify strata plans is based on its equitable jurisdiction to rectify documents;

d) the jurisdiction of the court cannot be said to be dependent on the decision of the Registrar whether to assume jurisdiction; and

e) it is not appropriate for the Registrar to adjudicate upon contested rights of parties for the determination of which it would be necessary to receive and weigh evidence.

[43] In all of the circumstances, I accept that the Registrar has a limited jurisdiction to remedy errors. However, that jurisdiction does not extend to remedy contested errors, which must be done by this Court, pursuant to the Court's equitable jurisdiction and s. 4 of the *Law and Equity Act*. Neither did the Registrar have the jurisdiction to order the broader procedures this Court has, such as calling further

witnesses and cross-examination of those witnesses: see *Entwistle* at paras. 35, 45, 51.

[44] Mr. Hui argued that the Strata mischaracterizes the Alleged Error as a unilateral mistake, and argues that rather than applying the test as set out in *Fairmont* and *Performance Industries Ltd. v. Sylvan Lake Gold & Tennis Club Ltd.*, 2002 SCC 19, in the context of alleged errors in registered strata plans, it is only the intention of the developer that is relevant: *Baker v. The Owners, Strata Plan KAS 2750,* 2022 BCSC 1449. He argues that the Strata's formulation of the Alleged Error should not be accepted, and the only relevant question is whether the Developer intended the L-2 Amenity Space to be designated as limited common property or common property. I cannot accept that argument, as it leads to the absurd result that where a developer intentionally files a strata plan that is not in compliance with a development permit or a disclosure statement, the Strata is not entitled to seek relief by way of rectification from this Court.

A. Rule 9-5(1)(d): Abuse of Process

[45] Mr. Hui's position is that there was no Alleged Error, and that the filed Strata Plan is in fact consistent with the Disclosure Statement. His primary argument is that the petition is an abuse of process and that it should be struck on that basis. Again, evidence is admissible when considering this ground.

[46] First, Mr. Hui argues that the petition is an impermissible collateral attack on the Registrar's Decision. Mr. Hui says the Registrar decided he had the jurisdiction to consider the issues raised by the Strata in their application, and he determined that the L-2 Amenity Space was intentionally designated as limited common property for the benefit of Lot 60. The Registrar determined that the "evidence demonstrates action and decisions that consistently reflect the developer's intention that the private entrance and private lobby would be amenities for the exclusive use of [Mr. Hui], the purchaser of the penthouse unit Strata Lot 60".

[47] He argues that the Strata failed to seek a judicial review of the Registrar's Decision, and instead now seeks the same relief that was before the Registrar,

relying upon substantially the same evidence and making the same argument. His position is that this petition is therefore an abuse of process and should be dismissed summarily.

[48] I am unable to accept this argument. In the underlying petition the Strata seeks a declaration that the Strata Plan contains an error, and asks the court to exercise its jurisdiction to rectify the Alleged Error on the Strata Plan. Counsel for the Strata confirmed their position is that the Developer made an intentional unilateral mistake, knowing that the Development Permit did not comply with the Disclosure Statement, and that they intentionally filed a Strata Plan that did not comply with the Development Permit. While they acknowledge they seek similar relief to that sought before the Registrar, they say the Strata applies to this Court, pursuant to our equitable jurisdiction, to rectify the registered Strata Plan so that it accords with the agreement between the Developer and the Strata. They say that agreement incorporates the representation and warranties in the Disclosure Statement which provided that the development of the Erickson will comply with all of the restrictions governing the use and development of the land, including the Development Permit. They argue that the Developer knew about the mistake in the Strata Plan, and permitting the Developer to take advantage of that would amount to the equivalent of fraud, as it is characterized for the purpose of seeking rectification.

[49] I cannot accept Mr. Hui's argument that "the Strata elected to proceed before the Registrar rather than apply to Court. It should be held to that election." *Entwistle* makes clear that this Court and the Registrar have "concurrent jurisdiction to determine whether an error has occurred in a registered strata plan and to rectify that error": at para. 51. This Court's jurisdiction is based on its equitable jurisdiction, and the Registrar's jurisdiction is from s. 14.12 of the *Regulatio*n.

