

CANADA / JUDGMENT

Davis v. The Owners, Strata Plan NW 3411

2020 BCSC 1434

COURT

Supreme Court of British Columbia

DECIDED

20 August 2020

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2020 BCSC 1434 Davis v. The Owners, Strata Plan NW 3411

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Davis v. The Owners, Strata Plan NW 3411,

2020 BCSC 1434

Date: 20200820

Docket: S204997

Registry: New Westminster

Between:

Marsha Marie Davis

Petitioner

And

The Owners, Strata Plan NW 3411

Respondent

Before: The Honourable Mr. Justice Verhoeven

Oral Ruling Re Application for a Special Levy

In Chambers

Counsel for the Petitioner:

G.S. Hamilton

Counsel for the Court-Appointed Administrator, Garth Cambrey:

J.A. Bleay

Various owners

In person

Place and Date of Hearing:

New Westminster, B.C.

August 20, 2020

Place and Date of Ruling:

New Westminster, B.C.

August 20, 2020

- [1] THE COURT: I am going to give my decision now. It is going to be abbreviated because of the time of day, but I feel in the circumstances that it is necessary to give a decision without further undue delay.
- [2] The central issue is whether the administrator should be authorized to impose a special levy in the amount of \$5.3 million on behalf of the strata corporation for purposes of repair and remediation of the building's structure and the building envelope.

Background

- [3] The application materials are fairly voluminous, but they consist primarily of information about the fairly extensive background of this matter, as well as numerous application responses and affidavits from various owners. The notice of application filed by the petitioner is quite extensive.
- [4] The matter has a considerable history, and has been before the courts pursuant to this petition now on several occasions. The history of the matter is set out in detail in the petitioner's notice of application filed with the court July 24, 2020. No significant issue was taken with the recitation of the facts set out therein. In interests of saving time, I am not going to read all that out.
- [5] In general terms and summarizing, I can say this. The building is called Garden Terrace. It is a 40-unit multilevel residential complex. It is 28 years old. It is clear on the basis of all the evidence that it is suffering from serious deterioration that has accumulated over many years, and regrettably, the building has not been maintained sufficiently so as to defer or avoid the current state of disrepair. The situation has gotten so severe that the petitioner's unit is not habitable, and this has been so for a considerable period of time.

- [6] For some time the strata corporation entertained the possibility of simply selling the whole complex. That is, winding up the strata corporation and selling it. That option was examined during 2016 and 2017. For purposes of consideration of that issue, the proposed purchasers, a development company, Ledingham McAllister, commissioned an engineering report to identify the repairs that would be needed. That report was prepared by Spratt Emanuel Engineering Ltd. They gave an estimate of \$4.98 million for the repairs. The owners ultimately rejected a resolution to wind up the strata corporation and sell the property to the developer for \$26 million. That process ended up deferring the possibility of repairing the structure, to which the owners then turned.
- [7] The then strata council president signalled the large impending expenses to the owners in a message to them in December 2017, where he indicated that the building was getting older, and that the average lifespan of a wood frame building is approximately 30 to 35 years. He said:

Garden Terrace is quickly coming up to the time where major foundation repairs for existing water leaks, rain screen and stucco repairs that are now starting to cause water ingress into the building plus the flat roof will need replacement in the very near future.

