

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Abdoh v. Owners of Strata Plan KAS 2003*,  
2013 BCSC 817

Date: 20130509  
Docket: 45919  
Registry: Kamloops

Between:

**Sylviane Abdoh and Hamid Abdoh**

Plaintiffs

And

**The Owners, Strata Plan KAS 2003 and 567506 B.C. Ltd.**

Defendants

And

**The Owners Strata Plan KAS 2003**

Third Party

And

**Intrawest ULC formerly known as Intrawest Corporation**

Fourth Party

Before: The Honourable Mr. Justice Meiklem  
In Chambers

**Reasons for Judgment**

Counsel for the Plaintiffs:	J. Frame
Counsel for The Owners, Strata Plan 2003:	S.M. Armstrong
Counsel for 567506 B.C LTD:	C. AuBuchon
Counsel for Intrawest ULC:	A. Cocks (via teleconference)
Place and Date of Hearing:	Kamloops, B.C. March 8, 2013
Place and Date of Judgment:	Kamloops, B.C. May 9, 2013

**The Applications**

[1] The plaintiffs are owners of a residential strata lot in a building known as Fireside Lodge situated in the Sun Peaks ski village north of Kamloops. Fireside Lodge consists of 82 strata lots, of which lots 1 through 73 are residential, and lots 74 through 82 are commercial. Strata lot 80 is leased by the defendant 567506 B.C. Ltd. for the operation of a restaurant known as Powder Hounds. This business has been a tenant in strata lot 80 since the completion of the building in 1998.

[2] The plaintiffs' claim in this summary trial application is for declaratory relief and ancillary orders dealing with the parking floor of the Fireside Lodge, specifically:

1. A declaration that the owners, occupiers, tenants and visitors of strata lots 74 through 82 inclusive are not permitted to make use of the parking area designated as Limited Common Property ("LCP") for the residential lots of Strata Plan KAS 2003 (the "Strata Plan"), save and except strata lot 80's entitlement to use a storage area identified as LCP for the use of strata lot 80 in a unanimous resolution of The Owners, Strata Plan KAS 2003 (the "Strata Corporation") dated November 10, 1998;
2. An order that the Strata Corporation and its council stop permitting, and take reasonable measures to prevent, owners, occupiers, tenants and visitors of the commercial strata lots from possessing, occupying, or

otherwise using the parking area designated as LCP for the residential strata lots 1 through 73;

3. An order that Powder Hounds forthwith remove its water heater from the garbage storage area on the parking floor of Fireside Lodge;

4. An order that Powder Hounds forthwith remove the Powder Hounds' sign on the exterior of Fireside Lodge, directly above the west entranceway to Fireside Lodge.

### **The Factual Background**

[3] The Strata Plan was deposited in the Kamloops Land Title Office on January 21, 1998. The Strata Plan designated most of the underground floor as LCP available for parking for the exclusive benefit of strata lots 1 through 73. Excluded from the LCP parking area were common property areas for a mechanical room, an electrical room, stairs and a garbage storage room.

[4] On November 10, 1998, by unanimous resolution, as required by the *Condominium Act* then in force, the Strata Corporation removed the LCP designation in favour of the residential owners over a specific portion of the parking floor described as a storage area. This area of approximately 12.5 square metres is an enclosed storage room and was re-designated as a LCP storage area for the use of strata lot 80 which is situate on the main floor directly above the storage area.

[5] Sometime prior to the November 10, 1998 first meeting of the Strata Corporation, the owner developer, Intrawest, had consented to Powder Hounds placing its air conditioning condenser unit and refrigeration compressors (collectively referred to hereafter as the "Cooling Equipment") in a small area of the LCP parking area north of, and adjacent to, the LCP storage area for strata lot 80. This equipment is located on platforms which are bolted to the wall and roof of the parkade in that area.