[50] The Registrar's determination was that the evidence before him was the Developer had intentionally designed the L-2 Amenity Space as limited common property for the benefit of Strata Lot 60. He further noted that the identified discrepancy between the Development Permit and the L-2 Amenity Space,

"does not mean there is an error in the registered strata plan given the evidence demonstrates actions and decisions that consistently reflect the developer's intention." However, the Registrar, quite properly, did not consider whether the Developer knew, or ought to have known, about the Alleged Error, nor did he consider whether permitting the party to take advantage of the error would amount to fraud or the equivalent of fraud. Such jurisdiction belongs to this Court, and for that reason, I do not accept this petition is an impermissible collateral attack on the Registrar's Decision, nor that it is contrary to the principle of *res judicata.* For similar reasons I do not agree with his argument that the decision of the Registrar is final and binding on the parties, in all of these circumstances: *Entwistle* at para. 64, citing *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63.

[51] Mr. Hui also argues the petition is an abuse of process as it attempts to litigate a dispute that is properly between the Strata and the Developer (being the alleged non-compliance of the Strata Plan with the Development Permit). He says that the petition seeks to "expropriate" his rights over the L-2 Amenity Space, rather than seek compensation from the Developer. He stresses that he owns Lot 60 in his personal capacity, and the Strata fails to differentiate between Mr. Hui in his personal capacity and Mr. Hui as the president of Concord.

[52] Mr. Hui is named personally in the petition, and not in his capacity as president of the Concord. Further, Concord is not named in the petition. That is a decision made by the Strata, and I make no comment as to whether they would be wise to amend their petition to add additional parties, or to consider also seeking a judicial review of the determination of the Registrar. While Mr. Hui argues that the Strata is only bringing the petition against Mr. Hui because he is the president of Concord, and because any claim they may have against the Developer would now be statute barred, that is not a determinative issue on this application to strike. It may be a relevant issue at the substantive hearing of the petition.

[53] However, until this Court deals in a substantive manner with the underlying petition, I do not accept that what the Strata seeks is expropriation. Rather, as characterized, their petition seeks rectification of the filed Strata Plan, which if successful, would lead to the determination that the L-2 Amenity Space was never supposed to be for the benefit of Mr. Hui. In these circumstances, I do not accept that the petition is being brought for an ulterior or improper purpose.

[54] For these reasons, I decline to strike the petition pursuant to Rule 9-5(1)(d).

B. Rule 9-5(1)(a): No Reasonable Claim

[55] Mr. Hui argues that the petition should be dismissed pursuant to Rule 9-5(1)(a) on the basis that it discloses no reasonable claim. When considering this argument, no evidence is admissible. The test is whether it is "plain and obvious" assuming the facts pleaded to be true that the claim is certain to fail.

[56] Again, for the reasons already set out above, I am unable to conclude that the Strata's petition to seek rectification of the Strata Plan is certain to fail. The threshold for success on such an application is a high one, and Mr. Hui has not met it.

C. Rule 9-5(1)(b): Unnecessary, Scandalous, Frivolous or Vexatious

[57] Finally, Mr. Hui also argues that the petition is unnecessary, scandalous, frivolous or vexatious and so should be struck pursuant to Rule 9-5(1)(b). He argues that the law is settled that in the event of an inconsistency between a development permit and a registered strata plan, the strata plan must prevail as it relates to the unit owner's respective rights to real property: *Frank v. The Owners, Strata Plan LMS355*, 2016 BCSC 1206 at paras. 35–41, aff'd 2017 BCCA 92. He takes the position that the Strata is trying to expropriate rights associated with Lot 60 based on the terms of the Development Permit, that in law, the Strata is not entitled to do.

[58] The legal basis of the petition makes clear that the Strata's position is that Mr. Hui, as president of Concord, "knew or ought to have known that Concord had submitted a development permit application to the City requesting that the L-2

Amenity Space be excluded from the computation of [floor space ratio] on the basis that it would be used as an amenity space for the benefit of all the residents of The Erickson". The Developer ultimately received a Development Permit with the "express condition that the Amenity Spaces, including the L-2 Amenity Space, had to be permanently maintained for the exclusive use of the residents and occupants of The Erickson".

[59] In these circumstances, where Mr. Hui is not only the owner of Lot 60, but also the president of Concord, I cannot conclude the Strata's petition is unnecessary, scandalous, frivolous or vexatious. I decline to strike the petition pursuant to Rule 9-5(1)(b).

VI. CONCLUSION

[60] Mr. Hui's application is dismissed, and the Strata is entitled to their costs, in any event of the cause.

[61] As these were oral reasons, they have been edited where necessary and quotes from the caselaw have been inserted, but the overall substance and result has not changed.

"Blake J."