

CANADA / JUDGMENT

Rochette v. Bradburn

2021 BCSC 1752

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1752 Rochette v. Bradburn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rochette v. Bradburn,

2021 BCSC 1752

Date: 20210902

Docket: S194145

Registry: Victoria

Between:

Sylvie Rochette, Jim Tennant, and Laura Podgorenko

Petitioners

And

Bruce Bradburn, Arthur Roberts, Mary Matchett, and

The Owners, Strata Plan 962

Respondents

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Petitioners:

T. Morley

Counsel for the Respondents Bruce Bradburn, Arthur Roberts, and Marty Matchett:

M. Wehrung

Counsel for the Proposed Respondents Roger McGuire, James Allard, Mark Stevens, and Gerald Hauck:

A. Bookman

No other appearances

Place and Dates of Hearing:

Victoria, B.C.

June 21-24, 2021

Place and Date of Judgment:

Victoria, B.C.

September 2, 2021

Table of Contents

Introduction.. 3

Background.. 4

Should the Petition be Dismissed?. 8

Parties' Positions. 8

Legal Principles. 11

Analysis. 14

Application to Add the Proposed Respondents to the Petition.. 19

Parties' Positions. 19

Legal Principles. 21

Analysis. 21

Application to Convert to Trial List and Amend Pleadings. 27

Parties' Positions. 27

Legal Principles. 27

Analysis. 29

Disposition.. 32

Introduction

- [1] The application before me concerns a strata property dispute between owners in Strata Plan 962 in Victoria, BC (the "Strata Corporation"). The dispute is between strata plan owners who live full-time in their strata suites and strata plan owners who rent out their suites. There have been ongoing tensions between the two types of owners.
- [2] A petition was filed on September 20, 2019 by the petitioners, Sylvia Rochette, Jim Tennant, and Laura Podgorenko, seeking a number of orders against the then-members of the strata council (the "personal respondents"), who subsequently resigned. The personal respondents are Bruce Bradburn, Arthur Roberts, and Mary Matchett. The amended petition, filed on September 25, 2020, alleges breaches of the personal respondents' fiduciary duties owed as members of the strata council and breaches of the Strata Property Act, S.B.C. 1998, c. 43.
- [3] The personal respondents pleaded the terms of a document they refer to as the "Release" in their February 3, 2021 amended response to the amended petition. They argue the Release, signed on January 29, 2021 between the Strata Corporation and the personal respondents, is a complete answer to the amended petition. The Strata Corporation also pleads the terms of the Release in its March 18, 2021 amended response to the amended petition. The petitioners do not acknowledge the document the personal respondents rely upon is a legally effective "release", but for ease of reference I refer to it as "the Release" in this judgment.
- [4] The petitioners filed a March 26, 2021 application seeking to add a number of individuals as respondents to the petition (the "proposed respondents"). The proposed respondents are Roger McGuire, Jim Allard, Mark Stevens, and Gerald Hauck. The petitioners also seek to transfer the petition to the trial list and replace the amended petition with a proposed notice of civil claim.
- [5] The personal respondents oppose both orders. The proposed respondents oppose being added as respondents to the petition and say, if they are added, it is premature to transfer the petition to the trial list.
- [6] There is a May 7, 2021 cross-application filed by the personal respondents seeking dismissal of the entire petition as it relates to the personal respondents or, alternatively, seeking to strike portions of the petition. The personal respondents specifically seek the following, again relying on the Release:

The amended petition filed September 25, 2020 be dismissed as against the Personal Respondents and/or the amended petition be further amended to strike out all paragraphs in which damages and/or declaratory relief are sought from the Personal Respondents.

- [7] The petitioners strongly disagree that the petition ought to be dismissed, struck, or amended to strike out various paragraphs relating to the personal respondents.

- [8] An issue of solicitor client privilege was adjourned generally. The other respondent named in the underlying petition, the Strata Corporation, did not appear before me as it is only responding to the issue of solicitor client privilege.
- [9] If I find the petition should be dismissed, there will be no petition to transfer to the trial list. As a result, I address the personal respondents' application first. For the reasons that follow, I dismiss the personal respondents' application and grant the petitioners' application to transfer the petition to the trial list. I dismiss the petitioners' application as it relates to adding the proposed respondents.

Background

- [10] The Strata Corporation is located at 1234 Wharf Street in Victoria, BC. It is comprised of common property and 57 strata lots. Of the 57 strata lots, the owners of approximately 31 strata lots participate in a profit-seeking rental pool. The owners of those strata lots are not ordinarily resident in the building. The other strata lots are generally occupied by owners who are ordinarily resident in the building. The owners of strata lots in the rental pool rent their lots through an agreement with the Victoria Regent Waterfront Hotel & Suites (sometimes referred to as "VRH Ltd."). It leases common property for its operations from the Strata Corporation. The common property includes two levels of parking, a "lobby" located on the third (main) floor, an elevator area, hallways on the third through tenth floors, and a structure located on the eleventh floor.
- [11] The petitioners, owners who live in their strata suites, commenced the underlying petition on September 20, 2019. They seek a number of orders, mostly in the nature of declaratory relief. However, they also seek damages against the personal respondents to be paid to the respondent Strata Corporation. The damages sought are to benefit the Strata Corporation, not the petitioners. The personal respondents are owners of strata lots in the Strata Corporation and are members of the rental pool.
- [12] Two of the proposed respondents, Jim Allard and Gerald Hauck, each own a strata lot in the Strata Corporation and are members of the rental pool. The other two proposed respondents, Roger McGuire and Mark Stevens, each own a strata lot in the Strata Corporation, but they are not members of the rental pool. All four of the proposed respondents were appointed and served as members of the strata council after the resignation of the personal respondents. The proposed respondents were members of the strata council at the time the Release was signed.
- [13] In their application, the petitioners set out the key events that are relevant to both applications. The personal respondents and proposed respondents take issue with a number of these facts. I set them out because they give an indication of the ongoing disputes between the parties, but I do not make any findings of fact:

Date

Event

Feb 23, 2019

The Strata Corporation elects a seven member strata council that includes the petitioners Rochette and Tennant and the respondents Bradburn, Roberts and Matchett.

