

CANADA / JUDGMENT

Ackert v. At Nature's Door Owners' Association

2020 BCSC 2051

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2051 Ackert v. At Nature's Door Owners' Association

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ackert v. At Nature's Door Owners' Association,

2020 BCSC 2051

Date: 20201222

Docket: S1811994

Registry: Vancouver

Between:

David Ackert and Charlotte Nicolson Ackert

Plaintiffs

And

At Nature's Door Owners' Association, FHP SP Limited Partnership and

FHP (Canada) Management Company Inc.

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

August 26-28, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2020

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- [1] These are my reasons for judgment on cross applications brought by the plaintiffs, who are spouses, and one of the defendants, At Nature's Door Owners' Association (the "Association"), in an action regarding a time share development.

The applications

- [2] The Association applies for summary judgment dismissing the plaintiffs' amended notice of civil claim (the Amended Claim") in its entirety under R. 9-6 of the Supreme Court Civil Rules [Rules] on the basis that the claim is meritless and based on fictitious and false facts, the claim or large portions of it are statute-barred by limitation periods, and the claim is barred by the equitable principle of laches.

- [3] In the alternative, the Association seeks an order striking out the whole of the plaintiffs' Amended Claim under R. 9-5(1) of the Rules. They contend the pleadings are utterly deficient in that there are, in the Association's submission, "at best a loose, disjointed, confusing and unintelligible set of what appear to be technical legalities which are not connected to material facts and which in any event are not properly pled as causes of action".
- [4] In the further alternative, the Association seeks an order striking out a number of identified pleadings from the Amended Claim.
- [5] The defendants, FSH SP Limited Partnership ("Fairmont") and FHP (Canada) Management Company Inc. ("FHP"), take no position on the Association's application.
- [6] The plaintiffs, in turn, bring an application to strike certain portions of the Association's amended response to notice of civil claim (the "Amended Response") under R. 9-5(1) and (2) of the Rules.
- [7] The plaintiffs further seek an order that the Association produce certain categories of documents. The defendants oppose this application and submit the issue of production should be determined subsequent to determination of the other applications.
- [8] Lastly, the plaintiffs seek an order for summary judgment dismissing the Association's counterclaim against the plaintiff (the "Counterclaim") under R. 9-6 of the Rules. The Association opposes the application and the other defendants take no position.

Background

The structure and operation of the development and time share plan

- [9] The Association acts on behalf of owners in a shared-ownership, strata-titled development located in Whistler known as At Nature's Door (the "Development").
- [10] The Development consists of 26 strata lots. Strata lots 1 to 4 are made up of a communal lodge, guest suites, and an amenities area (the "Common Strata Lots"). Strata lots 5 to 26 are townhomes (the "Strata Lot(s)").
- [11] The strata plan for the owners' (Strata Plan BCS587) was deposited on November 7, 2003, creating the strata corporation for the Development (the "Strata Corporation").
- [12] The Development is structured such that each Strata Lot is comprised of ten 1/10th undivided fractional interests known as "chapters". There are a total of 220 chapters in the Development which is comprised of 22 townhomes having 10 chapters per townhome. Purchasers can buy one or more chapters in one or more of the Strata Lots. Each of the chapters constitutes a time share interest in a time share plan, as those terms are defined in the Real Estate Act [REA] and its successor legislation, the Real Estate Development Marketing Act. Fractional interests in a strata lot in conjunction with a time share plan are specifically contemplated in the legislation. That is why, when the Development was first

marketed, the developer filed a prospectus under the REA.

- [13] When the Development was created in 2004 the developer granted a head lease to the Association over each Strata Lot. Each of the head leases is registered on the title of each Strata Lot. Subleases for each chapter under the strata lot were then granted by the Association and sold to Strata Lot chapter purchasers.
- [14] On February 4, 2004, a head lease between the Association and the developer was registered against title to the plaintiffs' Strata Lot (the "Head Lease").
- [15] The plaintiffs are the only purchasers in the Development who purchased all 10 chapters in one Strata Lot. They did so in 2005 through purchases of eight separate fractional interests in Strata Lot 24 directly from the developer and the remaining two interests in Strata Lot 24 from an initial purchaser. When they purchased their first chapters, they entered into purchase agreements with the developer and sublease agreements with the Association as set out in the Development prospectus. When they purchased the other two chapters, they entered into purchase agreements with the vendors and assignments and assumption of sublease agreements with the vendors and Association. Each of the subleases agreements is essentially the same, with regard to each chapter purchased (the "Sublease").
- [16] Chapter owners have the right under their sublease to four weeks of occupancy of their Strata Lot per year. The remaining weeks are available for reservation by the owners on a first come first served basis based on season. Access by owners to the recreational facilities and other services is available year round.
- [17] The Development prospectus describes the structure of the Development and addresses the allocation of responsibilities for expenses between the Strata Corporation, the Association, the manager and the owners.
- [18] The following agreements and documents were included in the attachments to the prospectus:
 - a) Owner developer's notice of different bylaws (for the Strata Corporation);
 - b) Purchase agreement;
 - c) Initial Association budgets and monthly assessments;
 - d) Association Head Lease;
 - e) Owner sublease and assignment and assumption agreement;
 - f) Proposed bylaws of the Association;
 - g) Management and guest services agreement (the "Management Agreement"); and
 - h) Rental disclosure statement.

- [19] The Association, under the terms of the subleases with the chapter owners, is responsible for administering the use of the townhomes by the owners, the maintenance and repair of the townhomes, and the collection of assessments and payment of expenses on behalf of the owners. The Association retains a manager under the Management Agreement to carry out those responsibilities, provide guest services and amenities (which include concierge services, cleaning services, check-in and luxury services like grocery shopping, ski rental and maintenance), and make the recreational facilities in the Development available to all owners.
- [20] At first, the manager was the owner of the Common Strata Lots.
- [21] Each owner is a member of the Strata Corporation. The Strata Corporation is responsible for the control, management and administration of the common property. At first, the manager for the Association was also the manager for the Strata Corporation. A regulation came into force under the Real Estate Services Act [RESA] requiring strata corporation managers acting on behalf of a strata corporation to be licensed as of January 1, 2006. The Strata Corporation retained a licensed manager in 2008, FHP, one of the defendants in this action.
- [22] At that time, the previous manager under the Management Agreement with the Association was replaced by Fairmont. Fairmont is not a licensed strata property manager.
- [23] Also at that time, the previous manager, which was the owner of the Common Strata Lots, sold its interests to the Strata Corporation.
- [24] Under the terms of the Management Agreement, Fairmont, as manager, continues to provide services to the Association.

Should summary judgment be granted dismissing the plaintiffs' Amended Claim?

- [25] The purpose of the ability to pronounce summary judgment is "to weed out and prevent meritless claims or defences from proceeding to trial. To succeed on a summary judgment application, the party seeking summary judgment must show there is no genuine issue of material fact that requires a trial for determination": *Belfour v. Tarasenko*, 2016 BCCA 438 at para. 41, citing *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10-11.
- [26] The Association submits the plaintiffs' Amended Claim is bound to fail on the basis that the claim is meritless, it is statute-barred due to the expiry of a limitation period, and it is barred due to the equitable principle of laches.
- [27] The relief sought by the plaintiffs in their Amended Claim is as follows:
- a) Restitution
 - b) Declaratory relief in the form of:
 - i. A declaration that the Head Lease is a license revocable at will;
 - ii. A declaration that the Head Lease is void or unenforceable against the plaintiffs;

- iii. A declaration that the Head Lease is terminated;
- iv. A declaration that the Sublease is void or unenforceable against the plaintiffs;
- v. A declaration that the Sublease is terminated;
- vi. A declaration that the Association is in breach of the Societies Act and the RESA;
- vii. A declaration that Fairmont is in breach of the RESA;
- viii. A declaration that all amounts paid by or on account of the plaintiffs are held in a constructive trust by the Association or FHP SP Limited Partnership;
- c) Possession of the plaintiffs' Strata Lot;
- d) An accounting of the unlawful charges paid by or on account of the plaintiffs to the Association, which continue to be paid; and
- e) Interest.

