IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rochette v. McGuire,*
2024 BCSC 112

Date: 20240126
Docket: S220497
Registry: Victoria

Between:

Sylvie Rochette, Jim Tennant, and Laura Podgorenko

Petitioners

And

Roger McGuire, James Allard, Mark Stevens, and Gerald Hauck

Respondents

Corrected Judgment: The text of this judgment was corrected at paragraph 252 on January 31, 2024.

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Petitioners:	T.W. Morley
Counsel for the Respondents:	A.M. Bookman
Counsel for The Owners, Strata Plan 962:	B.L. Scheidegger
Counsel for Bruce Bradburn, Arthur Roberts, and Mary Matchett:	M.D. Wehrung
Place and Dates of Hearing:	Victoria, B.C. August 21-24, 2023
Place and Date of Judgment:	Victoria, B.C. January 26, 2024

Introduction

[1] This litigation involves a dispute between certain unit owners in Strata Plan 962, a residential building in Victoria, British Columbia (the "Strata") and the individual members of the 2020 strata council, Roger McGuire, James Allard, Mark Stevens, and Gerald Hauck (collectively, the "2020 Council").

[2] The conflict arises from schisms between Strata owners who live permanently in their suites and those who rent out their suites as hotel units through the Victoria Regent Hotel ("VRH").

[3] The petition alleges the respondents, acting in their capacity as the 2020 Council, were in breach of ss. 31 and 32 of the *Strata Property Act*, S.B.C. 1998, c. 43 [*Act*] when (1) some or all of them failed to disclose conflicts of interest surrounding the renewal of the Common Area Use Agreement (the "CAUA") with VRH in 2020 and (2) when the 2020 Council, on behalf of the Strata, granted a release of claims (the "Release") to the personal respondents in proceedings commenced by these same petitioners against members of the 2019 Strata council, Bruce Bradburn, Arthur Roberts and Mary Matchett (collectively, the "2019 Council"), together with the Owners of Strata Plan 962; *Rochette v. Bradburn*, Action No. S194145, Victoria Registry ("*Bradburn*").

[4] It is further alleged the Release is invalid as being an unauthorized disposition of Strata property contrary to s. 82 of the *Act* because the respondents failed to obtain the necessary three-quarter resolution of the owners.

[5] In the result, the petitioners seek declaratory orders respecting the actions of the individual respondents, a setting aside of the Release granted to the 2019 Council and damages, both actual and punitive.

[6] The respondents in the *Bradburn* action are persons on notice to this petition hearing given one of the remedies sought is a declaration the Release is invalid and of no effect. The respondents in *Bradburn* have relied on the Release as a defence, or partial defence, to the claims made against them.

[7] The Strata is also on notice given it is a party to the *Bradburn* action and the Release. As well, the Strata notes it is an interested party because the Strata, according to its bylaws, is potentially liable to indemnify the respondents for legal expenses and costs of this proceeding pursuant to provisions of the *Act* if the petitioners are successful in this proceeding.

[8] Both these respondents and the Strata reference the existence of another action pending before the court; *Coyle v. McGuire*, Action No. S230970, Victoria Registry, where similar relief against the 2020 Council, together with VRH, is sought by different owners in the Strata but based upon the same essential factual matrix as is alleged in this proceeding, save in *Coyle* the petitioners overtly allege acts of dishonesty against the respondents.

[9] The Strata, although not a party to the *Coyle* proceeding, filed a response noting its position that the whole of the *Coyle* proceeding is duplicative of this proceeding; the only difference being the identity of the petitioners.

[10] Counsel for the petitioners, both here and in *Bradburn*, represent the petitioners in *Coyle*.

[11] The respondents here reference the *Coyle* petition as a further example of multiple proceedings arising from the same allegations. They argue, given the reasons for judgement in *Rochette v. Bradburn*, 2021 BCSC 1752 [*Bradburn* RFJ], this proceeding is an abuse of process. They seek to strike this petition as an abuse of process arguing it discloses no cause of action or, is duplicative of the *Bradburn* and *Coyle* litigation.

[12] There are other matters based on the same or similar allegations, either pending or resolved, before the Civil Resolution Tribunal. These were initiated by Sylvie Rochette, a petitioner both here and in *Bradburn*, and by Brent Furdyk, one of the petitioners in *Coyle.*

[13] In the *Bradburn* RFJ, Justice MacDonald dismissed these same petitioners' application to add the 2020 Council as respondents in the *Bradburn* action based,

according to the respondents here, on the same allegations as are contained in the present petition.

[14] Alternatively, if the petition is not struck, the respondents argue the matter is incapable of resolution by way of a summary proceeding on affidavit material and the matter should be referred to the trial list. In the further alternative, the petition should be stayed to await the outcome of the *Bradburn* action which is set for a three-week trial commencing March 2024.

[15] Lastly, if the matter proceeds, the respondents argue the petitioners have not established a conflict of interest underlying any of the actions of the 2020 Council collectively or of its individual members. Accordingly, they say the petition ought to be dismissed.

[16] VRH is on notice in this proceeding given the original relief sought to set aside the November 2020 CAUA renewal between the Strata and VRH. That claim was abandoned by the petitioners in the amended petition.

[17] VRH provided a document dated June 2023 waiving any potential litigation against the Strata based upon the July 2020 CAUA renewal. VRH did not appear in the hearing before me.

[18] The Strata seeks determination of this matter without further delay noting the judicial time spent and the consequent legal expense given the Strata's potential liability to its former council members for indemnity for legal expenses pursuant to its bylaws.

[19] The respondents in *Bradburn* oppose the relief sought noting it would be dispositive of a defence raised by them in the *Bradburn* proceeding which, at the instance of the petitioners, was converted into an action and is now set for trial in late March of 2024.

[20] The *Bradburn* respondents note the validity of the Release was put over to the trial list at the instance of these petitioners. Before me, both sets of respondents,

the 2019 and the 2020 Councils argue it is improper to make orders respecting the validity of the Release in advance of the upcoming trial in a separate proceeding.

Issues

[21] If the respondents here were made responsible for monetary damages occasioned by the 2019 Council, actual monetary damages cannot be determined against them until after the outcome of the *Bradburn* action. Accordingly, the issues here are whether or not the respondents, either as individuals, or collectively acting as the 2020 Council had a direct or indirect interest in the execution of the Release in favour of the respondents in *Bradburn* or in the negotiations leading up to the execution of the CAUA, be it in July or November 2020.

[22] If so, did they fail to disclose the conflict and remove themselves from the decision-making process?

[23] If the answer to Question 1 is “yes” and to Question 2 “no”, the remaining issue is whether the petitioners are entitled to the remedies they seek given the language of s. 33 of the *Act*.

[24] In particular, having regard to the *Bradburn* RFJ, where MacDonald J. noted credibility would be a central issue, can the fairness or the reasonableness of the Release be determined?

[25] If no conflict is proven vis a vis the execution of the Release, are the petitioners entitled to have the Release set aside given the provisions of s. 82 of the *Act*?

[26] The respondents, by way of cross-application, seek dismissal of the petition alleging an abuse of process. They argue the present petition is based on the same allegations as earlier allegations in the amended notice of civil claim in *Bradburn* where MacDonald J. found the proposed amendments disclosed no cause of action against these respondents.

[27] Alternatively, they argue the matter requires a trial with all of the litigation tools necessary to determine the outcome. This is despite opposing the application in *Bradburn* where they were to be added as parties.

Background

[28] The Strata is located at 1234 Wharf Street in Victoria. It has 57 strata lots. Some of the owners participate in a profit-seeking rental pool and are not, typically, ordinarily resident in the building. Others, including all of the petitioners, occupy the units they own.

[29] The owners of the rental lots rent out their units through an agreement with the VRH.

[30] The Strata and VRH had a CAUA in place respecting portions of the Strata's common property for the term February 1, 2017 to January 31, 2020 with a lease rate of $10,788.00 plus GST (the "2017–2020 CAUA").

[31] In February 2019, the owners agreed that if the 2017–2020 CAUA was not renewed for a three-year period, a renewal for one year was authorized on the same terms and could be signed on behalf of the Strata.

[32] Consequently, whatever authority was derived from subsequent Annual General Meetings ("AGMs") or Special General Meetings ("SGMs"), there being no agreement between the parties on the outcome of an SGM in October 2019, there was authority for the Strata, through council, to extend the existing agreement with VRH on the same terms and conditions as contained in the 2017–2020 CAUA for one year.

[33] In the spring of 2019 events occurred within the Strata, more relevant to the *Bradburn* proceeding than here, raising the level of discord between the owner/occupiers of their units and those whose units were in the rental pool.

[34] Actions taken by the respondents in the *Bradburn* action are said to have prejudiced the owner/occupiers' rights. Certain owner/occupiers who previously were

members of council were removed and, by late spring 2019, the council was comprised of the three personal respondents in *Bradburn*; all of whose units participated in the rental pool.

[35] On September 20, 2019, these same petitioners commenced a petition (the *Bradburn* action) naming the three remaining 2019 Council members as respondents. The petition alleged, *inter alia*, that the 2019 Council had engaged in misfeasance, malfeasance and breached their fiduciary duty to the Strata. As here, the petition sought remedial orders, declaratory orders and damages against the 2019 Council.

[36] One of the 2019 Council members, Mr. Bradburn, was, at all material times, a director of VRH.

[37] In October 2019 the Strata convened an SGM to address the possible renewal of the CAUA with VRH for portions of its common property.

[38] There are divergent views regarding the result of the SGM as to the authority it bestowed upon any subsequent council to bind the Strata to a CAUA renewal (other than the previously authorized one-year term) without approval of three quarters of the owners at an AGM and/or SGM of the Strata.

[39] The petitioners argue the evidence makes clear the 2019 SGM never authorized the Strata to renew the CAUA with VRH without further approval of its owners at an AGM and/or SGM but, instead, directed the formation of a committee to determine the fair market rental value of the leased portion of the common area. A professional real estate company was engaged to advise on market value of the rented portion of the common area.

[40] However, despite evidence from the meeting's chairperson suggesting the motion to authorize the CAUA renewal was never voted on, let alone approved, the Minutes of the SGM and a subsequent legal opinion obtained from Strata's then legal counsel suggest otherwise.

[41] Wendy Albers, the Strata's property manager who was in attendance at the October 2019 SGM, deposed to her understanding that the CAUA renewal for a three-year term was authorized but acknowledged a committee was struck to determine rental rates.

[42] The Minutes of the SGM were ratified by the majority of the owners.

[43] Nonetheless, the petitioners argue the resolution to empower the Strata to enter into a renewal was never voted on and the matter was referred to committee.