May 31 - Jun 1, 2019

The Strata Council initiates discussions with VRH Ltd, about expanding the scope of the maintenance services provided by VRH Ltd. The issue that members of council that have a pecuniary interest in VRH Ltd. participating in any negotiations is a conflict of interest is raised.

Jun 1, 2019

The respondents Bradburn and Roberts exchange emails (including Matchett as an addressee) stating "our overriding priority is to obtain control of our Strata Council. All other objectives and 'battles' right now are secondary" because the Petitioners are out to "destroy the Rental Pool".

Jun 17, 2019

The Strata Corporation has a Special General Meeting (the "June SGM") in which a resolution was passed removing four members of the strata council: Sylvie Rochette, Jim Tennant, Jeremey Janzen and Leslie Welsh.

Jun 18, 2019

The Strata Council resolves to spend money to receive a legal opinion on the validity of the June SGM (despite no challenge to its validity) and whether the Strata Council can authorize payments to Wilson McCormack for legal services as an emergency expenditure.

Jun 21, 2019

Wilson McCormack provides a legal opinion that the June SGM was valid (at a cost of \$4,223.44).

Jun 25, 2019

Wilson McCormack provides a legal opinion that the Strata Council can authorize payments to Wilson McCormack as an emergency expenditure (at a cost of \$3,873.52).

Jun 25, 2019

The Civil Resolution Tribunal makes an order declaring portions of the existing rental restriction bylaw (Bylaw 39(1)) unenforceable. It is now clear that owners could rent their strata lots without having to participate in the Rental Pool.

Jun - Sep 2019

The Strata Council retains Wilson McCormack, and expends funds of The Owners Strata Plan 962, to draft a bylaw that would prevent owners from renting their strata lots unless the owner participated in the Rental Pool.

Aug 13, 2019

A demand for a special general meeting, pursuant to section 43 of the Strata Property Act, is delivered to Strata Council. The Strata Council retains Wilson McCormack and expends funds of The Owners Strata Plan 962 to provide an opinion on whether the demand is proper. The opinion is that there is a technical deficiency in the demand and the Strata Council declines to exercise its discretion to call a special general meeting.

Sep 22, 2019

The respondents Bradburn and Roberts [are] informed by Wilson McCormack that because of their interest in the VRH Ltd, they cannot have a role in renewing the Lease agreement between VRH Ltd. and The Owners Strata Plan 962. The Strata Council instructs Wilson McCormack to draft a resolution regarding that lease agreement. The extent and content of those instructions are unknown.

Oct 3, 2019

The Strata Council instructs the property management company to distribute an Amended Notice of Special General Meeting that includes Resolution #1 stating: "The owners by 3/4 vote approve the lease between The Owners, Strata Plan 962 and the Victoria Regent Hotel Ltd. pursuant to ss. 71 and 80(2) of the Strata Property Act on the same terms and conditions upon its expiry for an additional 3-year term commencing February 1, 2020."

Oct 26, 2019

A special general meeting is chaired by Tony Gioventu, the executive director of the Condominium Home Owner's Association. The owners, by unanimous resolution, provide direction to council that it cannot enter into an agreement with the VRH Ltd. prior to a committee bringing back a negotiated consensus agreement to be voted on by the owners at a subsequent general meeting. There is no vote on Resolution #1.

Nov 1, 2019

The respondent Bradburn, as a member of Strata Council, contracts with a commercial real estate appraiser to prepare a report regarding an appropriate rental rate for the lease of common property of The Owners Strata Plan 962 to VRH Ltd.

Nov 15, 2019

The respondents Bradburn, Roberts, Matchett file a Response to Petition alleging that the "current lease agreement between VRH Ltd. and the Strata Corporation...was renewed for another three-year term by way of a 3/4 vote at a special general meeting of the Strata Corporation on October 26, 2019".

Nov 28, 2019

The Strata Council calls an "emergency Council meeting to approve obtaining a legal opinion from Strata council in regard to resolution 1 of the Oct. 26 SGM." The resolution is approved, and the firm Wilson McCormack is retained to provide a legal opinion.

Nov 28, 2019

The firm Wilson McCormack provides a legal opinion incorrectly stating that the Chair determined that Resolution #1 was voted on and approved and that prior to the October SGM "The Strata Corporation and the Rental Pool agreed to extend the term on the same terms and conditions for a further three year term subject only to approval by 3/4 vote of owners", it concluded that "the Lease has been renewed for a further 3 year term."

Nov 28, 2019

The respondents Bradburn, Roberts, Matchett provide written notice of resignation effective December 4, 2020 and note that the Strata Corporation will have no council.

Dec 5, 2019

Bruce Bradburn and Arthur Roberts, as representatives of the Victoria Regent Hotel Ltd., decide to sign the "new lease right away" and consider that "when the appraisal comes in, we can offer a good faith proposal to adjust the rental rate and put it up for a majority vote at the AGM, assuming Cora goes along with it".

Jan 25, 2020

The Strata Corporation has an Annual General Meeting and elects a five-person council of Jim Allard, Roger McGuire, Martin Osberg, Gerald Hauck and Mark Stevens.

Feb 1, 2020

The Owners Strata Plan 962 and VRH Ltd, enter into an agreement permitting VRH Ltd. to rent certain common property areas for \$10,788.00 per year commencing February 1, 2020 and ending January 31, 2023 (the "Original Rental Agreement"). Bruce Bradburn and Arthur Roberts sign as authorized signatories of VRH Ltd. and Mark Stevens and Roger McGuire sign as authorized signatories on behalf of The Owners Strata Plan 962.

Unknown Date

The Owners Strata Plan 962 and VRH Ltd. rescind the Original Rental Agreement and enter into a different agreement permitting VRH Ltd. to rent certain common property areas for \$27,000.00 per year commencing February 1, 2020 and ending January 31, 2023 (the "Revised Rental Agreement"). Earl Wilde and Mark Horne sign as authorized signatories of VRH Ltd. and Mark Stevens and Roger McGuire sign as authorized signatories on behalf [of] The Owners Strata Plan 962.

The difference between the rent payable over the term of the Original Rental Agreement and the rent payable over the term of the Revised Rental Agreement is \$48,636.00 not including taxes.

