IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *SWS Marketing Inc. v. Zavier,* 2024 BCSC 2178

Date: 20241203
Docket: S138229
Registry: Vancouver

Between:

SWS Marketing Inc.

Plaintiff

And

Odin Zavier, Thane Lanz, Randall Rogiani, Eduardo Soto, Gary Mythen, Sacha Elez, Burt Petersen, Charlene Petersen, Fan Jin, Gordon Lemon, Doris Lanz, Joseph Lanz, The Owners Strata Plan Kas 1886 and The Tenants: John Doe #1, Jane Doe #1, John Doe #2, Jane Doe #2, John Doe #3, Jane Doe #3, John Doe #4, Jane Doe #4, John Doe #5, Jane Doe #5, John Doe #6, Jane Doe #6, John Doe #7, Jane Doe #7, John Doe #8, Jane Doe #8, John Doe #9, Jane Doe #9

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:	D. Palaschuk
Counsel for the Defendants Odin Zavier, Randall Rogiani, Eduardo Soto, Gary Mythen, Burt Petersen, Charlene Petersen, Fan Jin, Gordon Lemon, and Joseph Lanz:	A. Grewal
Agent for Strata Plan KAS 1886:	R. Gauthier
Place and Date of Trial/Hearing:	Vancouver, B.C. September 3, 6, and 11, 2024
Place and Date of Judgment:	Vancouver, B.C. December 3, 2024

Introduction

[1] As noted by the defendants, this action is "complex, convoluted, and part of a lengthy legal battle between the plaintiffs and various defendants, over a number of different actions." The BCCA most recently summarized the history in *SWS Marketing Inc. v. 1125003 B.C. Ltd*., 2023 BCCA 225, as follows:

> [3] The history between the parties, and other third parties, is extended and tortured. The chronology in the appellants' factum is 13 pages long. That chronology is then followed by a further dozen pages of facts which are supported by some 75 footnotes. The judge's reasons referred to, and the respondents' factum further develops, the numerous actions, proceedings and interlocutory applications between the parties or various combinations of them. The respondents' factum also describes the dozen or so judgments of the trial court and of this Court that have addressed different disputes between the parties, or at least some of them, and that provide an ever-evolving chronology of these disputes.
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> …
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> [5] The appellant/plaintiff, SWS, was incorporated in 2008 by its original principals to serve as a vehicle for real estate investments. Those principals were Mr. Gauthier, Mr. Zavier and Mr. Lanz. In 2010, Mr. Zavier became interested in two buildings, containing 14 residential strata lots (the "Project"), that were located in Vernon and that were the subject of the 806 Action. He planned to acquire the buildings, sell the strata lots to purchasers who would use his management company to manage the properties, rent them out and pay the mortgage. He also intended to use his share of rental revenue and management fees to improve the buildings with a view of ultimately selling them for profit. His wholly-owned company, Four Elements Marketing Inc., entered into a contract to purchase the land and buildings from the previous owners.
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> [6] In 2010, he invited SWS to assist in marketing the strata lots. Purchasers were required to enter into a purchase and sales agreement with Four Elements and a joint venture agreement with SWS. The joint venture agreement provided that SWS would manage the strata lot and rent it out, with profits and losses being shared equally between SWS and the purchasers of the units.
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> [7] The transactions closed in March 2011. SWS took over management of the Project in April 2011. It then appointed a strata council controlled by Mr. Gauthier. In 2012 or 2013 there was a falling out between Mr. Gauthier on the one hand, and Messrs. Zavier and Lanz on the other. Mr. Zavier ultimately induced a majority of owners to join him in setting up an alternate strata council. Neither council recognized the legitimacy of the other. Both claimed the right to manage the Project and to collect strata fees. The chambers judge correctly observed that the "situation deteriorated into chaos" and that by November 2013 "the Project was already embroiled in litigation on several fronts".

[8] In the spring of 2017, Mr. Zavier sought assistance from the defendant Mr. Rezmer. Mr. Rezmer apparently had expertise in managing difficult properties. He incorporated a new company, the corporate defendant 1125003 B.C. Ltd. ("112"). The defendant, Mr. Saxvik, was hired to manage 112.

[9] The judge noted that 112 offered individual owners of the Project "the prospect of greater stability and an exit strategy in the form of a "lease-option agreement" which purported to authorize 112 to carry out the management functions that had initially been assigned to SWS under the original joint venture agreements. Most owners entered into such lease-option agreements with 112.

