

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Guenther v. Owners, Strata Plan KAS431*,
2011 BCSC 119

Date: 20110201
Docket: 87477
Registry: Kelowna

Between:

Lloyd Guenther

Petitioner

And

The Owners, Strata Plan KAS431

Respondent

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Petitioner:

M. Bujar

Counsel for the Respondent:

T. Brown

Place and Date of Trial/Hearing:

Kelowna, B.C.
January 13, 2011

Place and Date of Judgment:

Kelowna, B.C.
February 1, 2011

[1] The petitioner is the owner of a strata lot in the respondent's building. He is seeking the appointment of an administrator and various ancillary forms of relief.

[2] The primary dispute between the parties relates to two factually interconnected issues. In the mid-1980s, most of the owners of units in the strata development enclosed their balconies. The strata corporation does not seriously dispute that some of the enclosed balconies may need to be repaired. It takes the position, however, that the obligation to make those repairs rests with the individual unit owners. The petitioner argues that it is the strata corporation's responsibility. The second issue relates to the building envelope. The petitioner is of the view that the building envelope may have suffered damage as a result of the way in which the balconies were enclosed. It is beyond dispute that water leaks into some of the enclosed balconies. The petitioner is concerned that this water may be penetrating the building envelope.

[3] There are a number of other issues, including the adequacy of the fire alarms, cracks in some of the concrete, and the use by the strata council of the contingency reserve fund. These issues are less important to the parties and, standing alone, would not support the relief sought, even if resolved in the petitioner's favour.

[4] In what follows, I will first set out the law then review the facts I find based on the evidence. Finally, I will turn to an analysis of the legal principles as applied to the facts as found.

The Law

[5] Section 72 of the *Strata Property Act*, S.B.C. 1998, c. 43, provides that a strata corporation must repair and maintain common property. It also provides that a strata corporation may, by bylaw, impose on an owner the responsibility to repair and maintain "limited common property that the owner has a right to use". There are two provisions in the respondent's bylaws dealing with responsibilities of owners and the strata corporation in relation to limited common property. Section 3.2 of the bylaws provides that:

- 3.2 An owner who has the use of limited common property must repair and maintain it, except for repair and maintenance that is the responsibility of the Strata Corporation as directed by the B.C. Strata Property Act.

Section 11 deals with the strata corporation's obligation to repair and maintain property. Section 11.1(b) provides that the strata corporation is obligated to repair and maintain common property, except common property that has been designated limited common property. As to the latter, the strata corporation's duty to repair and maintain is restricted to repairs and maintenance that ordinarily occur less than once a year. Section 11.1(c)(II) provides that the strata corporation must repair and maintain limited common properties such as "railings and similar structures that enclose balconies" no matter how often the repair or maintenance ordinarily occurs.

[6] Regardless of who is responsible to make repairs, the obligation extends to making good or sound that which was previously good or sound and that which may never have been good or sound (see *Sterloff v. Strata Corp. of Strata Plan No. VR2613*, [1994] B.C.J. No. 445 (S.C.), cited with approval at para. 29 of *Taychuk v. Owners, Strata Plan LMS744*, 2002 BCSC 1638 at para. 29). The obligation is to do that which is reasonable in the circumstances (see generally *Wright v. Strata Plan No. 205* (1996), 20 B.C.L.R. (3d) 343, aff'd (1998), 43 B.C.L.R. (3d) 1 (C.A.) at paras. 29-30, quoted with approval in *Taychuk* at para. 30).

[7] The petitioner is seeking a declaration that certain actions by the strata council are "significantly unfair" to him. Section 164 of the *Strata Property Act* authorizes the Supreme Court to make "any interim or final order" necessary to prevent or remedy a "significantly unfair" action or decision by a strata corporation or its council. In *Reid v. Strata Plan LMS2503*, 2003 BCCA 126, Ryan J.A. wrote at para. 27:

...that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness...

[8] Section 174 of the *Strata Property Act* provides that a court may appoint an administrator if it is in the best interest of the strata corporation to do so. In *Lum v.*

The Owners, Strata Plan VR519, 2001 BCSC 493 at para. 11, Harvey J. distilled from a review of the authorities various situations in which it might be said that is so. Those situations include a demonstrated inability on the part of a strata council to manage the strata corporation or when the conflict between owners or groups of owners is such that it impedes or prevents the proper governance of the strata corporation. In determining whether to exercise the discretion to appoint an administrator, two overarching factors are to be borne in mind. First, as pointed out by Harvey J. in *Lum*, the appointment of a receiver can be, and often is, expensive. Second, as was noted by Huddart J. (as she then was) in *Cook v. Strata Plan N-50*, [1995] B.C.J. No. 2882 (S.C.), the appointment of an administrator can have the effect of overriding the democratic government of a strata community and thus is to be reserved for situations in which it is absolutely necessary.