Jan 16, 2021

Jim Allard, Mark Stevens, Roger McGuire and Gerald Hauck, acting as Strata Council, pass a resolution to agree to release the respondents Bradburn, Roberts, Matchett for any damages, loss, expense or costs awarded to The Owners Strata Plan 962.

Jan 29, 2021

Roger McGuire signs the Release.

Jan 29, 2021

Roger McGuire and Gerry Hauck resign from Strata Council.

Should the Petition be Dismissed?

Parties' Positions

- [14] The personal respondents argue that pursuant to Rule 16-1(18) of the Supreme Court Civil Rules [Rules], it is not necessary to first convert a petition into an action in order to apply a Rule to a proceeding: *Bacon v. British Columbia (Minister of Finance)*, 2020 BCCA 218 at para. 26, citing *Fern Castle Holdings Corp. v. Stonebridge Village Residence Ltd.*, 2011 BCSC 163 at paras. 7-12. The personal respondents rely on Rule 9-5(1)(b) and (c), Rule 9-6, and Rule 9-7 in their application to have the petition dismissed or, alternatively, to strike some of the claims against them.
- [15] The personal respondents argue that the petitioners, both in their amended petition and in their proposed notice of civil claim, did not seek to have the Release declared invalid. The personal respondents therefore assumed the petitioners accept the Release as valid and made arguments based on this assumption.

- [16] The personal respondents argue that the Release answers everything in the petition. The Strata Corporation has unequivocally released the personal respondents from any and all claims the Strata Corporation may have had against them. The Release answers the petitioners' claims and the petition should not continue against the personal respondents. There are no triable issues remaining. To the extent that issues are remaining, they are moot or academic claims which this Court should not entertain.
- [17] The personal respondents argue the petitioners are ostensibly making claims on behalf of the Strata Corporation but the Strata Corporation opposes the petition. The Strata Corporation also relies on the Release and takes the position the claims are moot.
- [18] The personal respondents argue there was no wrongdoing raised in the pleadings with respect to the Release. The personal respondents were not on the Strata Council when the Release was signed. At the time the Release was executed, the personal respondents did not owe the petitioners, the Strata Corporation, or the proposed respondents a duty of care because they ceased to be members of the strata council on December 4, 2019. Hence, they could not have breached their fiduciary duties under ss. 31 or 32 of the Strata Property Act. There is also no evidence of any failure by the Strata Corporation to act in good faith with respect to the Release.
- [19] The personal respondents submit that a valid release can and should be enforced summarily. If not, the respondents are deprived of a significant part of the benefit for which they bargained. The personal respondents argue this Court should exercise its discretion and apply Rule 9-5 to strike the petition as it pertains to the personal respondents. Due to the Release, the petition is now unnecessary. All damages pleaded in the petition are for the benefit of the Strata Corporation, a signatory to the Release. Allowing a trial or hearing of the petition to proceed will require additional judicial time if the personal respondents are forced to participate despite the Release. If the Release bars the petitioners' claims against the personal respondents, it will end the claim against the personal respondents and will result in substantial savings of time and expense for all parties.
- [20] If I am of the view that the whole, or parts, of the petition should not be struck under Rule 9-5, the personal respondents seek a dismissal of the petitioners' claims against them pursuant to Rule 9-6 or Rule 9-7.
- [21] The petitioners argue that there is no evidence before me as to the authenticity of the Release. The petitioners have no ability to determine if the Release is valid.
- [22] The petitioners contend the petition cannot be dismissed under Rule 9-5, or decided under Rules 9-6 and 9-7, because no claims in the petition have been asserted by the Strata Corporation, so no claims can be settled by the Release. All the Release does is prevent the Strata Corporation from exercising a potential future legal right because the personal respondents, pursuant to the terms of the Release, have no liability to the Strata Corporation. Since the Strata Corporation has not made any claims, signing the Release is merely a covenant not to sue the personal respondents.

- [23] The petitioners argue the Release does not address the concerns raised in the petition. The Release is not signed by the petitioners and it excludes any claim for declaratory relief. The petitioners' claims have not been tried on their merits and the Release is inapplicable as it pertains to them. The quantum of damages and the apportionment of damages amongst the three personal respondents have not been addressed despite the need to do so under the Negligence Act, R.S.B.C. 1996, c. 333. The declaratory relief is not moot, especially since the Release did not contain an admission of liability on the part of the personal respondents.
- [24] The petitioners also argue the orders sought are too vague. The personal respondents do not attach what the pleadings would look like if this Court was to strike certain paragraphs of the petition.
- [25] The petitioners argue that at the time the Release was signed, the insurer under the policy of insurance for the Strata Corporation had a duty to defend any claims made against both the Strata Corporation and the personal respondents, as former members of the strata council. The petitioners argue that by having the Strata Corporation and the personal respondents sign the Release, the insurer improperly dealt with itself.
- [26] In terms of the application for summary judgment, the petitioners argue the cause of action is not bound to fail and the personal respondents have not provided a complete answer through the Release. There are genuine issues for trial.
- [27] The usual meaning of a Release is that the action, here the petition, is discontinued. No consent dismissal order has been entered, nor could it be, because consent orders cannot be signed as between two respondents.

Legal Principles

- [28] Rule 9-5(1) of the Rules provides that at any stage of a proceeding this Court may strike out or amend any part of a petition on a number of grounds. If the issues raised in the petition are academic in nature, the court should decline to determine them. Unnecessary pleadings should be struck: *Village Bay Preservation Society v. Mayne Airfield Inc.* (1982), 136 D.L.R. (3d) 729, [1982] B.C.J. No. 1652 (S.C.) at 732.
- [29] Pleadings will be struck if they do not establish a cause of action, do not advance a claim known to law, or are without substance because they are groundless and fanciful: *Dempsey et al. v. Envision Credit Union et al.*, 2006 BCSC 750 at para. 17.
- [30] The existence of a binding release is a threshold issue, the resolution of which may make the remaining issues moot: *Isaacs v. Nortel Networks Corp.* (2001), 15 C.C.E.L. (3d) 78 at para. 18, 16 C.P.C. (5th) 69 (Ont. S.C.J.). Difficult questions of law may be decided under this Rule if, on a proper analysis of the law, it is plain and obvious that the claim cannot succeed: *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2009 BCSC 577 at para. 31, *aff'd* 2011 BCCA 345.