Is the plaintiffs' Amended Claim suitable for determination by way of summary judgment?

[28] The Association submits that the Development prospectus, the Head Lease and Sublease, and the constitution and bylaws of the Association and Strata Corporation (the "Development Documents") clearly establish, without the need to weigh any evidence, that the plaintiffs' claim is without merit and should be dismissed. The Association submits the court is able to determine the claims based on a review of the Development Documents which are valid and enforceable against the plaintiffs.

[29] The Association submits based on the Development Documents there is no genuine issue of material fact that requires a trial for the determination of the claims or defences raised: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10-11.

[30] The plaintiffs submit their claims cannot be determined without a hearing and full evidentiary record at trial, and the Development Documents and other evidence filed with regard to the Association's application are insufficient to form a basis for judgment on the claims.

[31] I find that most of the claims for relief within the Amended Claim are suitable for determination by way of summary judgment, primarily based on the terms of the Development Documents. I will address each claim for relief and my reasons for finding them with or without merit.

Declarations regarding the invalidity of the Head Lease and Sublease

Claim that the Head Lease is actually a license revocable at will, and therefore the Sublease is not a lease

- [32] The plaintiffs allege that the Head Lease is not actually a lease but instead is a license granted by the developer to the Association. As such, the Association could not have granted the plaintiffs the Sublease.
- [33] They also contend that since they own 10/10 of the fractional interests in their Strata Lot, the Head Lease and Sublease have no purpose and therefore performance of the obligations thereunder by the Association is impossible or impracticable.
- [34] They do not set out any facts demonstrating how the Association's obligations are impossible or impracticable.
- [35] They also allege that the Head Lease is a "subdivision" in contravention of s. 73 of the Land Title Act and is therefore illegal and unenforceable.
- [36] The Head Lease includes the following terms, which are also described in the prospectus, in consideration of \$10 prepaid rent and other good and valuable consideration:
- a) A grant by the developer (lessor) of a lease in favour of the Association (lessee) over Strata Lot 24 for a term of almost 99 years (February 4, 2004 to November 7, 2102), renewable for a further 99 years subject to overriding veto of 75% vote of Association representatives at a general meeting.
 - b) The grant includes a lease to the Association of all rights associated to Strata Lot 24 to use and enjoy any limited common property of Strata Lot 24 and the Strata Corporation, subject to bylaws and rules of the Strata Corporation applicable to all Development townhome owners.
 - c) The Association covenants and agrees with the developer (lessor) to grant a sublease in the form attached to the Head Lease to each purchaser from the developer of an undivided one-tenth fee simple interest and to each subsequent owner.
 - d) The Association agrees to pay water rates, electric, gas, cable and telephone charges and to repair and keep up fences and to leave the Strata Lot in good repair and comply with the Strata Property Act and the Strata Corporation bylaws.
 - e) The developer covenants with the Association for quiet enjoyment.
 - f) The developer may enter and view the state of repair and shall be entitled to re-entry on non-payment of rent or non-performance of covenants, subject to the rights of the sublessees.
 - g) The developer covenants it will not assign, transfer or convey by any single instrument any interest in Strata Lot 24 which is greater or less than an undivided one-tenth fee simple interest in Strata Lot 24.
- [37] The Sublease includes the following terms in consideration of base rent of \$1.00 and "additional rent", defined as amounts specified in any notice of assessment, damage assessments and operating costs (further defined and set out in a schedule):

- a) The Association and plaintiffs are entering into the Sublease pursuant to the owner's purchase agreement for their undivided 1/10th interest in Strata Lot 24.
- b) The term of the Sublease is until one day prior to the expiry of the Head Lease and is automatically renewed for a term of 99 years less one day, unless the Association by special resolution elects not to renew the Head Lease.
- c) The plaintiffs are entitled to exclusive use, occupation and possession of Strata Lot 24 during the owner's "use period", but not otherwise.
- d) The grant includes all rights associated with Strata Lot 24 to use and enjoy that limited common property during the use period, and the common property of the Strata Corporation and services and privileges provided by the Association subject to the rules and bylaws of the Strata Corporation and Association.
- e) The use period is a four-week period each lease year determined through a reservation system set out and will vary from year to year.
- f) The balance of the time available will be available for co-owners of Strata Lot 24 and other Strata Lot owners subject to availability and reservation, and will not be subject to the Sublease.
- g) Guests of the plaintiffs are permitted to occupy the Strata Lot during the use period whether accompanied by the plaintiffs or not.
- h) The plaintiffs are prohibited from charging rent or accepting consideration for use of the Strata Lot.
- i) The Association will provide furniture, furnishings, fixtures and equipment as set out in the prospectus and these are the property of the Association.
- j) The "operating costs" which are included in the additional rent include the Strata Corporation assessments and levies, utilities, Whistler Resort Association Fees, property taxes, municipality utility rates, and Association expenses including capital reserve fund contributions, costs of repairing and replacing in-suite Association items, management fees payable to the manager pursuant to the Association's agreement with the manager, operating reserves, legal and accounting costs of the Association.
- k) The base rent is due upon execution of the sublease and the additional rent is due when assessed, and interest runs from sums due but not paid within 30 days after the Association bills the plaintiffs.

- l) The Association covenants to provide the plaintiffs with quiet enjoyment; to keep the Head Lease in good standing; to deposit all funds received from the plaintiffs with a savings institution and make all books and records pertaining to the operation and management of the Strata Lot available for inspection; and not to permit pets or smoking in the Strata Lot or common property except in accordance with the bylaws of the Strata Corporation and Association.
- m) The Association will carry out cleaning, maintenance and repair of limited common property for the Strata Lot and other matters for which the co-owners are similarly responsible pursuant to the Strata Property Act [SPA] or the bylaws of the Strata Corporation or both.
- n) The Association is responsible for routine repairs and maintenance in and to the Strata Lot, as a result of normal wear and tear. The plaintiffs are responsible for damage.
- o) Up to two weeks a year will be designated as a maintenance week for the Association to maintain, deep-clean and refurbish the Strata Lot.
- p) The Association will have the right to enter the Strata Lot, on reasonable notice if occupied, for inspection at reasonable hours and when necessary to effect cleaning, repairs or alterations.
- q) If the plaintiffs are in default of their obligations, the Association may suspend the plaintiffs' right of use and possession of the Strata Lot and the right to use and enjoy the services and privileges provided to or arranged by the Association, and the plaintiff's right to vote in the Association until the default is rectified.
- r) The plaintiffs grant a lien to the Association over the plaintiffs' 1/10th fee simple interest for any unpaid additional rent owing under the Sublease and have the right to appoint a receiver and power of sale to enforce the lien for unpaid amounts of 30 days.
- s) The plaintiffs agree the Association is not liable for injury or death to the plaintiffs or their guests or other damage incurred while on the Strata Lot or common property of the Strata Corporation.
- t) The plaintiffs in conjunction with entering into the Sublease apply for membership in the Association and agree to comply with its bylaws, rules and orders or those made by the manager with the authorization of the Association.
- u) If the Association retains a manager the plaintiffs will deal with the manager with respect to all matters relating to the Strata Lot and the Sublease, and the plaintiffs will act in accordance with the Management Agreement.
- v) The plaintiffs acknowledge that the Strata Lot's vote in the Strata Corporation, unless a majority of the co-owners decide otherwise, is determined by the reservation number system under the Sublease.

