IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Elahi v. Owners, Strata Plan VR 1023,* 2011 BCSC 1665

Date: 20111205
Docket: S101961
Registry: Vancouver

Between:

Freidoun Elahi and Hortensia Chaves De Moreno

Petitioners

And

The Owners, Strata Plan VR 1023

Respondent

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Petitioners:	P.G. Mendes, M.A. Sawicka
Counsel for the Respondent:	G.S. Hamilton
Place and Date of Hearing:	Vancouver, B.C. February 14, 2011
Place and Date of Judgment:	Vancouver, B.C. December 5, 2011

Introduction

[1] This is a dispute between the petitioners, Freidoun Elahi and Hortensia Chaves De Moreno, and The Owners of Strata Plan VR 1023 (“the Strata Corporation”). The petitioners own a strata lot which is part of a condominium complex in downtown Vancouver.

[2] When the petitioners bought their unit in 2000, there was a wooden deck attached to the south-west side; on the deck was a solarium. I understand it was built immediately adjacent to and up against the south-west wall of the portion of the building near the petitioners’ unit. The solarium occupied only a portion of the deck’s area.

[3] In 2009, the City of Vancouver (the “City”) ordered the petitioners to remove the solarium and to restore the deck to its original condition. Building permit BU444689 was issued to the petitioners; it provided for removal of the solarium and for restoration of the deck to its originally permitted condition, open with guardrails.

[4] The dispute between the parties concerns the issue of who is responsible for the cost of bringing the existing deck into compliance. As well, after the solarium was taken down, parts of the exterior surface of the building immediately adjacent to two windows and a door (which were previously protected from the elements by the solarium but are now exposed) were in a deteriorated condition and required remedial work to make the area appropriately weatherproof. The cost of those repairs is also in dispute.

Relief Sought

[5] The petitioners seek the following relief:

1. a declaration that the unanimous resolution of the strata corporation, approved on December 3, 1981 and registered on the common property record of the strata corporation as document J89023, be in full force and effect;
2. a declaration that the area adjacent the Petitioners' strata lot is limited common property for the exclusive use of strata lot 4 (the "LCP");

3. a declaration that the strata corporation is responsible for the repair and maintenance of the deck located on the LCP and the doors and windows of the Petitioners' strata lot that front onto the LCP;

4. a declaration that the strata corporation's refusal to pay for the cost of repairs to the LCP deck and the [*sic*] as well as the doors and windows of the Petitioners' strata lot that front onto the LCP is significantly unfair to the Petitioners within the meaning of the provisions of s. 164 of the Act [*Strata Property Act*, S.B.C. 1998, c. 43];

5. a declaration that the strata corporation is in breach of its duty to repair and maintain the exterior portions of the Petitioners' strata lot, under Section 72 of the Act and the strata corporation's bylaws, including the LCP and the windows and doors that front onto the LCP;

6. an Order pursuant to section 165 of the Act that the strata corporation undertake to complete, forthwith and at its own expense, the outstanding alterations to the LCP contemplated by the Building Permit BU444688, issued by the City of Vancouver, on May 1, 2009;

7. further or in the alternative to paragraph 6, an Order to [*sic*] pursuant to section 165 of the Act that the strata corporation perform its duties under bylaw 3.5 and take whatever steps are reasonably necessary to repair and maintain the LCP and the windows and doors of the Petitioners' strata lot so as to make the LCP and the Petitioners' strata lot fit for habitation;

8. an Order pursuant to s. 36 of the Act that the strata corporation provide the Petitioners with copies of:

    a) all correspondence sent or received by the strata corporation, other than privileged correspondence, concerning the Petitioners' applications for permits to make improvements to the LCP;

    b) all strata council and strata corporation minutes back to 1981;

9. an Order that the Petitioners have leave to apply to the court for directions to assist and permit them to carry out the terms of this Order;

10. an Order that the strata corporation pay costs to the Petitioners at scale B; and

11. such other relief as this honorable court deems just.

