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The Case of the Court Ordered Special Levy

Publication / Date: The CHOA Journal- Summer 2015
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Recent changes to the *Strata Property Act* (the "SPA") now permit a strata corporation to apply to Court in limited circumstances for approval of a defeated special levy resolution. What a Court will require before granting such approval was recently set out in the case of *The Owners, Strata Plan VIS 114 v. John Doe*[1].

Effective December 12, 2013, section 173 of the SPA was amended to permit the Supreme Court of British Columbia to order that a special levy resolution be approved notwithstanding that it had not obtained approval by means of a 3/4 vote provided that:

- at least 51% of the owners present at the meeting had voted in favour of the resolution;
- the levy is for maintenance or repair of common property or common assets;
- the maintenance or repairs are necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise; and
- the application is made within 90 days of the date of the meeting at which the vote was held.

In *VIS 114*, the Court was required to consider whether the strata corporation had satisfied the requirements that the repair and maintenance was necessary to ensure safety or prevent significant loss or damage whether physical or otherwise.

VIS 114 experienced water ingress problems beginning in the mid 1980s. The first building envelope condition assessment ("BECA") was prepared in 2007. The BECA recommended the replacement of windows, the installation of new double glazed balcony sliding doors on the first level and installation of a rain screen system to the exterior walls. The estimated probable cost was approximately $5.2 million.

Because the south and east walls were more directly exposed to the wind and rain, work was initiated on the south facing wall and a section of the east facing wall in 2008. Window caulking and spot stucco patching was conducted on the rest of the building envelope.

In 2011, Morrison Hershfield ("MH") conducted a building envelope visual review and noted that the unremediated walls were approaching the end of their service life and that complete rehabilitation should be considered within the next five years. Additionally, MH noted that the single pane window assemblies were approaching the end of their usable service life.

On March 1, 2013, the strata corporation received a depreciation report prepared by MH. The report stated that the east wall remediation should be considered in the next year and was more urgently required than the other walls. Rehabilitation of the north and west elevations should be considered within the next five years.

In 2013, the owners approved a special levy to complete the remediation of the east wall. Thus, by the end of 2013, the south and east walls had been fully remediated.

At the 2014 annual general meeting, the owners were required to vote on a resolution to raise approximately $1.7 million to remediate the north and west walls.

[1] 2015 BCSC 13

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The resolution was approved by 63% of the vote at the meeting. Thus, because the resolution did not achieve a 3/4 vote, the resolution failed. The strata corporation then applied to Court for approval pursuant to section 173 of the SPA.

A group of owners opposed the strata corporation's application to have the special levy resolution approved. In considering the matter, the Judge held that the strata corporation had the onus of establishing that the repair was necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise on the balance of probabilities.

To determine the reasonableness of the strata corporation's actions, the Judge noted that the Court will typically consider the professional advice of the engineers regarding the timing, extent and method of repairs.

In opposing the application, the owners argued that a court should exercise its discretion to order that a failed special levy resolution be approved only where the engineering evidence clearly establishes that the repairs are <u>immediately</u> necessary to ensure safety or prevent significant loss or damage. Thus, the Judge was required to determine whether the discretion granted to the Court should only be exercised when the need for repair was immediate or whether such discretion should be exercised when the work was only just necessary.

The owners compared the wording of section 173(2) with section 98(3) of the SPA. Section 98(3) of the SPA permits unapproved expenditures where an "immediate expenditure is necessary to ensure safety or prevent significant loss or damage whether physical or otherwise". The owners also referenced section 98(5) of the SPA which limited the unapproved expenditures to only the minimum amount needed to ensure safety or prevent significant loss or damage.

In addition to arguing that the resolution should be approved only where the repair must occur immediately, the owners argued that only the minimum amount needed to ensure safety or prevent significant loss or damage should be authorized. The owners argued that a full remediation of the two walls at this time was not necessary and that significant loss or damage could be prevented by the caulking and maintenance program until at least 2017.

