IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clarke v. The Owners, Strata Plan VIS770,* 2010 BCSC 705

Date: 20100518
Docket: 08 0064
Registry: Victoria

Between:

Peter Clarke, Connie Tisdall and Maria Tippett

Petitioners

And:

The Owners, Strata Plan VIS770

Respondent

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

(In Chambers)

Appearing on her own behalf:	L. Chorney
Appearing on his own behalf:	E. Vilnis
Appearing on his own behalf:	P. Hannah
Counsel for the Administrator: Gerry Fanaken	G. H. Dabbs
Place and Date of Hearing:	Victoria, B.C. May 6, 2010
Place and Date of Judgment:	Victoria, B.C. May 18, 2010

[1] This is one of a series of decisions respecting a heritage conversion residential strata lot building with eight units. My initial reasons for judgment are at 2008 BCSC 347, and the two most recent are at 2009 BCSC 1415 and 2010 BCSC 293 respectively. Much of the relevant background for the current issues is set out there and I do not propose to repeat it here.

[2] At issue, in part, is whether to accept two recommendations of the court appointed administrator respecting badly needed building envelope repairs. The recommendations are as follows:

> (a) To raise $10,000 by a special levy upon the owners to support the administrator's proposal to retain a qualified engineering consultant to prepare a scope of work in respect of the building envelope initiative; and
>
> (b) To raise $400,000 by a special levy upon the owners to support the administrator's proposal to commence the development of a fund for the building envelope repair program.

[3] The administrator put these proposals forward by means of resolutions Nos. 6 and 7 at a Special General Meeting of the owners on April 5, 2010. The owners voted unanimously to defeat the resolutions, both of which required a three-quarter majority to pass.

[4] In spite of the complete lack of support, the administrator applies pursuant to ss. 165, 173 and 174 of the *Strata Property Act,* S.B.C. 1998, c. 43, and my earlier orders granting the administrator, and owners, leave to apply for directions. The order appointing the administrator, as extended from time to time, requires him "to exercise all powers and perform all duties of the strata council for the corporation such powers and duties to be held to the exclusion of the strata council."

[5] A strata council is obligated under the legislation to perform the duties and obligations of the strata corporation (s. 4) and the strata corporation has duties

respecting the maintenance and repair of common property, including the building envelope (ss. 3 and 72). Except in unusual circumstances identified in the legislation, none of which arise here, it falls to the administrator to carry out the obligations of the strata corporation respecting the need for building envelope repairs, subject, as I have pointed out previously, to first seeking the agreement of a three-quarter majority of the owners when a special resolution is required. In my most recent reasons I reviewed the law as it relates to the court ordering necessary repairs if the administrator's attempt to secure the passage of a special resolution fails.

[6] Nobody disputes that there is a pressing need to carry out building envelope repairs. The disagreements among the owners center on the cost of developing an adequate scope of work and overseeing the project, including whether an engineer or architect, with experience in local heritage restoration, is necessary for that purpose; and ultimately, the extent and cost of the necessary work. In the result, there are three proposals before the court.

[7] Mr. Vilnis, one of the owners, is a retired architect, who practiced in a different jurisdiction. He provides a proposal described as the costing of a "minimal invasive rehabilitation" intended to achieve "a substantial savings in capital cost." He describes at least one significant aspect of his proposal as "not the optimal solution" but "serviceable by proper maintenance." For the most part, the Vilnis proposal involves preparing or repairing exterior wall and deck surfaces, covering or painting them, repairing or replacing roofing and flashings, eliminating existing skylights and associated carpentry work.

[8] Mr. Vilnis estimates a cost of $156,000, plus applicable taxes for the work contemplated in the proposal. He makes no allowance for engineering or architectural oversight by a person with special expertise in heritage conversions. Instead, he assumes that the owners will donate their time as necessary to supervise the work. Presumably, in that regard, he is primarily offering his own services.

[9] The building was constructed in or about 1912 and converted to strata lot units in the late 1970s. The problems associated with the building envelope are likely attributable to shoddy design and workmanship relating to the conversion as well as lack of appropriate maintenance and repairs. It is necessary in my view that whatever work is undertaken now, it be overseen and certified, as necessary, by an appropriately qualified consultant even though that adds a layer of expense. Without denigrating Mr. Vilnis's work experience in any way, I do not accept that he has the necessary expertise given the age, heritage designation and extent of the building envelope problems.