The Issues

[9] The petitioner argues that the strata corporation is in breach of its duty to repair in two respects. First, it has failed to cause repairs to be made to those balconies which leak; and second, it has failed to investigate the integrity of the building envelope. These failures are said to be significantly unfair to the petitioner and, to the extent that is so, are the basis for making ancillary orders to correct them. Finally, the failure to repair and/or investigate, whether standing alone or taken in combination with the issues relating to the fire alarm system and the other matters noted above, is the basis for the petitioner's assertion that it is appropriate to appoint an administrator.

[10] The respondent argues that it is not in breach of its duty to repair. As to the balconies, it argues that it is the owners' obligation to repair them. As to the building envelope, the strata corporation argues that it has undertaken a reasonable investigation of that issue and, based on that investigation, has concluded that there is no need to commission a further expensive study. More generally, the respondent argues that the evidence does not establish that it is unable to manage itself, but rather supports the conclusion that, in the face of difficult circumstances, it has discharged its obligations competently.

Factual Background

[11] The building in question is a 42-unit three-storey wood-frame structure built in the early 1980s. Parking for the residents is at ground level but underneath the building. All of the strata units have a balcony. All but one of the balconies has been enclosed. In the mid-1980s, the unit owners installed window frames and windows that rest on the balcony railing and extend up to the floor of the balcony above.

[12] In the summer of 1998, the strata corporation decided to install vinyl siding to the exterior of the building and to replace the roof. They contracted with Hovey Roofing and Siding to do that. The work began on September 28th. By early November, council had received a number of complaints from which it concluded there were “major water problems”. As a result, they engaged Allan Purll, an architect, to investigate and directed Hovey Roofing to stop work on the “balcony areas” pending completion of Mr. Purll’s investigation. Mr. Purll reported his findings in a letter dated November 9, 1998. That report is the genesis of the petitioner’s concerns. The respondent argues that the petitioner has misunderstood Mr. Purll’s findings. For both of these reasons, it is necessary to review the report in some detail.

[13] Mr. Purll visited the building on November 9, 1998. He inspected the balconies of three apartments and visually inspected the exterior of the building at roof level. The building, as originally constructed, had cedar siding and a cedar shake roof. Hovey construction installed a metal roof and was in the process of installing vinyl siding over the existing cedar siding. The decks of the balconies are constructed of concrete topped plywood. As initially constructed, the guarding around the balconies consisted of stud-framed half-walls finished on the interior and the exterior with cedar siding. Because the balconies were originally designed to be exterior space, the siding was mounted directly on the studs without any vapour barrier or insulation. Mr. Purll noted in his report that prior to the work being undertaken by Hovey Roofing, there had been “no reported instances of water infiltration anywhere”. In all three units, he noted water and dampness on the interior surfaces of the balcony enclosures. He also noted that the windows enclosing the

balconies were not designed for the purpose that they were being used. They have aluminum frames with unsealed corner joints that permit water penetration. Compounding this, the windows and the sills on which they rest were improperly installed. The sills which should slope to the outside, in fact, slope to the inside, thus shedding water onto the interior face of the balcony walls.

[14] Although the problems arising from the manner in which the balconies were enclosed had existed since the modifications were made, it was the installation of the new roof that exposed them. The roof, at least when inspected by Mr. Purll, did not have eavestroughing. It shed water onto the sill of at least some of the balconies. The combination of these two things (the new roof and the substandard initial construction) resulted in water penetrating to the interior walls of a number of the balconies.

[15] Mr. Purll made a number of recommendations. He “strongly recommended” the installation of gutters at the bottom edge of the sloping roof. In terms of the balconies, he made detailed recommendations including removing the newly installed window sills, changing the cedar cap underneath the sill on the balcony railings, installing new aluminum sills that are properly sealed and if, as Mr. Purll had been told, the vinyl siding had been installed directly onto the wood-stud framing, it should be removed and appropriate sheathing installed before it is re-installed. He also recommended that vapour barriers be installed on the interior faces of the balcony walls, if the balconies were to be used as inside space.