[6] The Strata Corporation has filed a counter-petition, seeking this relief:

1. A declaration that the area adjacent to the Respondents' strata lot is limited common property for the exclusive use of strata lot 4 (the "LCP");

2. A declaration that the Respondents are responsible for the repair and maintenance of the deck located on the LCP and the doors and windows of the Respondents' strata lot that front onto the LCP;

3. An Order pursuant to section 173 of the *Strata Property Act* that the Respondents undertake to complete, forthwith and at their own expense, the outstanding alterations to the LCP contemplated by Building Permit BU444688, issued by the City of Vancouver, on May 1, 2009;
4. Further or in the alternative to paragraph 3, an Order pursuant to section 173 of the *Strata Property Act* that the Respondents repair the deck located on the LCP and the door and windows of the Respondent's strata lot that front onto the LCP;
5. Costs; and
6. Such further and other relief as to this Honourable Court may deem just and proper.

Background

[7] The building was originally constructed in approximately 1912 as a rental apartment complex. In 1980, it was purchased by a development corporation which converted it into a strata property and sold the individual strata lots. The building itself is comprised of six storeys; there are 52 residential lots and three commercial lots.

[8] On or about December 3, 1981, shortly after the Strata Plan was deposited at the land title office, the Strata Corporation (at that time, the developer of the property was the sole member of the strata plan) passed a unanimous resolution ("the Unanimous Resolution") which designated an area of common property as limited common property ("LCP") for the exclusive use and enjoyment of Strata Lot 4. By the resolution, the Strata Corporation also granted an irrevocable privilege to the owner of Strata Lot 4 to construct and maintain a solarium within the LCP boundary. The actual text of the resolution is as follows:

> CERTIFICATE OF STRATA CORPORATION
> THE OWNERS, STRATA PLAN VR 1023
> AS OF THE 3rd DAY OF DECEMBER, 1981
>
> The undersigned, being the owner/developer and sole member of the council of the strata corporation the Owners, Strata Plan VR 1023, being a strata corporation existing under the Condominium Act, British Columbia, HEREBY CERTIFY that the following unanimous resolution was duly passed at a general meeting of the Strata Corporation duly called and held on the 3rd day of December, 1981.

RESOLUTION OF THE STRATA CORPORATION,
THE OWNERS, STRATA PLAN NO. VR. 1023
AS OF THE 3rd DAY OF DECEMBER, 1981.

WHEREAS:

A. The Owners, Strata Plan No. VR 1023 is responsible for the control, management and administration of the limited common property situate and contained within the Strata Plan registered in the Vancouver Land Title Office under Strata Plan VP. 1023;

B. Pursuant to Section 117 (f) and (g), Condominium Act, R.S.B.S. [*sic*] 1979, c. 61, as amended, the Strata Corporation may designate an area as limited common property and specify the strata lots that are to have the use of the limited common property.

C. The Owners, Strata Plan No. VR 1023 wish to designate common property as limited common property for the exclusive use and enjoyment of the owners of Strata Lot 4 and grant special privileges with respect to the use of the limited common property.

BE IT unanimously resolved that:

The Strata Corporation designate the common property outlined in red on the plan attached hereto as Schedule A to be limited common property for the exclusive use and enjoyment of the owners of Strata Lot 4.

The owners from time to time of Strata Lot 4 shall have the irrevocable privilege to carry out the works necessary to construct and maintain a solarium within the area designated as limited common property for Strata Lot 4. The Strata Corporation shall take whatever action or proceedings may be necessary in order to assist the said owner of Strata Lot 4 to obtain the necessary building permit from the City of Vancouver to carry out the said works.

The aforesaid designation of limited common property and grant of special privilege with respect to the use and enjoyment of the limited common property made to the owner of Strata Lot 4 shall be irrevocable.

CERTIFIED BY THE SOLE MEMBER OF STRATA PLAN VR 1023, THIS 3rd DAY OF DECEMBER, 1981.

[9] In 1982, the then-owner of Lot 4 built a deck structure, somewhat elevated from the ground; he also constructed a solarium over approximately one-half of the deck. He obtained a permit to construct the deck, but no permit was ever obtained for the construction of the solarium.

