# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *One West Holdings Ltd. v. The Owners, Strata Plan LMS2995,* 2019 BCSC 707

Date: 20190507
Docket: S110378
Registry: Vancouver

Between:

**One West Holdings Ltd. and 669268 B.C. Ltd.**

Plaintiffs

And:

**The Owners, Strata Plan LMS2995**

Defendant

And:

**One West Holdings Ltd.**

Defendant by Counterclaim

Before: The Honourable Mr. Justice Skolrood

## Reasons for Judgment

| | |
|---|---|
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| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>February 27 and 28, 2019 |
| Place and Date of Judgment: | Vancouver, B.C.<br>May 7, 2019 |

## Introduction

[1] These reasons deal with the first two of a series of interlocutory applications brought in an ongoing action between One West Holdings Ltd. ("One West") and The Owners, Strata Plan LMS2995 (the "Strata Corporation"), involving a strata development located in downtown Vancouver (the "Development").

[2] In the first application, One West seeks document production from individual owners (the "Owners") of strata lots in the Development. In the second application, the Strata Corporation seeks leave to file a further amended response to civil claim.

## Background

[3] The background facts are relatively straightforward. Given the interlocutory nature of these applications, I will set out the background in a summary fashion and will, as much as possible, avoid making any findings of fact.

[4] One West, formerly known as Concord Pacific Group Inc. ("CPGI"), was the developer of the Development, which consists of 530 residential strata lots and 5 commercial strata lots.

[5] The other named plaintiff, 669268 B.C. Ltd. ("669 Ltd."), owns two of the commercial strata lots, out of which it operates a restaurant.

[6] The Development was built in the 1990's. The strata plan, which created the Strata Corporation, was filed in the Land Title Office on October 31, 1997.

[7] The Development includes approximately 40 commercial parking stalls and associated drive aisles (the "Commercial Parking Stalls") that are located on the designated common property of the Development. The central issue in this action is which of One West and the Strata Corporation has the rights to possess, control and profit from the Commercial Parking Stalls.

[8] This issue turns on the validity of a lease structure put in place by CPGI prior to the deposit of the strata plan pursuant to which CPGI purported to retain control over all of the parking stalls and storage lockers in the Development, including the

Commercial Parking Stalls. One West submits that this structure is common to many similar strata developments.

[9] Stated briefly, the lease structure worked as follows:

a) Pacific Place Holdings Ltd. (“PPHL”) was the registered owner of the land on which the Development was located, acting as a bare legal trustee for CPGI. On October 29, 1997, PPHL entered into an Option to Lease with CPGI. The Option to Lease was registered in the Land Title Office on October 30, 1997;

b) Also on October 30, 1997, CPGI exercised the Option to Lease and PPHL and CPGI entered into a Parking Lease, with PPHL as landlord and CPGI as tenant. Under the Parking Lease, CPGI became entitled to exclusive possession of the area of the Development in which all parking stalls, including the Commercial Parking Stalls, and storage lockers were located;

c) On October 31, 1997, the strata plan was filed, creating the 530 residential strata lots, the five commercial strata lots, and the common property which included all of the parking stalls. According to One West (which, again, was formerly CPGI), the common property was burdened with the Option to Lease and the Parking Lease;

d) Thereafter, as individual strata lots were sold, CPGI made partial assignments of its rights as tenant under the Parking Lease to purchasers of the strata lots. Thus each purchaser acquired rights to one or more parking stalls by way of a partial lease assignment from CPGI; and

e) On November 13, 1997, CPGI assigned its interest as tenant in the 106 visitor parking stalls to the Strata Corporation. However, CPGI at no time assigned or transferred its rights to the Commercial Parking Stalls under the Parking Lease, although it did enter into a sub-lease with 669 Ltd. dated June 1, 2003, for those stalls. The Commercial Parking Stalls were

> operated by a commercial parking lot operator for the benefit of CPGI and 669 Ltd.

[10] One West alleges that details of the Option to Lease and the Parking Lease were set out in disclosure statements filed with the Superintendent of Real Estate and which were provided to all original purchasers of strata lots in the Development who were resident in BC. A large number of strata lots were sold internationally, mostly in Hong Kong and Taiwan. According to One West, those purchasers were not required to and did not receive disclosure statements, however they did receive a detailed information package which included a description of the Option to Lease and the Parking Lease.

