

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

SECTION 1 OF THE OWNERS, STRATA PLAN LMS 2643

PLAINTIFF

AND:

HAROLD DEVELOPMENTS LTD., JAMES KWAN, YVONNE KWAN,  
WILLIAM KWAN and others

DEFENDANTS

AND:

HAROLD DEVELOPMENTS LTD., JAMES KWAN, YVONNE KWAN,  
WILLIAM KWAN and others

THIRD PARTIES

**OUTLINE OF THE DEFENDANT CITY OF RICHMOND**  
to the Applicants James & Yvonne Kwan's Notice of Motion  
dated February 22, 2008

**Part III**

Basis for opposing relief:

1. This Outline is prepared and submitted by the City of Richmond. The City of Richmond understands that counsel for other Defendants represented at the hearing of the Application wish to adopt the submissions contained in this Outline, subject to specific submissions each might make on points which are germane only to them.
2. The City of Richmond submits that the Kwans' Application should be dismissed with costs because:
  - a) the limitation period for commencement of action has passed;
  - b) the cause of action for damage to individual property of a strata unit owner and to common property of the strata belongs to the individual strata unit owners, not the strata corporation;
  - c) each strata unit owner has the right and the obligation to advance

- his or her own cause of action within the limitation period;
- d) there is no basis in statute, in practice, or under the Rules of Court for the proposed parallel action by way of the issuance and service of a separate Writ of Summons and Statement of Claim within this existing action;
  - e) the proposed third party claim is not tenable because it is brought after the limitation period has expired and the claim is, as a matter of fact and law, independent of, rather than dependent on the present action; and
  - f) although lack of dependence is a full answer to the request for leave to commence a third party claim after the expiry of the limitation period, the Applicants have also failed to offer any valid explanation for delay in commencing proceedings.
3. In bringing this Application, the Kwans seek to circumvent the provisions of the *Strata Property Act*, S.B.C. 1998 c. 43 and the *Limitation Act*, R.S.B.C. 1996 c. 266. They try to use an action in which they are specifically and clearly precluded from being a party plaintiff by virtue of the *Strata Property Act, supra*, as the means to avoid the applicable provisions of the *Limitation Act, supra*.

#### A. THE LIMITATION PERIOD FOR COMMENCEMENT OF ACTION HAS PASSED

4. The Kwans ask this Court to allow them to advance a claim against the City of Richmond and others which the City of Richmond submits is barred by the *Limitation Act, supra*.
5. The claim they wish to advance is for damages arising from alleged water ingress to strata lots they own in Lighthouse Place and for damage to the common property of Lighthouse Place of which they hold a proportionate

interest pursuant to s. 66 of the *Strata Property Act, supra*. S.66 says:

Ownership of property

66 An owner owns the common property and common assets of the strata corporation as a tenant in common in a share equal to the unit entitlement of the owner's strata lot divided by the total unit entitlement of all the strata lots.

6. The limitation period which applies to the Kwans' claim is found in s. 3(5) of the *Limitation Act, supra*, which provides that no claim may be brought more than 6 years after the right to do so arose.

*British Columbia (Workers' Compensation Board) v. Thompson Berwick Pratt & Partners* (1986), 24 B.C.L.R. (2d) (C.A.)

7. In bringing this Application, the Kwans have not clearly stated that the limitation period set out in s. 3(5) has expired. That position must be clearly stated in order that the issues arising in the Application are properly before the Court and capable of being responded to by the City of Richmond. The proper approach to this kind of Application is set out in *Strata Plan LMS 1725 v. Pacific Place Holdings Ltd.* 2007 BCCA 611 at paragraph 12.

8. While the City of Richmond notes the material in paragraph 20 of the Applicant's Outline dealing with limitation, there is no admission by the Kwans in their Affidavit evidence that the limitation period has expired.

9. The City of Richmond will approach the Application on the basis that:
- a) the nature of the Application is an explicit concession that the limitation period has expired; or, alternatively,
  - b) that the facts demonstrate that the limitation period has expired.

a) by the Nature of the Application

10. The Kwans rely on the combination of the provisions of s. 4(1) of the *Limitation Act, supra*, and Rules 15(5)(a)(iii) and 22 of the Rules of Court in bringing this

Application. They bring this Application having learned after November, 2007, they say, that “a limitation period might preclude their claims for reimbursement of their contribution to remediation costs.”

Affidavit #3 of Yvonne Kwan at para. 8(c)

Affidavit #1 of James Kwan at para. 3

11. It is the combination of those provisions which allows an otherwise statute barred claim to be advanced in B.C. In bringing this Application relying on those provisions, the Kwans must be taken to have conceded that the limitation period set out in s. 3 (5) of the *Limitation Act, supra*, has expired. Otherwise, there would be no need to bring this Application at all, or in the manner it has been brought with reference to s. 4 and the Rules of Court.

b) on the Facts

12. In the alternative, if the Kwans have not conceded the expiry of the limitation period, the City of Richmond submits that the following establishes that the limitation period with respect to the Kwan’s cause of action commenced running at the latest in July 2000 and expired at the latest in July 2006.
13. Although represented by counsel in the period 1995 to date, the Kwans did not commence any action or issue Third Party proceedings with respect to the claim they now wish to advance before the limitation period expired.
14. The City of Richmond submits that the Kwans are estopped from asserting that the limitation period expired at a time other than July, 2006 or, in the alternative, submits that the facts indicate that the limitation period applicable to the Kwan’s claim expired, at the latest, in July, 2006.

(i) estoppel

15. The City of Richmond submits that the Kwans' right to bring their claim arose at the latest in July 2000 when they, along with the other strata unit owners in Lighthouse Place, received a report from RDH Building Engineering Limited ("RDH") assessing the condition of the building envelope of Lighthouse Place. The findings in that report form the basis for the allegations of negligence and breach of contract in the Plaintiff's Statement of Claim. Those allegations are repeated by the Kwans in the same words as the Plaintiff in the Kwans' proposed Statement of Claim and Third Party Notice.
  
16. In an earlier application in this action, the Kwans relied on the July RDH report to assert that the limitation period commenced to run in July, 2000 and expired in July 2006 and that amendments to the pleadings should not be allowed. The Reasons from that case are attached as Exhibit "B" to Affidavit #3 of Yvonne Kwan. In those Reasons at paragraph 28 and 29, Sigurdson J. said:

[28] The Kwans however say that the amendment should not be allowed because of the *Limitation Act*. They say that the plaintiffs are adding new causes of action after the expiry of the limitation period and the writ did not include a claim against the Kwans in negligence.