…

[15] The judge identified that the 229 Action, which had been consolidated with a separate petition commenced by Mr. Zavier, Mr. Lanz and the owners (who were defendants in the 229 Action), was tried before Justice Adair over 18 days in February and March 2022. The reasons of Justice Adair, indexed at 2022 BCSC 743 (the "229 Reasons") were thorough and comprehensive. No appeal was brought from the orders made in the 229 Reasons.

[16] The judge described Justice Adair's conclusions in the 229 Action:

> (a) SWS was not entitled to a declaration that the joint venture agreements had been breached, because a declaration that past conduct was wrongful is not a remedy that can properly be granted (para. 211);
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> (b) SWS's claim for an accounting was refused because there was no air of reality to SWS's allegation that the defendants had in fact earned hidden profits in any significant amount (paras. 212-213);
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> (c) Mr. Zavier had signed and was a party to a joint venture agreement (paras. 214-220);
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> (d) the joint venture agreements had not been terminated by an accepted repudiation, as the defendants alleged, nor were the defendants entitled to rescind, thus entitling SWS to a remedy for breach of contract (paras. 221-246);
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> (e) SWS's claim asserting a beneficial interest in the owners' units, on the basis that it had contributed to the down-payments, was refused (paras. 247-278);
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> (f) SWS's claim for damages alleged to be payable under the joint venture agreements was refused (paras. 280-285);
>
> (g) further submissions would have to be made before the appropriate remedy could be granted for the breach of contract that was found to have occurred (paras. 286-298);
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> (h) SWS's claim for an assignment of certain rights under the *Strata Property Act* and associated injunctive relief was refused (paras. 299-307); and
>
> (i) the counterclaim was dismissed (paras. 324-356).

…

[27] The judge then said:

> [56] The situation has only grown worse since those words were written. It is now the plaintiffs who are seeking to relitigate the same dispute in a different guise. Like 112, they have already had their day (indeed, too many days) in court.

[28] The judge ordered the 806 Action be struck under Rule 9-5(1)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 as an abuse of process.

Issues in this Application

[2] As is evident, since the falling out between the parties in this matter, the two strata-titled buildings in Vernon, BC (the "Vernon Project") have been the source of numerous causes of action in the Supreme and Provincial Courts of British Columbia over 12 years. This included an 18-day trial before Justice Adair of the BC Supreme Court in early 2022. In her decision, Justice Adair provided a further, very apt description of the background in this case:

> [13] As I will describe, what was sold to the Defendant-owners as a relatively low risk, low stress, self-financing real-estate investment in a unit in a small strata complex in Vernon, has generated more than eight years of litigation, and many, many court applications. The Defendant-owners became embroiled in bitter disputes between Mr. Gauthier, Mr. Zavier and Mr. Lanz about SWS and how the profits from the Vernon Project should be divided. At the end of the trial, it was observed that everyone wants the units to be sold, and that appeared to be the one area of consensus. I agree with that observation. Sale of the units would at least bring an end to the prolonged fighting over matters relating to the Strata Corporation and its governance, and reduce the scope of the war to one over money and the division of profits from the Vernon Project.

[3] Ultimately, Justice Adair found that SWS was entitled to a remedy against each of the defendants (excluding Mr. Petersen) and Mr. Zavier for their breaches of the Joint Venture Agreements. However, Justice Adair concluded that the submissions received at trial were insufficient for her to make a final ruling with respect to a remedy—including whether to make the sought order for the units to be sold and the proceeds of sale paid into court. The court therefore directed the parties to schedule a one-day hearing before Justice Adair on the question of remedy for the breaches of the Joint Venture Agreements.

[4] That hearing occurred on July 28, 2022, and resulted in a detailed order that included the sale of the 14 units (the "Adair Order"). With the consent of the parties, Justice Adair allowed SWS to have conduct of the sale of all 14 units in the Vernon property. She also ordered that the defendants were to execute a listing contract and other required listing documents with a listing agent selected by SWS, in order to sell the Vernon Property as a package of all 14 lots.

