

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan KAS 1886 v.  
Zavier,*  
2026 BCCA 11

Date: 20260114  
Docket: CA50843; CA50844

Docket: CA50843

Between:

**The Owners, Strata Plan KAS 1886**

Appellant/  
Respondent on Cross Appeal  
(Petitioner)

And

**Odin Zavier**

Respondent/  
Appellant on Cross Appeal  
(Respondent)

And

**Computershare Trust Company of Canada,  
SWS Marketing Inc., and René Gauthier**

Respondents  
(Respondents)

- and -

Docket: CA50844

Between:

**The Owners, Strata Plan KAS 1886**

Appellant/  
Respondent on Cross Appeal  
(Petitioner)

And

**Gordon Lemon and 1125003 BC Ltd.**

Respondents/  
Appellants on Cross Appeal  
(Respondents)

And

**First West Credit Union, SWS Marketing Inc.,  
and Rene Gauthier**

Respondents  
(Respondents)

Before: The Honourable Madam Justice DeWitt-Van Oosten  
The Honourable Justice Gomery  
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated June 23,  
2025 (*Owners of Strata Plan KAS 1886 v. Lemon*, 2025 BCSC 1166,  
Vernon Dockets S58060 and S58065).

Agent for the Appellants: R. Gauthier

Counsel for the Respondents: A. Grewal

Place and Date of Hearing: Vancouver, British Columbia  
December 12, 2025

Place and Date of Judgment: Vancouver, British Columbia  
January 14, 2026

**Written Reasons by:**

The Honourable Justice Gomery

**Concurred in by:**

The Honourable Madam Justice DeWitt-Van Oosten  
The Honourable Justice Warren

**Summary:**

*The appellant challenges the dismissal of petition proceedings which sought to enforce the payment of strata fees. The chambers judge dismissed the petitions on two grounds: (1) the claim in respect to fees prior to February 2021 was statute-barred, and (2) the claim in respect to fees since February 2021 was unproven. The appellant proposes to adduce fresh evidence showing the breakdown of strata fees payable by each unit.*

*Held: Appeals allowed and application to adduce fresh evidence dismissed. The cross appeals are dismissed.*

*The chambers judge erred in finding that the claim in respect to pre-February 2021 fees was statute-barred, because she did not consider the legal effect of partial payments. The fresh evidence application is dismissed because the relevant evidence was available at trial and the appellant did not exercise due diligence to raise it then. Finally, the judge erred in finding that the claim in respect to post-February 2021 fees was unproven. The judge misunderstood the period encompassed by the claim, an error which was palpable and overriding as it determined her conclusion. The petitions are remitted for redetermination at the Supreme Court.*

**Reasons for Judgment of the Honourable Justice Gomery:****Overview**

[1] These proceedings for the recovery of strata fees from Odin Zavier and Gordon Lemon derive from a long-standing dispute between two factions within a strata corporation (the “Strata”). There were duelling strata councils, each claiming to have been properly elected. The dispute began in 2013 and was resolved by an order made by Branch J. in January 2021 (*SWS Marketing Inc. v. Zavier*, 2021 BCSC 312, varied 2021 BCCA 201). There have been further various legal proceedings leading to this point.

[2] The leaders of the two factions were Mr. René Gauthier and Mr. Zavier. Mr. Lemon belonged to the Zavier faction. The two putative strata councils were the Gauthier council and the Zavier council. The Gauthier council prevailed.

[3] In February 2023, Mr. Gauthier caused the Strata to commence petition proceedings against Zavier and Lemon to enforce their obligation to pay strata fees. The chambers judge dismissed the petitions on two grounds: (1) the claim in respect

of fees prior to February 2021 was discoverable prior to February 2021 and therefore statute-barred pursuant to the *Limitation Act*, S.B.C. 2012, c. 13; and (2) the claim in respect of fees since February 2021 was unproven.

[4] On appeal, the Strata submits that the judge erred in finding that the claim prior to February 2021 is statute-barred for two reasons: the two-year limitation period did not begin to run because the Gauthier council did not have the practical ability to commence a claim before Branch J. confirmed its status as the lawful strata council in January 2021; and, in any event, the running of the limitation period was extended by payments made by Mr. Zavier and Mr. Lemon until February 2021. The Strata submits that the judge erred in finding that the claim since February 2021 was unproven because the spreadsheets upon which it relies were unchallenged by Mr. Zavier and Mr. Lemon, the amounts in question were accepted by a judge in a companion proceeding, and the judge failed to take into account undisputed evidence verifying the claim. Alternatively, the Strata seeks to adduce fresh evidence to prove that which was unproven in the court below.