[11] On January 21, 2005, the Strata Corporation seized control of the Commercial Parking Stalls and installed its own commercial parking lot operator. Since that time, the Strata Corporation has operated the Commercial Parking Stalls as a commercial parking lot and has retained all of the revenues generated therefrom.

[12] In this action, One West seeks declarations as to the validity of the Parking Lease and claims damages for what it characterizes as the Strata Corporation's wrongful seizure of the Commercial Parking Stalls.

[13] In response, the Strata Corporation alleges that the Option to Lease and the Parking Lease are illegal and invalid. It submits that the Parking Lease structure implemented by CPGI was in breach of the *Condominium Act*, R.S.B.C. 1979, c. 61, the governing statute at the time (the *Condominium Act* was subsequently replaced by the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*]). The Strata Corporation further alleges that the Option to Lease and the Parking Lease were entered into in breach of the fiduciary duty owed by CPGI, as developer, to future purchasers and owners.

## **One West's Document Production Application**

[14] I will deal first with One West's application for further document production.

[15] To date, the lists of documents that have been produced are:

a) April 3, 2012 – One West (47 documents);

b) May 8, 2012 – Strata Corporation (21 documents);

c) December 17, 2012 – Strata Corporation (29 documents);

d) January 31, 2013 – Strata Corporation (5 documents);

e) May 3, 2013 – Strata Corporation (86 documents);

f) May 23, 2018 – One West (620 documents);

g) July 24, 2018 – One West (45 documents);

h) July 27, 2018 – Strata Corporation (1130 documents);

i) September 14, 2018 – One West (540 documents);

j) September 29, 2018 – One West (6 documents);

k) October 5, 2018 – One West (12 documents); and

l) February 15, 2019 – One West (557 documents).

[16] Additionally, on February 15, 2019, One West delivered a further amended list of documents, totalling more than 25,000 pages, which contained the bulk of the contents from its solicitors' transaction files for all 530 residential strata lots.

[17] One West submits that the Strata Corporation has so far failed to meet its document production obligations. The main point of contention concerns the documents of the Owners of the strata lots, including both the original and subsequent purchasers. One West takes the position that these documents are relevant by virtue of the Strata Corporation's amended response to civil claim in which it denies that original purchasers of strata lots who were resident in BC

received disclosure statements and that original purchasers outside of BC received information packages, as described in paragraph 10 above.

[18] It is apparent that One West wishes to confirm that each of the Owners received the relevant disclosure documents. To date, it has made two attempts to do so. In February 2018, One West proposed that this issue be addressed by way of production of sample parking stall and locker assignments and an admission that each original owner received and signed such an assignment. The Strata Corporation did not respond to this proposal. Then, in September and October 2018, One West sought admissions of authenticity from the Strata Corporation with respect to 529 originally signed offers for purchase and agreements for sale and 500 parking lot and locker assignment documents. These documents were located in the transaction closing files of One West's solicitors. The Strata Corporation refused to admit to the authenticity of any of the documents.

[19] For its part, the Strata Corporation does not challenge the relevance of any of the Owners' documents, but says that they are not within its possession and control. It submits that it has been working diligently to produce documents and that One West has been equally if not more dilatory in terms of its production.

[20] The Strata Corporation has filed evidence of its efforts to obtain documents from the Owners, including correspondence sent to Owners asking for documents in their possession. According to the Strata Corporation, these efforts have resulted in it obtaining some documents from a total of 21 Owners, which it is in the process of listing.

[21] One West does not accept this approach, hence its application. It advances two bases for requiring production of individual Owners' documents, both of which it alleges flow from a demand for production issued to the Strata Corporation. First, One West submits that the Strata Corporation itself has no interest in the common property of the Development, including the Commercial Parking Stalls, and that it is merely the representative of the Owners who are the "true parties" to the litigation.

As the “true parties”, the Owners are obligated to produce documents in accordance with the *Supreme Court Civil Rules*.

