

CANADA / JUDGMENT

Baker v. The Owners, Strata Plan KAS 2750

2022 BCSC 1449

COURT

Supreme Court of British Columbia

DECIDED

2 September 2022

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2022 BCSC 1449 Baker v. The Owners, Strata Plan KAS 2750

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Baker v. The Owners, Strata Plan KAS 2750,

2022 BCSC 1449

Date: 20220902

Docket: S132911

Registry: Kelowna

Between:

Kenton John Baker and Cecilia Gil Baker

Petitioners

And

The Owners, Strata Plan KAS 2750, Simon Ludger Gosselin, Rosalind May Gosselin, Sharon Roberta Cizmar, Myles Andrew Cizmar, Willy Gordon Herwig, Joanne Sproule, John Stuart Garrett, Shelly Rosalind Garrett, James Robert Ferguson, Helen Lai Ferguson, Gordon Estlin Thorne, Doreen Roberta Thorne, Douglas Neil Schultz and Sarah Jill Schultz

Respondents

Corrected Judgment: The text of this judgment was corrected on the cover page on November 1, 2022.

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Petitioners:

M. Moorhouse

Counsel for the Respondent, The Owners, Strata Plan KAS 2750:

M. Fischer

Counsel for the Personal Respondents:

T. Fitzpatrick

Appearing in person, by telephone, with leave of the Court:

B. Yaseniuk

Place and Date of Hearing:

Kelowna, B.C.

June 2, 2022

Place and Date of Judgment:

Kelowna, B.C.

September 2, 2022

Introduction

- [1] This case is ultimately about who is responsible for the cost of remediating a retaining wall that borders the lower edge of a bare land strata residential development built on a hill. If the retaining wall ("Wall") is common property ("CP") then the respondent, The Owners, Strata Plan KAS 2750 ("Strata. Corp."), is responsible for the cost. If the Wall is part of eight strata lots, then some or all of the owners of those strata lots alone (the petitioners and the named personal respondents) are responsible for the cost. This issue of who is responsible for the Wall has divided the small community of owners. Groups within the community have tried to address what each sees as the fair resolution for what will be a significant remediation cost.
- [2] The petitioners apply for the following declaration and orders:
- a) a declaration that the strata plan for the Strata Corp., deposited in the Land Title Office ("LTO") on January 27, 2005, contains an error, being that the Wall was not designated as CP when it was intended to have been designated as CP;
 - b) an order that the Strata Corp. have an explanatory plan prepared designating the Wall as CP;
 - c) an order that the registrar of land titles be directed, pursuant to s. 14.12 of the Strata Property Regulation, B.C. Reg. 43/2000 [Regulation], to correct the strata plan to designate the Wall as CP; and

d) leave to seek further direction if necessary to correct the error in the strata plan.

[3] The issues on this petition are:

- a) whether there was an error at the time the strata plan was filed; and
- b) if so, whether this Court should order that the strata plan be rectified.

The development, the parties, and other interested persons

- [4] The strata lot development is located at 10605 Cedar Avenue in Summerland, B.C. In 2005, the land was developed into a 24-lot bare land strata residential subdivision called Rock Garden Estates ("RG Estates"). The developer is 0656133 B.C. Ltd., and the developer's work, including the Wall, was completed in 2005. The eventual purchasers of each strata lot are responsible for the construction of a house on their respective lots. Some of the lots do not yet have houses built on them.
- [5] The strata lots in RG Estates are arranged in three rows on a hillside, with one large lot at the top. Cedar Avenue is below the lowest row of strata lots, and lots one through ten (south to north) border Cedar Avenue.
- [6] The Wall is adjacent to Cedar Avenue and is situated at the western boundary of, but within, what is shown on the strata plan as strata lots three to ten. The Wall starts at lot three where it is 1.2 metres tall, and gets progressively taller as it borders the lots to the north. At lot ten, the Wall is 4.8 metres high. The Wall wraps around the northern boundary of lot ten and continues for a short distance where its height decreases as the land on which it is built rises up the slope of the hill. A surveyor's map shows that the outside of the Wall is inches from the western boundaries of strata lots three to ten. The Wall is constructed of interlocking 12-inch wide blocks affixed in place with fibreglass pins. The Wall has back-fill reinforcement behind it, comprising 2.95 metre lengths of geogrid which are anchored to the Wall and extend horizontally at .6 metre vertical spacing into the ground behind the Wall. There is a drainage pipe at the back of the engineered fill at the elevation of the toe of the Wall.
- [7] The petitioners are the owners of strata lot ten. In 2018, they were starting to construct a home on their lot when the District of Summerland ("District") issued a stop work order as a result of observed failure of the Wall. The petitioners have not been able to resume construction since as a result of the unresolved issues regarding the Wall.
- [8] The personal respondents are each individually or with one other, the owners of strata lots three through nine. As the Wall is located within their respective lots, they are directly impacted by the declaration and orders sought as their strata lots will be reduced in size if the Wall is CP. However, they take no position on this petition except as to costs, and to seek that if the declaration and orders are granted, that they should include a term that the area designated as CP should be as minimal in size as possible to include the Wall only and encroach the least amount as possible onto their individual strata lots.

- [9] The Strata Corp. took no position on the petition, but filed a response and supporting materials, and its counsel made submissions setting out what it understood to be the positions of the various groups within the RG Estates community. Counsel for the Strata Corp. confirmed that all owners were notified of the petition as required by s. 167 of the Strata Property Act, S.B.C., 1998 c. 43 [SPA]. As stated in its response to petition, and supported by an affidavit of a current strata council member:

The Strata Corporation's members are divided on the handling of the Wall. There is a need for the Strata Corporation to remain neutral on this Petition. The ownership (other than the Petitioners) attended a meeting on March 9, 2022 at which 23 of 24 strata lots were represented. The voters at that meeting unanimously directed the Strata Council to formally take no position on the substantive issues on this Petition, and instead take the role of ensuring the Court is informed of the context and the factual and legal arguments on either side of the issue, with the understanding that more detailed formal Responses might be filed on behalf of other interested owners.