[29] The evidence concerning a possible limitation defence is in issue but is as follows. The construction was apparently done in 1995 and 1996 with an occupancy permit issued to the developer on December 20, 1996. The defendants contend that the plaintiffs knew of the leaks from 1997 and that the strata corporation retained an expert and obtained a report in July 2000. The action was started on November 2, 2005 and the statement of claim was filed on March 13, 2006. The defendants say that the limitation period expired six years after July 2000 and, therefore, the claim as particularized against the individual Kwans in October 2006, when the proposed pleadings were tendered, is out of time. ...
  
17. Sigurdson J.'s statement in paragraph 29 concerning when the Kwans said the limitation period expired is based on the submissions made by the Kwans in their Outline dated March 7, 2007. In Part II of the Outline, the following is stated:

... Further, and in any event, the proposed new cause of action is barred by the Limitation Act and it is not just and convenient to add this new cause of action.

Lighthouse Place was constructed in or about 1995 and completed in 1996. An occupancy permit was issued in December 1996. In or about July 2000, the Strata Corporation received a report from RDH Engineering Ltd. regarding the building enveloped condition assessment at Lighthouse Place. ...

Affidavit No. 1 of D. Russell, para. 29, Ex. "CC"

18. The Kwans' submission that the limitation period for the strata unit owners represented by the Plaintiff in this action began upon receipt of the July 2000 RDH report is correct at law.

19. Since the Kwans had the very same information that the other strata unit owners represented by the Plaintiff had in July 2000 and now assert the very same allegations with respect to deficiencies as do the strata unit owners represented by the Plaintiff, the Kwans cannot assert a different commencement time for the limitation period than they said applied to the very same kind of claim brought by the other strata owners in this action.

(ii) facts indicating limitation period expired in July, 2006

20. The Kwans admit that they had become aware of what they describe as a "perception" in "approximately July 2000" that "the building envelope of Lighthouse Place was not performing appropriately" and that "the building required remediation, to a greater or lesser extent."

Affidavit #3 of Yvonne Kwan at para. 4

Affidavit #1 of James Kwan at para. 3

21. In fact, the Kwans knew that the building envelope was not performing properly well before 2000.

(ii.1) *pre-2000 knowledge*

22. The Kwans knew as individuals, as directing minds of Harold Developments Ltd. (the developer of Lighthouse Place), and as members of the Strata Council (themselves or through their representatives sitting on the Strata Council) that there were many instances of water ingress before 2000.

23. In 1997, Yvonne Kwan was elected to Strata Council as owner of 15 strata lots and Harold Developments Ltd. was elected to Strata Council as owner of 44 strata lots. In 1998 Fay Qoon Mohr was elected to Strata Council as representative for Yvonne Kwan (46 strata lots) and Harold Developments Ltd. was elected to Strata Council (lot 215 – Mindy Abramowitz representing). In 1999 Fay Qoon Mohr was elected to Strata Council as representative for James and Yvonne Kwan (45 strata lots) and Harold Developments Ltd. was elected to Strata Council (lot 215 – Mindy Abramowitz representing).

Affidavit No. 1 of D. Russell, para. 8, Ex. “D”, E” and “F”

24. Yvonne Kwan knew of water ingress problems prior to 2000 as shown by the following evidence:

a) Yvonne Kwan knew when she was a member of Strata Council that purchasers of units in Lighthouse Place were complaining about water leaks;

Affidavit No. 1 of D. Russell, para. 10, Ex. “O”

b) Yvonne Kwan was a member of Strata Council from October 6, 1997 to September, 1998;

Affidavit No. 1 of D. Russell, paras. 7-8, Exs. “C” and “D”

c) November, 1999 – letter from Yvonne Kwan on behalf of Harold Developments Ltd. to Andrew Cheung Architects Inc.;

Affidavit No. 1 of D. Russell, para. 11, Exs. “P” and “Q”

- d) at the Annual General Meeting of September 16, 1999, Owners passed a Special Resolution to hire a building envelope consultant to conduct an inspection of Lighthouse Place (a Special Resolution which would not have passed if opposed by the Kwans and Harold Developments Ltd.).

Affidavit No. 1 of D. Russell, para. 8, Ex. "E"

- 25. James Kwan knew of water ingress problems prior to 2000 as shown by the following evidence:

- a) March, 1998 – letter from Andrew Cheung Architects Inc. to Harold Developments Ltd. (attention James Kwan);

Affidavit No. 1 of D. Russell, para. 9, Ex. "H"

- b) at the Annual General Meeting of September 16, 1999, Owners passed a Special Resolution to hire a building envelope consultant to conduct an inspection of Lighthouse Place (a Special Resolution which would not have passed if opposed by the Kwans and Harold Developments Ltd.).

Affidavit No. 1 of D. Russell, para. 8, Ex. E

- 26. The Kwans also knew of water ingress problems prior to 2000 through their representative on Strata Council, Fay Qoon Mohr as shown by the following evidence:

- a) January, 1998 – Walkthrough and report;

Affidavit No. 1 of D. Russell, para. 9, Ex. G

- b) April, 1998 – fax to and from Jakin Engineering;

Affidavit No. 1 of D. Russell, para. 9, Exs. "I" and "J"

- c) May, 1998 – letter from Fay to Jakin Engineering;

Affidavit No. 1 of D. Russell, para. 9, Ex. "K"

- d) June, 1998 – fax from owner of unit 308 to Jakin Construction and to Fay at Harold Developments Ltd.;

Affidavit No. 1 of D. Russell, para. 9, Ex. "L"

- e) January, 1999 – Strata Council Meeting report by Fay;

Affidavit No. 1 of D. Russell, para. 9, Ex. "N3"

- f) January, 1999 – letter from Fay to Almetco Building Products Ltd.

Affidavit No. 1 of D. Russell, para. 9, Ex. "N1"

- g) February, 1999 – report from Alliance Roofing Systems Ltd.

Affidavit No. 1 of D. Russell, para. 9, Ex. "N4"

- h) December, 1999 – Strata Council Meeting approved the appointment of RDH Building Engineering Limited to do the building envelope inspection.