[5] Mr. Zavier and Mr. Lemon submit that the judge did not err, and the appeals should be dismissed. They maintain that there was nothing to stop the Gauthier council from commencing a claim in respect of unpaid strata fees before Branch J.'s decision. They object to consideration of the argument that the limitation period was extended by payments made by them on account of their obligation to pay strata fees, because this is an argument not advanced in the court below. They submit that the judge did not err in finding that the claim in respect of the period since February 2021 is unproven on the record, and that the fresh evidence application must fail because the evidence in question was available and could have been tendered in the court below.

[6] The judge ordered that both sides bear their own costs. If the appeals are dismissed, Mr. Zavier and Mr. Lemon cross appeal and ask this Court to award them costs in this Court and the court below.

[7] For the reasons that follow, I would allow the appeals and remit the Strata's claims to the Supreme Court of British Columbia for rehearing. In my opinion:

- a) the availability of the limitation defence cannot be determined because it is open to the Strata to contend that the limitation period was extended by the payments of strata fees and the judge's findings do not address the limitation defence in that light;
- b) the fresh evidence application should be dismissed because the evidence in question could have been adduced, with the exercise of due diligence, in the court below;
- c) the judge misunderstood that, on the pleadings, the claim for strata fees in the period after February 2021 ran to the date of the hearing, and consequently failed to address evidence that proved the claim in respect of a part of the period; and
- d) it is in the interests of justice that the entire claim be remitted for reconsideration in the court below.

[8] In the light of this analysis, the cross appeals should be dismissed.

**History of relevant proceedings**

[9] On January 20, 2021, Branch J. ordered that:

The court declares that the present council members are René Gauthier, William Gauthier and Sacha Elez.

[10] Justice Branch's order goes on to require the preparation of consolidated financial statements combining the transactions directed by the Gauthier council and the purported Zavier strata council, and that a general meeting of the members of the Strata be held to address the treatment of the transactions. These provisions of his order were set aside on appeal. This Court held that they were not authorized by s. 165 of the *Strata Corporation Act*, S.B.C. 1998, c. 43, upon which Branch J. had

relied. It remitted the matter to the Supreme Court to consider whether such orders might be authorized under s. 164: *SWS Marketing Inc. v. Xavier*, 2021 BCCA 201.

[11] On June 21, 2021, Branch J. made a further order directing the provision to the Strata of accounting information and documentation pertaining to the steps taken by the purported Xavier council. He did not direct the preparation of consolidated financial statements under s. 164 or otherwise.

[12] The Strata commenced these proceedings by two petitions, one as against Mr. Xavier, and the other as against Mr. Lemon, on February 9, 2023.

[13] The petitions were heard together by the chambers judge in February and April 2025, and she dismissed them by written reasons for judgment on June 23, 2025.

### **Issues**

[14] In my view, there are three issues of substance:

1. Is the claim statute-barred in respect of the period prior to February 2021?
2. Should the Court permit the Strata to adduce fresh evidence to prove its claim in respect of the period since February 2021?
3. Did the judge err in finding that the claim in respect of the period since February 2021 is unproven?

### **Analysis**

1. **Is the claim statute-barred in respect of the period prior to February 2021?**

[15] The *Limitation Act* establishes a basic limitation period of two years from the date that a claim is discovered: s. 6. Discovery of a claim is ascertained objectively according to rules set out in s. 8. However, the date of discovery is adjusted, and the limitation period extended, if the claim is acknowledged before the limitation period

has expired according to the rules set out in s. 24. One way in which a claim may be acknowledged is by part payment of a claim for a liquidated sum: s. 24(7).

***The argument under s. 24 of the Limitation Act***

[16] Section 24(1) provides that, where a person acknowledges liability in respect of a claim before the limitation period has expired:

- (a) the claim must not be considered to have been discovered on any day earlier than the day on which the acknowledgement is made, and
- (b) the act or omission on which the claim is based is deemed to have taken place on the day on which the acknowledgement is made.

[17] Section 24(7) states:

(7) In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is or may be made or by the person's agent is an acknowledgement by the person against whom the claim is or may be made of liability in respect of the claim.

[18] In the period prior to February 2021, the Zavier council maintained that it was the duly elected strata council and, as such, it purported to levy strata fees on behalf of the Strata. In their petition responses, Mr. Zavier and Mr. Lemon acknowledge that they paid these fees. They plead, in identical terms, that “the Respondent, in addition, made all of [his] strata fee payments to the Zavier strata”. Mr. Zavier states, in his affidavit #1:

- 16. Between September 2013 to approximately February 2021, I paid all of my strata fees owing to what I thought was the proper strata: Zavier council.
- 17. Justice Branch determined that the Gauthier council was the proper strata.
- 18. I acknowledge I have not paid strata fees since in or around February 2021.

