IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VR456 (Re),* 2022 BCSC 502

Date: 20220330
Docket: S215858
Registry: Vancouver

Re: The Owners, Strata Plan VR456
In the Matter of Division 2 of Part 16 of the *Strata Property Act*, S.B.C. 1998, c. 43

- and -

Docket: S222743
Registry: New Westminster

Between:

Tracey Anne MacLennan and Suzanne Elise Foster, Executors of the Will of Colin MacKenzie MacLennan, Deceased

Petitioners

And

The Owners, Strata Plan VR 456

Respondent

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Petitioner, The Administrator of Strata Plan VR456, in Vancouver Action No. S215858 appearing via videoconference:	P. Mendes
Counsel for Michelle Mok and James Mok in Vancouver Action No. S215858 appearing via videoconference:	M. Nied
Counsel for Tracey MacLennan and Suzanne Foster in Vancouver Action No. S215858 appearing via videoconference:	J. Abrioux

Counsel for Michelle Mok and James Mok in New Westminster Action No. S222743 appearing via videoconference:	M. Nied
Counsel for Tracey MacLennan and Suzanne Foster in New Westminster Action No. S222743 appearing via videoconference:	J. Abrioux
Counsel for The Administrator of Strata Plan VR456 in New Westminster Action No. S222743Vancouver Action No. S215858 appearing via videoconference:	P. Mendes
Place and Dates of Hearing:	Vancouver, B.C. January 17-19, 2022
Place and Date of Judgment:	Vancouver, B.C. March 30, 2022

Table of Contents

Overview

[1] The owners of one of the strata lots in Strata Plan VR456, known as Spruce West, brought a petition, NW S222743, seeking the appointment of an administrator ("appointment petition"). They brought the appointment petition because the owners had failed to maintain Spruce West to the point that it was the subject of a City of Vancouver Emergency Work Order that remained outstanding for over two years, it had become dangerous, and according to some, uninhabitable. The owners of five of the six strata lots consented to an order appointing an administrator.

[2] Pursuant to the consent order, the administrator advertised Spruce West for sale and received offers to purchase, one of which resulted in a contract of purchase and sale, subject to the owners voting to wind up the strata corporation and approving the sale. The owners of five of the six strata lots have passed a motion voluntarily winding-up the strata corporation and selling Spruce West to Butterscotch Holdings Inc. The administrator has brought a petition, VA S215858, seeking orders confirming the winding-up, approving the sale, and other orders necessary to effect the winding-up (the "confirmation petition").

[3] The owners who oppose the winding-up and sale are James Mok and Michelle Mok, the co-owners of strata lot four. While they took no position on the petition appointment at the time the consent order was made, they now assert the consent order was not properly made and should be set aside. The basis for their position is that Ms. Mok was not served with the appointment petition, the terms of the consent order were broader than the relief sought in the petition, and the consent order contained a term that could not be ordered by the court. The Moks also oppose the confirmation petition because they assert that the marketing of Spruce West was inadequate, and the proposed sale is improvident because the proceeds will not permit them to find a replacement home in the same neighbourhood.

[4] The owners who brought the appointment petition assert that it was served on Ms. Mok through common law service by delivery to her spouse, Dr. Mok. They submit that while the terms of the consent order differed from what was set out in the

petition in some regards, neither Dr. Mok nor Ms. Mok responded to the appointment petition. As a result, they were entitled to enter the consent order on the terms consented to by the other owners who responded to the appointment petition. They submit that its terms accord with the law.

[5] The administrator takes the position that the arguments that the Moks make to set aside the consent order are made too late and should not undo everything that the administrator has done to address the problems with Spruce West.

[6] The core issues are whether:

a) the consent order appointing the administrator should be set aside for failure to serve Ms. Mok and because its terms are broader that the petition seeking appointment of an administrator; and

b) the sale is provident, such that the vote of the owners of five of the six strata lots to voluntarily wind up the strata corporation and approving its sale should be confirmed.

Validity of the Consent Order Appointing the Administrator

[7] The owners of strata lot five, the executors of the Estate of Colin MacLennan, brought the appointment petition. Colin MacLennan's daughters, Tracey Anne MacLennan and Suzanne Elise Foster, determined that Spruce West was in significant disrepair when they became the owners of strata lot five after their father's death. The disrepair included significant water ingress in the walls, mould in their late father's unit (and at least one other unit), deteriorating fire escapes, cracks in the car park ceiling allowing water ingress, problems with the external doors and windows, crumbling concrete on the exterior walls, rusted steel structural supports in the exterior walls, crumbling stucco siding, and problems with the main roof and parkade roof.

[8] Ms. MacLennan and Ms. Foster learned that problems with leaks and water ingress had been reported since 1998. There have been various reports and

inspections by building inspectors and engineers since. The owners commissioned reports in 2017 and 2018. The 2017 report authors recommended repairs for which the costs were estimated to be $1.1 million. The 2018 report authors recommended repairs estimated to cost $1.68 million. Not all of the owners accepted the recommendations made and so the strata corporation did not undertake the work recommended

[9] In April 2018, the City of Vancouver issued an Emergency Work Order pertaining to the exterior fire exits. Initially, the Emergency Work Order had a deadline of “immediately”. Ms. MacLennan and Ms. Foster did not learn of it until some time after it was issued, because the owner who had received the notice did not advise the other owners about it. The owners did not undertake the work necessary to address the City of Vancouver’s Emergency Work Order.

[10] As a result of this paralysis, Ms. MacLennan and Ms. Foster retained a lawyer who wrote to the other owners and advised them that Ms. MacLennan and Ms. Foster would be commencing proceedings to have an administrator appointed so that repairs would be undertaken or the building sold to a developer. They advised that before doing so, they were prepared to entertain a final opportunity for the owners to develop a strategy for repair or a sale through a winding-up process. Other owners retained legal counsel and allegedly committed strata corporation funds to the legal bills without the prior approval of the owners. A resolution to pay those outstanding legal bills was defeated. The discussions and decision-making that Ms. MacLennan and Ms. Foster attempted to prompt were derailed by this legal bill dispute.

[11] On January 10, 2020, Ms. MacLennan and Ms. Foster filed the appointment petition. The appointment petition sought an order that an administrator be appointed to investigate the condition of the strata corporation’s property, including whether it would be in the best interests of the owners to wind up the strata corporation, as well as to recommend work to be done to repair the common property of the strata corporation, and to raise funds by special levy to pay for the

repairs. The appointment petition was brought pursuant to s. 174 of the *Strata Property Act*, S.B.C. 1998, c. 43.

[12] A consent order was made on April 17, 2020, providing for the appointment of an administrator to undertake the powers and duties of the strata corporation and the strata council to undertake the repairs required to meet the City of Vancouver Emergency Work Order, and to pursue a voluntary wind-up, including entering into a listing agreement to sell Spruce West.

[13] The Moks assert the consent order must be set aside because the petition was not served on Ms. Mok, the consent order was entered improperly, it contained relief different from that sought in the petition, and the court could not order that the administrator enter into a listing agreement to sell Spruce West without a resolution passed by a majority of the owners.

Legal Principles

[14] Rule 22-7 of the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides authority for the court to set aside steps taken in a proceeding in certain circumstances and provides that failure to comply with the rules is an irregularity, as opposed to a nullifying failure:

> **Rule 22-7 — Effect of Non-compliance**
>
> **Non-compliance with rules**
>
> (1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify
>
> (a) a proceeding,
>
> (b) a step taken in the proceeding, or
>
> (c) any document or order made in the proceeding.
>
> **Powers of court**
>
> (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may
>
> (a) set aside a proceeding, either wholly or in part,
>
> (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
>
> (c) allow an amendment to be made under Rule 6-1,

> (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
>
> (e) make any other order it considers will further the object of these Supreme Court Civil Rules.
>
> **Proceeding must not be set aside for incorrect originating pleading**
>
> (3) The court must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed.
>
> **Application to set aside for irregularity**
>
> (4) An application for an order under subrule (2) (a), (b) or (d) must not be granted unless the application is made
>
> (a) within a reasonable time, and
>
> (b) before the applicant has taken a fresh step after knowledge of the irregularity.

[15] The Moks assert the court has the inherent jurisdiction to set aside a consent order on a ground that would invalidate a compromise not contained in a judgment or order, citing *Pond v. Pond*, 2017 BCCA 243, and *Racz v. Mission (District)*, 1988, 22 B.C.L.R. (2d) 70, 1988 CanLII 2937 (C.A.).

[16] The Moks also submit that the court has the inherent jurisdiction to set aside a consent order that amounts to an abuse of process, relying on *Macht v. Macht*, [1997] B.C.J. No. 3112, 1997 CanLII 12624.

Service of Ms. Mok

[17] Rule 16-1(3) of the *Supreme Court Civil Rules* provides for service of a petition as follows:

> **Service**
>
> (3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.

[18] Rule 4-3(2)(a) provides that personal service is effected by leaving a copy of the document with the person.

[19] The appointment petition was served in accordance with the *Supreme Court Civil Rules* on the other owners, except Ms. Mok. The failure to serve Ms. Mok in accordance with the *Supreme Court Civil Rules* was an oversight.

[20] Ms. MacLennan and Ms. Foster submit that, notwithstanding the failure to serve Ms. Mok in accordance with the *Supreme Court Civil Rules*, they made effective common law service on Ms. Mok.

[21] Common law service is made when an originating process is brought to the attention of a named defendant: *Ngo v. Go*, 2009 BCSC 1146 at para. 23, citing *Balla et al v. Fitch Research Corporation et al*, 2005 BCSC 1447 at paras. 24-27. This can include personal service on a spouse of a party who brings it to the attention of their spouse.

[22] The requirement for service to be effective at common law is evidence that allows the court to confidently conclude that the person knew that the originating process was a legal claim, who commenced the proceeding, and the general nature of what was sought: *Balla* at paras. 18, 27.

[23] Dr. Mok was served with the appointment petition on January 21, 2020 at strata lot four in Spruce West. Dr. Mok was the chair of the strata council for Spruce West. On January 24, 2020, he sent an email to the other owners, including Ms. Mok, suggesting an immediate meeting to discuss the still outstanding City of Vancouver Emergency Work Order, “[i]n light of the Petition”. The obvious inference to be drawn from this email is that by virtue of the email, if not before, Ms. Mok became aware of the existence of the appointment petition.

[24] Ms. Mok swore an affidavit about the appointment petition in which she did not state that her husband did not make her aware of the appointment petition. Dr. Mok also swore an affidavit; he did not depose that he did not make Ms. Mok aware of the appointment petition.

[25] On February 13, 2020, Priyan Samarakoone, a lawyer, contacted counsel for Ms. MacLennan and Ms. Foster and advised them that he represented Dr. Mok and Ms. Mok.

[26] Based on the evidence of the email from Dr. Mok to the other owners copied to Ms. Mok, and the lack of contrary evidence in the Moks' affidavits, I find that Ms. Mok was made aware of the appointment petition by her spouse, Dr. Mok. Based on the evidence that she retained a lawyer, I find that Ms. Mok knew who the petitioners were and had an understanding of the general nature of the relief sought in the appointment petition.