- [31] An answering party who has filed a defence may apply under Rule 9-6(4) for judgment dismissing all or part of a claim in the originating pleading. If the court is satisfied the pleadings reveal no genuine issue for trial (with respect to either a defence or a claim), the court must pronounce judgment or dismiss the claim accordingly: *McGregor v. Holyrood Manor*, 2014 BCSC 679 at para. 12, citing *Serup v. Board of Trustees of School District #57* (1989), 54 B.C.L.R. (2d) 258, 57 D.L.R. (4th) 261 (C.A.). As stated in *McGregor*:
- [13] The purpose of an application under Rule 9-6 is to show the case already pleaded by the plaintiff is unsound or that the applicant has a complete answer to it. In such circumstances, there is reason to weigh the plaintiff's pleadings in the scales against the defendants' affidavit evidence of the defendant: *McDaniel [v. McDaniel]*, 2009 BCCA 53], para. 18.
- [32] The test under Rule 9-6 is whether it is manifestly clear on the relevant facts and law that there is no genuine matter to be tried. Rule 9-6(5)(a) is mandatory in that where there is no genuine issue to be tried, the court must dismiss the claim: *Canada (Attorney General) v. Lameman*, 2008 SCC 14.
- [33] An application under Rule 9-6 may involve the consideration of evidence. The judge should not weigh evidence, but "may draw inferences that are strongly supported by undisputed facts": *Kerfoot v. Richter*, 2018 BCCA 238 at para. 31. Where there are disputed facts, the applicant "bears the evidentiary burden of showing that there is no genuine issue to be tried": *Kerfoot* at para. 29.
- [34] Issues of mixed fact and law are most appropriately addressed under Rule 9-7: *Foot v. Canada (Attorney General)*, 2012 BCSC 177 at para. 25. A claim may be dismissed pursuant to Rule 9-7(15) which provides:

On a hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion it would be unjust to decide the issues on the application.

- [35] Rule 16-1(18) provides the court with authority to apply any of the Rules to a petition proceeding: *Edward Chapman, Limited v. FS Property Inc.*, 2021 BCSC 384 at para. 32.
- [36] In *Zary v. Canada Mortgage and Housing Corporation*, 2015 BCSC 1145, Justice Skolrood explained the proper approach to the question of suitability for summary trial:
- [31] The critical question facing the court when hearing a summary trial application is whether the court can find the facts necessary to decide the disputed issues. Even where the court can find the necessary facts, it must still consider whether it would be just to decide the matter summarily, by reference to factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of delay, and the cost of

taking the matter forward to a conventional trial: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) and *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31.

- [37] In *McGregor* a dismissal was sought pursuant to Rules 9-4, 9-5, and 9-7, on various grounds, including that the plaintiff had executed a binding release of all claims relating to her contract of employment. Given that all matters had been addressed by a previous Labour Relations Board proceeding and release, it was determined that there were no genuine claims to be tried and the matter was dismissed pursuant to Rule 9-7.

Analysis

- [38] The personal respondents contend the Release constitutes a full answer to the petitioners' claim. They argue "the essential facts for the purpose of this application (i.e., the existence and terms of the Release) are not in dispute." That was not evident on the evidence before me. For example, the petitioners argue there is no evidence the Release is authentic.

- [39] The terms of the Release provide in part:

FOR AND IN CONSIDERATION of the execution of this Release, the payment to the Respondent Strata of \$10,000 by or on behalf of the Personal Respondents and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the execution of this Release, the Respondent Strata agrees as follows:

Release

1. The Respondent Strata hereby releases, remises and forever discharges the Personal Respondents, and each of them, from any and all liability for damages, loss, expense or costs alleged in the Petition as owing by the Personal Respondents to the Respondent Strata, including any liability under section 33 of the Strata Property Act and those facts and matters that were pleaded or ought to have been pleaded by the Petitioners in the Petition.

...

Further Proceedings

4. If the Petitioners maintain or continue the Petition, any of the Personal Respondents and the Respondent Strata may produce this Release or a true copy of it in the Petition for any purpose the court may permit, including as a basis for the dismissal of the Petition.

Dismissal of the Petition

5. The Respondent Strata consents to a dismissal of the Petition without costs to the Personal Respondents, if, as or when so agreed by the Petitioners or sought by the Personal Respondents on application in the Petition...

No Admission of Liability

6. The Respondent Strata understands and agrees that the consideration expressed here in is for the compromise of a disputed claim and is not to be construed as an admission of liability by the Personal Respondents, by whom liability is expressly denied.

Difference in Facts

7. The Respondent Strata acknowledges that the facts in respect of which this Release is made may prove to be other than or different from the facts in that connection now known by the Respondent Strata or believed to be true.
 8. The Respondent Strata expressly accepts and assumes the risk of the facts being different and agrees that all of the terms of this Release shall be in all respects effective and not subject to termination or rescission by any discovery of any difference in the facts
- [40] The Release is signed by Roger McGuire, on behalf of the Strata Corporation. It is not signed by the personal respondents or the petitioners, but it recognizes the existence of the petition and identifies the petitioners and personal respondents within the preamble.
- [41] I agree with the personal respondents that Rule 16-1(18) authorizes this Court to exercise its discretion in a wide range of circumstances. I can apply various Rules to petition proceedings, including striking pleadings pursuant to Rule 9-5(1): McLean v. British Columbia (Attorney General), 2018 BCSC 2052 at paras. 48, 74. Nevertheless, I am not persuaded that the petition should be struck pursuant to Rule 9-5, or dismissed pursuant to Rules 9-6 or Rule 9-7 based on the Release.
- [42] The burden on the respondents in an application to strike pursuant to Rule 9-5 is high. It must be plain and obvious that the proceeding discloses no reasonable cause of action. I must dismiss the claim if the petition is unnecessary or will cause undue delay based on the signed Release. However, I should only dismiss it if it is plain and obvious the claims must fail.
- [43] The personal respondents argue that because the amended petition seeks damages be paid to the Strata Corporation, and the Strata Corporation has been compensated through the Release, the issues are moot. The personal respondents rely on the grounds that the petition is unnecessary as against them and it may add unnecessary time and cost to the hearing of the proceeding. The dismissal of the claims against the personal respondents would allow a trial with the Strata Corporation to be completed in a significantly shortened amount of time, increasing the prospects of a just, speedy, and inexpensive resolution of the petitioners' claims.
- [44] I agree the Release, on its face, releases the personal respondents from any damages owing to the Strata Corporation. But because the Strata Corporation made no claims against the personal respondents, there is an argument that the document is merely a covenant by the Strata Corporation not to seek damages from the personal respondents in the future.