- [10] Subsequently, on March 22, 2022, counsel for the Strata Corp. received a letter and enclosures signed by the owners representing seven of the strata lots, disagreeing with some of the response to petition and materials filed by the Strata Corp. These are owners of some of the uphill strata lots that do not contain the Wall ("Uphill Owners"), and they oppose the granting of the declaration and orders. A legal assistant in the office of counsel for the Strata Corp., filed an affidavit which attaches that letter and enclosures. On March 28, 2022, counsel for the Strata Corp. wrote to each of the Uphill Owners advising that he was not their counsel, and if they wished to respond to the petition they should seek guidance from their own lawyer on how to do so, file a response and seek standing at the hearing of this petition. However, none of the Uphill Owners filed a response to the petition, and only one, Mr. Bon Yaseniuk, sought standing at the hearing of this petition. Regardless, I have read and considered the letter of the Uphill Owners which I have treated as submissions on the petition.
- [11] In addition to being one of the Uphill Owners, Mr. Yaseniuk filed his own affidavit. He attended the hearing of this petition by telephone and made submissions.

Legal framework

- [12] Section 14.12 of the Regulation provides:

14.12(1) In this section:

"error" means any erroneous measurement or error, defect or omission in a registered strata plan;

"registered strata plan" includes any document, deposited in the land title office, that

- (a) is referred to in section 245 (a) or (b) of the Act,

- (b) forms part of a strata plan under the Condominium Act, R.S.B.C. 1996, c. 64 or a former Act, or
 - (c) amends or replaces a document referred to in paragraph (a) or (b).
- (2) If it appears to the registrar that there is an error in any registered strata plan, the registrar may give notice or direct that notice be given to any person, in the manner and within the time determined by the registrar, and the registrar, after considering submissions, if any, and examining the evidence, may correct the error.
- [13] In *Chow v. The Owners, Strata Plan NW 3243*, 2017 BCCA 28, the Court discussed this Court's jurisdiction to correct an error in a registered strata plan under s. 14.12:
- [24] The registrar was asked to exercise the jurisdiction under s. 14.12 but declined, apparently because the issue was before the courts. Whether or not that is all that can be said about the reason for declining jurisdiction, the rectification issue was before the court. The "Legal Basis" portion of the respondents' Amended Response to Petition, filed April 28, 2014, expressly sought rectification of the "mistake" as provided for under s. 14.12. I am satisfied that in these circumstances a court has the jurisdiction to deal with the issue posed by s. 14.12 and make a declaration determining rights under the section and, if the court determines there was such an error that should be rectified, pronounce an order directing the registrar to correct the record. I do not rule out the possibility that a court might refer the matter back to the registrar to exercise his or her powers under the Regulation and stay proceedings in the court pending that determination.
- [14] The strata plan was subsequently rectified when the case was remitted to this court: at 2017 BCSC 2331 [Chow#2].
- [15] Subsequently, in *Entwistle v. The Owners, Strata Plan EPS 3242*, 2019 BCSC 1311 at para. 51, Justice Sewell held that s. 14.12 did not vest exclusive jurisdiction in the registrar to rectify a registered strata plan, and that *Chow* stands for the proposition that the court and the registrar of land titles have concurrent jurisdiction to determine whether an error has occurred in a registered strata plan and to rectify that error. The court's jurisdiction to do so is based on its equitable jurisdiction to rectify documents.
- [16] In discussing rectification, Sewell J. referred to principles from *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2017 BCCA 374 [Arbutus Bay], leave to appeal ref'd, [2018] S.C.C.A. No. 37892 (S.C.C.):
- [31] The first is that the power of the court to rectify documents is limited to cases in which the court finds as a fact that an agreement or instrument as recorded did not accurately set out the pre-existing agreement of the parties. This is a question of fact that the court must decide after hearing all relevant evidence, tested by the adversarial process of litigation.

- [32] The second is that an order for rectification acts retrospectively to the date the instrument was created. Therefore, the effect of the July 18 Order was to amend the Strata Plan as of the date it was executed, prior to the time it was submitted for registration.
- [36] In my view, this court has the jurisdiction to rectify documents that have been registered, provided that in so doing it recognizes and gives effect to the indefeasibility provisions of the Land Title Act.
- [17] Rectification is available when "by mistake a legal instrument does not accord with the true agreement it was intended to record". The purpose of rectification is to give effect to "the parties' true intentions, rather than to an erroneous transcription of those true intentions": *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at para. 12 [Fairmont]. It must be used "with great caution", and is not available where there were "mistakes merely in the making of that antecedent agreement" or where the basis of the application is that one or both of the parties "wish to amend not the instrument recording their agreement, but the agreement itself": *Fairmont* at para. 13.
- [18] The doctrine of rectification applies equally to "unilateral" instruments such as resolutions, and the focus of the test is whether "the parties who signed the document in question can show they had a definite and ascertainable intention when they signed, but that because of a mistake, the document failed to reflect that intention": *5551928 Manitoba Ltd. v. Canada (Attorney General)*, 2019 BCCA 376 at para. 32.
- [19] Rectification is an equitable remedy and a court may refuse to grant it when it would prejudice the rights of an innocent third party who has actually relied and acted upon the flawed document: *Arbutus Bay* at para. 65-66. One of the underlying purposes of rectification is to "prevent one party from enforcing an error and being unjustly enriched by the other's mistake" and to "prevent a third party who has not relied on the agreement from enforcing a mistake and receiving a windfall": *Arbutus Bay* at para. 65.
- [20] I did not receive any argument that the indefeasibility provisions of the Land Title Act, R.S.B.C. 1996 c. 250 should apply to prevent rectification in this case.

Factual background

- [21] Mr. Antrobus, Mr. Rene Mantha, Ms. Susan McCallister, and Mr. Yaseniuk, swore affidavits that provide the historical and more current information regarding this dispute. Mr. Antrobus is a principal of the developer, and Mr. Mantha and Ms. McCallister are either recent or current strata council members, and they both reviewed the Strata Corp. records. They both attached historical minutes of meetings and correspondence, as did Mr. Yaseniuk in his affidavit. In making findings as to what took place historically, I have relied upon the minutes and correspondence as business records, and not a witness' interpretation of those documents, as that is sometimes a contested matter.