[6] Also prior to the first strata council being formed and while Intrawest were exercising the powers and performing the duties of a strata council, Powder Hounds modified the common property garbage storage area on the parking floor by building a wall which divided the area into two parts and installed a water heater in one part for their own use. Mr. Ernst of Powder Hounds deposed that Intrawest also approved the location of the Powder Hounds business sign above the entryway to Fireside Lodge which is located at the northeast corner of the restaurant in October 1998. The plaintiffs' complaint about the sign is that it does not comply with the Strata Corporation's Bylaw 3(6), because it "is beyond the outside perimeter of Powder Hounds' strata lot". According to the bylaws, an exterior sign may be attached to "the common property around the outside perimeter of the strata lots", but must be "located only on the strata lot side of the Lodge".

[7] The plaintiffs purchased lot 34 in October 2006.

[8] Mr. Abdoh was elected as one of seven strata council members at the December 4, 2010 annual general meeting of the Strata Corporation. The minutes of that meeting recorded that residential owners asked Gateway Property Management Corp. ("Gateway"), to send a letter to commercial owners that no commercial owners or their customers were to park in the underground parking between December 20, 2010 and January 5, 2011. The evidence is not clear about whether such a letter was sent.

[9] At a meeting of the strata council on January 25, 2011, despite Mr. Abdoh's input that council had no authority to permit commercial users to use the LCP parking area, the majority of council agreed to allow the commercial lots to use the underground parking provided that they did not abuse the privilege, and did not use it during Christmas holidays, President's week, and Spring Break. Mr. Abdoh deposed that he repeated this position at a strata council meeting on May 10, 2011.

[10] Counsel for Mr. Abdoh sent a letter to the Strata Corporation, c/o Gateway on June 28, 2011, warning that litigation would be commenced if satisfactory responses were not received by the end of June to questions about the legal basis of Powder

Hounds' occupation and use of portions of the parking area other than the LCP designated for them in 1998. This was the second concern dealt with in the June 28 letter, the first being Mr. Abdoh's concern with an apparent conflict of interest in the intended selection of a building maintenance contractor who was a tenant of a commercial owner who was one of the three members of the selection subcommittee. The letter gave no explanation of why a response was necessary within 2 days.

[11] This proceeding was started with the filing of a notice of civil claim on July 8, 2011.

[12] Gateway wrote letters dated July 28, 2011 on behalf of the strata council to all the owners of commercial strata lots advising them that as a result of the civil action filed against the Strata Corporation, the strata council must uphold the registered Strata Plan and the bylaws and request that commercial owners, tenants and employees not use the underground parking. A separate letter of the same date was sent to Mr. Kimmerle, the owner of strata lot 80, advising him that as a result of the civil action being filed, the strata council requested that he advise his tenants (Powder Hounds) to remove all moveable chattels from the LCP area of the underground parking as well as the common area in the garbage room and specifically mentioned the area to the north of the LCP for strata lot 80.

[13] Powder Hounds has removed all moveable chattels from the LCP area of the underground parking. The Cooling Equipment remains in place in a small open area north of the LCP storage area of strata lot 80.

[14] Mr. Ernst of Powder Hounds deposes that he has attempted to find an alternative location for the air conditioner condenser, but has not been able to find one on the interior of the building. Exterior location of condensers is possible with the discretionary consent of Sun Peaks Resort Corporation; however, even if consent was obtained, the only practical location is on Powder Hounds' patio, and locating the condenser there would reduce their summer business due to the noise emitted.

[15] Mr. Ernst deposes that the compressors for his refrigeration systems require significant air movement to function properly. Although they could be moved into the LCP storage area or into Powder Hounds' kitchen, there would be insufficient air flow and the refrigerators would malfunction.

[16] Mr. Ernst deposes that Powder Hounds is not a large company and relies on seasonal crowds for its survival and that the changes to Fireside Lodge requested by the plaintiffs could put serious financial strain on Powder Hounds and jeopardize its future existence.

[17] It is not in dispute that the area where the Cooling Equipment in question is located is not accessible by cars and contains other equipment for the building's heating and cooling equipment. It was never designated as a parking space and there is no evidence of any other use by the residential owners being prevented or hindered.