Moreover, monetary compensation is not at the core of this dispute. The declaratory orders sought are important to the petitioners. The petitioners seek orders that the personal respondents acted as members of the strata council while in a conflict of interest and acted contrary to their fiduciary duties owed to the Strata Corporation. The petitioners argue the personal respondents placed their personal interests ahead of the interests of the Strata Corporation. The Release does not purport to address these issues.

- [45] The petitioners want to alert future owners who might consider voting for the personal respondents if they run for strata council again. The petitioners submit they are attempting to protect the interests of strata owners and it is therefore vital for the governance of the Strata Corporation that the court make the sought-after declarations.
- [46] Declaratory relief is only appropriate where the dispute is real and not theoretical: *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4. As set out in *Metro Vancouver Housing Corp.*:
- [60] Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought
- [47] With respect to Rule 9-5(1)(b) and (c), I do not find the Release establishes that the petition is unnecessary or that it will delay the proceedings. First, even if the petitioners should have denied the validity of the Release in their pleadings, as argued by the personal respondents, before this Court can strike a pleading it must consider not only the pleading as set out, but also as they may be amended: *Lam v. Ark Platforms Inc.*, 2021 BCSC 647 at para. 36.
- [48] Second, even if I were to accept the Release as valid and enforceable, it does not appear to be a full answer to the petition. The contractual agreement regarding damages does not dispose of the question of liability or the declarations sought by the petitioners. The Release only affects the personal respondents' liability to contribute to and indemnify the Strata Corporation. I cannot deny the petitioners legal recourse in this summary fashion based on an agreement between the two respondents. An agreement between two respondents regarding indemnification for damages as assessed between them does not defeat all the claims of the petitioners.
- [49] While damages are possibly moot, the declaratory relief is alive and the petitioners have a genuine interest in its resolution. I find the issues raised in the petition are not moot or academic in nature. The pleadings are not unnecessary. I decline to strike all or part of the petition pursuant to Rule 9-5.
- [50] Rule 9-6(4) permits a party who has filed a defence to apply for summary judgment dismissing all or part of a claim. The purpose of an application under Rule 9-6 is to show the case as pleaded by the plaintiff is unsound or the applicant has a complete answer to it: *McGregor* at paras. 13-15.

- [51] Rule 9-6 does not allow for a summary trial. Applications for summary judgment pursuant to Rule 9-6 are based upon the pleadings and affidavit evidence. The case can be dismissed if the respondent adduces evidence that completely answers the petitioners' case. While the Rule allows a limited review of the evidence, the court does not weigh the evidence "beyond determining whether it is incontrovertible": *Beach Estate v. Beach*, 2019 BCCA 277 at para. 49.
- [52] The onus is on the personal respondents to establish there is no genuine issue requiring a hearing. The personal respondents must satisfy this Court that there are no triable issues of fact or credibility. If there are issues of fact or credibility, the application must be dismissed because the petition should be heard on its merits. If I have any doubt, the case should be allowed to proceed.
- [53] I have determined that it is unlikely the Release disposes of all issues in the petition. The respondents have not met their burden to establish that it is plain and obvious the petition will fail, particularly as it relates to the declaratory relief. The petition should not be struck or disposed of in this summary manner.
- [54] Rule 9-7 does not refer to petitions. However, Rule 16-1(18) permits this Court to apply the summary trial rule to petitions: *J & A Properties Ltd. v. De Angelis*, 2019 BCSC 750 at para. 32. As a result, the summary trial procedures are available in petition proceedings.
- [55] The personal respondents argue the issue of proportionality supports the proceeding being determined by summary trial and I agree this is a significant consideration: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 23-28; *Jones v. Alberni-Clayoquot (Regional District)*, 2018 BCSC 216 at para. 28. Rule 9-7, in proper circumstances, facilitates the objective of proportionality. The need for a just, speedy, and inexpensive resolution of proceedings often persuades the court of the suitability of disposition by way of summary trial.
- [56] Here, however, there are a number of factual disputes. For example, there are disputes regarding the expenditure of legal fees to draft a new bylaw after part of Bylaw 39(1) (relating to rentals made outside the rental pool) was struck down by the Civil Resolution Tribunal. There is a dispute regarding what happened at the November 2019 Special General Meeting, namely whether Resolution One was voted on and, if so, whether it carried. There is a dispute over the validity of a legal opinion regarding Resolution One and a committee to determine the square footage rental rate for the common property. Another major dispute is the validity of the Release.
- [57] Based on the problems with the Release and the other issues articulated above, I am unable to decide the issues on the affidavit evidence before me, ensuring a fair and just determination on the merits. There are genuine issues of fact and credibility which relate to the underlying issues. I decline to dismiss the petition pursuant to Rule 9-7.

[58] To be clear, I am not making any findings regarding the validity of the Release. I have at this preliminary stage taken the petitioners' concerns seriously and believe the factual findings are best left for a full evidentiary hearing. The trial judge can determine if the substance of the Release can or cannot defeat some or all of the claims of the petitioners.

[59] Given my decision, I need not address the involvement of the insurer, whether the Release is unenforceable as a matter of public policy, or the other issues raised by the petitioners.

Application to Add the Proposed Respondents to the Petition

Parties' Positions

[60] Relying on Rule 6-2(7)(b) and (c), the petitioners seek to add the proposed respondents as parties to the petition on the ground that as members of the new strata council, elected January 25, 2020, they breached their fiduciary duties to the Strata Corporation. They argue the proposed respondents did so in two ways:

i) by renewing the initial common property lease agreement with the hotel, when they knew there was no unanimous resolution carried at the November 2019 Special General Meeting to extend the lease for another three years; and

ii) by signing the Release because, as members of the strata council, they had a duty to protect the Strata Corporation.

