

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***B.P.Y.A. 1163 Holdings Ltd. v. The
Owners, Strata Plan VR 2192 ,
2008 BCSC 695***

Date: 20080602
Docket: VA L022115
Registry: Vancouver

Between:

B.P.Y.A. 1163 Holdings Ltd.

Plaintiff

And

The Owners, Strata Plan VR 2192

Defendants

Before: The Honourable Madam Justice Griffin

Reasons for Judgment

Counsel for Plaintiff

E.T. McCormack

Counsel for Defendant

J.A. Bleay

Date and Place of Trial:

April 14-18, 2008
Vancouver, B.C.

INTRODUCTION

[1] The Plaintiff, B.P.Y.A. 1163 Holdings Ltd. ("BPYA"), is the owner of five strata lots in a commercial strata development in North Vancouver, commonly known as Lonsdale Court. It is suing the strata corporation responsible for the administration of Lonsdale Court, including management of the common property and assets, the Owners, Strata Plan VR 2192. For ease of reference, I will refer to the Defendant as the "Strata Corp."

[2] A central aspect of BPYA's claim is that parking stalls have not been properly allocated to it by the Strata Corp. in accordance with the Strata Corp.'s own bylaws and the bylaws of the City of North Vancouver. BPYA also claims that because it has been deprived of its rightful allocation of parking, it should be entitled to receive the income earned from the rental of parking stalls by the Strata Corp. over the years.

[3] As well, BPYA claims that the Strata Corp. has wrongfully charged it fees, described as excess user charges, allocating to it certain costs for water, refuse removal and caretaker services in a manner that is disproportionate to other strata owners. BPYA says that the Strata Corp. does not have the legal authority to impose these charges. It claims damages equivalent to a return of the excess user charges, net of what would be its proportionate share if the operating expenses had been allocated amongst all owners on a basis proportionate to the unit entitlement of their respective strata lots.

[4] BPYA also claims that the affairs of the Strata Corp. have been conducted in a manner significantly unfair to it, by reason of the same facts regarding parking allocation and excess user charges.

[5] The Strata Corp. denies BPYA's allegations. It further says that if the Strata Corp. has acted in any way improperly, that BPYA has acquiesced in and is now estopped from impugning those actions. It further argues that BPYA's claim is all or in part barred by operation of the **Limitation Act**, R.S.B.C. 1996, c. 266.

STATUTORY REMEDY

[6] This Court has wide remedial powers pursuant to the **Strata Property Act**, S.B.C. 1998, c. 43. Sections 164 and 165 of the **Act** provide as follows:

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).

[7] Section 43 of the **Condominium Act**, R.S.B.C. 1996, c. 64, which was repealed by s. 294 of the **Strata Property Act** effective July 1, 2000 (B.C. Reg. 43/2000), also gave the Court wide powers to direct or prohibit an act of a strata council, or to vary a transaction or resolution, and to regulate the conduct of a strata corporation's future affairs.

BACKGROUND FACTS

[8] BPYA owns the following strata lots, which were purchased on the following dates:

<u>Strata Lot</u>	<u>Purchase Date</u>
30	November 29, 1993
27	June 14, 1996
29	June 14, 1996
28	March 2, 1998
26	February 2, 1991
21	June 7, 2006

[9] The strata lots owned by BPYA are being used for the following purposes:

Strata Lot 30	Neighbourhood Pub
Strata Lots 26-29	Cold Beer & Wine Store
Strata Lot 21	Storage

[10] There are only 28 strata lots in the 2-storey Lonsdale Court complex. All are used for commercial purposes. The uses of the other units range from professional services to hairdressing.

PARKING ISSUES

[11] The neighbourhood pub located in BPYA's Strata Lot 30 is classified as a class "D" licensed establishment. The City of North Vancouver's zoning bylaws require that a certain number of 24-hour parking spaces be available to the pub. This was taken into account prior to the development of Lonsdale Court as it was always the intention to have a neighbourhood pub in the building.

[12] The applicable zoning bylaw of the City of North Vancouver, namely Comprehensive Development 124 Zone ("CD 124"), sets out the parking requirements for Lonsdale Court as follows:

...

- (8) the minimum number of off-street parking spaces provided shall be calculated as follows:
 - (a) for a Class "D" licensed establishment, 1 space per 11.61 square metres (125 square feet) of licensed floor area, excluding areas dedicated for games use; (b/l 6781-May 26/96)

...