[22] Second, and in the alternative, One West submits that even if the Owners are not parties to the action, the court has jurisdiction under R. 7-1(18) to order production of documents in the possession or control of a third party, and, furthermore, that One West can serve its demand for production on the Owners through the Strata Corporation, without the need to individually serve each Owner.

[23] One West’s application is novel in the sense that I was not referred to any case law in this jurisdiction in which these issues have been considered.

**Are the Owners a Party for the Purposes of Document Disclosure?**

[24] With respect to its first argument, One West succinctly summarizes its position at paragraph 110 of its written submission:

a) The individual Owners are the true parties in interest in this action and counterclaim;

b) The Strata Corporation, which has no interest in the common property that is the subject of this litigation, is on the record as representative of the Owners;

c) It follows that each of the Owners is a “party of record”; and accordingly

d) All documents in the possession and control of the individual Owners are producible.

[25] Point (b) is not in dispute. Section 66 of the *SPA* vests direct ownership of the common property and common assets of a strata corporation in the owners in proportion to their respective unit entitlements: *Hamilton v. Ball*, 2006 BCCA 243 at para. 3. Moreover, ss. 163(1) and 171(1) provide that a strata corporation may be sued, and may sue, “as representative of” the owners, with respect to matters relating to the common property or common assets, and pursuant to s. 166, a

judgment against the strata corporation is a judgment against all the owners. Thus, the Strata Corporation stands in a representative capacity *vis-à-vis* the Owners.

[26] In *The Owners, Strata Plan LMS 888 v. The City of Coquitlam*, 2003 BCSC 941, Mr. Justice Cohen considered the status and role of a strata corporation in litigation. The issue before him was whether the failure of the strata corporation to obtain a special resolution and the written consent of the owners, as required under ss. 171 and 172 of the *SPA*, before commencing an action to recover certain remediation costs, was fatal to such an action. In finding that it was, Cohen J. said at paras. 29-30:

> [29] I disagree with the plaintiff's position that the court should override the plain meaning of the words in ss. 171 and 172 by deleting from those sections an express and mandatory prerequisite to commencement of an action. The wording in ss. 171 and 172 does not state that a strata corporation may sue on behalf of the owners and on its own behalf; the wording is clearly restrictive, providing that a strata corporation may sue as representative of all owners (s. 171) or that a strata corporation may sue on behalf of one or more owners (s. 172). In the instant case, the plaintiff's claims against the Polygon Defendants sound mainly in negligence, claims that could not be made by the plaintiff independent of ss. 171 and 172. The plaintiff is simply the vehicle by which the Legislature has intended that a representative action of this kind may be brought where the owners by 3/4 vote have approved that course of action and have, in effect, agreed that all owners will be bound by or share in any judgment and contribute *pro rata* to the costs of the action.
>
> [30] The plaintiff is not a separate entity that will share in the award or contribute independently to the costs of the action as a true representative plaintiff would in a representative action brought pursuant to the common law or under Supreme Court Rule 5(11) which governs representative proceedings. In my opinion, this action is, therefore, purely a statutory representative action that gives the plaintiff the capacity to sue or a right of action, which it would not otherwise have. It is in this respect, in my opinion, that ss. 171 and 172 are substantive, rather than purely procedural.

[27] One West's position is that the effect of ss. 163, 166, and 171 is that the "true parties in interest" are the Owners, that the Strata Corporation is merely the Owners' representative without any standing in its own right, and that having "sued and been sued through their statutory representative, the [O]wners are parties to the action."

[28] One West also relies on the decision of Madam Justice Martin, as she then was, in *Condominium Plan No. 0020701 v. Investplan Properties Inc*., 2007 ABQB

774 [*Investplan*]. There, the plaintiff condominium corporation sued a number of defendants in respect of issues concerning the common property of the strata development. The action was brought under Alberta's *Condominium Property Act*, R.S.A. 2000, c. C-22, and was certified as a class proceeding with all purchasers of units in the strata development as members of the class. One of the defendants sought an order that the individual owners produce documents from their own solicitors' files concerning the purchase of their units. Justice Martin found that the documents in issue were relevant and, at para. 13, held that "the documents are within the power of or possession of the relevant plaintiffs and are therefore producible."