[19] I am satisfied that the Strata should be permitted to argue that the limitation period was extended under s. 24 of the *Limitation Act*, even though it did not make the argument before the chambers judge. It is a new argument, not a new issue. The limitations issue was raised by Mr. Zavier and Mr. Lemon, as respondents to the petitions. Petition proceedings do not allow for the filing of a pleading in reply. The

Strata was not obliged to formally state its position as to why the limitation defence should not succeed. Putting aside procedural formalities, the point is purely legal, involving the application of the statute to the undisputed fact of the payments made by the respondents.

[20] The parties agree that Mr. Zavier’s last payment was on February 1, 2021, in respect of a purported strata fee charged by the Zavier council in January. The date of Mr. Lemon’s last payment is undisclosed in the appeal record. For present purposes, it can be assumed that both respondents were making payments on account of their obligation to the Strata until a date that was just slightly more than two years before the Strata commenced proceedings (on February 9, 2023) to recover the debt.

[21] If the limitation period was extended by the part payments, the question is whether the claim was immediately discoverable, as of the date of the final payments by Mr. Zavier and Mr. Lemon or could only be considered to have been discovered by the Strata after some time had passed. The chambers judge did not consider this question, because she was not alerted by the parties to the legal effect of the acknowledged part payments.

[22] The judge considered only the requirements of s. 8 and found that they were satisfied. Referring to authorities for the uncontroversial proposition that it is not necessary for the quantum of a claim to be crystallized before the limitation period starts to run, she stated:

[26] These authorities support the conclusion that unlike the petitioner’s argument in this case, it was not necessary to wait for the accounting exercise ordered by Justice Branch to be completed for the limitation period to start running. While the Strata argues it needed to recalculate all the fees charged for the years 2013 to 2021 and was therefore only able to “discover” their claim after the Branch Order, the jurisprudence on discovery of a claim is not limited to such precision. It was enough for the Petitioner to know, as outlined by the respondents:

- that it had suffered loss by non-payment of monthly strata fees (section 8(a) of *Limitation Act*);

- that this loss was contributed [to] by the omission of the respondent not paying the monthly strata fees (sections 8(b)–(c) of *Limitation Act*); and
- that the Court was the appropriate means to remedy the nonpayment of strata fees (section 8(d) of *Limitation Act*).

[27] In this case, I find that the Strata had the requisite knowledge to understand that it had suffered loss by non-payment of monthly strata fees, that this loss was occasioned by or contributed [to] by the omission of the respective respondents in these two petitions, and that the court was the appropriate means to remedy the non-payment of the strata fees.

[23] Because the effect of partial payment was not considered, the judge’s findings do not address an argument requiring a delay in objective discoverability of eight days (in Mr. Xavier’s case) or perhaps a few weeks (in Mr. Lemon’s case) for the limitation period to be avoided. It is unclear whether the judge would have come to the same conclusion, had she been directed to the correct legal framing of the issue.

***The Strata’s other arguments to avoid the limitation defence***

[24] The Strata submits that the judge erred in her discoverability analysis by failing to appreciate the significance of the requirement in s. 8(d) of the *Limitation Act* that “a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage”. It argues that the requirement, properly understood, engages an inquiry into the plaintiff’s practical ability to bring a claim, citing *Aubichon v. British Columbia (Attorney General)*, 2021 BCSC 1183 at paras. 19 and 25, aff’d 2022 BCCA 77. While *Aubichon* did not turn on this proposition, there are other cases that support it: *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108 at paras. 421–422, varied without deciding this point, 2022 ONCA 509 at para. 60, aff’d *sub nom Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32; *CPC Networks Corp. v. McDougall Gauley LLP*, 2021 SKCA 127 at paras. 76–78; *Ren v. Eastern Platinum Limited*, 2023 BCSC 404 at paras. 63–67, aff’d without consideration of this point, 2024 BCCA 109.

[25] This argument addresses only the delay prior to Branch J.’s order of January 20, 2021, and not the delay between January 20 and February 9. Even if the partial

payments by Mr. Zavier and Mr. Lemon extended the applicable period, it is not a full answer to the limitation defence.

[26] Similarly, the Strata submits in the alternative that the respondents are estopped from maintaining that the Gauthier council could have commenced proceedings earlier by their insistence, prior to January 20, 2021, that the Gauthier council was illegitimate. Again, whatever its merit, this argument does not address the delay between January 20 and February 9.