[16] On November 13, 1998, the strata council met and discussed Mr. Purll’s report. Representatives from Hovey Roofing attended the meeting. Nothing was decided or settled at that meeting. Hovey Roofing denied responsibility for the leaks in the balconies, claiming that they existed prior to their involvement. Council did not agree with Mr. Purll’s recommendation about the need for eavestroughing, although Hovey Roofing thought it a reasonable step to take.

[17] Council next addressed the matter on November 17, 1998. The minutes of that meeting reveal that council had retained the services of a roof inspector and a

siding inspector. Those inspectors would not issue reports until the work that Hovey was contracted to do was completed, and Hovey was refusing to do any further work until council decided whether it wanted any remedial work done to the window sills on the balconies. Nothing of any consequence was decided at this meeting, but the next day, two members of council inspected 15 suites for evidence of water penetration. Some suites had no evidence of leaking; others showed significant signs of water penetration. It is apparent, however, that in all cases the areas of concern were the balconies.

[18] Council next dealt with the matter in a substantive way at a meeting on March 3, 1999. The minutes of that meeting reveal that Hovey Roofing had finished the job and that the strata corporation had received the roof inspector's report. The inspector recommended eavestroughing to "catch water before it drips down on the handrails" of the balconies below. Council received two quotes for the installation of eavestroughing, but because it did not have a budget for this work, the issue had to be deferred to the owners for consideration at a general meeting (there is no evidence as to whether the owners considered the matter or whether eavestroughing was ever installed).

[19] Council next dealt with the matter on September 13, 1999. Prior to that meeting a local glass company had examined the balcony railings and provided an estimate to repair the deficiencies noted in the Purll report. Council considered the estimate and ultimately agreed that:

...any maintenance cost inside the balcony is the Strata Lot Owners responsibility and the Strata Corporation is not responsible for glassed in balconies.

A motion was adopted by the council as follows:

...it is the Owners responsibility to repair the sundeck. If an Owner wants to make improvements to slope the railing sill outwards to drain water to the outside of the building, the work must be done by a professional and Council must provide prior approval before an Owner undertakes any work to the exterior of the building.

[20] The petitioner has deposed that between 1999 and 2007, neither the strata council nor any of the individual unit owners took any steps to address the problems identified by Mr. Purll in his report.

[21] The petitioner and his spouse purchased their unit in 2003. In November 2005, Mr. Guenther was elected to council. He was re-elected in November 2006 and November 2007. He did not stand for election in November 2008. In 2007 David Massey, one of the strata owners, gave Mr. Guenther a copy of Mr. Purll's report. He then had it distributed to all of the owners.

[22] The strata corporation considered a number of special resolutions at its annual general meeting on November 29, 2007. Among them was one that would authorize the strata corporation to impose a special levy of \$5,000 "for the inspection and report on the building envelope". Twenty-seven unit holders voted in favour of the motion; eleven were opposed. Because the motion required a 75 percent majority to carry and only 71 percent of the owners voted in favour of it, it was defeated.

[23] The strata corporation held a special general meeting around January 25, 2008, to consider special resolutions relating to the building envelop. In advance of that meeting, and as required by the *Act*, the owners were notified that the strata corporation would be considering a special resolution authorizing the corporation to spend up to \$6,000 from its contingency reserve fund for an inspection of and report on the building envelope. When the resolution was put to the owners at the meeting, it was amended, and as amended, it purported to authorize a special levy not to exceed \$23,100 for the inspection and report. The motion was carried; indeed, no owners voted against it. It was never acted upon, however, because the strata corporation received advice that it was not valid in that the owners did not have proper notice of it.

[24] On June 13, 2008, Stutters Consulting Services Inc. reported to the strata council through Mr. Guenther on its "investigative site meeting". Stutters apparently provided a report dated May 12, 2008. That report is not in evidence; however, a

condensed summary of one aspect of it is set out in a letter from Stutters dated June 13, 2008. In that letter, Mr. Stutters succinctly summarized his view of the problems with the balconies. He wrote that the following were common to most of the balconies he examined (it is unclear which balconies he examined):

2 ...water intrusion into the enclosed balconies due to a failure of the exterior Rain screen assembly, incorrect window installation, incorrect flashing installation, incorrect sill plate slope, standing water leaking into balconies and or water stains on the balconies interiors.

He also noted that they found “decaying or rotting building components” within all of the balconies. He noted that none of the balcony enclosures had vapour barriers or insulation, nor did they have building paper under the exterior siding. He estimated that the cost to correct all of these difficulties would be between \$320,000 and \$350,000. Allocated between units and based on the unit entitlements in the strata, this cost would range from a low of approximately \$5,600 to a high of just over \$11,000 per owner.