- [38] The plaintiffs' legal basis set out in the Amended Claim for claiming that the Head Lease is a license, is based on their argument that the developer did not grant the exclusive use of the plaintiffs' Strata Lot to the Association, but rather mandated that the Association ensure exclusive use is provided to the developer.
- [39] This is contradicted by the terms of the Head Lease which specifically set out that the Association, as lessee, has all rights associated with the plaintiffs' Strata Lot, quiet enjoyment of the Strata Lot, and that the lessor may only enter and view the state of repair and shall be entitled to re-entry on non-payment of rent or non-performance of covenants, subject to the rights of the sublessees.
- [40] The plaintiffs make no other argument or claim with regard to their position that the Head Lease is actually a license. They submit that this determination ought to be made after full argument and upon an evidentiary record at trial.
- [41] Taking into consideration the factors of what constitutes a lease or sublease, in particular the principles set out in the decisions submitted by the plaintiff in 389079 B.C. Ltd. v. Coast Hotels Ltd. (1998), 63 B.C.L.R. (3d) 359 (S.C.), and Ocean Harvesters Ltd. v. Quinlan Brothers Ltd., [1975] 1 S.C.R. 684, I find that the documentation itself is sufficient to make a determination of the intentions of the parties to the leases and that these contracts are in fact leases. The Head Lease provides exclusive occupancy to the Association. The Sublease provides the plaintiffs with exclusive occupancy under its terms, which are interests in the real property. Neither is a license revocable at will.
- [42] The other terms of the lease are not inconsistent with a lease.
- [43] The plaintiffs' claim that because they own 10/10 of the fractional interests in their Strata Lot their Sublease is inapplicable is a bald assertion, to which no legal foundation was provided.
- [44] I find this claim to be meritless.

The allegation that the Head Lease violates s. 73 of the Land Title Act

- [45] The plaintiffs allege the Head Lease contravenes s. 73 of the Land Title Act [LTA] because it is a lease of a strata lot for a period of over three years, and therefore the lease is invalid. Section 73 of the Land Title Act provides:

Restrictions on subdivision

73 (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of

- (a) transferring it, or
- (b) leasing it, or agreeing to lease it, for life or for a term exceeding 3 years.

- (2) Except on compliance with this Part, a person must not subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.
- (3) Subsection (1) does not apply to a subdivision for the purpose of leasing a building or part of a building.
- (4) [Not applicable.]
- (5) [Not applicable]
- (6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.
- [46] The Association submits, and I agree, that a proper reading of s. 73 of the LTA does not support the plaintiffs' claim.
- [47] The Head Lease is a lease of the plaintiffs' entire Strata Lot. It does not purport to lease a "smaller parcel" of the Strata Lot as set out in s. 73(1) of the LTA. There is no attempt or intention to subdivide the Strata Lot by way of the 99-year Head Lease. The Head Lease was properly registered under the LTA. There is no issue with its enforceability under the LTA, even though s. 73.1, which deems a lease enforceable despite non-compliance, was not in force at the time of its registration.
- [48] I find this claim to be meritless.

The allegation that the Head Lease and Sublease are void for uncertainty

- [49] The plaintiffs further allege the Head Lease and consequently the Sublease are void for uncertainty because the rent to be paid under the Sublease is uncertain and "subject to the whims of the Association and Fairmont" and because the leases do not contain a dispute resolution process. The Association submits the terms of the Head Lease are not uncertain and lack of a dispute resolution provision is not fatal.
- [50] The rent provisions referenced above in both leases are adequately defined. The Head Lease includes a clear base rent provision and sets out additional amounts for which the Association is directly responsible, including utilities.
- [51] Within the Sublease it is clear how the base rent and additional rent will be calculated, and on what basis. The source of the costs adding up to the "additional rent" are clearly set out and the terms provide for a right to inspect the records related to the amounts payable.

- [52] Despite the dollar amount not being set out for the calculation of additional rent, it is clear the parties understood the basis of the rent charges and how they would be calculated. The assessments for additional rent are set out in notices of assessment provided to the plaintiffs within each lease year, and payments are subject to interest after 30 days of receipt of the notice.
- [53] The additional rents are similar to additional rents in commercial leases which are a passing on of operational costs incurred by the landlord. Here, the Association is passing on its own costs or otherwise including in additional amounts payable by the plaintiffs to the Strata Corporation. These amounts are not necessarily known in advance, however the terms of the lease provide for an estimated budget to be prepared and presented by the Association to the plaintiffs in determining the assessment of additional rent.
- [54] On the evidence before me, the plaintiffs have been able to determine the rent and when it is due over the past number of years, and are not in arrears. They have not claimed to be unable to determine their rent. The parties have clearly been able to give effect to the wording regarding rent and additional rent. I do not find that the wording renders the contracts void for uncertainty.
- [55] Regarding the plaintiffs' allegation about dispute resolution, I do not see how the lease not having a dispute resolution process with regard to rent renders the lease void for uncertainty. The absence of such a provision does not render a contract or a provision void for uncertainty.
- [56] I find the claim the Head Lease and Sublease are void for uncertainty to be meritless.

Claim for restitution: allegations re "unlawful charges"

- [57] The plaintiffs further submit that the management scheme is unlawful since unlicensed persons, the Association and Fairmont, are providing services which require licensing under the RESA, or the Strata Corporation has otherwise unlawfully delegated its obligations to the Association and Fairmont.
- [58] The plaintiffs allege the Association and manager Fairmont, under the Management Agreement, provide services that are required to be licensed under the RESA. As such, the fees the plaintiffs have paid to the Association as collected by Fairmont are "unlawful charges".
- [59] The plaintiffs allege the Association, Fairmont and the licensee FHP have been enriched by way of receiving payments to which they are not legally entitled. The plaintiffs' allege they have been correspondingly deprived since the payments were illegal.
- [60] They also allege that since 2008, when the Strata Corporation purchased the Common Strata Lots, the facilities and manager office which comprise the Common Strata Lots became common assets of the Strata Corporation. This means the Strata Corporation is responsible for the maintenance and repair of these units under the SPA.

- [61] The plaintiffs allege that the Association and Strata Corporation have been comingling their receipts and the Strata Corporation has inappropriately delegated its responsibilities for managing the common property and assets of the corporation to the Association and Fairmont. The allegations regarding unlicensed activity by the Association and Fairmont make up the alternative claim that since those parties needed to be licensed to collect the unlawful charges, they are illegal and therefore the Association and Fairmont and FHP have been unjustly enriched by way of receipt of payments to which they were not entitled and the plaintiffs correspondingly deprived.
- [62] Based on those allegations, the plaintiffs claim restitution for a return of the "unlawful charges".
- [63] There is some merit to these claims. Since 2008, the Common Strata Lots have been common assets of the Strata Corporation under the SPA. The SPA requires the Strata Corporation to be responsible for the repair and maintenance of common assets. When the Common Strata Lots became Strata Corporation common assets, it is not clear whether the terms of the original Association Management Agreement were amended to reflect this transfer of responsibility.
- [64] It is unclear which activity the licensee FHP performs on behalf of the Strata Corporation and whether, in effect, the Association and Fairmont are performing services with regard to the common property and common assets of the Strata Corporation on behalf of the corporation and which services they are currently performing directly on behalf of Association members.
- [65] There is no allegation that the plaintiffs did not receive any of the services paid for. There is no allegation that they have been subject to fines by the Strata Corporation or have other debt owing to the Strata Corporation. However, they may have been paying fees to the Association and Fairmont to which they were not entitled, and a corresponding deprivation to the plaintiffs may exist.
- [66] The Association submits that unlicensed activity is regulated by the Superintendent of Real Estate under the RESA. They submit that because the activity as alleged by the plaintiffs is regulated, those claims should be determined by the regulatory body, and this claim is an impermissible collateral attack of the proper process and procedure. They further submit that any complaint regarding the conduct of the Strata Corporation's performance of its duties and compliance with its bylaws and rules and the SPA should be brought by way of an application for orders under s. 165 of the SPA. They cite *Yang v. Re/Max Commercial Realty Associates* (482258 BC Ltd.), 2016 BCSC 2147, in support of their position.
- [67] In *Yang*, the court dismissed much of the relief sought by the petitioner on the grounds of *res judicata*, or otherwise under R. 9-5(1)(d) as an abuse of process. The court found those claims were already decided on prior petitions brought by the petitioner concerning allegations of misconduct by the strata management and violations of the SPA and the RESA. In prior decisions, the court made it clear to the petitioner that complaints against the

respondent and its licensees for professional misconduct in providing strata management services or commission of offences under the RESA must be directed to the regulator of licensees under that legislation. The petitioner was a member of the strata corporation, and at the heart of his complaints was the governance of the strata corporation by its strata council. The petition was found to be an attempt to relitigate a matter already decided.