[44] In November 2019, all members of the 2019 Council resigned.

[45] Following the resignation of the 2019 Council, the Strata was without a council for several months. The four respondents, along with another member who resigned before any of the impugned actions took place, were elected to council in late January 2020. Two of the respondents, Messrs. McGuire and Stevens, are owner-occupants of Strata units; the other two, Messrs. Hauck and Allard have their units in the rental pool.

[46] Some of those subsequently elected to the 2020 Council were in attendance at the October 2019 SGM; some were not.

[47] Following the October 2019 SGM, a real estate firm, D.R. Coell & Associates was engaged to provide an opinion as to market value of the rental of the common areas of the Strata; two levels of parking, a lobby, an elevator area and some hallways.

[48] The dispute here focuses, in part, on the renewal of the CAUA between the Strata and VRH in 2020 which, according to the petitioners, informed the actions of the 2020 Council in executing the Release of the Strata's right to monetary claims against the 2019 Council arising from alleged wrongdoings by the 2019 Council in the *Bradburn* action.

[49] In July 2020, the petitioners allege the 2020 Council, including the two owners who participated in the rental pool, agreed on behalf of the Strata to a three-year

CAUA renewal with VRH, February 1, 2020 to January 31, 2023, upon the same terms and conditions as the 2017–2020 CAUA without proper authority from owners at an AGM or a further SGM.

[50] The July 2020 CAUA was signed by Mr. McGuire on behalf of the Strata. Mr. Bradburn signed on behalf of VRH.

[51] Later, in November of 2020, following delivery of a second report on rental values from D.R. Coell & Associates, Mr. McGuire signed another CAUA with VRH for the same three-year term, 2020 to 2023, but with a significant increase in the rental rate. Neither the July 2020 nor the November 2020 renewal was voted upon by the owners at an AGM or SGM.

[52] Each of the respondents deposed that they believed the 2020 Council was empowered to renew the CAUA and the role of the committee formed as to fair market value was advisory. They rely on the Minutes of the SGM and the legal opinion provided by counsel.

[53] Messrs. Allard and Hauck are the two respondents whose units were in the rental pool. They deposed they were aware, as were the non-renting council members, that they were conflicted from dealing with the CAUA renewal given earlier opinions provided to the 2019 Council. They recused or absented themselves from the renewal process by neither negotiating nor voting on the renewal of the CAUA.

[54] Mr. Allard stated that by “recused” he meant the two owners whose units were in the rental pool:

> … did not participate in the process to renew the Common Property Lease Agreement. Our decision to not participate in the process to renew the Common Property Lease Agreement was not recorded in a formal manner, but was discussed amongst the Strata council of Mark Stevens, [Roger] McGuire, Gerald Hauck and myself.
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> The renewal Common Property Lease Agreement was not discussed at any Strata council meetings while I was a member of the Strata Council.

[55] Following execution of the November CAUA, the Strata invoiced VRH for the retroactive rent payable from February 1, 2020 to date. VRH paid the accrued "back rent" owing under the November CAUA.

[56] With respect to ratification of the November 2020 CAUA, the Strata extended the agreement for two months at an SGM on November 17, 2022. At the time of the extension, these proceedings were extant and the *Bradburn* RFJ had been published.

[57] Presumably, that extension informed the petitioners' decision to abandon the relief originally sought by them to set the CAUA aside.

[58] That said, were I to find the 2020 Council, or some of them, were in conflict vis a vis the renewal(s) or the Release, relief would still be available.

[59] VRH provided a letter waiving any right to claim as against the Strata in respect of the earlier July 2020 CAUA stating, in part:

> VRH Ltd. entered into the leasing agreement with you, known as the 2020 CAUA in or about June 2020 on its strength of its belief that a lawful resolution and direction by the Owners, Strata Plan VRS 962 allowed the Strata Corporation to execute the document. VRH Ltd. also entered into that agreement on its understanding that in accordance with the direction given by the Owners to the Strata Council at the 2019 AGM, that the 2020 CAUA rent amount would be amended under the power of the same resolution and direction, to increase the rent payable after an appraisal process established a new market rent amount, and that amount was agreed between the parties.
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> VRH Ltd. subsequently re-signed the 2020 CAUA with an increased rent amount willingly, without coercion or any promises collateral to the agreement, made by third parties or otherwise. VRH ltd. fully intended to novate the contract and retroactively pay a new agreed upon rent, which it did for the balance of the term of the 2020 CAUA, and for the extension of term into March 2023.
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> VRH Ltd. does not have, never has had, and has no intention to make any claims of any nature against the Owners, Strata Plan VRS 962 or any of its owners in regard to the 2020 CAUA.

[60] The respondents, after originally denying the July renewal of the CAUA explained that the three-year renewal upon the same terms was a placeholder agreement signed at the instance of VRH for "business purposes".

[61] In the November 2020 renewal, rental rates increased from approximately $10,800 to $27,000 annually under the terms of the 2020 CAUA renewal.

[62] According to the respondents, on or about December 1, 2020, the 2019 Council made a settlement offer through counsel to the Strata through its counsel, pertaining to the *Bradburn* action. On January 26, 2021, the 2020 Council approved the settlement offer on behalf of the Strata. Shortly thereafter on January 29, 2021, the 2020 Council resolved that Mr. McGuire was authorized to execute the Release.

[63] In consideration of $10,000 paid by the *Bradburn* respondents to the Strata, the Strata released those respondents from any liability for any alleged breaches of the *Act* and agreed to save harmless and indemnify the respondents from further claims by the Strata. The Release contemplated dismissal of the petition although the individual petitioners, Rochette *et al.*, were not signatories to the Release nor did they receive any apparent benefit from it.

[64] The respondents collectively state that the Release was negotiated between legal counsel for the Strata and the *Bradburn* respondents. Each deny instigating the negotiations or having an individual interest in the outcome.

[65] Each of the respondents deposed they felt the Release was in the “best interests of the Strata to conclude the 2019 [*Bradburn*] Action”.

[66] The respondents in *Bradburn* amended their response to petition to rely upon the Release as a defence or partial defence to the claims brought against them by the petitioners.

The *Bradburn* Action

[67] The *Bradburn* petition was commenced in the fall of 2019. In the words of their counsel, it “concerns alleged breaches of the *Act* and fiduciary duties owed by the 2019 Strata Council to the Strata Corporation while they were acting as the Strata Council”.

[68] As here, a variety of declaratory and monetary relief, including punitive damages, is sought against each of the respondents.

[69] In the spring of 2021, the petitioners brought an application to join the 2020 Council members to the *Bradburn* proceeding, amend the pleadings and convert the petition to an action. The 2019 Council applied for dismissal of the petition based upon the Release.

[70] The matter came on for hearing over four days in June 2021. In September 2021, MacDonald J. dismissed the respondents' application to strike the proceeding, allowed the petition to be transferred to the trial list and allowed some, not all, of the amendments sought by the petitioners. However, she dismissed the petitioners' application to add the 2020 Council concluding the proposed pleadings (1) had no nexus between the various wrongdoings alleged as against the separate councils, and (2) disclosed no cause of action against them.

[71] In the words of petitioners' counsel, the execution of the Release was as a result of a conflict of interest created by the 2020 Council's recognition, that by "[n]o later than November 1, 2020, it was clear that a central issue in the 2019 action was whether the Strata Corporation had approval from the owners to enter into a [CAUA] agreement with VRH Ltd." and that it was "reasonable to expect that the 2020 Strata Council could be named in their personal capacities as parties to the action".

[72] At para. 84 of the *Bradburn* RFJ, MacDonald J. stated:

> The petitioners do not allege the proposed respondents were acting in a conflict of interest when they were involved in renewing the initial common property lease agreement. Instead, they allege the proposed respondents breached their fiduciary duties to the Strata Corporation. Although not pleaded, the petitioners also argue the proposed respondents had a duty to protect the Strata Corporation which they violated when they signed the Release. They did not explain what direct or indirect interest the proposed respondents had in signing the Release.
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> [Emphasis added.]

[73] A further issue raised, but not adjudicated upon, was a claim of solicitor/client privilege surrounding the execution of the Release. The respondents both here and before MacDonald J. say they acted on the advice of Strata's counsel in agreeing to the Release. The privilege surrounding that advice attaches to Strata, not the respondents.

[74] A useful chronology of events as alleged by the petitioners, not as found by MacDonald J., is provided in *Bradburn* RFJ:

> [13] In their application, the petitioners set out the key events that are relevant to both applications. The personal respondents and proposed respondents take issue with a number of these facts. I set them out because they give an indication of the ongoing disputes between the parties, but I do not make any findings of fact (emphasis added):

Date	Event
Feb 23, 2019	The Strata Corporation elects a seven member strata council that includes the petitioners Rochette and Tennant and the respondents Bradburn, Roberts and Matchett.
May 31 - Jun 1, 2019	The Strata Council initiates discussions with VRH Ltd, about expanding the scope of the maintenance services provided by VRH Ltd. The issue that members of council that have a pecuniary interest in VRH Ltd. participating in any negotiations is a conflict of interest is raised.
Jun 1, 2019	The respondents Bradburn and Roberts exchange emails (including Matchett as an addressee) stating "our overriding priority is to obtain control of our Strata Council. All other objectives and 'battles' right now are secondary" because the Petitioners are out to "destroy the Rental Pool".
Jun 17, 2019	The Strata Corporation has a Special General Meeting (the "June SGM") in which a resolution was passed removing four members of the strata council: Sylvie Rochette, Jim Tennant, Jeremey Janzen and Leslie Welsh.
Jun 18, 2019	The Strata Council resolves to spend money to receive a legal opinion on the validity of the June SGM (despite no challenge to its validity) and whether the Strata Council can

	authorize payments to Wilson McCormack for legal services as an emergency expenditure.
Jun 21, 2019	Wilson McCormack provides a legal opinion that the June SGM was valid (at a cost of $4,223.44).
Jun 25, 2019	Wilson McCormack provides a legal opinion that the Strata Council can authorize payments to Wilson McCormack as an emergency expenditure (at a cost of $3,873.52).
Jun 25, 2019	The Civil Resolution Tribunal makes an order declaring portions of the existing rental restriction bylaw (Bylaw 39(1)) unenforceable. It is now clear that owners could rent their strata lots without having to participate in the Rental Pool.
Jun – Sep 2019	The Strata Council retains Wilson McCormack, and expends funds of The Owners Strata Plan 962, to draft a bylaw that would prevent owners from renting their strata lots unless the owner participated in the Rental Pool.
Aug 13, 2019	A demand for a special general meeting, pursuant to section 43 of the Strata Property Act, is delivered to Strata Council. The Strata Council retains Wilson McCormack and expends funds of The Owners Strata Plan 962 to provide an opinion on whether the demand is proper. The opinion is that there is a technical deficiency in the demand and the Strata Council declines to exercise its discretion to call a special general meeting.
Sep 22, 2019	The respondents Bradburn and Roberts [are] informed by Wilson McCormack that because of their interest in the VRH Ltd, they cannot have a role in renewing the [CAUA] agreement between VRH Ltd. and The Owners Strata Plan 962. The Strata Council instructs Wilson McCormack to draft a resolution regarding that [CAUA] agreement. The extent and content of those instructions are unknown.
Oct 3, 2019	The Strata Council instructs the property management company to distribute an Amended Notice of Special General Meeting that includes Resolution #1 stating: “The owners by 3/4 vote approve the [CAUA] between The Owners, Strata Plan 962 and the Victoria Regent Hotel Ltd. pursuant to ss. 71 and 80(2) of the Strata Property Act on the same terms and conditions upon its expiry for an additional 3-year term commencing February 1, 2020.”