[61] The petitioners argue three out of the five members of the new strata council were identified by Mr. Roberts or Mr. Bradburn, both personal respondents, as people willing to work with them and support the rental pool.

[62] The petitioners contend that the proposed respondents were well aware of the pleadings and the ongoing litigation and they breached their duty of good faith to the Strata Corporation when they signed the Release in these circumstances.

[63] The petitioners lastly argue there is a strong and clear connection between the proposed respondents and the remedy sought in the petition. The personal respondents established this connection when they relied upon the Release in answer to the allegations against them. The Release has connected the proposed respondents to the relief sought.

[64] The proposed respondents strongly oppose being added as parties to this matter. They argue the proposed pleadings do not disclose a clear cause of action against them. They argue the amended pleadings rely on s. 31 of the Strata Property Act which cannot ground a claim by the petitioners. Strata council members can only be found liable under s. 32 and there is no allegation of a conflict of interest against the proposed respondents. If I find there is a cause of action against the proposed respondents, they argue the claim should be pursued in a separate petition.

- [65] The personal respondents also oppose having the proposed respondents added as parties to the petition or the proposed notice of civil claim if I allow the other part of the petitioners' application. The personal respondents argue the conduct of the proposed respondents, while serving on the strata council from January 2020 to January 2021, is not relevant to the current allegations against the personal respondents and the Strata Corporation. Further, adding the proposed respondents to this petition constitutes a significant and unnecessary expansion of this proceeding. Any claim against the proposed respondents must be brought by way of a separate proceeding.
- [66] The personal respondents agree with the proposed respondents' submissions that a cause of action as against the proposed respondents is lacking.

Legal Principles

- [67] *Letvad v. Fenwick*, 2000 BCCA 630 at para. 21, provides that a person may be added as a party pursuant to Rule 6-2(7) if the applicant satisfies the court that:
- there exists a question or issue between a person and the existing party in relation to the subject matter or the relief claimed in the proceeding; and
 - it is just and convenient to do so.
- [68] The threshold with respect to the first branch of the test is low: *Wells v. San Industries Ltd.*, 2019 BCSC 1141 at para. 16. In terms of the second branch of the test, the court will consider any delay in seeking to add the individual(s), the reasons for the delay, any prejudice caused by the delay, and the "extent of the connection, if any, between the existing claims and the proposed new cause of action": *Wells* at para. 17.
- [69] The court should consider the proposed amendments and any affidavit evidence. However, the court should not weigh the evidence to determine if there is a chance of success. Rather, the court should examine the evidence only to determine if an issue between the parties exists: *Wells* at para. 16.

Analysis

- [70] For the following reasons, I find the proposed pleadings do not disclose a cause of action against the proposed respondents. I therefore decline to add them as parties to the proceeding.
- [71] The existing allegations in the amended petition focus on the period of February 23, 2019 to January 25, 2020, during which time the personal respondents were members of the strata council. They resigned on December 4, 2019. The proposed respondents did not become members of the strata council until after this period, on January 25, 2020. The timing makes it difficult to say the claim against the proposed respondents is connected with or related to the relief claimed in the amended petition. I appreciate the personal respondents have raised the Release as a defence. However, this does not connect the proposed respondents to

the relief sought in the petition. The Release was not signed until January 16, 2021. This supports the suggestion that if there is a cause of action against the proposed respondents, it should be pleaded in a separate petition or action.

- [72] In terms of whether there is a cause of action against them, the proposed respondents rely on *Sahyoun v. Ho*, 2013 BCSC 1143. In *Sahyoun* Justice Voith, as he then was, held a claimant must commit to a cause of action in their pleadings. They must also adequately inform the opposing party of the legal foundation of their claim:
- [18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.
- [19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.
- [53] At bottom, in a case that involves multiple plaintiffs, multiple defendants and multiple causes of action, it remains necessary for each plaintiff to identify with precision what material facts (not evidence), what causes of action and what relief he or she is advancing against which defendant(s).
- [73] Rule 3-7(9) states: "Conclusions of law must not be pleaded unless the material facts supporting them are pleaded." In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, Chief Justice McLachlin emphasized that a claimant must clearly plead the facts relied upon:
- [22] ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.
- [74] The proposed notice of civil claim and alternative proposed further amended petition name the proposed respondents as parties. The legal basis for the claims against them appears to be ss. 31, 32, and 33 of the *Strata Property Act* (though I note the proposed notice of civil claim does not expressly plead the *Strata Property Act* within the "Legal Basis"). Section 31 sets out the standard of conduct for strata council members:

Council member's standard of care

31 In exercising the powers and performing the duties of the strata corporation, each council member must

- (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
- (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[75] Section 32 addresses the process for identifying and disclosing conflicts of interest as well as recusal requirements. It provides:

Disclosure of conflict of interest

32 A council member who has a direct or indirect interest in

- (a) a contract or transaction with the strata corporation, or
- (b) a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member,

must

- (c) disclose fully and promptly to the council the nature and extent of the interest,
- (d) abstain from voting on the contract, transaction or matter, and
- (e) leave the council meeting
- (i) while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and
- (ii) while the council votes on the contract, transaction or matter.

[76] Section 32 provides that a strata council member must promptly and fully disclose any direct or indirect interest in any contract or transaction with the Strata Corporation if the interest could result in a material conflict of interest. This includes any matter that is or will be the subject of consideration by the strata council. Section 32 requires that any strata council member who is in a conflict of interest recuse themselves from the portion of a strata council meeting, discussion, or decision that relates to the matter in dispute. The strata council member must abstain from voting on any issue where a conflict of interest is present.

[77] Section 33 addresses the consequences when a council member does not comply with the statutory requirements. It provides:

Accountability

33 (1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 vote at an annual or special general meeting.

- (2) For the purposes of the 3/4 vote referred to in subsection (1), a person who has an interest in the contract or transaction is not an eligible voter.
- (3) If, on application under subsection (1), the court finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into, the court may do one or more of the following:
 - (a) set aside the contract or transaction if no significant injustice will be caused to third parties;
 - (b) if the council member has not acted honestly and in good faith, require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;
 - (c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

[78] Section 33 sets out the specific and limited circumstances where one owner can sue a member of the strata council. It does not contain language permitting owners to sue other owners who are not on strata council.