[27] Ms. Mok submits that common law service has not been accepted as effective where personal service is required subsequent to the *Supreme Court Civil Rules* replacing the *Rules of Court*: *Tschurtschenthaler v. Sunlogics Inc.*, 2013 BCSC 1197.

[28] It is true that since the *Supreme Court Civil Rules*, the jurisprudence is less concerned with whether common law service has been effected and more concerned with the discretion found in Rule 4-6(4) of the *Supreme Court Civil Rules*. Rule 4-6(4) provides that the court can take into consideration any evidence it considers appropriate to determine whether there has been service.

[29] In *Tschurtschenthaler*, Justice Jenkins considered an application to set aside a default judgment where the corporate defendant was served by delivering a copy of the notice of civil claim to an officer of the corporation in without prejudice correspondence. Justice Jenkins called into question whether common law service remained applicable, given that the then relatively new *Supreme Court Civil Rules* provide for a clear and simple method of serving a corporate entity with a notice of civil claim. Justice Jenkins noted that the Court of Appeal had not spoken on the issue of common law service since the *Supreme Court Civil Rules* came into force in 2010.

[30] Neither the requirement to serve a petition personally, nor the method of personal service of a petition, changed when the *Supreme Court Civil Rules* replaced the *Rules of Court*. For that reason, the basis on which Justice Jenkins questioned the applicability of common law service does not readily arise in these circumstances. I conclude that the *Supreme Court Civil Rules* do not contain any changes applicable to this type of proceeding which would support the supposition that the concept of common law service is no longer applicable to the personal service of petitions.

[31] In addition, subsequent to Justice Jenkins' decision in *Tschurtschenthaler*, the Court of Appeal issued a case upholding service despite non-compliance with the rule for personal service under the current *Supreme Court Civil Rules*, after considering all the evidence pertaining to service as permitted by Rule 4-6(4): *McIlvenna v. Viebig*, 2013 BCCA 411 at para. 42, citing *Orazia v. Ciulla* (1966), 57 W.W.R. 641, 1966 CanLII 430 (B.C.S.C.). *Orazia* is cited in many of the cases considering common law service, including in the comprehensive review of the law undertaken by Justice Johnston in *Balla.* While the Court of Appeal in *McIlvenna* did not address Justice Jenkins' point about whether common law service continued to be applicable under the *Supreme Court Civil Rules*, it applied the principles that inform common law service and cited the leading decision on it in the course of doing so.

[32] In *Edwards Estates (Re)*, 2019 BCSC 858, I considered the evidence of personal service of a petition and held that service had been effective, notwithstanding that the petition had not been left with the respondent, but rather with a person who gave it to him, citing *McIlvenna* and *Orazia.*

[33] I am satisfied that under the concept of common law service, and/or by virtue of Rule 4-6(4), a court may consider the evidence and determine that a person has been served with a petition, notwithstanding failure to serve it personally by leaving it with that person, so long as the court is persuaded that the person had knowledge

that the petition had been filed with the court, who the petitioner is, what the petition is about, and the general nature of the relief sought in the petition.

[34] I conclude that is what occurred here. I decline to set aside the consent order appointing the administrator on the basis that it was not personally served on Ms. Mok in the manner set out in the *Supreme Court Civil Rules*.

[35] Ms. MacLennan and Ms. Foster submit that, in the alternative, Rule 16-1(3) gives the Court discretion to dispense with personal service. Having determined that effective service has been made, it is not necessary for me to consider this alternative submission.

Relief Sought in the Petition is Different from the Relief Provided for in the Consent Order

[36] As noted above, the appointment petition was filed on January 10, 2020 and served on Dr. Mok on January 21, 2020. I infer it was served on the other owners at around the same time. In accordance with Rule 16-1(5), the time by which to respond was February 11, 2020.

[37] On February 11, 2020, the owner of strata lot six, Dan Sonnenschein, filed a petition response. On April 6, 2020, the owners of strata lots one and two (Agnes Oy Line Mui) and strata lot three (Peter Tovbis) filed petition responses. Dr. Mok and Ms. Mok have never filed a response to the appointment petition, including to this date.

[38] Ms. MacLennan and Ms. Foster assert that Dr. Mok and Ms. Mok have no standing to seek any relief on the appointment petition given that, by virtue of failing to respond, they are not parties. Since Dr. Mok was personally served, and based on my determination that Ms. Mok was effectively served, this is an argument deserving of consideration for both of them. However, they seek leave to be added as parties to the appointment petition if that is required. Given my disposition of their arguments on the appointment petition, I will not address this procedural quandary that is of their own creation. I do consider it to be part of a pattern of conduct on their

part to obstruct the resolution of issues pertaining to Spruce West. For example, at some strata meetings where a voice vote was called for, Dr. Mok refused to voice a vote and simply held up a sign which read “no”. When asked to clarify whether that was a refusal to vote or a negative vote on the motion, he refused to provide clarification.

[39] I also pause to note that it is not disputed that the Moks have standing on the confirmation petition, notwithstanding that they did not respond to the appointment petition.

[40] On March 11, 2020, counsel for Ms. MacLennan and Ms. Foster sent a letter to Mr. Samarakoone (the Moks’ counsel) and the other owners or their representatives, enclosing a notice of hearing of the appointment petition for March 24, 2020. Mr. Samarakoone replied that he was no longer acting for the Moks, but he would forward the letter to them.

[41] On March 18, 2020, counsel for Ms. MacLennan and Ms. Foster sent an email to Dr. Mok and the other owners, advising that they would be proceeding with the hearing to appoint the administrator, attaching a notice of hearing and a draft order. The draft order had terms different from the petition and almost identical to the consent order that was ultimately entered.

[42] In their affidavits, neither Dr. Mok nor Ms. Mok denied that they received the email about the March 24, 2020 hearing from their former counsel. Dr. Mok deposed that he intended to attend the March 24, 2020 hearing and booked the day off to attend. I conclude that the Moks were informed of the date of the hearing by their former lawyer. I conclude that they had notice of the terms sought to be included in the order.

[43] Leaving aside non-substantive wording changes, the consent order differs from the relief sought in the petition with regard to the powers and duties to be exercised by the administrator, and the objectives the administrator was tasked with accomplishing.

[44] The Moks rely on cases in which an order has been set aside on appeal when the order made exceeded the relief sought: *N-Krypt International Corp. v. LeVasseur,* 2018 BCCA 20; *Naderi v. Naderi*, 2012 BCCA 16 at paras. 8, 22. The Moks did not appeal the consent order, they seek to have it set aside in the same court. The standard of review that the Court of Appeal employs to determine whether to set aside an order is not applicable to this application.

[45] The Moks also submit that in order to seek an order on the terms that are contained in the consent order, the petitioners were required to amend the petition and serve it on all persons whose interests would be affected by the relief sought: Rules 6-1(2)-(7) and 16-1(19). In support of this submission, they also submit that the Court's jurisdiction comes from the originating petition and so to grant relief, it must be provided for in the originating petition and notice given.

[46] The administrator submits that in the circumstances in which this consent order was entered, the failure to amend is not a failure to comply with the *Supreme Court Civil Rules*.

[47] Assuming, without deciding, that there was a failure to comply with the *Supreme Court Civil Rules*, it is presumed to be an irregularity, not a nullity: Rule 22-7(1). The Moks assert that because it is a failure that goes to the Court's jurisdiction, the irregularity cannot be cured.

[48] In my view, in order for the Court to lose jurisdiction to make the consent order, the relief provided in the consent order must be substantively different from that sought in the petition.

[49] The petition sought appointment of an administrator to exercise the powers and duties of the owners and strata council pursuant to s. 174, whereas the consent order provides for the administrator to exercise all the powers and all the duties of the strata council and the strata corporation.

[50] I do not consider the addition of the word “all” modifying “powers and duties” to provide for a substantively different scope than “powers and duties” without the modifier “all”.

[51] With regard to the fact that the petition sought an order that the administrator have the powers and duties of the owners and the strata council, but the consent order provides the administrator with duties of the strata corporation and the strata council, I note that the petition cites s. 174 of the *Strata Property Act* as authority for this aspect of the appointment. Section 174 of the *Strata Property Act* provides for an administrator to be appointed to exercise the powers and duties of the strata corporation. Accordingly, the change from the petition to the consent order is consistent with the provision specifically cited in the petition, and best described as a correction in the relief sought. I do not consider this change from the petition to the consent order to have affected the Moks’ right to notice of what was sought in the petition versus what was ordered by consent.

[52] With regard to the tasks to be undertaken by the administrator, the relief sought in the appointment petition charges the administrator with investigating the condition of Spruce West, retaining an engineer to prepare a written report detailing the repairs required, establishing a timeline for the repairs, hiring consultants or appraisers to evaluate whether it is in the best interests of the owners to wind up the strata corporation, and recommending work. The appointment petition seeks, alternatively, that the strata corporation repair its common property, hire a building envelope consultant to investigate the condition of the common property, and assess a $1,700,000 levy to undertake the repairs and a $30,000 levy for the costs of specifications and tender documents to undertake the repairs. The appointment petition, again in the alternative, also seeks a winding-up order pursuant to s. 284 (Part 16 – Division 3) of the *Strata Property Act.*

[53] On these issues, the consent order narrows the repair work to be done to the City of Vancouver Emergency Work Order and directs the administrator to

investigate and complete a voluntary winding-up in accordance with Part 16, Division 2 of the *Strata Property Act.*

[54] The nature of the winding-up sought in the appointment petition is a court-ordered dissolution (i.e.: not voluntary) pursuant to s. 284 of the *Strata Property Act*. Section 284(3) requires the court to consider the best interests of the owners, the probability and extent of significant unfairness to one or more owners (and other categories of persons not relevant to this matter), and whether there will be significant confusion and uncertainty in the affairs of the strata corporation or of the owners.

[55] Voluntary winding-ups are voted on by the owners and if there is supermajority (80%) approval, they may be confirmed by the court pursuant to s. 278.1. Section 278.1(5) requires the court to take into account the same considerations mandated in s. 284(3).

[56] The petition sought a non-voluntary winding-up order as alternative relief. The consent order provides for the administrator to pursue a voluntary winding-up resolution. The difference is that under the relief sought in the petition, the court would order the winding-up at the hearing of the petition based on the evidence then available. Under the consent order provisions, the administrator was to take steps to conduct a voluntary winding-up vote by the owners who would vote on it at a special general meeting, and if approved, the administrator was to seek court approval. The matters the court must consider in either case and the test to be applied to court approval are the same.

[57] Four of the strata lots responded to the appointment petition and decided they would agree to the repairs necessary to address the City of Vancouver Emergency Work Order and determined they would pursue a voluntary winding-up instead of undertaking the rest of the repairs. The pivot to a voluntary winding-up provided the owners more control over the winding-up. They negotiated those terms with Ms. MacLennan and Ms. Foster, such that five of the six strata lot owners, and all

of the parties to the appointment petition, agreed on the terms of the appointment of the administrator.