[5] The Adair Order also provided, by consent, that:

> Any person or person in possession of the Vernon property shall immediately and at all times during the currency of this Order permit any duly authorized agent or agents that has conduct of sale to inspect or appraise the Vernon Property and show the Vernon Property to the prospective purchases and to post signs on the Vernon property indicating that the Vernon property is offered for sale.

[6] Justice Adair has now retired. On May 2, 2024, Chief Justice Hinkson (as he then was) ordered that "Pursuant to Supreme Court Civil Rule 23-1(10) Justice Burke is appointed to determine the remaining issues in this case in lieu of the Honourable Justice Adair, who retired on December 31, 2022". As a result, I must now deal with the issues arising as reflected in this application.

[7] In January 2024, the defendants and 1125003 BC Ltd. ("112") filed this application, seeking a number of orders—including that each of the 14 strata lots be listed and marketed as individual units, and sold individually to any offer received that is within 10% of the BC Assessment value. The defendants also seek an order that Strata Plan KAS 1886 create a separate bank account for all strata fees and/or other fees received from a new owner of the sold strata lot. Furthermore, the defendants seek an order that SWS Marketing, Rene Gauthier and any authorised agent of SWS comply with the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*], and should they fail to do so, indemnify the owners of the Strata lots for any fines, damages, lost rent or otherwise issued against them in favour of the tenant.

[8] The defendants point out that almost all of the relief sought by the SWS was dismissed by Justice Adair in her 2022 reasons for judgment. The only remedy granted to SWS was for breach of contract, but no damages were sought nor

awarded, as SWS failed to provide any evidence that they suffered damages arising from the breach.

[9] The two issues that arise in this application are therefore:

1) Can the court vary or make a supplementary order to allow for individual sales of the Vernon Project units and to require that Strata Plan 1886 create a separate bank account for all strata fees and/or other fees received from a new owner of the sold strata lot?

2) Can and should the court order that SWS and their agents comply with the *Residential Tenancy Act*?

[10] I turn to the first issue now. In dealing with this first issue, the question arises as to whether this Court has jurisdiction to vary the Adair Order made on July 28, 2022—entered as a final order—or make a further order allowing for the sale of the individual units.

Position of the parties

[11] At the outset, the defendants concede that there has been a final order granted in this action, and no appeal of that order was lodged. The defendants acknowledge that once an order is entered, the court is *functus officio*. They point, however, to three exceptions to this general rule in support of the current application. In doing so, the defendants acknowledge that they have the burden of proof in demonstrating that the court should vary or supplement the Adair Order according to these exceptions.

[12] The defendants first rely on Rule 13-1(17), which reads:

> The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

[13] The defendants acknowledge this power is discretionary and there are limits as to what can be corrected in a final order, per *Lochhead v. Lochhead*, 2011 BCSC

1662 at paras. 15–20. However, they maintain that the Court can rely on this rule to vary the Adair Order in this case.

[14] In addition to Rule 13-1(17), the defendants maintain, as set out in *Lochhead,* that the court has inherent jurisdiction to amend an entered order if it does not reflect the manifest intention of the court. In *Morriss v. Cuttler*, 2013 BCSC 96 at para. 32, the court elaborates on this jurisdiction, citing a 1996 decision from the Newfoundland Court of Appeal:

> [32] In regard to the second exception, where there has been an error in expressing the manifest intention of the court, the Newfoundland Court of Appeal in *McLean v. Carr Estate* (1996), 1996 CanLII 11078 (NL CA), 138 D.L.R. (4th) 541 (N.F.C.A.) (application for leave to appeal dismissed [1996] S.C.C.A. No. 484) at 547 further explained:
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> > *Functus officio* means, literally, having discharged his duty. Determining whether a judge is *functus officio* involves, in light of Rule 15.07, drawing a line between an omission by the trial judge ─ a failure to do something which should have been done ─ and the discharge of the duty but failing to consider some argument which had someone, whether counsel or judge, though about it might have had some impact on the result. The line is not easily drawn. If a court was required to answer four questions, but determined only three, clearly, it would not have done something it was required to do. The judge would not be *functus officio*, at least, in respect of the fourth question.
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> [Emphasis added in *Morriss*.]

[15] The defendants argue that it is essential that the property be sold, as this will be better for both the parties and the court. Given that 12 new actions regarding the Vernon Property have been filed since Justice Adair's judgment in 2022, the defendants say that judicial economy and the best interests of the parties—who are presently mired in dispute and the continuing need to pay legal fees—both lend support to the properties' sale. As the properties have been listed together as a package of 14 since October 2022 and have not yet sold, the defendant owners argue it is now time to allow individual listings of the properties in order for the disputes between the parties to end.

