COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mok v. The Owners, Strata Plan VR456,* 2023 BCCA 401

Date: 20231102
Dockets: CA48259; CA48260

Docket: CA48259

Between:

James Mok and Michelle Mok

Appellants
(Respondents)

And

The Owners, Strata Plan VR456

Respondent
(Petitioner)

And

Agnes Oy Line Mui, Petislav Tovbis, Tracey Anne MacLennan and Suzanne Elise Foster, Executors of the Will of Colin MacKenzie MacLennan, Deceased, Dan Jacob Sonnenschein, Crowe MacKay & Company Ltd., Bank of Montreal, Canadian Imperial Bank of Commerce and Jennifer MacLennan

Respondents
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- and -

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Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated March 30, 2022 (*The Owners, Strata Plan VR456 (Re)*, 2022 BCSC 502, Vancouver Dockets S215858 and S222743).

Counsel for the Appellants:	M. Nied
Counsel for the Respondents, Appointed Liquidators and Administrators of The Owners, Strata Plan VR456:	P. Roberts, K.C.
Counsel for the Respondents, Tracey Anne MacLennan and Suzanne Elise Foster, Executors of the Will of Colin MacKenzie MacLennan, Deceased:	J. Abrioux K.A. McGoldrick
Place and Date of Hearing:	Vancouver, British Columbia May 29, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 2, 2023

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Voith
The Honourable Justice Marchand

Summary:

This appeal concerns the voluntary winding-up of a six-unit strata building over the opposition of the appellants, who own one unit. They seek to set aside orders made to give effect to the sale of the property and the winding-up of the strata. Held: Appeal dismissed. The judge below made no errors regarding her findings on the petition to appoint an administrator to undertake repairs or arrange a sale of the strata. Specifically, she did not err in finding that the relief sought in that petition was substantially the same as that sought in the consent order which provided for the administrator's appointment; and that the administrator could enter a listing agreement without first holding a vote. Although it was not open to the judge to rely on common law service, the failure to personally serve one of the appellants can be treated as an irregularity under Rule 22-7. She did not err in finding the consent order to have been properly obtained without the involvement of the appellants as they had not responded to the petition. Nor did the judge err in her analysis of the orders confirming the winding-up of the strata. Specifically, she did not err in finding that the liquidator was properly appointed even though it had not filed an application, and that the winding-up was in the owners' best interests and did not result in significant unfairness to the appellants, even though each owner received less than the assessed value of their unit.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] This appeal concerns the voluntary winding-up of a six-unit strata building in Vancouver over the opposition of the appellants, James and Michelle Mok, who own one unit. They seek to set aside orders made to give effect to the sale of the property and the winding-up of the strata. For the reasons that follow, I would dismiss the appeal.

Background

[2] The respondent is a strata corporation known as Spruce West. The strata plan consists of six residential strata lots in a six-storey concrete building located on West 13th Avenue in Vancouver. The 45-year old building was in a state of marked disrepair, including significant water ingress in the walls, mould in two units, deteriorating fire escapes, cracks in the car park ceiling, crumbling concrete on the outside walls, rusted steel structural supports in the exterior walls, crumbling stucco siding, as well as problems with the electrical system, the main roof, and the doors and windows. Water problems had been reported as early as 1998. Reports

commissioned in 2009 and 2017 recommended repairs estimated to cost between $1.1 and $1.68 million, which translated to $183,000 to $280,000 per unit. In 2018, the City of Vancouver issued an emergency work order directing repair of the fire exit stairs.

[3] All of the owners of Spruce West were members of the strata council. For many years, resolutions to effect repairs were consistently defeated by the appellants and one other owner. As a result of this paralysis, the respondents, Tracey MacLennan and Suzanne Foster, who had recently inherited their unit from their father's estate, decided to force the issue. They retained a lawyer who wrote to the other owners to advise that proceedings would be commenced to have an administrator appointed so that repairs could be undertaken or the building sold to a developer. Before appointing an administrator, they were willing to try one last time to develop a strategy for repair or sale through a winding-up process.

[4] As it turned out, the owners were unable to agree on how to proceed. On January 10, 2020, Ms. MacLennan and Ms. Foster filed a petition to appoint an administrator (the "Appointment Petition") under s. 174 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"). The application was set for hearing on March 24, 2020, but a few days before the hearing the courts were closed due to the COVID-19 pandemic.

[5] On April 17, 2020, the owners who had filed and responded to the Appointment Petition entered into a consent order providing for the appointment of an administrator to undertake the powers and duties of the strata corporation and the strata council in order to resolve the problems facing the strata. The appellants had not responded to the Appointment Petition, so they were not included in this resolution by way of consent order.

[6] Once appointed, the administrator advertised Spruce West for sale and eventually a developer, Butterscotch Holdings Inc. ("Butterscotch"), made an offer to purchase. All of the owners, except the Moks, voted in favour of a motion to voluntarily wind-up the strata corporation and sell Spruce West to Butterscotch. The

administrator then filed a petition (the "Confirmation Petition") seeking orders confirming the winding-up, approving the sale, and other orders necessary to effect the winding-up.

[7] This time, the appellants filed a response to the Confirmation Petition opposing the relief sought, primarily on the basis that the marketing of Spruce West had been inadequate and the proposed sale was improvident. They also sought to set aside the consent order made in the Appointment Petition, asserting that Ms. Mok had not been served with the Appointment Petition, that the terms of the consent order were broader than the relief sought in the Appointment Petition, and that the consent order contained a term that could not be ordered by the court—allowing the administrator to list Spruce West for sale without a vote of the owners.

[8] At the hearing, the judge refused to set aside the consent order appointing the administrator. She confirmed the winding-up resolution, and made the orders sought in the Confirmation Petition. I will not summarize the judge's reasons for doing so here; they are more conveniently addressed in responding to the issues raised on appeal which largely mirror the issues raised at the hearing below.

Issues on appeal

[9] The appellants contend the judge made four errors in refusing to set aside the consent order made in the Appointment Petition:

1. Concluding the consent order did not substantially differ from the relief sought in the Appointment Petition;

2. Holding that the administrator could enter into a listing contract without a vote of the owners;

3. Relying on common law service to conclude that Ms. Mok had been served with the Appointment Petition; and

4. Finding the consent order was properly obtained.

[10] With respect to the Confirmation Petition orders, the appellants contend the judge erred by:

1. Confirming the appointment of the liquidator when the liquidator had not applied to be appointed;

2. Imposing a burden on the appellants to demonstrate significant unfairness;

3. Admitting the respondents' retroactive appraisal;

4. Failing to draw an adverse inference against the respondents;

5. Ignoring evidence of unfairness; and

6. Finding the proposed sale to be provident;

[11] Faced with ten grounds of appeal, I cannot resist remarking that an appeal is not made stronger by the number of grounds raised. The judge below faced an even greater barrage of issues, a number of which were, thankfully, not put in issue on appeal.