[29] Similarly, One West argues that the Owners are the "relevant plaintiffs", and accordingly are obligated to disclose documents under R. 7-1.

[30] I do not agree with One West's position.

[31] Document discovery in civil actions is governed by R. 7-1 of the *Rules*. Pursuant to R. 7-1(1) and (15), the obligation to list and produce documents rests with each "party of record" :

> ***List of documents***
>
> (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
>
> (a) prepare a list of documents… that lists
>
> (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
>
> (ii) all other documents to which the party intends to refer at trial, and
>
> (b) serve the list on all parties of record.
>
> …
>
> ***Inspection of documents***
>
> (15) A party who has served a list of documents on any other party must allow the other party to inspect and copy… the listed documents except those documents that the listing party objects to producing.

[32] The term “party of record” is defined in R. 1-1 as follows:

> “party of record”, in relation to a proceeding, means a person who has filed a pleading, petition or response to petition in the proceeding…

[33] Under this definition, none of the Owners are parties of record, as none have filed a pleading, petition or response to petition. Any such filings in this action were made by the Strata Corporation, which has the same powers as a natural person: *SPA* s. 2(2). To consider a filing made by the Strata Corporation as having been made by the Owners themselves would defeat the *SPA*’s creation of a separate legal entity that is expressly permitted to conduct litigation on behalf of the Owners.

[34] Accepting One West’s position would make strata litigation unwieldy. It would mean that whenever a strata corporation was sued pursuant to s.163, or commenced litigation pursuant to s.171, every single owner (often numbering in the hundreds) would immediately be subject to the obligations imposed by R. 7-1, without any further application by the opposing party, and possibly without any further notice should the strata corporation be unable to contact them. I agree with the Strata Corporation that One West’s position, if accepted, could expose owners to potential sanctions for failing to comply with an order that they were never aware of. Instead, in my view, the appropriate mechanism for discovering documents outside of a strata corporation’s possession or control, including documents held by individual owners, is R. 7-1(18).

[35] *Investplan* does not assist One West. In that case, Justice Martin was dealing with a different legislative scheme, Alberta’s *Condominium Property Act*. Unlike the *SPA*, the *Condominium Property Act* does not on its face establish the strata corporation as a separate legal entity from the owners. As such, while the action was brought in the name of the strata corporation, Justice Martin again referred to the owners as the “relevant plaintiffs”. That is not the case here where the Strata Corporation is a distinct legal entity from the Owners and where, again, it is the sole party of record. I also note that there is minimal analysis in *Investplan* that illustrates the path by which Justice Martin arrived at the production order.

[36] One West also points to R. 7-2(6), which provides that a "person for whose immediate benefit an action is brought or defended may be examined for discovery". It submits that the Owners fall within the definition of parties for whom the current action is being defended.

[37] R. 7-2(6) (then R. 27(8)) was considered by the Court of Appeal in the context of strata litigation in *Owners, Strata Plan No. VR368 v. Marathon Realty Limited* (1982), 41 B.C.L.R. 155 (C.A.). In that case, the plaintiff strata corporation brought an action against various defendants related to issues concerning the strata development. The action was brought under the *Condominium Act* (the predecessor to the *SPA*) on behalf of the owners.

[38] The defendant Marathon Realty took out appointments to examine 16 owners for discovery. On an application by the plaintiff, the chambers judge held that the defendant could only examine an officer of the strata corporation and not any of the owners. The Court of Appeal disagreed. At 160, Justice Seaton said:

> This action on behalf of these owners is, at least in part, an action for the benefit of the individual owners: the immediate benefit of the owners. It follows, in my view, that the appellant is entitled to examine the individual owners on whose behalf the corporation is suing. I do not find that result offensive.
>
> It is those individual owners, who entered into their individual contracts, whose individual cause of action is being put forward. Only through discovering those individuals can the appellant properly defend itself.

[39] One West submits that similarly, in this case, it is the individual Owners' stake in the common property that is in issue.