[16] The defendants highlight a third exception, developed under the common law, to the general rule that a court is *functus officio* once a final order is entered. In

William v. Adie, 1966 B.C.J. No. 43, 1966 CanLII 615 (BC CA), the Court of Appeal—relying on *Preston Banking co v. William Allsup & Sons Ltd.,* (1894) 1 Ch 141 (Eng. CA)—found that, in a "proper case", the court may make a supplemental order for the purpose of giving assistance to the parties to work out the judgement.

[17] The defendants submit that this is a proper case for the court to make a supplemental order to assist the parties in working out the judgment. Once the properties are individually sold, each applicant will have the right to make application for payment out as per Terms 6 and 7 of the Order, and the issue of what is owed per property can be dealt with at that time.

[18] In response, SWS says there is no evidence that allowing the units to be listed individually would assist in selling the units and that it would in fact make the matter worse. SWS says the defendants are attempting to vary the Adair Order, in which the manifest intent of the court was already reflected—that is, "to give SWS conduct of sale…and full authority in the management and control of the business of the joint venture." SWS submits that, pursuant to Rule 13-5 (5), only SWS can apply for "directions" from the court, as they alone have conduct of sale. SWS relies on the fact that this aspect of the Adair Order was not by consent, and that the order specifically provided that "the Vernon property will be sold as a package with all 14 strata lots."

[19] Even if the court determined that the order did not reflect the manifest intent of the court, SWS further submits that the court must also consider whether the plaintiffs would suffer undue prejudice if the order was amended. The plaintiffs say they would suffer undue prejudice if the order was amended to provide for the individual sale of the 14 units, due to the real estate agent's assertion that selling the units individually would harm their saleability. Further, SWS asserts that there is no urgency to sell because each unit has a positive monthly cash flow. Finally, SWS submits that the Vernon property is now rezoned, and suggests that one tenant could stop this rezoning if one unit is sold.

Analysis

[20] The defendant applicants are correct in stating that a court has jurisdiction—albeit limited—to vary a final order in certain circumstances. The most oft-cited articulation of those circumstances comes from Justice Finch in *Harrison v. Harrison,* 2007 BCCA 120:

> [29] Once an order has been entered, however, the court which made the order is *functus officio* with respect to the issues therein: *Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al*, 1950 CanLII 435 (UK JCPC), [1950] 2 W.W.R. 796 (P.C.). Once the judge is *functus*, the power to re-visit an order is much narrower. Generally speaking, that power is confined to making corrections or amendments in two situations: first, under Rule 41(24) of the *Supreme Court Rules* where there has been a 'slip' in drawing up the order or where a matter should have been but was not adjudicated upon; and second, where there has been an error in expressing the manifest intention of the court: *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142; see also *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848.
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> [Emphasis added.]

[21] The substance of the former Rule 41(24) is now found in Rule 13-1(17) and is referred to in the case law as the "slip rule": *Lochhead* at para. 18. In *Chand v. Insurance Corp. of British Columbia,* 2009 BCCA 559, the Court of Appeal provides further clarification on the limits of this rule:

> [44] There are limits as to what can be corrected under Rule 41(24). McLachlin and Taylor, *British Columbia Practice*, 3rd ed. by Frederick Irvine (Markham, Ont.: Butterworths, 2006), summarize these limits at 41-38 to 39:
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> > Notwithstanding that R. 41(24) is much wider than the old "slip rule", it cannot be used to amend or alter a substantive finding even though that finding might be demonstrated to be in error ... R. 41(24) does not permit changing a final order where a judge has second thoughts about his order, or to permit the parties to provide fresh details on matters already before the court .... Its proper use is (1) to rectify a slip in drawing the order which, if unamended, would produce a result contrary to the intention of the court or of the parties... or (2) to provide for a matter which should have been but was not adjudicated upon.... [citations omitted].
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> [Emphasis added.]