[10] Dr. Chorney is another owner. She put forward a proposal prepared by Read Jones Christoffersen ("RJC"), a firm of consulting engineers. The proposed project engineer has expertise in heritage work. The RJC report suggests a probable cost of $150,000 to $200,000 but also recommends budgeting for a structural assessment and preparation of a scope of work. The additional cost associated with those steps is estimated at about $10,000. In addition, the RJC proposal contemplates up to $18,500 for preparing construction documents and tendering as well as a fee of 8% to 15% of the final construction cost for contract administration and field review. This could increase the fees payable on a $200,000 project by a further $58,500, resulting in an overall project cost of $258,500.

[11] It is understandable that the majority of the owners oppose paying fees that might significantly exceed 25% of the cost of the project and continue to rise if the estimated cost of work proves to be conservative. While I consider the RJC fee structure too rich in the circumstances, I recognize that an engineering consultation and oversight is probably necessary to accomplish the building envelope repairs.

[12] The administrator contends that it would be:

> ... perilous to simply engage contractors to undertake repairs without the co-ordinated direction and supervision of an engineering consultant ... [who] would independently establish a comprehensive scope of work, call for bids through a formal tendering process and then assess the submissions in order to make recommendations to the owners on the proper course to follow in respect of obtaining and awarding contracts … [and] then be responsible for

> supervising the work in accordance with the scope of work and established specifications.

[13] The administrator recommends RDH Building Engineering Ltd. ("RDH") to prepare the scope of work. RDH, like RJC, apparently has the necessary expertise in heritage work. The administrator recommends a budget of $10,000 to be raised by special levy for that purpose. While that expense is similar to the RJC proposal, it does not address the other engineering costs set out in the Chorney proposal.

[14] Instead, the administrator recommends an additional special levy of $400,000 to develop a fund for the building repair program. The administrator does not specifically address how he arrived at $400,000 although I suspect that he was attempting to be as conservative as possible given the unknown factors at play. Presumably, he included any additional engineer or architect fees in this amount. In the result, the recommendation envisages a total project cost of $410,000.

[15] At the time of the hearing, the administrator had not enquired whether there is an architect available with the necessary qualifications and experience in heritage work who could develop the scope of work and perform administrative and quality assurance functions at less cost than quoted by RJC.

[16] The administrator should take reasonable steps in such regard to ensure that the strata corporation is getting necessary services at a competitive price. Having said that, the initial cost estimates of $10,000 from two sources for the preparation of a scope of work is probably an indication that that particular amount is reasonable.

[17] In my view, the overall cost of repairs is likely to significantly exceed Mr. Vilnis's estimate. Alternatively, if the work is limited as Mr. Vilnis suggests, it will not adequately address the problems or the heritage nature of the building. Saving money in the short term is a factor but ought not to be the overriding goal.

[18] The RJC estimated cost of repairs is more realistic, although it recognizes the risk of unknown factors coming to light that may add significantly to the cost. The

RJC proposal, endorsed by Dr. Chorney, however, proffers too expensive a fee structure, at least at this stage, to commit to it.

[19] I am satisfied that it is in the best interests of the strata corporation to meet its obligation to repair the common property by accumulating a building repair fund recognizing, however, that the initial amount may prove inadequate as more information becomes available. For example, once bids or estimates for the work are received, it may be apparent that more money is needed than the amount I propose to order now.

[20] Taking into account all submissions, I impose a special levy of $250,000 on the owners to create a building repair fund. Unless otherwise ordered, only the administrator may draw on the fund for the purposes set out below.

[21] The administrator may pay up to $20,000 from the fund, as necessary, to engage either or both a qualified professional architect and engineer, with experience in heritage work, as needed, to conduct further assessments and prepare a scope of work for the building envelope repair project, and then prepare and tender contracts. The administrator is further authorized to sign contracts on behalf of the strata corporation for the building repairs, the total of which is not to exceed $230,000, including projected engineer or architect fees through completion of the project. Any retainers of an architect or engineer shall be subject, except as to amount, to the conditions set out in paragraphs 51-52 of these reasons.

[22] Dr. Chorney asks for court sanction, or approval, of the specific repair plans but I prefer to leave it to the administrator, with the assistance and advice of the consultants, to decide whether to commit to the contracts. Of course, the administrator may apply for further directions if he considers it necessary to do so.