Affidavit No. 1 of D. Russell, para. 13, Ex. "R"

*(ii.2) knowledge in 2000*

- 27. In 2000, the Kwans had knowledge of concerns about the building envelope. The Kwans knowledge in 2000 is direct as well as through their representative as shown in the following evidence:

- a) they became aware of a perception that the building envelope of Lighthouse Place was not performing appropriately and that the building required remediation, to a greater or lesser extent;

Affidavit No. 1 of James Kwan, para. 3

Affidavit No. 3 of Yvonne Kwan, para. 4

- b) Fay Qoon Mohr attended the August Strata Council Meeting at

which the draft RDH report was presented to Council;

Affidavit No. 1 of D. Russell, para. 15, Ex. "T"

c) in September, 2000, James and Yvonne Kwan provided comments to the Strata Corporation on the draft RDH report;

Affidavit No. 1 of D. Russell, para. 16, Ex. "U"

d) Fay Qoon Mohr attended the November Strata Council Meeting at which RDH made a presentation on the building envelope report.

Affidavit No. 1 of D. Russell, para. 18, Ex. "V"

28. The City of Richmond submits that time began running against the Kwans at the latest in July 2000 just as it did for every other strata unit owner.
29. The legal significance of this in relation to the status of the Kwans to commence proceedings is discussed in the paragraphs below.
30. In *Strata Plan No. VR 1720 v. Bart Developments Ltd.* (1998), 53 B.C.L.R. (3d) 304 (S.C.), aff'd (1999), 49 C.L.R. (2d) 161 (C.A.), it was held that time begins to run when a strata unit owner receives a report from a consultant assessing deficiencies in construction from which a reasonable person such as a strata owner would have concluded that a good cause of action lay against those responsible for the identified deficiencies. That clearly occurred in July 2000.
31. It is the knowledge of an individual owner which determines when the limitation period starts to run for the purposes of the postponement provisions of the *Limitation Act, supra*.  
*Strata Plan VR 2000 v. Shaw* (1998), 55 B.C.L.R. (3d) 103 (S.C.)
32. There are four components which must be satisfied before the running of time of the limitation period begins. They were set out in *Ounjian v. St. Paul's*

*Hospital 2002 BCSC 104* by Tysoe J.:

21 In *Vance v. Peglar*, Lambert J.A. usefully broke the text of s. 6(4) down into three components; there is a fourth component which was not relevant in *Vance v. Peglar*. The four components can be paraphrased within the context of the present circumstances as follows:

1. The identity of the defendant is known to the plaintiff.
  2. The plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge.
  3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
  4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.
33. These four components were met in July 2000 or shortly thereafter when the Kwans could have obtained appropriate advice on the situation they found themselves in at law after receiving the RDH report.
34. Throughout the period 2000-2006 the Kwans had sufficient knowledge of the facts and the identity of the potential defendants to be in a position to seek appropriate advice and they had advisors who could have given them that appropriate advice.
35. The Kwans, as developers of Lighthouse Place were in a unique position to know the identity of all defendants who worked on the design and construction of the complex. In fact, in June 2001, the Kwans' counsel wrote to the professionals, trades, and suppliers putting them on notice of a potential claim for water ingress damage. The Kwans had facts about the possibility of building envelope failure as a result of the July RDH engineering report.

36. If the Kwans had taken appropriate advice at the time of the July RDH report, they would presumably have concluded that they had the claim they now wish to advance and from their point of view that it had a reasonable enough prospect of success to make it worthwhile advancing. They would also have understood that based on the provisions of the *Strata Property Act, supra*, (which came into force on July 1, 2000) and on existing British Columbia case law, the cause of action for damage to unit owners' property and to common property was personal to the unit owners and was not a cause of action of the strata corporation. They also would have understood that the limitation period was personal to each owner and that time began to run, at the latest, when a strata unit owner receives the report of consultants concerning water ingress. The state of the law is addressed in paragraphs 51-64 and 118-125 below.
37. There is no suggestion in any of the materials filed in support of the Application that there was any "mistake of law" concerning the existence and effect of the limitation legislation on the Kwans' claim.
38. The Kwans had legal counsel available throughout the period 1995-2007. Howard D. Wong acted as solicitor for Harold Developments Ltd. in which the Kwans were shareholders, directors and officers: see paragraph 2 of Affidavit #1 of L. Mounteney. Rose-Mary Liu Basham, Q.C. (and others in her firm) represented the Kwans in litigation related to Lighthouse Place (Affidavit #3 of Yvonne Kwan at paragraph 7) and her firm acted as counsel for the Kwans in two proceedings where Reasons were issued which are attached as Exhibits "A" and "B" to Affidavit #3 of Yvonne Kwan. The provisions of s. 171 of the *Strata Property Act, supra*, were central to the application before Romilly J.: see Exhibit "A" to Affidavit #3 of Yvonne Kwan at paragraph 2. Mr. Sutherland took over from Ms. Basham, Q.C. in November 2007: see paragraph 7 of Affidavit #3 of Yvonne Kwan.

39. Throughout the period 2000-2006, legal action was under consideration by the Kwans and their counsel:

a) November, 2000 – letter from Howard Wong to Harold Developments Ltd. (attention: James and Yvonne Kwan);

Affidavit No. 1 of D. Russell, para. 19, Ex. "W"

b) March, 2001 – letter from Harold Developments Ltd. (signed by James Kwan) to Andrew Cheung;

Affidavit No. 1 of D. Russell, para. 20, Ex. "X"

c) June, 2001 – letters to and from the Kwans and Rose-Mary Liu Basham, Q.C. and a letter dated June 21, 2001 with Annexure;

Affidavit No. 1 of D. Russell, paras. 22, 23 and 24., Exs. "Z", "AA" and "BB"

d) January, 2005 – the Kwans and Harold Developments Ltd. apparently gave instructions to their solicitors that they would not assign their rights to sue anyone in connection with Lighthouse Place to the Strata Corporation;

Affidavit No. 1 of D. Russell, para. 31, Ex."DD"

e) April 2005 – email from Howard Wong to Harold Holdings (Yvonne and Danny) and letter from Howard Wong to Rose-Mary Basham and Leslie Olsen.

