COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Owners of Strata Plan NW 2301 v. Owners of Strata Plan NW 2364,* 2025 BCCA 440

Date: 20251212
Dockets: CA50374; CA50378

Between:

The Owners, Strata Plan NW 2364

Appellant
(Respondent)

And

The Owners, Strata Plan NW 2301

Respondent
(Petitioner)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Fleming
The Honourable Justice MacNaughton

On appeal from: Orders of the Supreme Court of British Columbia, dated March 31, 2022 and December 12, 2024 (*The Owners, Strata Plan NW 2301 v. The Owners, Strata Plan NW 2364*, 2022 BCSC 527, 2024 BCSC 2467, Vancouver Docket S213810).

Counsel for the Appellant:	J.R. Shewfelt
Counsel for the Respondent:	E.J.S. Aitken S.R.R. Lusztig
Place and Date of Hearing:	Vancouver, British Columbia September 17, 2025
Place and Date of Judgment, with Written Reasons to Follow:	Vancouver, British Columbia September 17, 2025
Place and Date of Written Reasons:	Vancouver, British Columbia December 12, 2025

Written Reasons of the Court

Summary:

The parties are two strata corporations located side by side. Following the hearing of a petition, a judge found that the parties had entered a contract requiring them to share the costs of maintaining certain amenities used by owners in both strata corporations. The judge held that the appellant, who sought to terminate the arrangement, was required to pay its share of the costs. However, the judge declined to grant specific monetary relief, instead leaving it to the parties to determine the amounts owing and apply for more precise orders if necessary. The entered order did not include a term granting the parties liberty to apply for further orders. The appellant challenges the decision of a chambers judge to amend the entered order by adding a term granting the respondent liberty to apply in the extant proceeding for further remedial orders.

Held: Appeal dismissed. The chambers judge amended the entered order to reflect the manifest intention of the judge hearing the original petition. It is open to a judge of the Supreme Court to grant liberty to apply for further remedial orders that are consequential to the court's determination of liability.

Reasons for Judgment of the Court:

[1] On this appeal, the appellant challenged the decision of a chambers judge to amend an entered order. At the end of the hearing, we dismissed the appeal with reasons to follow. These are our reasons.

Background

[2] The parties are two strata corporations located side by side on Carrigan Court in Burnaby. Originally, the land was owned and developed as one property. As a condition of subdivision, and prior to the registration of two separate strata plans, the developer and the District of Burnaby agreed to a covenant (the "Covenant") under s. 215 of the *Land Title Act*, R.S.B.C. 1979, c. 219 (now s. 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250). Two terms of the Covenant are relevant to this appeal: (1) certain amenities are to be made available for use by owners in both strata corporations; and (2) the cost of maintaining those amenities is to be shared. The amenities consist of a racquetball court, squash court, lounge, exercise room, swimming pool and change rooms located on the respondent strata's land, and a tennis court and some ancillary facilities located on the appellant strata's land.

[3] The two stratas complied with the arrangement without issue for over 25 years. In March 2019, facing a significant assessment for repairs to the amenities on the respondent's property, the appellant gave notice that it was terminating the arrangement. The respondent then filed a petition to enforce the arrangement, seeking the following relief:

> 1. A Declaration that the s. 219 Covenant, originally filed pursuant to s. 215 of the *Land Title Act* on July 22, 1985 in the Land Title Office is a current, subsisting, and binding agreement on all the parties and subsequent successors in title, including the Owners, Strata Plan NW 2364. [the "Agreement"]
> 2. An Order that the Owners, Strata Plan NW 2364, as described in the Agreement, pay all the necessary costs, expenses, capital and repair costs required to keep the recreational facilities and parking facilities contemplated in the Agreement in good condition and available for use by all owners entitled to use the facilities.
> 3. An Order that the Owners, Strata Plan NW 2364 take whatever repair or structural work in hand to have the tennis courts operative, as set out in the Agreement within twelve months of the making of this order.
> 4. An Order that the Owners, Strata Plan NW 2364 pay the costs of the Petitioners at Scale B of the Supreme Court Civil Rules, Appendix B.