- [8] That was emphasized again in another note, not dated but inferred on the basis of other information to have been sent in December 2017, indicating that the serious problems with the building would cost a significant amount of repair, and expense, and the levy costs would be in the realm of \$120,000 - to \$150,000 per owner. So the prospect of large expenses on the horizon are not new to the strata corporation and its owners.
- [9] The strata corporation failed to undertake the repairs, and this petition resulted. The petitioner sought both the appointment of an administrator and also an order requiring the strata corporation to make the repairs.
- [10] The matter has been in court a number of times now, and there are three court orders in which the courts have sought to advance the process of repairing and remediating this structure.
- [11] On January 9, 2019, Justice Macintosh ordered the strata corporation to hire a building envelope consultant to investigate the condition of the common property, and prepare a full building envelope condition assessment report, referred to in the outline as the "BECA." That was eventually done. Morrison Hershfield, an engineering firm, prepared that report. That report recommends that the strata corporation undertake an immediate comprehensive building envelope repair at a cost of \$4.4 to \$5.1 million.
- [12] The matter was not resolved, and it came back before the court on July 10, 2019. At that time Justice Norell ordered the strata corporation cause Morrison Hershfield to complete specifications and construction documents for tender as described in option A in the proposal provided by Morrison Hershfield dated May 6, 2019, by no later than November 1, 2019, and to hold a special general meeting by no later than December 1, 2019, to vote on a

three-quarter vote resolution to approve the work. The strata corporation did not hold that meeting by the date specified in the court order. The petitioner applied for an order of contempt. A consent order was entered into.

- [13] A special general meeting was held February 12, 2020. However, both resolutions presented to the owners for repair options were defeated. That was for a resolution for approximately \$5 million for repairs, or alternatively targeted repairs costing \$950,000. As I said, both went down to defeat.
- [14] The matter was brought back before the court. On March 11 of 2020, Justice Groves made a fairly comprehensive order appointing Garth Cambrey as administrator, and directing that Mr. Cambrey hire a consulting engineer, and in general terms, move the matter forward, including calling a meeting of the owners within 120 days to consider one or more resolutions pertaining to the administrator's proposed repair program.
- [15] The administrator has been acting pursuant to that court order. He has sought yet another engineering report. That was prepared by RDH Consulting Engineers. The upshot of the RDH report was similar to that of Morrison Hershfield. So there are now essentially three reports all indicating that the cost of the repairs would be in the range of \$5 million.
- [16] The administrator convened a special general meeting that took place June 17, 2020. There were two resolutions put forward to the owners. The first was to approve the special levy in the amount of \$5.3 million. 12 persons were in favour, 23 opposed. The second resolution was to finance the repairs over five years. That would be more expensive because it would involve interest costs. The total cost was about \$6 million. That also failed, with zero persons in favour and 35 opposed.
- [17] Now, there is no question that the underlying responsibility of the strata corporation is to repair and maintain the common property. This is fundamental to the concept of joint ownership, and it is set out in s. 72 of the Strata Property Act. The obligation of the strata corporation is well-recognized in the case law. I refer, for example, to the decision of Justice Ralph in *Browne v. The Owners, Strata Plan 582*, 2007 BCSC 206, at para. 26, referring to that same section. In para. 28 the court states:

Irrespective of whether there has been dissension among owners with respect to proceeding with the repair, the strata corporation's obligation to maintain the common property continues. As Macdonald J. observed in *Tadeson v. Strata Plan NW 2644* (1999), 1999 CanLII 6999 (BC SC), 30 R.P.R. (3d) 253, 94 A.C.W.S. (3d) 1017 (B.C.S.C.) at para.15:

The failure of the respondent strata corporation here is not due to any neglect on its part. That failure results from the refusal of the respondent owners to authorize the work, and the special assessment necessary to carry it out. But it remains, so far as the petitioners are concerned, a failure to fulfill a clear statutory obligation.

- [18] The court cites other well-known authorities for that proposition.