- [68] Yang does not appear to be a case of a party seeking restitution or compensation.
- [69] The parties in this action all agree no complaint has been made to the regulators. The plaintiffs submit they are not obligated to make such complaints before bringing their claim. In this claim, the plaintiffs seek relief from both a licensee (FHP) and unlicensed persons (the Association and Fairmont) for activity with regard to the same Strata Corporation.
- [70] The enforcement provisions in the RESA do not provide for restitution from unlicensed persons. While there is a compensation fund which compensates consumers with regard to certain misconduct of licensed persons under the RESA, there is no similar compensation scheme with respect to unlicensed activity. Nor is there a disgorgement power under the RESA. I note that the Real Estate Council and superintendent do have property freeze order powers. However, distribution of frozen funds is subject to a court application.
- [71] The Real Estate Council and the superintendent under the RESA clearly have the ability to take regulatory action against, respectively, licensed and unlicensed persons providing strata management services, as defined in that legislation. However, there does not appear to be any provision within that process for relief similar to restitution with respect to unlicensed persons. With respect to licensees, a claim may be made to the compensation fund for a loss incurred by reason of a licensee's misappropriation or wrongful conversion of funds or by fraud. That is akin to an insurance claim process, and not a direct claim for restitution from the licensee.
- [72] The facts alleged involve intertwined conduct of licensed and unlicensed persons.
- [73] I do not find the claim for restitution an impermissible collateral attack or that it is meritless on the evidence and submissions of the parties. Therefore, I do not dismiss the plaintiffs' claim for restitution.

Claim for possession

- [74] The plaintiffs make a claim for possession. This is based on their claim that the Head Lease and Sublease are not leases but licenses revocable at will, and are invalid. Since those claims are meritless it follows that the claim for possession is also meritless.

Allegations regarding unlawful rental restrictions

- [75] The plaintiffs allege that the Strata Corporation has no bylaws restricting rental of Strata Lots.

- [76] The plaintiffs allege the Association purported to pass a bylaw prohibiting a Strata Lot owner from directly or indirectly charging or accepting rent or any form of consideration for the use of a Strata Lot and that breaches are subject to immediate fines (the "Rental Bylaw").
- [77] The plaintiffs submit their Sublease contains no prohibition or restrictions on such rental activity.
- [78] Their Amended Claim alleges that the Rental Bylaw is ultra vires the Association.
- [79] There is no allegation that the plaintiffs have incurred any loss by reason of the Strata Corporation's alleged failure to have a rental restriction bylaw or the Association's attempt to enact a bylaw.
- [80] The Development Documents contradict the plaintiffs' assertions. The Strata Corporation, since inception, has had a bylaw restricting rentals, as was attached to the prospectus. The plaintiffs' Sublease requires them to adhere to Strata Corporation bylaws and the Sublease itself contains a prohibition on rentals and sublets.
- [81] The plaintiffs' allegations regarding the rental restrictions are clearly meritless, however, no relief appears to be sought with regard to these allegations.

Claim for an accounting

- [82] The claim for an accounting relates to the claim for restitution and on the same basis I do not find the claim to be without merit. I do not dismiss the plaintiffs' claim for an accounting.

Claim for interest

- [83] The claim for interest relates to the claim for restitution and on the same basis I do not find the claim to be without merit. I do not dismiss the plaintiffs' claim for interest.

Is the Amended Claim statute-barred?

What is the nature of the plaintiffs' action?

- [84] The Association submits the plaintiffs' claims are barred because of the expiry of a limitation period under the Limitation Act, which enables the court to dismiss a claim under R. 9-6: *Sime v. Jupp*, 2009 BCSC 1154 at paras. 17 and 22.
- [85] The plaintiffs submit the Limitation Act does not bar the declaratory relief claimed since it is not a "claim" under that act. This is because, the plaintiffs submit, they seek declaratory relief which does not fall into the definition of "claim" in the Limitation Act, and the other relief they seek is based on conduct falling within the applicable limitation period.
- [86] With regard to the declaratory relief, they submit that aspect of the action is a "court proceeding in which the only relief sought is to obtain a declaration" pursuant to s. 2(1)(d) of the Limitation Act.

- [87] Both parties refer me to the recent decision of this Court in *Lower v. Investment Industry Regulatory Organization of Canada*, 2019 BCSC 2188, where the issue was whether the plaintiff's action seeking declaratory relief was actually a "claim" for the purposes of the Limitation Act. In that decision, the Court considered the test set out in *Yellowbird v. Samson Cree Nation No. 444*, 2006 ABQB 434, for determination of whether the relief claimed is truly declaratory:
- [79] In *Yellowbird v. Samson Cree Nation No. 444*, 2006 ABQB 434 at para. 35-38, aff'd 2008 ABCA 270, the Court stated:
- [35] The cases show that plaintiffs faced with a limitations problem will sometimes seek a declaration that the defendant has violated a right or owes a duty, in an attempt to avoid openly seeking a remedial order. To date the cases have not identified a satisfactory test on this issue. In my respectful view, an attempt to define the boundary between remedial orders and declaratory orders by searching for the "thrust of the claim" is unproductive. This test is too vague to be helpful, and will lead to results-oriented jurisprudence. The statutory test is whether the relief requires the defendant to comply with a duty or pay damages for violating a right. The coercive nature of a remedial order is captured in the words "requiring a defendant to comply". A helpful test to determine if the relief is truly declaratory, or only declaratory in form, is:

If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff "leave the court in peace" and enjoy the benefits of the declaration "without further resort to the judicial process"?

- [88] The Court in *Lower* also referred to *McMurtry v. McMurtry*, 2016 ONSC 2853, in discussing the requirement to narrowly construe what is to be classified as declaratory relief:

- [80] In *McMurtry*, the court stated:

- [134] The case law and academic authorities emphasize that "declaratory relief" is to be construed narrowly - specifically because relief in that form is not subject to a limitation period. In *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Carswell, 2007) at p. 3, the author introduces the subject as follows:

The essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness and judicial support to the legal relationship between the parties without an order of enforcement or execution ...

If a declaration is merely ancillary to consequential relief which is statute-barred, the entire recourse is considered as consequential relief and will fall. [Footnote omitted]

- [135] ... It is the potential for additional resort to the judicial process, and not the potential for additional administrative or other steps to be required, that is meant by "consequential relief".