[4] The petition was heard by Justice Wilson on February 24, 2022. He concluded that the strata corporations could not enforce the Covenant because they were not parties to it. Instead, Justice Wilson found that the parties had entered into a post-incorporation contract on the same terms as the Covenant—a contract that could not be unilaterally terminated by either party. However, he was not prepared to grant monetary orders for the appellant's share of the costs of maintaining the amenities (the relief sought at paras. 2 and 3 of the petition), saying:

> [93] As to items two and three of the relief sought, the parties continue to be obligated to one another in accordance with their contract. I am not prepared to make any monetary orders based upon the evidence before me because I have no information about anticipated costs, nor is there any evidence as to what costs or expenses may be considered "necessary" in all of the circumstances. If more precise orders are required arising out of items two and three from the petition, a further application may be required.
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> [Emphasis added.]

[5] It is of significance to the appeal before us that Wilson J.'s order, as drafted by counsel and entered, did not include a term granting the parties liberty to apply for further orders.

[6] The appellant appealed the order, contending that Wilson J. erred in finding a binding contract between the two stratas. This Court dismissed the appeal on January 30, 2023. In August of that year the Supreme Court of Canada declined to hear a further appeal to that court.

[7] With the appeal process concluded, the respondent demanded that the appellant pay its share of expenses relating to the amenities. The appellant did not comply.

[8] In February 2024 the respondent sent an email to the appellant enclosing a draft notice of application seeking orders compelling the appellant to pay: (a) $388,024 for past expenses relating to the amenities; and (b) $228,759, representing a reasonable estimate of the expected and necessary costs for 2024 to maintain the recreational facilities in good condition. The appellant took the position that the application could not proceed because the original petition was spent and the court was *functus officio*.

[9] At that point, the respondent applied to amend Wilson J.'s order to include a term recognizing the right to apply for "more precise orders" as set out at para. 93 of Wilson J.'s reasons for judgment.

[10] In response, the appellant cross applied to add a term to Wilson J.'s order dismissing paras. 2 and 3 of the original petition, which sought orders compelling the appellant to pay its share for the upkeep of the amenities.

The Hearing Below

[11] The judge began by setting out the principles to be applied in determining whether an entered order may be amended, noting: (1) he had inherent jurisdiction to amend the entered order to reflect the manifest intention of the court; (2) the nature of the application was discretionary; (3) the ultimate issue was whether it is in

the interests of justice to correct the order; and (4) the application before him was not a rehearing on the merits but rather a determination of whether the order conformed with the reasons, which required him to step into the shoes of Wilson J.

[12] The judge then set out the position of the petitioner (the respondent on this appeal):

> [23] …. The petitioner submits that the manifest intention of Justice Wilson is clear in para. 93. The petitioner says that Justice Wilson's reasons for judgment did not substantively dispose of paras. 2–3 of Part 1 of the petition, which seek the granting of monetary orders flowing from the respondent's obligations as expressed in the covenant and subsequent agreement. Instead, Justice Wilson held that a further application may be required for more precise orders arising out of the items 2 and 3 from the petition.
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> [24] The petitioner submits that given the express references to the within petition preceding the word "application", it is evident that Justice Wilson contemplated a further application (and supplemental relief) within the existing petition as opposed to applications at large in a new proceeding.

[13] The judge then turned to the appellant's position, which rested on two premises. First, the appellant asserted that the respondent was not entitled to a "do over" of the petition—having failed to tender evidence as to the nature or amount of the costs of maintaining the amenities, they left Wilson J. with no option but to dismiss the monetary relief sought at paras. 2 and 3 of the petition. Second, the appellant contended that Wilson J.'s reference to a further application did not mean an application within the existing petition, but rather the filing of a second petition seeking payment—a process which would enable the appellant to rely on a limitation period defence.

[14] The judge did not accept either of the appellant's premises. He agreed with the respondent that Wilson J.'s intention was clearly expressed in para. 93 of his reasons: the parties were obligated to pay one another for the cost of maintaining the amenities. Since neither party put in evidence the costs that had been incurred or might be incurred based on estimates, the amounts owed could be decided on a subsequent application within the existing proceeding: at paras. 30–31.