[58] The substantive relief provided for in the consent order is substantively consistent with, but narrower than, the relief sought in the appointment petition. The emergency repair work is a subset of the necessary repair work covered by the relief sought in the appointment petition.

[59] By failing to respond to the petition, the Moks did not assume the risks and responsibilities of getting on the record, which includes costs. They also precluded themselves from influencing the outcome: *Ranftl v. The Owners, Strata Plan VR 672,* 2005 BCSC 1760 at paras. 21-22. Had the non-voluntary winding-up relief been addressed at the hearing of the appointment petition, the Moks would not have had standing to oppose it. Ironically, the pivot to the voluntary winding-up enfranchised the Moks by affording them time and opportunity to persuade other owners to not agree to the winding-up and to vote against it.

[60] The other matter that was addressed differently in the consent order than in the relief sought in the appointment petition was the matter of costs. The petitioners sought costs. The consent order provided for the matter of reimbursement of the petitioners' legal expenses to be voted on at a meeting of the owners, without prejudice to the petitioners to seek their costs in the future. Again, this afforded a measure of control to the owners as a whole, including the Moks, that was to their advantage.

[61] There are a number of other changes that are ancillary to the pivot from undertaking all repairs or a non-voluntary winding-up to the consent order providing for the emergency repairs and a voluntary winding-up. I do not consider them to be substantive or to negatively affect the Moks.

[62] In reaching this conclusion, I have taken into account the provision of the consent order authorizing the administrator to enter into a listing agreement for Spruce West without a vote of the owners. As I conclude below, the governing

appellate authority provides that a strata corporation has the power to enter into a listing agreement by virtue of s. 2(2) of the *Strata Property Act*. The petition sought the appointment of an administrator under s. 174 of the *Strata Property Act*, which provides for an administrator to assume the powers and duties of the strata corporation. Accordingly, the consent order does not substantively differ from the relief sought in the petition when the powers and duties of the strata corporation to be vested in the administrator are understood in accordance with the case law.

[63] I conclude that the Moks' rights to notice, as persons affected by the relief sought in the appointment petition, was not abrogated or substantively negatively affected by the terms of the consent order.

[64] Accordingly, it is my view that if the *Rules of Court* did require the petition to be amended, it is an irregularity and not a failure that caused the Court to lose jurisdiction. Assuming the irregularity, it was incumbent on the Moks to move to persuade the Court to set aside the consent order within a reasonable time and before they took a fresh step after knowledge of the irregularity: Rule 22-7(5). They did not do so. They had notice of the terms of the consent order as a draft order proposed for the hearing of the appointment petition in March 2020, and they had the entered consent order in May 2020. The evidence shows that from the outset of the involvement of the administrator, the Moks were in conflict with him over what he had the power to do. The administrator consistently referred them to the consent order. They did not move to set it aside until December 2021.

[65] The Moks waited far too long to raise the failure to comply with the *Supreme Court Civil Rules* they now assert. Between May 2020 and December 2021, the administrator replaced the strata council, held votes, expended strata funds, listed Spruce West, received and reviewed offers, negotiated the offers, held the winding-up vote, and made the application to approve it. The owners, in the meantime, continued to incur expenses related to their strata lots.

[66] I will not set aside the consent order on the basis that its content differed from the relief sought in the appointment petition.

Entry of the Consent Order

[67] The March 24, 2020 hearing of the appointment petition did not proceed because by that time, the British Columbia Supreme Court had adjourned all in-person court matters due to the COVID-19 pandemic.

[68] The owners, other than the Moks, determined they would agree to the appointment petition on certain terms. Having reached an agreement with all of the owners who responded to the petition, Ms. MacLennan and Ms. Foster filed a requisition asking that the consent order be entered as a desk order. That allowed them to proceed with addressing the issues despite the courts being closed for hearings.

[69] The Moks submit that Ms. MacLennan and Ms. Foster acted improperly by entering into discussions with the other owners and entering a consent order by desk order, instead of proceeding with a hearing of the appointment petition. Dr. Mok asserts that even though he did not respond to the appointment petition, he intended to attend and speak at the hearing. He asserts that the consent order entered by way of desk order without notice to him deprived him of his right to do so.

[70] I do not agree. By failing to respond to the petition, Dr. Mok and Ms. Mok (since I found she was effectively served) deprived themselves of the right to further notice of steps taken in the proceeding, including the opportunity to participate in its resolution by way of contested hearing or consent order.

[71] The Moks assert that Ms. MacLennan and Ms. Foster misrepresented the state of affairs by filing a requisition to enter the consent order, which stated that each party affected by the order agreed to the terms of the order, and that they were filing an order signed by five of six strata lot owners. The Moks assert that the representation was incorrect because they were affected parties and had not agreed to the terms of the consent order.

[72] I do not accept this submission because neither Dr. Mok nor Ms. Mok responded to the appointment petition and so they were not affected parties:

Rule 1-1(1) of the *Supreme Court Civil Rules*. They may have remained persons whose interests were affected by the order sought, but that is different from being a party: *Democracy Watch v. British Columbia (Attorney General)*, 2017 BCSC 1303 at para. 8. Consent orders require the consent of parties of record, not of persons who do not have party status: Rule 13-1(10).

[73] Next, the Moks assert that the representation that the order was consented to by five of six strata lot owners was incorrect because Ms. Mok had not been served and Dr. Mok did not consent. That submission fails on math. There are six strata lots, and the owners of five of them consented to the order. The petitioners' representation was accurate.

Whether the Consent Order is an Invalid Contract Or An Abuse of Process

[74] The Moks assert that the Court should set aside the consent order because it is essentially an agreement between the owners of Spruce West to appoint an administrator. They assert that because not all of the owners agreed to the appointment, there is no valid contract and the order must be set aside: *Pond; Racz.*

[75] The contractual analogy is not entirely apt because under the *Strata Property Act*, all of the owners do not have to agree to the appointment of an administrator. If there is no agreement by all of the owners, then one or more owner can petition the court for appointment. That is exactly what happened here.

[76] To the extent the contractual analogy is apt, in a consent order, the contracting parties are the parties to the legal proceeding. At the time the order was made, all of the affected persons had been served. Those who had responded to the appointment petition and had become parties of record agreed to the appointment of the administrator on the terms in the order.

[77] The Moks also submit that the Court has the inherent jurisdiction to set aside a consent order that amounts to an abuse of process, relying on *Macht*. In *Macht*, the petitioner sought a divorce, primary custody, and child support. At the time the

order sought to be set aside was made, both parties were represented. Despite having been advised by the respondent's lawyer that the petitioner had to comply with the notice of intention to proceed provisions of the *Rules of Court*, and the respondent delivering an unfiled appearance to the petitioner, the petitioner proceeded *ex parte* and obtained an order for a divorce, for sole custody, and for child support in an amount greater than sought in the petition.

[78] The Moks argue this case is analogous to *Macht* because the order sought was granted without the respondent having notice of what was sought and the chance to respond. I do not consider this case analogous. For the reasons I have already given, the Moks were served with the petition and had notice of the changes to the relief sought via the draft order that was sent to them, notwithstanding that they had not responded to the appointment petition. With the possible exception of the issue of whether the owners should have the right to vote on a listing contract, which I will address below, the Moks had the chance to respond to the petition and the revised relief sought as set out in the draft order, but did not.

[79] The Moks also rely on *Ching-Peng Chien v. Canada Eighty-Eight and Yong*, 2005 BCSC 466, for the proposition that where full and fair disclosure has not been made during an *ex parte* hearing, an order may be set aside. In that case, the Court had reference to Rule 52(12.3) of the then in force *Rules of Court*, providing that a person may apply to set aside an order made without notice where the person is affected by the order. The Court also found that it could set aside the order on its own motion when it was made *ex parte*, and the party seeking the order had made submissions which led the Court to believe it had jurisdiction to make the order when it did not. The Moks assert that submitting a consent order for entry by way of desk order without notice to all affected persons is, for all intents and purposes, an *ex parte* application, subject to the strict duty of utmost good faith and disclosure.

[80] Again, the Moks had ample notice of what was sought. I do not agree that the consent order was obtained *ex parte.* Nor were intentional or unintentional misrepresentations made to the Court when it was sought.

[81] Based on the same reasoning, the Moks assert that the consent order was an abuse of process. I do not find it to be an abuse of process based on lack of notice to the Moks or lack of accurate representations to the Court for the same reasons I have just articulated. In addition, where a hearing is held *intra parte*, as this one was, the court may order relief broader than that sought, so long as the parties have had the opportunity to be heard: *A.L.M. v. K.H.*, 2004 BCSC 1420 at para. 37. In this case, the hearing of the petition converted to a consent order by way of desk order when all of the parties, who responded to the petition, reached an agreement with the petitioner on what the terms of the order should be. I am satisfied that this amounted to those parties who came forward having the opportunity to be heard.

Whether the Consent Order Could Provide for the Administrator to Enter Into a Listing Contract

[82] The Moks submit that the consent order must be set aside because it permits the administrator to enter into a listing agreement without a vote of the owners. They say this provision is not permissible at law and so the order must be set aside.

[83] Section 174(7) of the *Strata Property Act* prohibits an administrator appointed under s. 174 from doing anything that requires a vote of the owners, unless the vote has been held and reached the required threshold. This prohibition is qualified by the words “unless the court otherwise orders”.

[84] The Moks rely on *Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW 3271*, 2016 BCCA 118 [*Strata Plan NW 3271*], in which the Court of Appeal held that a court could not abrogate the owners’ rights to vote on a matter which the *Strata Property Act* required a vote to be taken before the strata corporation could act. In that case, the administrator was appointed by consent order. The consent order provided for the administrator to prepare bylaws to be voted upon by the owners. If the bylaws were not passed by a 3/4 majority, the administrator could apply to the court for further direction. That came to pass, and the chambers judge, relying on the words “unless the court otherwise orders” in s. 174(7) of the *Strata Property Act,* made an order repealing and replacing the

strata corporation's bylaws. The Court of Appeal overturned that order (not the consent order), stating that the words "unless the court otherwise orders" could not be used to abrogate the owners' democratic rights on the matters provided for in the *Strata Property Act*. The Court of Appeal did not explain what application the words "unless the court otherwise orders" could have.

[85] A threshold issue is whether the *Strata Property Act* restricts the strata corporation from entering into a listing agreement unless the owners have passed a resolution at a general meeting authorizing it to do so, or, whether the powers and duties of a strata corporation include the power to enter into a listing agreement without such a resolution.

[86] The Moks rely on *Buckerfield v. The Owners of Strata Plan VR. 92,* 2018 BCSC 839 at para. 19, aff'd *Dubas v. the Owners of Strata Plan VR. 92,* 2019 BCCA 196 at para. 35 [*Strata Plan VR 92*], in which the Court of Appeal upheld the decision of the chambers judge who declined to grant a declaration that a supermajority vote was required to list a strata complex for sale. In the course of doing so, both the chambers judge and the Court of Appeal reviewed various provisions under the *Strata Property Act*, which mandate that certain things can only be done with owner approval and specifying thresholds for certain issues on which votes must be held. A simple majority, 50%, is the threshold for those which do not require a 75% or 80% vote. Where a voluntary winding-up is underway, the winding-up must be subjected to a vote, receive 80% support, and must be confirmed by the court. The disposition of land must be passed by a 3/4 vote (75%) of the owners.