[22] In sum, this results in three situations in which the court can vary a final order (as exceptions to the general principle of *functus officio*): (1) when there is a "slip"-

type error in the order, (2) when there is a matter which should have been but was not adjudicated upon, and (3) when the order contains an error in expressing the manifest intention of the court: *Lochhead* at paras. 20–22. The first two arise from Rule 13-1(17), and the third has been held to exist as part of the court's inherent jurisdiction: *Lochhead* at para. 21; *Chand* at para. 46.

[23] In this case, I find that I have jurisdiction to vary the Adair Order to reflect the manifest intent of this Court, pursuant to the third circumstance articulated above. This jurisdictional proposition finds authority in the 2004 appellate decision of *Buschau v. Rogers Communications Inc.,* 2004 BCCA 142:

> [26] …The Court also had the power to amend the entered order on the basis that it contained an error in expressing the manifest intention of the Court. As stated by Rinfret J. for the Supreme Court of Canada in *Paper Machinery*, *supra*:
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> > The question really is therefore whether there is power in the Court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think, - and we see no reason why it should not also be the rule followed by this Court - that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the court (*In re Swire* [(1885) 30 Ch. D. 239]; *Preston Banking Company v. Allsup & Sons* [[1895] 1 Ch. 141]; *Ainsworth v. Wilding* [[1896] 1 Ch. 673]). [at 188; emphasis added.]
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> *Paper Machinery* has been cited on numerous occasions by Canadian courts, including this court in *R. v. Blaker* (1983), 46 B.C.L.R. 344 (B.C. C.A.), at 347, and in *Racz v. Mission (District)* (1988), 22 B.C.L.R. (2d) 70 (B.C. C.A.). In the latter case, the Court set aside a "consent dismissal order" entered by a solicitor who had acted without authority. The Court found that it had inherent jurisdiction to correct what would otherwise be an abuse of process and ruled that it was not necessary to require the plaintiff to bring a fresh action in order to set the order aside…
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> …
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> [27] Even if the error in the order was not a "clerical" one or an error arising from an "accidental slip or omission" within the meaning of R. 41(24), then, the court below had the inherent jurisdiction to correct the order insofar as it did not reflect its manifest intention. In the absence of any evidence that the respondents had taken any irrevocable step in reliance on the order, or would suffer undue prejudice were it corrected, I conclude that the Court should have exercised this jurisdiction and corrected its order.

[24] This was later confirmed in *Chand,* which also clarified the additional assessment required by a court invoking this inherent jurisdiction:

> [54] Under the analysis described in Buschau, once the court determines that the order did not reflect the manifest intention of the court, it must also consider whether in this case Ms. Chand had taken any irrevocable step in reliance on the order or would suffer undue prejudice if it were corrected.
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> …
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> [59] The ultimate issue as expressed in Buschau is whether it is in the interests of justice to correct the order.
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> [Emphasis added.]

[25] Therefore, although the Adair Order has been entered and is thus "final", I now step into the shoes of Justice Adair. The apparent "manifest" intention of the Adair Order was to have the properties sold. While she provided conduct of sale to SWS as part of the remedy, tying it up in group sale for years would not appear to reflect the manifest intent of the order.

[26] In addressing the plaintiff's argument, I am prepared to consider that some prejudice may arise if the units are listed individually if the property has indeed been rezoned. It is unfortunate, however, that this information was not shared with the defendants until the second day of this application. As noted by counsel for the defendants, they may have changed their position and may not have pursued this application had they been aware of the alleged rezoning. Unfortunately, I take this as another example of the continuing litigious conduct of the parties, which is utilizing scarce judicial resources without corresponding need. It is critical that the sale of the units proceed with some alacrity to resolve this tangled and lengthy dispute once and for all.

[27] As the defendant applicants correctly note, the court does have jurisdiction to "make a supplemental order for the purpose of giving assistance to the parties to work out the judgment": *Morriss* at para. 33. The BCCA discussed this power in *Williams v. Adie*, 57 W.W.R. 221, 1966 CanLII 615 (B.C.C.A.) at 227, relying on an 1895 case from the English Court of Appeal:

> …It also seems to be the practice of the courts that in a proper case the court may make supplemental orders for the purpose of giving assistance in working out a judgment. In *Preston Banking Co. v. Allsup & Sons, supra*, Lord Halsbury said at p. 143:
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> > If by mistake or otherwise an order has been drawn up which does not express the intention of the Court, the Court must always have jurisdiction to correct it. ... Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to rehear it. ... Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction; but he has no jurisdiction to rehear or alter this order.