- [89] In *Lower*, the plaintiff sought a declaration that a regulatory decision was "ultra vires" and "invalid". The plaintiff submitted this relief was required so he could say the regulatory decision was no longer of any force or effect. The Court found that the relief sought by the plaintiff was remedial and coercive, and was a remedy for an alleged breach of his procedural fairness rights. Adopting the submission of the respondent, the Court found that "[g]ranting the order sought would also likely lead to further dispute between the parties about the effect of the declarations sought": *Lower*, at para. 84.
- [90] The Association submits that the plaintiffs seek declarations for similar purposes, with a similar result.
- [91] The plaintiffs' position is that the Sublease and Head Lease "were never valid or that they were rendered invalid by the actions of the defendants these declarations alone will confirm, pronounce, and add judicial support to the legal relationships between the parties, including whether those relationships are governed by the " leases.
- [92] The restitution, accounting and interest claims all flow from the declarations sought regarding the leases and conduct of the Association and Fairmont.
- [93] The plaintiffs submit they are permitted to bring claims for consequential remedies in addition to declaratory relief. They refer me to the recent decision in *Kyle v. Atwill*, 2020 ONCA 476, for the premise that where consequential relief is sought, the limitation period will apply to that relief, while the declaratory relief will benefit from the absence of a limitation period.
- [94] In *Kyle*, the relevant Ontario Limitations Act provision was considered. Section 16(1)(a) of the Ontario Limitations Act provides there is no limitation period for a proceeding for a declaration "if no consequential relief is sought". Where relief consequential to declaratory relief is sought, a statutory limitation period applies only to the consequential relief:
- [56] In summary, although one may always characterize any relief that is sought that depends on the outcome of the declaration proceeding as consequential relief, the intent and effect of s. 16(1)(a) is not to preclude the party seeking the declaration from also asking for consequential relief as a matter of procedure. It is to prevent a party who seeks a consequential remedy from circumventing the limitation period that is applicable to the claim for the remedy by joining that claim with an application for a declaration: see, for example, *Alguire v. The Manufacturers Life Insurance Company (Manulife Financial)*, 2018 ONCA 202, 140 O.R. (3d) 1, at para. 29; see also *Sarna*, at pp. 55-56.3
- [95] The declaratory relief must actually be declaratory in nature, and not a substantive claim. Where the declaratory relief is actually a "claim for a substantive remedy", and the relief sought under that claim is time-barred, the consequential relief would necessarily also be time-barred: *Kyle*, at para. 52.

- [96] In the case before me, the declarations sought are not a discreet end to the issues between the parties. What necessarily flows is further resort to the judicial process by the plaintiffs to enjoy the benefits of the declarations if the Association, other defendants, and others, like the strata council, resist implementation of the declarations.
- [97] I find that the declaratory relief sought by the plaintiffs is not actually declaratory relief for the purposes of the Limitation Act because the plaintiffs could not "leave the court in peace" to enjoy the benefits of the declarations without further resort to the judicial process.

What limitation periods apply to the claims?

- [98] In terms of timing and discoverability, there are three distinct categories of acts or omissions for the purposes of considering a limitation defence.
- [99] Under the transition provisions in the Limitation Act, a "pre-existing claim" is a claim based on an act or omission that took place before June 1, 2013, for which no court proceeding was brought before June 1, 2013.
- [100] If a pre-existing claim was discovered before June 1, 2013, the former statutory limitation period applies at the time of discovery of the claim. That period is six years.
- [101] Claims based on acts or omissions that took place before June 1, 2013, but were only discovered on or after June 1, 2013, are subject to the current statutory period of two years under the Limitation Act.
- [102] Claims based on any acts or omission that occurred on or after June 1, 2013, are subject to the two-year limitation period from the date of discovery.
- [103] The plaintiffs commenced their action on November 6, 2018, and filed their Amended Claim on September 26, 2019.
- [104] The plaintiffs entered into the Sublease agreement and became members of the Association when they purchased their fractional interests in 2005. In November 2008, Fairmont became the manager under the Management Agreement with the Association. It is these membership and contractual arrangements that form the basis of the plaintiffs' claims for relief.
- [105] Mr. Ackert, one of the plaintiffs, was a member of the board of directors of the Association in 2011 and 2015.
- [106] In or about May 2011, Mr. Ackert took part in a board committee tasked with reviewing the ownership model of the Development and its sustainability. In late 2013 and early 2014, the plaintiffs made requests to the board to relax or modify terms of the Management Agreement regarding certain operating costs.

- [107] Mr. Ackert deposes that he had discussions with a real estate lawyer, who was also an owner and member of the Association board, about the validity and enforceability of the arrangements for the Development. However, Mr. Ackert deposes, "rather than seize on that issue, my wife and I attempted to work with the Association in order to come to an arrangement that would allow us to make reasonable changes to our property without disrupting the arrangements which other owners had come to accept".
- [108] Mr. Ackert deposes that beginning in 2013 to 2014 he and his spouse sought to "find a solution that would allow us to enjoy the benefit of our full ownership of [Strata Lot] 24, while not impacting the other Strata Lots in the Development or the Association's operations".
- [109] He further deposes, "[i]n or around 2014 we advised the Association that the simplest solution, given that we owned all ten chapters in [Strata Lot] 24, was for the Association to agree to exempt [Strata Lot] 24 from the current arrangement, including applicable leases. Our hope in making this request was to be able to treat [Strata Lot] 24 as our own."
- [110] In or around December 2017, the plaintiffs listed for sale their entire interest in the Strata Lot, being all 10 fractional interests, without success.
- [111] Based on the plaintiffs' evidence, at the latest, their discovery of the issues they now identify in their claim with regard to the validity and enforceability of the arrangements for the Development, including the claims regarding the validity of the Head Lease and Sublease, took place by the end of 2014. This includes claims with regard to the alleged Rental Bylaw, which is the latest document referenced by the plaintiffs as creating invalid operations with regard to the Development.
- [112] The plaintiffs make no submissions about when their claims were discovered. They make no tolling claim. They do submit that their claims in restitution and accounting relate to ongoing conduct with regard to fees paid to the Association and Fairmont and revenue received by FHP. The plaintiffs submit, with respect to those claims for relief, that the defendants' conduct in collecting or receiving funds is ongoing. They further allege this has been in contravention of the Development Documents and the RESA since 2008.
- [113] Each day on which a civil wrong continues is the starting point for a limitation period applying to damages suffered on that day: *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135 at para. 47. The plaintiffs do not make a claim for damages but seek restitution for the deprivation suffered by reason of the unjust enrichment of the Association and Fairmont. The application of the limitation period to the timing of the unlawful collection or receipt of payments is analogous.

- [114] The claims for restitution, accounting, and interest are consequential to and dependent upon the declaratory relief sought regarding the compliance of the Association and Fairmont with the RESA in collection of the "unlawful amounts". The plaintiffs allege the "unlawful amounts" have been and continue to be paid by them to the Association and Fairmont.
- [115] The claim for possession arises from the declaratory relief sought regarding the legal effect of the Head Lease and Sublease. This may be a claim for possession which is excluded from application of the Limitation Act under s. 3(1)(b). This is based on the allegation that the Head Lease is not a lease, and in effect the Association has dispossessed the plaintiffs from their Strata Lot in circumstances amounting to trespass. Therefore, it is not clear that a limitation period applies to this claim.
- [116] The plaintiffs' claim for relief in possession is the same as the period applicable to the declaratory relief sought regarding the validity of the Head Lease and Sublease.
- [117] The Association conceded that the limitation period may not bar the claims for restitution and accounting from November 6, 2016 onward.
- [118] Based on the above, I find that the relief claimed with regard to all of the plaintiffs' claims for declaratory relief are statute-barred.
- [119] The claims with regard to restitution, an accounting, and interest are also barred with regard to alleged "unlawful charges" paid prior to November 6, 2016.
- [120] The Association's alternative claim that the relief for possession is statute-barred is not made out on the summary judgment application.

Is the Amended claim barred by the doctrine of laches?

- [121] The Association submits the plaintiffs' claims are barred by the doctrine of laches. I must find that the doctrine is applicable to claims for declaratory relief, possession, restitution and accounting in order for the doctrine to apply to each type of claim. Ultimately, however, the Association has the burden of proving there was an unreasonable delay in the commencement of proceedings, and in all the circumstances the consequences of delay renders the grant of relief sought unreasonable or unjust: *Ahone v. Holloway* (1988), 30 B.C.L.R. (2d) 368 at 378 (C.A.). The requirements for laches will not be met if the evidence does not establish any prejudice by the delay: *Ahone* at 378.
- [122] The Association has not provided evidence on their application that they have suffered any prejudice from the delay in bringing the claim. They submit the delay has caused them to alter their position in reasonable reliance on the plaintiffs' acceptance of the status quo but no details or evidence of how their position was altered are provided.