[40] However, *Marathon Realty* is grounded in the specific rule (then R. 27(8), now R. 7-2(6)) which expressly authorizes examination for discovery of persons "for whose immediate benefit an action is brought or defended". Rule 7-1, dealing with document discovery, contains no similar provision. In other words, there is no rule requiring discovery of documents in the control or possession of interested parties or parties for whose benefit the action is brought or defended.

[41] Finally, I do not accept that s. 166(1) has the effect of making a document production order issued against the Strata Corporation binding on the Owners. The entirety of s. 166 reads as follows:

> **Owner's liability for judgment against strata corporation**
>
> **166** (1) A judgment against the strata corporation is a judgment against all the owners.
>
> (2) A strata lot's share of a judgment against the strata corporation is calculated in accordance with section 99 (2) or 100 (1) as if the amount of the judgment were a contribution to the operating fund and contingency reserve fund, and an owner's liability is limited to that proportionate share of the judgment.
>
> (3) Other than as set out in this section, an owner has no personal liability, in his or her capacity as an owner, for loss or damage arising from any of the following:
>
> > (a) the management and maintenance of the common property and common assets by the strata corporation;
> >
> > (b) the actions or omissions of the council or strata corporation;
> >
> > (c) any contracts made or debts or liabilities incurred by or on behalf of the strata corporation.

[42] Section 1 of the *SRA* defines "judgment" as "a judgment of a court, and includes costs awarded in respect of the judgment".

[43] In my view, the function of s. 166 is to allocate monetary judgments against the strata corporation to the individual owners, and should not be read as intending to alter document production responsibilities. As I have explained, imposing document production obligations on individual owners in the manner proposed by One West could have significant adverse consequences on strata litigation. Had the Legislature intended to impose those obligations, it would have done so expressly.

[44] For these reasons, I do not accept One West's position that the Owners are obliged to produce documents within their control or possession.

**Is One West Entitled to Document Production Pursuant to Rule 7-1(18)?**

[45] In the alternative, One West submits that if the Owners are not parties to the action, they can nonetheless be compelled to produce documents under R. 7-1(18), which provides:

> If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
>
> (a) production, inspection and copying of the document;
>
> (b) preparation of a certified copy that may be used instead of the original.

[46] One West submits that it has served the Strata Corporation with its demand for documents from the Owners, as well as this application seeking an order for such production. It argues that by virtue of s. 163 of the *SPA* (which, as noted, provides that a strata corporation may be sued as representative of the owners), this service also constitutes good and proper service on the Owners.

[47] One West's argument is that serving the application on the Strata Corporation is the equivalent of suing the Corporation as representative of the Owners within the meaning of s. 163. It points to the definitions of "sue" and "suit" in s. 1 of the *SPA:*

> "sue" means the act of bringing any kind of court proceeding;
>
> "suit" means any kind of court proceeding.

[48] The *SPA* does not define "proceeding". However, proceeding is defined under R.1-1:

> "proceeding" means an action, a petition proceeding and a requisition proceeding and includes any other suit, cause, matter, stated case under Rule 18-2 or appeal.

[49] One West submits that while an application is not an action, petition or a requisition proceeding, it does fall within the broader meaning of the terms "cause" or "matter" which appear in the definition of proceeding.

[50] In support of this proposition, One West cites *Pacific Savings and Mortgage Corporation v. Can-Corp Development Ltd.* (1982), 37 B.C.L.R. 42 (C.A.) [*Pacific Savings*]. In *Pacific Savings*, the Court of Appeal allowed an appeal from a decision of a chambers judge refusing to reopen a final order of foreclosure by way of a notice of motion filed in the foreclosure proceeding. Along with filing the notice of motion, the applicant had filed a *lis pendens* in the Land Title Office.

[51] The question of whether the applicant could proceed in this manner turned in part on the interpretation of s. 213 of the *Land Title Act*, R.S.B.C. 1979, c. 219, which authorized the filing of a *lis pendens* alongside the commencement of a proceeding. That section also required the registrar to attach a “copy of the originating process” to the certificate of *lis pendens*.