[10] A short while later, it appears there was a dispute between the owner of Lot 4 and the developer concerning this construction. The developer advised the owner that the solarium was “overbuilt” and had been constructed without a permit and requested its immediate removal. What ultimately became of that dispute is

unknown; presumably there was some resolution reached because there is no indication of further discussion of the deck or solarium for many years.

[11] On November 30, 2000, the petitioners became the registered owner of Strata Lot 4.

[12] In 2003, the Strata Corporation conducted an inspection of the solarium and concluded that it appeared structurally unsound and was in a potentially dangerous condition. The Strata Corporation subsequently obtained an engineering report confirming that concern and recommending removal of the solarium.

[13] Discussions followed between the Strata Corporation and the Lot 4 owners. In July of 2004, legal counsel for the petitioners wrote to counsel for the Strata Corporation, advising of a proposal to remove the solarium and replace it with a ground-level concrete patio or a wooden platform deck. The Strata Corporation responded, advising that it did not object to the petitioners building a new solarium so long as the existing solarium was demolished by the end of November at the petitioners' expense.

[14] On February 9, 2005, the petitioners' counsel wrote to the Strata Corporation, advising that the petitioners accepted the Strata Corporation's offer to permit demolition and reconstruction of the solarium, provided all necessary permits were obtained from the appropriate bodies. The petitioners also advised that if regulatory approval could not be obtained, they intended to construct a concrete patio with a fenced enclosure, the same size as the existing deck.

[15] In April 2005, counsel for the Strata Corporation responded, advising that a new structure on the same footprint as the existing solarium/deck might not be possible as it likely would encroach on adjoining property. Counsel also advised that a ground level concrete patio would not be acceptable because it would obstruct the windows of another strata unit.

[16] Over the next year, the petitioners engaged in discussions with the regulatory authorities with a view to settling upon a plan. That did not come about. As well,

none of the required documentation was submitted to the City as required. Ultimately, on January 8, 2007, the City issued an order requiring removal of the solarium on or before January 22, 2007.

[17] Discussions continued between the petitioners and the Strata Corporation in an effort to reach an agreement as to what would be done with the situation. No final agreement was reached.

[18] On March 13, 2007, the Strata Corporation directed a letter to the petitioners' representative, clarifying the Strata Corporation's position:

(a) the Strata Corporation recognized the right that had been granted in 1981 to Strata Lot 4's owners with respect to the solarium; and

(b) the Strata Corporation's primary concern was that the solarium was structurally sound.

[19] In April 2007, the City of Vancouver Board of Variance approved the petitioners' application to rebuild the solarium. In November, the City issued a Development Permit to the petitioners to rebuild the solarium. The petitioners were then required to apply for a Building Permit. Apparently, the required information and payment of fees was not provided to the City. Ultimately, on or about November 24, 2008, because of inactivity in the file with the City, the petitioners' Permit for a deck was due to lapse.

[20] Finally, on March 12, 2009, the City rejected the petitioners' Building Permit application because the information was inadequate. Concurrently, the City ordered the petitioners to obtain a Building Permit to remove the solarium and obtain a Building Permit to restore the solarium to its original condition, namely an open deck with guardrails.

[21] On or about May 1, 2009, the petitioners obtained a Building Permit to remove the solarium and construct an open deck with three foot, five inch guardrails.

In August of 2009, the petitioners removed the solarium. The original deck structure remains.

[22] In the course of or as a consequence of the removal of the solarium, certain windows and a patio door of Strata Lot 4, fronting onto the limited common property area, were exposed to the elements and rain water was permitted to enter. On the basis of the material filed, I understand the petitioners removed wood, plaster and glass/acrylic materials enclosing the solarium (without a permit).

[23] In November of 2009, legal counsel for the petitioners contacted the Strata Corporation, advising of the petitioners' position that the Strata Corporation should be responsible for installing the guardrails, repairing the deck foundation and repairing the leaking windows and doors. A short while later, counsel for the Strata Corporation directed a letter to the petitioners' lawyer advising that work was being done on the solarium without the Strata Corporation's consent and requiring that the petitioners cease from performing any further work on the limited common property.