Oct 26, 2019	A special general meeting is chaired by Tony Gioventu, the executive director of the Condominium Home Owner's Association. The owners, by unanimous resolution, provide direction to council that it cannot enter into an agreement with the VRH Ltd. prior to a committee bringing back a negotiated consensus agreement to be voted on by the owners at a subsequent general meeting. There is no vote on Resolution #1.
Nov 1, 2019	The respondent Bradburn, as a member of Strata Council, contracts with a commercial real estate appraiser to prepare a report regarding an appropriate rental rate for the lease of common property of The Owners Strata Plan 962 to VRH Ltd.
Nov 15, 2019	The respondents Bradburn, Roberts, Matchett file a Response to Petition alleging that the “current [CAUA] agreement between VRH Ltd. and the Strata Corporation...was renewed for another three-year term by way of a 3/4 vote at a special general meeting of the Strata Corporation on October 26, 2019”.
Nov 28, 2019	The Strata Council calls an “emergency Council meeting to approve obtaining a legal opinion from Strata council in regard to resolution 1 of the Oct. 26 SGM.” The resolution is approved, and the firm Wilson McCormack is retained to provide a legal opinion.
Nov 28, 2019	The firm Wilson McCormack provides a legal opinion incorrectly stating that the Chair determined that Resolution #1 was voted on and approved and that prior to the October SGM “The Strata Corporation and the Rental Pool agreed to extend the term on the same terms and conditions for a further three year term subject only to approval by 3/4 vote of owners”, it concluded that “the [CAUA] has been renewed for a further 3 year term.”
Nov 28, 2019	The respondents Bradburn, Roberts, Matchett provide written notice of resignation effective December 4, 2020 and note that the Strata Corporation will have no council.
Dec 5, 2019	Bruce Bradburn and Arthur Roberts, as representatives of the Victoria Regent Hotel Ltd., decide to sign the "new [CAUA] right away" and consider that "when the appraisal comes in, we can offer a good faith proposal to adjust the rental rate and put it up for a majority vote at the AGM, assuming Cora goes along with it”.

Jan 25, 2020	The Strata Corporation has an Annual General Meeting and elects a five-person council of Jim Allard, Roger McGuire, Martin Osberg, Gerald Hauck and Mark Stevens.
Feb 1, 2020	The Owners Strata Plan 962 and VRH Ltd, enter into an agreement permitting VRH Ltd. to rent certain common property areas for $10,788.00 per year commencing February 1, 2020 and ending January 31, 2023 (the "Original Rental Agreement"). Bruce Bradburn and Arthur Roberts sign as authorized signatories of VRH Ltd. and Mark Stevens and Roger McGuire sign as authorized signatories on behalf of The Owners Strata Plan 962.
Unknown Date	The Owners Strata Plan 962 and VRH Ltd. rescind the Original Rental Agreement and enter into a different agreement permitting VRH Ltd. to rent certain common property areas for $27,000.00 per year commencing February 1, 2020 and ending January 31, 2023 (the "Revised Rental Agreement"). Earl Wilde and Mark Horne sign as authorized signatories of VRH Ltd. and Mark Stevens and Roger McGuire sign as authorized signatories on behalf [of] The Owners Strata Plan 962. The difference between the rent payable over the term of the Original Rental Agreement and the rent payable over the term of the Revised Rental Agreement is $48,636.00 not including taxes.
Jan 16, 2021	Jim Allard, Mark Stevens, Roger McGuire and Gerald Hauck, acting as Strata Council, pass a resolution to agree to Release the respondents Bradburn, Roberts, Matchett for any damages, loss, expense or costs awarded to The Owners Strata Plan 962.
Jan 29, 2021	Roger McGuire signs the Release.
Jan 29, 2021	Roger McGuire and Gerry Hauck resign from Strata Council.

[75] While many important facts remain in issue, it is on the above allegations that the application to join the 2020 Council was dismissed as failing to disclose a cause of action.

[76] For instance, the reference to February 1, 2020 is, I believe, in error. The renewal on the same terms and conditions was, according to the evidence before

me, signed in July 2020 by authorized signatories of VRH (one of whom was Mr. Bradburn) as well as Messrs. Stevens and McGuire on behalf of the Strata. Both those respondents are owners of a unit in the Strata but are not members of the rental pool. The other two respondents, Messrs. Allard and Hauck, each own Strata units that are part of the rental pool.

[77] The result of the October 2019 SGM is disputed according to the pleadings both in *Bradburn* and here.

[78] The validity of the Release and the authority of the 2020 Council to execute the Release is at issue in *Bradburn.*

[79] The determination of the validity of the Release was referred to the trial list in *Bradburn*. The petitioners seek an order in this proceeding setting aside the Release or, alternatively, an order that the personal respondents in this proceeding be made responsible for "all losses arising from an unreasonable or unfair contract or transactions … resulting from actions he took as a member of the Strata Council in which he had a direct or indirect personal interest".

[80] As to the conversion of the matter from a petition hearing to a trial, MacDonald J. noted in the *Bradburn* RFJ:

> [98] The allegations before me relate to a number of factual and legal disputes. I have already outlined the factual disputes regarding the passing of Resolution One at the Special General Meeting and the validity of the Release. There is an issue regarding whether the personal respondents, as members of the strata council, acted in a conflict of interest when they made decisions regarding the hotel when they were directors of the hotel which would benefit from their decisions. There are disputes regarding whether the personal respondents intentionally provided incomplete, inaccurate, or misleading information to legal counsel and whether they should have spent money on a legal opinion at all. There is also an issue of whether the personal respondents should have provided instructions to legal counsel because they were allegedly in a conflict of interest. The factual disputes relate to the material issues. All parties agree cross-examination is required. Master Harper has already ordered cross-examination of the respondents and one personal respondent has been cross-examined.
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> [99] Based on *Saputo,* I am satisfied there are *bona fide* triable issues for trial. There are relatively complex legal issues and numerous factual

> disputes. Further, and particularly based on my concerns with the Release, I cannot say the matter is bound to fail.
>
> [100] The many disputed facts will not be easily resolved without access to standard trial procedures, including discoveries. While I appreciate that cross-examination on affidavits was permitted by Master Harper on September 1, 2020, and there has been fulsome document disclosure, this is not the test. The petitioners have met their burden to refer this matter to the trial list because they have established there are *bona fide* triable issues and they are not bound to lose. There are also additional factual disputes since Master Harper's order, particularly the intervening signing of the Release.
>
> [101] I direct that the amended petition be converted to an action and referred to the trial list. By transferring it to the trial list, I do not intend to foreclose the possibility of a summary trial in this proceeding. However, prior to trial the parties will have the benefit of trial procedures such as admissions, notices to admit, examinations for discovery of the parties, and pre-trial examination of non-parties. These tools will assist the parties to efficiently resolve the disputes that are currently outlined in the amended petition.

[81] While leave was granted to make some of the proposed amendments to their pleadings relating to the *Bradburn* action, the proposed amendment alleging collusion between the two councils was not. Justice MacDonald stated:

> [105] Additionally, leave to amend the pleadings to claim collusion between the original strata council and the new strata council is not permitted. The factual foundation for collusion was not included in the proposed notice of civil claim or the proposed further amended petition. In addition, the "Legal Basis" of the proposed pleadings does not refer to any cause of action or breach of statutory duties relating to collusion. The petitioners have not pointed to any provision in the *Strata Property Act* allowing them to bring a claim of collusion against the personal respondents who were not on strata council at the time collusion is alleged.

[82] As to the dismissal of the application to join these respondents in the *Bradburn* action, MacDonald J. noted the following:

> [60] Relying on Rule 6-2(7)(b) and (c), the petitioners seek to add the proposed respondents as parties to the petition on the ground that as members of the new strata council, elected January 25, 2020, they breached their fiduciary duties to the Strata Corporation. They argue the proposed respondents did so in two ways:
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> > i) by renewing the initial [CAUA] with the hotel, when they knew there was no unanimous resolution carried at the November 2019 Special General Meeting to extend the [CAUA] for another three years; and
> >
> > ii) by signing the Release because, as members of the strata council, they had a duty to protect the Strata Corporation.

> [61] The petitioners argue three out of the five members of the new strata council were identified by Mr. Roberts or Mr. Bradburn, both personal respondents, as people willing to work with them and support the rental pool.

[83] The reasons continue on as follows:

> [78] Section 33 sets out the specific and limited circumstances where one owner can sue a member of the strata council. It does not contain language permitting owners to sue other owners who are not on strata council.
>
> [79] The statutory right of the petitioners to bring their claim against the proposed respondents under s. 33 is triggered where there is a basis to allege that a council member failed to declare a conflict of interest or otherwise acted contrary to s. 32: *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183, leave to appeal ref'd [2007] S.C.C.A. No. 262. The majority in *Dockside* set this out as follows:
>
> > Remedy for Breaches of ss. 31 and 32 – s. 33
> >
> > [59] Section 33 provides remedies for breaches of ss. 31 and 32. A strata corporation or an owner may apply for an order under s. 33(3) "[i]f a council member who has an interest in a contract or transaction fails to comply with section 32…." Under s. 33(3), the court may make an order, if it "finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into…." Under s. 33(3)(b), "if the council member has not acted honestly and in good faith, [the court may] require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction…."
>
> [80] Paragraph 59 of *Dockside Brewing Co. Ltd.* is somewhat confusing when it refers to s. 33 providing remedies for s. 31. The same confusion arises in para. 51 which states: "I agree with the chambers judge that in acting as they did, the appellants failed to comply with s. 32, and failed to carry out both their statutory fiduciary duty, under s. 31(a), and their statutory duty of care, under s. 31(b)". Despite these references to s. 31, the statutory language of s. 33 refers only to s. 32. It does not link back to s. 31.
>
> [81] How ss. 31 and 32 interact with s. 33 was explained in *Wong v. AA Property Management Ltd.,* 2013 BCSC 1551. After referring to the discussion of s. 33 of the *Strata Property Act* in *Dockside Brewing Co. Ltd.*, Justice Jenkins explained:
>
> > [33] The Court of Appeal did not provide any additional rights upon owners to commence and maintain an action in this court against current or former council members other than set out in the above paragraph [para. 59 in *Dockside Brewing*].
> >
> > …
> >
> > [36] Finally in summation, an owner can sue a council member only in instances where the council member is in breach of the "conflict of interest" sections of section 32 of the Act.
> >
> > [Emphasis added.]