[23] Dr. Chorney also invites me to fix a timeline for finishing the building envelope repairs. I am not inclined to do so, at least at this point. Any consultant involved in assessing the problems, or overseeing the tendering process, should proceed on the basis that the work is long overdue and must be completed as quickly as possible.

Furthermore, there is a significant continuing cost associated with the appointment of the administrator and it may be necessary to extend the appointment until the work is satisfactorily completed. Both the administrator and any consultant must take all reasonable steps to ensure the timeline is both realistic and adhered to.

[24] At this stage, I have insufficient evidence to determine how long the actual work will take. Instead of fixing a time for completion that may amount to an unrealistic guess, the order must be as flexible as possible to avoid the expense of unnecessary applications to amend.

[25] It is also important to provide sufficient flexibility to permit changes to the funding amounts as more information becomes available. Accordingly, the administrator may increase the total amount payable to consultants if a three-quarter majority of the owners agrees or the court otherwise orders. Further, the administrator may enter into contracts totalling more than $250,000 if a three-quarter majority of the owners agrees or the court otherwise orders. I encourage the owners to approach such questions responsibly and reasonably so as to avoid the cost of further applications.

[26] I grant leave for two clear days' notice to all owners of any applications respecting directions or the amounts to be accumulated or spent. If I am not available, another judge may hear the applications.

[27] Finally, if the administrator completes the repairs to the building envelope at a total cost less than $250,000, he may return to each owner the balance of their respective contribution, subject to offsetting any other monies the owner may owe to the strata corporation.

[28] The remaining issues relate to Unit 8 owned by the Kaufmanns. The administrator seeks the following orders:

1. To raise $15,000 by a special levy upon the owners to engage Morrison Hershfield Engineering to advance the repair program respecting Unit 8;

2. That the owners and occupiers of Unit 8 give up possession of Unit 8 to the administrator by 12:00 noon on May 13, 2010;

3. That the administrator is entitled, after 12:00 noon on May 13, 2010, to take possession of Unit 8 and, in doing so, may seek the assistance of a court appointed sheriff or a duly appointed police officer of the City of Victoria;

4. Upon the administrator completing the work on Unit 8 as required by the remedial action requirement dated September 18, 2008, of the City of Victoria, the administrator shall return possession of Unit 8 to the registered owners and occupants thereof; and

5. The registered owners and occupants of Unit 8 shall not interfere with the administrator's possession of Unit 8 during the time the administrator is in possession of Unit 8 as set out in the above orders.

[29] The administrator contends these orders are necessary to give effect to my earlier orders, as follows:

Order made October 15, 2009:

1. That the registered owners and occupants of Unit 8 do cooperate with the administrator in taking all reasonable steps necessary to comply with the remedial action requirement dated September 18, 2008, of the City of Victoria; and

2. The registered owners and occupants of Unit 8 do permit any duly authorized agent of the administrator or on behalf of the City of Victoria to inspect the interior of the premises of Unit 8 and to conduct work thereon, between the hours of 9:00 a.m. and 6:00 p.m., for the purpose of effecting the remedial action requirement.

Order made March 9, 2010:

1. The administrator is authorized to take all steps reasonably necessary for the purposes of effecting [the remedial action requirement], including, without limitation, the removal for that purpose of any betterments and improvements and the construction of any modifications to Unit 8 or any common property as necessary; and

2. Upon receipt of 48 hours' advance written notice from the administrator, the registered owners and occupants of Unit 8 shall provide unfettered access to Unit 8 to the administrator and any duly authorized agent on behalf of the administrator (including engineering or other consultants and tradespersons) or any duly authorized agent on behalf of the City of Victoria for the purpose of effecting the remedial action requirement.

The last order further provided that the written notice could be delivered by email to the owners and occupiers or in such other manner as they and the administrator might agree.

[30] I do not propose to set out the serious problems affecting both Unit 8 and the common property of the strata corporation. Those problems are well known to all the owners and are discussed in detail in my previous reasons. In fact, the urgent need to address those problems was a principal reason for the appointment of an administrator in 2008. In spite of that, the problems associated with Unit 8 remain unresolved. I earlier found that the strata corporation has a duty to resolve them and that the Kaufmanns have been delaying the matter.