[87] The Court of Appeal also held that a listing agreement that is conditional upon an approved winding-up provision does not infringe the interests of dissenting owners. Dissenting owners have the protection that the winding-up must be passed by 80% and approved by the court, and the disposition of land must be approved by 75%. This was also important to the chambers judge. The decision stands for the proposition that in a voluntary winding-up and sale, the back end requirements of a

supermajority resolution and confirmation by the court provide the protection to the owners.

[88] At para. 19 of the chambers judgment in *Strata Plan VR 92,* Justice Brundrett stated:

> [19] First, I do not read the provisions in the *Strata Property Act*, which the petitioners cite, or the authorities provided to me, as directly mandating the requirement of a supermajority vote in order for the Strata Council to retain a realtor by signing a listing agreement to secure offer(s) for a sale which is in any event conditional upon the wind-up resolution by the owners: see, for instance, ss. 71, 78-82, and 105 of the *Strata Property Act*. In particular, I do not read the retention of a realtor as a change in use of common property, an alteration of common property or the disposal of land by the strata corporation engaging the supermajority requirements set out in some of those other sections. Hence, the normal default voting threshold of a majority vote would apply to the decision to approve a listing agreement: s. 50 of the *Strata Property Act*.

[89] The Moks submit that the last sentence of this paragraph is authority for the proposition that s. 50 of the *Strata Property Act* requires the owners to pass a resolution with a 50% threshold in order to enter into a listing agreement. Section 50 of the *Strata Property Act* does not expressly cover the authority to enter into a listing agreement. It provides that at annual or general meetings, matters are decided by majority vote unless a different voting threshold is required or permitted by the *Strata Property Act*.

[90] The administrator relies on *The Owners, Strata Plan VR2122 v. Bradbury*, 2018 BCCA 280 [*Strata Plan VR2122* BCCA], where Justice Fenlon, for the Court, rejected the argument that only the liquidator could enter into a contract to sell strata property in a voluntary winding-up (which could only occur after an 80% vote). At para. 39, Justice Fenlon held that a strata corporation has the powers of a natural person, and may enter into contracts, by virtue of s. 2(2) of the *Strata Property Act*. The administrator argues that because a strata corporation can enter into a listing agreement, the provision of the consent order authorizing the administrator, who was given the powers of the strata corporation, to do that without a vote does not offend s. 174(7) or the interpretation of that provision found in *Strata Plan NW 3271.*

[91] The Moks submit that the Court of Appeal's decision in *Strata Plan VR 92* is more recent authority than *Strata Plan VR2122* BCCA and governs.

[92] Neither *Strata Plan VR 92* nor *Strata Plan VR2122* BCCA directly answer the question of whether a vote of owners is required for an administrator exercising the powers and duties of a strata corporation to enter into a listing agreement.

[93] The ratio of *Strata Plan VR 92* is that the *Strata Property Act* does not expressly or impliedly require a supermajority vote to list strata complex for sale. In that case, the petition was brought before the listing agreement had been entered into. The strata corporation had planned a general meeting at which a resolution would be put to the owners. Accordingly, the petition proceeded on the footing that a vote would be held, and the question was whether it could be passed by 50% or required a supermajority. The issue of whether a vote was required was not before the court. However, at para. 92, set out above, Justice Brundrett stated, arguably in *obiter*, that "a majority vote would apply to the decision to approve a listing agreement". The Court of Appeal upheld the decision as a whole, and therefore I consider that the Court of Appeal upheld that statement also.

[94] In *VR2122*, the owners passed a resolution to pursue a voluntary winding-up and directed the strata council to source a broker to market the property. The strata council selected the broker and entered into the listing agreement: *VR2122* BCCA at para. 3, *The Owners, Strata Plan VR2122 v. Wake,* 2017 BCSC 2386 [*VR2122* BCSC] at paras. 33-35. The question of whether the owners had to vote on the listing agreement was not addressed. The ratio of the decision is that in a voluntary winding-up, the listing agreement does not have to be entered into by the liquidator, it can be entered into by the strata corporation. However, that ratio is situated in a context where the owners first voted to pursue a voluntarily winding-up and market the property. In this case, five of six of the owners did the same thing through the consent order but not through a vote at a general meeting.

[95] It is not appropriate to conclude that in *Strata Plan VR 92*, the Court of Appeal overturned its decision in *Strata Plan VR2122* BCCA without saying so. However, in

order to reconcile these cases, it is necessary to understand whether the powers and duties of a strata corporation include the ability to enter into a listing agreement without the vote of the owners at a general meeting.

[96] As explained in *VR* 92, the *Strata Property Act* provides for certain matters for which a resolution achieving a 75% or 80% majority is required. Entering into a listing agreement is not among them. Where the *Strata Property Act* requires a resolution but does not stipulate the threshold, a 50% majority is required: see for example, s. 25 of the *Strata Property Act.* The matters that require a vote are enumerated in the *Strata Property Act*. The provisions and standard bylaws that require a resolution of owners are listed in the *British Columbia Strata Property Practice Manual*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2008, 2021 update) at §6.101, 6-61 to 6-65. Entering into a listing agreement is not among them. At paras. 57-58 of *Strata Plan NW 3271*, the Court of Appeal described this as a comprehensive list of the provisions that required owner approval through a vote before the strata corporation can act.

[97] In *VR2122* BCSC, at paras. 120 and 121, Justice Loo considered British Columbia government published commentary and a bulletin from the Condominium Home Owners Association Bulletin on the voluntary winding-up process. Both of those publications suggested the usual practice is for the owners to pass a majority resolution to move the process forward and hire legal counsel, following which the strata council will search for a broker and retain the broker to market the strata plan or negotiate with a developer. Again, the question of whether a resolution to enter into a listing agreement is required is not expressly addressed.

[98] According to the authors of the *British Columbia Strata Property Practice Manual*, the *Strata Property Act* does not require that a contract be approved by either a majority vote or a three-quarter vote. However, before funds can be spent, they must be approved in a budget: §6.4.

[99] In summary, the law is uniform that the strata council, on behalf of the strata corporation, may enter into the listing agreement as part of the process of a

voluntary winding-up that a majority of the owners have determined to embark on. The recommended practice and the usual practice by which the majority of owners demonstrate that they have determined to embark on a voluntary winding-up is to pass a resolution at a general meeting. The *Strata Property Act* does not expressly require a resolution: *Strata Plan NW 3271* at para. 58.

[100] However, I cannot conclude that the precedential authority of *VR 92* is only *obiter*. The issue decided was whether a resolution to enter into a listing agreement had to be passed by a supermajority of the owners. Justice Brundrett answered in the negative and said that a majority vote was required. That is different than answering in the negative because no vote is required. Despite the lack of consideration between the difference in those two possible negative answers, and despite express requirement in the *Strata Property Act*, I consider myself bound by *VR 92* to hold that a simple majority resolution is required.

[101] I return to the consent order and the decision of the Court of Appeal in *Strata Plan NW 3271*. The Moks submit that *Strata Plan NW 3271* stands for the proposition that a court may not permit that owners' voting power be bypassed, as the consent order in this case did, by permitting the administrator to enter into a listing agreement without approval of the owners.

[102] However, that is not precisely what the Court of Appeal held in that case nor what it was asked to consider. In that case, unlike in this case, the matter in issue, the amendments of the bylaws, was the subject of an express provision of the *Strata Property Act* requiring a vote. The consent order did not dispense with that. The administrator held the vote and it was defeated. The application to the court was for approval of the bylaws notwithstanding they had been defeated at the statutorily required vote. The Court of Appeal would not permit the court to override the vote. The Court of Appeal held that the "unless a court otherwise orders" provision in s. 174(7) of the *Strata Property Act*, was not clear enough to permit a court to override a vote. Although those words obviously have some meaning or the legislature would not have included them, the Court of Appeal did not attempt

to interpret them in that case beyond holding that they were not clear enough to override a vote.

[103] I acknowledge that the prohibition in s. 174(7) is broader than a prohibition against overturning a vote. It states that the administrator may not do anything that the *Strata Property Act* requires be the subject of a vote unless the vote has been held and passed by the applicable threshold, unless the court otherwise orders.

[104] There are two important differences between this case and *Strata Plan NW 3271*. The first is that in this case, a majority of the owners consented to the court ordering the step (entering the listing agreement) that would be subject to the vote, while in *Strata Plan NW 3271,* the owners merely consented to the administrator being appointed to draft new bylaws. They did not consent to the new bylaws without a vote. The second is that in this case, the court's order permitting the administrator to enter into the listing agreement was done in the consent order, unlike in *Strata Plan NW* 3271 where after the vote failed, the application to the court was on a contested basis with the applicant seeking to use the "unless the court otherwise orders" provision to sweep away the failed vote.

[105] In this case, I consider the consent order signed by a majority of the owners to demonstrate that the majority of the owners had determined to embark upon a voluntary winding-up. I conclude that was a principled basis for the court to "otherwise order" that the administrator could enter into a listing agreement with a resolution of the owners because the majority of the owners expressed their consent to the administrator doing so.

[106] I conclude that the provision of the consent order permitting the administrator to enter into a listing agreement is valid.

Confirmation Petition

[107] The owners of strata lots one, two, three, five, and six seek to have the winding-up of the strata corporation confirmed and a liquidator appointed to carry out the winding-up, including the sale of Spruce West.

[108] The Moks oppose the relief sought in the confirmation petition. The Moks raise issues with the form, and therefore validity, of the winding-up resolution. However, the focus of the Moks' submissions was that the marketing of Spruce West was inadequate such that the contract of purchase and sale with the proposed buyer, Butterscotch, did not yield a fair market value price. The Moks submit that if Spruce West is sold, they will be out of their home and unable to buy an equivalent home in the same neighbourhood.

Legal Principles

[109] Before the *Strata Property Act* was amended in November 2015, the strata unit owners had to vote unanimously to wind up and terminate a strata corporation. In *VR2122* BCSC at para. 8, Justice Loo explained that the amendments reduced the unanimity requirement to 80% of the strata units, coupled with the requirement of court oversight to consider the best interests of owners, the probability of significant unfairness to one or more owners, and the probability of confusion and uncertainty.

