IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wight v. Strata Plan VR 123,* 2024 BCSC 1952

Date: 20241024
Docket: S238702
Registry: Vancouver

Between:

William Gibson Wight and Elizabeth Ann Frey

Petitioners

And

Jason Shewchuk and the Owners of Strata Plan VR 123

Respondents

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Petitioners:	C.G. Haddock F. Fan
Counsel for the Respondent, Owners of Strata VR 123:	T. Timberg
Place and Dates of Hearing:	Vancouver, B.C. August 29 and September 18, 2024
Place and Date of Judgment:	Vancouver, B.C. October 24, 2024

Table of Contents

Introduction

[1] The petitioners William Gibson and Elizabeth Frey jointly own a residential strata unit in a strata property on Maple Street in Vancouver (the "Strata Property"). In this application the petitioners seek various orders compelling the respondent strata corporation, the Owners, Strata Plan VR 123 (the "Strata Corporation") to complete repair work on the Strata Property including authorizing the issuance of a special levy payable by owners, of up to $2.1 million, to pay for this work.

[2] The repair work at issue includes the complete replacement of the parkade membrane which acts as a waterproofing layer bonded to the top of the Strata Property's parkade roof slab. The roof slab and membrane extend past the edge of the Strata Property building and are covered by landscaping, gardens and patios. As a result, to do the required work landscaping and other materials will have to be temporarily removed while the existing membrane removed and a new membrane is installed.

[3] The petitioners submit that because the required 75% vote in favour of replacing the entire membrane has not been achieved the Strata Corporation is unable to proceed with necessary repairs to be funded by a special levy. They submit that a court order is required compelling the Strata Corporation to do so.

[4] The respondent Strata Corporation does not take a position on this application – with the exception of the petitioners' application for an order for costs against it.

[5] The respondent Jason Shewchuk, also an owner of a residential unit in the Strata Property, opposes the orders sought by the petitioners. He contends that it is unnecessary to replace the entire membrane at this time and that necessary repair work can be completed in an incremental, as-needed basis. In addition to responding to this petition Mr. Shewchuk filed a cross-application opposing the completion of repairs and imposition of a special levy.

Background

[6] The building on the Strata Property is a single three-story building comprised of thirty-three strata lots and one common property strata lot. The building is of wood frame construction built above a single level concrete parkade. The building was constructed in approximately 1974.

History of Membrane Issues

[7] In about 2000 Strata owners observed water seeping into the ground floor units of the Strata Property. The Strata Corporation completed repairs between 2007 and 2010 to repair water leaks into these units including repairing the damaged units, installing new drainage pipes, exterior brick sealing, caulking and sealant restoration.

[8] When the repairs were not entirely successful the Strata council decided to get engineering advice which resulted in the commissioning of several engineering reports. A summary of the recommendations in those reports is as follows:

a) In 2010 BC Building Science Partnership recommended that “the only true means of providing a durable effective solution to restore the condition and function of the at-grade waterproofing and parking garage is to undertake a comprehensive replacement of the waterproofing over the parking garage.”

b) In 2011 MacArthur Vantell Limited conducted a second engineering review and recommended that “[u]ltimately, the most effective long-term method of addressing the parking garage leakage problems is to renew the entire waterproofing membrane.”

c) In 2016 WSP Canada provided a parking garage evaluation concluding that previous repairs to remedy water and salt penetration had failed. WSP concluded that “localized roof flab waterproofing repairs are no longer a viable option to protect the garage structure”. They recommended

> "full garage roof slab waterproofing membrane replacement in the near future in order to prevent further degradation of the structure."

d) In 2017 RDH Building Science produced a building assessment which recommended replacement of "the original built up waterproof membrane on the podium slab within the next year".

[9] The Strata owners selected JRS Engineering as a consultant with respect to replacement of the membrane and on July 9, 2020 passed the resolutions authorizing the expenditure for completing the tendering and building permit process for the parkade membrane replacement. In late 2021 or early 2022 a company, DuraSeal, was selected as the general contractor to complete the recommended work with the estimated construction cost at that time being approximately $1.7 million.