[18] The most significant non-permitted use of the LCP residential parking area by the commercial owners and invitees was of course the parking of vehicles, which at certain times directly hindered the residential owners and their invitees in the use of their LCP parking area. The next most significant non-permitted use was the use by Powder Hounds of open areas outside their own LCP enclosed storage area for storage of various chattels.

[19] The Strata Corporation passed special resolutions (the votes were 44 in favour, 0 opposed, 1 abstention) at its December 3, 2011 annual general meeting to grant Powder Hounds' exclusive use of the area, described as "the boiler room", for the sole purpose of holding the hot water tank, and another small portion (approximately 2 feet by 4 feet) of the common property garbage storage area to place a cart holding two oil barrels of used cooking oil, for a period of one year, for a fee of \$360 per year. These resolutions were specified to be under the authority of s. 76 of the *Strata Property Act*, [SBC 1998] Chapter 43 (the "Act"), and for a one year period.

[20] At the December 1, 2012 annual general meeting of the Strata Corporation, a resolution to renew the exclusive use of the boiler room was not put forward by the Chair, based on advice from legal counsel, but a special resolution to grant exclusive use of the additional 2 foot by 4 foot area for one year was passed, (34 in favour, 0 opposed, 1 abstaining) as was a resolution granting exclusive use of common property outside the restaurant for “placement and storage of furniture and commercial property”, (34 in favour, 1 opposed, 0 abstaining).

[21] The Strata Corporation’s application response, confirmed by the affidavit of Ms. Murray, the property manager for the Strata Corporation, states that the corporation intends to pass a resolution by a  $\frac{3}{4}$  vote at its next special general meeting designating the area in the common property garbage room in which the Powder Hounds’ water heater is situated as LCP for Powder Hounds’ exclusive use. Common property may be designated as limited common property by a  $\frac{3}{4}$  vote resolution at an annual or special general meeting, pursuant to s. 74 of the *Act*.

**The Issues and the Applicable Statutory Provisions Relating to the LCP Residential Parking Area**

[22] The first two orders sought pertain to non-permitted use of the LCP parking area. The plaintiffs’ application for an order directing the Strata Corporation and its council to stop permitting and to start preventing commercial owners and customers from use of the parking floor invokes the jurisdiction of the court under s.164 and s.165 of the *Act*, which read:

**Preventing or remedying unfair acts**

**164** (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

- (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
- (b) vary a transaction or resolution, and
- (c) regulate the conduct of the strata corporation's future affairs.

**Other court remedies**

**165** On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

- (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
- (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[23] At the time of the hearing, the only continuing non-permitted use of that area relates to the placement of the Cooling Equipment belonging to Powder Hounds. The Strata Corporation and strata council have acted to disallow the other non-permitted uses of the LCP parking area, and the commercial owners are complying. In other words, the issue of the Strata Corporation not fulfilling its duty in respect of non-permitted uses of the LCP residential parking area is moot, except with respect to the continued placement of the Cooling Equipment. I will deal with the application for the first two orders as one seeking orders specific to that equipment.

[24] The plaintiffs submit, correctly, that the Strata Corporation has no authority to grant a lease or licence over an area designated as LCP and has a duty to manage and maintain common property for the benefit of the owners. They argue that failures or refusals of the strata council and the Strata Corporation to enforce its bylaws, the Strata Plan and the provisions of the *Act*, constitute breaches of ss. 3, 26 and 31 of the *Act*, which the court should prohibit pursuant to ss. 164 and 165 of the *Act*. Sections 3, 26 and 31 of the *Act* provide as follows:

**Responsibilities of strata corporation**

**3** Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

...

**Council exercises powers and performs duties of strata corporation**

**26** Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

...

**Council member's standard of care**

**31** In exercising the powers and performing the duties of the strata corporation, each council member must

(a) act honestly and in good faith with a view to the best interests of the strata corporation, and

(b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[25] I note that s. 3 addresses the responsibility of a strata corporation, s. 26 addresses the role of a strata council, and s. 31 addresses an individual council member's standard of care.