> [82] Justice Jenkins held the right of owners to commence actions against strata council members is limited to what is set out in s. 33 of the *Strata Property Act*. It is limited to relief flowing from breaches of s. 32. This accords with the plain wording of the *Strata Property Act.* The legislation does not allow another strata owner to sue for violations of s. 31.
>
> [83] The petitioners dispute this interpretation. They argue there is a freestanding right in s. 31 which the proposed respondents have breached. The petitioners rely on the "inherent jurisdiction of this court." I was not taken to any authority suggesting that the inherent jurisdiction of this Court expands upon a right to bring an action based on the *Strata Property Act.* Individual strata owners are not entitled to sue the strata council whenever they disagree with a decision. This Court can only grant remedies for breaches of s. 32: *Wong*. Section 31 simply informs the remedies in s. 33, and articulates the standard of conduct that applies to conflicts of interest under s. 32.
>
> [84] The petitioners do not allege the proposed respondents were acting in a conflict of interest when they were involved in renewing the initial common property [CAUA] agreement. Instead, they allege the proposed respondents breached their fiduciary duties to the Strata Corporation. Although not pleaded, the petitioners also argue the proposed respondents had a duty to protect the Strata Corporation which they violated when they signed the Release. They did not explain what direct or indirect interest the proposed respondents had in signing the Release.
>
> [85] Pursuant to the *Strata Property Act*, the only cause of action which can be brought in this Court against a strata council member is for acting in a conflict of interest. An owner can sue a council member for breach of their standard of conduct in the context of a conflict of interest: s. 33. Despite these limitations, the petitioners have not alleged a conflict of interest against the proposed respondents, and there are no facts before me to support a conflict of interest.
>
> [86] I am not prepared to add the proposed respondents as parties to the amended petition because the petitioners have not pointed to a cause of action against them. I am not satisfied it is just and convenient to add the proposed respondents as parties.
>
> [87] That said, the proposed respondents will likely be witnesses at the hearing on the merits regarding the strata council decisions to sign the initial common property [CAUA] agreement and to sign the Release. The validity of the Release will likely be a threshold issue at trial: *Isaacs* at para. 18.

[84] No leave to appeal that conclusion was sought despite, as the petitioners submit before me, the issue is of significant importance to owners of strata units, strata corporations and council members beyond those involved in the within litigation. Instead, the petitioners commenced this separate petition against the respondents alleging the 2020 Council were in a conflict of interest in respect of both the CAUA renewals and the Release of the 2019 Council.

[85] Despite not pursuing an appeal, the petitioners challenge the conclusion that the rights of owners to sue council members is limited to circumstances where s. 32 has been breached. They argue I am not bound to adhere to the reasoning in *Wong v. AA Property Management Ltd.*, 2013 BCSC 1551.

The *Coyle* Action

[86] I was referred to another proceeding involving the respondents and other owner/occupants of the Strata represented by counsel here, Mr. Morley.

[87] As part of their assertion that this proceeding is an abuse of process, the respondents and the Strata have referred me to *Coyle* where, although the petitioners are different individuals, the factual matrix is near identical.

[88] Recalling MacDonald J. disallowed the proposed amendment alleging collusion between the 2019 and 2020 Councils, the pleadings in *Coyle* mirror, in large measure, the inferences that I am asked to draw from the evidence before me.

[89] In the *Coyle* petition, the petitioners allege an agreement between Mr. Stevens and Mr. McGuire to enter into an unauthorized CAUA in July 2020 was "a personal favour to Bruce Bradburn, Arthur Roberts and Victoria Regent Hotel Ltd." and, further, that Messrs. Allard and Hauck "had an indirect personal interest because they had an agreement with the Victoria Regent Hotel Ltd. in which the Victoria Regent Hotel Ltd. would pay to them a portion of its profits".

[90] Inferentially, I am asked to draw the same conclusions here absent a specific pleading in support.

[91] Later in the *Coyle* petition, the petitioners allege the respondents became aware of the *Bradburn* litigation and realized they could end up having to pay the Strata the loss it suffered due to the 2020 CAUA, an amount that would outweigh the benefit the 2020 Council would receive from the CAUA. Because of this, the 2020 Council demanded VRH agree to a new CAUA at a higher rental rate; agreed to the

Release because VRH would contract at a higher CAUA rate if they did so; and knew they had no lawful authority to agree to the Release.

[92] The *Coyle* petitioners also allege the Strata owners were not alerted to the Release and that VRH has never released the Strata from potential legal claims pertaining to the 2020 CAUA and the Release.

[93] Those allegations are not referenced in the petition before me. Nevertheless, they underlie the submissions of counsel for the petitioners who, in effect, notes that the only proper inference is that the signatories to the CAUA would gain favour with the former 2019 Council members and personally profit from the extension of the CAUA without any revision to the rental revenue. This is despite the contrary evidence of all involved that the July 2020 renewal was never intended to stand for a three-year term without revision upward of the rent.

[94] Similar claims underlie the allegation of a conflict of interest giving rise to the Release. In short, the relief sought, including punitive damages, is mirrored here; but in *Coyle*, the alleged fraudulent and deceitful actions of the 2020 Council are set out overtly in the factual basis.

Position of the Parties

[95] The petitioners argue the only logical inference from the sequence of events leading to the execution of the Release is as follows: the 2020 Council; all of them, knowingly entered into the July 2020 CAUA renewal on behalf of Strata without the authority of the owners to do so and, upon recognizing their potential legal jeopardy for doing so, got VRH to abandon the terms of the July 2020 CAUA in favour of the November 2020 CAUA which provided more favourable terms to the Strata. This, too, without the authority of the owners.

[96] Following the execution of the November CAUA, the 2020 Council, recognizing its potential liability for their unauthorized actions; specifically, the possibility/likelihood of being drawn into the *Bradburn* proceeding as defendants, entered into the Release with the *Bradburn* respondents out of self-interest rather

than in the ‘best interest of the Strata’ or reliance on the negotiation of Strata’s counsel.

[97] In any event, the petitioners argue the Release, being outside of the authority of the 2020 Council without the necessary three-quarter support of the owners, is ‘illegal’ and therefore subject to being set aside at the instance of these petitioners in this proceeding.

[98] Alternatively, the petitioners argue the respondents should be declared prospectively responsible for any damages awarded to the Strata against the *Bradburn* defendants.

[99] Hypothetically, were the Release found to effectively insulate the *Bradburn* defendants, the trial judge would still be asked to assess damages to be paid to the Strata not by the respondents in *Bradburn,* but by these respondents.

[100] The respondents argue the petition, just as was determined by MacDonald J. in the proposed notice of civil claim, discloses no cause of action against the respondents. It is an abuse of process.

[101] The respondents say the petitioners have merely changed the allegations against them from breach of a “freestanding fiduciary duty” to “conflict of interest” based upon the same facts, which disclosed no cause of action in the *Bradburn* RFJ.

[102] Alternatively, the respondents argue the inquiry here need not proceed past consideration of whether the respondents had a “direct or indirect” interest in the two contracts critiqued by the petitioners: (1) the two (July and November 2020) CAUAs with VRH and; (2) the Release between the Strata and the defendants in *Bradburn*.

[103] On the evidence before me, although the petitioners argue I should find it unreliable, all of the respondents and VRH depose to their belief council had the necessary authority to negotiate a renewal of the CAUA and the rent would reflect market rates with the input of the real estate advisor as to market rent.

[104] The July 2020 renewal, basically a reprint of the 2017–2020 CAUA is described as a ‘placeholder’ agreement required by VRH for ‘business purposes’ and never intended to endure for the stated term.

[105] The respondents argue the two members of council whose units were part of the rental pool acknowledged the conflict created by involvement in the rental pool (based on earlier advice of Strata’s counsel to the *Bradburn* respondents) and took no part in the discussions leading to the execution of either CAUA. Further, the topic was not discussed at any council meeting at which they were present.

[106] Absent a finding of a conflict of interest, the respondents submit the petitioners are not entitled to any of the relief sought. Even, were the execution of the Release not compliant with s. 82 of the *Act*, which is not conceded, the matter of the validity of the Release is a live issue in a separate proceeding and ought to be determined in that proceeding.

[107] Further, based on *Bradburn*, the petitioners have no standing to sue individual council members for alleged breaches of s. 31 of the *Act*.

Abuse of Process

[108] The respondents seek dismissal of portions of the petition under Rule 9-5; in particular those orders sought in paras. 2, 5, 8, 11 and 14 of the petition seeking declaratory orders that each of the respondents “acted opposite his statutory and fiduciary duty to the Strata Corporation and failed to disclose direct or indirect personal interests in contracts and matters with the Victoria Regent Hotel Ltd. and Bruce Bradburn, Arthur Roberts and Mary Matchett” (emphasis added).

[109] Paragraph 14 of the petition seeks to set aside the Release but does not specify the legal basis.

[110] In the event the Release is not set aside, the petition seeks orders that the respondents are personally liable for all losses arising from an unreasonable or unfair contract (the Release).

[111] Rule 9-5 reads:

> Scandalous, frivolous or vexatious matters
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> > (a) it discloses no reasonable claim or defence, as the case may be,
> >
> > (b) it is unnecessary, scandalous, frivolous or vexatious,
> >
> > (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
> >
> > (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> Admissibility of evidence
>
> (2) No evidence is admissible on an application under subrule (1) (a).
>
> Powers of registrar
>
> (3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),
>
> > (a) the registrar may, despite any other provision of these Supreme Court Civil Rules,
> >
> > > (i) retain the document and all filed copies of it, and
> > >
> > > (ii) refer the document to the court, and
> >
> > (b) the court may, after a summary hearing, make an order under subrule (1).
>
> Reconsideration of order
>
> (4) If the court makes an order referred to in subrule (3) (b),
>
> > (a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,
> >
> > (b) the person who filed the document may, within 7 days after being notified, apply to the court, and
> >
> > (c) the court may confirm, vary or rescind the order.