Discussion

[24] Notwithstanding the quite lengthy history of the problems concerning the solarium and the deck, the dispute seems to have taken its current shape in November 2009 when the petitioners first called upon the Strata Corporation to undertake and pay for the cost of reconstructing the deck and repairing the doors and windows. The petitioners' position, as I understand it, is that they do not intend at this time to build a replacement solarium, but they wish to preserve the right to do so in the future.

[25] They argue that the Unanimous Resolution makes them responsible for the repair and maintenance of the solarium; however, they say that, by virtue of the applicable legislation, s. 72 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "Act"), and the relevant bylaws, the Strata Corporation has a duty to repair and maintain the deck and the LCP generally.

[26] The Strata Corporation disputes that approach. In its submission, the Unanimous Resolution designated only a particular space or area as LCP for Lot 4, together with a right to construct and maintain a solarium within that area. When that grant was made, the area was empty. The then-owner constructed the deck and the solarium in order to exercise the privilege that had been granted. The Strata Corporation argues that the responsibility of the owner of Lot 4 to "construct and maintain" encompasses both the solarium and the deck upon which it sits - an integral part of the "works necessary to construct and maintain a solarium within the area designated" (the wording used in the Unanimous Resolution).

[27] In my view, for the reasons which follow, the Strata Corporation's position is correct and must succeed.

[28] The Unanimous Resolution granted a right to use the space. That right can only be revoked by a subsequent unanimous resolution of all the owners. There has not been any such resolution to date, and so the granted right remains intact.

[29] In fact, both parties quite properly agree that the right to construct and maintain a solarium within that area exists today and continues. It is the specific issue of what responsibilities are entailed that is the subject of this litigation, and which I am satisfied must be resolved in favour of the Strata Corporation.

[30] I find the "works necessary to construct and maintain a solarium", the words used in the Unanimous Resolution, comprises both the deck and the solarium. When the grant was made, there was nothing on the site; the LCP that was designated for the use and enjoyment of the owner of Lot 4 was a vacant space. The owner then constructed the deck that provided a platform for the solarium and he constructed the solarium itself upon the deck. Those were constructed by the owner as a means of exercising his right. There is simply no basis to differentiate between the deck and the solarium, or to somehow find that the deck is part of the LCP, conceptually different than the solarium. That does not accord with common sense.

[31] In the result, I conclude that both components, the deck and the solarium, are part of the works necessary to construct and maintain a solarium within the area designated as LCP for Strata Lot 4 and I reject the submission that the deck structure is part of the LCP.

[32] A proper understanding of the meaning to be attributed to the word “maintain” is relevant to the analysis. I have concluded that it must be given an expansive meaning, taking into its ambit the correction of a structural defect or, where the circumstances require, reconstruction. My view in the matter is substantially informed by a discussion of the issue found in the decision of Burnyeat J. in *Mott v. Leasehold Strata Plan LMS2185 UBC Properties Inc.* (1998), 20 R.P.R. (3d) 298, 84 A.C.W.S. (3d) 588 (B.C.S.C.) (“*Mott*”) at paras. 27-28:

> 27 In *Manton v. York Condominium Corp. No. 461* (1984), 49 O.R. (2d) 83 (Ont. Dist. Ct.), the obligation to "maintain" was found to be broad enough to include the obligation of the owners to correct a structural defect. The court cited with approval the following passage of Cory J.A. (as he then was) in *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337 (Ont. C.A.) at 341:
>
> > The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement costs of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.
>
> 28 In support of this conclusion, Cory J.A. cited the decision in *Canadian Pacific Railway v. Grand Trunk Railway* (1914), 49 S.C.R. 525 (S.C.C.) where the word "maintained" was interpreted to be wide enough to include the reconstruction of a bridge so that it could service an increased flow of traffic.

[33] In the result, the obligation that the Unanimous Resolution imposes upon the owner of Lot 4 to “construct and <u>maintain</u> a solarium” (my emphasis) encompasses the task of reconstructing these structural elements (both the deck and the solarium) when the circumstances require.

[34] The petitioners also submit that the Strata Corporation should be found to have the responsibility for the deck work because of the duties that are imposed on it by the relevant legislation and the bylaws of the Corporation.