Affidavit No. 1 of D. Russell, paras. 32 and 33, Exs. "EE" and "FF"

f) May 2005 – letter from Howard Wong to Yvonne and James Kwan attaching correspondence with Rose-Mary Liu Basham, Q.C.;

Affidavit No. 1 of D. Russell, para. 34, Ex. "GG"

40. The Kwans and their counsel were aware of s. 171 of the *Strata Property Act*,

*supra*, as is indicated in:

- a) the Reasons for Judgment of Romilly J. set out in Exhibit "B" to the Affidavit of Yvonne Kwan #3;
- b) Rose-Mary Liu Basham, Q.C. was counsel in *The Owners, Strata Plan LMS 888 v. The City of Coquitlam et al* 2003 BCSC 941; and
- c) the Special Resolutions passed at a Special General Meeting of owners on May 9, 2005 pursuant to s. 171 and 172 of the *Strata Property Act, supra*.

41. The litigation proposed by the Strata Corporation and approved by owners was known to the Kwans legal advisors.

Affidavit No. 1 of D. Russell, para. 32, Ex. "EE"

42. The Special Resolutions passed on May 9, 2005 specifically name the Kwans as prospective defendants.

Affidavit No. 1 of D. Russell, para. 35, Ex. "HH"

43. The evidence confirms definitively that by May, 2005 the Kwans and their legal counsel knew:

- a) that Lighthouse place was suffering from water ingress;
- b) that remediation was going to be undertaken by the Strata Corporation;
- c) that the Kwans, along with all other unit owners, had been assessed a special levy for remediation expenses;
- d) that the Kwans had not assigned their right to sue anyone to the Strata Corporation;
- e) that there was an issue of whether the Kwans would have to bring their own action;
- f) that the Strata Corporation was going to sue on behalf of unit owners other than the Kwans; and
- g) that the Kwans were to be defendants in the action brought by the

Strata Corporation.

44. The City of Richmond submits that the Kwans have had sufficient knowledge of the facts and the ability to ascertain their legal rights since at least 2000. They have had legal representation available to them from 1995 to 2006. They offer no evidence that they have been wrongly advised by their lawyers. The Kwans simply say they “did not appreciate”. The words “did not appreciate” suggest that advice may have been given which was not understood. In any event, the Kwans have not denied receipt of legal advice concerning their right to commence action to recover remediation costs.
45. Any suggestion that the Kwans were not told of their right to commence action is contradicted by the evidence of Yvonne Kwan in Affidavit # 4. There she says that her delay in instructing counsel to sue for recovery of remediation costs was affected by a number of personal matters. That suggests that absent those personal matters, she was in a position to instruct counsel and that the personal matters only led to delay in giving those instructions. Affidavit #4 suggests that Yvonne Kwan knew that she and her husband had a claim for remediation costs separate and apart from the action that the Strata Corporation was authorized to commence in May, 2005 and failed to give instructions up to the end of September, 2005 when the personal matters apparently first arose.
46. The City of Richmond submits that the limitation period for any action taken by the Kwans began running at the latest in July 2000 and expired at the latest in July 2006. The evidence does not disclose that the Kwans were wrongly advised of their rights in that period.

**B. CAUSE OF ACTION BELONGS TO OWNERS NOT THE STRATA CORPORATION**

47. In considering the form of relief sought by the Applicants it is necessary to understand the legal regime governing common property and strata unit owners' rights of suit.
48. The Kwans are the owners of 50 strata lots in Lighthouse Place.  
Affidavit #1 of L. Mounteney, at para. 2(c) and (d)
49. They now seek to claim damages arising from alleged defects in those units and in the common property of Lighthouse Place.
50. The allegations they make in the proposed Statement of Claim and Third Party Notice are identical to those made by the Plaintiff in the original action brought to recover damages for injury to the units and proportionate share of common property of all strata unit owners other than the Kwans. The only difference between the two sets of pleadings, and it is a significant one, is that the Kwans are not Defendants or Third Parties in the proceedings they propose. They are Defendants in the original action.
51. In British Columbia, common property is owned by strata unit owners as tenants in common in proportion to their respective unit entitlements rather than by the strata corporation. That is set out in s. 66 of the *Strata Property Act, supra*, quoted in paragraph 5 above.
52. S. 66 was a re-wording of s. 12 (1) of the *Condominium Act, R.S.B.C. 1996* which was in force until June 30, 2000 when that *Act* was repealed and replaced by the *Strata Property Act, supra*. S. 12 (1) said:  
The common property, common facilities and other assets of the strata corporation must be held by the owners as tenants in common in shares proportionate to the unit entitlement of their strata lots.
53. Since the strata corporation has no property interest in the common property, it

has no right to claim for damage to common property. It is the individual strata lot owner and not the strata corporation (or Section) which, at first instance, can assert the right to claim for damage to the common property.

54. This principle of law was not established for the first time in *Hamilton v. Ball* 2006 BCCA 243 as the Applicants suggest in their Outline. While it was confirmed as the law in that case at para. 26, it has been the law consistently in B.C. since at least 1980. The following cases all establish that the cause of action for damage to individual units and to common property belongs to the individual strata lot owners, not the strata corporation.

*Owners, Strata Plan No. NW 651 v. Beck's Mechanical Ltd.*  
(1980), 20 B.C.L.R.12 (S.C.)

*Strata Plan VR 368 v. Marathon Realty Co.* (1982) 41 B.C.L.R.  
155 (S.C.)

*The Owners, Strata Plan VR 2000 v. Shaw et al, supra*

*Strata Plan No. VR 1720 v. Bart Developments Ltd., supra*

*The Owners, Strata Plan LMS 1468 v. Reunion Properties Inc.*  
2002 BCSC 929

*The Owners, Strata Plan LMS 888 v. The City of Coquitlam et al, supra*

55. Each strata unit owner has his or her own separate cause of action for compensation for damage to his or her own unit and to his or her proportionate interest in the common property. The claims can be brought by the strata corporation as representative of individual owners, subject to the provisions of ss. 171 and 172 of the *Strata Property Act, supra*. But the cause of action is that of the strata unit owner, not the strata corporation.
56. Owners of strata lots may choose to join together to bring a representative action for damage to common property or common assets in the name of the strata corporation or a section. S. 171 of the *Strata Property Act, supra*, which came into effect on July 1, 2000 provides:

### **Strata corporation may sue as representative of all owners**

**171** (1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:

(a) the interpretation or application of this Act, the regulations, the bylaws or the rules;

(b) the common property or common assets;

(c) the use or enjoyment of a strata lot;

(d) money owing, including money owing as a fine, under this Act, the bylaws or the rules.

(2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.