[112] The respondents argue the petitioners ought not be allowed to re-litigate the same matters, which MacDonald J. determined did not disclose a cause of action in the *Bradburn* RFJ.

[113] In particular, they argue the petitioners are advancing the same facts to circumvent the determination in the *Bradburn* RFJ that the only cause of action maintainable by owners against council members is for a breach of s. 32 duties; acting in a conflict of interest.

[114] They argue MacDonald J. disposed of the conflict of interest allegation in *Bradburn* when, on facts no different than those alleged here, she found "no facts before [her] to support a conflict of interest": see *Bradburn* RFJ at paras. 84–87.

[115] By facts, she meant those alleged, as she made clear she was not making findings of facts.

[116] The application in *Bradburn* was interlocutory and, not dispositive of the factual issues that arose.

[117] Further, even if not doomed to failure because of the *Bradburn* RFJ, the respondents argue the proceeding is an abuse of process owing to the multiple proceedings involving the same factual matrix. On this point, I was referred to *Drover v. BCE Inc.*, 2013 BCSC 1341, where the Court found:

> [19] The doctrine of abuse of process can be invoked to prevent the misuse of the court's procedures in a way that brings the administration of justice into disrepute. The doctrine concentrates on the integrity of the adjudicative process: *Duzan v. Glaxosmithkline, Inc.*, 2011 SKQB 118 at para. 26.
>
> [20] The commencement by a plaintiff of more than one action against the same defendant in relation to the same dispute or matter can be an abuse of process: *Lacharity v. University of Victoria Students' Society*, 2012 BCSC 1819 at para. 24.

[118] The respondents argue the petitioners in *Coyle* are, in effect, the alter egos of the petitioners here given the duplicative albeit escalating characterization of the same facts in support of the same claimed relief.

[119] They point to *Coyle* and the separate proceedings brought before the Civil Resolution Tribunal and allege the result in *Bradburn* RFJ clearly demonstrates the petitioners are attempting to re-litigate matters raised by the petitioners before MacDonald J.

[120] Cumulatively, they argue the combined effect of the various suits involving the respondents are an abuse as described in *Drover*.

[121] They argue replacing the concept of “breach of fiduciary” duty with “conflict of interest” does not breathe life into allegations found wanting after a full hearing.

[122] In response, the petitioners argue the dismissal of an application to add a party or to amend pleadings does not prevent a claimant from remedying those deficiencies by the commencement of another action if properly formulated.

[123] They note *Coyle* has different petitioners. It is the subject of an application to strike by the Strata. Its mere existence does not inform the determination as to whether this proceeding is an abuse of process.

[124] The *Bradburn* RFJ make clear MacDonald J. made no findings of fact. An alleged conflict of interest by the respondents, or the absence thereof, was not the basis for dismissal of the application.

[125] Justice MacDonald dismissed the application based on the lack of nexus between the allegations made against the respective councils and, relying on the reasoning in *Wong*, concluded there is no stand alone right of an owner to bring suit against a member of council other than for a breach of s. 32.

[126] Following the dismissal of their application to add the respondents to the proceeding in *Bradburn*, this petition was brought.

[127] In *Owners, Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, upon consideration of whether an action could still be maintained against that party following dismissal of an application to add them, the Court stated, at para. 12:

> If it is conceded that there is no accrued limitation defence or if the court can determine that fact on the interlocutory application, then the question is really limited to one of convenience since the party can always commence a separate action in which there will be no limitation issue. The question is whether it is more convenient to have one action or two?

[128] Here, there is no sustainable limitation argument.

[129] This petition, while clearly relying on those same facts as were presented before MacDonald J. and in *Coyle* (albeit with more detailed allegations), explains the legal basis as alleged breaches by the respondents of s. 32 of the *Act.*

[130] The matter of the new allegations is not *res judicata* as suggested by the respondents given no facts were found on whether the allegations in the proposed notice of civil claim could sustain a finding of a conflict by the 2020 Council.

[131] The portion of *Bradburn* RFJ at para. 85 where MacDonald J. said, “there are no facts before me to support a conflict of interest” is, in my view, unnecessary to the conclusion reached insofar as the allegations of conflict against the Council in their involvement with the CAUA renewals and the Release.”

[132] Accordingly, I decline to strike the whole of relief sought in the paragraphs set out above.

[133] However, to the extent the petitioners allege a freestanding breach of the duties under s. 31 of the *Act*, I agree with the respondents that such is a collateral attack on an existing finding as between the petitioner and the respondent and it would be inappropriate or improper for me to, in effect, come to a different conclusion.

[134] Our Court of Appeal discussed the doctrine of collateral attack in *Sood v. Hans*, 2023 BCCA 138:

> [52] A court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. Such an order may not be attacked collaterally. A collateral attack is an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment: *C.U.P.E.* at para. 33, citing *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599.
>
> …
>
> [54] The principles concerning collateral attack were recently reviewed by this Court in *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261 [*M.K*.]. The appellant in *M.K.* had unsuccessfully sought an order for child support retroactive to her daughter’s birthdate. After the Supreme Court of Canada denied her leave application she commenced a new action challenging the constitutional validity of the federal and provincial child support regimes, claiming that under the *Charter*, child support awards should always be

> retroactive to a child's birthdate. The action was dismissed as a collateral attack on the earlier order.
>
> [55] In explaining that the new action was a collateral attack on the previous order, Justice Dickson pointed out that to determine whether a claim constitutes a collateral attack, the court should ask whether the claim, or any part of it, amounts in effect to an appeal of an existing order: *M.K.* at para. 33; *Krist v. British Columbia*, 2017 BCCA 78 at para. 47. A claim will amount "in effect" to an appeal of an existing order if it seeks to invalidate, or otherwise challenge the legal force of, the order: *M.K.* at para. 33; *Lamb v. Canada (Attorney General)*, 2018 BCCA 266 at para. 94.

[135] The finality principle is central to the proper functioning of the courts. Accordingly, "a litigant may not attack an order pronounced by a court of competent jurisdiction except as provided by law for that express purpose": *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261 at para. 1.

[136] While no findings of fact were made in the *Bradburn* RFJ, the legal issue, whether the petitioners have rights under s. 31 to sue council members for a breach of fiduciary duty or failure to fulfill their obligations to Strata as set out in s. 31(a) and (b) were, as between these parties, decided.

[137] The petitioners did not appeal or seek leave to appeal the finding despite their submission before me that the issue is of broad interest to those who are members of or council members of a Strata.

[138] In my view, they cannot re-argue that matter in a separate proceeding particularly where the petitioners successfully argued before MacDonald J. that "the validity of the release will likely be a threshold issue at trial".

[139] The petitioners now seek to set the Release aside based on a summary application in a separate proceeding.

[140] While MacDonald J. noted in the *Bradburn* RFJ there is no requirement that the validity of the Release only be determined at the conclusion of the trial, as it can be determined prior to trial, it is disingenuous, in my view, to submit it can be determined summarily in another proceeding based upon the same legal basis as was determined by MacDonald J. as failing to disclose a cause of action.

[141] Hence, in my view, the principle of collateral attack is engaged insofar as the petitioners seek to rely on the legal basis found to be unavailable to them in a parallel proceeding.

[142] Exceptions to the application of collateral attack may be made where the interests underlying the doctrine "would not be served by adhering to [it] or where the fair administration of justice would not be harmed": *M.K.* at para. 38. Here, I find that no exceptions apply. The only appropriate avenue to challenge MacDonald J.'s decision is by way of appeal.

[143] Accordingly, I allow the respondent's application to the extent the words "acted opposite his statutory and fiduciary duty to the Strata Corporation" will be struck from each of paras. 2, 5, 8, and 11 of the petition.

[144] The issue of whether there was a s. 32 breach vis a vis the 2020 Council and the Release remains a live issue in this proceeding.

[145] Paragraph 14 of the amended petition seeks to set aside the Release. It does not, on its face, engage s. 31 and, in the legal basis, relies on alleged breaches of s. 32 by council members and a want of authority on their part to bind the Strata for failure to obtain a three-quarter majority of the owners' approval as required by s. 82 of the *Act*.

[146] I shall deal with each of those issues further in these reasons. I decline to strike para. 14.

Is this Petition Suitable for Summary Resolution?

[147] The petitioners, relying on *Cepuran v. Carlton*, 2022 BCCA 76, argue the presumptive resolution of matters commenced by petition, is by way of summary process. They, like the Strata, oppose further delay and argue the record before me provides a sufficient evidentiary basis to make the necessary findings of fact to dispose of the proceeding.

[148] In *Cepuran*, a five-justice division addressed the test for referring a petition to trial. It held:

> [145] The proposition that where a petition proceeding gives rise to a triable issue it must be referred to trial is an adoption of the rule for summary judgment. The summary judgment rule was an early rule of procedure "designed to provide machinery whereby the defendant can, at an early stage, get rid of an action in a summary way by showing that it has no merit": *Progressive Const. Ltd. v. Newton* (1980), 25 B.C.L.R. 330 at 333, 1980 CanLII 493 (S.C.).
>
> …
>
> [147] There has been considerable reform in civil litigation since the days when it was thought that the only way to allow litigants their day in court, when there were contested issues, was to have a full trial with all the procedural bells and whistles available in an action.
>
> …
>
> [150] The Supreme Court of Canada has noted that streamlined procedures for the resolution of civil disputes can increase access to justice and be a more proportionate manner of determining a dispute than a full trial, in some cases: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1, 4, 5, 21, 23–25, 28; *Hudema v. Moore*, 2021 BCCA 482 at paras. 49–50.

[149] The Court continued as follows:

> [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the *Rules* contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29–30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. <u>The mere fact that there is a triable issue is no longer a good reason.</u>
>
> [159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.
>
> [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some <u>limited discovery of documents or cross-examination</u> on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.
>
> [Emphasis added.]

[150] Petitioner's counsel also points to *Mah Estate v. Lawrence*, 2023 BCSC 411 at para. 56, where Justice Gibb-Carsley stated, "a matter will be suitable for summary trial if the court is able to find the facts necessary to decide the issues before it and it is not otherwise unjust".

[151] The petitioners argue the necessary factual findings can be made based on conflicting evidence within the respondents' own affidavit material and the absence of evidence, controlled by the respondents, that ought to have been provided which support the petitioners' assertion that the respondents' denials of conflict are "unreliable".