[110] Section 278.1 of the amended *Strata Property Act* provides as follows:

> **Confirmation by court of winding-up resolution**
>
> **278.1** (1) A strata corporation that passes a winding-up resolution in accordance with section 277, if the strata plan has 5 or more strata lots,
>
> (a) may apply to the Supreme Court for an order confirming the resolution, and
>
> (b) must do so within 60 days after the resolution is passed.
>
> (2) For certainty, the failure of a strata corporation to comply with subsection (1) (b) does not prevent the strata corporation from applying under subsection (1) (a) or affect the validity of a winding-up resolution.
>
> (3) A record required by the Supreme Court Civil Rules to be served on a person who may be affected by the order sought under subsection (1) must, without limiting that requirement, be served on the owners and registered charge holders identified in the interest schedule.
>
> (4) On application by a strata corporation under subsection (1), the court may make an order confirming the winding-up resolution.
>
> (5) In determining whether to make an order under subsection (4), the court must consider
>
> (a) the best interests of the owners, and

> (b) the probability and extent, if the winding-up resolution is confirmed or not confirmed, of
>
> (i) significant unfairness to one or more
>
> (A) owners,
>
> (B) holders of registered charges against land shown on the strata plan or land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, or
>
> (C) other creditors, and
>
> (ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners.

[111] In *VR2122* BCSC, at paras. 79-84, Justice Loo stated that the process is to consider the best interests of the owners by balancing the competing views of those in favour of the winding-up and sale and those opposed. The next step is to consider the probability and extent of significant unfairness to one or more owners if the sale is or is not confirmed. The onus to establish significant unfairness is on those opposing the winding-up. The final step is to make a qualitative assessment of the likelihood and extent of significant unfairness and significant confusion and uncertainty. If the court concludes there will be significant unfairness to an owner who opposes the winding-up and/or there will be confusion and uncertainty caused by the winding-up and sale, it must be to an extent that warrants overriding the clear legislative authority to wind up a strata corporation where 80% of strata unit owners have voted to do so.

[112] The Court of Appeal overturned Justice Loo's decision appointing a liquidator without the liquidator appearing before the court to seeks its appointment, an issue to which I will return. The Court of Appeal upheld the rest of the decision, including the analysis of the voluntary winding-up provisions.

Validity of the Winding-up Resolution

[113] The Moks submit that the resolution passed by 83% of the owners to wind up the strata corporation was invalid because:

a) it was not obtained by the liquidator;

b) the contract of purchase and sale with Butterscotch was incomplete in that it did not include personal items, such as window coverings;

c) it did not provide an accurate estimate of the costs of winding up; and

d) the interest schedule is flawed.

[114] The applicable legislative provisions are ss. 277, 278, and 279 of the *Strata Property Act*:

> **Appointment of liquidator**
>
> **277** (1) To appoint a liquidator to wind up the strata corporation, a resolution to cancel the strata plan and appoint a liquidator must be passed by an 80% vote at an annual or special general meeting.
>
> (2) A liquidator must have the qualifications of a liquidator that are required by the *Business Corporations Act*.
>
> (3) The resolution must give the name and address of the liquidator and approve all of the following:
>
> (a) the cancellation of the strata plan;
>
> (b) the dissolution of the strata corporation;
>
> (c) the surrender to the liquidator of each owner's interest in
>
> (i) land shown on the strata plan,
>
> (ii) land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and
>
> (iii) personal property held by or on behalf of the strata corporation;
>
> (d) an estimate of the costs of winding up;
>
> (e) the interest schedule referred to in section 278.
>
> **Interest schedule**
>
> **278** (1) The interest schedule must meet any requirements as to form and content that are required by this Act and the regulations, and must do all of the following:
>
> (a) state whether the strata corporation holds land in its name, or has land held on its behalf, that is not shown on the strata plan;
>
> (b) identify land shown on the strata plan and land held in the name of or on behalf of the strata corporation, but not shown on the strata

plan, by legal description sufficient to allow the registrar to identify it in the records of the land title office;

(c) list the name and postal address of each owner;

(d) list the name, postal address and the estimated value of the interest of each holder of a registered charge against the land;

(e) list the name, postal address and interest of each creditor of the strata corporation who is not a holder of a registered charge against the land;

(f) list each owner's share of the proceeds of distribution in accordance with the following formula:

$$\frac{\text{most recent assessed value of an owner's strata lot}}{\text{most recent assessed value of all the strata lots in the strata plan, excluding any strata lots held by or on behalf of the strata corporation}}$$

(2) If there is no assessed value for the owner's strata lot or for any strata lot in the strata plan, an appraised value

(a) that has been determined by an independent appraiser, and

(b) that is approved by a resolution passed by a 3/4 vote at an annual or special general meeting

may be used in place of the assessed value for the purposes of the formula in subsection (1) (f).

(3) If a strata corporation has a schedule of interest on destruction that was required under section 4 (g) of the *Condominium Act*, R.S.B.C. 1996, c. 64, or a similar schedule that was required under any former Act, that schedule determines the owner's share of the proceeds of distribution on the winding up of the strata corporation and for that purpose replaces the formula in subsection (1) (f).

Vesting order

279 (1) Within 30 days of being appointed, the liquidator must apply to the Supreme Court for an order confirming the appointment of the liquidator and vesting in the liquidator

(a) land shown on the strata plan,

(b) land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and

(c) personal property held by or on behalf of the strata corporation

for the purpose of selling the land and personal property and distributing the proceeds as set out in the interest schedule.

(2) The court may grant the order if satisfied that

> (a) the requirements of section 277 have been met, and
>
> (b) if the strata plan has 5 or more strata lots, the winding-up resolution under section 277 has been confirmed by an order of the court under section 278.1.
>
> (3) For the purposes of subsection (1), the liquidator is appointed on the date the winding-up resolution under section 277
>
> (a) is passed, if the strata plan has fewer than 5 strata lots, or
>
> (b) is confirmed by an order under section 278.1, in any other case.

Liquidator Must Apply for Approval of the Sale and its own Appointment and Vesting Order

[115] The Moks assert that the governing provision is s. 282 of the *Strata Property Act*, which requires the liquidator to obtain a resolution before disposing of property. Since the liquidator did not obtain the resolution, the confirmation petition must be summarily dismissed. The Moks rely on *VR2122* BCCA for this proposition.

[116] In *VR2122* BCSC, the owners negotiated a conditional purchase and sale agreement and then passed a resolution to wind up and appoint a liquidator. The chambers judge approved the winding-up resolution, appointed the liquidator, approved the sale pursuant to the purchase and sale agreement, and made ancillary orders.

[117] At the appeal, the owners opposing the winding-up and sale argued that it was mandatory for the liquidator to apply to be appointed and to hold the vote to dispose of the property. The Court of Appeal held that it was necessary for the liquidator to apply to be appointed and for the vesting order to be made, but that did not preclude the strata corporation from entering into a listing agreement, marketing the property, and entering into a conditional purchase and sale agreement or seeking its approval on the s. 278.1 application. The Court of Appeal upheld the terms of the order confirming the winding-up and approving the sale, but overturned the terms of the order appointing the liquidator, vesting title to the strata property in the liquidator, declaring good and marketable title, and providing for the authority and powers to the liquidator. After explaining that a purchase and sale agreement could be and should be entered into before the s. 277 resolution seeking

appointment of a liquidator, in the context of a voluntary winding-up, so that the best interests of the owners can be considered under s. 278.1(5), the Court of Appeal stated, at para. 42:

> Having said that, I would agree with the appellants that the Act requires the liquidator to apply for approval of his appointment and the vesting order. The liquidator is assuming important responsibilities and should be before the court seeking its approval. The court must be able to determine that the liquidator is qualified and suited to carry out these responsibilities. I see nothing in the Act that would prevent the liquidator from bringing that application at the same time the strata corporation applies for approval of the winding-up resolution, with the preliminary issue of the adequacy of the winding-up resolution necessarily to be determined first.
>
> [emphasis in the original].

[118] This passage, and this case as a whole, is not support for the proposition that the failure of the liquidator to apply for its appointment, or for the approval of the winding-up of the strata corporation, precludes the court from making the orders confirming the winding-up vote and approving the sale. At para. 47 of *VR2122* BCCA, the Court of Appeal said there is no reason why the strata corporation cannot apply, as a part of the s. 278.1 application, to obtain court approval of a particular purchase and sale agreement sought to be implemented through the winding-up process, and the Court of Appeal upheld the order approving the sale.

[119] I do not accept the Moks' submissions that the winding-up resolution (including the resolution to approve the sale) was invalidly passed because the resolution was put to the owners by the administrator and not by the liquidator.

[120] However, in oral argument, the Moks also asserted that because the liquidator did not bring the application for its appointment, the petition should fail. In *VR2122* BCCA, the Court of Appeal set aside the portions of the order appointing the liquidator and vesting the property, etc., because the liquidator did not apply for them.

[121] It is apparent from s. 279 that the liquidator's application cannot be made before the s. 278.1 order has been made in the case of a strata plan with five or more strata lots, as is the case here. The Court of Appeal, in *VR2122* BCCA, stated

that the liquidator must be before the court, and observed that there was no reason the liquidator could not apply at the same time as the application confirming the winding-up resolution and appointing the liquidator. The Court also confirmed that, pursuant to s. 279, the application can be made at any time within 30 days of the liquidator's appointment.

[122] *VR2122* BCCA, and the legislation, uses the word "application". There has to be an underlying proceeding in which an application can be made. In this case, the administrator commenced the petition seeking the orders sought, including confirmation of the winding-up, approval of the sale, appointment of the administrator, the vesting orders, and ancillary orders. The proposed liquidator has responded to the confirmation petition and advised that it consents to the orders pertaining to its appointment, the vesting, its powers and authority, and the orders ancillary to those terms of the order. Counsel for the liquidator appeared at the hearing of the confirmation petition and advised the Court that, although it could have sought to be added as a petitioner or have brought a separate petition, it responded to the petition and consented to the orders that pertain to it, in order to streamline the costs and be as efficient as possible.

[123] I am satisfied that this process meets the requirements of the *Strata Property Act* in substance and the requirement described in *VR2122* BCCA, that the liquidator be before the court so the court can be satisfied that its appointment is appropriate. The liquidator is before the Court to confirm that it consents to the terms on which it is being appointed and no issues have been raised with the suitability of the liquidator or the terms on which it is appointed.

[124] I do not consider the Moks' arguments on this aspect of the confirmation petition preclude me from making the orders sought.

Whether the Contract of Purchase and Sale was Incomplete

[125] The Moks argue that at the time the resolution of the owners was passed approving the winding-up, the contract of purchase and sale was incomplete because it did not contain a schedule of personal property, such as "upgrade

materials, appliances, equipment and window coverings" which were to remain the property of the owners. They submit the resolution did not comply with s. 277(3)(c)(iii) of the *Strata Property Act*, which requires that the resolution identify the personal property held by or on behalf of the strata corporation to be surrendered to the liquidator.

[126] I do not accept the Moks' submission. While there was discussion at the time of the resolution that a list of the property to be excluded would be appended to the contract of purchase and sale, thereby amending the contract of purchase and sale, s. 277(3)(c)(iii) requires that personal property to be surrendered to the liquidator be included in the resolution, not that excluded personal property be listed in the resolution. The contract of purchase and sale defines the property to be transferred as the lands and buildings, inclusive of structures and improvements.