[25] After receiving the Stutters estimate, the strata council sought legal advice on its obligation to repair. Matthew Fischer provided that advice in a letter dated August 28, 2008. He noted that a strata corporation, through its council, has a positive duty to repair and maintain common property. He succinctly captured at least one aspect of the issue writing that the corporation had a “known problem of unknown scope”. He wrote:

...It is not specifically known whether the building envelope as a whole requires attention, or remediation. If there has never been any indication of any problem with the building envelope other than at the balconies, then it is arguable that a further inspection might not be strictly required; however it is a matter for the judgment of the Strata Council.

He recommended that council take reasonable steps to determine the scope of the problem they may be facing before embarking on repairs. His rationale was that if they repair the balconies without first determining the extent of the problem, they may discover that the repairs have to be redone, either in whole or in part. Relying on this advice, council invited Stutters Consulting to provide a written estimate on

the cost of a building envelope inspection and report. Inclusive of supportive architectural consulting services, Stutters said it would do the job for \$18,600.

[26] Council then made inquires of their insurance company to determine whether the cost of an inspection and any remedial work was covered. On October 8, 2008, their insurance adjustor advised that the insurance company was not prepared to cover the costs.

[27] At the November annual general meeting, Patti Crichton was elected to council. She assumed the role of president and continued in that position until she resigned on September 2, 2010. With the exception of Ms. LaFleche, none of the previous members of council stood for re-election in November 2008. On January 17, 2009, the strata council considered the issue of the balconies. They resolved to do nothing until they received a legal opinion as to who was responsible for paying for the remediation of the balconies and any related damage to the building. At both a January 17, 2009 “information meeting” and a council meeting held four days later, feelings were running high, at least on the part of some, about the issue of the balconies. The minutes of January 21, 2009, reflect that “a guest started making insulting remarks to council, disrupting the meeting” and was asked to leave. Those same minutes record that the meeting of January 17th “was disrupted by an owner”.

[28] On January 27, 2009, the strata council caused a notice to be posted and circulated to the owners. The notice invited any owners who had “any concerns” about their balcony to complete a maintenance request form. It further advised that the strata council would be inspecting all of the balconies that had “issues” and would be obtaining quotes for the cost of repair. At its February 21, 2009 meeting, Ken Stables, a member of council, reported that, in his opinion, “there is not and never has been any breaches to the building envelope”. As a result, he felt that there was no reason to spend any more money on the issue. He recognized that the “balcony issue” was a separate matter and thought it should be addressed at a subsequent council meeting. The minutes of the February 21st meeting record that council “fully agrees” with Mr. Stables’ opinion. Council next met on February 25,

2009. The minutes reflect that notwithstanding two requests by council that owners report of any problems with their balconies, not a single complaint had been received. Council decided it would receive reports until the end of March, after which the matter would be brought to a conclusion one way or another.

[29] In late February or early March, Mr. Guenther circulated a petition to the owners asking that a special general meeting be convened to consider a series of resolutions. Four of the resolutions would, if passed, remove four members of the strata council, including Ms. Crichton and Mr. Stables. According to the petition, the basis for their removal was their failure to deal with fire alarms and the “building envelope/water ingress concerns of owners”. There were resolutions dealing with the building envelope which, if passed, would authorize a \$7,000 special levy to obtain “a full building inspection and recommendation report and repair cost estimate”. Another resolution would, if passed, authorize the strata to hire Total Restoration to do the work. The final resolution would direct the council to undertake any repairs recommended by Total Restoration.

[30] The strata council learned of this petition prior to its March 8, 2009 meeting. Council had been contemplating a special general meeting for March 30, 2009, in order to deal with a number of matters. Given the petition, council resolved to combine the business raised by the petition and the business that the council wished to conduct at a single special general meeting. The minutes of the March 8, 2009 meeting reflect that as of that date, only six owners had responded to the council’s request for reports of concerns, and those owners said they had no concerns.

[31] Ms. Crichton, on behalf of council, circulated an “Information Bulletin” after the March 8, 2009 council meeting. In it she explained why a special general meeting was going to be convened. Aside from the petition, council had received complaints regarding the state of various common areas within the building. The lobby carpet was showing wear, the hallways needed to be painted, and cracks had been reported in some of the walls. She wrote of council’s obligation to repair common proper and invited the owners to inspect the building before the meeting and

solicited their support for resolutions designed to address these issues. As to the balcony and building envelope issues, Ms. Crichton wrote separately to the owners asking them to review various documents, including Mr. Stables' report on the building envelope, so that council could address any unanswered questions at an anticipated information meeting.