[35] The specific provision of the Act that is said to apply is s. 72:

> **Repair of property**
>
> 72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.
>
> (2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of
>
> (a) limited common property that the owner has a right to use, or
>
> (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.
>
> (3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.

[36] The bylaw of the Strata Corporation which the petitioners say is relevant and which they rely on provides as follows:

> 3.5 The Strata Corporation shall repair and maintain the following:
>
> (a) common assets of the Strata Corporation;
>
> (b) common property that has not been designated as limited common property;
>
> (c) limited common property, but the duty to repair and maintain it is restricted to
>
> (i) repair and maintenance that in the ordinary course of events occurs less often than once a year, and
>
> (ii) the following, no matter how often the repair or maintenance readily occurs:
>
> (A) the structure of the building;
>
> (B) the exterior of the building;
>
> (C) chimneys, stairs, balconies, and other things attached to the exterior of the building;
>
> (D) doors, windows and skylights on the exterior of the building or that front on the common property;
>
> (E) fences, railings and similar structures that enclose patios, balconies and yards;

> (d) a Strata Lot, but the duty to repair and maintain it is restricted to
>
> (i) the structure of the building;
>
> (ii) the exterior of the building;
>
> (iii) chimneys, stairs, balconies, and other things attached to the exterior of the building;
>
> (iv) doors, windows and skylights on the exterior of the building or that front on the common property; and,
>
> (v) fences, railings and similar structures that enclose patios, balconies and yards.

[36] Dealing first with the bylaw, quite apart from the question of whether the bylaw can be said to take precedence over the assignment of responsibility provided by the Unanimous Resolution, there is a more fundamental problem. In the facts at bar, the rights and obligations arising from the Unanimous Resolution, described as irrevocable, can only be modified by an instrument, either a resolution or bylaw, which is itself unanimous - agreed to by all affected parties. That is simply not the situation here. In fact, the bylaws of the Strata Corporation were adopted by a three-quarter vote majority of the members in 2002. I am satisfied that they do not have the effect of defeating or altering the specific rights and responsibilities of the Unanimous Resolution grant in question. That proposition is made clear by another passage from the *Mott* decision, where Burnyeat J. stated at paras. 32-33:

> 32 Accordingly, it is necessary to review the provisions of bylaws 139.6 and 139.8 to see whether they did or can alter the situation which existed prior to June 6, 1997 when they became effective. It is also necessary to review these bylaws to confirm that they are consistent with the Part V bylaws which were in existence when Mr. and Mrs. Mott purchased their property and, in particular, ss. 115(c), 115(h), 116(c) and 116(f) of the *Act*.
>
> 33 Section 115(h) of the *Act* provides that permission from the Strata Council before undertaking alterations is not to be unreasonably withheld. While the Strata Corporation is authorized to pass further bylaws, rules and regulations, it does not follow that those provisions can be contrary to the provisions set out in the *Act* or the Lease. Bylaws must be consistent with the *Act* and with any Lease: see, for instance, *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 38 D.L.R. (4th) 430 (Ont. C.A.). Accordingly, even assuming that bylaws 139.6 and 139.8 have been passed in substitution of the provisions of s. 115(h) of the *Act*, any permission by the Strata Council cannot be unreasonably withheld. This is the case even though bylaws 139.6 and 139.8 do not use the words "cannot be unreasonably withheld" which are contained in s. 115(h) of the *Act*.

In that case, the strata corporation was held unable to modify the terms of the lease without the consent of the other parties to the agreement.

[37] With reference to the present matter, the same reasoning applies: the adoption of the bylaws by a 75% vote of the members could not alter the rights and responsibilities that had been granted irrevocably by the Unanimous Resolution.

[38] The same conclusion applies with respect to the argument that s. 72 of the Act can be construed to make the Strata Corporation responsible for the costs.

[39] By way of background, when the development in issue, Strata Plan VR 1023, was originally conceived, such matters were governed by the then-extant provincial legislation, the *Condominium Act*, R.S.B.C. 1979, c. 61. The Unanimous Resolution was lawfully made in accordance with that Act. The Act itself was however subsequently repealed and replaced by the *Strata Property Act*. Nevertheless, I am satisfied that the rights and obligations created by the Unanimous Resolution are unaffected by that change.