[28] Helpfully, *Williams* dealt with a somewhat analogous set of facts to the case at hand. The litigation originated because the appellant and respondents agreed to the dissolution of their partnership but disagreed as to the proper method of dissolution. In delivering judgment at the original trial, Justice Munroe ordered, *inter alia*, a specific method for the sale of the partnership's real estate. Justice Munroe also ordered that the parties were at liberty to apply for further directions.

[29] There was then a subsequent application to Justice Munroe for further directions regarding the mode of sale, the formulae for fixing the offering price, the timing of the sale, and the number of parcels in which the real estate was to be sold. Justice Munroe made a supplemental order on these topics, and it is this supplemental order at the basis of the appeal in *Williams*—wherein the appellant alleged that Justice Munroe did not have jurisdiction to make it. The Court of Appeal held that Justice Munroe *did* have jurisdiction to make a supplemental order on the *number of parcels* that the property was to be sold in, but that the other parts of the order were outside his jurisdiction. At 229, the court states:

> …The number of parcels in which the real estate (the subject matter of clause 7 [e] of the judgment) was to be sold is clearly a matter for directions, as the judgment did not purport to deal with that phase of the marketing, and, therefore, the learned judge's direction in that regard was made with jurisdiction. But the changing of the mode of sale from the dual listings, with the accompanying formulae for fixing the offering price, to auction by the registrar of the court at a time earlier than set out in the judgment, cannot, in my respectful view, be considered to be anything else than a clear and substantial amendment and variation of the terms of the judgment, and so beyond the jurisdiction of the learned judge, unless by agreement of the parties...

> …Although it is true that the declaration of dissolution and the following order for liquidation of assets are part of the substantive judgment, the following detailed orders or methods to carry out the realizations are, in my respectful view, no less integral parts of the judgment and cannot be merely considered as a working out of the judgment. I cannot concede that a specific in a formal judgment is to be treated as a lesser or merely qualifying addendum to an earlier generality. In fact, it is obvious from the pleadings that the whole contest at the trial centred on the various proposals which resulted in clause 7 of the judgment; the parties had agreed from the outset on the dissolution and orderly winding up and proper realization of assets. Some of the methods were apparently negotiated before judgment, and the judgment, in effect, was really the final decision of the court in the contest as to the methods of sale and realization of assets.

[30] In *Morriss,* Justice Gropper confirms the court's jurisdiction to enter a supplemental order to work out the judgment, per *Williams*. However, she seems to recognize further limitations to this power:

> [36] The court also enjoys the power to make supplementary orders if it has so reserved in order to assist the parties in working out the order. It may only amend the original order if there is a provision reserving jurisdiction for the court and it is proved that there has been a change of circumstances.
>
> [Emphasis added.]

[31] Justice Gropper further held that the court will have reserved jurisdiction in cases "where the original order included a provision that gave the parties 'liberty to apply' again*": Morriss* at para. 33. She draws this from the following passage of *Williams*:

> [13] The question then arises as to whether or not the language in clause 8 in the judgment, *viz.* "... the parties shall be at liberty to apply for further directions," has the effect of extending the jurisdiction of the learned trial judge. I think not. The words "liberty to apply" would by their very nature appear to have a somewhat broader scope than "liberty to apply for further direction" and the former words have been held not to reserve to a court a jurisdiction which it would not otherwise possess. In Stephen v. Stephen [1931] P 197, 100 LJP 86, Lawrence, L.J. said at pp. 208-9: "Obviously the Court cannot by inserting in its order the words 'liberty to apply' reserve to itself a jurisdiction which the Act does not confer upon it." See also *Cristel v. Cristel*, [1951] W.N. 421, [1951] 2 All E.R. 574, where it was held that the words "liberty to apply" are only effective where an order or judgment requires a *working out* which needs the decision of the court, but do not justify an alteration except where an unforeseen change of circumstances has arisen.
>
> [Emphasis added.]

[32] However, this passage refers to the court grappling with whether these words provide the court with jurisdiction to *vary* an order—not whether they are required for the court to have jurisdiction to make a *supplemental* order.

[33] In any case, item 10 of the Adair Order provides that "SWS or the Owners may apply to the court for further directions." As a result, I conclude this court has the jurisdiction to make a supplemental order on the individual sale of the units.