[32] In March 2009, the strata council retained Craig Hostland, a civil and structural engineer, to “[c]onduct a preliminary site investigation of three above grade balcony decks for water intrusion and provide recommendations” (report of March 17, 2009). In addition to project management and general engineering consulting work, Mr. Hostland devotes a significant portion of his time to the inspection of commercial buildings for buyers, insurance companies and commercial lenders. During his inspection, Mr. Hostland examined the balconies of units 214, 314 and 313. He found that which had been observed by everyone else who examined these balconies: improperly installed window sills, windows designed for weather protection of exterior spaces being used to provide a weather barrier for an interior space, and evidence of water intrusion. Although he noted the superficial nature of his inspection, he expressed the tentative view that the water intrusion on the balconies was not likely “causing structural duress”. He recommended further investigation however. At a minimum, he recommended replacing the window sills and upgrading the windows. He carried out a further investigation on April 6, 2009, and reported the results of that review on April 9, 2009. He conducted an “intrusive site investigation of two above grade balcony decks for water intrusion damage” (units 214 and 313). He repeated many of the conclusions he had reached tentatively earlier. He emphasized that the half-walls surrounding the balconies were not part of the building envelope. He found no visible rot in the wooden half-walls but noted that some of the framing that holds the windows on the balconies was visibly rotting. He exposed some of the “key structural elements” of the two balconies and did not see any visible rot. He wrote that:

...the water intrusion experienced by the occupants reviewed by inspector is NOT causing structural duress...

Mr. Hostland repeated the recommendations he had earlier made with regard to repairing and upgrading the windows and window frames.

[33] On April 2, 2009, a special general meeting was held to consider the resolutions outlined in the petition that Mr. Guenther had circulated to owners and resolutions that the strata council wished to have addressed dealing with painting the common areas and upgrading the lobby. The resolutions calling for the removal of the council members were all defeated. None of them attracted even 30 percent of the eligible vote. The resolutions calling for a special levy to fund a report on the integrity of the building envelope was also defeated. None of the resolutions, except the one calling for painting of the common areas, even attracted a majority of votes.

[34] On September 30, 2009, Ms. Crichton reported to the owners. As to the building envelope, she noted that Mr. Hostland had confirmed that there were “no building envelope issues”, and as a result, council felt it unnecessary to have a vote on whether the corporation should expend the \$350,000 that Stutters estimated it would cost to repair the balconies.

[35] This petition was filed in November 2009.

[36] In addition to the problems associated with the balconies, the strata council had received reports of cracking in some of the walls in the corridors of the building and in some of the concrete flooring in the stairwell of the parking area. As a result of these complaints, council engaged Mr. Hostland to conduct a further investigation. He reported on his findings on December 31, 2009. He explained the likely causes of the cracking and the elevation noted in the parkade floor. Neither were the result of any structural problem; rather, they were due to the building settling. He advised the owners to monitor the cracking and to take remedial steps if the cracks expanded. The cracking in the corridor walls were “not untypical for large wood framed buildings in the Kelowna area from seasonal or general shifting after construction”. Like the cracks in the stairwell, they are not a source of concern unless they expand. Finally, he examined water stains on the walls and concluded that they were surface stains due to a leaky pipe.

[37] In August 2010, Mr. Guenther received two quotes for building envelope inspections. The first was from an architectural firm, Iredale Group, who estimated such an inspection would cost \$12,000. The second quote is from Levelton Consultants Ltd. They advised that they would perform a building envelope assessment for \$7,275.

[38] In September 2010, Ms. Crichton resigned from council and Mr. Stables became the president. On September 23, 2010, council received the third and final report of Mr. Hostland. Council asked Mr. Hostland to review the exterior wall system of the building to determine:

- (a) if there is building wrap beneath the cedar siding; (b) if there are any apparent moisture problems, leaks or water intrusion into the interior of the exterior wall system; and (c) if there is potential for water intrusion.

He conducted a visual survey of the exterior of the building in early August 2010. He then selected six locations that, in his opinion, were most likely to have moisture penetration, if there was any moisture penetration at all. He had the exterior wall components removed to expose the stud framing. He measured the moisture content and visually examined the exposed areas. In two of the locations, the wall cavity was like new; in three other locations, he saw no evidence of moisture staining and no evidence of mould or mildew; in a sixth location, which is a location at which he had noted light staining on his first examination of the exterior of the building, he found insignificant and “not active” staining within the building envelope. His examination revealed that in all six test locations, the walls consisted of 2”x4” studs, insulation, plywood sheeting, building paper, a poly vapour barrier, and siding. He concluded that:

12. The building exhibits no significant moisture related issues pertaining to the exterior building structure at this time from exterior moisture intrusion. All locations exhibited tar paper which is typical building wrap for a building of its age.