[26] In my view, s. 164 of the *Act* is not applicable to this application, because the plaintiffs do not allege, nor is there any evidence of, any significantly unfair action or threatened action of the Strata Corporation or strata council in relation to the plaintiffs. Section 165 is the appropriate section to invoke on this application, and it empowers the court to order a strata corporation to perform a duty it is required to perform under the *Act*, the bylaws or the rules, or to stop contravening the *Act*, regulation, its bylaws or the rules, (a "rule" being defined in s. 1 of the *Act* as a rule of the strata corporation made under s. 125 or s. 197).

[27] The Strata Corporation advances four alternative arguments in opposition to the plaintiffs' application for the orders sought in respect of the LCP parking area, namely:

1. any impropriety respecting the location of the Cooling Equipment is *de minimus*, and does not merit judicial scrutiny;
2. an easement is implied in respect of this equipment pursuant to s. 69(1)(b) of the *Act*, which reads as follows:

(b) for the passage or provision of water, sewage, drainage, gas, oil, electricity, garbage, heating and cooling systems and other services, including telephone, radio and television, through or by means of any pipes, wires, cables, chutes, ducts or other facilities existing in the common property or another strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of the strata lot, and

3. the components of the Cooling Equipment are fixtures, and therefore common property of the Strata Corporation;

4. the Strata Corporation and its council have fulfilled the Strata Corporation's obligations under ss.3, 26 and 31 of the *Act*, which require the council to act honestly and in good faith with a view to the best interests of the strata corporation and to exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances.

[28] Powder Hounds advances the same arguments in opposition to the relief sought in respect of the Cooling Equipment, and adds an estoppel argument; because of its reliance on the contractual dealings with the owner/developer before the first annual general meeting of the Strata Corporation, and the subsequent acquiescence of the Strata Corporation, it would be unconscionable, unjust or inequitable to require Powder Hounds to remove the Cooling Equipment.

### **Analysis of the Arguments Pertaining to the LCP Residential Parking Area**

[29] It is acknowledged by all parties that the Strata Corporation can only change the LCP designation of the parking floor by amending the Strata Plan, because of the provisions of s. 75 of the *Act*, which reads as follows:

#### **Removal of designation of limited common property**

**75** (1) If a designation of common property as limited common property was made

(a) by the owner developer at the time the strata plan was deposited or by a plan amendment by the owner developer under section 258, or

(b) by an amendment to the strata plan under section 257,

the designation may only be removed by amending the plan under section 257.

(2) If a designation of common property as limited common property was made by a resolution passed by a 3/4 vote under section 74, it may only be removed by a resolution passed by a 3/4 vote at an annual or special general meeting.

(3) A resolution passed under subsection (2) does not have effect until it is filed in the land title office.

(4) The removal of a designation of limited common property by a resolution under subsection (2) does not require an amendment to the strata plan.

[30] Section 257 of the *Act* reads as follows:

**Amending strata plan to designate limited common property**

**257** To amend a strata plan to designate limited common property, or to amend a strata plan to remove a designation of limited common property made by the owner developer at the time the strata plan was deposited or by amendment of the strata plan, the strata plan must be amended as follows:

(a) a resolution approving the amendment must be passed by a unanimous vote at an annual or special general meeting;

(b) an application to amend the strata plan must be made to the registrar accompanied by

(i) a reference or explanatory plan, whichever the registrar requires, that

(A) shows the amendment, and

(B) is in a form required under the *Land Title Act* for a reference or explanatory plan, and

(ii) a Certificate of Strata Corporation in the prescribed form stating that the resolution referred to in paragraph (a) has been passed and that the reference or explanatory plan conforms to the resolution.

[31] It is open to the Strata Corporation to attempt to amend the Strata Plan in that fashion. If such a resolution was not expected to be supported unanimously, and the dissention came from less than 5% of the Strata Corporation's votes, (in this case 4 votes or less), the Strata Corporation could, if so resolved by a 3/4 vote at a general meeting, apply to the court pursuant to s. 52 of the *Act* to, in effect, implement the wishes of the 95% or more of the owners over the wishes of the dissenters, on whatever terms the court considers just.

