COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hui v. The Owners, Strata Plan BCS3702,* 2024 BCCA 262

Date: 20240711
Docket: CA49328

Between:

Chi Yan Hui

Appellant
(Respondent)

And

The Owners, Strata Plan BCS3702

Respondent
(Petitioner)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated August 11, 2023 (*The Owners, Strata Plan BCS3702 v. Hui*, 2023 BCSC 1420, Vancouver Docket S229039).

Counsel for the Appellant:	D.E. Gruber E.W. Hulshof
Counsel for the Respondent:	N. Baker
Place and Date of Hearing:	Vancouver, British Columbia June 10, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 11, 2024

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Justice Skolrood

Summary:

Case concerns an order dismissing an application to strike proceedings as an abuse of process under R. 9-5(1)(d) of the Supreme Court Civil Rules. The appellant submits that the petition below was a collateral attack on a decision of the Registrar of Land Titles, who found no error on a strata plan, and that the chambers judge erred in not dismissing the petition as an abuse of process.

Held: Appeal dismissed. The jurisdiction of the Registrar and the court differs and is not co-extensive. The Registrar's jurisdiction is bound by the statutory language empowering him, while the court's is broader. While the Registrar had the jurisdiction to determine that the strata plan did not contain an error within the meaning of the statutory mandate, only the court has the jurisdiction to adjudicate issues rooted in, for example, the equitable doctrine of mistake. Hence, the underlying petition is not a collateral attack on the Registrar's decision, because it is grounded in a different jurisdiction and engages different legal tests than the proceedings before the Registrar.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The issue on this appeal is whether a chambers judge erred in not striking a petition as an abuse of process. The applicant, now appellant, argued that a petition brought by a Strata Corporation sought essentially the same relief between the same parties as it had previously sought from the Registrar of Land Titles. That relief, which was refused, involved the "correction" or "rectification" of a registered Strata Plan which shows certain areas within the Strata as limited common property for the benefit of the owner of one of the strata lots and not common property for the use and benefit of all owners. The issue arose because there is a discrepancy between what is shown on the Strata Plan (and other draft plans and documents) and the conditions of the development permit which required the disputed area to be common property for the benefit of all residents.

[2] For the reasons that follow, I would dismiss the appeal.

Background

[3] The facts in this case are largely uncontested. I have set them out below in some detail because they are necessary to understand the issue before the judge

and on appeal. In doing so, I have drawn heavily on the background as outlined in the reasons for judgment.

[4] The underlying dispute relates to access to a certain amenities space (or area) on the second level of a seventeen-storey residential building at 1560 Homer Mews, known as "the Erickson" (the "L-2 Amenity Space"). As noted in the introduction, the Strata Plan, as deposited in the Land Title Office, shows the L-2 Amenity Space to be limited common property for the benefit of the owner of Strata Lot 60, the two-floor penthouse in the Erickson ("Lot 60"). The design of the building involved a dedicated street level entrance to Lot 60 through a private lobby on level two from which a private elevator connected that lobby to the penthouse.

[5] The Erickson was built on land owned by Concord Pacific Group Inc. ("Concord"). It was developed by an affiliate of Concord, the Erickson Projects Limited Partnership (the "Developer"). The owner of Lot 60 is the appellant, Chi Yan Hui, who is the president of Concord.

[6] In 2004, Concord submitted a development permit 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 building be excluded from the computation of floor space ratio as they would be amenity spaces for the use and enjoyment of all residents of the Erickson. The development application is not in the record.

[7] 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;
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> 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
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> 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." [Reasons for Judgment at para. 8.]

The Disclosure Statement also identified other property as being common property for the use and benefit of all owners, including a theatre, swimming pool, exercise room, and other amenities. None of these spaces appear on level two of the Erickson.

[8] 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 therewith. The terms of that agreement are not known to the Strata and are not in the record. This agreement was signed after the development application was filed, but before the Development Permit was issued.

[9] On November 17, 2005, the City issued the Development Permit which included a number of conditions concerning amenity areas, including the L-2 Amenity Space. Specifically, the Development Permit required:

> a) that the amenity areas shall not be put to any other use, except as described in the approved application for exclusion;
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> b) access and availability for the use of all amenities located in the project shall be made to all residents of the building; and
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> c) the amenity spaces and facilities approved as part of the Development Permit shall be provided and thereafter be permanently maintained for use by residents/users/tenants of the building complex. [Reasons for Judgment at para. 12.]