[10] On April 21, 2022, a Special General Meeting was held and a resolution from Strata owners was sought seeking a special levy of approximately $1.7 million for the parkade membrane replacement project. The Strata owners voted 17 in favour of the special levy with 12 voting against, which was below the required 75% approval threshold.

[11] In June 2022 JRS Engineering provided a report addressing proceeding with parkade membrane replacement on a phased or targeted repair basis. In this report JRS advised that in its opinion such an approach would result in increased costs in the long run, there was a risk targeted approach might fail to identify problem areas and that it may be difficult to tie in repaired areas with unrepaired areas. JRS recommended that the most prudent solution remained proceeding with a "comprehensive" renewal of the parkade membrane – that is, removal and replacement of this material.

[12] In July 2022 RDH Building Science updated its 2016 report and recommended that the parkade membrane renewal be completed in 2024.

[13] Since these events no steps have been taken to complete replacement of the parkade membrane, primarily as a result of a disagreement between owners with respect to cost. The Strata Council submits that it remains neutral although it has sought information from Strata owners on their position. At this time of the 33 strata owners (or lots), thirteen replied to a request that they confirm their views on whether to proceed with a full parkade membrane replacement. Eight owners supported proceeding with the replacement, four were opposed to doing so, one owner was indifferent. In August 2024 there was an attempt to replace the Strata council by requisition under the *Strata Property Act,* SBC 1998, c. 43 (the "*SPA*"), which failed.

Position of Mr. Shewchuk

[14] Mr. Shewchuk and other Strata owners are opposed to incurring the cost of a full parkade membrane replacement at this time. In summary Mr. Shewchuk submits as follows:

a) That the various reports recommending full replacement of the parkade membrane contain inaccuracies concerning the extent of damage caused by water ingress to the Strata Property, including the parkade slab and foundation walls.

b) That the parkade slab and foundation walls are in fair condition. He submits that the parkade membrane does not require replacement and instead, targeted repairs of the parkade membrane, including cleaning efflorescence, repairing visible corroded steel and fixing perimeter drainage, could be carried out.

c) That a special levy of $2.1 million will result in each Strata owner being required to contribute between $60,000 and $70,000. He submits that a full parkade membrane replacement will have a lifespan of 50 years which may exceed the lifespan of the building. As well, he submits that given the lands where the Strata Property is located are suitable for higher density development, there is a possibility that the existing building will be

demolished and a larger building constructed, making a complete repair of the parking membrane a wasted expense.

The Most Recent Expert Reports

[15] In August 2024 Mr. Shewchuk and others opposed to a full replacement obtained a report from JRG Building Engineering, at a cost of approximately $3,100. The JRG report states that areas of the parkade membrane they were able to inspect showed that the membrane was still adhered to the parkade slab. Despite this finding, the JRG report states that the age and construction of the membrane were such that it was past the “reliable stage in its lifespan”. The report identified issues including efflorescence and cracks which indicated that localized areas of the membrane had failed.

[16] Although JRG’s report states that phased repairs could be carried out, in the report writer’s opinion, this generally results in increased total costs and possible performance related issues due to more “membrane tie-in points”. JRG recommended removal and installation of the entire parkade membrane in one phase – although their estimated cost was $300,000 lower than the $1.7 million estimate obtained by JRS Engineering.

[17] In September 2024 the Strata Corporation obtained a report from JRS Engineering to address the merits of proceeding with parkade membrane replacement on a staged basis. In its September 2024 report JRS advises that proceeding on a phased basis will result in permitting delay (given that permitting is now complete for a full replacement and a staged repair will require multiple permits), increased total costs, difficulty in identifying which areas of the parkade membrane are leaking and longer-term disruption to owners as a result of a longer, phased process.

Legal Overview

[18] Section 165(a) of *SPA*, provides this Court with the statutory jurisdiction to order a strata corporation to perform a duty it is required to perform under the *SPA*.

Section 72(1) of the *SPA* imposes a duty on a strata corporation to repair and maintain common property and common assets.

[19] There is no dispute that the parkade membrane, parkade slab and related infrastructure are common property and that the Strata Corporation has a duty to repair and maintain such property.