13. I conclude, based on the design and installed building wall system as denoted in as-built drawings and verified on site and site assessment and intrusive assessment of the six defined most critical locations that there is little to no chance of active “mould” growth in the building wall cavity.

Analysis

[39] I will deal with the issues raised by the petitioner in relation to the building envelope separately from the issues relating to the balconies. While there are other issues raised, in particular with respect to the fire alarm system, it is clear that the questions surrounding the building envelope and the balconies are the most significant to the parties.

[40] It is common ground that the building envelope is common property and thus the responsibility of the strata corporation to maintain and repair. The parties have proceeded on the tacit understanding that the duty to repair extends to or includes a duty to investigate to determine if repairs are necessary. Assuming that is so, the duty is to do that which is reasonable in all the circumstances. What is reasonable will depend on a number of factors including the likelihood of the need to repair, the cost of further investigation, and the gravity of the harm sought to be avoided or mitigated by investigating and remedying any discovered problems.

[41] The evidence relating to the building envelope, and more specifically whether there is a need to further investigate its integrity, consists of the observations and opinions of three third parties and the experience and observations of some unit owners.

[42] I do not read Mr. Purll's report to suggest that there is a problem with the building envelope, either because of the shoddy balcony enclosures or otherwise. First, his report focuses on the balconies of the several units he examined and, to a lesser degree, the roof. The only possible reference to the building envelope is at p. 6 of his report where he wrote:

...if, as reported the new siding in some locations has been installed directly on the wood stud framing, this is to be corrected.

Even if this is a reference to the building envelope, as opposed to the balconies, it is not particularly probative. First, it is based on a "report" as opposed to anything that Mr. Purll actually saw. Second, the other evidence is that the vinyl siding was installed over the cedar siding and not directly on the stud frame of the walls. The

second person to carry out a review of the building was Mr. Stutters. In his letter of June 13, 2008, he identified problems with the balconies but made no reference to the building envelope.

[43] Two things are worthy of note about the foregoing reports. First, while it is apparent that Mr. Purll is an architect, there is no evidence of Mr. Stutters' qualifications. Second, neither the Purll report nor the correspondence from Stutters Consulting is before the court in the form of expert opinion.

[44] The third person to investigate the issue is Mr. Hostland. His report of September 23, 2010, is in the form of expert opinion. In addition, of all of the third parties to examine the building, his examination has been the most thorough. He concluded that there are "no significant moisture related issues pertaining to the exterior structure of the building".

[45] The other evidence the petitioner points to are cracks in some of the interior walls, cracks in the concrete stairwell at or near ground level, and instances in which the vinyl siding had come loose. The first two matters were investigated and satisfactorily explained by Mr. Hostland. They are not a basis to doubt the integrity of the building envelope. As to the latter matter, there is no basis to conclude that because the siding has, in some locations, separated from the building that an extensive investigation into the integrity of the entire building envelope is warranted.

[46] On the basis of the evidence before me, I am not satisfied that the strata corporation is in breach of any duty it may have to further investigate the possibility of damage to the building envelope.

[47] The next issue relates to the balconies. Unlike the building envelope, the parties do not agree on whether the balconies are common property, limited common property, or something else. The petitioner argues that they are common property, and the strata corporation takes the position that they are limited common property. Although the result of this proceeding does not turn on the categorization

of the balconies, the parties argued the question and it may be significant to the issues that will remain following this decision so I will address it.

[48] The strata corporation's bylaws define "limited common property" as:

...common property designated for the exclusive use of the owners of one or more Strata lots.

[49] The strata corporation argues that the strata council's resolution of September 13, 1999, had the effect of designating balconies as limited common property and assigning to the owners the responsibility for repairing and maintaining them. I am satisfied that the balconies in this strata development are limited common property. I reach that conclusion based on the provisions of the *Condominium Act*, R.S.B.C. 1996, c. 64, which was the legislation governing strata developments when this development was built. Section 53 of that Act sets out two methods by which limited common property could be created. First, by operation of s. 53(1), a strata corporation could designate an area as limited common property by special resolution. Second, s. 53(2) provides that the owner/developer may designate limited common property "for the exclusive use" of one or more strata lot owners on the strata plan when the plan is tendered for registration in the Land Title Office. On Strata Plan K431, which created the respondent, the following designation appears:

Balconies are common are for the exclusive use of the units to which they are attached and are denoted by CEU.