[27] In the interests of completeness, I should add that I am not persuaded that there was a practical impediment to the commencement of a proceeding by the Gauthier council in the name of the Strata prior to Branch J.'s decision. Mr. Gauthier and his council were consistently asserting their standing as the lawfully elected council in correspondence and affidavits. There was nothing to stop them from doing so in a legal proceeding. Had they commenced a proceeding in the Strata's name, it would have brought the dispute with the Zavier council to a head: the Zavier council would have objected that the suit was not properly brought, and a judge would have ruled in the Gauthier council's favour, as eventually occurred. The question of whether s. 8(d) of the *Limitation Act* engages an inquiry into the plaintiff's practical ability to bring a claim need not be resolved on this appeal.

***Conclusion as to the limitation defence***

[28] While the Strata's other arguments fail, its argument based on s. 24 of the *Limitation Act* succeeds and we are left with the absence of findings responsive to the proper legal framing of the issue, upon which the limitation defence depends.

[29] To summarize, the judge erred in finding that the claim in respect of the period prior to February 2021 is statute-barred for the reasons she gave. For reasons further developed below, I would remit this issue to the Supreme Court for further consideration.

**2. Should the Court permit the Strata to adduce fresh evidence to prove its claim in respect of the period since February 2021?**

[30] The judge stated:

[42] With respect to the remaining claim for strata fees that is not statute-barred (i.e. the strata fees owing after February 2021), there is insufficient evidence to establish the actual amounts owing. ...

[43] The Strata has provided a spreadsheet created by Mr. Gauthier of what it says are non-payments of strata fees over particular periods. However, I agree with the respondents that none of the underlying documents used by the Strata to create the chart have been provided. There is no evidence of the strata fees set for each year at the AGM, nor any AGM minutes that reference this and show the breakdown of the strata fees payable by each strata unit.

[Emphasis added.]

[31] The Strata proposes to adduce, as fresh evidence, the missing AGM minutes and budgets showing the breakdown of strata fees payable by each strata unit. I would dismiss the application for the following reasons.

[32] As a general rule, appellate courts are limited to considering evidence in the record of the proceedings in the court below. Exceptionally, this Court is authorized to admit additional evidence, but this discretionary authority is limited and is exercised on the basis of the *Palmer* criteria (from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8): *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 29. The *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice: *Barendregt* at para. 31. The *Palmer* criteria are:

- (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle is not applied as strictly in a criminal case as in civil cases);
- (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- (iii) the evidence is credible in the sense that it is reasonably capable of belief; and

- (iv) the evidence is such that, if believed, it could have affected the result at trial.

*Barendregt* at para. 29.

[33] The Strata has been represented on appeal, as it was in the court below, by Mr. Gauthier. He is not a lawyer. He submits that his failure to adduce records that were in his possession was inadvertent. He says that there were complex, overlapping proceedings, and he became confused as to what was in evidence in these proceedings, as opposed to others.

[34] Accepting that the failure to put forward the records in question was inadvertent, the Strata did not exercise due diligence. An appellant is not excused from the obligation of due diligence in the presentation of its case in the trial court by its failure to retain a lawyer. I should add that, by the time this case came before the chambers judge, litigation had been underway through various courts and legal proceedings for 12 years. Mr. Gauthier was at the centre of it. He was a most experienced litigant. He must have understood that it was incumbent on the Strata to prove its case.

**3. Did the judge err in finding that the claim in respect of the period since February 2021 is unproven?**

[35] The judge's determination that the claim was unproved turns largely, but not entirely, on a factual determination as to the adequacy of evidence. The standard of review in relation to questions of fact, and the application of legal standards to the facts, is deferential. It requires a showing of a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26, 36. A palpable error is one that is obvious. An overriding error is one that is determinative of the outcome of the case: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33.

[36] In this case, it is obvious that the judge erred in her appreciation of what she had to decide. She understood that the period encompassed by the claim ended in 2023. This is apparent from the following passage in her reasons. Having concluded

that the claim is unproven due to the absence of AGM minutes approving the budget and strata fees on strata entitlement (as set out para. 43 of her reasons quoted above), she adds:

[44] ... A further affidavit [of Mr. Gauthier] of November 14, 2024 refers to AGM minutes approving the budget and strata fees on strata entitlement for the year 2024. However, the current petition was filed in February 2023, and these minutes are therefore not an evidentiary basis for fees owing from 2021 to 2023.

[Emphasis added.]