[123] I find that the Association has not made out the defence of laches, even if it applies to the relief sought, because they did not provide evidence to establish any prejudice they have suffered from the plaintiffs' delay.

The Association's application to strike under Rule 9-5(1)

[124] The Association seeks an order striking out the whole or part of the plaintiffs' Amended Claim under R. 9-5(1).

[125] Given my findings on the summary judgment application, which dismissed all of the plaintiffs' claims for relief apart from their claims for restitution, an accounting, and interest respecting the "unlawful charges" from November 6, 2016, I will address the application to strike pleadings with respect to the pleadings relevant to the remaining claims.

[126] Rule 3-1(2) sets out the required contents of a notice of claim:

Contents of notice of civil claim

(2) A notice of civil claim must do the following:

- (a) set out a concise statement of the material facts giving rise to the claim;
- (b) set out the relief sought by the plaintiff against each named defendant;
- (c) set out a concise summary of the legal basis for the relief sought;
- (d) set out the proposed place of trial;
- (e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;
- (f) provide the data collection information required in the appendix to the form;
- (g) otherwise comply with Rule 3-7.

[127] A concise statement of material facts is mandatory. It is necessary to identify by name or state the essential elements of the cause of action that is advanced: *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 33.

[128] Rule 3-7, cited in R. 3-1(2)(g), provides general rules of pleadings which a litigant must observe.

[129] Rule 9-5(1) provides:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,

- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[130] A pleading is embarrassing if it does not state the real issue in an intelligible form, is prolix, includes irrelevant facts, argument or evidence: *McNutt v. A.G. Canada et al*, 2004 BCSC 113 at para. 41. Pleadings which do not comply with Rules 3-3(2) and 3-7, and which offend basic pleadings principles designed to avoid uncertainty and confusion, or which represent an unsatisfactory mixture of pleaded fact, evidence, argument and irrelevance, may be struck: *Kazakoff v. Taft*, 2017 BCSC 66 at paras. 37-38; *Creyke v. Creyke*, 2016 BCCA 499 at para. 48.

[131] I will go through the specific pleadings in the plaintiffs' Amended Claim that are in question and determine whether they should be struck. These are contained in the Statement of Facts section and the Legal Basis section of the Amended Claim.

Statement of Facts

[132] The Association objects to paragraph 13 of the plaintiffs' Amended Claim, which states that the Strata Corporation has certain responsibilities under the SPA with regard to the Development. They object because this is a conclusion of law and offends R. 3-7(9). While it is a conclusion of law and not a fact, this is relevant to the plaintiffs' claims regarding the Association's and Fairmont's conduct. There are material facts plead with regard to alleged conduct of the Association and Fairmont in relation to this conclusion of law (see paragraph 42 of the Amended Claim, for example). This legal conclusion is also set out in the Legal Basis, although with less specific reference to the SPA. I do not strike this paragraph.

[133] The plaintiffs agree their wording in paragraph 14(a) is incorrect and "separately owned" should read "separately titled" with respect to the 1/10th fractional interests. I permit the plaintiffs to amend their pleading to reflect this correction.

[134] Paragraphs 33 to 37 set out facts relating to the first manager of the Development. They are not material facts relevant to the remaining claims. I strike these paragraphs.

[135] Paragraphs 38 and 39 relate to facts regarding the change in ownership of the Common Strata Lots and are materially relevant to the remaining claims regarding the Strata Corporation's common asset management. I do not strike these paragraphs.

[136] Paragraph 41 sets out alleged facts regarding Fairmont's occupation of the Common Strata Lots which is alleged to disregard the roles of the Association and the Strata Corporation. This is materially relevant to the plaintiffs' claims regarding the unlawful charges. It is not confusing or meaningless. I do not strike this paragraph.

- [137] Paragraphs 45 and 46 allege Fairmont and the Association do not have the rights or remedies available to them as plead, and that the services provided are the responsibility of the Strata Corporation or a licensee on behalf of the corporation. The Association submits these are conclusions of law and not material facts. This is correct. However, the facts supporting these conclusions are plead. These conclusions of law are also set out in the Legal Basis, and should properly be found in that part only. I do not strike these paragraphs.
- [138] Paragraph 49 alleges the Association and strata council held joint meetings with little or no distinction between the two. This is a material fact with regard to the claims of unlawful charges. The Association disputes the allegation but this is a fact-driven issue to be proven on the evidence. I do not strike this paragraph.
- [139] Paragraph 50 alleges the Strata Corporation imposed restrictions on strata council membership. This is relevant to the remaining claims for relief with regard to the governance of the Strata Corporation and which persons are actually conducting its business for the purposes of the restitution and accounting claims. I do not strike this paragraph.
- [140] Paragraph 51 alleges that based on the inner workings of the Association and the strata council there is no separate governance of the Strata Corporation. The Association submits this is a conclusion of law. They also object on the ground there is, in fact, no overlap of responsibilities based on the Development Documents. This is a question of mixed fact and law and there are material facts plead regarding the conduct of the two bodies and responsibilities taken on by the Association which relates to the remaining claims. Those facts cannot be determined on the documents themselves. I do not strike this paragraph.
- [141] Paragraph 53 alleges the unlawful amounts were paid by the plaintiffs on the mistaken belief that they were lawfully owed to the Association. This is a fact or mixed question of fact and law that is materially relevant to the plaintiffs' claim for restitution. I do not strike this paragraph.
- [142] Paragraph 53.1 alleges the Association, Fairmont and/or FHP have been enriched by way of receiving the unlawful charges to which they were not entitled and the plaintiffs were correspondingly deprived. The Association submits there are no facts pleaded to support the unjust enrichment claim. However, there are facts pleaded alleging the defendants were not entitled to the unlawful charges. I do not strike this paragraph.
- [143] Paragraph 55 alleges the Strata Corporation has no bylaws to restrict rentals. I agree with the Association that this allegation is irrelevant to the plaintiffs' claims and is also demonstrably false from the bylaws referred to in the pleading. I strike this paragraph.

- [144] Paragraphs 56 and 57 allege that the Association purported to pass a rental bylaw in 2013 and that there is a fine associated with the bylaw. This allegation is irrelevant to the plaintiffs' claims. There are no allegations the plaintiffs tried to rent their Strata Lot or that the Association received rent or rent fines with regard to the plaintiffs' claim for restitution. I strike these paragraphs.
- [145] Paragraph 58 sets out the purpose of the Association as defined in its constitution, which is "to facilitate the exercise by the members of the [Association] and others of their rights pursuant to the subleases". The Association submits this is not material to the plaintiffs' claims. The plaintiffs submit it is a material fact required to establish the role of the Association within the Development. I agree with the plaintiffs that the purpose of the Association is relevant to the plaintiffs' remaining claims, although it may not be material. I do not strike this paragraph.
- [146] The plaintiffs conceded that paragraph 59 contains a demonstrably false allegation and I strike this paragraph.

Legal Basis

- [147] Paragraphs 79 and 80 plead conclusions of law regarding the responsibilities of the Strata Corporation and the Association. The Association's objection is based on a dispute with the conclusion. I do not strike these paragraphs.
- [148] Paragraph 81 cites a conclusion of law regarding "At Nature's Door" based on its operations. The Development is not a party or an entity nor is it subject to the SPA which is the legislative basis for the conclusion. The pleading is irrelevant to the plaintiffs' claims and there is no legal basis for the conclusion. I strike this paragraph.
- [149] Paragraphs 83 to 86 set out facts and the plaintiffs concede they should be properly plead within Part 2. I grant leave to the plaintiffs to amend their claim to place these pleadings within Part 2.
- [150] Paragraph 87 is a bald conclusion of law regarding the Association breaching the Head Lease by failing to comply with the requirements of the Societies Act. There are no facts pleaded to support this legal basis and it is irrelevant to the claims for relief. There is no section of the Societies Act which is referenced as support for this pleading. Subsection 7(1) of the Societies Act sets out the restrictions on a society's activities and powers, and s. 7(2) clarifies that an act by a society is not invalid merely because it is contrary to s. 7(1). I strike this paragraph.
- [151] Paragraph 87.2 concludes that the Association breached the Sublease by charging and collecting the unlawful charges. There are no material facts pleaded with regard to this conclusion. The Sublease's wording specifies items claimed as unlawful charges are "additional rent". I strike this paragraph.