The Appointment Petition Orders

1. The consent order differed from the relief sought in the petition

[12] In accordance with Rule 22-1(7)(a) of the British Columbia *Supreme Court Civil Rules,* B.C. Reg. 168/2009 (the "*Rules*"), "[g]enerally speaking, 'any question arising' on a chambers proceeding will be limited to questions raised by the form of the notice of application and will not extend to questions which go substantially beyond the application": *Gupta v. Gadhri*, 2022 BCCA 75 at paras. 37–38. The appellants say that this rule was breached in the present case because the consent order went beyond the relief sought in the Appointment Petition.

[13] The appellants acknowledge that they did not file a response to the Appointment Petition. However, they say they did so on the understanding that the petitioners were only seeking the appointment of an administrator to exercise the

powers and duties of the strata in relation to the repair and maintenance of the strata's common property. They say they were taken by surprise by the consent order which authorized the administrator to investigate and complete voluntary winding-up of the strata corporation, and to list the building for sale.

[14] The appellants also complain that they did not get a chance to speak against the consent order. Having received a letter from respondents' counsel informing them that a hearing had been set for March 24, 2020, they understood that they would have a chance to oppose the relief sought. The hearing did not occur because the courts closed on March 23, 2020 due to the COVID-19 pandemic, but Mr. Mok says that he and Ms. Mok did not know the respondents were going to proceed by way of a consent order. He says they were not consulted about that process, and only realized the consent order had been entered and an administrator appointed when they received an email from the administrator.

[15] The latter complaint does not call into question the soundness of the consent order. The appellants were not parties to the Appointment Petition because they had chosen not to file a response. As the judge held, by failing to respond to the petition they avoided the cost of participating, but they also deprived themselves of the opportunity to be involved in its resolution by way of a contested hearing or otherwise. The respondents provided the appellants with a copy of the notice of application and the proposed consent order as a courtesy, and the judge found that Mr. and Ms. Mok had notice of the terms sought to be included in the order: at para. 42. I agree with her conclusion that Mr. Mok would not have had a right to speak at the hearing even if it had proceeded, and neither his consent nor that of Ms. Mok was required.

[16] As to the preliminary objection, I cannot agree that the consent order went beyond the relief sought in the Appointment Petition. Although it is true that most of the Appointment Petition addressed repairs to the strata building, it also identified under the "orders sought" section the following relief:

> 2. The Administrator shall take all reasonable steps to investigate the condition of the Strata Corporation's common property, including:

> …
>
> (b) Hiring consultants or appraisers to evaluate whether it is in the best interests of owners to wind-up the Strata Corporation;
>
> …
>
> 14. Further, or in the alternative, an order winding-up the Strata Corporation in accordance with s. 284 of the *Act*;

[17] The judge recognized there were differences between the powers and duties described in the Appointment Petition and those described in the consent order: at para. 43. She conducted a comprehensive review of those differences and determined they were neither substantive nor prejudicial to the Moks: at paras. 49–61. For example, she addressed the appellants' argument, repeated on appeal, that the Appointment Petition did not seek "an order that an administrator be appointed to exercise all powers and perform all duties of the Strata." I agree with the judge's conclusion that the addition of the word "all" in the consent order before the words "powers and duties" did not broaden the scope of the power sought: at para. 50. An administrator who is granted "the powers and duties of the owners and strata council pursuant to s. 174" has all of those powers—adding "all" is superfluous.

[18] The judge also addressed the difference in the type of winding-up order sought, saying:

> [56] The petition sought a non-voluntary winding-up order as alternative relief. The consent order provides for the administrator to pursue a voluntary winding-up resolution. The difference is that under the relief sought in the petition, the court would order the winding-up at the hearing of the petition based on the evidence then available. Under the consent order provisions, the administrator was to take steps to conduct a voluntary winding-up vote by the owners who would vote on it at a special general meeting, and if approved, the administrator was to seek court approval. The matters the court must consider in either case and the test to be applied to court approval are the same.
>
> [Emphasis added.]

As the judge observed, the "pivot to a voluntary winding-up provided the owners more control over the winding-up": at para. 57. The Moks therefore benefited from that change.

[19] In summary, I would not accede to this ground of appeal. The judge made no error in holding that the consent order provided for relief that was substantially the same as the relief sought in the Appointment Petition.

2. The administrator could not enter into a listing agreement without the owners voting to approve that step

[20] The appellants contend that the judge should have set aside the consent order because it permitted the administrator to enter into a listing agreement without a vote of the owners. They say this provision was contrary to s. 174(7) of the *Act* which prohibits an administrator from doing anything that requires a vote of the owners, unless a vote which reaches the required threshold has been held:

> 174 (7) Unless the court otherwise orders, if, under this Act, a strata corporation must, before exercising a power or performing a duty, obtain approval by a resolution passed by a majority vote, 3/4 vote, 80% vote or unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[21] I agree with the appellants that this Court in *Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW 3271*, 2016 BCCA 118 [*Norenger*], questioned whether the opening words of this section ("unless the court otherwise orders") authorize a court to abrogate the owners' rights to vote on a matter which the *Act* says must be subject to a vote. However, the first question to be determined is whether the *Act* requires the owners to hold a vote before the strata enters into a listing agreement. The chambers judge considered herself bound by this Court's decision in *Dubas v. The Owners of Strata Plan VR. 92,* 2019 BCCA 196 [*Dubas*] at para. 35 to answer that question in the affirmative.

[22] In *Dubas*, the Court upheld the decision of Justice Brundrett declining to grant a declaration that a supermajority vote—i.e., of 75% or 80% in favour—was required to list a strata complex for sale. He reviewed the provisions of the *Act*, mandating that certain steps can only be taken with owner approval expressed by a vote that meets specific thresholds. He concluded that entering into a listing agreement was not one of the matters identified in the *Act* as requiring a 75% or 80% vote, and therefore the default of a simple majority applied, saying:

> [19] First, I do not read the provisions in the *Strata Property Act*, which the petitioners cite, or the authorities provided to me, as directly mandating the requirement of a supermajority vote in order for the Strata Council to retain a realtor by signing a listing agreement to secure offer(s) for a sale which is in any event conditional upon the wind-up resolution by the owners: see, for instance, ss. 71, 78-82, and 105 of the *Strata Property Act.* In particular, I do not read the retention of a realtor as a change in use of common property, an alteration of common property or the disposal of land by the strata corporation engaging the supermajority requirements set out in some of those other sections. Hence, the normal default voting threshold of a majority vote would apply to the decision to approve a listing agreement: s. 50 of the *Strata Property Act*.
>
> [Emphasis added.]

[23] The judge in the present case recognized that in *Dubas*, the issue of whether a vote was required was not before the court. She also noted that the petition in *Dubas* was brought before the listing agreement had been entered into and after the strata corporation had determined to hold a vote at a general meeting. The judge therefore observed that the conclusion that "a simple majority vote would apply to the decision to approve a listing agreement" was arguably *obiter*. Nonetheless, because this Court upheld the decision as a whole, and did not express disagreement with that statement, she concluded that *Dubas* should be read as determinative of the issue.