2005 - the developer's intention, the strata plan, and the disclosure statement

- [22] Mr. Antrobus states that "in order to properly develop and service" RG Estates it was necessary to construct the Wall on the western boundary of strata lots three to ten. Mr. Antrobus states that the Wall "was essential to the development of RG Estates".
- [23] Mr. Antrobus does not elaborate on why the Wall was essential. For example, whether it was necessary to enable 24 lots to be built as opposed to a lesser number, or if it was necessary to provide support or services for some or all of the strata lots. It is a disputed fact on this hearing how much support, if any, the Wall provides to the strata lots above strata lots three to ten. It is not in dispute that the Wall was installed at the time of development at the direction of the developer.
- [24] Critically, Mr. Antrobus states that the "Developer always intended for the Retaining Wall to form part of the common property". He states that the developer's solicitor, Mr. Larry Halbauer, was instructed to prepare and file the documents necessary to create RG Estates strata lots in the development and that "Mr. Halbauer was instructed that the Retaining Wall was to be common property". This is uncontradicted evidence.
- [25] Unfortunately, Mr. Halbauer is now deceased and there is no evidence from him, or his file on this petition other than a letter received by the Strata Corp. in 2010 and discussed below.
- [26] The strata plan was deposited in the LTO on January 27, 2005. The Wall is not shown on the strata plan and therefore not identified as CP.
- [27] The Real Estate Development Marketing Act, S.B.C. 2004, c. 41 [REDMA] requires developers to complete a disclosure statement that is provided to potential buyers. Section 22 of REDMA makes a director of a developer potentially personally liable for a misrepresentation contained in a disclosure statement.
- [28] On March 15, 2006, the developer issued an amended disclosure statement. The original disclosure statement was not in evidence, but the amendments are underlined and do not concern the relevant provision. Both Mr. Antrobus and his spouse Ms. Antrobus, who is also a director of the developer, signed the disclosure statement. Mr. Antrobus states that, consistent with the developer's intention, clause 3.3 of the disclosure statement states that the Wall is CP:

Common Property

The common facility (assets) are roadways, underground utilities, street lighting, fencing (along south property line), retaining wall including fencing (along west and north property line) and a recreational vehicle parking lot.

[Emphasis added.]

[29] Mr. Antrobus states that his spouse is a realtor and she listed and sold the strata lots in RG Estates. The online listing for the strata lots in RG Estates states that the Wall is CP. He attaches an online listing. Although the date of that listing is not stated, it was likely sometime shortly before June 2019, given another date referenced in the listing.

2010 - Mr. Halbauer's opinion

[30] Minutes of the Strata Corp. indicate that the Wall was discussed at an August 10, 2010 annual general meeting. The context was that the owner of strata lot seven had damaged the Wall at that lot. The issue was raised as to whether the Wall is CP, and it was noted that the Wall was not shown as CP on the strata plan, but the disclosure statement stated it was CP. There was also a concern regarding insurance for the Wall. The minutes of the meeting on this subject conclude:

iv. Action Required - Look into the requirements for registration of the retaining wall as common property

v. Action Required - Ensure that the insurance coverage on the retaining wall is in place

[31] The minutes show that Mr. and Ms. Antrobus were present at the meeting, and participated in the discussion. Mr. Antrobus is noted as stating that when everyone bought a strata lot they were informed that the Wall is CP.

[32] The strata council subsequently made inquiries with the insurer stating its understanding that the insurance policy that it holds on strata CP includes the Wall. The insurer responded that the policy does not cover failure in the Wall itself as opposed to specific perils. I pause here to note that whether the insurer considered the Wall to be CP in 2010 is not relevant to whether there was an error in the strata plan in 2005. There was no evidence of what the insurer was instructed regarding the Wall.

[33] The strata council also made inquiries of Mr. Halbauer, the solicitor who was instructed by the developer in 2005. In a letter dated August 30, 2010, Mr. Halbauer stated:

The retaining wall is common property.

Common property in a bare land strata is not required to be registered in the Land Titles Office, only the individual strata lots require registration.

If one directs their attention to paragraph 69(2) of the Strata Property Act you will note that there is a statutory easement created either in favour of the common property from each strata lot. Section 69(3) further states that the easement exists without registration.

[34] The relevant portions of s. 69 of the SPA are:

69 (1) There exists an easement in favour of each strata lot in the strata plan and the owner of each strata lot

- (a) for the strata lot's vertical and sideways support by the common property and by every other strata lot capable of providing support,
 - (2) There exists an easement in favour of the common property and the owners of the common property
 - (a) for the common property's vertical and sideways support by every strata lot capable of providing support,
 - (3) The easements referred to in subsections (1) and (2)
 - (a) exist without registration in a land title office,
 - (b) charge and burden that part of the common property capable of providing support or shelter to a strata lot,
 - (c) charge and burden each strata lot capable of providing support or shelter to another strata lot or to the common property,
 - (e) include all of the rights and obligations needed to give effect to and enforce them, including a right of entry to inspect, maintain, repair and replace the shelter, support, services and facilities described in subsections (1) and (2).
 - (4) The easements referred to in subsections (1) and (2) may be enforced by the strata corporation on its own behalf or on behalf of one or more owners to the same extent as if the strata corporation were the owner of a strata lot or the common property that benefits from the easement.
- [35] Counsel submit that unfortunately Mr. Halbauer's opinion is not accurate. In my view, the letter by itself does not convey what might have been instructed or assumed. There is no evidence of the instructions given to Mr. Halbauer. If Mr. Halbauer was instructed or assumed that the Wall was located outside the western boundary of strata lots three to ten shown on the strata plan, the letter makes sense. When the letter refers to s. 69(2), it would then be referring to the implied easement the Wall enjoys from the adjoining strata lots. If such an instruction or assumption regarding the location of the Wall was made, it was in error. The Wall is situated within those strata lots.

2014 - the depreciation report

- [36] Pursuant to s. 94 of the SPA, the Strata Corp. is required to obtain a depreciation report unless the requirement for the report is waived. A depreciation report estimates the repair and replacement cost for major items of a strata corporation and the expected life of those items.

[37] The Strata Corp.'s only depreciation report was completed in November 2014. The report includes the Wall. I pause here to note that whether the author of the depreciation report considered the Wall to be CP in 2014 is not relevant to whether there was an error in the strata plan in 2005. There was no evidence of what the author of the depreciation report was instructed regarding the Wall.