The Development Permit further 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. <u>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</u>; [Reasons for Judgment at para. 13; emphasis in original.]

[10] 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. It describes the area as limited common

property for the sole use and benefit of the owner of Lot 60 and denotes the space 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 contained an error, because it failed to identify the L-2 Amenity Space as common property available to all residents as required by the Development Permit.

[11] 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 inspector concluded that the Erickson was not in compliance. On August 24, 2017, the City Inspector wrote to the Strata, confirming that there was a violation of s. 6.2 of City of Vancouver, By-law No. 3575, *Zoning and Development By-law*, the conditions of the Development Permit, and that an application to retain the current use of the L-2 Amenity Space “may be considered” upon application for a minor amendment to the Development Permit.

[12] On January 17, 2018, the Strata applied to the Registrar for a declaration that the designation of the L-2 Amenity Space as limited common property was an error and asked for correction of that error by the Registrar.

[13] The dispute between the parties results, therefore, from discrepancies between certain documents that established the Strata and permitted the development of the Erickson. Certain drafts of the Strata Plan and the eventual Strata Plan as filed conflict with the Development Permit on the designation of the L-2 Amenity Space. And, the aforementioned documents, along with certain statements in the Disclosure Statement, are said to conflict with s. 2.2(e) of the Disclosure Statement which warrants that the Development would comply with all applicable permits, laws, and regulations.

[14] The Strata argued in its application before the Registrar that the Registrar had the jurisdiction to correct the Strata Plan based on the submitted evidence. Mr. Hui took the position that the Registrar did not have the jurisdiction to decide the question as it would require the Registrar impermissibly to decide contested legal

and factual issues. The parties essentially reversed their positions on the jurisdiction issue in the court below and in this Court.

[15] 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 found no correctible error because the Developer's intention was to designate the disputed area for the exclusive benefit of the owner of Lot 60 and the Registered Strata Plan reflected that intention. He explained:

> 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.
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> 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. [Reasons for Judgment at para. 18; emphasis in original.]

[16] After the Registrar's Decision, 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). [Reasons for Judgment at para. 19.]

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

[17] In 2021, or early 2022, Concord applied for an amendment to the Development Permit to change the use of the disputed area, which the City appears to have denied in April 2022.

[18] The Strata did not seek judicial review of the Registrar's Decision. Rather, it filed the within petition on November 9, 2022, seeking rectification on the basis of unilateral mistake. Mr. Hui applied on various grounds to strike the petition. It is Mr. Hui's application alleging abuse of process under R. 9-5(1)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, that is in issue on appeal.

Reasons for Judgment

[19] I intend only to highlight those portions of the judgment material to the issues on appeal.

[20] After setting out the background facts, the judge turned to the abuse of process application. She explained that the doctrines of abuse of process and collateral attack are intended to prevent actions that violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice. These doctrines achieve those goals by preventing the re-litigation of decided issues and what amounts, in substance, to an impermissible appeal of an earlier decision.

[21] The judge identified the importance of the issue of the respective jurisdictions of the Registrar and the Court to identify and remedy errors in a registered strata plan. She characterised the issue in this way:

> [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). [Emphasis added.]

[22] The judge began her analysis by identifying the principles governing the equitable remedy of rectification within the broader doctrine of mistake, noting that a remedy may be available either where there is a mutual or unilateral mistake. The legal basis of the petition, she accepted, was an allegation of unilateral mistake in filing a Strata Plan that did not comply with the Development Permit, and failing to file an amended Disclosure Statement. The judge went on to elaborate on the test for finding a unilateral mistake, noting the Strata's position that an available remedy, if an error were found, could be a retrospective rectification of the Strata Plan.

[23] The judge then turned to the jurisdiction of the Registrar, accepting that the Registrar did not have exclusive jurisdiction to correct errors. She referred to Justice Sewell's analysis of this issue in *Entwistle v. The Owners, Strata Plan EPS 3342*, 2019 BCSC 1311, which I reproduce here for convenience:

> [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:
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> > [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*].
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> [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:
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> a) section 14.12 of the *Regulation* is limited to correcting errors in strata plans and does not address the elements of rectification;
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> 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;
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> c) the court's jurisdiction to rectify strata plans is based on its equitable jurisdiction to rectify documents;
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> d) the jurisdiction of the court cannot be said to be dependent on the decision of the Registrar whether to assume jurisdiction; and
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> 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.
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> [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.