[24] Respectfully, I do not read this Court's affirmation of *Dubas* as determining that the *Act* requires a vote before a listing agreement may be entered into. As Lord Halsbury cautioned, "a case is only an authority for what it actually decides": *Quinn v. Leathem*, [1901] A.C. 495 (H.L.) at 506.

[25] In *Dubas*, an informal ballot to enter into a listing agreement had already passed by a majority vote, and a formal vote was planned for an upcoming special general meeting. Presumably because of this, no party took the position that the strata corporation was empowered to list the strata for sale without a vote. Thus, the only issue before the court was the threshold for approval, not whether a vote was required by the *Act*.

[26] The simple majority threshold specified in s. 57(1) of the *Act* applies to votes on "matters" decided at an annual or special general meeting that are not required

by the *Act* to meet a specific threshold. “Matters” is a broad and undefined term. In my view, it encompasses any matter to be voted on by the owners at an annual or special general meeting, where the *Act* or regulations do not specify a threshold, and whether the *Act* requires such a vote or not. If a resolution is put forward that is not one with respect to which the *Act* requires a vote, it makes sense that the owners would address the resolution by way of a simple majority. That is all that *Dubas* determined.

[27] As to the fundamental question—whether a vote is required before a strata corporation may enter into a listing agreement—in my view the answer is no. As this Court observed in *Norenger* at para. 58, the matters requiring a vote are comprehensively listed in the *Act.* The *British Columbia Strata Property Practice Manual*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2008, 2021 update) at §6.101, 6–61 to 6–65 lists the provisions and standard bylaws that require a resolution of owners, and notes that entering into a listing agreement is not among them.

[28] The appellants stress the importance of a decision to list a strata complex for sale. They point out that once a broker is engaged, the property will be marketed and an offer to purchase may be procured—all of which naturally creates anxiety for owners and residents faced with the prospect of losing their homes without an opportunity to vote on whether the strata corporation should even embark on the sales process.

[29] These are legitimate concerns, and they underpin the practice that has developed of holding a vote before the strata property is listed. A prudent practice is not, however, equivalent to a legislative prescription. The Legislature could have mandated a resolution before listing agreements are entered into but did not. The owners’ democratic rights, and the interests those rights are intended to protect, are not negated by the absence of a voting requirement before the strata property is listed. The decision to accept an offer and to actually sell the property must be approved by a supermajority of the owners: s. 282(1).

[30] In summary on this ground of appeal, I see no error in the judge's ultimate conclusion that the provision of the consent order permitting the administrator to enter into a listing agreement without first holding a vote of the owners was a valid term and did not warrant setting aside the order.

3. Ms. Mok was not served with the Appointment Petition

[31] It is not in dispute that Rule 16-1(3) requires personal service of a petition on a person whose interests may be affected. Where that person is an individual, Rule 4-3(2) requires that a copy of the petition be left with them. The respondents effected personal service of the Appointment Petition on Mr. Mok in accordance with the *Rules*, but overlooked the need to serve Ms. Mok in the same manner. The appellants contend that the respondents' failure to serve Ms. Mok with the Appointment Petition rendered the consequent consent order a nullity: *Wright v. Czinege*, 2008 BCSC 1292 at para. 44. The appellants also rely on a passage in Beverley M. McLachlin and James P. Taylor, *British Columbia Practice*, 3rd ed. (Markham, Ontario: LexisNexis Butterworths, 2006, updated August 2023) at 22-91 under the heading "Nullity Examples":

> ***Defective Service of Documents***
>
> Defective service of documents is not cured merely by the fact that the documents have found their way into the possession of the person served. Service must be effected in the manner provided by the *Rules of Court* or by an applicable statutory provision.

[32] The judge ruled that Ms. Mok had been served, relying primarily on the concept of common law service and in the alternative on Rule 4-6(4). It is convenient to first address her use of Rule 4-6 which reads:

> **Proof of service**
>
> (1) Service of a document is proved as follows:
>
> (a) service on a person of an originating pleading is proved
>
> (i) by filing an affidavit of personal service in Form 15, or
>
> (ii) by the person filing a responding pleading;
>
> (b) service on a person of a petition is proved
>
> (i) by filing an affidavit of personal service in Form 15, or
>
> (ii) by the person filing a response to petition;

> (c) service of any other document served by personal service is proved by filing an affidavit of personal service in Form 15;
>
> (d) service of any document that is served by ordinary service is proved
>
> (i) by filing an affidavit of ordinary service in Form 16, or
>
> (ii) by filing a requisition in Form 17 to which is attached a written acknowledgment of receipt signed by the party or lawyer on whom the document was served.
>
> **Proof of service by sheriff**
>
> (2) Service of a document by a sheriff may be proved by a certificate in Form 18 endorsed on a copy of the document.
>
> **Service on member of Canadian Armed Forces**
>
> (3) If a member of the Canadian Armed Forces has been served with a document by an officer of the Canadian Armed Forces, proof of the service in the form of a certificate annexed to a copy of the document served, signed by the officer and stating his or her rank and when, where and how service was effected, may be filed as proof of service.
>
> **Admissibility of other evidence of service**
>
> (4) Nothing in subrules (1) to (3) restricts the court from considering any other evidence of service that the court considers appropriate in the circumstances.

[33] In my respectful view, the judge erred in interpreting Rule 4-6(4) as authority for departing from the manner of service prescribed by the *Rules*. Rather, this subrule addresses only the evidence a court may rely on in determining whether service has been proved. In other words, Rule 4-6(4) does nothing more than enable a court to consider evidence establishing service in compliance with the *Rules*, beyond the evidence expressly identified in Rule 4-6(1) to (3).

[34] I turn next to the judge's reliance on common law service, which she addressed as follows:

> [22] The requirement for service to be effective at common law is evidence that allows the court to confidently conclude that the person knew that the originating process was a legal claim, who commenced the proceeding, and the general nature of what was sought: *Balla* at paras. 18, 27.
>
> [23] Dr. Mok was served with the appointment petition on January 21, 2020 at strata lot four in Spruce West. Dr. Mok was the chair of the strata council for Spruce West. On January 24, 2020, he sent an email to the other owners, including Ms. Mok, suggesting an immediate meeting to discuss the still outstanding City of Vancouver Emergency Work Order, "[i]n light of the Petition". The obvious inference to be drawn from this email is that by virtue

> of the email, if not before, Ms. Mok became aware of the existence of the appointment petition.
>
> [24] Ms. Mok swore an affidavit about the appointment petition in which she did not state that her husband did not make her aware of the appointment petition. Dr. Mok also swore an affidavit; he did not depose that he did not make Ms. Mok aware of the appointment petition.
>
> [25] On February 13, 2020, Priyan Samarakoone, a lawyer, contacted counsel for Ms. MacLennan and Ms. Foster and advised them that he represented Dr. Mok and Ms. Mok.
>
> [26] Based on the evidence of the email from Dr. Mok to the other owners copied to Ms. Mok, and the lack of contrary evidence in the Moks' affidavits, I find that Ms. Mok was made aware of the appointment petition by her spouse, Dr. Mok. Based on the evidence that she retained a lawyer, I find that Ms. Mok knew who the petitioners were and had an understanding of the general nature of the relief sought in the appointment petition.
>
> [Emphasis added.]