[79] The statutory right of the petitioners to bring their claim against the proposed respondents under s. 33 is triggered where there is a basis to allege that a council member failed to declare a conflict of interest or otherwise acted contrary to s. 32: *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183, leave to appeal ref'd [2007] S.C.C.A. No. 262. The majority in *Dockside* set this out as follows:

Remedy for Breaches of ss. 31 and 32 - s. 33

[59] Section 33 provides remedies for breaches of ss. 31 and 32. A strata corporation or an owner may apply for an order under s. 33(3) "[i]f a council member who has an interest in a contract or transaction fails to comply with section 32. " Under s. 33(3), the court may make an order, if it "finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into ." Under s. 33(3)(b), "if the council member has not acted honestly and in good faith, [the court may] require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction ."

- [80] Paragraph 59 of *Dockside Brewing Co. Ltd.* is somewhat confusing when it refers to s. 33 providing remedies for s. 31. The same confusion arises in para. 51 which states: "I agree with the chambers judge that in acting as they did, the appellants failed to comply with s. 32, and failed to carry out both their statutory fiduciary duty, under s. 31(a), and their statutory duty of care, under s. 31(b)". Despite these references to s. 31, the statutory language of s. 33 refers only to s. 32. It does not link back to s. 31.
- [81] How ss. 31 and 32 interact with s. 33 was explained in *Wong v. AA Property Management Ltd.*, 2013 BCSC 1551. After referring to the discussion of s. 33 of the *Strata Property Act* in *Dockside Brewing Co. Ltd.*, Justice Jenkins explained:
- [33] The Court of Appeal did not provide any additional rights upon owners to commence and maintain an action in this court against current or former council members other than set out in the above paragraph [para. 59 in *Dockside Brewing*].
- [36] Finally in summation, an owner can sue a council member only in instances where the council member is in breach of the "conflict of interest" sections of section 32 of the Act.
- [Emphasis added.]
- [82] Justice Jenkins held the right of owners to commence actions against strata council members is limited to what is set out in s. 33 of the *Strata Property Act*. It is limited to relief flowing from breaches of s. 32. This accords with the plain wording of the *Strata Property Act*. The legislation does not allow another strata owner to sue for violations of s. 31.
- [83] The petitioners dispute this interpretation. They argue there is a freestanding right in s. 31 which the proposed respondents have breached. The petitioners rely on the "inherent jurisdiction of this court." I was not taken to any authority suggesting that the inherent jurisdiction of this Court expands upon a right to bring an action based on the *Strata Property Act*. Individual strata owners are not entitled to sue the strata council whenever they disagree with a decision. This Court can only grant remedies for breaches of s. 32: *Wong*. Section 31 simply informs the remedies in s. 33, and articulates the standard of conduct that applies to conflicts of interest under s. 32.
- [84] The petitioners do not allege the proposed respondents were acting in a conflict of interest when they were involved in renewing the initial common property lease agreement. Instead, they allege the proposed respondents breached their fiduciary duties to the *Strata Corporation*. Although not pleaded, the petitioners also argue the proposed respondents had a duty to protect the *Strata Corporation* which they violated when they signed the Release. They did not explain what direct or indirect interest the proposed respondents had in signing the Release.

- [85] Pursuant to the Strata Property Act, the only cause of action which can be brought in this Court against a strata council member is for acting in a conflict of interest. An owner can sue a council member for breach of their standard of conduct in the context of a conflict of interest: s. 33. Despite these limitations, the petitioners have not alleged a conflict of interest against the proposed respondents, and there are no facts before me to support a conflict of interest.
- [86] I am not prepared to add the proposed respondents as parties to the amended petition because the petitioners have not pointed to a cause of action against them. I am not satisfied it is just and convenient to add the proposed respondents as parties.
- [87] That said, the proposed respondents will likely be witnesses at the hearing on the merits regarding the strata council decisions to sign the initial common property lease agreement and to sign the Release. The validity of the Release will likely be a threshold issue at trial: Isaacs at para. 18.

Application to Convert to Trial List and Amend Pleadings

Parties' Positions

- [88] The petitioners argue that the petition should be converted to a notice of civil claim and transferred to the trial list. The petitioners rely on *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at paras. 42-43 [Saputo], for the principle that a petition should be converted if there are bona fide triable issues unless the party requesting that the matter be put on the trial list is bound to lose.
- [89] The personal respondents argue there are no triable issues remaining due to the Release. Further, they say it is premature because the parties have not exhausted the procedural tools available to them. The matter should not be converted to a trial. The pleadings should not be amended to expand the claims and there is no cause of action against the personal respondents with respect to the execution of the Release. They argue there is no connection between the existing claims and the proposed claims.
- [90] The proposed respondents similarly take the position that it is premature to transfer this matter to the trial list.

Legal Principles

- [91] Petition proceedings are intended to be an efficient way of determining issues that can be decided on the basis of affidavit evidence. At times, however, the parties will need the full benefit of trial procedures, including discoveries. In such cases, a party may apply to convert the matter to an action and put it on the trial list. That a petition addressing Strata Property Act provisions can be converted into an action to obtain these very tools was endorsed in *Southern Interior Construction Association v. Strata Plan KAS 2048*, 2007 BCSC

792.