(3) For the purposes of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter. ... [emphasis added]

57. Owners of strata units may also agree to join together and combine their individual claims for damage to their individual strata units in an action brought in the name of the strata corporation pursuant to s. 172. This was done by the owners referred to in the Writ of Summons and in paragraph 3 of the Statement of Claim. S. 172 of the *Strata Property Act, supra*, provides:

### **Strata corporation may sue on behalf of some owners**

**172** (1) The strata corporation may sue on behalf of one or more owners about matters affecting only their strata lots if, before beginning the suit,

(a) it obtains the written consent of those owners, and

(b) the suit is authorized by a resolution passed by a  $\frac{3}{4}$  vote at an annual or special general meeting.

(2) Only those owners on whose behalf the suit is brought must contribute to the expense of suing under this section.

(3) A strata lot's share of total contribution to the expense of suing is calculated in accordance with section 99(2) or 100(1) except that

(a) only owners on whose behalf the suit is brought are required to

contribute, and

(b) only the unit entitlement of strata lots owned by owners on whose behalf the suit is brought are used in the calculations.

58. Where a strata corporation has “sections” which represent the differing interests of owners of residential and non-residential strata lots (as in Lighthouse Place), it is the section and not the strata corporation which enjoys the right to sue under s. 171 with respect to matters affecting solely the interest of the section owners. In this action, the damage alleged is solely to the common property of Section 1. That Section is entitled to exercise the rights given to the strata corporation under s. 171. S. 194 provides:

**Powers and duties of section**

**194** (1) After the creation of sections, the strata corporation retains its powers and duties in matters of common interest to all the owners.

(2) With respect to a matter that relates solely to the section, the section is a corporation and has the same powers and duties as the strata corporation ...

(c) to sue or arbitrate in the name of the section, ...

59. However, the representative action can only be brought on behalf of strata unit owners who are not defendants in the action pursuant to s.171 (1) and on behalf of owners who have consented in writing to their claim being part of the representative action pursuant to s. 172.
60. As a matter of law, those strata unit owners who are defendants cannot be part of the representative plaintiff in a s. 171 action to recover damages for injury to common property. They cannot be and are not represented in (and their cause of action is not part of) the representative action.
61. Contrary to what Applicant’s counsel submits in paragraph 24 of the Applicant’s Outline, there is no means for the Kwans to “voluntarily” participate in this action

as Plaintiffs. The legislation is clear and unambiguous. A party can not be part of a representative action as plaintiff if it is a defendant in the proceeding.

62. Individual owners do not lose rights to make claims independently of the strata corporation which brings an action pursuant to ss. 171 or 172. Strata unit owners who are defendants, have always had and continue to have a common law right of action in connection with the injury to their proportionate interest in common property. S. 171 did not take that right away: *Hamilton v. Ball, supra*.
63. Therefore, there is no issue arising “concerning who benefits from any award the Court may order” as Applicants’ counsel suggests in paragraph 24 of the Applicants’ Outline. Parties represented in the representative action recover in that action. Others recover in their separate actions. The amount recovered by each party is restricted to the amount each has contributed to the remediation fund. No strata unit owner recovers on behalf of any other strata unit owner. This is set out in case law discussed in paragraph 122 below.
64. As a result of the application of s. 171 of the *Strata Property Act, supra*, that right of action must be enforced in an action commenced separately from the representative action. S. 171 does not deal with how the separate actions might be heard. The provisions governing that are set out in the Rules of Court. But s. 171 conclusively requires that there be separate actions commenced.
65. Separate actions were commenced in an earlier proceeding in a similar situation: see *Esteem Investments Ltd. v. Strata Plan No. VR 1513* (1988), 32 B.C.L.R. (2d) (C.A.) at paragraph 15.
66. Separate legal proceedings can be commenced against different defendants arising out of the same set of facts. That has been held to be so even where the separate action is commenced after the plaintiff was not granted leave to add the defendants as parties in an existing action.

*Strata Plan LMS 343 v. Haseman Canada Corp.* 2006 BCSC 1457;  
aff'd 2007 BCCA 301

*Strata Plan LMS 343 v. Coquitlam (City)* 2005 BCSC 1150

67. These legal principles apply to the facts of this case in the following way.
68. In May, 2005, strata unit owners at Lighthouse Place authorized the Strata Corporation to bring this representative action pursuant to ss. 171 and 172 by Special Resolutions. The resolutions specifically authorized the Strata Corporation to commence action against Yvonne and James Kwan among other prospective defendants. The Plaintiff did that.
69. The Kwans could not be part of the action pursuant to s. 171 since they were to be defendants.
70. The Kwans did not provide the written consent to the Strata Corporation to act on their behalf with respect to a claim for damage to the Kwans' strata units and so were not part of the action commenced pursuant to s. 172.
71. After the Special Resolutions were passed, the Kwans retained their rights to bring a separate action to recover the damages they allege with respect to their interest in strata units and their proportion of common property and which were not part of the claim being brought by the Plaintiff.
72. The Kwans were named as defendants in this action in November, 2005 and Appearances were filed for Yvonne and James Kwan on December 15 and December 21, 2005, respectively.
73. The Writ of Summons specifically identified the strata unit owners that were represented by the Plaintiff in this action. The Kwans are not listed as represented strata unit owners.

74. They clearly were not part of the action.
75. The Kwans had the right and the obligation to pursue their separate cause of action within the limitation period.
76. Instead of commencing their own action within the limitation period as the Kwans were entitled to do, the Kwans have now brought what can only be described as an extraordinary Application in which they seek to circumvent the Rules of Court and the *Limitation Act, supra*.
77. The City of Richmond submits that there is no basis for allowing the Kwans to bring what is required to be a separate proceeding by way of the means suggested in the Kwans' Application – through adding a parallel action to the existing action or by way of Third Party proceedings after the expiry of the applicable limitation period.

### C. NO BASIS FOR A PARALLEL ACTION

78. The Kwans' are seeking, by grant of leave of the Court, the right to issue a separate Writ and Statement of Claim in the present action.
79. The City of Richmond submits that the Application to authorize a parallel proceeding and to deprive the defendants of their limitation defence should be dismissed for the following reasons:
  - (i) the *Limitation Act, supra*, does not provide for relief against a time limitation bar by way of a parallel action; and,
  - (ii) the order they seek has no basis in the Rules of Court, and is contrary to principles set out in the Rules of Court;

(i) the *Limitation Act, supra*

80. The *Limitation Act, supra*, sets out specific proceedings in which the lapse of time for the bringing of an action is not a bar. Issuance of a new Writ of Summons and Statement of Claim as proposed by the Applicants is not one of them. S. 4 provides that the lapse of time is not a bar only to (a) proceedings by counterclaim, (b) third party proceedings, (c) claims by way of set off or (d) adding or substituting a new party as Plaintiff or Defendant in the original action.