[35] I must respectfully disagree with the judge's conclusion that the respondents can rely on common law service. The judge found authority for common law service in this Court's decision in *McIlvenna v. Viebig*, 2013 BCCA 411 [*McIlvenna*] at para. 42, which cited *Orazio v. Ciulla* (1966), 57 W.W.R. 641 (B.C.S.C.) [*Orazio*]. The judge noted that *Orazio* has been referred to in a number of British Columbia Supreme Court cases considering common law service including *Balla et al v. Fitch Research Corporation et al*, 2005 BCSC 1447, and *Tschurtschenthaler v. Sunlogics Inc.*, 2013 BCSC 1197, and an earlier decision of hers, *Edwards Estates (Re)*, 2019 BCSC 858.

[36] In my view, neither *Orazio* nor *McIlvenna* is authority for the principle that common law service may be relied on where service has not been effected in compliance with the *Rules*. In *Orazio*, Smith L.J.S.C. considered what amounted to personal service under the *Rules* in place at the time, which did not define personal service. The defendant in *Orazio* had read the writ but handed it back to a solicitor who was not his counsel, and then sought an order setting aside this purported service. Smith L.J.S.C. concluded that the rules of service had been followed in that case, and made no mention of common law service.

[37] In *McIlvenna*, the Court considered an award of costs against a former litigation guardian who had ceded control of the litigation. On appeal, the litigation

guardian argued that she had not been effectively served. Justice Chiasson, writing for the Court, framed and dismissed that argument as follows:

> [42] The appellant asserts that the application for an order for costs against the litigation guardian was improper because she was not served personally. It is not clear to me that the issue of service was raised with the trial judge, but the object of service is to ensure that people are made aware of what is sought against them (*Orazio v. Ciulla* (1966), 57 W.W.R. 641 (B.C.S.C.)). Rule 4-6(4) of the *Supreme Court Civil Rules* provides that the court can take into consideration any evidence it considers appropriate in the circumstances when determining whether there has been service. Counsel was served. The litigation guardian filed an affidavit in opposition to the application and counsel appeared on her behalf. In my view, any irregularity in service was vitiated.
>
> [Emphasis added.]

[38] Chiasson J.A. made no reference to common law service. He treated the failure to serve the litigation guardian personally as an irregularity that could be overcome. He also considered Rule 4-6(4) in a manner consistent with its use as an evidentiary tool. Chiasson J.A. did not expressly identify the authority he relied on to vitiate the irregularity, but, as I explain below, the *Rules* make provision for that step to be taken.

[39] If service at common law exists, it must be grounded in the court's exercise of its inherent jurisdiction to make orders controlling its own process. However, a court must look first to its statutory powers before considering inherent jurisdiction: *Endean v. British Columbia,* 2016 SCC 42 [*Endean*]. In *Endean*, Justice Cromwell, writing the majority reasons, explained the rule this way:

> [23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 29-31.

> [24] The courts have recognized that, given the broad and loosely defined nature of these powers, they should be "exercised sparingly and with caution": *Caron*, at para. 30. It follows that courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that forms their inherent jurisdiction: see, e.g., *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 63-68. As The Honourable Georgina Jackson and Janis Sarra write, "[i]t is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances": "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 73.
>
> [Emphasis added.]

[40] Although the *Rules* and inherent jurisdiction co-exist, and the *Rules* are procedural and do not form a complete code, a court should invoke its inherent jurisdiction only where the *Rules* do not appear to contemplate the situation in issue. Where no such extenuating circumstances exist, inherent jurisdiction is not ousted; there is simply no basis for a judge to employ this unusual power: *Buchan v. Moss Management Inc*., 2010 BCCA 393 at para. 30.

[41] In my respectful view there are no extenuating circumstances, no gap or need that the *Rules* do not contemplate in regard to service of a petition. First, the current *Rules* are comprehensive and mandatory in regard to the manner in which such service is to be effected. Inherent jurisdiction cannot be used to craft a means of service that contradicts those prescriptions. Second, the *Rules* provide a basis for excusing a failure to effect personal service as prescribed by treating it as an irregularity. Rule 22-7 provides in part:

> **Non-compliance with rules**
>
> (1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify
>
> (a) a proceeding,
>
> (b) a step taken in the proceeding, or
>
> (c) any document or order made in the proceeding.
>
> **Powers of court**
>
> (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may

> (a) set aside a proceeding, either wholly or in part,
>
> (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
>
> (c) allow an amendment to be made under Rule 6-1,
>
> (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
>
> (e) make any other order it considers will further the object of these Supreme Court Civil Rules.
>
> …
>
> **Application to set aside for irregularity**
>
> (4) An application for an order under subrule (2) (a), (b) or (d) must not be granted unless the application is made
>
> (a) within a reasonable time, and
>
> (b) before the applicant has taken a fresh step after knowledge of the irregularity.

[42] The appellants say that personal service of an originating document like a petition is too significant a procedural step to treat failure to comply with the *Rules* as an irregularity—it is, rather, a nullity. They rely on *William v. Lake Babine Indian Band,* 1999 CanLII 6121 (B.C.S.C.) at paras. 26, 37–42 which states:

> [37] The proper and valid service of documents involving litigation is fundamental to any further proceedings by which the litigation is advanced and imperative in order for a court to assume jurisdiction over the subject of the litigation. Such a fundamental concept was enunciated over half a century ago. It remains as valued today as it was when Lord Green, M.R. observed in *Craig v. Klassen*, [1943] 1 K.B. 256 (Eng. C.A.) at p. 262:
>
> > It is beyond question that failure to serve process where service of process [is] required goes to the root of our conceptions of the proper procedure in litigation.