[40] In *Strata Plan LMS608 v. Strata Plan LMS608*, [2001] B.C.J. No. 2116, (14 June 2001), Vancouver L010978 (S.C.), the court was required to consider the effect of that legislative change to the regulation of a strata corporation. Resort was had to s. 35 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which reads as follows:

> 35 (1) If all or part of an enactment is repealed, the repeal does not
>
> (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect,
>
> (b) affect the previous operation of the enactment so repealed or anything done or suffered under it,
>
> (c) affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed,
>
> (d) subject to section 36 (1) (d), affect an offence committed against or a contravention of the repealed enactment, or a penalty, forfeiture or punishment incurred under it, or
>
> (e) affect an investigation, proceeding or remedy for the right, obligation, penalty, forfeiture or punishment.
>
> (2) Subject to section 36 (1), an investigation, proceeding or remedy described in subsection (1) (e) may be instituted, continued or enforced and

> the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.

[41] In the result, the rights and obligations arising from the Unanimous Resolution survive and continue in force.

[42] My conclusions that the owners of Lot 4 should be responsible for the repair and maintenance costs of the solarium facility, and that both deck and solarium were not intended to form part of the general common property, are supported as well by a line of jurisprudence that originates with a decision of the Saskatchewan Court of Queen's Bench, *Okrainetz v. Condominium Plan No. 82R42988*, 102 Sask.R. 225, 24 R.P.R. (2d) 293 (Q.B.), and cases which follow. The principle emerging is that, in disputes of this nature, where the issue is the determination of repair responsibilities, the court should examine and consider the realities of the strata development.

[43] An effect of the application of the principle is seen in *Lim et al. v. The Owners, Strata Plan VR2654*, 2001 BCSC 1386, 44 R.P.R. (3d) 243 ("*Lim*"), where the general scheme of the *Condominium Act* was considered in delineating the respective duties of the strata council and the individual owners with respect to the expenses of maintaining limited common property. In concluding her analysis, Madam Justice Boyd said this at para. 63:

> ... Put another way, the Strata Corporation is primarily responsible for maintaining limited common property. Owners will be responsible for maintaining limited common property only to the extent their use of it creates additional expenses.

[44] Finally, it is, in my view, not without some significance that, up to November 2009, the petitioners, in all of their dealings with the Strata Corporation and the City with respect to this matter, conducted themselves in a way that quite clearly implied that they believed it to be their responsibility to deal with the matters of both the solarium and the deck structure upon which it was located. It was only very late in the day that they adopted the tack that the Strata Corporation was to be financially responsible for the deck.

[45] That of course does not determine the outcome, but it seems to be an aspect of the situation of some minor relevance.

[46] In conclusion, I reject the submission that the deck structure is part of the LCP and find that the petitioners are responsible for the repair and maintenance of the deck located on the LCP.

[47] A second aspect of the dispute concerns the responsibility for the cost of repairing the windows and door on the outside of the building in the area that was formerly within the enclosure provided by the solarium. On the evidence before the Court, it appears that the portions of the exterior building cladding are in some state of decay or damage. The affidavit of one of the petitioners says that the windows and door have been leaking since the solarium was demolished. There is also reference in the material to the petitioners having removed the wood, plaster and glass/acrylic enclosing the solarium.

[48] As well, there was a suggestion in the materials that the door may have been originally installed by the person who owned Lot 4 when the solarium was constructed, and that it was not part of the original as-built structure.

[49] In the circumstances, I am left to address the matter with something of a deficiency of information, but will do so despite that difficulty.

[50] In the submission of the petitioners, the duty to repair and maintain that door and those windows falls upon the Strata Corporation, as per Bylaw 3.5(c)(ii), set out earlier in these Reasons.

[51] The Strata Corporation says that it is not responsible for that door and those windows, and bases that position on two considerations:

> 1) The Strata Corporation did not intend the 2002 amendments to the bylaws to create obligations to repair the solarium or any other property associated with or affected by the Unanimous Resolution. The evidence of this corporate intent is contained in the affidavit of Margaret Underhill,

although I note that there is nothing in the bylaw to make that proposition clear.