[52] The issue for the court was whether the applicant’s notice of motion was an originating process. Speaking for the Court, Justice Anderson said at 59-60:

> Counsel for the mortgagees contends that the words "originating process" referred to in s. 213 of the Act mean the commencement of a new action and the issue of a writ of summons. He submits that a motion in the foreclosure proceedings for an order to reopen them is not an "originating process".
>
> "Originating process", as defined in the Supreme Court Rules [R. 1(8)], means "a writ of summons, petition, third-party notice, or any document which commences a proceeding or adds a new party to a proceeding".
>
> "Proceeding" is defined in the Supreme Court Rules as "an action, suit, cause, matter, appeal or originating application".
>
> In my opinion, the notice of motion filed by the mortgagors in the court registry and attached to the certificate of lis pendens was a document commencing a "cause or matter".
>
> The word "cause" has been defined as a "matter or other similar proceeding competently brought before and litigated in a particular Court": see *Green v. Penzance (Lord)* (1881), 6 App. Cas. 657, 671, 51 L.J.Q.B. 25 at 41 (H.L.).
>
> The word "matter" has been defined as covering proceedings not commenced by action. For example, the phrase "cause or matter" includes the voluntary winding up of a company: see *Re Mysore West Gold Mining Co.* (1889), 42 Ch. D. 535.
>
> As the words "cause or matter" have not been defined in our rules, I have no hesitation in holding that they include the commencement of a proceeding to reopen a mortgage by way of motion. I point out, moreover, that the sensible course to follow is not to start a new action for redemption but to file a motion in the foreclosure action. In determining the equities, the court must, in

> exercising its discretion, have regard to the conduct of the parties in the foreclosure proceedings. To commence a new action would create needless expense and confusion.
>
> [Emphasis added.]

[53] One West submits that *Pacific Savings* is dispositive of the point that the provision in s. 163 of the *SPA* authorizing the Strata Corporation to be sued as a representative of the owners includes service of an application on the Strata Corporation in that representative capacity.

[54] With respect, I do not agree. The key finding of the Court of Appeal in *Pacific Savings* is found at 60 where Anderson J.A. held that the terms "cause or matter… include the commencement of a proceeding to reopen a mortgage by way of motion" (emphasis added).

[55] *Pacific Savings* does not stand for the proposition that a notice of motion will in all circumstances constitute a proceeding. Rather, it acknowledges that a notice of motion may do so if the application raises a new matter or cause: *Bryfogle v. School District No. 49 et al*, 2007 BCSC 457 at para. 42, aff'd 2009 BCCA 256; *Pearlman v. Vancouver Police Department and Constable Ben Stevens #2177*, 2012 BCSC 1179 at para. 25.

[56] Here, One West's application to compel further document production does not commence a new matter or cause. Rather, it is an interlocutory application brought in an existing proceeding. As such, it does not fall within the ambit of s. 163.

[57] I would add that where a strata corporation intends to sue in its representative capacity on behalf of the owners (under s. 171), certain steps must be taken, including obtaining a special resolution of the owners (s. 171(2)). It would lead to an absurd result if were held that an interlocutory application equates to a lawsuit under s. 163 such that the strata corporation would have to fulfill the requirement of s. 171(2) each time it intended to file such an application.

[58] It follows that I do not accept One West's position that service on the Strata Corporation constitutes service on the Owners.

[59] As a further alternative, One West submits that the court has the discretion under R. 4-3(1) to dispense with the requirement for personal service of each owner. Rule 4-3(1) provides for personal service of court documents “unless the court otherwise orders”.

[60] One West points to a similar provision in R. 16-1(3), which requires personal service of a petition on all persons whose interests may be affected by the order sought, again unless the court otherwise orders. Rule 16-1(3) was considered in *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2016 BCSC 898. There, a number of trucking companies sought to challenge regulations that purported to retroactively impose minimum rates of payment for truck drivers who haul containers in and out of Port Metro Vancouver. The petitioners sought directions from the court as to whether they were obliged to give notice of the petition to each individual truck driver whose interests might be affected and, if so, the manner of giving such notice.

[61] Mr. Justice G.P. Weatherill acknowledged that the interests of the individual truckers may be affected by the outcome of the petition, but held that individual service of the truckers was unnecessary as the cost of doing so would be prohibitive. Instead, he held that notice could be provided to the truckers through the union to which many belonged and through a trucking association. However, he also required that the petitioners bring an application for substitutional service of the petition materials on the truckers.