[43] The principles informing the application of Rule 22-7, and the modern approach to irregularities, were helpfully reviewed by Justice Willcock in *Ari v. Insurance Corporation of British Columbia*, 2021 BCCA 180. His discussion of Rule 22-7 arose in the context of whether a third party notice filed without leave and out of time is a nullity. He stated:

> [47] … R. 22-7 … permit[s] superior courts to address irregularities and limit[s] the circumstances in which technical failures will preclude the resolution of civil disputes on their merits.
>
> …

> [51] ... In *Mussell v. Cronhelm* (1994), 111 D.L.R. (4th) 95 (B.C.C.A.), Prowse J.A. wrote for the court at 100–101:
>
> > ... Rule 2 provides that a failure to adhere strictly to the rules will give rise to an irregularity, rather than a nullity. With respect to the latter rule, regard may be had to the words of Lord Denning, speaking of the English counterpart to Rule 2, in *Harkness v. Bell's Asbestos and Engineering, Ltd.*, [1966] 3 All E.R. 843 (leave to appeal to the House of Lords refused) at pp. 845-6:
> >
> > > This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible ... for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." That could not be said in 1963; see *Re Pritchard (decd.)* [[1963] 1 All ER 873 at p. 879, [1963] Ch. 502 at p. 518]; but it can be in 1966. The new rule does it.
> >
> > > […]
>
> [52] In *International Forest Products*, McEachern C.J.B.C., speaking for the court in 1997, referred to Prowse J.A.'s judgment in *Mussell* as the "modern view" of these matters and said (at para. 15) "*Elloway* cannot be regarded as authoritative since the adoption of Rule 2(1)".
>
> …
>
> [63] The modern approach to the rules of civil procedure should result in few steps being considered to be nullities. The clearest cases for nullities are steps that are not contemplated by the *Rules*, or litigation commenced by persons without authority or in courts without jurisdiction.
>
> [Emphasis added.]

[44] In my view, the modern approach to irregularities and nullities applies to service under the *Rules*: *Gokturk v. Nelson*, 2023 BCCA 164 at paras. 55–75. That is not, however, to detract from the importance of complying with the requirements for service. A party who fails to adhere to the *Rules* faces the prospect and expense of a challenge to the validity of orders and other steps taken in a proceeding. Further, whether noncompliance will be excused as an irregularity is a case-specific question. In some circumstances, failure to serve in accordance with the *Rules* may be a matter of substance, for example where default judgment is taken and the noncompliance prevented the defendant from defending a claim and being heard.

[45] Although common law service is not available as an alternative means of service, at the end of the day the factors to be considered under Rule 22-7 are, not surprisingly, similar to the factors judges have used in addressing the concept of common law service:

- Is there prejudice to the opposing party who has not been served?
- Did the party whose interest may be affected by the order sought have notice of the proceeding?
- Was that party aware of its substance?
- Did they have an opportunity to respond?
- Was the failure to serve intentional?

These same questions will guide the judge's exercise of discretion under Rule 22-7. Of importance too is the requirement in Rule 22-7(4) that the person complaining of the irregularity must apply to set aside the proceeding or order obtained within a reasonable time and before the applicant has taken a fresh step after knowledge of the irregularity.

[46] Applying these considerations to the present case, I conclude that the failure to personally serve Ms. Mok in accordance with the *Rules* is an irregularity which should be excused and which does not warrant setting aside the consent order appointing the administrator. The judge found that Ms. Mok was aware of the Appointment Petition at least within a few days of the other owners being served (para. 23); she filed an affidavit but did not attest to not having received the petition; and by February 13, 2020, Ms. Mok had retained counsel to represent her in relation to the Appointment Petition.

[47] Another important consideration is the appellants' failure to apply to set aside the consent order in a timely way. They waited one and one-half years before filing an application on December 15, 2021, and that application was not set for hearing until January 2022. In the interim, the respondents proceeded to list and sell the

property and much water passed under the bridge. As this Court observed at the hearing, the object of the *Rules* is to secure the just and efficient determination of proceedings on the merits. They are not to be used to "bob and weave" in order to create complexity and mischief.

[48] For completeness, I consider here the respondents' argument that Rules 16-1(3) and 4-3(1) allow the court to make a retroactive order, *nunc pro tunc*, to dispense with service. Those rules read as follows:

> **Rule 16-1(3)**
>
> **Service**
>
> (3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.
>
> **Rule 4–3(1)**
>
> **When documents must be served by personal service**
>
> (1) Unless the court otherwise orders or these Supreme Court Civil Rules otherwise provide, the following documents must be served by personal service in accordance with subrule (2):
>
> (a) a notice of civil claim;
>
> (b) a petition;
>
> [Emphasis added.]

[49] In my view, although the reservations to the court in these rules to "otherwise order" are broad enough to be used in this way, a *nunc pro tunc* order would generally be made following an application by the party seeking the alternative means of service. Here, there was no such application. Rather, the Moks challenged the adequacy of service, asserting that because they had not been served properly, the consequent consent order should be struck—relief available under Rule 22-7(2)(b). In these circumstances, the better course for the party opposing such a challenge is to rely on Rule 22-7(2)(e) which gives the court discretion to "make any other order it considers will further the object of these Supreme Court Civil Rules". In other words, that subsection should be used because it enables the court to "forgive" non-compliance with the rules in appropriate cases.

[50] In summary on this ground of appeal, I agree with the judge's ultimate decision that the lack of service in the circumstances of this case is not a basis to set aside the consent order.

4. The consent order was not properly obtained

[51] The appellants submit that the judge erred in law by concluding that the appellants' consent was not necessary for the consent order to be valid. They say that if Ms. Mok was not served with the Appointment Petition, she could not file a response or become a petition respondent. Since this ground of appeal depends on Ms. Mok not having been served, the previous ground of appeal is dispositive.

The Confirmation Petition Proceeding

[52] In relation to the Confirmation Petition proceeding, the owners (other than the Moks) sought to have the winding-up of the strata corporation confirmed and the liquidator appointed to carry out the winding-up, including the sale of Spruce West. The appellants opposed the relief sought in the Confirmation Petition primarily on the basis that the sale was improvident and therefore unfair to them because they would be forced out of their home and unable to buy an equivalent home in the same neighbourhood.

[53] Before the *Act* was amended in 2015, a strata corporation could be wound-up and terminated only when all of the owners voted to do so. The amendments reduced the unanimity requirement to 80% of the strata units but added s. 278.1. That section requires court approval of the winding-up resolution in order to protect the interests of those owners opposed to the winding-up, as well as others whose interests could be affected, such as registered charge holders and creditors of the strata corporation. Section 278.1 reads:

> **Confirmation by court of winding-up resolution**
>
> **278.1** (1) A strata corporation that passes a winding-up resolution in accordance with section 277, if the strata plan has 5 or more strata lots,
>
> (a) may apply to the Supreme Court for an order confirming the resolution, and

> (b) must do so within 60 days after the resolution is passed.
>
> (2) For certainty, the failure of a strata corporation to comply with subsection (1) (b) does not prevent the strata corporation from applying under subsection (1) (a) or affect the validity of a winding-up resolution.
>
> (3) A record required by the Supreme Court Civil Rules to be served on a person who may be affected by the order sought under subsection (1) must, without limiting that requirement, be served on the owners and registered charge holders identified in the interest schedule.
>
> (4) On application by a strata corporation under subsection (1), the court may make an order confirming the winding-up resolution.
>
> (5) In determining whether to make an order under subsection (4), the court must consider
>
> (a) the best interests of the owners, and
>
> (b) the probability and extent, if the winding-up resolution is confirmed or not confirmed, of
>
> (i) significant unfairness to one or more
>
> (A) owners,
>
> (B) holders of registered charges against land shown on the strata plan or land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, or
>
> (C) other creditors, and
>
> (ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners.
>
> [Emphasis added.]