[34] In view of all this I am inclined to make a supplementary order to reflect the manifest intent of the Adair Order for the reasons set out above. I conclude, however, it is reasonable to suspend the decision to allow the units to be marketed and sold individually now that the circumstances have changed and it may be more advantageous to have the units sold a group. While it is important to allow some time to see how this factor impacts the saleability, that time must be limited so these litigious groups do not continue to use scarce judicial resources. I will therefore suspend the order to allow the individual sale of units for 12 months, which should provide SWS sufficient time to market the units with the rezoning in place. While SWS says it sometimes takes two to three years to sell a project such as this, they have already had close to two years—and now have the further advantage of the rezoning.

2) Can and should the court order that SWS and their agents comply with the *Residential Tenancy Act*?

Position of the Parties

[35] The defendants also ask the Court to address issues associated with the *RTA*. In particular, the defendants submit that SWS has been using the Adair Order in a manner that contravenes the *RTA,* as SWS is not providing proper notice to the tenants when entering their units, nor providing proper notice to the defendant-owners so that they themselves could comply with the *RTA* requirements. The defendants submit that these contraventions may lead to penalties being imposed upon the defendants-owners under the *RTA*. The defendants also maintain that

SWS is attempting to use the Adair Order to get around the bylaws and the *Strata Property Act.*

[36] The defendants submit that this can be resolved by SWS agreeing to follow the *RTA,* or giving sufficient notice to the defendant-owners so that they can comply with the *RTA*. The defendants say that even after raising concerns with SWS directly, SWS refuses to comply, taking the position that it does not need to follow the *RTA*.

[37] In reply, SWS says the court has no jurisdiction over the *RTA*. Additionally, they maintain that SWS and Mr. Gauthier *have* been giving 24-hour notice for access to the units, and that there is no evidence from the tenants that inappropriate notice was given. As a result, SWS says that the sought order—that SWS comply with the *RTA*—is an unnecessary amendment of the Adair Order, which in part is a standard order for conduct of sale.

[38] SWS also says that the Adair Order does not conflict with the *RTA,* and further that the tenants are subject to this order because they are a "party". Once the tenants were served and did not file a response, they were not entitled to service of subsequent applications as set out in *Wang v. Corsa Auto Gallery*, 2023 BCSC 382. SWS says the applicants are using the *RTA* as an attempt to justify their intentional noncompliance with the Adair Order.

Analysis

[39] Neither party provided direct case law on the issue of court orders as they intersect with the *RTA*, and indeed there is very little. In *Crown Point Hotel (1981) Ltd. v. British Columbia (Ministry of Public Safety & Solicitor General),* 2007 BCSC 1048, however, there is a suggestion that the *RTA* must be considered when complying with orders originating outside of RTB proceedings. In *Crown Point*, the court judicially reviewed the Fire Commissioner's order that the petitioner discontinue use and occupancy of the basement, second, third, and fourth floors of a hotel. Complying with this order meant that the building would be "emptied of its occupants within 30 days and remain unoccupied" while repairs were made: *Crown*

Point at para. 39. The petitioner argued that complying with such an order would violate provisions of the *RTA*, while the respondents said that such an immediate end to tenancies was provided for in the *RTA* itself.

[40] Justice Romilly agreed with the defendants, finding that the petitioner could comply with both the Fire Commissioner's order and the *RTA* through s. 44(1)(e):

> [62] However, s. 44(1)(e) also provides that the tenancy can be ended without notice if the tenancy is frustrated. In my view, the forced closure of the residential facilities by a valid order of the Fire Commissioner constitutes "frustration" of the residential tenancy agreement…
>
> …
>
> [66] If the Landlord is faced with an order from the Fire Commissioner that is incompatible with his obligations under his residential tenancy agreements, this surely constitutes a "radical change in the obligation" unforeseen by the parties to the agreement. Once the agreement is frustrated, the tenancy ends by virtue of s. 44 of the *Residential Tenancy Act*.

[41] While Justice Romilly does not directly opine on the question of whether it was *necessary* for the petitioner to comply with the *RTA* in the face of the Fire Commissioner's order, this proposition seems to flow from the judgment's reliance on provisions of the *RTA* to ground the reasonableness of the order.