[15] The judge also rejected the appellant's argument, grounded in *Brockman v. Valmont Industries Holland B.V.*, 2022 BCCA 80, that it is not open to a judge to

permit a party to come back with better or more evidence in support of the relief it seeks. On this point he said:

> [35] …. It often happens in this Court that a matter proceeds to judgment, and the judge at that point realizes that there is an absence of evidence on an issue that needs further clarification. In that circumstance, judges often allow for further evidence to be adduced. I note that in the petitioner's submissions, they point to a number of such cases where liberty was granted to adduce further evidence on issues not decided by the court.
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> [36] In this regard, I am aware of no authority that indicates that Justice Wilson exceeded his jurisdiction by allowing further evidence on the monetary relief as he did at para. 93 of his reasons. It follows that I do not accept the underlying premise of the respondent's submission. In my opinion, *Brockman* is distinguishable. In that case, the chambers judge purported to allow a hearing in stages on the issues of whether oppression existed.
>
> [Emphasis added.]

[16] The judge granted the respondent's application and dismissed the appellant's cross application. In accordance with the respondent's application, he ordered that Wilson J.'s order be amended to include the following term:

> The petitioner has liberty to apply in this proceeding for further orders arising out of paragraphs 2 and 3 of Part 1 of the petition.

On Appeal

[17] We begin by addressing the appellant's decision to file notices of appeal from both Wilson J.'s order as amended (a step requiring an application to extend the time for filing the appeal) and the order of the judge below varying that order. Only an appeal from the order amending Wilson J.'s order was necessary. If the appellant had succeeded on this appeal, the order adding a term to Wilson J.'s order granting liberty to apply would have been set aside and replaced with an order adding a term dismissing the applications for monetary relief. Thus, the final form of Wilson J.'s order depended entirely on the appeal from the amending order. Although this unnecessary procedural step does not affect the outcome of this appeal, we address it here to discourage others from taking a similar approach.

[18] We turn now to the grounds of appeal, which we would reframe slightly as follows:

1. The judge erred in principle by exercising his discretion to amend the order in a manner inconsistent with Wilson J.'s reasons for judgment; and

2. The judge erred by failing to follow this Court's direction in *Brockman* that applicants should not be allowed a second opportunity to bolster their case.

[19] A judge's decision to vary an entered order is an exercise of judicial discretion. An order of this kind will not be disturbed on appeal absent an error in principle, a failure to consider, or a misapplication of, a relevant factor, or an order that is so clearly wrong as to amount to an injustice: *Sherwood v. Cinnabar Brown Holdings Ltd.,* 2021 BCCA 449 at paras. 40–41.

Analysis

1. Did the judge amend the order in a manner inconsistent with Wilson J.'s reasons for judgment?

[20] The judge found that Wilson J.'s manifest intention was to preserve liberty to apply for further consequential remedial orders—in his words to "push the determination of the amounts owed to … a subsequent application within the existing proceeding": at para. 31. The appellant argues that the judge's reading of Wilson J.'s reasons cannot be supported.

[21] In our view this ground of appeal can be dealt with summarily. The appellant simply disagrees with the judge's interpretation of Wilson J.'s reasons for judgment without pointing to any error in the judge's reasoning.

[22] Further, the appellant's submission that Wilson J. dismissed the respondent's application for monetary relief is inconsistent with the plain language of para. 93, which we repeat here for ease of reference:

> [93] As to items two and three of the relief sought, the parties continue to be obligated to one another in accordance with their contract. I am not prepared to make any monetary orders based upon the evidence before me because I have no information about anticipated costs, nor is there any evidence as to what costs or expenses may be considered "necessary" in all

> of the circumstances. If more precise orders are required arising out of items two and three from the petition, a further application may be required.
>
> [Emphasis added.]

Wilson J.'s reference to "more precise orders" is irreconcilable with an intention to dismiss the claims for monetary relief. There would be no need for further orders if the court had intended to dismiss the relief sought by the respondent.

2. Did the judge err by failing to follow this Court's direction in *Brockman*?

[23] The crux of this ground of appeal is the premise that it is not open to a judge to grant liberty to apply at a later date for relief raised in the application before the court, absent a decision made before or at the hearing to adjourn that part of the proceeding. Put plainly, the appellant says that an applicant who asks for relief but fails to tender the evidence necessary to support that relief must lose, and the court cannot give them another chance to prove their case.