[54] The appellants submit that the judge erred in finding the proposed winding-up and sale to be in the best interests of the owners and that it would not result in significant unfairness to them. They say the sale was improvident in part because it reflected market conditions in place more than a year before the hearing; that the judge reversed the burden of proof, requiring them to prove the sale was improvident; admitted appraisal evidence from the respondents that failed to comply with the rules of court; and failed to draw an adverse inference against the respondents for failing to explain the reference in the Confirmation Petition to an incentive to be provided by the purchaser to the owners to buy into the redevelopment, an incentive which the Moks say they had not been made aware of.

Finally, the appellants contend the judge erred in granting the liquidation order given that the liquidator had not himself applied for that appointment.

[55] There is merit to the appellants' complaints about the respondents' delay in applying for the court's approval of the winding-up and sale, the deficiencies in the appraisal evidence, and the respondents' failure to respond directly to the enigmatic reference to an incentive in the Confirmation Petition. It was not a model application. However, the question before us is whether the judge erred in upholding the Confirmation Petition orders in the extraordinary circumstances of this case. These orders are discretionary decisions reviewable on a deferential standard: *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 81. In my view, the judge's decision does not reflect errors in principle, a failure to consider relevant factors, or result in an injustice. I turn now to the specific grounds of appeal, a number of which can be conveniently dealt with together.

1. Appointment of the liquidator

[56] The appellants argue that the judge erred in confirming the appointment of the liquidator and in making the vesting order when it was the strata corporation, rather than the liquidator, who applied for that relief. They submit that s. 279(1) of the *Act* requires the liquidator to apply. That section reads:

> **Vesting order**
>
> **279** (1) Within 30 days of being appointed, the liquidator must apply to the Supreme Court for an order confirming the appointment of the liquidator and vesting in the liquidator
>
> (a) land shown on the strata plan,
>
> (b) land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and
>
> (c) personal property held by or on behalf of the strata corporation
>
> for the purpose of selling the land and personal property and distributing the proceeds as set out in the interest schedule.
>
> [Emphasis added.]

[57] The appellants say this Court emphasized the importance of this requirement, setting aside the appointment of a liquidator in *The Owners, Strata Plan VR2122 v. Bradbury*, 2018 BCCA 280 [*VR2122*], where this Court stated:

> [42] Having said that, *I would agree with the appellants that the Act requires the* liquidator *to apply for approval of his appointment and the vesting order*. The liquidator is assuming important responsibilities and should be before the court seeking its approval. The court must be able to determine that the liquidator is qualified and suited to carry out these responsibilities. I see nothing in the Act that would prevent the liquidator from bringing that application at the same time the strata corporation applies for approval of the winding-up resolution, with the preliminary issue of the adequacy of the winding-up resolution necessarily to be determined first.
>
> [Underlining in original; italic emphasis added.]

[58] I would not accede to this submission. I agree with the judge that, although the *Act* uses the words “the liquidator must apply”, it does not require the liquidator to initiate the request for appointment by filing a petition or seeking to be added to an existing petition. Rather, what is required is that the liquidator be before the court seeking approval of its appointment, demonstrating an intention to act, and filing material in support of its qualifications to act, so that the court is in a position to assess the liquidator’s suitability and the appointment’s terms. Legislation should not be interpreted in a way that elevates form over substance, or constitutes an empty exercise: *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 at para. 77. In the present case, the appellants do not argue that having the liquidator initiate the process to confirm its appointment and vest title would add any substantial benefit to the winding-up process.

[59] In *VR2122*, the liquidator was not a party to the underlying wind-up petition, had not filed a response to the orders being sought, had not provided affidavit evidence of his qualifications and was not in any manner before the court. In contrast, in the present case, the owners resolved at a special general meeting held on March 24, 2021 by a vote of 83.33%, to wind-up the strata corporation, appoint a liquidator, and sell the strata lands to Butterscotch. On June 17, 2021, the administrator filed the Confirmation Petition which sought, among other things, orders confirming the appointment of a liquidator and an order vesting the strata

lands in the liquidator. On July 2, 2021, the liquidator filed affidavit evidence of the professional qualifications and experience of its representative, Derek Lai, confirming acceptance of the liquidator's appointment, and appending as an exhibit the engagement letter with Spruce West strata. On January 11, 2022, the liquidator filed a response to the Confirmation Petition. Counsel for the liquidator also appeared at the hearing of the Confirmation Petition.

[60] In my view, the requirements of s. 279(1) were met in this case. However, I should not be taken to suggest that counsel for the liquidator must always be personally present in court at the hearing. Where there is no issue raised as to the appointment or suitability of the liquidator, a response and supporting affidavits may well suffice. In the present case the appellants did not object to the suitability of the liquidator, the terms of his appointment, or the propriety of vesting title to the Spruce West strata land in the liquidator. Their only objections were first, that the resolution to approve the sale should have been put to the owners by the administrator and not by the liquidator; and second, that the liquidator itself had to formally make the application seeking confirmation of its appointment. (The appellants have advanced only the second of these objections on appeal).

2. Did the judge err in finding the winding-up resolution to be in the owners' best interests?

[61] The appellants submit that the judge made a number of errors in determining that the winding-up and sale were in the owner's best interests and were not unfair to the appellants, as per s. 278(5) of the *Act*.

(a) Was the sale improvident?

[62] I begin by addressing the appellants contention that the judge erred in her assessment of whether the sale was provident. Although s. 278.1(5) does not specifically refer to the providence of the proposed sale, it is, as the judge recognized, an important consideration in determining whether the winding-up and sale are in the best interests of the owners. This factor took on particular importance in this case because, unlike most windings-up and sales to developers which involve

a significant premium to owners over the market value of their specific unit, the owners here were to receive less than the provincially-assessed value of their units.

[63] The decision to grant a winding-up order is discretionary and reviewable on a deferential standard. The appellants say that the judge made reviewable errors because she ignored relevant factors in assessing whether the proposed sale was provident, including the length of time that had passed between the strata corporation entering into the purchase and sale agreement and the court approval hearing. They contend that this delay took on particular significance in a rising real estate market. They say further that she was required to consider the market value of the property as of the date of the hearing rather than the date of the purchase and sale agreement. In this regard, the appellants contend the judge not only relied on the market value at the time of the sale, but in doing so admitted an appraisal that failed to comply with the threshold requirements for opinion evidence.

[64] I see no error in the judge's interpretation or application of s. 275.1. Consideration of the owners' best interests requires the judge to look at the views of those owners who want the property sold, and of those owners who do not, and to determine on an objective standard what reasonable owners would do in comparable circumstances. The judge in the present case thoroughly reviewed and weighed these competing views: at paras. 149–163.