- [19] The relief sought by the petitioner in this case essentially mirrors that which was set out by the court in the Browne decision at para. 37.
- [20] A number of owners have appeared on this telephone hearing before me today. I have heard from the current president of the strata corporation, who speaks on his own behalf, and I have heard from another person who represents a number of other owners. The essential points being made in opposition to the petition are that the owners are financially strapped, that the repair costs are very expensive, and that they are simply not in a position to pay for these repairs. It is suggested that there are other options, chiefly that of phasing the repairs, which would involve stretching out the repairs to 2025, that is five years hence, with only a small amount of the repairs being done now, and approximately \$4 million being deferred for some considerable length of time. In my view, that option does not meet the obligations of the strata corporation, and despite what an engineer mentions in an email, does not comply with the obligations of the strata corporation to maintain the building. It is simply not an option.
- [21] Furthermore, the time for considering more stretched out or deferred proposals has passed, given what has occurred to date in this matter.
- [22] At this point the administrator, who is well known, competent and respected in this field, is recommending that the repairs proceed pursuant to both the Morrison Hershfield and RDH reports.
- [23] I have a great deal of sympathy for the owners who say that times are tough. We have the COVID-19 pandemic currently. Some people are having problems finding work. People are having problems with financing, and so on. There is no detailed financial affidavit evidence before me about that, but I can certainly appreciate that people will have problems paying or financing repairs, which on average would be over \$100,000 per unit. Naturally the actual cost will depend on unit entitlements.
- [24] However, the fundamental obligation of the strata corporation to maintain the building remains, and must be addressed. I associate myself with the legal principles set out in the decision of Justice Morellato in *Santos v. The Owners, Strata Plan LMS 1509*, 2016 BCSC 1775. I will refer and adopt paras. 33 to 39 of that decision. Also, and in particular, with the findings and comments she makes at para. 48, which are as follows:

The evidence establishes that the strata corporation's failure to repair the building envelope has spanned the course of many years. Further delay and further votes will not remedy the deadlock and may serve to exacerbate an already untenable situation. In the context of this case, without the issuance of a special levy order, even the appointment of a very able administrator is, in my view, unlikely to remedy the deadlock. The administrator will most probably be dealing with the same owners, the same factions and the same dynamic of conflict among them.

- [25] Now, in this case, matters have advanced further. An administrator has been appointed who is making recommendations for the repairs that are required. However, the administrator has no power to override the provisions of the Act, and therefore this matter has come back to court for a decision.
- [26] I also bear in mind the pertinent comments of Justice Fitzpatrick in *The Owners, Strata Plan VIS114 v. John Doe*, 2015 BCSC 13, having to do with the financial strain and difficulties that special levies can cause, and whether those should or can stand in the way of necessary repairs. I refer specifically to paras. 110 through 116 of that decision, which were referred to in argument, and are as follows:
- [110] Even if the statutory test (necessary repairs to ensure safety or prevent significant loss or damage) is met, the court may consider other factors in deciding whether it will exercise its discretion in granting relief under s. 173(2).
- [111] One of those considerations may be the financial ability of the owners to pay any special levy: *Oldaker* at para. 72. In *Weir*, the court in para. 28 referred to a strata corporation considering the "impact on the owners". Further, in *Weir*, the court stated:
- [29] In carrying out its duty, the respondent must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: *Sterloff v. Strata Corp. Of Strata Plan No. VR 2613* [(1994), 38 R.P.R. (2d) 102], [1994] B.C.J. No. 445 and *Browne*.
- [112] Many of the respondent owners state in their evidence that, having paid substantial special levies in the past, they have been financially drained. Some say that they would find it difficult, if not impossible, to pay a further \$36,578 in 2015.
- [113] They say that the remediation would be expensive in comparison to the other "good" option available which is far less costly. They point to the Depreciation Report which estimates the cost of sealing the north and west walls at approximately \$110,000 over three years, at a cost per owner of less than \$840 per annum.
- [114] Finally, the respondent owners say that the Depreciation Report identifies that other expensive repairs, such as the roof membrane, elevator, heating and fire suppression systems, may become necessary in the next few years. If those repairs are also necessary, it would add to their financial burden.
- [115] It is a truism to say that any homeowner would care to avoid expensive repairs to the structure of his or her house, townhome or condominium. But the sad fact of life is that home ownership comes with a price, if that homeowner wishes the home to stay in the same relative state as when they purchased it. A homeowner who ignores necessary repairs usually does so at her peril and she will usually suffer the consequences at a later time. *Clarence House* is no exception, as its history makes clear.