[20] In *Tadeson v. Strata Plan NW 2644,* 1999 CanLII 6999 (BCSC), 30 RPR (3d) 253 [*Tadeson*], the court dealt with an impasse between strata owners concerning the completion of building repairs to address water ingress and resulting damage, including mold. As is the case here, in *Tadeson* the court found that the failure to repair was not a failure of the strata corporation to act, but rather the refusal of strata owners to approve the work and the special assessment to carry it out. The court concluded that it had the jurisdiction to and did declare that repairs at issue were required, ordered that the strata corporation proceed with repairs in a manner as its strata council may decide and that a special assessment be made to pay for completion of the work: *Tadeson,* at paras. 15-29

[21] As was reinforced by Justice Verhoven in *Davis v. The Owners, Strata Plan NW 3411,* 2020 BCSC 1434 at para. 17, referring to *Browne v. The Owners, Strata Plan 582,* 2007 BCSC 206 at para. 28, regardless of whether owners disagree whether to proceed with repairs, a strata corporation's obligation to maintain common property continues. Justice Verhoven was dealing with a similar argument from some owners, being that a $5.3 million special levy to repair a building's structure and building envelope was not affordable and that it would be preferable to defer or stage some repairs. Justice Verhoven found that to do so would simply be "kicking the can down the road": *The Owners, Strata Plan NW 3411,* at paras. 27-28.

[22] Although s. 108(2) of the *SPA* ordinarily requires a special levy to be approved by a 75% majority of strata owners, this Court has the jurisdiction to order that a strata corporation issue a special levy without notice to or approval by strata owners: *Santos v. The Owners, Strata Plan LMS 1509,* 2016 BCSC 1775 at para. 35.

Analysis

[23] Despite the valiant efforts of Mr. Shewchuk in arguing that a phased replacement of the parkade membrane would be more appropriate, I am not satisfied that this is the case. Each of the expert reports going back to 2010 indicate that the parking garage membrane is at the end of its useful life and has caused and will likely cause further damage to the Strata Property, if it is not replaced. A full replacement was recommended as early as 2010 and this recommendation remains valid today.

[24] With respect to whether a phased approach to repair would be sufficient, the report obtained by Mr. Shewchuk from JRG and by the Strata Corporation from JRS establishes that it is prudent to replace the entire parking garage membrane at this time because a phased approach will, in summary, result in increased costs and may not reliably repair damaged portions.

[25] I am satisfied that as a result of the impasse between strata owners that the Strata Corporation has been unable to perform its statutory duty to repair and maintain common property and in particular, the parkade membrane designed to preventing water ingress into the Strata Property parking garage. Accordingly, a declaration that the repairs are required, and orders requiring the Strata Corporation to complete the repairs and to issue a special levy not exceeding $2.1 million, under s. 165(a) of the *SPA,* is warranted.

Jurisdiction

[26] Neither party raised the issue of jurisdiction. Nonetheless, I find it necessary to address this issue given the shared jurisdiction of the BC Supreme Court and BC Civil Resolution Tribunal (the "CRT") in relation to strata property claims.

[27] The CRT has jurisdiction over a claim under the *SPA* concerning "the common property or common assets of a strata corporation": *Civil Resolution Tribunal Act*, SBC 2012, c. 25, s. 121(1)(b) [*CRTA*]. If the CRT has jurisdiction over

a dispute, a person must not bring that dispute to court unless an exception applies: *CRTA*, s. 16.4.

[28] The CRT is considered to have "specialized expertise" in relation to strata property claims: *CRTA,* s. 121(2). This means that, if a court determines that in a proceeding before it "all matters are within the jurisdiction of the tribunal", the court must "dismiss the proceeding unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim": *CRTA,* s. 16.1(1). The interests of justice and fairness include, among other factors: the complexity of the dispute, the principle of proportionality, and the views of the parties: *CRTA,* s. 16.3.