[152] No pre-trial procedures were sought by either the petitioners or respondents in advance of this hearing. No use of hybrid procedures as described in *Cepuran* were sought before me.

[153] A summary trial will almost invariably involve the resolution of some credibility issues, but the existence of conflicts in evidence that cannot easily be resolved in affidavits does not necessarily entitle a party to a full trial. The crucial question is whether they "can achieve a just and fair result in the context of a summary trial": *Gill v. Gill*, 2022 BCCA 264 at para. 54.

[154] Proportionality is a consideration in determining whether it is appropriate to use hybrid procedures within a petition proceeding to assist in determining the issues.

[155] Here, the petitioners abandoned the relief relating to the 2020 CAUA, likely the most significant financial issue between these parties.

[156] While disgorgement of profits from any of the impugned contracts is sought by the petitioners, none is alleged, let alone proved, as against these respondents. Other than punitive damages claimed by the petitioners in each proceeding, they seek declaratory relief and recovery of the Strata's financial loss in the event (1) the liability of the 2019 Council is established in *Bradburn* but the Release precludes recovery of damages; or (2) the Release is not invalidated in this proceeding but I

accede to the petitioners' claim that these respondents indemnify the Strata for losses found payable by the 2019 Council but unrecoverable because of the Release.

[157] For the latter relief, indemnity for losses sustained by Strata as a result of the Release, it is incumbent on the petitioners to demonstrate the respondents did not act honestly and in good faith: *Act*, s. 33(3)(b).

[158] The Strata opposes delay in any form noting the potential liability to indemnify both councils for their actual legal expenses if breaches are not proven.

[159] There is also the consideration of the impact of any delay on the scheduled trial in *Blackburn*.

[160] Cumulatively, those factors militate in proceeding in a summary fashion.

[161] With that said, certain factual findings are, in my view, unavailable given discrepancies in both the affidavit and documentary material; for example, the authority conferred upon the 2020 Council at the 2019 SGM.

[162] That, of course, does not lessen the burden on the petitioners to prove the alleged conflict(s) of the 2020 Council that give rise to the remedies sought.

The Legislative Regime

[163] The petition alleges the respondents breached both ss. 31 and 32 of the *Act* and acted "opposite their statutory and fiduciary duty to the Strata and failed to disclose direct or indirect personal interests in contracts and matters with the VRH and the 2019 council" based upon (1) the renewal of the CAUA without the proper authority to do so and (2) them entering into the Release on behalf of the Strata in favour of the 2019 Council.

[164] Both actions were, according to the petitioners, unauthorized given the outcome of the October 2019 SGM which, they say, placed limits on council's authority to negotiate the CAUA renewal without a three-quarter vote of Strata owners in favour.

[165] The execution of the Release was unauthorized because s. 82 of the *Act* prescribes monetary limits on the council in dealing with the Strata's property.

[166] The relevant sections of the *Act* read as follows:

> Council member's standard of care
>
> 31 In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.
>
> Disclosure of conflict of interest
>
> 32 A council member who has a direct or indirect interest in
>
> (a) a contract or transaction with the strata corporation, or
>
> (b) a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member,
>
> must
>
> (c) disclose fully and promptly to the council the nature and extent of the interest,
>
> (d) abstain from voting on the contract, transaction or matter, and
>
> (e) leave the council meeting
>
> (i) while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and
>
> (ii) while the council votes on the contract, transaction or matter.
>
> Accountability
>
> 33 (1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 vote at an annual or special general meeting.
>
> (2) For the purposes of the 3/4 vote referred to in subsection (1), a person who has an interest in the contract or transaction is not an eligible voter.
>
> (3) If, on application under subsection (1), the court finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into, the court may do one or more of the following:

> (a) set aside the contract or transaction if no significant injustice will be caused to third parties;
>
> (b) if the council member has not acted honestly and in good faith, require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;
>
> (c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

[167] The purpose of s. 33 is to disgorge profits from a council member who personally profited from self-dealing or conflict of interest or to recover pecuniary loss suffered by the strata corporation as a result of the council member breaching s. 32. The relief is discretionary and specific. Section 33 is unique because it provides an owner with a cause of action against a council member personally for actions or omissions the council member undertook as a council member if the council member contravened s. 32. Section 33 is one of a handful of sections of the *Act* that the Civil Resolution Tribunal does not have jurisdiction to decide.

[168] To engage s. 33(3)(b), as is sought here, the petitioners need demonstrate not only a conflict but, as well, that the respondents were not acting honestly and in good faith.

[169] Section 82 of the *Act* reads:

> Acquisition and disposal of personal property by strata corporation
>
> 82 (1) The strata corporation may acquire personal property
>
> (a) for the use of the strata corporation, and
>
> (b) for the purposes of making an alteration referred to in Division 6.
>
> (2) The strata corporation may sell, lease, mortgage or otherwise dispose of personal property.
>
> (3) The strata corporation must obtain prior approval by a resolution passed at an annual or special general meeting of an acquisition or disposal of personal property if the personal property has a market value of more than
>
> (a) an amount set out in the bylaws, or
>
> (b) $1 000, if the bylaws are silent as to the amount.

[170] Here, the Strata's bylaws are silent as to the amount.

The Legal Framework

[171] *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 [*Dockside*], leave to appeal to SCC ref'd, 32060 (27 September 2007), is the leading authority on the application of ss. 31–33 of the *Act*.

[172] In *Dockside,* the claim was against strata council members who "approved expenditures for legal expenses to support litigation in circumstances where the statutorily required approvals for the litigation could not be obtained": at para. 1. The chambers judge found that the expenditures were "unreasonable and unfair" to the strata corporation because "they were entered into by circumventing the requirements for resolutions of a three-quarters majority": at para. 60. The strata council failed to disclose their conflict of interest and did not act honestly and in good faith: at para. 2.

[173] The following summary of facts appears in *Dockside*:

> [13] The chambers judge's decision reflected his analysis of these statutory provisions. He found (at para. 69) that the failure of the appellants to disclose their conflict of interest in accordance with s. 32 did not meet the standard of s. 31. The actions of the appellants could not be characterized as acting "honestly and in good faith", and did not meet the standard of "the care, diligence and skill of a reasonably prudent person in comparable circumstances".
>
> [14] He found further (at para. 73) that s. 171(2) indicates the intention of the legislature that only litigation approved by three-quarters of the owners is in the best interests of the strata corporation. He reasoned that by attempting to circumvent s. 171(2), the appellants acted for their own gain (at paras. 75-76), which failed to meet the standard of care of "a reasonably prudent person in comparable circumstances", as required by s. 31. He found the contracts to pay legal expenses were "unreasonable and unfair to the strata corporation", satisfying s. 33(3) of the ***Act***. His order that the appellants compensate the strata corporation for the expenditures followed, under s. 33(3)(b).
>
> [15] The chambers judge rejected the appellants' defence that because they had acted on the advice of their lawyers and a property manager, they met the statutory fiduciary duty and duty of care. He noted (at para. 70) that the appellants were
>
> > …warned time and again by their opponents that they were acting in a conflict of interest and contrary to the provisions of the *SPA*, yet they

> never heeded those warnings nor did they seek independent legal advice as to their potential liability as Strata Council members.

[174] In the chambers decision (*Dockside Brewing Co. Ltd. v. Owners, Strata Plan LMS 3837*, 2005 BCSC 1209) the chambers judge noted:

> [64] By voting on the numerous resolutions before the Strata Council, on and after May 14, 2002, to give effect to their strategy to engage the Strata Corporation in litigation over validity of the leases, without disclosing their numerous and obvious conflicts of interest in such a "transaction", the Respondent Strata Council Members acted contrary to s. 32 of the *SPA*. Had they complied with s. 32 and s. 33 of the *SPA*, the Strata Council resolutions could not have passed and the Strata Corporation would have been spared nearly $200,000 in fruitless expenditure on legal fees.
>
> [Emphasis added.]

[175] Regarding the suggestion council members had obtained the opinion of legal counsel as to the propriety of their actions, and as such were acting honestly and in good faith, the chambers judge said:

> [70] The Respondent Strata Council Members were not counselled against the strategy they pursued by the lawyers they engaged and were encouraged to pursue it by advice they received. However, the Respondent Strata Council Members were warned time and again by their opponents that they were acting in a conflict of interest and contrary to the provisions of the ***SPA***, yet they never heeded those warnings nor did they seek independent legal advice as to their potential liability as Strata Council members.
>
> [71] The law firm which recommended the LSOG strategy was found in conflict of interest by the court in June 2002, when retained to act for the Strata Corporation. Even then the Respondent Strata Council Members persisted in confusing their own interests as members of the LSOG with those of the Strata Corporation. The LSOG had obtained the initial opinion that the leases were susceptible to challenge from the firm which also provided the LSOG with advice that Strata Corporation funds could be used to pay for litigation challenging the leases without the approval of 3/4 of the owners, by budgeting legal fees as an operating expenditure and having the LSOG's surrogate Betty Ang sue the Strata Corporation.
>
> [72] Even after the LSOG strategy of supporting the Betty Ang Petition was dashed when Lowry J. ruled that Mr. Verhoeven was unauthorized to represent the Strata Corporation to support the Betty Ang Petition, the Respondent Strata Council Members persisted in their strategy by purporting to retain, instruct and pay counsel to initiate, on behalf of the Strata Corporation, the very action they knew was not supported by a resolution of 3/4 of the owners.

[176] In the result, the strata council was ordered to pay $190,398.99 to the strata corporation (the legal expenses) and special costs of $150,000.

[177] The petitioners say the facts here are analogous: the respondents entered into CAUA renewals knowing they were without lawful authority to do so and in conflict with their duty to the Strata because two of them had a financial interest in the outcome.

[178] The respondent, Mr. McGuire, is said to have executed the July 2020 CAUA as a 'personal favour' to Mr. Bradburn.

[179] Then, when their potential entanglement as defendants in the *Bradburn* action occurred to them, the 2020 Council, out of self-interest, executed the Release in favour of the 2019 Council.

[180] The respondents distinguish *Dockside* on its facts arguing that here I should find, unlike in *Dockside*, those council members who were part of the rental pool took no part in discussions leading to the renewal of the CAUAs. Further, the two council members who took part in the renewal argue they acted honestly and in good faith, believing they had the authority to bind the Strata to a renewal of the CAUA for three years based upon current rental rates for the leased area.

[181] The latter belief arises from the Minutes of the SGM and the legal opinion that followed.

[182] The facts, they say, are entirely different from those found in *Dockside*.