[62] One West argues by analogy, that service of its application on the Strata Corporation should be deemed to be sufficient notice to the owners.

[63] In my view, there is a distinction between providing notice of a proceeding to parties whose interests may be affected and serving a party with a court process requiring that party to take certain actions on pain of sanction if they fail to do so. In a petition proceeding, interested parties who are given notice have the option of filing a response and joining the proceeding as a party. They also have the option of not doing so. In contrast, One West seeks to impose a positive obligation on the

Owners to produce documents. Failure of an Owner to comply opens that person up to the range of sanctions available for breach of a court order. These are fundamentally different situations.

[64] This brings me back to R. 7-1(18), dealing with documents in the possession of non-parties. That rule requires an application, on notice to the non-party, brought under R. 8-1. Rule 8-1, which deals with applications generally, requires an applicant to serve its application materials on the parties of record and on "every other person…who may be affected by the orders sought": R. 8-1(7).

[65] The combined effect in this case, in terms of One West's application to compel production of documents in the possession and control of the Owners, is that the application must be brought under R. 7-1(18) and must be served on each Owner pursuant to R. 8-1(7).

[66] Paragraphs 1-3 of One West's notice of application filed February 13, 2019, are therefore dismissed.

**Should the Strata Corporation Be Ordered to Verify its Lists of Documents by Affidavit?**

[67] The second aspect of One West's document production application (set out in paragraph 4 of the notice of application) seeks an order that the Strata Corporation verify its lists of documents by affidavit. One West alleges that a verification affidavit is warranted because the Strata Corporation has both failed to include relevant documents in its lists of documents and has displayed a "dilatory and casual approach" to document disclosure: *Gardner v. Viridis Energy Inc.*, 2012 BCSC 1816 at para. 52.

[68] I am not satisfied that an affidavit verifying the Strata Corporation's documents is warranted. It is apparent from the chronology provided by One West that disclosure is ongoing, including the production of a vast quantity of documents by One West as recently as February 15, 2019.

[69] Moreover, One West's principal complaint about the Strata Corporation's document production relates to the Owners' documents, which I have found are not producible through the Strata Corporation.

[70] Therefore, paragraph 4 of One West's notice of application filed February 13, 2019, is dismissed.

[71] Before leaving this issue, it is worth making the point that One West's application was borne out of some legitimate frustration concerning attempts to deal with the Owners' documents. As set out at paragraph 18 above, One West has proposed using a sample set of documents by agreement and has also issued notices to admit, however, for reasons that were not well explained, these have not resulted in any form of agreement concerning the Owners' documents.

[72] While One West's concerns are not sufficient to overcome the technical requirements of the *Rules* concerning document production, the parties are encouraged to work together to devise a system of document production and management to ensure that the trial record is not overborne by thousands of pages of duplicate and largely standard form documents.

**Strata Corporation's Amendment Application**

[73] The Strata Corporation filed a notice of application dated February 14, 2019, in which it seeks to file a further amended response to amended civil claim ("FARACC"). The notice of application also sought additional relief largely relating to examinations for discovery and document production. However, given time constraints, the parties only addressed the pleading amendment application.

[74] Generally speaking, the Strata Corporation seeks to file a FARACC in order to further clarify certain aspects of its defence and to provide particulars of its pleadings as requested by One West.

[75] The principles governing pleadings are well established. Rules 3-1 and 3-3, which deal with notices of civil claim and responses to civil claim, respectively,

require the pleadings to set out concise statements of the material facts. For a very helpful and thorough discussion of these rules and the governing principles, see *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 16-26.

[76] The test for granting amendments is also well established. The court will take a generous approach and will permit amendments as necessary to determine the real question in issue between the parties: *Sommer v. Coast Capital Savings Credit Union*, 2013 BCSC 881 at para. 19. The court will not sanction useless amendments, nor will it permit amendments that offend the factors (now set out in R. 9-5) dealing with applications to strike pleadings: *Victoria Grey Metro Trust Company v. Fort Gary Trust Company* (1982), 30 B.C.L.R. (2d) 45 at 46-47 (S.C.); *Virk v. Brar*, 2011 BCSC 301 at para. 6.