- [152] Paragraph 89 sets out the conclusion that it is unlawful for a person to be paid for strata management services under s. 4 of the RESA if that person is not licensed. Section 4 of the RESA prohibits a person from taking action for remuneration in relation to real estate services, which includes strata management services, unless they are licensed. This is a conclusion of law. The Association objects to the application of the RESA to the facts. I do not strike this paragraph.
- [153] Paragraph 90 claims that the Association, Fairmont and FHP were enriched by way of payments to which they were not entitled, the plaintiffs were correspondingly deprived and there was no juristic reasons for same. Material facts are adequately pleaded as I found above. I do not strike this paragraph.
- [154] The plaintiffs conceded the conclusion of law in paragraph 91 is incorrect and I strike it accordingly.

The plaintiffs' application to strike portions of the Association's Amended Response under Rule 9-5(1) and (2)

- [155] The plaintiffs seek the striking of certain paragraphs of the Association's Amended Response as they claim these paragraphs are argumentative, improper commentary on the Amended Claim, do not raise a defence, or fail to properly plead the key elements of a defence. In the alternative, the plaintiffs seek an order directing the Association to further amend the Amended Response.
- [156] I will consider the specific paragraphs of the Amended Response that remain in question and determine whether they should be struck. These are contained in the Version of Facts section and the Legal Basis section of the Amended Response.

Version of Facts

- [157] The plaintiffs object to a number of the Association's facts in paragraph 4 as being argumentative and improper commentary. The Association concedes that some of the content was argument which could be struck, and other portions were conclusions of law which should be set out in Part 3.
- [158] The Association concedes the objection to portions in paragraph 4(a) are commentary and may be struck. I strike that portion.
- [159] I agree with the plaintiffs that much of the challenged portion of paragraph 4(b) is argument and should be struck. The following wording is struck:

the use of the word "purportedly" in the Amended Notice of Civil Claim is contentious and as such are irrevocably and contractually bound and/or have waived and/or are estopped and/or barred from contesting any legal efficacy or validity of the legal relationship having regard to the Binding Documents.

[160] There is similar phrasing in paragraph 4(c) that I strike:

the use of the word "notionally voluntary society" is contentious and as such are irrevocably and contractually bound and/or have waived and/or are estopped and barred from contesting any membership and/or ownership in the Defendant having regard to the Binding Documents.

[161] As set out by the plaintiffs, portions of paragraph 4(v) A and B also contain argument which the Association essentially admits, however the Association submits it was included to be helpful. It is not helpful to include argument in the facts section of the pleadings and I strike those portions in their entirety.

[162] The plaintiffs highlight paragraph 4(v) F, G and H and object to them on the basis the content is conclusory or argument. The Association concedes that this content should be set out in Part 3 of the Response. I grant leave to the Association to amend the Amended Response accordingly.

[163] The portions of paragraph 4(g)(iii) and (iv) referring to paragraphs 18 and 19 of the plaintiffs' Amended Claim being irrelevant is again argument and is struck. This was conceded by the Association.

[164] The portion of paragraph 4(g)(viii) "and in any event are completely lacking in particularity" is argument and the proper route to take is, as the plaintiffs submit, to request or make an application for particulars. That wording is struck. The other portion objected to is an allegation of fact or mixed fact and law regarding the "bargain" and I do not strike that wording.

Legal Basis

[165] The plaintiffs object to paragraph 4 which sets out the Association's defence of estoppel and promissory estoppel. The plaintiffs submit since the Association has not pleaded the Association has acted in reliance of the conduct, the Association has failed to plead the necessary elements required to prove promissory estoppel. In support of this submission, they refer me to *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, which summarizes the principles of promissory estoppel at 57:

The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[166] The Association submits it pleaded the defence of estoppel by conduct. Even if that were the case, I was not referred to any case law to support the proposition that estoppel by conduct does not require the Association to prove it relied upon the conduct of the plaintiffs to the detriment of the Association. The Association's defences of estoppel and promissory estoppel in paragraph 4 are struck.

[167] The plaintiffs object to paragraph 5 as it pleads that the plaintiffs' claims are an abuse of process which is not a defence, and more appropriately set out in an application to strike as grounds for dismissal. The Association concedes this content is not a defence, but submits that does not mean it is inappropriate to include it in order to put the plaintiffs on notice of the Association's objection to the claim. The content also includes conclusions and facts that relate to the tort of abuse of process. I agree with the plaintiffs that the whole of paragraph 5 is focussed on the Association's position that the plaintiffs are liable in the tort, and not simply putting the plaintiffs on notice of a possible application to strike. I strike the whole of paragraph 5.

[168] The plaintiffs object to paragraphs 6(c), 6(e), 6(g), 9 and 10 as they do not raise a defence or legal basis for a defence. These paragraphs are essentially objections to the plaintiffs' pleadings and argument regarding the inappropriate or insufficient content of the pleadings. The Association submits they included this in their legal basis again to put the plaintiffs on notice of their objections to the pleadings and their struggle with how to respond to them. Those matters have been raised, appropriately, within the parties' applications. This content is not appropriate for the legal basis content of the Amended Response and I strike these portions of the Amended Response.

The plaintiffs' application for summary judgment under Rule 9-6 dismissing the Association's Counterclaim

[169] The Association's Counterclaim seeks damages resulting from the plaintiffs' tortious abuse of process.

[170] The plaintiffs apply for an order granting summary judgment dismissing the Association's Counterclaim on the basis that the Counterclaim does not raise a genuine issue for trial with regard to the claim for damages arising from the tort of abuse of process.

[171] The parties referred me to the recent decision of the Court of Appeal in *Oei v. Hui*, 2020 BCCA 214 at paras. 5, 6 and 79, which clarified the elements required to plead the tort of abuse of process in British Columbia. They are:

- a) previous court proceedings brought against the claiming party;
- b) for a collateral and improper purpose;
- c) an overt act or threat, in furtherance of a purpose not legitimate in the use of the process; and
- d) damages suffered by the party alleging abuse of process.

[172] The plaintiffs submit the Association has not plead an improper purpose, an overt act or threat, and has failed to plead material facts in support of its damages claim.

[173] The Association submits it has satisfied the pleading requirements, and in the alternative the court should permit it to amend its Counterclaim to rectify any deficiencies.

Did the Association fail to plead an improper purpose?