[183] As to the Release, the respondents maintain they were not in conflict as they were not, as alleged, seeking to insulate themselves from litigation from wrongful acts but acting on the advice of counsel and, in good faith, believed the Release was in the Strata's best interest.

[184] As to their unlawful actions, either the execution of the CAUA without authority from the 2019 SGM, or the Release of the 2019 Council without the necessary three-quarter vote required by s. 82, the respondents say the petitioners

are foreclosed from advancing claims based upon malfeasance, misfeasance or breach of fiduciary duty as that matter has previously been decided as between them in the *Bradburn* RFJ.

Discussion

[185] The petitioners acknowledge in their submission that "[t]he critical aspect of this Petition is whether the 2020 Strata Council, when they resolved to sign the Release, had a direct or indirect interest in the "dismissal" of the 2019 Action".

[186] With respect to that assertion, that is the respondents were in breach of their s. 32 obligations respecting both the CAUA renewals and the Release, the petitioners concede the success of the claims requires they prove, on a balance of probabilities, the following:

> There was a contract or transaction entered into by the Strata Corporation (the Release);
>
> That the contract or transaction was unreasonable or unfair to the Strata Corporation (unlawful);
>
> That one or more members of council had an interest in the contract or transaction (the 2020 Council wanted to prevent themselves from becoming parties to the 2019 Action or any personal liability to the Strata Corporation);
>
> That the members of council with an interest in the contract did not disclose that interest, participated in the discussion of that contract or transaction, and voted on the contract or transaction (all members of the 2020 Strata Council voted in favour of entering into the Release);
>
> Setting aside the Release would not cause a significant injustice to a third party (the third party is the 2019 Strata Council and there is no significant injustice because they knew the 2020 Strata Council did not have legal authority to bind the Strata Corporation to the Release).

[187] Additionally, if they are to succeed in having the 2020 Council indemnify the Strata for losses arising from the unreasonable and unfair contract, the Release, they need show the respondents did not act honestly and in good faith when they signed the Release.

[188] There is no doubt there was a contract; the Release. The stated consideration was $10,000 paid by the *Bradburn* respondents to the Strata.

[189] The petitioners, relying on *Dockside*, argue that the Release is manifestly unfair and unreasonable because the 2020 Council caused the Strata to enter into it without the proper authorization under s. 82 of the *Act*.

[190] I am uncertain that conclusion follows as a matter of course given the different facts in *Dockside*. However, because I conclude the petitioners have not satisfied their burden in respect of a breach of s. 32, a prerequisite to the inquiry as to the reasonableness or fairness of the Release, I need not decide whether an unauthorized act of council, as opposed to an act resulting from a breach of s. 32, is either unreasonable or unfair as a matter of law. In saying that, I am not predetermining the issue of whether the validity of the Release is captured by the provisions of s. 82.

[191] Even were it, in respect of the Release, I adopt the remarks of MacDonald J. at paras. 78–85 of the *Bradburn* RFJ. She concluded, and I agree, that the rights of an owner to sue council members is confined to circumstances engaging a breach of s. 32. There is no stand alone right of an owner to sue a council member for breaches of s. 31. Failure to observe the requirements of s. 82 of the *Act* would be such a breach. Thus, while actionable, it is not actionable at the instance of an owner.

[192] The petitioners, in their submissions, concede proof of a conflict of interest is an essential ingredient of the remedies they seek. Without evidence of a conflict, the petition fails.

[193] A conflict of interest connotes an actual or perceived motivation for personal benefit. The respondents argue the petitioners have not demonstrated any form of personal benefit, direct or indirect, to a strata council member to constitute a conflict of interest in any of the impugned contracts; the renewals or the Release.

[194] The underlying factual basis in support of the alleged conflicts is set out in paras. 37–41 of the amended petition filed at the commencement of the hearing before me. Those read:

37. On July 28, 2020, the respondents Stevens, Hauck, Allard and McGuire acting as the Strata Council call a council meeting in which they confirm that the VRH Lease was signed by Council "on behalf of the Owners".
38. At the time the VRH Lease was signed by the council, the respondents Allard and Hauck had an interest in that matter because as participants in the Rental Pool Agreement they have a direct interest in the VRH Lease being less than fair market value.
39. No members of council disclosed any conflict of interest in this matter, no members of counsel left the council meeting while the matter was discussed and no members of council abstained from voting on the matter.
40. No later than November 1, 2020, it was clear that a central issue in the 2019 Action was whether the Strata Corporation had approval from the owners to enter into a lease agreement with VRH Ltd.
    a. The position of the Petitioners was that by a unanimous vote at the October 26, 2019 Special General Meeting the owners approved the creation of a committee to study the parameters of a potential lease renewal and for that committee to provide its recommendations at a subsequent general meeting;
    b. The position of the Petitioners regarding the Nov 2019 Opinion was that it could only be based on legal counsel being provided with incomplete, inaccurate or misleading information for the purpose of receiving a legal opinion that the matter had not been defeated;
    c. The position of the 2019 Respondents was that they did not renew the VRH Lease because they resigned from council and there was "no evidence to suggest that the current Strata Council members [the Respondents Roger McGuire, James Allard, Mark Stevens and Gerald Hauck] could not or did not seek legal advice in respect of executing the [lease] renewal before doing so"; and
    d. The position of the respondents Stevens, Hauck, Allard and McGuire acting as the Strata Council was that the "owners unanimously approved the renewal of the [lease].
41. The respondents Stevens, Hauck, Allard and McGuire had a direct interest in resolving the 2019 Action because the actions they took to sign the VRH Lease was directly connected to one of the central issues in the 2019 Action and it was reasonable to expect that they could be named in their personal capacities as parties to the action.

[195] In submissions, the petitioners theorize the conflict regarding the Release began with the signing of the July 2020 CAUA renewal. This, in turn, led to a series of cascading events resulting in the November renewal of the CAUA with increased rental revenue followed by the respondents' realization that their actions respecting the lease would entangle them in the *Bradburn* litigation so, in an effort to insulate

themselves from legal liability, caused the Strata to release the respondents in *Bradburn* from any monetary claims.

[196] I am asked to find the Release was occasioned, not as described by the respondents, as a result of an initial proposal of settlement by the *Bradburn* respondents and negotiated through their counsel and Strata's counsel, but rather a step taken by the respondents out of self-interest to protect them from entanglement in the outstanding litigation brought by the same petitioners as in *Bradburn.*

[197] Respectfully, that conclusion requires me to overlook the well-founded reasoning in the *Bradburn* RFJ that there is no nexus between the misdeeds alleged of the 2019 Council and those alleged here against the 2020 Council. While acknowledging MacDonald J. made no factual findings, her conclusions are well founded on the evidence before me.

[198] The pleadings in *Bradburn*, filed on behalf of the Strata, make clear no renewals of the CAUA were signed by the 2019 Council prior to their resignation. The facts before me support that conclusion.

[199] Neither Messrs. Allard or Hauck signed the renewals, as alleged in the petition. They state they took no part in the renewals. Both acknowledge their status as renters put them in a conflict vis a vis the renewal. The conflict was known to all council members; all of whom depose that neither Mr. Allard nor Mr. Hauck participated in the renewal process.

[200] Despite allegations of monetary gain on behalf of the respondents in respect of the contracts, there is not a scintilla of evidence that any of the four respondents received a monetary benefit from either the renewal of the CAUA or the Release.

[201] There is no language in the Release which affords any of these respondents' protection from suits brought against them for (1) breach of their s. 31 obligations (a lawsuit by Strata) or (2) for breaches of s. 32 (actionable by either Strata or owners).

[202] The respondents deny any self-interest in the matter of the Release granted by Strata in the *Bradburn* litigation. They say they acted on legal advice from the Strata's counsel with respect to the Release and that the settlement discussions were not instigated by them nor motivated by self-interest.

[203] While the actual legal advice received is not in evidence, the matter of privilege arose, and was adjourned in *Bradburn.* One of the petitioners in *Coyle* is presently seeking production of documentation surrounding the advice given in the Civil Resolution Tribunal.

[204] The respondents' unchallenged assertion before me is that the privilege is that of the Strata; not theirs. There is a pending application regarding privilege in *Bradburn* adjourned by MacDonald J. to, presumably, the trial in *Bradburn*.

[205] While the petitioners note that reliance on legal advice provided no defence in *Dockside*, I agree with the respondents that the facts here are distinguishable from those found by the chambers judge in *Dockside*.

[206] In *Dockside*, the conflicts of council members were numerous and blatant. The council had been warned on numerous occasions of such. The legal advice the council in *Dockside* received was from counsel who were determined to be in conflict themselves as between the strata and council members.

[207] While the petitioners argue the 2019 SGM did not provide the 2020 Council with authority to enter renewals of the CAUA, there is considerable evidence to the contrary; the Minutes from the meeting, signed by a majority of members, authorize the 2020 Council to act but not the formation of the committee to establish fair market rents. A legal opinion was obtained from Strata's counsel that the authority was granted.

[208] While the petitioners' challenge the accuracy of the information given to counsel and, as a result, the legal opinion, that is not a matter I can determine on the evidence before me.

[209] Both the property manager and VRH believed the 2020 Council had authority.

[210] Even were the matter of authority retrospectively determined and found not to exist based on evidence from Tony Gioventu, who chaired the 2019 SGM, it is reasonable to conclude on the evidence that based on the information available to the 2020 Council at the time of the renewal, the respondents honestly believed they had the authority to act as they did.

[211] The same reasoning applies to the Release. The respondents all depose that they believed the settlement of the *Bradburn* action was in the best interests of the Strata and they acted on the advice of Strata's counsel. On the evidence before me, they neither initiated nor engaged in the negotiation of the Release.

[212] The quantum leap the petitioners seek regarding the execution of the Release hinges on the unproven supposition that the respondents, all of them, were in conflict following their wrongful renewal of the CAUAs, because "no later than November 1, 2020, it was clear that a central issue in the 2019 Action was whether the Strata Corporation had approval from the owners to enter into a lease agreement with VRH Ltd."

[213] With respect, the latter assertion overstates the weight afforded to the issue of the CAUA renewal in the *Bradburn* pleadings extant as at November 2020.

[214] Those pleadings seek 33 separate forms of relief against the respondents individually or collectively. Two of the enumerated claims, paras. 24 and 25, relate to the CAUA with VRH. The remainder of the relief and the factual underpinnings in support deal with distinct matters.

[215] As the initial alleged conflict, it is unclear from the pleadings what interest, or more particularly what conflict arose, in respect of Messrs. McGuire and Stevens' dealings with VRH. Each deposed that they alone, believing they had the authority to do so, were involved in the renewals of the CAUAs. They say neither Messrs. Allard nor Hauck was involved. They say the renewals were not discussed at Council meetings.