2) The windows and the door were probably modified as part of the construction of the solarium and, in any event, they are now a problem because the solarium has been removed.

[52] I was referred to a decision of Cullen J. in the matter of *Kearsley v. The Owners, Strata Plan KAS 1215*, 2008 BCSC 1606, 90 B.C.L.R. (4th) 143, a case dealing with window repair in an area contained within a solarium. While there are some factual similarities, I have concluded that the decision in that case does not determine the outcome in the present matter.

[53] In fact, the most succinct statement of the proper, applicable underlying principle is as articulated by Boyd J. in *Lim* at para. 63, cited previously, where she stated that "Owners will be responsible for maintaining limited common property only to the extent their use of it creates additional expenses."

[54] There is a striking consonance between that principle and the thrust of s. 72 (2) of the Act:

> **Repair of property**
>
> 72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.
>
> (2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of
>
> (a) limited common property that the owner has a right to use, or
>
> (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

[55] I recognize, of course, that there has been no bylaw passed to make the petitioners responsible for the door and windows. Nevertheless, applying the general principle to the discussion and decision set out earlier respecting the solarium, it is my conclusion that the cost of repairing the windows and door should be borne by the petitioners to the extent that they are a consequence of the removal of the solarium structure. Problems or damage created by that removal process are

properly characterized as having a sufficiently close relationship to the construction and maintenance of the solarium. However, where the need to effect repairs is a consequence of general wear, tear and deterioration of the building structure, the obligation should fall upon the Strata Corporation, just as it would for any other exterior door or window of the building. Such repairs are clearly within the contemplation of Bylaw 3.5(c)(ii). It is not reasonable to conclude that the fact that the petitioners had a solarium located there at some point in time should permanently exempt the area from the responsibilities of the Strata Corporation.

[56] However, as for the door in question, if it was installed by the owner of Lot 4 as part of the solarium construction, maintenance responsibility for that must fall to the petitioners. I would observe that the same proposition - that repairs that are attributable to the solarium structure should be borne by the petitioners - would apply equally with respect to the exterior of the building in the event its integrity might be affected by the deck and subsequent removal of the deck.

[57] The practical effect of the Court's ruling in this regard will require the parties to consult and discuss the specifics of the circumstances surrounding the required repairs for the windows and door, and, in all probability, to reach a reasonable agreement which may entail some sharing of the expenses.

Conclusion

[58] In the result, I find as follows:

1) the petitioners, the owners of Lot 4, are responsible for the repair and maintenance of the deck located on the LCP;

2) the petitioners, the owners of Lot 4, are responsible for the repair and maintenance of the doors and windows of the strata lot fronting onto the LCP, to the extent those repairs and maintenance are attributable to the solarium structure; other ordinary repairs and maintenance are the responsibility of the Strata Corporation;

3) there will be an order, pursuant to s. 173 of the Act, that the petitioners undertake to complete, forthwith and at their own expense, the outstanding alterations to the LCP contemplated by Building Permit No. BU444688, issued by the City of Vancouver on May 1, 2009;

4) the petitioners' application for a declaration that the Strata Corporation has acted in a way that is significantly unfair to the petitioners within the meaning of the provisions of s. 164 of the Act is dismissed;

5) there will be a declaration that the Unanimous Resolution of the Strata Corporation, approved on December 3, 1981 and registered on the common property record of the Strata Corporation as document J89023, granting the petitioners the right to construct and maintain a solarium on the limited common property, is in full force and effect, subject to the limitations contained within these reasons for judgment.

[59] In the course of the evidence, the suggestion arose that the deck structure located on the LCP is in fact encroaching on property not owned by the Strata Corporation. It would follow, as a matter of common sense and basic principles, that any replacement deck structure must be confined to the property owned by the Strata Corporation and must comply with any relevant building restrictions of the local authority.

Costs

[60] The respondent Strata Corporation is entitled to recover its costs at Scale B.

"The Honourable Mr. Justice Williams"