[24] Having identified the broader jurisdiction of the court, the judge went on apply her analysis to determine if the petition was an abuse of process because the same relief was being sought in the petition as had been sought before the Registrar. She concluded that it was not, reasoning as follows:

> [48] … 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.
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> [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 *Regulation*.
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> [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.

On Appeal

[25] Before embarking on my analysis of the issues, I make an introductory comment. We were treated to submissions best characterized as legal gymnastics, in which each party attempted to explain why their position before the Registrar about the extent of the Registrar's jurisdiction was legitimately reversed before the court below and again before us. In my view, there is nothing to be gained by dwelling on these changes of position, or by drawing any conclusions from them.

[26] As I will explain, I agree with the judge that the petition is not an abuse of process. But, I do not agree that the principles in *Entwistle* accurately identify the scope of the Registrar's jurisdiction. As will be seen, in some circumstances, the Registrar may deal with contested facts, and may control the process of adjudicating matters to the extent that such processes are inherently incidental to the Registrar's adjudication within the bounds of the statute. The Registrar must also have the power to apply for the assistance of a court, if necessary to discharge its mandate, such as, for example, in compelling evidence.

[27] Mr. Hui contends, first, that the relief sought in the petition is essentially the same as that sought before the Registrar. He says that the Registrar has a broad jurisdiction to determine the dispute on the basis of contested evidence. This jurisdiction, he says, is a concurrent jurisdiction equivalent to the jurisdiction of the court. He argues that this proposition is established in *Chow v. The Owners, Strata Plan NW 3243*, 2017 BCCA 28. Mr. Hui says the decision in *Entwistle*, which concluded that, notwithstanding *Chow*, the Registrar does not have a jurisdiction to decide contested evidence is wrong. Accordingly, he submits the Registrar had the jurisdiction to decide the issues as they are now articulated in the petition. In Mr. Hui's view, since the issues, parties, and remedy sought are the same, the petition is a collateral attack on the Registrar's decision and represents an abuse of process. He says the judge fell into error by not recognizing that the courts and the Registrar have a concurrent and co-extensive jurisdiction. Finally, Mr. Hui reminded us that the Court of Appeal is not bound by the *obiter* comments in *Entwistle*, since the principles of horizontal *stare decisis* do not apply to this Court.

[28] In my view, it is necessary to begin by recognizing that the jurisdiction of the Registrar is determined by the mandate conferred by statute. In this case, 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
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> 14.12 (1) In this section:
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> "error" means any erroneous measurement or error, defect or omission in a registered strata plan;
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> "registered strata plan" includes any document, deposited in the land title office, that
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> (a) is referred to in section 245 (a) or (b) of the Act,
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> (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.

[29] I observe that the definition of "error" is somewhat narrow in its scope. It is readily apparent that the definition captures the kinds of errors that may arise from mismeasurement, failure to record details on the plan, omission of information through inadvertence, drafting errors, and so on. The meaning of the word "error" takes its bearings from that context. One can imagine many circumstances in which slips, errors of description, typographical errors, and other kinds of mistakes are reflected on a strata plan and require correction. In my view, these mistakes are the kind of "error" intended to be captured by this section of the *Regulation*. It may well be that often mistakes of that kind are clear to all and there is no contest about them, even though the Registrar may require evidence and argument to identify and correct the defect in a strata plan.

[30] I observe that the Registrar, after referring to para. 22 of *Chow*, described the type of errors that previously had been found to fall within the statutory mandate.

Those types of errors are consistent with the narrow scope of the mandate I have described above. The Registrar said:

> Section 14.12 contains the definition of "error": it means "any erroneous measurement or error, defect or omission in a registered strata plan". In the past, I have found errors to exist in registered strata plans where it has been clearly demonstrated that the calculations for determination of unit entitlement are incorrect, or where strata lots have been incorrectly or inconsistently numbered, or not numbered or designated, or where a misdescription of common property as limited common property has occurred. There is no defect in the Strata Plan, as it was examined and found to be registrable as deposited, nor was there an omission. No registration error has occurred with respect to the Strata Plan.