The Judge refused to create an analogy between sections 98 and 173 of the SPA. The Judge noted that section 98 of the SPA references "unapproved expenditures" whereas section 173 of the SPA relates to expenditures that received approval by at least a majority of the owners at the meeting. Additionally, section 98 of the SPA was intended to address urgent situations and permit only a minimum expenditure whereas such limitations were not included in the language of section 173 of the SPA.

The Judge concluded that to satisfy the requirements of section 173 of the SPA, the strata corporation only needed to establish that the repairs and maintenance are necessary to ensure safety or prevent loss and damage.

The owners then argued that the work was not required at this time and that according to the engineering evidence, could wait until at least 2017 and possibly beyond that date. The Judge was then required to consider whether there was a timeframe in which the work must occur in order to be considered necessary.

The Judge considered the affidavit evidence of the engineer which provided that water ingress was occurring and that the exterior cladding system had failed. The engineer stated that the cladding had passed its useful service life and that repairs to the cladding were becoming less effective. The affidavit noted that MH did not support ongoing interim maintenance due to the lack of durability of the repairs.

Thus, although the engineering reports had concluded that the estimated remaining life may be up to five years from the date of the report, the Judge accepted the additional affidavit evidence as establishing that the repairs were "necessary" from the perspective that they

were the only effective way to stop the water ingress problems. The Judge concluded that the strata corporation's decision to now proceed with the repairs was reasonable.

The Judge then considered whether the repair was necessary to ensure safety or prevent significant physical loss or damage.

The Judge reviewed evidence that certain owners on the north and west facing walls were experiencing extensive condensation and mould and that damage to the interior of the strata lots had occurred. The evidence also established that at least one owner had experienced health issues as a result of the mould.

The Judge also considered whether there was other loss or damage that should be considered. The Judge agreed with the strata corporation's arguments that the lack of repair has resulted in a loss of value of the strata lots, that the failure to carry out the repair at this time represented the potential waste of money spent on targeted repairs and that there was a likelihood of increased repair costs if the remediation was to take place in the future rather than at this time.

The owners opposing the application argued that the individuals suffering from condensation or leaking issues should deal with it on their own and take steps to reduce the amount of condensation within their strata lot. The Judge characterized the Respondent owners' response as attempting to minimize the issues. The Judge noted however that in at least one case the owner opposing the application was residing in a warm, dry and mould free unit.

The Judge found that there was ongoing physical loss or damage and that there will be future physical loss to the common property and property of owners arising from the failure to proceed with the remediation. The Judge also found that the failure to proceed with the remediation had resulted in risks to the safety of the residents. The Judge concluded that the remediation of the north and west walls was necessary to ensure the safety of the residents and prevent significant physical loss and damage.

Before making an order, the Judge noted that even if the strata corporation established that the repairs were necessary to ensure safety or prevent significant loss or damage, the Court may consider other factors in deciding whether it will exercise its discretion in approving the special levy resolution. The Judge then considered the financial ability of the owners to pay the special levy. The owners opposing the resolution presented evidence that some owners will find it difficult if not impossible to pay a further special levy of approximately $36,000 in 2015. Additionally, the owners argued that, based on the depreciation report, there were other expensive repairs such as roof membrane, elevators, heating and fire suppression systems on the horizon that would add to their financial burden. In response to such arguments, the Judge noted that "home ownership comes with a price" and that a home owner who ignores necessary repairs usually does so at their peril and will usually suffer the consequences at a later date.

Although the Judge acknowledged that the special levy under consideration will be significant and difficult for some owners, it was only one factor in the overall consideration. The Judge recognized that if an owner was unable to raise the funds, the strata lot may have to be sold. The Judge noted that no one owner's personal situation should dictate the result.

After considering all of the foregoing factors, the Judge ordered that the special levy resolution be approved and that the strata corporation proceed as if it had passed by a 3/4 vote.

Strata corporations should find the detailed analysis in this case helpful when evaluating their circumstances to determine the likelihood of success if a Court application is made to approve a defeated special levy resolution.