2017 - further discussion regarding the Wall

[38] Minutes from strata council meetings indicate that the status of the Wall was discussed again in 2017. On May 3, 2017, the strata council was advised that a lawyer for a potential purchaser suggested the Wall may not be CP "as per the Strata Act". A council member had contacted the Condominium Home Owners Association ("CHOA") for advice as the Wall is listed as CP in the disclosure statement and in legal correspondence. The member reported that the CHOA employee advised that the legislation took precedence over these documents. The strata council decided it needed "to determine whose property the retaining wall was on to determine who was responsible for it". A member agreed to follow up.

[39] On May 25, 2017, that member advised the strata council that "based on historical information" the Wall is the responsibility of the Strata Corp. as stated in the disclosure statement and a lawyer's letter. From the description, this appears to be Mr. Halbauer's letter. The minutes also reflect a concern that any owner constructing on strata lots three to ten needs to ensure that the geogrid which supports the Wall is not disturbed. The minutes of the July 11, 2017 strata council meeting state that council will send a letter to applicable lot owners which have yet to build, reminding them of the geogrid that supports the Wall and potential liability should it be disturbed.

[40] Again, I pause here to note that whether an employee of the CHOA concluded in 2017 that the Wall is CP is not relevant to whether there was an error in the strata plan in 2005.

2018 - the current issue begins

[41] On May 30, 2018, the strata council received a letter from the District building inspector that advised that a stop work order had been issued for strata lots nine and ten because the Wall was failing. The owners of those two lots had at that time begun construction of their homes. The letter asked the Strata Corp. to hire a geotechnical engineer to report on the condition of the Wall and a methodology for repair. The District stated that the stop work orders would remain in place until the District received assurance that the Wall was structurally adequate.

[42] At an annual general meeting of the Strata Corp. on June 13, 2018, a motion was passed to approve the hiring of a geotechnical engineer to assess and report back to strata council regarding the Wall. The strata council subsequently retained Ecora Engineering & Resource Group ("Ecora") to assess the Wall.

[43] Ecora produced a written report in August 2018. As to the probable cause of the Wall distress, the engineers concluded that:

- High groundwater and the relatively high permeability of the backfill material as compared to the native glacial till soils as well as the location of the wall being at the bottom of the terrace subdivision, has likely led to preferential flow of groundwater and surface runoff through the reinforced zone;
- Inadequate drainage behind the wall resulting in the build up of hydrostatic pressures and erosion of backfill materials behind the wall, and;
- Global stability and/or saturated ground conditions were not considered by the wall designers(s).

One or more of the design flaws discussed above may not have led to visible degradation and distress of the wall. However, it is likely that the combination of design flaws has led to underperformance and the noted signs of wall distress.

[44] Ecora recommended that to ensure the safety of the public, the stop work order on lot ten should remain in place until remediation of the Wall is completed, and that efforts should be made to reduce the flow of overland waters from the subdivision to strata lots two to ten, especially ten. Ecora referred to possible long-term solutions.

[45] I note that Ecora's report was not admitted on this petition as expert evidence, but only as expert advice that the Strata Corp. had received, and which formed part of the information it had at the time.

[46] On October 17, 2018, at a special general meeting of the Strata Corp., Ecora presented their findings. A total of 23 lot owners were represented at the meeting. The minutes indicate that the issue of whether the Wall is CP and hence who was responsible for the remediation was raised again. There were conflicting opinions on whether the Wall is CP. The minutes conclude:

6. Path Forward

- Due to the uncertainty related to the wall as common property a vote for a special levy is not necessary at this time. No vote was taken.
- In order to determine whether or not the retaining wall is common property the strata council will begin to seek legal opinion and solicit advice from legal counsel that deal specifically with strata issues.

2019/2020 - the proposed bylaw

[47] In 2019, the strata council decided that the most cost-efficient strategy to address the Wall issues was to propose a bylaw pursuant to s. 72(3) of the SPA in which the Strata Corp. would assume responsibility for the repair and remediation of the Wall, and thereafter impose a special levy. The strata council instructed their counsel to draft a proposed bylaw ("Proposed Bylaw").

[48] Section 72 of the SPA states:

72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

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

[49] The Proposed Bylaw contained conditions required prior to registration of the Proposed Bylaw in the LTO, as follows:

The Strata Council shall be directed to take such steps as are necessary to promptly register the approved bylaw in the Land Title Office only after all necessary plans have been completed for the remediation or replacement of the Engineered Retaining Wall, AND any approvals, permits, and encroachment agreements have been finalized, costing has been determined, and approval of the necessary special levy or alternative funding has been approved.

[50] Minutes of a May 29, 2019 special meeting of the Strata Corp. indicate 23 strata lots were represented. A motion to adopt the Proposed Bylaw was defeated with 16 in favour, 6 opposed, and one abstention.

[51] On September 4, 2019, the Strata Corp. received another letter from the District following a meeting earlier that day. The District confirmed its position that the District would not remove the stop work order until remediation is completed, and that "Remediation of the retaining wall is a legal matter between the Strata Corporation and the strata owners." The District gave the Strata Corp. until October 31, 2019 to provide a plan for remediation failing which the District would seek direction to pursue its own remedial action.

[52] On October 2, 2019, at a special general meeting of the Strata Corp., the strata council again presented the Proposed Bylaw for adoption. A total of 23 strata lots were represented. The vote to adopt the Proposed Bylaw was carried with 19 in favour and 4 opposed.

- [53] In March 2020, Ecora produced another report which further elaborated its opinion that the primary cause of the movement of the Wall is due to insufficient drainage and hydrostatic pressure behind the Wall within the backfill materials during rain and runoff events, in addition to other factors. Ecora provided remediation options and probable costs. In summary, these were drainage improvements within RG Estates uphill of the Wall, and/or structural reinforcement of the Wall, and/or a second wall in front of the Wall which would require the Strata Corp. to obtain property from the District along Cedar Avenue.
- [54] On July 30, 2020, at the annual and special general meeting of the Strata Corp., two resolutions were passed. The first was to approve one of the options for remediation proposed by Ecora, with 19 votes for and four against. The second was to approve a special levy of \$401,000 (\$16,714 per lot), with 20 votes for and two against. One strata lot owner, Mr. Yaseniuk, had left the meeting prior to the last vote.
- [55] I will return below to the circumstances surrounding the meetings from 2018 to 2020 as Mr. Yaseniuk and the Uphill Owners have arguments regarding these.