[31] In my opinion, the reasoning of this Court in *Chow* does not suggest anything broader than what the Registrar described. In *Chow*, the Court wrote the following:

> [22] There is clearly a jurisdiction for the registrar to correct an alleged error such as the one engaged in this case because what is alleged is an error or defect in a registered strata plan. The registrar may give notice to any person, examine the evidence, and consider submissions in reaching a decision about whether there has been an error, and whether and how to correct it. [Emphasis added.]

It is important to emphasise that the scope of the jurisdiction referred to in para. 22 of *Chow* is expressly related to the type of error at issue in that case. The error was an alleged misdescription of certain parking lots in a strata which had been designated on that strata plan as limited common property for the benefit of certain units, rather than as common property in order to provide visitor parking. The draftsman provided evidence that he had made an error in the way in which he labelled the parking lots. If that were the case, then this was clearly a drafting error that had found its way onto the strata plan. Indeed, that was the finding made when the case was referred back to the trial court: see reasons indexed at 2017 BCSC 2331.

[32] Since a case stands for only what it decides, I cannot see that *Chow* is authority for the proposition that the *Regulation* has conferred on the Registrar a general jurisdiction functionally or jurisprudentially equivalent to the powers of the trial court to deal with any correction or rectification of documents alleged to

constitute errors or mistakes of any kind. In any event, *Chow* is certainly not authority for the proposition that the Registrar has been endowed with a jurisdiction in equity to determine disputes of the kind between these parties, as framed in the petition.

[33] It follows, from this, that I reject the appellant's submission that the Registrar had the general jurisdiction to determine the dispute between the parties, regardless of the source of the jurisdiction required to adjudicate the claim, such as the invoking of an equitable or inherent jurisdiction. The Registrar's jurisdiction is bounded by the mandate found in the *Regulation*, and is limited to correcting the kinds of errors described above. I do not think it would be useful, however, to attempt to delineate with precision the metes and bounds of that mandate beyond what I have said. What is clear, however, is that the Registrar's statutory mandate does not extend to the invocation of an equitable jurisdiction to rectify or correct a registered strata plan rooted in the doctrine of unilateral mistake.

[34] It is, however, useful to comment on the holding in *Entwistle* that the jurisdiction of the Registrar does not extend to the receipt of contested evidence. In my opinion, that conclusion is in error. Provided that the type of error falls within the statutory mandate, the Registrar is entitled to receive submissions and consider the evidence. I see nothing in the scope of the statutory mandate that limits the Registrar to the consideration only of uncontested evidence. The reliance on *Heller v. Registrar, Vancouver Land Registration District*, [1963] S.C.R. 229, 1963 CanLII 39, to support the conclusion that the Registrar can receive only uncontested evidence, is misplaced. *Heller* dealt with a different statutory mandate, under the *Land Registry Act*, R.S.B.C. 1960, c. 208, which compelled a limited jurisdiction conferred by the statutory regime. In *Heller*, the Court noted that the Registrar's powers in that case were "limited by the words 'so far as practicable, without prejudicing rights conferred for value'": at 234. I do not see such a limitation having application here, given the absence of similar language in the *Regulation*. Rather, in my view, the *Regulation* contains express language that enables the Registrar to consider submissions and examine evidence. This must be taken to include those

submissions and evidence that are not agreed to as between parties, so long as they pertain to the kind of error that the Registrar has jurisdiction over.

[35] It also appears to me that the Registrar must have the ancillary or incidental powers necessary to fulfil the Registrar's mandate, including, if necessary, the power to apply to court for assistance in circumstances where no express authority has been conferred, such as, for example, the power to compel evidence.

[36] It follows from the foregoing that the judge was right to conclude that the Registrar did not have the jurisdiction to decide the dispute as it had been framed in the petition. The kind of error alleged was one that would have required the Registrar to determine the intentions of the parties, and the legal ramifications of those intentions. That issue could only be resolved by drawing on sources of jurisdiction, such as equitable doctrines, beyond the Registrar's statutory mandate.

[37] I turn now to the alternative argument advanced by Mr. Hui. He maintains that if the jurisdiction is limited so that the Registrar could not decide the issue as framed, the petition remains a collateral attack on the Registrar's decision. This is said to follow from two facts: the parties in the two proceedings are the same, and the Strata is seeking the same remedy it sought before the Registrar. In light of this, Mr. Hui says that the only remedy available to the Strata arising from the rejection of its application to the Registrar is a judicial review of that decision — a remedy that the Strata did not pursue. In substance, the Strata elected to seek its remedy before the Registrar, and, having failed, cannot now seek the same remedy from the court.