- [174] The Association pleads the improper purposes of the plaintiffs' claim is that it is an attempt "to back out of their contractual obligations and covenants and to recast their entire bargain in pursuit of a[n] unjustified windfall". Further, they submit it is an attempt "to threaten and coerce the Defendant and non-parties (other chapter-owners) by way of impermissible economic pressure in the form of litigation founded on baseless claims and on the basis of material facts which are known to be spurious". And finally, that the claims and actions of the plaintiffs "constitute a breach of their contractual obligations and covenants and have caused or threaten to cause loss and damage to the Defendant and all owners of undivided one-tenth fee simple and leasehold interests and therefore constitute an abuse of process".
- [175] The plaintiffs submit the Association does not plead any material facts in support of the allegation that the plaintiffs' claim is baseless and founded upon material facts which are known to be spurious. They further submit, quoting Oei at para. 37, that "knowing falsity, by itself, is not a 'purpose' as required for the tort, and a plea of knowingly false allegations cannot transform an acceptable purpose into a tortious purpose in respect of the tort of abuse of process".
- [176] In Oei, the plaintiffs alleged the defendants' action was advanced for the purpose of constraining the plaintiffs from dealing with the lands in question or developing them with others, and that the defendants were seeking to compel the plaintiffs to continue negotiations with respect to the lands. The Court of Appeal in Oei found that "it is not obvious that the purpose pleaded constraining the [plaintiffs] from dealing with others concerning the lands or negotiating with the [defendants] in respect to ownership and development of the lands is 'clearly collateral', that is, outside the ambit of the first action, or not reasonably related to the subject matter of the litigation, or outside the range of solutions that might reasonably be considered in settlement discussions": at para. 54.
- [177] The collateral and improper purpose claim is similar in this case. The Association's pleading does not simply plead knowing falsity as the basis for the improper purpose element. It has plead separately that the plaintiffs had a collateral and improper purpose in bringing their claims apart from the relief sought. That is, to permit the plaintiffs to back out of their obligations and covenants and, by reason of, cause damages to the Association and other chapter owners.
- [178] An improper act in the form of commencement of proceedings has been found where "there has been a prior demand or threat to obtain something not achievable through the proceedings": Oei, at para. 78, citing the Australian decision *Williams v. Spautz*, [1992] HCA 34. This is similar to what the Association pleads as the improper and collateral purpose of the plaintiffs, in referencing the plaintiffs' attempts to be treated differently than other chapter owners regarding the associated costs for their chapters by reason of their 10/10 fractional interests in their Strata Lot, and their failure to sell their 10/10 interest to a single purchaser. The Association pleads that since those negotiations and the attempt to sell

failed, the plaintiffs brought their notice of civil claim, which does not seek a similar result but instead seeks to dismantle the legal structure of the Development and release the plaintiffs from their contractual obligations as a whole.

[179] This is different than pleading the negotiations failed or the plaintiffs filed their claim in order to continue negotiations. The claim seeks different relief than the plaintiffs' alleged initial request or demand. Material facts in support of the pleading of improper and collateral purpose are sufficiently set out in the Counterclaim.

[180] I do not find that the Association's pleading of improper and collateral purpose is insufficiently plead to support a dismissal of the claim under R. 9-6.

Has the Association failed to plead material facts to establish an overt act or threat?

[181] The plaintiffs submit generally that the Association is required to plead that the process was brought as an overt act or threat. They submit the Association has not pleaded material facts to establish an overt act or threat.

[182] Facts are pleaded with regard to the plaintiffs' attempts to obtain certain exemptions and relaxing of the terms of the Sublease and obligations for owner costs by reason of their 10/10 interest. Facts are also pleaded regarding efforts by the plaintiffs to ensure all other chapter owners were made aware of the relief sought by the plaintiffs, and the costs that could be incurred if the whole structure were challenged.

[183] The bringing of a claim in analogous circumstances was found to be an overt demand or threat in the Australia decisions cited in Oei.

[184] The Association is not pleading that the plaintiffs brought their claims to put economic pressure on the Association and, in turn, force them to agree to the same relief being sought in the plaintiffs' claim. They submit it is a claim for special treatment of the plaintiffs as 10/10 owners which the Association pleads is the plaintiffs' true and collateral purpose.

[185] I find that the facts regarding the plaintiffs' conduct pleaded in the Association's Counterclaim may constitute an overt act or threat. The Association has sufficiently pleaded this element of the tort.

Has the Association failed to plead material facts in support of their claim for damages?

[186] The plaintiffs submit that the particularization of the Association's damages "in the form of actual legal expense and wasted time and effort on the part of the volunteer members of the Defendant's board" is not supported by any material facts since the Association has failed to plead material facts to establish the plaintiffs' action is without merit. They further submit that legal proceedings inevitably result in delay and cost and, as such, that alone is not actionable.

[187] The Association, as noted above, has included within the Counterclaim the facts pleaded within the Amended Claim which is replete with assertions that the plaintiffs' claims are factually incorrect and without merit.

[188] The Association is not claiming that the costs of the plaintiffs' process is what is actionable, but it is those costs that constitute the damages as a result of the actionable conduct. The plaintiffs did not refer me to any case law holding that damages in the form of legal costs and time wasted are not recoverable damages in an action for abuse of process. It is reasonable to find the damages related to being the defendant in a process brought improperly would include the costs incurred by that party associated with the abusive process itself.

[189] I do not find that the Association has failed to plead material facts to support its claim for damages.

[190] I dismiss the plaintiffs' application for summary judgment for dismissal of the Association's Counterclaim.

The plaintiffs' application for production of documents

[191] The plaintiffs apply for an order that the Association produce documents requested by the plaintiffs and prepare and serve an amended list of documents.

[192] Given my decisions on the other applications, while I acknowledge a number of the documents requested relate to claims for relief that I have not dismissed, I invite the parties to make further written submissions on the documents that continue to be sought by the plaintiffs.

[193] The plaintiffs may provide me with their submissions within 14 days of receipt of these reasons and the Association may provide responsive submissions within 7 days of receiving the plaintiffs' submissions. If the plaintiffs do not provide submissions in accordance with this direction, I will treat this application as being adjourned generally.

Conclusion

[194] In summary, I make the following orders on the applications:

- a) On the Association's application under R. 9-6 for dismissal of the plaintiffs' Amended Claim, the following claims are dismissed:
 - i. The claims for declarations regarding the invalidity of the Head Lease and Sublease. Namely:
 - (1) The claim that the Head Lease is actually a license revocable at will, and therefore the Sublease is not a lease;
 - (2) The allegation that the Head Lease violates s. 73 of the Land Title Act; and

(3) The allegation that the Head Lease and Sublease are void for uncertainty.

ii. The claim for possession.

iii. The allegations regarding unlawful rental restrictions.

The following claims for relief are not dismissed:

i. Restitution.

ii. An accounting.

iii. Interest.

b) On the Association's application under R. 9-6 to dismiss the Amended Claim as statute-barred:

i. All of the plaintiffs' claims for declaratory relief are statute-barred.

ii. The claims with regard to restitution, an accounting, and interest are also statute-barred with regard to alleged "unlawful charges" paid prior to November 6, 2016.

iii. The application to dismiss the claim for possession as statute-barred is dismissed.

c) On the Association's application under R. 9-5(1) to strike portions of the plaintiffs' Amended Claim, in the Statement of Facts:

i. Paragraphs 33, 34, 35, 36, 37, 55, 56, 57 and 59 are struck.

ii. Paragraphs 13, 38, 39, 41, 45, 46, 49, 50, 51, 53, 53.1, and 58 are not struck.

iii. I grant the plaintiffs leave to amend paragraph 14(a).

In the Legal Basis:

i. Paragraphs 81, 87, 87.2 and 91 are struck.

ii. Paragraphs 79, 80, 89, and 90 are not struck.

iii. I grant the plaintiffs leave to amend paragraphs 83, 84, 85, and 86.

d) On the plaintiffs' application under R. 9-5(1) and (2) to strike certain pleadings from the Association's Amended Response, in the Version of Facts:

i. A portion of paragraphs 4(a), 4(b), 4(c), 4(v) A, 4(v) B, 4(g)(iii), 4(g)(iv) and 4(g)(viii) are struck.

ii. I grant the Association leave to amend paragraphs 4(v) F, 4(v) G and 4(v) H.

In the Legal Basis:

i. Paragraphs 4, 5, 6(c), 6(e), 6(g), 9, and 10 are struck.

e) On the plaintiffs' application under R. 9-6 dismissing the Association's Counterclaim:

- i. The application is dismissed.
- f) On the plaintiffs' application for production of documents and an amended list:
 - i. The plaintiffs and the Association are to provide supplemental submissions as directed.

Costs

[195] The parties made limited submissions as to costs. Given my decision, if the parties are unable to agree on the issue of costs they are at liberty to make written submissions as to an appropriate order for costs.

[196] The plaintiffs may file written submissions within 30 days of receipt of these reasons. The Association and Fairmont may file responsive submissions within 14 days of the filing date of the plaintiffs' submissions. The plaintiffs will then have 7 days after that date to file any reply submissions.

"Wilkinson J."

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