(ii) application is without precedent and has no basis in the Rules of Court

81. In addition, this Application is not based on or justified by any Rule of Court, and is contrary to principles set out in the Rules of Court.

82. The Kwan's Outline says that they are seeking to be added as Plaintiffs pursuant to Rule 15. But that is not what is sought in paragraph 2 of the Kwans' Notice of Motion:

The Applicants have leave pursuant to Rule 15(5)(a)(iii)(A) and (B) to issue herein and serve a Writ and Statement of Claim, separate from all existing Writs and Statements of Claim, but in the same Action, in the form attached herto as "Schedule B", which Writ and Statement of Claim are not subject to any fully accrued limitation defence, pursuant to section 4(1) of the Limitation Act aforesaid.

83. In paragraph 26 of the Applicants' Outline the request of the Court is stated to be for leave to issue "a separate Statement of Claim in the same action".

84. The Applicants do not ask for an order to add parties to an existing action. Instead, the Applicants seek an order authorizing the commencement of a new and supposedly parallel proceeding (after the expiry of the limitation period), its inclusion within the framework of the existing action, and the removal of the defendants' rights to assert a limitation defence. The Kwans want to pursue within an existing action what is (and has to be under the *Strata Property Act*,

*supra*) a separate action. That is not governed by Rule 15. Rule 15 deals only with the addition of parties in an existing action, not the commencement of new actions.

85. In fact, there is no Rule of Court that governs the Application which is brought. There is no Rule of Court which gives the Court the power to authorize the commencement after the expiry of the limitation period of what must be a separate action and to do so in a way which deprives defendants of a right to assert a limitation defence. There is also no statutory provision that gives the Court this power. This Application is entirely without foundation.
86. It is also ill-conceived with respect to the Rules of Court and specifically is contrary to the principles underlying Rules 5(8), 15, and 19(7).
87. Although the Application is not justified by any Rule of Court, what is proposed is more like a consolidation under Rule 5 (8). The Application cannot be considered under that Rule because there was no separate action commenced that could be consolidated with the original action, presumably because of the expiry of the limitation period. However, even if there had been such an action, consolidation would not be possible because consolidation orders are refused when the plaintiff in one of the actions is a defendant in another of the actions. A party cannot be plaintiff and defendant in the same action: *McKenzie v. Cramer* [1947] O.R. 196; *Nickas v. Thompson* (1951), 3 W.W.R. 450 (B.C.S.C.); *Lewis v. Warren* (1956), 19 W.W.R. 248; *Stellar Properties Ltd. v. Botham Holdings Ltd.* (1990), 47 B.C.L.R. (2d) 260 (S.C.).
88. For the same reason, and although the Application does not seek to do this, the Kwans could not be added as Plaintiffs in the existing action pursuant to Rule 15. The only way they can seek relief is to start an action separate from the existing one.

89. Finally, the pleadings proposed in the new parallel action contravene Rule 19 (7). No party can plead an allegation of fact which is inconsistent with the party's previous pleading in the same action: *Gabbs v. Bouwhuis* 2005 BCSC 1782.
90. The proposed Statement of Claim is fundamentally inconsistent with the Statement of Defence filed by the Kwans in the originating action.
91. In paragraphs 44-47 of the Statement of Claim, the Plaintiff alleges that the strata lots, common property, common facilities and other assets of the Condominium have construction deficiencies which are particularized and which are said to have caused "Resultant Damage" and given rise to "Dangerous Defects".
92. In paragraph 4 of the Statement of Defence filed by the Kwans in this action on July 15, 2006, the Kwans pleaded the following:
- In reply to paragraphs 44-47 of the Statement of Claim, the Kwan Defendants deny:
- a. that the Strata Lots, common property, common facilities and other assets of the Condominium have Construction Deficiencies as alleged or at all;
- b. that the construction deficiencies have caused Resultant Damage as alleged or at all; and
- c. that the Construction Deficiencies and Resultant Damage have given rise to Dangerous Defects as alleged or at all.
93. In paragraphs 44-47 of the proposed Statement of Claim, the Kwans plead exactly the same allegations pleaded in paragraphs 44-47 of the Plaintiff's Statement of Claim which they denied in paragraph 4 of their Statement of Defence.
94. In paragraphs 9 and 26 of the Statement of Defence, the Kwans plead that the Plaintiff's claim, which is exactly the same as their proposed claim, is statute

barred.

95. In paragraph 23 of the Statement of Defence, the Kwans plead that the Plaintiff's claim, which is exactly the same as their proposed claim, is "too remote to sustain the action as it is in the nature of pure economic loss and does not pose any real and substantial risk or danger to the occupants or others."
96. Therefore, the proposed Statement of Claim would contravene Rule 19 (7).
97. There is no basis under statute or under the Rules of Court for the Application that the Kwans bring to authorize the commencement of a new action and deprive the defendants of a limitation defence. In addition, it is an Application which is contrary to the principles set out in any Rules of Court which might be remotely applicable. The Application should be dismissed on this basis alone.

#### D. THE PROPOSED THIRD PARTY CLAIM IS NOT TENABLE

98. The Kwans apply in the alternative to issue a Third Party Notice in which they seek contribution and indemnity (as set out in paragraph (a) in the Prayer for Relief) and damages (as set out in paragraph (c) in the Prayer for Relief).
99. The test for when a Third Party Notice may be validly issued after the expiry of the limitation period was set out in *Lui v. West Granville Manor Ltd. (No. 1)* (1985) 61 B.C.L.R. 315. Lambert J.A. said at paragraphs 52-3:

In my opinion, permitting third party proceedings to stand and not be struck out, where the third party proceedings are capable of standing alone as a separate cause of action, and where they are brought after the effluxion of a limitation period that would apply if the third party proceedings were standing alone, must depend on the establishment of some real and substantive connection between the third party proceedings and the original action. That real and substantive connection must also operate to explain why the third party

proceedings were not brought as an independent action. There must be some degree of dependence by the third party proceedings on the original action before the third party proceedings setting up a separate cause of action can be piggy-backed over the limitation period.