[29] It appears that not "all matters" in the petitioners' claim are within the jurisdiction of the CRT for the following reasons:

a) It is not entirely clear whether the CRT has the jurisdiction to grant the order the petitioner seeks. In resolving a claim, the CRT has the power to make an order "requiring a party to do something" or "requiring a party to pay money": *CRTA,* s. 123. The CRT has used s. 23 to make *Tadeson* orders in the past: *MacArthur v. The Owners, Strata Plan K588*, 2016 BCCRT 2 at paras. 52-53; *Dickson et al v. The Owners, Strata Plan K 671*, 2018 BCCRT 147 at paras. 30-31. Despite this, other Tribunal Members have taken the position that the CRT does not have the jurisdiction to order the "special levy" component of a *Tadeson* order: *Delcon (Plaza Del Mar) Investments Ltd. v. The Owners, Strata Plan VR 414*, 2024 BCCRT 129 at paras. 107-108.

b) While the petitioners' initial petition sought just a *Tadeson* order, the petitioners' amended petition seeks, in addition, the appointment of an administrator under s. 174 of the *SPA.* Section 174 of the *SPA* is beyond the jurisdiction of the CRT: *CRTA,* s. 122(1)(i). If a proceeding initially within the jurisdiction of the CRT is amended to include claims outside its jurisdiction, this Court must assess whether the dispute "at its core" is

within the CRT's jurisdiction: *Downing v Strata Plan VR2356*, 2019 BCSC 1745 at para. 40.

[30] I conclude that it is not within the interests of justice and fairness to dismiss this proceeding and have the CRT adjudicate this claim for the following reasons: (1) no party raised the issue of jurisdiction; (2) the parties have already made submissions; and (3) rearguing this issue would further delay the necessary repairs.

Costs

[31] The petitioners seek costs for this proceeding on a full indemnity basis – or alternatively at Scale B. They seek these costs against the Strata Corporation for the first full day of the hearing before this Court on August 29, 2024. As well, they seek costs against Mr. Shewchuk, or alternatively the Strata Corporation, for the second portion of the hearing which took place on September 18, 2024, during which this Court provided Mr. Shewchuk an opportunity to tender evidence and make submissions. Further, the petitioners ask for an order that they be exempt from paying their share of any levy raised for the purposes of paying dispute related expenses.

[32] Under the *SPA,* cost awards against a strata corporation are shared among the strata owners. Section 166 provides that a judgment against the strata corporation is a judgment against all the owners. Judgment is defined as including "costs awarded in respect of the judgment". Section 166 provides that an individual strata owner's liability for a judgment is limited to their proportionate share as calculated in accordance with ss. 99(2) or 100(1). An owner who sues a strata corporation is not liable to pay their share of the costs awarded against the strata, nor the strata corporations legal expenses in defending the suit: *SPA,* ss. 167(2) and 169(1)(a).

[33] The petitioners cite *The Owners, Strata Plan KAS 2428 v. Baettig*, 2017 BCCA 377 [*Baettig*] for the proposition that a strata corporation can recover costs on an indemnity basis following a forced sale proceeding. The argument seems to be that if a strata corporation can recover indemnity costs to enforce its rights, the same

should apply for a strata owner. Underlying the holding in *Baettig* is s. 118 of the *SPA* that allows a strata corporation to recover "reasonable legal costs" when it registers a lien against an owner's strata or forces a sale. In *Baettig,* the Court held that s. 118 costs are assessed outside of the Rule 14-1 framework. The petitioners have not pointed to a similar provision in the *SPA* that relates to their costs claim. As such, Rule 14-1 governs the petitioners' costs claim.

[34] Under Rule 14-1, this Court can only award either party and party costs or special costs. Under Rule 14-1(1), party and party costs are the default option. While special costs provide a much greater indemnity than party and party costs, they do not provide a full indemnity since "the successful party is entitled only to those fees and disbursements that were proper or reasonably necessary to conduct the proceeding": *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at paras. 45-49. Therefore, I treat the petitioners' claim for "costs on a full indemnity basis" and "reasonable legal fees … on a solicitor and own client basis" as a claim for special costs.

[35] The petitioners submit that it is "time to change the way costs are awarded on *Tadeson* orders". The petitioners did not draw this Court's attention to the usual way costs are awarded following *Tadeson* orders. In *Tadeson,* the successful petitioners were awarded ordinary costs on Scale 3 from the respondent owners (Scale 3 corresponds to Scale B under the new Supreme Court Rules: *Holland v. Marshall*, 2011 BCSC 607 at para. 60). It appears that party and party costs are usually awarded to the petitioners following a *Tadeson* order: *Santos v. Strata Plan LMS 1509,* 2016 BCSC 1775 at para. 67; *Browne et al. v. Strata Plan LMS 582*, 2007 BCSC 206 at para. 38.