[37] However, the petitions seek declarations of the amount owing as of the date of the court's determination, not as of the date of the filing of the petition. The amount that had accrued between February 2023 and the hearing in 2025 was in issue. The orders sought in the Zavier petition (the Lemon petition is the same, except for the amount) include:

4. A declaration that the amount due and owing to the Petitioner is \$18,001.70 as of 2023FEB07 increasing by further unpaid strata fees, special levees, interest, the Petitioner's reasonable legal costs for the proceedings herein and other amounts that may be payable pursuant to *Strata Property Act*, S.B.C. 1998, c.43 sections 116 and 118 and amendments thereto, (hereafter described as "Amount Owing" and increasing by further unpaid strata fees, special levies, interest, the Petitioner's reasonable legal costs for the proceedings herein and other amounts that may be payable pursuant to *Strata Property Act*, S.B.C. 1998, c. 43 sections 116 and 118 and amendments thereto).

5. An order setting the last day for payment of the Amount Owing at 30 days computed from the date of the Order pronounced that the Hearing of this Petition, or such other date as this Honourable Court may order.

[Emphasis added.]

[38] Moreover, the minutes and draft financial statement attached to Mr. Gauthier's affidavit of November 14, 2024, show actual strata fees per unit entitlement for 2023 as well as budgeted fees per unit entitlement for 2024. What is missing is the same information and documentation for 2021 and 2022.

[39] The judge's error in respect of the years 2023 and 2024 is palpable and overriding, because it is obvious and determines the judge's conclusion.

[40] As to the years 2021 (from February) and 2022, I am not persuaded that the chambers judge erred. It was open to her to point to the absence of documentation in evidence underlying the spreadsheets prepared and tendered by Mr. Gauthier. The Strata submits that identical documents were considered as reliable by Adair J. in earlier proceedings between the parties: *SWS Marketing Inc. v. Zavier*, 2022 BCSC 743 at para. 351. A finding made by another judge in a different context did not bind the chambers judge.

[41] The Strata further submits that Mr. Gauthier's spreadsheets were not contested in these proceedings. This is incorrect. There was no admission in the pleadings. Mr. Zavier objected to the accounting set out in the spreadsheets in no uncertain terms in his affidavit #1. He affirmed:

18. I acknowledge I have not paid strata fees since in or around February 2021.

19. I have not done so because of the accounting undertaken by Gauthier.

20. I understood the order of Justice Branch was to consolidate the accounting of the two stratas to start fresh.

21. However, Gauthier has not properly done an accounting. Rather, he has added in strata fees over and above what I thought were the proper fees going back to 2013.

22. Gauthier has been attempting to collect more strata fees than what is owing.

...

39. I am prepared to pay the outstanding from February 2021 to present, but the issues of accounting have not been dealt with...

**What should this Court do?**

[42] On an appeal, this Court may make any order that could have been made by the court below: *Court of Appeal Act*, S.B.C. 2021, c. 26, s. 24(1)(a). If it considers that a matter under appeal should have a new hearing, it may set aside the order under appeal and direct a new hearing: s. 27(1).

[43] In my view, a fresh hearing is required. While this is unfortunate, this Court is not in a position to find the facts necessary for a determination of the entire claim

against each respondent, and it is not in the interests of justice that the claims be determined piecemeal.

[44] In respect of the claims for the period prior to February 4, 2021, there are two issues to be determined.

[45] The first is the limitation defence which will turn upon an examination of the part payments, assessment of their legal effect, and consideration of whether the claims were immediately discoverable by the Strata in the few days or weeks following the final payments made by Mr. Zavier and Mr. Lemon. The parties have not addressed these questions in their arguments to date, and they require careful attention to facts that are not all in evidence.

[46] The second issue is the amount of the claim. If comprehensive financial statements were prepared, as contemplated in the portions of Branch J.'s order that were set aside on appeal, they are not in evidence. The Strata has tendered statements of account that show the strata fees claimed by resolutions of both the Gauthier council and the purported Zavier council, and the payments made by the respondents, to arrive at a net amount claimed. The statements only make sense if the Strata investigated and ratified the expenditures and dispositions of the purported Zavier council, and there is no evidence of that. The net amount owing is unclear.

[47] In respect of the period since February 4, 2021, part of that claim was found unproven on the evidence and the judge misapprehended the pleadings and the record with respect to the remainder. Given that a rehearing is necessary for large portions of the claim and the evidence is unclear as to the precise amounts owing, it makes sense, and is unlikely to prolong the further proceedings in the court below, that all three periods be addressed together. This will result in a consistent and coherent determination of the Strata's rights and the respondents' obligations.

**Disposition**

[48] For these reasons, I would allow the appeals and remit the petitions for redetermination in the Supreme Court where the parties should be at liberty to tender such further evidence as they deem fit. I would dismiss the cross appeals.

“The Honourable Justice Gomery”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Warren”