[31] The owners of Unit 8, Dr. Kaufmann and her son, did not attend the chambers hearing although Dr. Kaufmann forwarded an affidavit from Germany where she resides. It is apparent that Dr. Kaufmann opposes the orders sought relating to Unit 8 although she did not formally respond to the application, as required by the *Rules of Court.*

[32] The Kaufmanns were, but are no longer, represented by counsel in this proceeding. I am not aware if they filed a Notice of Intention to Act in Person with a local address for delivery.

[33] Nonetheless, I observe that Dr. Kaufmann objects that she received insufficient notice of the administrator's second application in which he seeks orders numbered 2–5 above. Dr. Kaufmann erroneously expressed the view that she is entitled to 42 days' notice, as would be the case for service outside Canada of an action or other originating proceeding.

[34] Ordinarily, the requisite notice for an application in Chambers is considerably less than that for responding to service of an originating proceeding under the *Rules of Court.* In the present case, the administrator successfully sought short leave so that the second notice of motion could be heard at the same time as the first one of which proper notice was given under the rules. Accordingly, the second application was properly before me.

[35] As to any future applications that may be necessary, the shortened notice period set out earlier in these reasons will apply to all owners, including the Kaufmanns.

[36] The Kaufmanns failed to comply with my order of October 15, 2009. This necessitated my further orders of March 9, 2010. Since the making of the latter orders, the Kaufmanns responded by email on April 1, 2010, stating, in part:

> [W]ith respect to the recent court order we shall cooperate in the process that will result in obtaining the City's approval with regard to remediation of the structures ordered by the City on common property adjacent to our suite.
>
> The understanding of how to proceed, and who will be doing the work, is of concern. Obviously, we want to be present and determine who will be authorized to circulate through our home to carry out construction work around it.
>
> Thus we have decided to have the required contractors coordinated ourselves to carry out the work as outlined by the City and as authorized through respective permits.

> Condition being:
>
> - All costs are at the strata corporation's expense;
> - Quotations from all contractors will be submitted for prior approval by the strata corporation;
> - Upon approval both by the City and the strata corporation, the remediation can be completed.

[37] The administrator refused to agree to proceed based on the conditions outlined by the Kaufmanns. To do so would inevitably have resulted in serious breaches of the existing court orders and also exposed the strata corporation, of which he is the effective representative, to justifiable complaints that it had not fulfilled its statutory duties outlined in my earlier reasons.

[38] In support of his most recent application, the administrator deposed in an affidavit that he responded to the April 1, 2010, email on April 20, 2010, to advise, among other things, that the City of Victoria required formal engineering or architectural letters of assurance before issuing any permits for the required work. He also advised that he had made arrangements for Morrison Hershfield Engineering to enter Unit 8 on April 27, 2010, for the purpose of "measuring and determining other aspects of the required remediation" and that no physical work would be done on that occasion. The administrator asked for access to the unit but advised that if access was not provided, he would arrange for a locksmith to attend to unlock the premises.

[39] The Kaufmanns responded by email on April 25, 2010, advising of their opposition and stated, in part, "There is no reason for not having the remediation organized ourselves as instructed by the City, after we told you that we will comply with the court order."

[40] On April 26, 2010, counsel for the administrator emailed the Kaufmanns setting out the material terms of the court orders at variance with the Kaufmanns' position but also advised, in light of their objections, that the administrator would not proceed with the planned entry. Counsel advised that the administrator would instead make the present application respecting access to Unit 8.

[41] Before the hearing, I granted leave to the Kaufmanns to forward an unfiled affidavit for the purpose of the hearing. In her affidavit, Dr. Kaufmann included a lengthy history and contended that there is no need to proceed with the proposed remediation work in Unit 8 as she does not consider it necessary. Dr. Kaufmann believes that the City will agree to a rezoning that will legitimize the changes to Unit 8.

[42] On the whole of the evidence, including that before me on the earlier applications, I am not persuaded that the Kaufmann proposal has any realistic prospect of success. In my previous reasons, found at 2009 BCSC 1415 (paras. 34-35), I expressly found that rezoning is not achievable and that it has no prospect of going forward. There is no new evidence to properly support a different conclusion now.

[43] Instead, the Kaufmanns refuse to accept my finding and continue to be intransigent respecting the Unit 8 issues. While I am sympathetic to their plea that they bought the unit sometime after the modifications at issue, that does not alter the need for immediate compliance with the remediation order.