2020/2021 - the Civil Resolution Tribunal claim

- [56] On August 7, 2020, the Strata Corp. was served with a notice of dispute at the Civil Resolution Tribunal ("CRT"), filed by Mr. Yaseniuk. Mr. Yaseniuk claimed that: (a) the Wall is not CP, and not the responsibility of the Strata Corp.; and (b) the Strata Corp. had to refund the special levy collected for the remediation of the Wall.
- [57] The Strata Corp. filed a response and argued that deference should be given to the expressed will of the ownership by a 75% vote to remediate the Wall as a common expense and thereby address the common interests related to drainage, soil retention, insurability, potential liability to the municipality and affected owners, and safety and property risks. The Strata Corp. further submitted that there was no appetite for discovering that the Strata Corp. is responsible for the Wall only after catastrophic failure occurs and litigation follows and that there was a common interest of the ownership to avoid those risks and have the Wall properly remediated in a proper, holistic and comprehensive way.
- [58] On March 26, 2021, the CRT released its decision, indexed at 2021 BCCRT 335 ("CRT Decision"). The Tribunal Member ("TM") found that the Wall is not CP.
- [59] The TM referred to s. 69 of the SPA and noted that the parties did not assert or provide evidence that there are any relevant easements that require the Strata Corp. to take responsibility for the Wall, and that the implied easements in favour of each strata lot for support did not make the Wall CP: at paras. 21-22.
- [60] The TM held that the Wall is not CP because it does not fall within the definition of CP in the SPA. The definition of CP in s. 1 is:

"common property" means

- (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
- (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
 - (i) within a floor, wall or ceiling that forms a boundary
- (A) between a strata lot and another strata lot,
- (B) between a strata lot and the common property, or
- (C) between a strata lot or common property and another parcel of land, or
- (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;

- [61] The TM found that the Wall did not come within either subparagraphs (a) or (b) of the definition: at paras. 24-25. The TM noted that "if something does not fit within the definition, it is not CP": at para. 26. No party at this hearing took issue with the finding that the Wall does not come within the definition of CP.
- [62] The TM reviewed the Strata Corp.'s arguments as to why the Strata Corp. should take responsibility for the Wall. The TM noted that these are arguments about why the Strata Corp. may want to take responsibility, however, they did not make the Wall CP: at para. 32.
- [63] The TM then discussed the disclosure statement and Mr. Antrobus' evidence that the Wall was a major part of the development and the developer's lawyer had been directed to register it as CP: at paras. 33-34. At para. 35, the TM concluded:
- [35] I accept CA's evidence, as it is uncontradicted. I also agree that it, along with the disclosure statement, confirms that the owner developer intended the wall to be CP. However, I find that intention is not sufficient to make it CP, without any corresponding designation on the strata plan. In *Newman v. The Owners, Strata Plan EPS 680*, 2017 BCCRT 122, a CRT member found in paragraph 31 that the information disclosed in a disclosure statement cannot dictate what is or is not within the boundaries of a strata lot or what is or is not CP. Rather, that determination must be based on the filed strata plan, and the applicable provisions of the SPA. Although not binding, I find that reasoning persuasive, and rely on it here.
- [36] CA's statement confirms the wall existed at the time the strata plan was created. Even though the owner developer intended the wall to be CP, and even if that designation was omitted from the strata plan due to a lawyer's error, the fact that the strata plan was never subsequently amended means the wall is not CP. I make no comment about potential liability for that mistake, if proven, as that issue is not before me in this dispute.
- [64] The TM then turned to the Proposed Bylaw. The TM noted that pursuant to s. 72(3) of the SPA, a strata corporation does not have discretion to decide to take responsibility for repairs to a strata lot unless authorized to do so by a valid and enforceable bylaw: at para. 44.

Section 128(2) of the SPA states that until a bylaw amendment is filed in the LTO, "it has no effect": at para. 45. The Proposed Bylaw was subject to a number of conditions and it had not yet been filed in the LTO. Hence, there was no bylaw in effect making the Strata Corp. responsible to repair or maintain any part of a strata lot (which includes the Wall), or permitting the Strata Corp. to require owners to pay to repair or maintain any part of a strata lot they do not own. The TM concluded that the owners are "not currently responsible to repair and maintain the wall": at para. 53.

[65] At paras. 62-67, the TM addressed that the levy based on the invalid Proposed Bylaw is without authority. The TM noted at para. 67:

[67] Nothing in this decision prevents the strata from collecting special levy funds for wall repairs or replacement in the future, if there is a valid bylaw permitting it and a subsequent $\frac{3}{4}$ vote resolution approving the special levy.

[66] The TM granted the Strata Corp. some time to perfect the Proposed Bylaw and ordered that if the Strata Corp. had not filed the Proposed Bylaw in the LTO by May 26, 2021, any funds collected must be refunded.

[67] Neither s. 14.12 of the Regulation, nor this Court's equitable jurisdiction to rectify the strata plan, were issues before the TM. In my view, the CRT Decision left open two possible avenues where the Strata Corp. might become responsible for remediation of the Wall. One was rectification of the strata plan to show the Wall as CP. The other was to file the Proposed Bylaw in the LTO: at para. 60.

[68] The Strata Corp. was unable to satisfy the conditions to enable it to file the Proposed Bylaw in the LTO by May 26, 2021. As a result, the Strata Corp. was required to refund the money collected pursuant to the special levy, and has been unable to proceed with the remediation. Counsel at this hearing advised that another attempt at passing a similar bylaw would likely not be successful.

2021 - further bylaw

[69] In July 2021, at an annual general meeting of the Strata Corp., the owners passed a bylaw requiring strata lots 11 to 24 to install rain barrels on their down spouts. The reason for this was that Ecora had identified a lack of proper drainage from upslope strata lots and resulting hydrostatic pressure as a possible contributing cause to the failure of the Wall.

Analysis

Was there an error in the strata plan?