[127] In addition, while the resolution purported to approve the contract of purchase and sale, which the Moks argue was incomplete, it was not required for it to do so. As noted above, the contract of purchase and sale did not have to be approved by the owners to get to this stage of the voluntary winding-up procedure, but it is open to the administrator to have this Court approve it: *VR2122* BCCA at para. 47. I understand that the contract of purchase and sale has now been amended to append the list of excluded personal property, and so the excluded property has been incorporated into the contract of purchase and sale to be approved by this Court. I do not accept that the problem asserted was a defect in the s. 277 resolution.

Inaccurate Estimate of the Costs of Winding-Up

[128] The Moks assert that because the resolution and the confirmation petition provided an estimate of the costs of the winding-up, followed by language that the actual costs might vary from the estimates, and that a variation will not require a further meeting or vote approval of the strata corporation, the resolution was inconsistent with s. 277(3) of the *Strata Property Act*, which is intended to provide certainty to the owners. They describe the order sought as a "blank cheque" which

ought not be approved, especially since the owners were given a much higher estimate several months before the winding-up resolution, thereby giving rise to the concern that the estimate in the resolution and the petition might be unreliable by a significant margin.

[129] The administrator and counsel for the liquidator point out that an estimate is required by s. 277(3) of the *Strata Property Act*. An estimate was provided at an earlier time that was much higher than the estimate currently provided. Counsel for the liquidator has explained that the higher estimate given before the resolution was based on the typical costs to wind up, but was determined to be too high because in this case, the administrator did a significant amount of work allowing for a more cost-efficient process resulting in a decreased estimate.

[130] The administrator and proposed liquidator also assert that an estimate should not be a straightjacket on which a winding-up vote should be invalidated. At the time the resolution is proposed and the estimate is provided, the nature of the opposition may be unknown and generally speaking, the more opposition, the more work to get to court approval, and the greater the expense. The liquidator's counsel also pointed out that the liquidator still has to have its accounts passed pursuant to s. 283 of the *Strata Property Act*. However, if the liquidator must go back to the owners to have actual costs that vary from the estimate approved, the process will be delayed and cost more.

[131] While I would not rule out the possibility that an estimate that is totally devoid of reality could invalidate a resolution, I accept that the language pertaining to estimates of costs was appropriate in the resolution. It follows that I reject the argument that the s. 277 resolution was invalid because it included such language.

Interest Schedule

[132] In its response to the petition, the Moks assert that the interest schedule improperly sets out the interest of one of the strata units. This argument was not addressed in any detail in the written or oral submissions, other than a statement that the schedule is "fatally flawed" and misleading.

[133] In the absence of a substantive submission and evidence on this point, I will not consider it further.

Best Interests of the Owners

[134] In *VR2122* BCSC, Justice Loo observed that once a resolution with an 80% vote in favour has been passed, the view of the 20% (or the portion who did not vote in favour) that the sale is not in their best interests is not enough to overcome the view of the majority. Rather, the best interests factor requires a balancing of the competing individual views of whether a sale is appropriate: *VR2122* BCSC at para. 79. The test is objective, requiring the court to consider what reasonable owners would do in comparable circumstances: *VR2122* BCSC at para. 98.

[135] The Moks rely on para. 112 of *VR2122* BCSC, where Justice Loo asserted that the court, "in considering the interests of the minority opposed to a sale, ought to imply the duties that were imposed on the sales committee and the strata titles board", citing the Singapore Court of Appeal in *Ghee and others v. Dave and others*, [2009] 3 SLR. 109, [2009] SCGA 14 at paras. 168 and 169. Justice Loo then includes a list of duties, including appointing competent professional advisors, marketing the property for a reasonable period of time, following up on expressions of interests, creating competition between interested purchasers, obtaining expert advice, such as an independent valuation, and waiting for the most propitious time for the sale.

[136] I pause to note that Justice Loo described these factors in considering the dissenting owners' interests. Earlier in her reasons, she emphasized the importance of balancing the competing views. Clearly, para. 112 is an expression of part of the analysis of determining the best interests of the owners, and not the whole of her analysis.

[137] The Moks assert that there were failures in the marketing of Spruce West, the process, timing of the confirmation petition, and the price obtained compared to current fair market value. As a result, the Court should conclude that the proposed sale does not serve the best interests of the owners.

[138] Before turning to the specifics of their concerns, it is important to understand the state of repair of Spruce West, the information that the owners and the administrator had about needed repairs, and the costs of those repairs.

[139] Dan Sonnenschein is the owner of strata lot six, the penthouse. Mr. Sonnenschein swore an affidavit about the history of the problems with the building which is largely uncontested.

[140] In 2009, Mr. Sonnenschein hired an inspection service to inspect his strata lot and common areas. The inspector reported that the building had not been properly maintained for years and urgently needed a maintenance program before more concrete fell off it. The inspector recommended several remediation steps, such as replacing windows with thermally broken frames and glazing, obtaining structural and electrical engineering advice on anchor bolts, structural supports for the concrete fire escape stairs, and the building's electrical system which was not properly grounded. The problems identified in this report were not addressed by the strata corporation, except the fire escape stairs which became the subject of the City of Vancouver Emergency Work Order before they were addressed by the administrator.

[141] In 2017, the strata corporation retained an engineering company to undertake a visual review of the building with a focus on its envelope. The engineers concluded that immediate repairs were needed to "maintain the life safety and occupant liveability" of the building, including replacing all exterior windows and doors, installing rain screen cladding, replacing failed walls, and repairing the main roof and the parkade roof. The engineers also concluded that the brackets connecting the fire exit stairs had failed, such that new brackets were required immediately and proper fire-stopping should be installed between the stairs and the walls. The estimated cost of repairs was $1,100,000.

[142] On April 17, 2018, the City of Vancouver issued the Emergency Work Order pertaining to the fire exit stairs.

[143] In 2018, the strata corporation retained a different engineering firm to conduct another visual review. This engineering firm recommended similar repairs as the first, suggested a five-year strategy, and estimated the costs would be $1,680,000.

[144] There is evidence that water ingress was apparent in the entryway to the building, the parking garage, and in at least some of the units. Mr. Sonnenschein had reported mould in his unit for several years. Ms. MacLennan and Ms. Foster also reported mould in strata lot five.

[145] As discussed above, none of the required rehabilitation had taken place prior to the administrator being appointed, and all were outstanding when the building was marketed.

Timing of the Sale

[146] The Moks assert that the sale should be delayed until the Broadway corridor project is far enough advanced that it will put upward pressure on the sale price. They rely on the evidence of their appraiser, who asserts that development, once those plans are approved, is the highest and best use of the building. The Moks also argue that Spruce West was marketed during the global COVID-19 pandemic, an unpropitious time.

[147] While this factor is to be considered in accordance with *VR2122* BCSC, it must be considered in context. A timing consideration assumes that the owners have the ability to choose when to market the property. In this case, despite the Moks' assertion that the building is liveable, the evidence is that there is mould in at least two of the units. Mr. Sonnenschein deposed that he is unable to obtain insurance. Ms. MacLennan and Ms. Foster are unable to rent strata lot five because of its condition. The owners have not taken any meaningful steps towards necessary repairs except the City of Vancouver Emergency Work Order, which they only did after an administrator was appointed for that purpose and after it had been outstanding for two years. The owners have forced themselves into a situation where the only viable option is to wind up and sell because they have not kept the building in a minimum standard of repair. Such circumstances do not permit timing

the market or waiting to take advantage of an increase in value when the Broadway corridor transit approvals take effect.

[148] I conclude the timing of marketing the building does not negatively impact the best interests of the owners assessment.

Marketing of Spruce West

[149] The Moks assert that the marketing of Spruce West was inadequate and the winding-up and sale should not be approved because:

a) it was listed for sale during the COVID-19 pandemic, which was a bad time;

b) it was conducted in a summary manner and for less time than it was supposed to be;

c) it was conducted in a manner that dissuaded other prospective purchasers after potential purchasers surfaced;

d) no appraisal was done to give confidence to the owners and the court that fair market value was obtained;

e) the contract of purchase and sale was entered into one-and-one-half years before the confirmation petition was heard and the sale price does not reflect current fair market value; and

f) the sale price undervalues Spruce West because it does not reflect that it is in close proximity to planned transportation improvements to the Broadway corridor.

[150] The administrator appointed pursuant to the consent order was Garth Cambrey.

[151] After requesting marketing proposals from four commercial brokerage firms, Mr. Cambrey entered into a listing agreement on behalf of Spruce West with

Goodman Commercial. Goodman assessed the value of Spruce West to range between $2.5 million and $4.095 million and proposed a listing price of $4,750,000.

[152] Mr. Cambrey did not obtain an independent appraisal of Spruce West, a matter provided for in the consent order. I will return to this topic.

[153] Goodman commenced marketing in July 2020. The marketing campaign included promotion in the "Goodman Report", advertisement on Goodman's website, through the Western Investor Newspaper, Landlord BC Magazine, Twitter, Facebook for Business, LinkedIn, an email campaign, a postcard mailout to 2,200 purchasers, a sales brochure to investors and developers, and follow-up with potential purchasers by phone call or meeting.

[154] Two prospective purchasers made offers. The highest was from OpenForm at $4,300,000, and the other was from Butterscotch at $3,900,000.

[155] The administrator signed a letter of intent with OpenForm on August 6, 2020. The administrator held a special general meeting on September 2, 2020, seeking approval from the owners to proceed with a court-ordered winding-up and sale based on the OpenForm offer. The owners other than the Moks voted in favour. The Moks abstained. However, on September 20, 2020, OpenForm withdrew its offer after doing due diligence based on the view it formed as to the costs to repair the building. It indicated it would be prepared to proceed at a price of $2,500,000.

[156] The administrator went back to Butterscotch and entered into a letter of intent on September 20, 2020. After Butterscotch toured the building, it also refused to move forward with its initial offer of $3,900,000. Through Goodman, the administrator negotiated an amended letter of intent at $3,300,000. The owners of five of the six strata lots approved the administrator entering into a letter of intent with Butterscotch at that price. A contract of purchase and sale was entered into on November 6, 2020 for the sale subject to the voluntary winding-up and court approval.

[157] On March 24, 2021, the administrator convened a special general meeting where the owners passed the resolution that is the subject of this petition.

[158] The Moks assert that the marketing period was too short, describing the marketing campaign as “little more than a week” compared to the proposals outlined by the companies that recommended a 6-12 week marketing period.

[159] I do not accept that the marketing period was “little more than a week”. The administrator deposed that the marketing started in July 2020. The administrator entered into the letter of intent with OpenForm on August 6, 2020. The evidence is that was not the end of the marketing in that the property remained and still is on Goodman’s website. However, it is clear that from that time on, a “under contract” banner appeared on the advertising of the property, including after OpenForm withdrew its offer and before the letter of intent was concluded with Butterscotch. Whether that would attract or detract potential buyers is not clear on the evidence. However, for the reasons that follow, it does not make a difference on the best interests analysis.

[160] The period of active marketing resulted in two offers that were in the upper portion of the range of prices that Goodman suggested the property should sell for. However, once those prospective purchasers looked more closely at Spruce West, they were not prepared to pay those prices for it. The first reduced its offer by $1,800,000 and the other by $600,000. Based on the evidence of the state of disrepair of Spruce West, I conclude that any purchaser who took a close look would have its enthusiasm dampened and concerns about repair costs heightened. That is not a facet that could be changed through a lengthier marketing campaign.