[38] I am unable to accede to this submission. In my view, it is not unusual to have alternative fora, capable of providing substantially the same relief, but drawing on different sources of jurisdiction, and applying different criteria to the adjudication of the dispute falling within that jurisdiction. An example canvassed during the hearing involved an individual dismissed from employment who seeks a remedy in damages before the Human Rights Tribunal. It may be that the individual alleges discrimination and is denied a remedy because discrimination is not made out on the standards applied by the Tribunal. The same individual may seek the same measure

of damages for wrongful dismissal before the court. The court will apply a different legal test, under a different statutory framework, and may well find that damages (in essence, the same remedy) are appropriate when assessed against that standard. I do not think that the latter action for wrongful dismissal could be dismissed on the basis that coming to court after losing before the Human Rights Tribunal is an abuse of process.

[39] As noted in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed. (Markham, LexisNexis: 2021) at ch. 2: "A party is not estopped from seeking relief in court where a tribunal lacks jurisdiction to deal with the question." The author draws support for this proposition from *Imperial Oil Limited v. Lloyd*, 2000 ABCA 7 at paras. 3–4. In that case, the Alberta Court of Appeal refused to strike an action where it was said that the plaintiffs had already failed in the same claim before various statutory tribunals. Without offering a definitive view, the court said:

> [3] The main argument of the appellant/defendant is that the first half of the Statement of Claim is *res judicata* because the plaintiffs have already failed in the same claim before various statutory Ontario pension tribunals. However, we have the gravest doubts whether there is *res judicata* because:
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> (a) the *Ontario Pension Benefits Act* does not appear to us to allow the Superintendent or Commission to decide a number of important types of claim which are raised by the Statement of Claim, and there is no *res judicata* unless the previous tribunal had jurisdiction over the subject matter;
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> (b) the Commission in fact said it had no power to decide some of these questions;
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> (c) the appellant/defendant itself, in its written argument before the Ontario Pension Commission, objected to its lack of jurisdiction on at least one issue;
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> (d) the various plaintiffs appear to have had different degrees of connection with the Ontario proceedings and the people who brought them.
>
> [4] The very best that can be said for the appellant/defendant is that there is doubt about whether there is *res judicata* as to all the claims or all the plaintiffs. We incline to the view that there is no *res judicata*, but the doubt precludes summary disposition of the suit on that ground.

[40] I agree with the definitive statement found in the Lange text. It follows that it is not sufficient to invoke principles of collateral attack or abuse of process that the

parties are the same and the remedy sought is the same. This much is at least the case where the different fora are invoking different sources of jurisdiction, and most likely applying different legal tests to adjudicate the issue. This is especially so where a tribunal lacks jurisdiction to deal with a question that could be raised properly before a court, as is the case here.

[41] Having said that, it is important to point out that having recourse to a tribunal with a jurisdiction that is narrower than another's may have implications for what positions may be taken before the second tribunal. In other words, questions of issue estoppel may well arise. It would not be open to relitigate findings of fact or conclusions made by the first decision maker, within jurisdiction and necessary to the outcome, before a second decision maker. In the context of this case, for example, the Registrar found as a fact that there was no error or mistake in identifying the L-2 Amenity Space as limited common property in the registered Strata Plan. That finding cannot be challenged in the court, but I do not understand that the Strata seeks to do so.

[42] Moreover, and on a slightly different point, I do not think a decision to proceed first before the Registrar can be seen as some kind of election, giving rise to an estoppel or a waiver of the right to invoke the broader jurisdiction of the court.

[43] Accordingly, the judge did not err in concluding that the petition, engaging as it does a different source of jurisdiction and different legal tests, is not an abuse of process. That is sufficient to dispose of this appeal. Having said that, nothing in this judgment should be taken to be any comment on the merits of the petition or the availability of the relief sought based on the facts alleged. Whether the relief is available, or the equitable doctrines relied on are properly engaged, on the facts of this case, is a matter to be determined on the hearing of the petition.

Disposition

[44] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Justice Skolrood"