[32] The test on such an application is set out in s. 52(3):

**Unanimous votes**

(3) On application under subsection (2), the court may, if satisfied that the passage of the resolution is in the best interests of the strata corporation and would not unfairly prejudice the dissenting voter or voters, make an order providing that the vote proceed as if the dissenting voter or voters had no vote.

[33] Although not in play on this application, I refer to these statutory provisions because I think that the test set out in s. 52(3) is useful to consider when weighing the plaintiffs' submission that the Strata Corporation has breached its statutory duty in its manner of dealing with the plaintiffs' complaints about the improper use of LCP residential parking area by Powder Hounds. The provisions of s. 52 provide a mechanism for the court to override the dissent of a very small minority to action (or inaction) which is in the best interests of the strata corporation and would not unfairly prejudice the dissenting voter or voters.

[34] The plaintiffs argue that the Strata Corporation has only modestly "toned down" the non-compliance by commercial owners and is wrongfully standing by its ability to permit non-compliance. It is clear that the Strata Corporation has taken a measured approach to the less significant intrusions of Powder Hounds, but it did eventually take decisive action in stopping the non-permitted parking use by commercial owners and invitees, and the use of additional open area storage use by Powder Hounds, once the plaintiffs' point was driven home by commencement of this proceeding. By the property manager's letter of July 28, 2011, the owners and the strata council invoked the bylaws to remedy the trespass in the LCP in respect of all chattels that were not attached or that could be removed easily. That description was clearly intended to exclude the Cooling Equipment.

[35] I do not agree with the characterization of the Strata Corporation's position in respect of the Cooling Equipment as advocating an ability to permit non-compliance. The measured approach taken in that regard was not necessarily inconsistent with the Strata Corporation's responsibility to manage the common property for the benefit of the owners, and the individual council members' standard of care set out in s. 31 of the Act, considering the lengthy tenure of Powder Hounds in strata lot 80,

Powder hounds' reliance (unfounded though it may be in law) on the original consent of the owner/developer in 1998 before the first strata council was elected, the absence of any complaints about the presence of the Cooling Equipment until 2011, the significant problems and costs associated with relocating the Cooling Equipment, and the absence of any effect on the use or enjoyment of the LCP by any of the residential owners.

[36] The Corporation's bylaws do prohibit the use of common property for any purpose contrary to its intended use. I accept that ss. 3 and 26 of the *Act*, read together imply a duty on the part of the Strata Corporation to enforce the Corporation's by-laws, (notwithstanding the absence of any express provision to that effect), but given the provisions of s. 31, enforcement vigour must be tempered with prudence and good faith.

[37] There are significant differences between the bylaw breach of storing miscellaneous chattels in an open area not intended for that use, and the bylaw breach of maintaining the Cooling Equipment placement. Obviously, the former is devoid of the easement and affixation arguments that have been made by the Strata Corporation and Powder Hounds on this application. More significantly, the former took up floor space and was unsightly - factors which could detrimentally affect the residents' use and enjoyment of the LCP - whereas the latter is mounted on the wall and attached to the ceiling in a manner that has no known detrimental effect on the resident owners' use and enjoyment of the LCP.

[38] The plaintiffs suggest that the facts are analogous to an owner looking at a continuing trespass and seeking a remedy from the court. Putting aside the question of whether the facts amount to trespass, which was not argued before me, the suggested analogy is not apt. Firstly, the plaintiffs together are only 1/73 owners of the LCP. There is no evidence that any other residential owner supports their position on enforcement. Secondly, the management of the LCP is the responsibility of the Strata Corporation, whose duty is to manage the common property, including the LCP, for the benefit of all the owners. From the overwhelming owners' votes in

the annual general meetings of 2011 and 2012 in support of the concessions to Powder Hounds in the use of common area space in the garbage room, I infer that the owners generally favour continued accommodation of the restaurant business' needs, to the extent reasonable and legally possible.

[39] The Strata Corporation's position on enforcement of the bylaws in respect of the Cooling Equipment is essentially that the breach is benign and does not interfere with any other owner's actual or potential use and enjoyment of the LCP for its intended purpose.