Although the acronym "CEU" is not defined in the strata plan, I take it to mean "common exclusive use". All of the balconies in the strata plan are so designated. The effect of this endorsement on the strata plan was to designate the balconies of each unit "limited common property".

[50] The next issue is whether the obligation to repair the balconies falls to the strata corporation or the individual unit owners. As earlier noted, the *Strata Property Act* permits a strata corporation to enact bylaws that make an owner responsible for the repair and maintenance of limited common property, and the respondent has exercised that option. The bylaws impose the obligation to repair "railings and similar

structures that enclose balconies” on the strata corporation (s. 11(c)(II)). If the corporation wishes to change the allocation of responsibility for repairs to the balcony railings and similar structures, it must amend its bylaws. A mere resolution of council is of no effect to the extent it purports to make such an alteration. Thus, the resolution of council at the September 13, 1999 meeting is of no effect.

[51] It remains to be determined if the strata corporation is in breach of its duty to repair the balconies. Unlike the evidence relating to the building envelop, the evidence is clear that at least some of the balconies are in need of repair. Everyone who has examined them has so concluded. In fact Mr. Purll, Mr. Stutters, and Mr. Hostland all agree on both the temporary measures that can be taken to prevent further damage and the more extensive and expensive repairs necessary to address the issue permanently. To not address the problem is to court the prospect of mould developing within the balcony walls, giving rise to health risks; it is to risk failure of the balcony walls or the windows that rest on those walls which may, in turn, cause personal injury or property damage; and finally, it is to delay the inevitable with the result that when the repairs are eventually made, they will likely be more expensive.

[52] In summary, I am satisfied that the strata corporation is in breach of its duty to repair at least some of the balconies. I am not satisfied that it is in breach of its duty to repair or further investigate the building envelope. Before turning to whether there should be a remedy, and if so what that remedy should be, I will address the miscellaneous other concerns that the petitioner has raised.

[53] There are three other matters the petitioner points to in support of the various remedies he seeks: the adequacy of the fire alarm system and the manner in which that issue was dealt with by the strata council; the use and adequacy of the contingency reserve fund; and the suggestion that the strata council has intimidated members of the strata corporation. I note that none of these are pleaded in the petition. They were raised for the first time in affidavits sworn in November and filed in December 2010.

[54] There are two issues relating to the contingency reserve fund. First, Mr. Guenther is of the opinion that given the age of the building and what he regards as the lack of maintenance over the years, the balance in the reserve fund is too low. That may well be the case but there is no basis, other than Mr. Guenther's opinion, to so conclude. The second issue is that it is said that the strata corporation paid for some painting and tiling from the fund. As I understand the evidence, it does not support that conclusion. Special resolutions were put before a special meeting of the strata corporation in April 2009 by which council sought the approval of the membership to paint the interior of the building and install tile in the front lobby. The motions were defeated. There is no evidence that the expenditures were made in spite of that defeat. In fact, the August 2009 balance sheet of the corporation which contains a line item entitled "Contingency Fund Expenditures" shows that only \$2,894 was charged to the fund. In short, there is no evidence to support the conclusion that the strata corporation has mismanaged or otherwise dealt with the contingency reserve fund in a way that would support the granting of any of the remedies sought by the petitioner.

[55] As to the question of intimidation, it is addressed in the affidavit of Mr. Massey and in Mr. Guenther's third affidavit. Mr. Massey has deposed that he was informed by Betty Yarrow that Ms. Crichton had threatened her with legal action at a meeting in December 2008. That assertion is categorically denied by Ms. Crichton. It is clear, however, that there was some unpleasantness at the meeting. Mr. Massey has exhibited to his affidavit a letter that Ms. Crichton wrote to Ms. Yarrow that day. The letter is telling. It provides in part:

I apologize for my outburst this evening. It was not appropriate.

I had a very long day. My vision is worsening and I get very frustrated when I cannot find paperwork easily...

What disturbed me was you were disrupting the meeting with your talking and when you encouraged Anna Marie to leave and you insulted Council, I came to their defence. Inappropriately.

Ms. Crichton concluded by encouraging Ms. Yarrow to attend future meetings but to deal with her concerns more constructively. This letter is not indicative of intimidation

but does reveal a person trying to deal with a wide range of difficult issues and difficult personalities. It reveals someone who, by her own assessment, reacted inappropriately. It also reveals someone who apologized promptly and graciously.