[36] The petitioners drew my attention to *Enefer v. Owners Strata Plan LMS 1564*, 2005 BCSC 1331 [*Enefer Costs*]. This was a costs decision following *Enefer v. The Owners, Strata Plan LMS 1564*, 2005 BCSC 1866 [*Enefer*]. *Enefer* involved a successful petition for a s. 165 order that the strata corporation raise funds and proceed with repairs (i.e. a *Tadeson* order). The strata corporation had already

raised $6.15 million to fund repairs in a series of two special levies but was unable to pass a third special levy raising a further $850,000. The strata corporation supported the petition, but the petition was opposed by one individual owner and an unidentified group of other owners.

[37] At issue in *Enefer* was whose responsibility it was to pay costs and whether special costs should be ordered. Justice Taylor held that the unidentified group of other owners were not liable for costs since they were not identifiable, a party to the litigation, and in any event “the exercise of a democratic right is not a proper basis to assign costs”: at para. 15. Ultimately, the petitioner was granted costs against the respondent strata corporation and the strata corporation was entitled to recover both those costs, and its own costs, from the individual dissenting owner: at para. 25.

[38] Justice Taylor held that neither the petitioners nor the strata corporation were entitled to special costs. The individual owner’s participation had extended the time required to conduct the hearing and was “one of groundless opposition and thus ill conceived.”: at para. 25. Justice Taylor found that nothing in his conduct during the litigation was “deserving of reproof or rebuke by an award of special costs”: at paras. 25-27, citing *Garcia v. Crestwood Forest Products* (1994), 1994 CanLII 2570 (BC CA), 9 B.C.L.R. (3d) 242 at para. 12.

[39] The petitioners submit “that reprehensible conduct does not need to be demonstrated to award costs on a full indemnity basis”. Although the petitioners concede that reprehensible conduct would be a rare finding on an application of this nature since the claim is not one of blameworthy action they contend that costs on a full indemnity basis can also be awarded for a failure to take necessary action.

[40] The petitioners contend that the Strata Corporation could have brought an application in this Court themselves under s. 173(2) of the *SPA*, which allows a strata corporation to bring an application for an order authorizing a special levy to fund repairs where more than 50% and less than 75% of owners have voted to proceed with repairs. If the strata corporation demonstrates on the balance of probabilities that the repairs are necessary, the Supreme Court may order under

s. 173(4) that the resolution is approved: *Thurlow & Alberni Project Ltd. v. The Owners, Strata Plan VR 2213*, 2022 BCCA 257 at para. 92.

[41] The petitioners argue that because the Strata Corporation neglected to bring the necessary application, they are now left with paying legal fees - which should have been borne by the Strata Corporation. They argue that this situation creates a "litigation chill" and undermines access to justice since only strata owners with financial resources can attempt to do "the right thing to protect their assets and the assets of all the other owners."

[42] This seems to be a similar argument to one made unsuccessfully in *Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638. In *Taychuk,* the petitioners succeeded in alleging that the strata corporation had failed to maintain common property. The petitioners sought special costs arguing that had the strata corporation acted reasonably they would not have incurred any legal expenses. Justice Gray held that their argument was flawed because special costs are only available in certain circumstances, such as to punish improper motives or conduct in litigation, and that generally "even successful litigants are forced to bear some of the costs of their litigation": at paras. 53-55. Ultimately, Justice Gray (as she then was) awarded the petitioners party and party costs.