[65] The judge considered the appellants' view that the proposed sale did not reflect the market value of the strata at the time the sale was entered into in November 2020 because the marketing had been deficient. She concluded that the purchase price reflected the condition of the building, rather than the way the building was marketed, saying:

> [154] Two prospective purchasers made offers. The highest was from OpenForm at $4,300,000, and the other was from Butterscotch at $3,900,000.
>
> [155] The administrator signed a letter of intent with OpenForm on August 6, 2020. The administrator held a special general meeting on September 2, 2020, seeking approval from the owners to proceed with a court-ordered winding-up and sale based on the OpenForm offer. The owners other than the Moks voted in favour. The Moks abstained. However, on September 20,

> 2020, OpenForm withdrew its offer after doing due diligence based on the view it formed as to the costs to repair the building. It indicated it would be prepared to proceed at a price of $2,500,000.
>
> [156] The administrator went back to Butterscotch and entered into a letter of intent on September 20, 2020. After Butterscotch toured the building, it also refused to move forward with its initial offer of $3,900,000. Through Goodman, the administrator negotiated an amended letter of intent at $3,300,000. The owners of five of the six strata lots approved the administrator entering into a letter of intent with Butterscotch at that price. A contract of purchase and sale was entered into on November 6, 2020 for the sale subject to the voluntary winding-up and court approval.
>
> …
>
> [160] The period of active marketing resulted in two offers that were in the upper portion of the range of prices that Goodman suggested the property should sell for. However, once those prospective purchasers looked more closely at Spruce West, they were not prepared to pay those prices for it. The first reduced its offer by $1,800,000 and the other by $600,000. Based on the evidence of the state of disrepair of Spruce West, I conclude that any purchaser who took a close look would have its enthusiasm dampened and concerns about repair costs heightened. That is not a facet that could be changed through a lengthier marketing campaign.
>
> [Emphasis added.]

[66] The judge also rejected, as unsupported by the evidence, the appellants' assertion that the real estate agent's decision to place a banner reading "under contract" on the listing—after the first potential offer—acted as a deterrent to other prospective buyers: at para. 159.

[67] In my view, the judge did not err in her assessment of the sale's providence.

(b) The retroactive appraisal

[68] The judge admitted into evidence an appraisal obtained by the respondents which valued the property at $3.38 million as of November 2020, the date of the purchase and sale agreement—$80,000 more than the $3.3 million offer made by Butterscotch. The appellants submit that this appraisal was substantively flawed because it relied on the wrong floor space ratio (1.2 versus the actual ratio of 1.45), and should not have been admitted in any event because it did not meet the threshold requirements for the admissibility of expert opinion evidence.

[69] This court may only interfere with a judge's decision to admit and rely on expert opinion evidence if the lower court erred in law, misapprehended evidence, failed to consider relevant factors, or abdicated its gatekeeping function: *R. v. C.M.M.*, 2020 BCCA 56 at paras. 80–81.

[70] The appellants submit that the judge failed in her gatekeeping role because the value of the property at the time of the sale was irrelevant; the issue to be determined was its value at the time of the hearing.

[71] The appellants submit further that the judge erred in law by admitting the report because it did not provide the instructions given to the experts, did not set out their qualifications, education or experience, and contained the opinions of multiple authors without providing a basis to determine which of them engaged in the analysis upon which the opinion was based. Finally, they say she erred because she did not consider whether admitting the report would be prejudicial to the appellants or would distort the adjudicative process.

[72] As to the prejudice to the appellants, they say in particular that the respondents did not serve the report until five business days before the hearing, even though the expert had been engaged in November 2021, well before the hearing and also well before the appellants filed their petition response materials. They say the report was not properly characterized as reply because it opined on a subject (retroactive value) which was distinct from the subject of the appellants' expert report (current value). They say they were deprived of any opportunity to obtain responsive expert evidence because of the report's late service.

[73] The judge concluded that the administrator did not tender the report as a response to the Moks' expert opinion evidence, which opined on the market value of the bare land. Instead, it was a response to Ms. Mok's affidavit which included evidence related to the real estate market and provincial assessments of the land and building. The judge ruled that, properly characterized as reply, the respondents' appraisal met the timelines in the *Rules*.

[74] Addressing the absence of the author's qualifications she said:

> [192] Finally, the Moks argue the report is not admissible because there is no statement of the authors' qualifications. Both the administrator's report and the Moks' report contain very brief descriptions of the authors' qualifications. None of the report writers attached *curricula vitae*. Nevertheless, based on the brief statements of qualifications and experience, I am satisfied that the reports are admissible.

[75] As the judge observed, Rule 11-6 does not apply to petition proceedings. However, common law requirements relating to expert evidence apply to proceedings other than trials: *Araya v. Nevsun Resources Ltd*., 2016 BCSC 1856 at para. 181, affirmed 2017 BCCA 401. Judges retain, in either case, the discretion to admit expert reports that do not comply with the usual requirements: *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2011 BCCA 421.

[76] The judge in the present case admitted appraisal reports from both sides in which the authors had provided only brief statements of qualifications. I see no error in her exercise of that discretion. Further, she appears to have given the respondents' appraisal little weight, noting only that, in assessing whether the owners were acting reasonably in accepting Butterscotch's offer when they did not have an appraisal at hand, "they would not have likely voted differently" even if they had received one: at para. 194.

(c) The delay in seeking approval

[77] In my view, the central question is whether the judge adequately addressed the lengthy delay between the purchase and sale agreement's acceptance by more than 80% of the owners, and the hearing to approve that sale.

[78] Section 278.1(1) of the *Act* permits a strata corporation that has passed a voluntary winding-up resolution to make an application for approval of the voluntary winding-up, and requires it to do so within 60 days of the resolution:

> 278.1 (1) A strata corporation that passes a winding-up resolution in accordance with section 277, if the strata plan has 5 or more strata lots,
>
> (a) may apply to the Supreme Court for an order confirming the resolution, and
>
> (b) must do so within 60 days after the resolution is passed.

> (2) For certainty, the failure of a strata corporation to comply with subsection (1) (b) does not prevent the strata corporation from applying under subsection (1) (a) or affect the validity of a winding-up resolution.

[79] The appellants contend that this requirement demonstrates the Legislature's recognition that the providence of a proposed sale is to be assessed at the date of the hearing. Because fair market value can fluctuate in a rising or falling market, a price that was provident at the time the contract was entered into may no longer be so, affecting owners' ability to purchase a replacement home in a rising market.

[80] The appellants submit that the judge failed to give effect to this requirement, despite recognizing that the market had risen since Butterscotch made its offer. She noted that the Moks' strata unit had increased in value by 15%: from $768,000 in 2020 to $883,000 in 2021.