[40] I do not hold that a *de minimus* argument would necessarily assist Powder Hounds, or the owner or tenant of strata lot 80, if the Strata Corporation, acting through the strata council, decided to enforce the bylaws in the case of the Cooling Equipment, but I find that the *de minimus* principle applies to the plaintiffs' complaints in respect of the Strata Corporation's acquiescence in the continued placement of that equipment, in the circumstances of this case. Unlike the initial inaction of the Strata Corporation respecting unauthorized parking, the effect of this inaction is of trifling consequence to any of the 73 residential owners of the LCP parking area.

[41] Further, I am not persuaded that the Strata Corporation or its council has contravened the *Act*, or has failed to fulfill its responsibilities under the *Act*, in choosing not to enforce a bylaw simply for the sake of enforcement, at the behest of one owner, in circumstances where no benefit would accrue to any owner, and substantial costs would be incurred by a long term tenant of a commercial owner.

[42] For these reasons, I decline to make the first two orders sought by the plaintiffs.

[43] Although I do not need to consider the Strata Corporation's alternative arguments, namely easement and affixation, I have analyzed those arguments and would hold that neither of them is applicable in respect of the Cooling Equipment on the facts of this case.

[44] Sub-section 69(1)(b) of the *Act* is cited in respect of the easement argument, but I would not interpret that subsection as authorizing any individual owner to install a cooling system or part of a cooling system in common property or another strata lot.

[45] The argument that the Cooling Equipment is a fixture and part of the building would fail, because although the degree of affixation is sufficient to meet the test set out in the jurisprudence, the equipment is affixed to the LCP for residential parking, whereas the purpose of the affixation is for the better use and enjoyment of commercial strata lot 80.

### **The Water Heater Issue**

[46] The relevant statutory provisions are ss. 71, 74 and 76 of the *Act*, which I will set out for convenience:

#### **Change in use of common property**

**71** Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless

- (a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
- (b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

...

#### **Designation of limited common property by 3/4 vote**

**74** (1) Common property may be designated as limited common property by a resolution passed by a 3/4 vote at an annual or special general meeting.

(2) A resolution passed under subsection (1) must be filed in the land title office with a sketch plan that

- (a) satisfies the registrar,
- (b) defines the areas of limited common property, and
- (c) specifies each strata lot whose owners are entitled to the exclusive use of the limited common property.

(3) A resolution passed under subsection (1) does not have effect until it is filed in the land title office.

(4) The designation of limited common property by a resolution under this section does not require an amendment to the strata plan.

...

**Short term exclusive use**

**76** (1) Subject to section 71, the strata corporation may give an owner or tenant permission to exclusively use, or a special privilege in relation to, common assets or common property that is not designated as limited common property.

(2) A permission or privilege under subsection (1) may be given for a period of not more than one year, and may be made subject to conditions.

(3) The strata corporation may renew the permission or privilege and on renewal may change the period or conditions.

(4) The permission or privilege given under subsection (1) may be cancelled by the strata corporation giving the owner or tenant reasonable notice of the cancellation.

[47] As I noted earlier, the Strata Corporation passed the necessary  $\frac{3}{4}$  vote resolution at its December 2011 annual general meeting to give Powder Hounds exclusive use of the boiler room for one year. This was not renewed at the December 2012 annual general meeting on legal advice because the Strata Corporation intends to present a motion at a special general meeting to designate that area of common property as limited common property for the use of strata lot 80, as permitted by s. 74 of the *Act*. In these circumstances, it is probably unnecessary to rule on the plaintiffs' argument that the section heading "Short term exclusive use" should be read as limiting s-s. 76(3) to the number of renewals that may be given. If it were necessary to rule on that argument, I would not accede to it. Certainly section headings may be helpful in interpretation, but "short term" accurately describes a one year period as well as any renewals of that length. I do not interpret the section as limiting the number of renewals, or precluding annual renewals.

[48] Although Powder Hounds does not currently have properly authorized permission to use the boiler room situated in the common property garbage area, the Strata Corporation intends to act in the near future to designate that room as LCP for Powder Hounds' exclusive use. It is likely that the required  $\frac{3}{4}$  vote resolution will pass. In these circumstances it would be inappropriate for the court to compel the removal of the water heater, and I decline to do so.