[43] While special costs are awarded primarily to punish litigation conduct, this Court does have the discretion to award special costs for non-punitive purposes in exceptional circumstances. In *Tanious*, Justice Dickson stated the following regarding the availability of special costs:

> [54] While the main purpose of special costs is to censure litigation misconduct, in exceptional circumstances they may be awarded for non-punitive purposes: *Gichuru* at para. 90. In my view, this is true, at least in part, because on rare occasions it may be unjust to apply ordinary costs rules and require a successful party to bear any part of the financial burden reasonably incurred in pursuing a claim even though the losing party committed no litigation misconduct. However, the exercise of discretion in making an extraordinary costs award must be justified by some unusual feature in the case beyond a large discrepancy between taxable and actual legal costs, such as special importance, difficulty or complexity associated with the litigation…

[44] Justice Dickson canvased three situations where special costs are awarded absent reprehensible conduct. First, special costs can be awarded in public interest litigation, but they are not awarded automatically. Special costs are available when the case involves: (1) "truly exceptional matters of public interest"; (2) when the plaintiffs "have no interest in the litigation that justifies the proceedings on economic grounds"; and (3) where the plaintiffs "show that it would not have been possible to pursue the litigation with private funding": *Tanious* at paras. 62-63. Second, special costs can be awarded, absent reprehensible conduct, in estates cases, but "[t]he modern approach is to follow ordinary costs rules with policy-based exceptions": *Tanious* at para. 64. Finally, special costs may be justified in the interests of justice in unique and exceptional circumstances. For example, special costs have been awarded where an individual is seeking judicial review to defend their livelihood or restore long-term disability benefits; or where absent special costs the litigation would "amount to a strictly pyrrhic victory": *Tanious* at para. 65.

[45] I take the petitioners to be arguing that this is one of those exceptional cases where special costs should be awarded in the interests of justice absent reprehensible litigation conduct. Given the failure of the special levy resolution, and the fact that the Strata Corporation neglected to bring an application under s. 173(2) of the *SPA*, the petitioners incurred legal costs to force the Strata Corporation to act on its legal duty.

[46] The petitioners argue that requiring individual owners to incur legal fees when bringing a claim to enforce a strata corporations' legal duties undermines access to justice since only owners with financial means could proceed. This argument has some merit, but in awarding costs, promoting access to justice is not "the paramount consideration" and must be weighed against other factors: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2 (CanLII) at para. 35. Other relevant factors include the general rule that costs are a partial, but not full, indemnity of legal costs; and that "costs awards should be predictable and consistent across similar cases": *Tanious* at paras. 35-39.

[47] In *Tanious,* access to justice played a key role in the trial judge's special cost award that was upheld on appeal. But the award was focused on increasing the respondent's access to justice in the unique and unusual circumstances of the case: *Tanious* at paras. 80-82. Here, in contrast, the petitioners make a broader policy argument that is not linked to their individual circumstances and do not argue why they would be denied access to justice if left to bear part of their legal expenses.

[48] I do not find that any reprehensible litigation conduct has occurred here. Further, while I am sympathetic to the petitioners' situation, I do not find that this is one of those unique and exceptional circumstances where I should exercise my discretion to award special costs in the interests of justice absent litigation misconduct.

[49] I neglect to award any costs personally against the respondent Mr. Shewchuk. He will of course remain responsible for his strata's share of the costs award and legal expenses. I find that his arguments, while ultimately unsuccessful, were made in good faith. Given that the Strata Corporation did not take a position on this petition, Mr. Shewchuk's submissions allowed this Court to understand the view of those opposed to the full parkade membrane replacement.

Conclusion

[50] The petitioners' application for declaration that the Strata Corporation is in breach of its duties to repair and maintain the Strata Property's common property, specifically the parkade and membrane and buildings (the "repairs") is granted.

[51] The petitioners' application for declaration that the repairs are required is granted.

[52] The petitioners' application for order that the Strata Corporation complete the repairs, having regard to the recommendations of JRS Engineering, is granted.

[53] The petitioners' application for an order that the Strata Corporation is authorized to issue a special levy not exceeding $2.1 million to owners, payable

based on their respective unit entitlement and in such manner as the Strata council may decide, is granted.

[54] I award the petitioners party and party costs assessed at Scale B for both days of this proceeding, payable by the respondent Strata Corporation. The petitioners are not responsible to contribute to the court costs payable or legal costs incurred by the Strata Corporation .

[55] Mr. Shewchuk's cross application filed September 3, 2024 is dismissed, with no court costs payable by any party in respect of this application.

"Mayer J."