[70] In my view, the evidence establishes that there was an error in the strata plan within the meaning of s. 14.12 of the Regulation. In particular, strata lots three to 10 are shown to encompass the area where the Wall is situated, when it was intended by the developer that the Wall be CP. In Chow#2 at para. 38, Justice Tammen referred to the definition of error in

s. 14.12 and noted that one of the definitions of error in the Shorter Oxford English Dictionary is "something done incorrectly because (of) ignorance or inadvertence; a mistake." Mr. Halbauer's 2010 letter supports that there was some misunderstanding of the location of the Wall.

- [71] As for the intention of the developer, I rely upon: Mr. Antrobus' uncontradicted evidence which I accept, regarding the developer's intention and instructions to Mr. Halbauer to make the Wall CP; and the contemporaneous disclosure statement, which consistent with that intention, represents that the Wall is CP. The disclosure statement is a document intended to be relied upon by purchasers, and it was signed by Mr. and Ms. Antrobus as directors of the developer. As Mr. and Ms. Antrobus would face potential liability if there was a misrepresentation in the disclosure statement, I find they would not have made that representation if the developer did not intend for the Wall to be CP, and if the developer had not instructed Mr. Halbauer to make the Wall CP. I find that there was a definite and ascertainable intention that the Wall be CP. There is no direct evidence of an intention to the contrary. I draw further support for this conclusion from Mr. Halbauer's letter in 2010, which states that the Wall is CP. When Mr. Halbauer responded to the inquiry from the strata council, he did not indicate any surprise or that this was not his original instruction.
- [72] The petitioners argue that the Strata Corp. has historically treated the Wall as CP, and they rely upon the statements of Mr. Mantha and Ms. McCallister to this effect. The petitioners argue that this is consistent with and supports the original intention of the developer as stated by Mr. Antrobus. The Uphill Owners challenge these statements. The evidence shows that there had been two occasions (2010 and 2017) where the issue of whether the Wall is CP was raised. When the strata council investigated this, the concerns were laid to rest by Mr. Halbauer's letter. Other than those two queries, it appears the Strata Corp. did treat the Wall as CP as it insured it and planned for it in the depreciation report. While these are consistent with the intention of the developer, they are not determinative of whether there was an error in 2005. Rather, I find they are more relevant to the equities of the situation and whether rectification should be granted.
- [73] Related to this, Mr. Yaseniuk argues that when the Wall at strata lot seven was damaged by the strata lot's owner in 2010, that owner had to repair the Wall. Mr. Yaseniuk argues that this is an indication that the Wall is not CP, otherwise the owner would not have had to pay for the repairs. I do not agree. The minutes are more consistent with the Strata Corp. treating the Wall as CP and ensuring that the person who damaged the Wall repaired it in accordance with engineering standards. Further, the fact that there was a discussion regarding this issue at the annual general meeting indicates that the Strata Corp. had an interest in the Wall, and this was not something entirely private to strata lot seven.
- [74] The Uphill Owners make four other arguments that although not framed this explicitly, are arguments as to why Mr. Antrobus' evidence of the developer's intention should not be accepted.

- [75] First, the Uphill Owners challenge Mr. Antrobus' evidence that the Wall was integral to the development of RG Estates and thus providing a reason supporting why the Wall was intended to be CP. The Uphill Owners argue that the Wall is along the front few lots of RG Estates, the natural slope of the land can be seen in pictures, and the Wall "is clearly designed exclusively to alter the slopes of lots 3-10, and is not beneficial to the development as a whole." The implication is that the Wall therefore could not have been intended to be CP.
- [76] I do not accede to this argument. Regardless of how much support, if any, the Wall provides to the remaining lots in RG Estates, I find that Mr. Antrobus' view, as a director of the developer, that the Wall was integral to the entire subdivision is consistent with the intention that the Wall is CP.
- [77] Second, the Uphill Owners argue that the Wall should be the responsibility of strata lots three to ten because the Wall: is not shown as CP on the registered strata plan; is not specifically mentioned in the Strata Corp.'s bylaws; and photographs of the property pins show that the Wall is situated entirely within strata lots three to ten. The implication is that because this is what was filed, this must have been what was intended, and there cannot have been an error.
- [78] There is no other independent evidence of intention to support this argument. Mr. Antrobus' evidence is uncontradicted and to the contrary. It is supported by Mr. Halbauer's opinion. The strata plan does not refer to the Wall as CP because of the error. The bylaws do not specifically mention the Wall, but they do state that the Strata Corp. is responsible for CP. If the Wall is CP, there is no need to refer to the Wall specifically in the bylaws.
- [79] Third, the Uphill Owners refer to a disclosure statement signed by Mr. and Ms. Antrobus when they sold strata lot 24 in 2014. They argue that the Antrobuses make no mention of the Wall being CP in that 2014 statement, and that this more recent disclosure statement is more reliable. The implication is that Mr. Antrobus should be disbelieved that it was the developer's intention in 2005 that the Wall is CP.
- [80] I do not accede to this argument. The two disclosure documents are entirely different documents. The first is the disclosure statement required by REDMA. The second is a vendors' disclosure statement provided on the sale of strata lot 24, and does not ask that the vendors make any representation about what is or is not CP for the development.
- [81] Finally, Mr. Yaseiniuk argues that there is no documentary proof of the developer's instructions to Mr. Halbauer in 2005. While this is true, as the instructions for the strata plan were given 17 years ago, and Mr. Halbauer is deceased, it is not surprising that the file was not produced on this petition.
- [82] In summary, I find that there was an error made within the meaning of error in s. 14.12 of the Regulation, as the registered strata plan did not accord with the intention of the developer in 2005.

Should the Court order rectification of the strata plan?