[216] The petitioners, in their written submission assert:

> The only reasonable explanation for why Mr. Stevens and Mr. McGuire signed the lease "in or about July 2020" was as a personal favour to whomever it was that asked Mr. Stevens and Mr. McGuire to sign the lease. This is a direct or indirect interest in the lease.

[217] That assertion ought to have been pleaded. Even were it, on the evidence, it is unproven.

[218] I agree with the respondents that the thrust of the petitioners' submissions are similar to the pleadings in *Coyle*. They seek to have unwarranted inferences made on suggestions of improper motives not articulated in their pleadings. That the respondents did not address them in their evidence is understandable given new 'facts' not raised in the pleadings are suggested as being proven. In *Sahyoun v. Ho*, 2013 BCSC 1143, Justice Voith said the following regarding pleadings:

> [16] The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice,* 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1:
>
> > If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such...
>
> [17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."
>
> [18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their

> resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.
>
> [19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.

[219] Unlike in *Coyle*, no facts are asserted here giving rise to a perceived conflict of interest between Messrs. McGuire and Stevens in their dealings with VRH.

[220] The petitioners' submission ignores, in my view, the evidence of Mr. Hauck and Mr. Allard.

[221] I agree with the submission of the respondents that the allegations, as pleaded, are distinct from those advanced in argument. Counsel's argument more closely resembles the allegations in *Coyle* than the pleadings here as amended in August of 2023.

[222] Underlying the petitioners' assertion of a "sweetheart deal" between the 2020 Council and VRH in the negotiation of the renewal of the CAUA is the unspoken allegation (in this petition) of collusion and dishonesty; a necessary finding were I to order the respondents indemnify Strata for losses occasioned by the 2019 Council's successful reliance on the Release.

[223] That amendment, denied by MacDonald J., reappears in the *Coyle* pleadings and underlies a series of inferences I am asked to draw here that the respondents knowingly exceeded their authority in negotiating renewals of the CAUA and then 'caused' the Release to be executed to prevent their entanglement in the *Bradburn* litigation.

[224] The petitioners characterize the evidence of the respondents as unreliable; which, in my view, is a thinly veiled allegation of false and/or misleading evidence without cross-examination or reference to the existence of other evidence supporting the respondents' contention.

[225] The petitioners rely upon the evidence of the respondents, or initial lack of evidence, concerning the July 2020 renewal and its subsequent description in affidavits filed later as a placeholder agreement as signs of deceit.

[226] The petitioners argue the July 2020 renewal, despite abandonment of relief relating to the CAUA in November 2020 is a critical aspect of the petition. The respondents failed to note this in their response to petition and referred only to the November 2020 renewal.

[227] The petitioners note that the "placeholder agreement" was not described as such in the Minutes that followed execution of the July renewal. The Minutes read, in part:

> Common Area Use Agreement: Agreement has been signed by both the Hotel Board Representatives and by Council on behalf of the Owners. The next step will involve reaching out to the Hotel Board and begin negations (sic) regarding services/charges. Ongoing.

[228] Initially, the respondents failed to refer to the July 2020 renewal in the responsive material. In their initial response to petition, the respondents noted only the November renewal. This omission, they later say, was related to the perception the allegations related to the November 2020 CAUA; the contract the petitioners then sought to set aside.

[229] Mr. McGuire, following the July 2020 Minutes and renewal being referenced in an affidavit from Jim Tennant, recalled the signing of the CAUA in July 2020.

[230] Based primarily on that omission and the statement of all respondents that they did not discuss either renewal, the petitioners say their evidence, *in toto*, is "unreliable and not credible".

[231] In answer to the suggestion the July renewal was a placeholder agreement sought by VRH, the petitioners assert:

> … any business reason the VRH Ltd. would have for a lease at a rental rate of $10,788.00 per year for a term from February 1, 2020 to January 31, 2023, without any right [of] termination by the landlord (Strata Corporation) would be for the purpose of making representations to a third party. Consequently, if

> Mr. Stevens did believe that was the purpose of the lease, then he was complicit in any subsequent misrepresentation.

[232] That is baseless supposition. I have the advantage of VRH's description of the July 2020 renewal which corresponds with the respondents' narrative as to the intended effect of the July 2020 renewal. The subsequent renewal by VRH upon less advantageous terms (a substantial rent increase) makes no commercial sense for VRH unless the 2020 renewal was, as argued by the respondents, meant to stand in place until the terms (increased rental) were renegotiated.

[233] The Minutes, while hardly a fulsome description of events, conform with the respondents' evidence the July renewal was intended by all of the signatories to endure only until new lease rates were established.

[234] The renewal with the increased rent followed closely the release of D.R. Coell and Associates' second report as to rental values.

[235] The petitioners advance no reasonable explanation for VRH's abandonment of the July 2020 CAUA that plausibly contradicts the assertion of both the respondents and VRH that the July document was seen by all as a placeholder agreement (there being no agreement in place following the expiry of the 2017–2020 CAUA).

[236] In the pleadings in *Coyle*, the execution of the November CAUA by VRH is "explained" in paras. 28–30.

[237] In summary, the *Coyle* pleadings revert to the conspiracy theory sought to be included in the amended pleadings in *Bradburn*. That is, in summary, the 2020 Council came to realize it might be liable for the shortfall in rent between the July 2020 renewal and market rates and that amount was "more than they would receive from Victoria Regent Hotel Ltd. under the agreement to receive a portion of the Victoria Regent Hotel Ltd.'s profits". Accordingly, they "demanded that Victoria Regent Hotel Ltd. enter a new [CAUA] at a higher rental rate". VRH's *quid quo pro* to accede to the 'demand' are fulsomely described in para. 30 of the *Coyle* petition—in

short, a release by Strata of the 2019 Council for the allegations in *Bradburn* as well as any undiscovered acts.

[238] While fully appreciating the petitioners in *Coyle* are different than here, the submissions here align more closely with the pleadings in *Coyle* than those here.

[239] The November 2020 CAUA has since been extended by the owners at a properly constituted meeting. The petitioners have abandoned the claim to set the contract aside.

[240] The petition seeks to have each of the respondents “pay to the Strata Corporation any profit he made because of an unreasonable or unfair contract or transaction entered into by the Strata Corporation because of the actions he took as a member of the Strata Council in which he had a direct or indirect personal interest”. No evidence was led wherein I could conclude a profit was made by any of the four respondents.

[241] Importantly, I find the petitioners have failed to establish the respondents, either collectively acting as the 2020 Council or individually, acted in conflict with their duties to the Strata.

[242] On the evidence before me, I find the renewal of the CAUA in July 2020 was intended to endure only while negotiations carried on regarding the appropriate rental.

[243] The two council members involved in the renewal, Messrs. McGuire and Stevens had no conflict in their roles as owner/occupiers in negotiating the terms with VRH.

[244] Reference to the signing of a contract at a subsequent meeting of the Strata council does not, of itself, lead to a conclusion the contract was the result of discussions at or a vote upon the contract at a Strata council meeting involving Messrs. Haulk and Allard; each of whom denied participation.

[245] Based on the Minutes of the 2019 SGM, the opinion of counsel and the views of the property manager, Messrs. McGuire and Stevens could reasonably conclude they had authority to bind the Strata to a further three-year renewal once appropriate information regarding rental values became available.

[246] The proffered explanation as to why the 2020 Council was in conflict in binding the Strata to the Release does not stand up to scrutiny.

[247] As pleaded, the underlying conflict was the 2020 Council's fear of becoming involved as respondents in the *Bradburn* action. I conclude, just as MacDonald J. did in the *Bradburn* RFJ, there is no nexus between the allegations in the separate petitions. They are distinct in time and in the alleged misdeeds of each separate council.

[248] More importantly, the Release does not provide any protection from actions taken by the Strata and/or an owner against these respondents.

[249] The unchallenged evidence of the respondents is that Strata's counsel, not counsel engaged by the respondents, were approached by counsel for *Bradburn*, then negotiated the Release and recommended Council approve it.

[250] The respondents' evidence concerning counsel's recommendation stands unchallenged. The petitioners have not in this proceeding sought to set aside the privilege belonging to Strata.

[251] As earlier noted, Strata's then legal counsel are not suggested to be in conflict as were counsel in *Dockside.*

[252] In summary, the reasoning suggested by the petitioners giving rise to the conflict of all the respondents regarding the Release is based on surmise and speculation as to their motivation; not a proven motive placing their self-interest in conflict with that of Strata. Further, neither dishonesty or a want of good faith by any of the respondents has been proven.

Should the Release be Set Aside Absent a Conflict of Interest?

[253] Section 30 of the *Act* provides:

> Contracts not invalidated
>
> 30 (1) The validity of a contract made or a certificate issued by the strata corporation is not affected by
>
> (a) a defect in the appointment or election of the council member or officer who makes the contract or signs the certificate on behalf of the strata corporation, or
>
> (b) a limitation on the authority of the council member or officer to act on behalf of the strata corporation.
>
> (2) A person who knew or ought reasonably to have known of the defect or limitation at the time the person made a contract with or received a certificate from the strata corporation may not rely on subsection (1) to bind the strata corporation with respect to the contract or certificate.

[254] The petitioners argue (1) because the respondents lacked the necessary authority under s. 82 to dispose of the Strata's rights under the *Bradburn* action (where the Strata is a respondent), and alleges the 2019 Council knew or ought to have known of the want of authority, s. 30(2) makes reliance on the Release by the 2019 Council in the *Bradburn* action improper thus warranting the relief requested in para. 14 of the amended petition; that is, "[a]n order setting aside the 'release and settlement agreement' that was signed on or around January 29, 2021 regarding British Columbia Supreme Court matter 19 4145, Victoria Registry, between the Strata Corporation and Bruce Bradburn, Arthur Roberts or Mary Matchett".

[255] With respect, that is a central issue in the upcoming trial in March.

[256] In my view, in would be inappropriate in this proceeding to make orders based on determinations that will be made following a full trial both as to factual and legal issues which inform the validity of the Release.

[257] I therefore decline to make any order respecting the Release having concluded these respondents, whether acting with authority or not, had no conflict of interest warranting interference with it under the provisions of s. 33 of the *Act.*

[258] Further, given my finding that the conclusion in *Bradburn* is both correct and, in any event, prevents these petitioners from arguing otherwise, the proper forum for determining the validity of the Release is the upcoming trial in *Bradburn.*

Conclusion

[259] In the result, the petition is dismissed.

[260] If the parties are unable to agree on the costs the matter can be reset before me upon the availability of all counsel and myself.

"Harvey J."