[24] It is helpful to begin by reviewing *Brockman*, the case the appellant relies on in support of this premise. In that case, the minority shareholder in a subsidiary company alleged that the parent company had violated the subsidiary's reasonable expectations in an oppressive or unfairly prejudicial manner in three ways:

> 1. By preventing the subsidiary from competing in the Canadian Utility Market;
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> 2. By failing to ensure that its board appointees acted in the subsidiary's best interest; and
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> 3. By furloughing a key manufacturing plant without obtaining the required 90% shareholder approval.

[25] The chambers judge found that these three claims were proved. However, the minority shareholders also alleged that the parent company engaged in oppressive conduct by requiring the subsidiary to purchase products from another entity at inflated prices and to pay excessive corporate charges. The judge found the

evidentiary record was not sufficient to support findings of oppression or unfair prejudice in relation to the latter two claims, but granted the minority shareholders leave to pursue the additional allegations of oppression at a future hearing.

[26] On appeal, this Court held that the chambers judge erred in principle by permitting the petitioners to supplement the record and come back to court to pursue the allegations of oppression which they had not been able to make out in the original hearing. Justice Harris, writing for the Court, emphasized that the petitioners had not applied for further document production on those issues, sought an adjournment of the hearing on the merits, or argued that the determination of certain issues should be deferred pending further document production. Instead, the petitioners had invited the judge to rule in their favour on the merits of those issues. In these circumstances, this Court held that the judge's task was to determine whether the petitioners had made out their case on the record before her: *Brockman* at paras. 47–50.

[27] In short, the error made by the chambers judge in *Brockman* was to allow the petitioners a second chance to prove a basis for liability that had been squarely raised and argued but found by the chambers judge to be wanting.

[28] We agree with the respondent that *Brockman* does not stand for the general proposition that a court lacks jurisdiction to grant liberty to apply for consequential remedial orders flowing from a liability determination or the granting of declaratory relief. Nothing in *Brockman* suggests that, after making a threshold liability determination, a judge cannot or should not invite further evidence or submissions on the nature or scope of the appropriate remedy.

[29] Indeed, *Brockman* recognizes that jurisdiction. Based on the oppression that had been proved, the chambers judge imposed a remedy requiring the parent company to purchase the minority shareholders' shares at a price which accounted for the subsidiary company's lost value. However, since the evidence before her was not sufficient to make a fair and reasonable assessment of that lost value, the chambers judge granted both parties liberty to apply for a final assessment to

determine the price to be paid in the event the parties were unable to agree on the amount. Notably, that portion of the chambers judge's order was not disturbed on appeal.

[30] In our view, it is open to a judge of the Supreme Court to grant liberty to apply for further remedial orders that are consequential to the court's determination of liability.

[31] In the present case, the principal issue before Wilson J. was whether the appellant was obligated to pay "all the necessary costs, expenses, capital and repair costs required to keep the recreational facilities and parking facilities contemplated in the Agreement in good condition and available for use by all owners entitled to use the facilities." Quantification of those amounts was consequential to the court's determination of whether the appellant had a contractual obligation to fund its share. The language of the remedial order requested by the respondent reflected this fact. Instead of asking the court to quantify a specific amount, the respondent sought an order in general terms obligating the appellant to pay its share of capital and operating costs as required by the parties' agreement. It was entirely reasonable for the respondent to expect that the parties—in keeping with the process they had used over the past 30 years—would be able to agree on the amount due.

[32] It is also notable that the obligation to pay applied to both parties and neither side had attempted at the hearing of the petition to address what each owed the other. In these circumstances the judge quite properly exercised discretion to allow the parties to seek further orders if they were unable to agree on the amounts due. That was both a common and commonsense order for the judge to make—one entirely in keeping with the efficient and orderly resolution of disputes.

[33] In summary, the appellant did not establish that the judge erred in the exercise of his discretion to amend the order to reflect the manifest intention of

Wilson J. by adding a term granting the parties liberty to apply for further orders in the extant proceeding.

[34] For the reasons given above, we dismissed the appeal.

"The Honourable Madam Justice Fenlon"

"The Honourable Justice Fleming"

"The Honourable Justice MacNaughton"