[161] The Moks also raise concerns that the marketing process referenced repairs required for “life safety” issues and the City Emergency Work Order, without emphasizing that the owners had approved a special levy to address those issues. In July 2020, the owners approved a $50,000 special levy to address the City of Vancouver Emergency Work Order, based on the administrator’s initial estimate of the cost of repairs. However, the repairs had not been undertaken at the time the

marketing of the property began and were not finished until mid-2021, in part because the owners defeated a second motion to pass a further special levy when the proposals from contractors exceeded the special levy funds raised.

[162] It would not have been accurate for the marketing to suggest that the owners were addressing the necessary repairs at their own expense. To be accurate on this front, the marketing would have had to say that the owners were prepared to address the City of Vancouver Emergency Work Order, a small fraction of the necessary repairs, at their own expense, leaving water running into the building, concrete crumbling of the walls, windows and doors needing replacement, and mould in at least two of the units.

[163] I do not accept that the content and length of the marketing campaign resulted in offers that were sub-par in terms of the best interests of the owners.

Evidence of Fair Market Value

[164] There is conflicting evidence as to whether the Butterscotch offer reflects the fair market value of Spruce West, including the timing at which fair market value should be determined.

[165] As a starting point, the administrator did not obtain an appraisal until after the Moks filed their response to this petition, including their appraisal, to which I will come.

[166] The consent order provided for the administrator to obtain an independent appraisal but did not require it. At an information meeting with the owners prior to retaining Goodman to list Spruce West, the administrator recommended to the owners that an appraisal be deferred until Spruce West was listed. Shortly after entering into a listing agreement with Goodman, the strata corporation held its annual general meeting. The agenda included a resolution for an appraisal. The administrator recommended the appraisal. The resolution did not receive a seconder and was defeated.

[167] The administrator did obtain an appraisal in late December 2021 in order to reply to the Moks' appraisal evidence. It is noteworthy that at the time the building was about to be marketed, the owners were so disinterested in spending the money to obtain an appraisal that no one seconded the motion the administrator put on the annual general meeting agenda. Regardless of whether the resolution was needed to obtain an appraisal, the objective evidence is that the owners were content to proceed without one.

[168] I turn to the issue of whether the sale price negotiated a few months later was not in the best interests of the owners, given that they did not have an independent appraisal at the time they entered into the contract for purchase and sale.

[169] The owners were faced with two unknowns of their own making. The first, and arguably controlling, was the actual cost of repairs. They were working with dated information that was not based on opening up the walls to see the real extent of the damage to the envelope and structures of the building. The second was the lack of an independent appraisal, the value of which would arguably be impacted by the first unknown.

[170] The owners had Goodman's opinion that the building sale price could range from $2.5 million to $4.05 million. The provincially-assessed value, as of July 2020, was $4,402,000. That latter value could not be said to be informed by the costs of repairs. The estimates of repairs ranged from $1.1 million to $1.68 million. By 2020, the repair estimates were dated and they were based on visual inspections only.

[171] The ongoing reluctance of a majority of owners to spend more than the bare minimum to repair Spruce West, coupled with the information they had about the market value of the building, their disinterest in obtaining an independent appraisal, and the information they had about the value of the building and the costs of repairs, collectively provides the basis on which to objectively assess whether the owners could make a decision on a sale price that was in their best interests. The resolution to raise the remainder of the funds to complete the City of Vancouver Emergency Work Order was defeated in December 2020, shortly after the owners approved the

Butterscotch letter of intent at $3.3 million, but before they passed the resolution in favour of the winding-up and sale.

[172] Considering all of the evidence from the perspective of a reasonable person in the position of the owners, it is my view that the owners could have made the decision that the supermajority made with the information available, especially since they made collective decisions to limit the information they had about the value of Spruce West and the true costs of repairs it needs.

[173] The Moks assert that the purchase and sale agreement with Butterscotch must be viewed against the current fair market value, i.e.: the fair market value at the time the court hears the petition. In support of this argument, they point to s. 278.1(1) of the *Strata Property Act*, which permits a strata corporation that has passed a voluntary winding-up resolution to make an application for approval of the voluntary winding-up, and requires it to do so within 60 days of the resolution.

[174] Subsections (1) and (2) of s. 287.1 are not readily reconcilable on their face. The s. 278.1(1) application to the court is permissive, but its timing is mandatory, subject to s. 278.1(2) which stipulates that failure to comply with the mandatory timing requirement neither invalidates the resolution nor prohibits the application for approval. The parties could not point to any authorities addressing these provisions.

[175] The Moks did not take the position that the failure to meet the 60-day timeframe is fatal, but they argue the 60-day timeframe must mean something. I agree with both of those positions. The Moks assert it means that the legislature requires evidence of the value of the proposed sale that is current at the time the court is hearing the petition to confirm the winding-up resolution.

[176] In my view, the legislature cannot be taken to be stipulating a requirement that the sale price represent market value at the time the court hears the confirmation petition in all cases. In a rapidly changing market, that could defeat any proposed winding-up. Among other things, having a petition heard within 60 days of a vote may be impossible in some British Columbia Supreme Court jurisdictions

where there is opposition to it such that more than a two-hour hearing is required. This matter required a three-day hearing. Counsel for the Moks was not retained until the summer of 2021 (after a March 2021 resolution) and was not available for the petition hearing until late 2021. It proceeded in January 2022.

[177] In my view, the legislature's inclusion of the 60-day timeframe, while permitting an escape valve, was to promote the value of having a timely court confirmation process so that the proposed winding-up and sale is not divorced in time from prevailing owner sentiments and market conditions. A resolution that has become stale by virtue of the passage of time may no longer be in the best interests of the owners or remain reflective of the owners' wishes. The court must consider that, especially in cases where the confirmation petition is brought after that timeframe.

[178] The confirmation petition was filed in July 2021, three to four months after the resolution was passed. The hearing date was scheduled in consultation with counsel for the Moks, considering the time at which a three-day petition could be accommodated in Vancouver. That is generally at least two to three months out from the time a hearing date is requested. In the circumstances, the time to hearing was not unreasonable.

[179] With regard to the currency of the intention of the owners, as late as January 2022, all of the owners, except the Moks, have sworn affidavits advising of their commitment to the winding-up and sale, despite the passage of time and the upswing in sale prices for residential properties in Vancouver, a topic to which I now turn.

[180] The evidence is that between the assessment years of 2020 and 2021, the provincially-assessed value of the Moks' strata unit increased from $768,000 to $883,000, or by 15%.

[181] The July 2020 provincially-assessed value of Spruce West was $4,402,000, broken down into land of $3,486,000 and improvements of $912,000. The July 2021 provincially-assessed value was $4,984,000.

[182] The Moks have provided an appraisal of the land component of the property as at November 17, 2021. The appraised value is $3,750,000. The appraiser also opines that the highest and best use of the property is to develop it as bare property once the Broadway corridor transit project has been approved. He notes that at the time of his report, the matter was to go before Vancouver City Council in the spring of 2022.

[183] I do not find an appraisal of the bare land value to be of assistance in determining whether this proposed sale of Spruce West is in the best interests of the owners. In order for it to be sold as bare land, the building would have to be taken down. The net sale proceeds to the owners must take into account the costs of taking down the building. There is no evidence of the costs of doing so. The only thing I can conclude from this valuation is that the net proceeds of a bare land sale would be $3,750,000 less the costs of converting the property to bare land. Other considerations would be that in order to effect such a sale, the owners would have to vacate their strata lots before obtaining the sale proceeds. There is no evidence that, at any point in the process that has unfolded over the last two years since the owners of strata lot five sought the appointment of an administrator, anyone has suggested the property be marketed as bare land.

[184] The administrator obtained an appraisal of the property (land and building) as at November 2020. The Moks assert it is not admissible because it cannot pass the threshold analysis of relevancy, necessity, absence of an exclusionary rule, and a properly qualified expert, relying on *White Burgess Langille Inman v. Abbott and Halliburton Co.*, 2015 SCC 23 at para. 23.

[185] The focus of the Moks' objection is relevance. They assert that because the appraisal is as at November 2020, 14 months ago, it does not provide any relevant

opinion evidence because the Court must assess the sale price against the current value of the property.

[186] I accept the evidence demonstrates that the market value of residential property in Vancouver has generally increased between the time Spruce West was marketed, the letter of intent with Butterscotch was entered into, and now.

[187] I pause to note that the Moks' companion argument is that Rule 11-6 of the *Supreme Court Civil Rules*, in particular the rules on reply expert reports, apply. If this is the case, it may never be possible to have admissible appraisal evidence if the timelines in Rule 11-6 must be respected because the value could easily change between the time the report must be served and the time of the hearing, given the sometimes volatile real estate markets in this province.

[188] Leaving aside the timelines in Rule 11-6, an appraisal conducted at the time a winding-up resolution was voted upon might no longer reflect the value of the property at the time the court considered the application, even if it was brought within the 60-day window provided for in s. 278.1(1).

[189] As provided for in *VR2122* BCSC, the test regarding the best interests of the owners is an objective test, taking into account what a reasonable person would do with the information available to the owners: at para. 98. I am of the view that appraisal value at the time the owners are making the decision is relevant.

[190] I do not accept the Moks' submission that the administrator's appraisal report is inadmissible because of the date at which the property was valued.

[191] The Moks also submit that the administrator's appraisal report is not admissible because it is not a proper reply. They rely on authorities interpreting Rule 11-6 reply requirements. Rule 11-6 is not applicable to expert evidence entered into evidence on a petition. In addition, the administrator does not tender the report as a response to the Moks' expert opinion evidence, which is opinion evidence on the market value of the bare land. He tenders the report as a response to evidence which Ms. Mok tendered in her affidavit as to the market value of Spruce West as

land and building, including evidence of provincial assessments and real estate market evidence. As evidence in reply to that, it meets the timelines in the *Supreme Court Civil Rules*.

[192] Finally, the Moks argue the report is not admissible because there is no statement of the authors' qualifications. Both the administrator's report and the Moks' report contain very brief descriptions of the authors' qualifications. None of the report writers attached *curricula vitae*. Nevertheless, based on the brief statements of qualifications and experience, I am satisfied that the reports are admissible.

[193] The administrator's appraisal is that as of November 2020, Spruce West's highest and best use was as a townhome development. The appraised value was $3,380,000.

[194] With regard to the use to which the administrator's appraisal report can be put on the confirmation petition, it was not available to the owners at the time they approved the letter of intent or voted on the resolution. It does not assist with determining if the owners, voting with the information they had, were acting in the best interests of the owners. However, it assists by providing insight that had the owners had the appraisal, they would not have likely voted differently.

Conclusion on Best Interests of the Owners

[195] In balancing the interests of the owners objectively and taking into account the circumstances of Spruce West and the information the owners had, I conclude that the Moks have not demonstrated that the proposed winding-up and sale is not in the best interests of the owners.