[44] The Kaufmanns also object that the proposed engineering costs relating to Unit 8 are excessive. Some other owners, including Mr. Vilnis and Mr. Hannah, make similar objections.

[45] At the conclusion of the chambers hearing, I asked the administrator to consider whether a local architect might provide the necessary assurance to the City of Victoria at a lesser cost than quoted by Morrison Hershfield Engineers.

[46] The administrator has since filed a supplemental affidavit setting out the steps taken after the hearing. Based, in part, on discussions with some of the owners during the hearing, the administrator contacted two architects, each with the necessary qualifications, to determine if they would provide the assurance to the City based on a review of the remediation work after the fact.

[47] Neither architect was prepared to do so, although one outlined a possible limited retainer to inspect before reconstruction, numerous times during construction and then, finally upon completion of construction. The architect estimated the cost of the limited retainer at a minimum of $5,000 but referred to it as “not standard” and advised against proceeding in that manner.

[48] The administrator also contacted the Chief Building Inspector of the City of Victoria who advised that the City would not accept the limited professional involvement described immediately above. According to the inspector, the required Letter of Assurance is predicated on the professional doing the necessary investigation, design, site inspection and then signing off on the proposed work. The Letter of Assurance to be provided at the end of the project necessarily relates back to the initial professional design. In the result, professionally sealed plans are also required. According to the inspector, it is not possible to sever the two functions and “[t]here really is no other way to approach the situation.”

[49] I am persuaded that the various problems associated with the remedial work in and around Unit 8 are complex and involve significant structural considerations necessitating the involvement of an engineer and, possibly, also an architect. At least two other engineering firms have now been contacted but it is apparent that each of those firms would have to inspect the premises before offering a firm quotation respecting the cost of preparing a full scope of work and complying with requirements imposed by the City of Victoria. In the view of the administrator, additional time and expense would be associated with that step.

[50] Instead, the administrator continues to recommend the hiring of Morrison Hershfield Engineering at a cost of $15,000, of which $1,835 is for the initial investigative work already completed. I observe that Mr. Vilnis has sworn and filed a further affidavit since the hearing in which he continues to object to the costs associated with accepting the administrator’s recommendation. While I did not give Mr. Vilnis leave to file a further affidavit, I have reviewed it and agree that financial

prudence is called for but do not agree that significant engineering costs, and possibly architectural costs, can be avoided in the circumstances.

[51] The administrator seeks an order for a special levy of $15,000 to retain Morrison Hershfield Engineering to “advance the repairs” respecting Unit 8. While I leave it to the administrator to work out the exact terms of the agreement, it must require the engineering firm to provide all the necessary professional engineering services necessary to take the project through to final completion and City of Victoria approval, based on reasonably competitive hourly rates to a maximum total of $15,000.

[52] Regardless of any retainer or periodic payment, the engineering firm must also agree that the total paid is reviewable, and subject to court approval, at the conclusion of the project upon the written demand of a three-quarter majority of the owners. On those conditions, I grant the administrator’s application for a special levy of $15,000 respecting the anticipated engineering costs associated with the remediation of Unit 8.

[53] As to the remaining orders sought respecting Unit 8, there is no doubt that they are unusually intrusive in nature. I am satisfied, however, that they are necessary.

[54] The Kaufmanns, as owners of the unit, could and should have taken steps to actively comply with the remediation order a long time ago. Since the appointment of the administrator, they have resisted every suggestion, fought every recommendation and refused to comply with orders of the court. The pattern has carried on far too long and has added very significantly to the costs of the administration. I grant the remaining orders that the administrator seeks as earlier set out in items 2–5 at paragraph 28 of these reasons.

[55] I see no reason why the other owners should pay the costs associated with the Kaufmanns’ resistance. I award lump sum costs in favour of the strata corporation against the Kaufmanns of $500 all inclusive of disbursements and any

applicable taxes. In fixing these costs, I ascribed about half the required chambers time to the Unit 8 issues. The Kaufmanns are required to pay the costs set out above forthwith.

[56] Counsel for the administrator shall prepare the court order. I dispense with any requirement that the owners approve the form of order. Counsel, or the administrator, shall deliver a copy of the entered order to each owner.

"M.D. Macaulay, J."
The Honourable Mr. Justice Macaulay