To put it another way, where the limitation period has expired, and the third party proceedings set up a separate cause of action, prejudice to the third party must be presumed, and an explanation is required, from the defendant who issued the third party notice, to explain the delay and to explain the dependence of the third party proceedings on the original action, before the third party notice will be allowed to stand. [emphasis added]

100. In *Lui v. West Granville (No. 2)* (1987), 11 B.C.L.R. (2d) 273 this passage was confirmed as the law at paragraph 83.
  101. For a third party proceeding to be validly commenced after a limitation period has expired, the third party proceeding must depend on the original action and the defendant issuing a Third Party Notice must not only explain the reason for delay but must also explain how and why the third party proceeding depends on the original action.
  102. The City of Richmond submits that the Application to issue a Third Party Notice should be dismissed because:
    - (a) with respect to the claim for damages, the Third Party claim cannot proceed after the expiry of the limitation period because the claim for damages arises from a cause of action separate and independent from the original action; and
    - (b) with respect to the claim for contribution and indemnity, the Kwans have no explanation for why they did not commence this proceeding within the limitation period.
- (a) separate and independent cause of action

103. In this case, the proposed Third Party proceeding does not and cannot depend on the original action filed by Section 1. To the contrary, s. 171 of the *Strata Property Act, supra*, specifically provides that the claim which is proposed to be brought by way of the Third Party Notice by the Kwans is independent of the claim made by Section 1.
104. The proposed Third Party proceeding with respect to any damages flowing from injury to individual strata units owned by the Kwans is their own right of action as tenants in common and is independent of any claim by other owners of strata units as discussed above. The Kwans' claim is independent of any representative Section action unless the Kwans consent in writing to the Strata Corporation including them in the representative action. The Kwans did not consent and are not included in the representative action. Any claim they have is separate and independent from the existing action in fact and law.
105. Further, there is nothing in the proposed Third Party claim that depends upon either the allegations in the action commenced by the Plaintiff or the resolution of that action at trial. There is nothing in the proceedings commenced by the Plaintiff that is necessary to give life to an action for damages by the Kwans with respect to injury to their strata units or the recovery of costs to remediate their proportionate share of the common property.
106. There is no basis under Rule 22 (and the case law interpreting it) for this Court to grant leave to issue the proposed Third Party Notice.

(b) no adequate explanation of delay

107. The lack of "dependence" arising from the legal principle that the cause of action is separate and distinct for each individual strata unit holder means that this Court does not have to consider whether there is any reasonable explanation for "delay" in not commencing Third Party proceedings (whether

that explanation is based on “mistake of law” or on the personal matters set out in Yvonne Kwan’s Affidavit #4). There is no basis for such proceedings.

108. However, because the Kwans have stressed through their counsel (not through any affidavit material) that there has been a “mistake of law” and Yvonne Kwan has referred to personal matters which she says explain the delay, the City of Richmond makes the following submissions.

(i) mistake of law as explanation for delay

109. The Applicant’s counsel places a substantial emphasis on “mistake of law”. He says at paragraph 7 of the July 7, 2008 Outline that “The Kwan’s primary explanation for delay is mistake of law.”

110. A failure to commence legal action within the limitation period which is based on incorrect legal advice can be a satisfactory explanation for delay: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161.

111. But there must be an explanation.

112. Where “mistake of law” is referred to as an explanation for delay beyond the expiry of a limitation period which justifies allowing proceedings not to be barred, there must be a substantive description of the nature of the mistake which substantiates the delay: *Teal Cedar, supra*; *West Fraser Mills Ltd. v. Chouinard* 1992 CarswellBC 1861(Master); rev’d (1992), 73 B.C.L.R. (2d) 252 (S.C.); aff’d (1993), 79 B.C.L.R. (2d) 321 (C.A.).

113. In both *Teal Cedar, supra*, and *West Fraser Mills, supra*, the lawyers who were responsible for making the mistake of law filed affidavits attesting to how the mistake arose and what was done about it.

114. Nowhere is there any explanation by the Kwans (“primary” or otherwise) or most importantly by their counsel (Wong, Basham, Yu, and /or Olsen) during the relevant time period to say what the “mistake of law” is, when it arose, and what was done about.
115. The City of Richmond submits that the failure of the Kwans to provide the kind of explanation required is fatal to the application for leave.
116. The Kwans counsel submits in his Outline that the mistake of law is related to the decision by the Court of Appeal in *Hamilton v. Ball, supra*. He says that this case changed the law and that this change of law was not predicted or recognized quickly enough.
117. A change of law can explain delay in commencing action which justifies a proceeding after the limitation period has expired: *Gilbert v. Graves* 2006 BCSC 1109.
118. However, there is no evidentiary basis to establish that there was the kind of mistake submitted by counsel. There is no Affidavit from any one of the Kwans’ lawyers saying that he or she failed to understand the law set out in *Hamilton v. Ball, supra*, before it was handed down or did not recognize quickly enough (or at all) that it had some effect on the Kwans. There is no evidence filed by or on behalf of the Kwans to say that the decision in *Hamilton v. Ball, supra*, had any impact on decisions surrounding the commencement of action to recover damages with respect to injury to the Kwans strata lots or to the damage to the Kwans proportionate interest in common property.
119. More importantly, there is no basis in law for saying that *Hamilton v. Ball, supra*, changed the law. *Hamilton v. Ball, supra*, did not change any law or

effect any change to the Kwans' rights in any way.

120. For the reasons set out in paragraphs 51-55 above concerning the property interests of strata unit owners, *Hamilton v. Ball, supra*, simply confirmed what had always been the law (both in statute and in common law application of the law in litigation settings). The owners of strata units hold them and a proportionate interest in common property of the strata as tenants in common. Strata unit owners, as tenants in common and in accordance with the procedures set out in the *Strata Property Act, supra* and its predecessor sections, have individual and separate causes of action relating to their own property interests. They are able to sue for damage to property held solely by them and to sue for their proportion of damage to property held in common.
121. This has been the law, as confirmed in *Hamilton v. Ball, supra*, since the 1980s in B.C. The law was clearly set out in *Owners, Strata Plan No. NW 651 v. Beck's Mechanical Ltd., supra*; *Strata Plan VR 368 v. Marathon Realty Co., supra*; *The Owners, Strata Plan VR 2000 v. Shaw et al, supra*; *Strata Plan No. VR 1720 v. Bart Developments Ltd., supra*; *The Owners, Strata Plan LMS 1468 v. Reunion Properties Inc., supra*; and *The Owners, Strata Plan LMS 888 v. The City of Coquitlam et al, supra*.
122. *Hamilton v. Ball, supra*, did not give the Kwans any right they did not already have from the time they received the RDH report in July, 2000 at the latest. No one had to predict *Hamilton v. Ball, supra* as a pre-condition to asserting a cause of action on behalf of the Kwans or to understand the nature of the Kwans' cause of action.
123. The Kwans' position with respect to damage suffered to common property was fully and completely explained in *Strata Plan VR 368 v. Marathon Realty Co., supra*. There, Seaton J.A. said:
- 16 Counsel for the respondent says that the fruits of an action