Significant Unfairness

[196] The significant unfairness assessment in ss. 278.1(5)(b)(i) and 284(3)(b)(i) encompasses oppressive conduct and unfairly prejudicial conduct or resolutions. It is intended to preclude conduct or consequences that are "burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith." The modifying term "significant" indicates that the "unfairness" must be oppressive or

transcend beyond mere prejudice or trifling unfairness. It must be "unfairness" that is "of great importance or consequence": *VR2122* BCSC at para. 140, citing *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 at paras. 25-28. The word "significant" imposes a more stringent threshold than simply "unfairness": *VR2122* BCSC at para. 140, citing *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 41.

[197] In *VR2122* BCSC, Justice Loo held that in considering significant unfairness, the issue must be viewed through the lens that the dissenting owners are facing an involuntary taking of their homes. In a case where the factors supporting the winding-up and sale are a significant profit of the sale of the strata corporation as a whole, Justice Loo held that there should be "greater emphasis on property rights as a home rather than to property rights as a commodity or economic interest". Justice Loo cited *The Owners, Strata Plan VR 1966*, 2017 BCSC 1661 at paras. 41 and 42 for the proposition that because it is an involuntary taking of a home, the statute must be strictly complied with. Although *VR2122* BCCA overturned the decision of Justice Loo in part, it upheld this aspect of her decision and expressly approved the passage from *Strata Plan VR 1996* relied on: *VR2122* BCCA at paras. 29, 32.

[198] In this case, the Moks argue that they view Spruce West as their home. They have owned it since 1997. The evidence is not clear as to whether it is the primary residence of either of them. One of the owners, Ms. Mui, deposed that Ms. Mok has not lived there for many years. Ms. Mok does not state that she lives there, but she does identify herself as being of that address.

[199] Unlike in other cases, where owners objecting a winding-up and sale of a strata corporation depose to attachments to their homes, the Moks do not do so. Ms. Mok deposes to the convenience of its location in terms of acquiring healthcare for a serious health condition. They both depose that they would like to relocate to the same neighbourhood. They have led evidence about the market costs of a similar home in the neighbourhood that demonstrates that their share of the winding-up and sale proceeds will not allow them to replace their home in the same neighbourhood.

[200] The evidence demonstrates that over more than a decade, the owners have made decisions to not spend the money to maintain their building. As a result, it is in disrepair. They cannot expect that they can buy a home in good repair of similar size in the same neighbourhood.

[201] The evidence demonstrates that after years of ignoring serious and growing problems with the building, since April 2020 the owners, other than the Moks, have reckoned with this fact and have agreed to the winding-up and sale. The Moks, however, believe the Broadway corridor transit project will enhance the value of Spruce West if they can hold on for a few more years. Their counsel's submissions emphasize the failure to capitalize on this as part of the submission that the timing of the sale was unpropitious. The strata minutes in evidence show that the Moks have been arguing that the owners should wait for the Broadway corridor plans to positively impact the price of the building for many years.

[202] Of the six strata lots, four are the homes of the owners. One is rented out. One is owned by the daughters of a deceased owner. This is not a case where the supermajority is seeking winding-up to capitalize on a profit. Although all of the owners, except the daughters of the deceased owner of strata lot five, will realize much more than they paid for their units, it is likely that they will all realize proceeds that are less than the cost of buying a similar sized home in the same neighbourhood. Their homes do not enjoy a value that would permit any of them to relocate to something in good repair in the same neighbourhood.

[203] Accordingly, the nature of this contest is not the same as one where the supermajority want to make money and the dissenting owners want to keep their homes. This is a contest between owners who do not want to spend the money to bring the building into good repair and have accepted that means they must sell it, and those who also have refused to spend the money to bring the building into good repair but do not accept that means they cannot continue to live there. The Moks are prepared to continue to live in a building that leaks, has crumbling concrete, and in

which some of the units contain health hazards like mould, until the Broadway corridor brings home the economic benefits they have been banking on.

[204] While the Moks have deposed as to features of the neighbourhood they are attached to and find convenient, the unfairness of the practical result that the proceeds will not allow them to relocate to a similar sized home in the same neighbourhood must be viewed in the context that they played a role in creating this situation.

[205] In attempting to discharge their onus to establish relative significant unfairness, the Moks have not, since April 2020 when the administrator was appointed to effect a sale of Spruce West, proposed a workable plan to rehabilitate Spruce West. I conclude that given the history of not being able to agree to a plan, despite the longstanding knowledge of serious problems with the structure, the owners will continue to deadlock on this issue.

[206] Ms. MacLennan and Ms. Foster cannot rent or occupy their strata lot. Their evidence shows that the value of their strata lot is eroding as they continue to fund the expenses associated with owning an uninhabitable strata lot in a dilapidated building.

[207] Mr. Sonnenschein deposed that he has been unable to obtain insurance on his strata lot due to the state of the building. He has inquired of the real estate agent who he used when he bought the unit and that agent is unwilling to list it because of the state of the building. He deposed that he is unable to rent out the strata lot because of the mould in his unit.

[208] While I consider that the Moks may not be able to continue to live in the same neighbourhood and that is a downside to them, there is greater unfairness on those owners who have accepted the reality that all of the owners are unable to agree on whether and how to repair the building if the winding-up and sale is not approved and the owners continue to be unable to agree.

Confusion and Uncertainty

[209] Since April 2020, a supermajority of the owners has agreed to move towards the winding-up and sale of Spruce West, instead of continuing the paralysis about what to do about its problems.

[210] The Moks do not agree that they have obstructed repairs on the building in the past or that the owners cannot work together to bring the building into repair. In his affidavit #3, Dr. Mok deposed that:

> **Repair Efforts**
>
> 11. I have reviewed the First Affidavit of Tracey Anne MacLennan made January 7, 2022, the First Affidavit of Suzanne Foster made January 7, 2022, the First Affidavit of Petislav Tovbis made January 5, 2022, the First Affidavit of Dan Jacob Sonnenschein made January 6, 2022 and the First Affidavit of Agnes Mui made January 5, 2022. Those affidavits make many allegations against Ms. Mok and me that are not true. Unfortunately, I am not in a position to make a full response to those allegations due to the very limited time I have had with those affidavits and the very limited time available to make this affidavit before the court materials must be filed with the Court.
>
> 12. However, I will quickly respond to the allegation in those affidavits that Ms. Mok and I have tried to obstruct repairs in respect of the Building and that the Owners are unable to work together to make repairs. That allegation is not true. Ms. Mok and I have supported needed repairs to the Building, and the Owners have repeatedly demonstrated their ability to cooperate to make repairs to the Building. Now shown to me and attached as **Exhibit "B"** are copies of some productive correspondence between me, Ms. Mok and our fellow Owners concerning repair issues. These are just some examples of many I could provide to the Court if I had the time to do so.
>
> 13. Also, in the First Affidavit of Petislav Tovbis made January 5, 2022 at paragraph 9, Mr. Tovbis suggests that Ms. Mok and I opposed the raising of a special levy for a city work order in respect of the Building. This is incorrect. Ms. Mok and I were in support of raising funds for repair work, but we had concerns about the amount to be raised because we had been given conflicting information by Barry Kinakin, an engineer at Read Jones Christofferson Ltd. We paid our portion of this special levy, and all other levies, in full and on time.
>
> 14. While the above-noted affidavits say some hurtful things about me and Ms. Mok, I bear no ill-will against my fellow Owners. I can see no reason why the Owners cannot work together with the assistance of an administrator or otherwise to make needed repairs to the Building or obtain fair value for our mutual asset instead of leaving several hundred thousand dollars (or more) on the table and making it impossible to buy comparable homes in the area.

[211] Ms. Mui, the owner of strata lots one and two, deposed that between her and the Moks, they have three of six votes and they have historically repeatedly voted to defeat any repairs. She deposed that for her part, she has done so because she has no money to invest in the building. She wished to continue with the winding-up and sale of the property.

[212] Mr. Tovbis, the owner of strata lot three, agrees that the failure to address the problems in the building is not due solely to the Moks but that there is no hope of moving forward other than through the winding-up and sale. He deposed that:

> 6. Although Dr. and Ms. Mok are not solely to blame for the condition of the building, they have consistently opposed efforts to undertake needed repairs to the building. They and others, including myself, have not been willing to spend money on addressing the disrepair in the building, and I have no confidence that the Moks have suddenly seen the light and now wish to commit to repairing the building.
>
> 7. While full of criticisms about the appointment of the administrator, the marketing process, and the sale price, their affidavits offer no hope to me as a fellow owner that if the windup does not proceed, we can come together as a group to address needed repairs.
>
> 8. I, too, am very concerned about the sale price for the property, but I am also aware that if we do not sell, extensive repairs are needed to the building, and most of us are not willing to spend that money.
>
> 9. Proof of this can be found in the minutes from the strata corporation's annual general meeting held on July 13, 2020. At that meeting, we voted on a $50,000 special levy to address a work order issued by the City of Vancouver. The work order required us to fix the fire escape or vacate the building. When it came time to vote on the special levy to install shoring in the fire escape, they refused to vote in favour at the cost of $2,128.36 to the Moks. Attached as Exhibit "A" to my affidavit is a true copy of the special general meeting held on July 13, 2020.
>
> 10. How can any owner be expected to put their faith in the ability of the strata corporation to address the state of disrepair in the building when we have owners unwilling to spend the money necessary to fix a dangerous fire escape?
>
> 11. Not confirming the windup vote at this stage will condemn the ownership to another deadlock on repairs, and undoing that deadlock will require further court intervention and more expense by the owners. Another owner will have to come forward and bring an application for the appointment of an administrator. It will also require the owners to undergo the cost and expense of another windup process.

> 12. If the windup does not proceed, it will be significantly unfair to me because, unlike Dr. and Ms. Mok, I cannot afford to continue to live in a building that remains in a significant state of disrepair. When I bought this property, I did not expect to be involved in a nearly 17-year argument over repairs and maintenance. I did not expect that an administrator would be necessary to agree on repairs related to life safety. My unit forms an important part of my life savings, and I fear that if we do not sell this building now, the strata corporation will continue in an indefinite stalemate over repairs.

[213] In response to the question about what is to be done if the winding-up and sale is not approved, given the paralysis in addressing the disrepair of Spruce West the owners have collectively demonstrated over the years, including the City of Vancouver Emergency Work Order, the Moks respond that they are willing to consider addressing repairing the building.

[214] The only evidence that repairs might finally come about is in Dr. Mok's third affidavit, in which he asserts that there is no reason the owners cannot work together to have repairs done. Against that, there is significant evidence of the owners not being able to agree to spend money on repairs. It is not enough to say that repairs could, in theory, be accomplished for this to be a viable alternative.

[215] I do not accept that an alternative to avoid selling the building is the owners agreeing on a plan to rehabilitate it. In the absence of a plan to address this seriously deteriorating building, I conclude that there would be significant confusion and uncertainty if this winding-up and sale is not approved.

Disposition

[216] The application to set aside the appointment petition is dismissed.

[217] I confirm the winding-up resolution and make the orders sought in the confirmation petition.

"Matthews J."