[81] I cannot agree that the judge failed to recognize the need to assess current market value. She was aware of the delay involved: the offer was made in July 2020, accepted in November 2020, approved by the owners on March 24, 2021, with approval sought before her in January 2022. She also recognized that s. 278.1(1) approvals are to be obtained within 60 days of the wind-up resolution. I see no error in her reasoning addressing this delay which I set out here in part:

> [173] The Moks assert that the purchase and sale agreement with Butterscotch must be viewed against the current fair market value, i.e.: the fair market value at the time the court hears the petition. In support of this argument, they point to s. 278.1(1) of the *Strata Property Act*, which permits a strata corporation that has passed a voluntary winding-up resolution to make an application for approval of the voluntary winding-up, and requires it to do so within 60 days of the resolution.
>
> …
>
> [176] In my view, the legislature cannot be taken to be stipulating a requirement that the sale price represent market value at the time the court hears the confirmation petition in all cases. In a rapidly changing market, that could defeat any proposed winding-up. Among other things, having a petition heard within 60 days of a vote may be impossible in some British Columbia Supreme Court jurisdictions where there is opposition to it such that more than a two-hour hearing is required. This matter required a three-day hearing. Counsel for the Moks was not retained until the summer of 2021 (after a March 2021 resolution) and was not available for the petition hearing until late 2021. It proceeded in January 2022.

> [177] In my view, the legislature's inclusion of the 60-day timeframe, while permitting an escape valve, was to promote the value of having a timely court confirmation process so that the proposed winding-up and sale is not divorced in time from prevailing owner sentiments and market conditions. A resolution that has become stale by virtue of the passage of time may no longer be in the best interests of the owners or remain reflective of the owners' wishes. The court must consider that, especially in cases where the confirmation petition is brought after that timeframe.
>
> [Emphasis added.]

[82] As set out earlier, the purchase and sale agreement was entered into in November 2020. The owners approved the sale in March 2021, and the Confirmation Petition was filed in July 2021. The hearing date for court approval was scheduled in consultation with counsel for the Moks, who was not available until the end of 2021. The hearing took place in January 2022. The judge observed that all of the owners, except the Moks, had sworn affidavits as late as January 2022 confirming their commitment to the winding-up and sale, despite the passage of time and the upswing in sale prices for residential properties in Vancouver: at para. 179.

[83] In the extraordinary circumstances of this case, I see no error in the judge's decision to approve the sale despite the delay.

(d) Assessment of unfairness

[84] The appellants say the judge did not consider the providence of the sale in assessing whether the sale was unfair to them. I cannot agree with that submission. The judge recognized that the Moks' objection to the winding-up rested primarily on their view that the sale price was too low, and would leave them unable to buy a home in the same area. But she found that this unfortunate state of affairs was the result of the owners having let the building fall into disrepair: at para. 200. She noted that none of the owners who supported the sale was going to be able to relocate to something in good repair in the same neighbourhood: at para. 202.

[85] The judge was required to consider the unfairness to the owners who wanted to sell if the wind-up was not approved. In this regard she said:

> [208] While I consider that the Moks may not be able to continue to live in the same neighbourhood and that is a downside to them, there is greater unfairness on those owners who have accepted the reality that all of the owners are unable to agree on whether and how to repair the building if the winding-up and sale is not approved and the owners continue to be unable to agree.
>
> [Emphasis added.]

[86] The appellants submit that the judge drew a false dichotomy between "approve the sale or repair" when the true options were "approve the sale or deny approval and remarket". I agree that the judge focused on the futility of rejecting the winding-up and expecting the parties to work out an agreement to repair the building, but she did so in response to Mr. Mok's affidavit evidence that there was no reason that the parties could not work together to have the repairs done: at para. 214. More importantly, the judge determined that this winding-up resolution should be approved taking into account the prejudice to the other owners who faced ongoing expenses and safety issues in their homes and wanted out now. She had before her the evidence of the owner of Strata Lot 3, Mr. Tovbis, that he was concerned about the cost of undergoing another winding-up procedure. There was also evidence that the building posed a risk to the health and safety of the owners and that the cost of effecting repairs to the building had risen significantly between 2020 and 2021.

[87] In summary on this issue, the judge did not err by failing to consider the providence of the sale in assessing whether it was unfair to the appellants.

(e) Imposing the burden of proof on the appellants

[88] The appellants say the judge erred in imposing a burden on them to prove that the sale was improvident. I see no error in her approach. The judge recognized that the petitioners seeking approval under s. 278.1 had the burden of establishing that the sale and winding-up were in the best interests of the owners. But she correctly concluded that, once the applicants led such evidence, there was a practical shifting of the burden to those opposing on the basis of unfairness to demonstrate that was so: *VR2122*; *The Owners, Strata Plan VR 2122 v. Wake*, 2017 BCSC 2386 at para. 81.

(f) Failing to draw an adverse inference

[89] Next, the appellants say the judge erred in choosing not to draw an adverse inference against the respondents concerning whether they received a special incentive from the developer to agree to the sale. The appellants' allegation of secret incentives is based on a partial quote from the Confirmation Petition:

> (i) The PSA also allows the owners to remain in their strata lots for a period of up to 4 months following the closing of the proposed sale of the property to Butterscotch (on a "rent free" basis), giving owners time to consider their accommodation options following the closing of the transaction. The offer further provides owners with an incentive to purchase into a new development to be constructed on the VR456 Lands.

The appellants say that they were not made aware of this incentive and were excluded from it. The existence of more preferential terms for some owners is a relevant consideration on a wind-up confirmation hearing: *VR2122* at para. 36. The appellants contend that the suggestion that some owners received a special incentive therefore cried out for an answer.

[90] The appellants note that approximately three weeks after they raised this issue in their response materials, the respondents filed five affidavits sworn by the owners in support of the wind-up petition. Those affidavits comprehensively answered the other issues raised by the appellants, but not one of them addressed the incentive or denied that they had been given a purchase incentive.

[91] The appellants submit that the judge should have drawn an adverse inference from the silence of the other owners on this crucial point. The only response came from the administrator's counsel who, in submissions, stated that he found the request for an adverse inference to be personally offensive as it suggested that there was a conspiracy to conceal information from the appellants on the part of both the liquidator and the administrator. The administrator and liquidator also explained that any incentive related to 100% of the owners approving the sale; this was a consensus which the Moks thwarted.

[92] A decision to draw an adverse inference is a discretionary one entitled to deference. I see no reviewable error in the judge's decision not to draw an adverse

inference. It was open to her to draw that inference on the evidence before her, but she was not required to do so.

(g) Ignoring evidence of unfairness

[93] Finally, the appellants say the judge ignored evidence indicating that the process was unfair to them. That evidence is said to include the administrator's decision not to organize a meeting to discuss the listing price after the appellants expressed interest and raised questions for the broker, "threats made to the appellants in an effort to intimidate them to exercise their democratic vote in a particular way," and their exclusion from the owners' information meeting which the administrator deposed took place before the wind-up vote.

[94] The administrator led evidence that the appellants were always kept aware of the claim through emails and general meetings, and were not excluded from any updates or decisions regarding the strata wind-up. Again, it was open to the judge on the record before her to conclude that there was no unfairness in the process.

Disposition

[95] For the reasons above, I would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Justice Marchand"