[42] In addition, ss. 29(1)(d) and 94 of the *RTA* broadly indicate that the legislature intended *RTA* protections to exist concurrently with court orders, and not be overridden by them:

> **Landlord's right to enter rental unit restricted**
>
> 29(1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
>
> …
>
> (d) the landlord has an order of the director authorizing the entry;
>
> **Court proceedings affecting tenants**
>
> 94 Despite any other enactment, no order of a court in a proceeding involving a foreclosure, an estate or a matrimonial dispute or another proceeding that affects possession of a rental unit is enforceable against a tenant of the rental unit unless the tenant was a party to the proceeding.
>
> [Emphasis added.]

[43] While these are not directly applicable in the case at hand, given that SWS is not a landlord and there is some doubt as to whether the tenants were a party to the proceedings, it seems that the legislature intended for certain protections to be overridden only by directors' orders and court orders.

[44] The *RTA* requires at least 24 hours notice for entry to a tenants' suite, which must include "the purpose for entering, which must be reasonable" and the date and time of the entry, which must be between 8 a.m. and 9 p.m., unless the tenant otherwise agrees: see s. 29(1)(b).

[45] The evidence concerning service on the tenants in this case is somewhat lacking. The service information does not include the information that the individual served was actually living in the unit (instead of just visiting). Even if that were the case, however, I must still deal with the question of how the *RTA* requirements impact this case. The *RTA* is a statute that is applicable to landlords and tenants. A landlord includes:

> the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord (i) permit occupation of the rental unit under a tenancy agreement, or (ii) exercises powers and perform duties under the Act, the tenancy agreement or a service agreement.

[46] I conclude, however, that this is a matter that falls within the "slip rule" as a matter that should have been but was not adjudicated on. Indeed, this part of the order was by consent. In my view, if this had been brought to the trial judge's attention, it is more than likely that the judge would have placed conditions in the order consistent with the *RTA* protections that respect tenants' rights. While SWS relies upon the Adair Order's use of the wording "immediate access" and says this is a usual order for conduct of sale that necessary for a variety of reasons, I do not accept that. Indeed, SWS says its practise has been in large part consistent with tenants' rights under the *RTA,* which I would expect to have occurred. While there may be some need for "immediate" access, I accept the solutions provided by the defendant-owners—for example, that notice of entry could well set out two

sequential dates. This would take care of what SWS says is a need for prospective buyers to see the property twice in a short span of days.

[47] There are a number of complaint letters from tenants about SWS' lack of entry notice. SWS points out, however, that there are no affidavits from the tenants indicating they did not have notice, and that 48-hour notice was usually provided (and in one instance, 24-hour notice was provided). While there is evidence that some of the tenants are disturbed by the situation, SWS says this situation was manufactured by 112, who told the tenants they did not need to allow SWS in.

[48] As noted by the defendants, SWS has been referencing the Adair Order to gain access to the tenanted units. SWS has referenced and attempted to use the Adair Order to access units on December 14, 17 and 19, 2022. In addition, while SWS provided notice on certain dates in 2023 (April 28, May 9, October 6–11), it did not provide the reason, as per the requirements under the *RTA*.

[49] The Adair order does not override those protections. Indeed, SWS has largely been following the notice requirements of the *RTA*. While SWS argues that the court has no jurisdiction over the *RTA*, this court *does* have jurisdiction over the Adair Order. While it is a final order, nowhere does it state that it overrides the protections in the *RTA*. While the *RTA* applies to landlords and tenants, which SWS is neither, the order must be interpreted in a lawful way. Statutory protections exist for a reason, and cannot and should not be overridden unless specifically addressed in an order after appropriate submissions. That is simply not the case here.

[50] Accordingly, I direct the Adair Order be varied to be consistent with the notice requirements of the *RTA*, which include the provision of a reason for entry.

[51] In summary, I conclude:

1) This Court has jurisdiction to amend the entered Adair Order at issue to reflect the individual sale of the units. The court orders that the units may be marketed and sold individually; but suspends this order for 12 months due to recent rezoning which may make it more advantageous for the units to be

sold as a group. I do not accordingly need to deal with the request that Strata Plan 1886 create a separate bank account for all strata fees and/or other fees received from a new owner of the sold strata lot.

2) SWS should conduct itself in accordance with both the Adair Order and the protections provided to tenants with respect to the notice requirements under the *RTA*.

"Burke J."