- [83] The Uphill Owners and Mr. Yaseniuk individually or collectively make a number of arguments as to why this Court should not order rectification if there was an error.
- [84] Mr. Yaseniuk argues that it would be unfair for the Wall to be CP because then the Strata Corp. and ultimately all strata lot owners, will bear the cost of remediation. Mr. Yaseniuk argues that not all present strata lot owners are original owners who received the developer's disclosure statement stating that the Wall is CP. However, at another point in his affidavit Mr. Yaseniuk states that the minutes of the Strata Corp. meetings are available to all purchasers so they could have discovered that there was an issue regarding whether the Wall is CP.
- [85] I do not accede to this argument because none of the Uphill Owners have filed an affidavit supporting any detrimental reliance either on the strata plan in deciding to purchase their property. However, in the submissions from the Uphill Owners, there is one sentence that states, "The current owners purchased Lot 24 under the understanding that the retaining wall was not common property according to this disclosure statement as well as what was filed as the Strata Plan", but there was no sworn statement to this effect by the Lot 24 owners. Lot 24 is the lot which was previously owned by the Antrobuses, who appear to have consistently represented over the years that the Wall is CP (in the REDMA disclosure statement, at the 2010 annual general meeting, in marketing materials for RG Estates as late as 2019, in Mr. Antrobus' letter to the CRT, and in his affidavit in these proceedings). The "this disclosure statement" in the sentence quoted above, refers to the Antrobuses' vendors' disclosure statement for Lot 24. As discussed above, this vendor's disclosure statement which was signed by Mr. Antrobus does not make any representation that could reasonably be construed as the Wall being or not being CP. None of the Uphill Owners except Mr. Yaseniuk filed an affidavit or attended the hearing even though they were advised by counsel for the Strata Corp. that if they opposed, they should seek legal advice and file a response and seek standing to make arguments. In the absence of an affidavit, there is no sworn evidence that the Uphill Owners, will be in a different situation if the strata plan is rectified than they would have been in if there had never been an error in the strata plan. As noted previously, I did not receive any submissions that the indefeasibility provisions of the LTA should apply to prevent rectification.
- [86] All of the other arguments of the Uphill Owners focused on different considerations. First, related to the above, Mr. Yaseniuk argues that despite the issue of whether the Wall is CP being raised in 2010 and 2017, the developer and strata councils at the time did nothing about it. The implication is that the Strata Corp. should have been estopped in the past and now from advocating that the Wall is CP. I do not agree that the Strata Corp. did nothing. In 2010, the strata council sought legal advice. Unfortunately, that advice did not convey what might have been instructed or assumed, resulting in an incorrect conclusion. In 2017, the strata council again investigated this issue. Although the evidence does not establish exactly what steps the strata council member took in 2017, the member reported back that based on

the investigations, which included the lawyer's letter, the Wall is CP. It appears that the strata council did favour taking responsibility for the Wall in the recent past. This is consistent with how it had generally treated the Wall in the more distant past. However, on this application, the Strata Corp. is not the petitioner, and it took no position. Its counsel set out the arguments advanced by both groups and did not advocate for one or the other position.

- [87] Second, the Uphill Owners challenge Ecora's conclusions regarding the cause of the failure of the Wall. Mr. Yaseniuk takes issue with the conclusions that drainage from the subdivision is contributing to the failure of the Wall. He states that RG Estates is built on a hill with the highest points being in the north, and that in a recent rain storm, all of the water from lots 11 to 24 ran downhill on the roads towards the south exit of the development, and the Wall is located on the west of the development. Mr. Yaseniuk states that "[drainage] from my property and, to the best of my knowledge, no other up-slope properties were ever formally evaluated so this claim is entirely unsubstantiated."
- [88] The Uphill Owners similarly deny that drainage from uphill properties contributed to the failure, and argue that it is "quite likely" that it was the excavation activity on strata lots nine and/or ten which caused the failure of the Wall in those segments of the Wall. The Uphill Owners point to the 2017 strata council minutes, where owners were reminded to be cautious of not disturbing the geogrid behind the Wall. They argue that "it appears that this directive was not followed". They submit "there has not been any confirmation that excavations on lots nine and/or ten did not contribute to the failure" and suggest that Ecora was not asked to investigate this or to consider a segmental repair. They point to a one-page letter from an engineer who first alerted the District to the failure of the Wall. That letter, from a Mr. Ravi Singh, refers to a bulge in the Wall at the same level of the bottom of the footing of the house under construction on lot nine, and states "Given the house's proximity to the wall, it is likely that the geogrid was encountered during excavation and the geogrid was torn or damaged; this should be confirmed visually."
- [89] In my view, this argument is misplaced as it does not address whether there should be rectification of the strata plan, but rather, addresses whether someone is at fault for the failure of the Wall and should be pursued, and whether the Strata Corp. fully investigated this. While the Strata Corp. received expert advice on the failure of the Wall, the adequacy of the investigation and the cause of the failure of the Wall are not in issue on this petition, and these reasons do not determine those issues. They are separate issues. They are not reasons to not order rectification of an error made in 2005.
- [90] Third, the Uphill Owners and Mr. Yaseniuk argue that there were misrepresentations on the part of the strata council in connection with the annual and special general meetings from 2018 to 2020 regarding the Wall issue. The Uphill Owners argue that the strata council knew that the issue of whether the Wall is CP was raised in 2017 and that someone from the CHOA had opined that the Wall is not CP. They state that "this demonstrates that council knew of the ownership issue, yet they emailed a document on September 24, 2018 regarding a special general meeting, stating "repairs are necessary, we have no choice in this matter", instead of

requiring the owners of strata lots nine and ten to pay for the repairs.