[77] One West consented to many of the proposed amendments. I will address the disputed amendments in turn, working off the numbering in the draft FARACC:

**a) Part 1, Division 2, Paragraph 14**

The Strata Corporation seeks to add a paragraph alleging that the majority of foreign based purchasers were not fluent in English and that the contracts of purchase and sale and the information packages were provided in English only. One West objects on the basis that the facts alleged are not material to any pleaded defence. For example, there is no plea of *non est factum*. However, the Strata Corporation does plead that there was inadequate disclosure to purchasers about the Option to Lease and the Parking Lease and I am satisfied that this allegation concerning the language of the disclosure information is material to that plea;

**b) Part 1, Division 2, Paragraph 16**

One West objects to the reference to “these misrepresentations or omissions” in the disclosure materials. The Strata Corporation has agreed to remove the reference to “misrepresentations”. In terms of “omissions”, I agree with One West that these need to be particularized. Thus, the

addition of the reference to omissions will only be permitted if particulars of the alleged omissions are included. If the Strata Corporation wishes to maintain the reference to the alleged misrepresentations, they must similarly be particularized;

**c) Part 1, Division 3, Paragraphs 2, 5-9**

One West objects to the reference to Concord Developments in paragraph 2, the reference to and description of the "Concord Group of Companies" in paragraph 5 and the history of the property set out in paragraphs 7-9. One West submits that these are not material facts and that reference to the broader "Concord Group" is unnecessary because the particular Concord entities involved are known. The Strata Corporation submits that the involvement of related Concord entities, particularly for the sale of strata lots to foreign purchasers, is directly relevant to its defences of inadequate disclosure and breach of fiduciary duty. In my view, many of the objected to facts are narrative in nature and are related to the Strata Corporation's theory of its case. I am prepared to let these amendments stand. I will add that there are a number of additional paragraphs in which One West objects to the inclusion of Concord Developments. At this preliminary stage, I am not able to determine whether those references are appropriate, but I am similarly not prepared to strike them from the pleading. I do not propose to address the additional paragraphs containing this reference any further;

**d) Part 1, Division 3, Paragraph 25**

This paragraph alleges that the various entities used to sell the strata lots internationally were part of the "Concord Group". One West objects on the basis that the facts alleged are not material to the defences pled by the Strata Corporation, but I agree with the Strata Corporation that the mechanism of sale through the foreign entities is relevant to its position and that the facts pled are material;

**e) Part 1, Division 3, Paragraphs 32-33**

Paragraph 32 alleges that interpreters provided for the foreign purchasers did not fully and accurately interpret the contract and disclosure documents. Paragraph 33 alleges that purchasers were directed to use solicitors selected by the Concord Group. I understand that the Strata Corporation has agreed to withdraw paragraph 33. If I am mistaken, I would not permit this amendment as it is not material to any defence pled by the Strata Corporation. Paragraph 32, however, is material in that it relates to the Strata Corporation's allegation of non or inadequate disclosure and it ties into the allegation set out in paragraph 14 that I have permitted;

**f) Part 3, Paragraph 10**

This paragraph alleges that the developer(s) failed to meet their disclosure obligations under the *Real Estate Act*, S.B.C. 2004, c. 42. The Strata Corporation submits that this is an important part of the factual matrix. One West objects on the basis that the amendment should not be permitted given that the Strata Corporation is not seeking any remedy under the *Real Estate Act* (as acknowledged by the Strata Corporation). I agree with One West that this paragraph does not plead material facts and thus the amendment is not permitted; and

**g) Part 3, Paragraph 14**

This paragraph alleges a breach of the clean hands doctrine and pleads that One West should be denied equitable relief. One West objects on the basis that the alleged breaches of the doctrine are not sufficiently pleaded. I disagree. The basis for the Strata Corporation's claim of breach of fiduciary duty is well set out in the FARACC and provides an adequate foundation for this plea.

## Conclusion

[78] One West's document production application is dismissed. The Strata Corporation is granted leave to file a FARACC in accordance with the directions set out above.

[79] Costs of both applications will be in the cause.

"Skolrood J."