[56] The second event that both Mr. Guenther and Mr. Massey cite relates to the petition that Mr. Guenther circulated seeking to have the strata council members removed, and seeking to compel the corporation to spend funds on an investigation of the building envelope. On March 11, 2009, Ms. Crichton wrote to Ms. Yarrow because she was a signatory to the petition. The letter is not threatening. In it, Ms. Crichton simply states her opinion on the potential cost of passing the resolutions dealing with the inspection of the building envelope. She advised Ms. Yarrow that she had the option to change her mind and invited her to consider the evidence. As with her earlier letter, this correspondence is civil in content and respectful in tone. Finally, I note that neither Ms. Yarrow nor anyone else has provided an affidavit suggesting that they were intimidated by the actions of anyone on the strata council. There is no merit to this contention.

[57] I turn finally to the fire alarm issue. It bears observing that it was as a result of Ms. Crichton's efforts, and the efforts of others on council, that in the spring of 2009, the strata corporation adopted a fire safety plan. In July 2010, a fire inspector measured the volume of sound emitted from fire alarms in the building. Several of the fire alarms were below the standard set in the building code. On the recommendation of the fire inspector, the council retained a company to conduct independent decibel readings in all of the suites. Those tests were performed in the third week of August. They revealed that the fire alarms could not be heard in most of the units. Within days of receiving the test results, the council ratified the expenditure of just over \$8,500 to install a new fire alarm system. The system itself was actually installed on August 27, 2010. The development now has a satisfactory rating from the fire department in all categories by which fire safety is measured. I am not persuaded that there is any basis to grant any of the remedies the petitioner seeks based on the manner in which the strata council has dealt with fire safety issues.

[58] As to the specific remedies sought, the petitioner relies on three of the factors listed in *Lum* in support of his application to have an administrator appointed. Specifically, he argues that the strata corporation has demonstrated an inability to manage itself; that an administrator is necessary to bring order to the affairs of the strata corporation; and or that there is a struggle among competing groups within the strata corporation which impedes its ability to properly govern itself. I am not persuaded that any of these assertions are borne out on the evidence. It is clear from the relief sought in the petition and the facts as pleaded that Mr. Guenther's primary concern is with respect to the building envelope and the strata council's failure to authorize an inspection of the kind he considers necessary. For the reasons already given, I am not satisfied that the strata council is in breach of its duty to repair or investigate the building envelope. Nor does the evidence support the conclusion that the strata council is unable to deal with the many issues it has faced in the past three years. Indeed, in my view, the strata council has and continues to deal with matters responsibly and competently. It follows from all of the foregoing that, as matters now stand, there is no basis to appoint an administrator or to conclude that any of the matters dealt with by the strata council to this juncture are significantly unfair in relation to the petitioner.

[59] What remains is the question of the balconies and the strata council's duty to repair them. To this point, the strata council has taken the position that the owners are responsible for the repair of their balconies. For the reasons given above, I have concluded that the strata corporation bears this responsibility. I think it appropriate to give the strata corporation an opportunity to address the question of balcony repairs in light of this decision. In addressing that issue, council may wish to first determine which balconies require repair. Based on the evidence before me, it is apparent that at least the balconies in units 214 and 313 require repair. In addition, council will no doubt deal with the concern expressed by Mr. Fischer in his August 28, 2008 correspondence.

[60] In conclusion, the application for the appointment of an administrator and the ancillary relief (specifically paragraphs b, c, d, e, f, g, h, i, and j) are dismissed.

There will be a declaration that the strata corporation is in breach of its duty to repair the balconies attached to units 214 and 313. The application for a declaration that the strata corporation is in breach of its duty to repair the building envelope is dismissed. Further, the application for declaration that the strata council's actions in connection with the building envelope and the balconies are or have been significantly unfair to the petitioner is dismissed.

[61] With a view to allowing the strata corporation a reasonable opportunity to address the issues relating to the balconies and in an effort to keep the legal costs associated with this matter at a minimum, the remaining items in the petition (specifically paragraphs k, m, n, p and q) are adjourned generally. The strata corporation and the petitioner are at liberty to set those matters down by requisition at any time on or after six months from the date of this judgment.

[62] Counsel may speak to the issue of costs at a time to be arranged through the trial co-ordinator. I will hear those submissions by telephone at 9 a.m. on the day set by the trial co-ordinator.

“G.M. Barrow, J.”
The Honourable Mr. Justice Barrow