- [91] Mr. Yaseniuk states that on September 4, 2019, after the first motion to pass the Proposed Bylaw was defeated at the May, 2019 meeting, strata council members met with a representative of the District. He states that members of the strata council were overheard asking the District to write a letter to the Strata Corp. "demanding" that the Wall be fixed by all of the owners. That day the District sent a letter and this formed part of a package to all owners stating that if the Strata Corp. did not come up with a plan to fix the Wall then the repair would be out of the owners' control and the District would fix it and bill the owners. After this, the strata council called for another vote and the Proposed Bylaw was passed. The Uphill Owners argue that the District's "threat" to repair the Wall was "based on the mistaken assumption that the Wall is located on CP or was a common asset", neither of which were the situation at the time.
- [92] The Uphill Owners further argue that after the Proposed Bylaw vote was defeated in May 2019, there was no reason for a re-vote, yet council did so after urging owners to vote yes. At that time, the strata council led owners to believe the total cost to repair the Wall would be \$150,000 to \$200,000. The total cost was not revealed until June 2020 to be \$401,000. The Uphill Owners argue that the "vote was therefore based on false information and should be considered invalid."
- [93] I do not accede to these arguments. If the Uphill Owners feel that the strata council was not properly representing the circumstances, then they had avenues available to them. The minutes show that there was nearly 100% representation personally or through proxies of all strata lot owners at the annual and special general meetings. The Uphill Owners had an opportunity to express their views. They lost the votes. This argument is a complaint that the Uphill Owners do not like the result of the resolutions that were passed. They are not reasons to not order rectification of an error made in 2005 in a registered strata plan. Further, the Proposed Bylaw never came into effect, so arguments about its validity are misplaced on this hearing about rectification.
- [94] Fourth, the Uphill Owners argue that it would be unfair for the Strata Corp. to pay for the remediation of the Wall because other retaining walls within RG Estates have been the responsibility of individual strata lot owners. They take issue with Ms. McCallister's characterization that these other walls are "smaller, largely decorative retaining walls", and attach photographs of those walls. Mr. Yaseniuk states that these walls also serve the purpose of retaining dirt and rocks and that some are over four feet, suggesting that they needed to be engineered.
- [95] I do not accede to this argument as it conflates two different fact situations. The Wall was not intended to be the petitioner's Wall or the personal Wall of any of the other owners of strata lots three to nine. The Wall was built by the developer and it was intended to be CP and the responsibility of the Strata Corp. This is distinct from walls which were placed on individual properties by home owners. There is no evidence that any of these other walls

were present at the time the strata plan was filed, or if they were present, the developer intended them to be CP.

- [96] Fifth, Mr. Yaseniuk refers to the CRT Decision. The Uphill Owners refer to Erdmann v. The Owners, Strata Plan KAS 2452, 2018 BCCRT 398, which they describe as a similar case. In that case, the CRT found that because the wall in question (which was damaged by groundwater), was located on the individual strata lots and was not listed as CP under the strata plan, the individual lot owners were responsible for repairing the wall.
- [97] No one challenges the CRT Decision on this hearing. The CRT Decision in this case is consistent with Erdmann, but the issue in the CRT Decision and in Erdmann, and the issue that this Court has been asked to determine, are different. In both the CRT Decision and in Erdmann, the CRT was asked to determine whether the wall in each case is CP. This was based on the definition of CP in the SPA. This Court has been asked to determine whether the strata plan's failure to have the Wall be CP was an error, and if so whether to rectify it.
- [98] Sixth, Mr. Yaseniuk refers to the petitioner Mr. Baker's evidence that he understood prior to purchasing strata lot ten that the Wall is CP. Mr. Yaseniuk argues that the petitioners are not the original purchasers of strata lot ten and that they had a responsibility to review the strata plan, which shows that the Wall is not CP. In other words, Mr. Yaseniuk argues that the Bakers should have relied upon the strata plan. Mr. Baker's understanding of whether the Wall is CP is not relevant to the first issue of whether there was an error in 2005, and is not determinative of whether there should be rectification in 2022 since the strata plan shows that it is not CP. Mr. Baker is not attempting to enforce a mistake and receive a windfall. He is attempting to correct an error so that the Strata Corp. does not receive a benefit (the avoidance of a cost) at the Bakers' expense.
- [99] In summary, I am not persuaded that any of the arguments advanced by the Uphill Owners and Mr. Yaseniuk are sufficient reason to not order rectification. I find it is equitable that rectification take place. The developer intended the Wall to be CP and instructed its lawyer to make it CP. Generally, the Strata Corp. through its strata council has for the past 17 years treated the Wall as CP. When the issue of whether it was CP was raised in 2010 and 2017, the Strata Corp. was assured that the Wall is CP, and it has insured it, and has planned for it in the depreciation report. There is no evidence that any strata lot owner at those times insisted that it is not CP and that the Strata Corp. should not continue to insure it or not provide for it in the depreciation report. It was only when the Wall failed at a large cost that the issue was revisited. In my view, in all the circumstances it would be inequitable to not order rectification with the result that a large cost would be visited upon the Bakers or some or all of the other owners of strata lots three through nine alone, and with a resulting benefit to the Strata Corp. and by implication all owners who would not have to share in that cost. In making that determination, I am referring solely to the effect of not ordering rectification, and not deciding the cause of the failure, and if there is any fault, who is ultimately responsible. I therefore find it just and equitable to order rectification of the strata plan to reflect that the Wall is CP.

[100] The extent of the Wall is an issue, and in particular whether it includes the geogrid that extends back approximately three metres into strata lots three to ten. Counsel at this hearing submitted that the CP was the land occupied by the Wall blocks only, and not the geogrid. Although there was no evidence from Mr. Antrobus on this, in my view, that had to be the intention of the developer as those strata lots would have been represented as considerably smaller if three metres were taken from the western property line, rather than what is likely about 12 to 18 inches. Further, the geogrid is identified as part of the "backfill reinforcement" in the Ecora report and is underground. Counsel argued that if the Wall is CP, then s. 69(2) of the SPA provides the Strata Corp. with a statutory easement for the Wall's vertical and sideways support, which would include features such as the geogrid. I agree.

[101] Finally, as discussed in Entwistle at paras. to 60-62 and 66-70, it is the registrar who ought to give effect to the court's decision that there was an error unless the effect of rectification somehow makes the document unregistrable. This court should not make an order that inhibits the ability of the Registrar to ensure that the strata plan as rectified is registrable, and all other requirements are met.

Orders

[102] I make the following declaration, directions and orders:

- a) a declaration that the strata plan for the Strata Corp., deposited in the Land Title Office ("LTO") on January 27, 2005, contains an error, being that strata lots three to 10 are shown as encompassing the Wall, when it was intended that the Wall be CP;
- b) a direction that the Strata Corp. have an explanatory plan prepared which will correct the above error;
- c) an order that the registrar of land titles be directed, pursuant to s. 14.12 of the Strata Property Regulation, B.C. Reg. 43/2000, to correct the error in the strata plan if the registrar is satisfied that the explanatory plan is in registrable form and all other requirements have been met; and
- d) any party has leave to seek further direction if necessary with respect to correction of the error in the strata plan.

[103] Although the parties did not address this, there may be registered charges on strata lots three to ten that may be affected by rectification and which may require that charge holder's consent before rectification can take place.

[104] As this is an unfortunate situation for all concerned, appropriately no party sought costs of this petition. Each party will bear their own costs.

"Norell J."

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