on behalf of some only of the owners will be for the benefit of all owners. We were not directed to any section of the Act that makes that so. It seems to be inconsistent with the words "on behalf of". If you sue on behalf of someone, it seems to me, you sue for his benefit not your own. If the intention had been to assign the benefit of the action to the corporation or the owners as a whole, different language than "on behalf of" would have been employed. In this legislation, "on behalf of" an owner means "for the benefit of" that owner. Other legislation has been interpreted in this way: see *Re Millar* (1976), 12 Nfld. & P.E.I.R. 440, 71 D.L.R. (3d) 120 at 128 (P.E.I.S.C.), and *Lewis v. Nicholson* (1852), 18 Q.B. 503, 118 E.R. 190.

124. This statement clearly indicates that any action commenced by the strata corporation would be only for the specific owners on whose behalf the action was commenced. This statement also responds to paragraphs 24 and 25 of the Kwans' Outline.
125. There is therefore no basis for a submission that *Hamilton v. Ball, supra* changed the law or that the law could not be discerned prior to *Hamilton v. Ball, supra*.
126. Any counsel the right of a strata unit owner to recover damages would have come across this quote from *Strata Plan VR 368 v. Marathon Realty Co., supra*. The case itself is easily found directly. More importantly, any counsel looking at the basis for commencing action on behalf of strata unit owners in July 2000 would have noted *Strata Plan VR 2000 v. Shaw, supra*, because it deals with limitation of actions and the right of parties to bring action. A substantial portion of the quote in paragraph 123 above is set out in paragraph 43 of *Strata Plan VR 2000 v. Shaw, supra*.
127. By 2004, there was a substantial body of case law defining an independent right of action on the part of strata unit owners with respect to both common property and their own individual units. To the extent that there was any difficulty about this concept (and none is set out in any evidence filed by or on

behalf of the Kwans), it is submitted that a reasonable and prudent legal advisor would have recommended legal action. This was discussed in *Strata Plan No. VR 1720 v. Bart Developments Ltd.*, *supra*. There, Esson J.A. stated:

5 That brings me to the cross-appeal by the plaintiffs. It is directed to the ruling that two aspects of the claim are statute-barred. The submission essentially is that, if the plaintiffs had sought legal advice in November 1989, they would not have been advised that there was a reasonable prospect of success in an action in negligence for repairs to a defective building. On this point, the judge held that the cost of replacement, which is the basis for those two aspects of the claim, was not one for pure economic loss but rather, as she put it, were actual repair costs resulting from physical damage. In this Court, the defendants have not sought to uphold that basis of decision, but nevertheless contend that the decision was correct in substance. In their factum, the plaintiffs put the matter this way:

In light of these cases, the reasonably competent notional legal advisor in November 1989 would not have provided a favourable opinion concerning the prospects of a successful legal action. Indeed, this would likely have remained the gist of any legal advice provided to the Respondent prior to the decision of the Supreme Court of Canada in Winnipeg Condominium (1995), 121 D.L.R. (4th) 193 (S.C.C.) in which the Supreme Court of Canada held that the cost of remedying such defects would be recoverable if the defects were such that they caused a reasonable apprehension of danger. That is the Respondent's allegation in this action. In this respect, it should be noted that Manitoba Court of Appeal in Winnipeg Condominium dismissed the plaintiff's claim largely on the basis of the decision in D&F Estates.

6 Accepting that the claim is one for pure economic loss, I do not accept that a reasonably prudent legal advisor in 1989 would have advised against joining the architect and engineer. The argument based on *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1995), 18 C.L.R. (2d) 1 (S.C.C.) is essentially based on the contention that the law was settled in 1973 in *Rivtow Marine Ltd. v. Washington Iron Works* (1973), 40 D.L.R. (3d) 530 (S.C.C.) and that a prudent lawyer would not have considered it to have been changed until the decision of the Supreme Court in *Winnipeg Condominium* was known. That argument essentially ignores the

general thrust of Canadian tort law in the years since *Rivtow* was decided. I need only refer to *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.) as an example of the case authorities and writings which any prudent advisor would have had in mind in 1989. As a matter of interest, I note that the *Winnipeg Condominium* case itself was begun in 1989 considerably earlier in the year than the relevant date in this case. I do not suggest that is an important circumstance, but is part of the picture.

128. The City of Richmond submits that there is no sufficient or valid explanation of delay arising from any “mistake of law” and that in, any event, the law did not change through the decision in *Hamilton v. Ball, supra*, nor did that case reveal law that was obscure or clarify law that was uncertain.

(ii) personal matters as explanation for delay

129. The personal matters referred to in Affidavit #4 of Yvonne Kwan do not explain why the Kwans, who knew about water ingress concerns at Lighthouse Place in beginning in 1997, had legal advisors working with them with respect to water ingress issues during the years 2000-2006, had the means of knowledge to commence their separate cause of action in July, 2006 or shortly thereafter, knew in May, 2005 that they would be defendants in an action to be commenced by the Strata Corporation, and knew in November, 2005 which unit holders were suing in this representative action, did not commence any proceedings, or seek to, until February, 2008. The City of Richmond repeats and relies on what is said in paragraphs 20-46 above with respect to the Kwans knowledge concerning damage and rights with respect to the commencement and the expiry of the limitation period.

## Conclusion

130. The City of Richmond submits that the Application should be dismissed with costs. The limitation period has expired with respect to the cause of action which the Kwans hold separately from other strata unit owners. There is no legal foundation for the request that this Court authorize the commencement of a parallel proceeding in this action after the expiry of the limitation period. The issuance of the proposed Third Party Notice after the expiry of the limitation period is not valid under Rule 22.

All of which is respectfully submitted.

Dated: July 11, 2008

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David M. Twining, Solicitor for the  
Defendant, City of Richmond

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