- [92] The burden on the petitioner with respect to the conversion application is low. This burden was articulated in Saputo at paras. 44-48. The threshold for transferring the petition to the trial list is whether there is a genuine triable issue. It has been described as similar to the test for summary judgment, and less stringent than the test for summary trial: Saputo at paras. 44, 46. Proceedings brought by petition should be referred to the trial list "when there are disputes of fact or law, unless the party requesting the trial is bound to lose": *Levere v. Moore*, 2020 BCSC 1656 at para. 15, citing Saputo at para. 43; *Thom v. Revery Architecture Inc.*, 2019 BCSC 2013 at para. 22. A petition should be converted to a trial unless there is no triable issue or the petitioner is "bound to lose": Saputo at para. 43.
- [93] A triable issue exists if "there is a dispute as to facts or law which raises a reasonable doubt, or which suggests there is a defence that deserves to be tried": *Douglas Lake Cattle Company v. Smith* (1991), 54 B.C.L.R. (2d) 52 at para. 36, 78 D.L.R. (4th) 319 (C.A.). This includes where the resolution of the dispute as to the facts or law requires an assessment of the credibility of witnesses: *2158872 Ontario Ltd. v. The Owners, Strata Plan BCS2647*, 2016 BCSC 946.
- [94] In *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160, the petitioner, relying upon Saputo, sought an order to refer a petition for judicial review of a development permit denial to the trial list. A unanimous Court of Appeal declined to order a trial. Speaking for the court, Justice Newbury noted that Saputo did not involve an application for judicial review. She further noted that in judicial reviews the courts play a supervisory role, rather than an adjudicative role, based on the record. She concluded courts will only look beyond the record in rare circumstances. The court should exercise considerable restraint before converting a petition for judicial review into a trial proceeding.
- [95] Here, the matter was started by petition because strata property disputes are governed by the Strata Property Act, an enactment. It is not a judicial review and the concerns about the court having a supervisory role, rather than an adjudicative one, do not apply. I therefore distinguish Beedie and find the Saputo approach applies.
- [96] In *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, Justice Dardi surveyed the leading authorities regarding converting a petition to an action. She subsequently summarized the factors the court is to consider at para. 39:
- (a) the undesirability of multiple proceedings;
 - (b) the desirability of avoiding unnecessary costs and delay;
 - (c) whether the particular issues involved require an assessment of the credibility of witnesses;
 - (d) the need for the court to have a full grasp of all the evidence; and
 - (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[97] The Court of Appeal in Kerfoot at paras. 27--31 recently summarized how evidence may be used under the Saputo test:

- a) a judge must not weigh evidence;
- b) a judge may only consider the evidence to assess whether it establishes a triable issue; and
- c) in assessing whether the evidence establishes a triable issue, a judge may draw inferences that are strongly supported by undisputed facts.

Analysis

[98] The allegations before me relate to a number of factual and legal disputes. I have already outlined the factual disputes regarding the passing of Resolution One at the Special General Meeting and the validity of the Release. There is an issue regarding whether the personal respondents, as members of the strata council, acted in a conflict of interest when they made decisions regarding the hotel when they were directors of the hotel which would benefit from their decisions. There are disputes regarding whether the personal respondents intentionally provided incomplete, inaccurate, or misleading information to legal counsel and whether they should have spent money on a legal opinion at all. There is also an issue of whether the personal respondents should have provided instructions to legal counsel because they were allegedly in a conflict of interest. The factual disputes relate to the material issues. All parties agree cross-examination is required. Master Harper has already ordered cross-examination of the respondents and one personal respondent has been cross-examined.

[99] Based on Saputo, I am satisfied there are bona fide triable issues for trial. There are relatively complex legal issues and numerous factual disputes. Further, and particularly based on my concerns with the Release, I cannot say the matter is bound to fail.

[100] The many disputed facts will not be easily resolved without access to standard trial procedures, including discoveries. While I appreciate that cross-examination on affidavits was permitted by Master Harper on September 1, 2020, and there has been fulsome document disclosure, this is not the test. The petitioners have met their burden to refer this matter to the trial list because they have established there are bona fide triable issues and they are not bound to lose. There are also additional factual disputes since Master Harper's order, particularly the intervening signing of the Release.

[101] I direct that the amended petition be converted to an action and referred to the trial list. By transferring it to the trial list, I do not intend to foreclose the possibility of a summary trial in this proceeding. However, prior to trial the parties will have the benefit of trial procedures such as admissions, notices to admit, examinations for discovery of the parties, and pre-trial examination of non-parties. These tools will assist the parties to efficiently resolve the disputes that are currently outlined in the amended petition.

- [102] In terms of amending the pleadings, while the exercise of discretion must be exercised judicially, the Court of Appeal has said there must be some flexibility to pleadings to ensure the pleading can adapt to changing circumstances: *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122 at para. 23.
- [103] In *Stewart v. Stewart*, 2018 BCSC 1266 at para. 14, Justice Abrioux, as he then was, articulated the principles to apply when faced with an application to amend the pleadings:
- (a) amendments should be permitted as necessary to determine the real issues between the parties;
 - (b) the party seeking leave to file the amendments is not required to adduce evidence of a pleading before trial;
 - (c) the facts are taken as alleged in proposed amended pleading;
 - (d) discretion is to be exercised judiciously;
 - (e) only in the clearest of cases will an amendment be struck as not disclosing a reasonable claim or defence, and if there is any doubt on the facts or the law, the matter should be allowed to proceed to trial; and
 - (f) disallowance should be a last resort, and the party opposing the amendments must prove actual prejudice, and not just potential prejudice.
- [104] I grant leave to the petitioners to file their proposed notice of civil claim. This includes leave to add the claims for punitive damages to the Strata Corporation and special costs of the plaintiffs, as these are connected to the underlying alleged breaches of the personal respondents and their actions throughout the litigation. I see no prejudice or injustice in allowing these amendments and it aligns with the court's generous approach to granting leave for amendments as outlined in *Stewart*. However, all references to the proposed respondents are not permissible and should be removed.
- [105] Additionally, leave to amend the pleadings to claim collusion between the original strata council and the new strata council is not permitted. The factual foundation for collusion was not included in the proposed notice of civil claim or the proposed further amended petition. In addition, the "Legal Basis" of the proposed pleadings does not refer to any cause of action or breach of statutory duties relating to collusion. The petitioners have not pointed to any provision in the Strata Property Act allowing them to bring a claim of collusion against the personal respondents who were not on strata council at the time collusion is alleged.

Disposition

- [106] I decline to dismiss the petition, or to strike portions of it, pursuant to Rule 9-5, Rule 9-6, or Rule 9-7.

[107] I decline to add the proposed respondents as parties to the proceeding.

[108] I direct that the amended petition be converted to an action and referred to the trial list.
The petitioners have leave to amend their pleadings within the parameters set out in paragraphs 104 and 105.

[109] The petitioners are to pay the costs of the proposed respondents. The personal respondents are to pay the costs of the petitioners.

"D. MacDonald J."

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