**The Signage Issue**

[49] Bylaws KAS 2003, amended December 4, 2010, provide, in s. 3(6):

- (6) A commercial owner, tenant, occupant or visitor will be permitted:
  - a. to install signage within and attach the same to the common property around the outside perimeter of the strata lots on the condition that such signage:
    - ...
    - v. each commercial lot is allowed to install one exterior sign per exterior wall of the strata lot and this/these signs(s) will be located only on the strata lot side of the Lodge

[50] The Powder Hounds main sign is a relatively attractive painted sign hanging centred over the west entranceway to the Fireside Lodge building. There is another sign simply stating “Restaurant” in large letters that is attached to the actual outside wall of strata lot 80 nearer to the northwest corner of the building. The hanging sign location was approved by the owner developer in 1998, and that sign has been in place without objection until this application. The issue of the sign’s location was not mentioned in the June 28, 2011 demand letter from Mr. Abdoh’s counsel to the Strata Corporation.

[51] The plaintiffs’ complaint is that it breaches the bylaws because it is beyond the outside perimeter of strata lot 80. This allegation was set out in the plaintiffs’ application and deposed to by Mr. Abdoh. The Strata Corporation’s response did not include any comment in that regard, nor did Ms. Murray’s affidavit refer to the sign issue. Mr. Ernst’s affidavit confirms that a marked-up copy of the Strata Plan floor plan attached to Mr. Abdoh’s affidavit accurately depicts the sign’s location. Photographs of the sign hanging in the arch of the building entranceway are in evidence. The arch in question is a few feet in front of the doors to the lodge building and on the outside of a walkway described on the plans as an arcade, which runs along the exterior of the building in front of the Powder Hounds restaurant and 7 other strata lots on that side of the building. The sign is within a few feet of the

corner formed by the north and east walls of strata lot 80, but just outside imaginary extensions of both of those walls.

[52] The issue is whether the location of the sign conforms to the bylaws. Merely being located beyond the perimeter of strata lot 80 is not breaching the bylaws, because they expressly permit signs to be attached to “the common property around the outside perimeter of the strata lots”.

[53] The Strata Corporation did not argue this issue. In fairness to all parties, the bylaws are somewhat ambiguous. Powder Hounds argues that the sign location can still be described as on common property around the outside perimeter of the strata lots.

[54] I do not agree with Powder Hounds’ interpretation of the sign bylaw. That interpretation would permit a sign anywhere on the common property on that side of the building, which is unlikely to have been the intention of the Strata Corporation. In my view, the phrase “the common property around the outside perimeter of the strata lots” means the same as “the common property comprising the exterior walls of the strata lots”. Of course, strictly speaking, the strata lots do not have exterior walls, because their perimeter is mid-wall, so the language used had to make reference to common property.

[55] If my interpretation differs from the intentions of the Strata Corporation, the bylaws can be amended to properly resolve the ambiguity.

[56] On my interpretation, the Powder Hounds sign does not conform to the bylaws. I decline to grant the order sought, however, for several reasons. Firstly, enforcement of the bylaws is the responsibility of strata council, which has only just been informed by these reasons of the non-conformity. Secondly, my interpretation may not accord with the intentions of the Strata Corporation and it may wish to amend the bylaws to more clearly express its intent. Thirdly, ordering immediate removal is a disproportionate response in the circumstances, (which also approach the *de minimus* range of significance), considering that no harm or urgency is

alleged and that immediate removal of the sign before a new sign is designed, approved by the Strata Corporation and Sun Peaks Resort and installed, is likely to confuse and inconvenience the Powder Hounds' clientele after such a long tenure, and potentially cause an unwarranted loss of business. This issue is remitted to the strata council to deal with in accordance with my findings.

[57] In conclusion, the plaintiffs' application is dismissed.

[58] The defendants shall recover 75% of their costs, on the scale of ordinary difficulty, without set-off.

"I.C. Meiklem J."

MEIKLEM J.