- [116] I acknowledge that the further special levy will be significant and difficult for some owners, including some of the respondent owners. However, this is but one factor in the overall consideration. Clearly there are owners here of differing financial means. Some may have the cash, some may have to borrow, some may have to liquidate capital assets or some may have to do a combination of these. If none of these are available, then the unit may have to be sold. It remains the case, however, that the matter must be looked at globally and no one owner's personal situation should dictate the result here.
- [27] In general, the option of deferring the repairs or having them staged is simply not practical. The building has reached such a state that the repairs are necessary and are required to comply with the strata corporation's obligations. As much as I might wish them away, and wish that there was some means to both respond to the statutory requirement to repair the building and at the same time address the financial problems that many owners are saying that they have, there is no way to address both of those things in the way that some of the owners are suggesting should be done.
- [28] I agree with the submissions made by the petitioner that authorizing very, very limited repairs at this time with deferral of the vast bulk of the repairs to some further date is simply, in the colloquial, kicking the can down the road, and will result in further litigation, dysfunction and cost, and will countenance a continuing breach of the strata corporation's obligations.
- [29] So for those reasons I am going to make the orders sought in the notice of application. I know that this decision will be disappointing to some who would like to see a more limited order made at this time, but for the reasons I have indicated, that is not an option.
- [30] The only question that remains, Mr. Hamilton, is in para. 3 of the orders sought, the notice of application suggests the words "to be paid immediately or some other time," I suggest that the court should make a decision about that.
- [31] MR. HAMILTON: Yeah, in my submission I suggested that the payment should go pursuant to this order now and leave it to Mr. Cambrey if he wants to accommodate the owners in a different way. Because he will be managing the construction schedule and he will know what money he needs and when.
- [32] THE COURT: Yes. But the order will be that he be authorized to issue a special levy; he on behalf of the strata corporation, of course, is authorized to issue a special levy. The word "immediately" is vague. It says "or at some other time as the court may order." So ...
- [33] MR. HAMILTON: Well, I mean, I would leave it to maybe Mr. Bleay would have a suggestion that I propose that it be due and payable as of September, whatever the next September 1, 2020. For precision.
- [34] THE COURT: Well, it would be following the issuance of the special levy; right? The issuance of some kind of direction from him?

- [35] MR. HAMILTON: Correct. He would issue another letter, My Lord, just saying I hereby issue a special levy as \$5.3 million due and payable --
- [36] THE COURT: Yeah.
- [37] MR. HAMILTON: -- on September 1st.
- [38] THE COURT: Well, I appreciate that time is of the essence, but some people are going to have to obtain personal financing for this.
- [39] MR. HAMILTON: Yes.
- [40] THE COURT: They might have to obtain mortgages. Some may decide that despite the current market conditions, that some of the owners have said are negative. Although I am not sure about that, but anyway, they may decide to sell. So in my view, it should be 60 days.
- [41] MR. HAMILTON: Thank you, My Lord.
- [42] THE COURT: So the orders will go as set out in the notice of application, and paragraph 3 is amended so that the special levy in the sum of \$5.3 million is to be paid within 60 days of the issuance of the levy.
- [43] The petitioner seeks costs.
- [44] MR. HAMILTON: Against the strata corporation, My Lord.
- [45] THE COURT: Yes. The petitioner has been successful and will be granted costs.
- [46] MR. HAMILTON: And finally, My Lord, if I could talk. Although the owners that spoke today are not formally respondents, I would ask that their signatures be dispensed with on the form of the order and that Mr. Bleay and I can finalize the order and send it for entry.
- [47] THE COURT: Yes. All right. I will make the order the signatures required will be those of counsel for the petitioner and counsel for the administrator. The other signatures are not required. Thank you.

"Verhoeven J."

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