- (c) for a Class “G” licensee retail store one space per 11.61 square metres (125 square feet) of public licensed area; (b/l 6781-May 26/96)
- (d) for all other commercial uses, one space per 46.45 square metres (500 square feet) of gross floor area (b/l 6781-May 26/96)

except that in no instance shall less than 61 parking spaces be provided;

...

[emphasis added]

[13] The above City bylaw is the 1995 version, the relevant provisions of which are substantially similar to an earlier version of the bylaw. The pub occupying Strata Lot 30 has no part of its licensed area dedicated for games use. In 2007, the requirement of one space per 11.61 square metres (125 square feet) for the Class “G” licensee retail store, the beer and wine store, was varied to one space per 46.45 square metres (500 square feet), which is the same as all other commercial uses except for the pub. This variance was the result of an application by BPYA to the City in connection with the expansion of its beer and wine store.

[14] Applying the City bylaws to the 1,300 square foot licensed area of the pub results in a requirement that there be 10.4 parking spaces provided for the licensed area of the pub. The City bylaws applied to the remaining floor area of the pub work out to a requirement that an additional 5.2 parking spaces be provided. In total, the City bylaws require that the pub provide 15 off-street parking spaces (rounding down to the nearest whole parking stall).

[15] The Strata Corp.'s own bylaws provide for the same allocation of parking stalls for the pub, Strata Lot 30, as the City of North Vancouver's zoning bylaws.

This is not surprising given that the development required City approval.

[16] The Strata Corp. bylaw relevant to parking for the pub was set out in bylaw amendments filed by the Strata Corp. on October 4, 1993 (the "October 1993 Bylaw Amendments"), and reads as follows:

16.6 Notwithstanding By-laws 16.1 and 16.2, so long as Strata Lot 30 of the Lands ("Lot 30") is used for a purpose contemplated by By-law 5.7, the Strata Council shall allocate to the owner of Lot 30 for the exclusive use of Lot 30, the owner and his invitees, such number of parking spaces as are required for such use of Lot 30 under the City of North Vancouver Building and Development by-law (as it existed in 1988), rounded down to the nearest whole parking spot. The parties acknowledge that such by-law requires that Lot 30 have one (1) parking space for each 125 square feet of licensed floor area, and that Lot 30 is authorized to have no more than 1,300 square feet of licensed floor area.

[17] The purpose contemplated by Bylaw 5.7 is that of a neighbourhood pub, beer and/or wine store. It was uncontested by the Defendant that the reference in the Strata Corp. Bylaw 16.6 to the City of North Vancouver bylaw was intended to refer to the equivalent of what is now City Zoning Bylaw CD 124.

[18] The Strata Corp. has no other bylaws with respect to allocation of parking, although its Bylaw 16.5 allows the Strata Corp. to impose charges for common parking areas that are not specifically allocated to owners, and to apply the net revenues to reduce overall operating expenses.

[19] As a matter of practice, the Strata Corp. has allocated one parking stall to each strata unit owner per each strata lot owned. Since most of the strata lots are less than 1,000 square feet, this for the most part coincides with the City of North Vancouver's parking requirements of one parking space per each 500 square feet of commercial space. However, there are a couple of strata lots owned by parties other than BPYA which are just over 1,000 square feet in size. It was unclear on the evidence whether the owners of these larger strata lots have been assigned two parking stalls in accord with the City's zoning bylaw.

[20] BPYA has not received the same allocation as other owners of one parking stall per strata lot owned, despite increasing its ownership of strata lots over the years.

[21] The following chart sets out the history of parking stalls assigned by the Strata Corp. to BPYA:

Year	No. of Parking Stalls	Lot(s) Owned by BPYA
1994	3	Lot 30
1997	3	Lots 27, 29 & 30
1998	3	Lots 27, 28, 29 & 30
2000	5	Lots 26, 27, 28, 29 & 30
2002	7	Lots 26, 27, 28, 29 & 30

[22] In addition to the above number of parking stalls, since at least 1999 BPYA has been allocated an outside parking stall which it uses as a storage area.

[23] After it purchased Strata Lot 21 on June 7, 2006, BPYA owned six strata lots. Its allocation of parking stalls was not increased until just before this trial. Minutes of a strata council meeting attended by two council members on February 15, 2008 suggest that at this meeting a total of 10 parking stalls were assigned to Strata Lot 30, the pub. It is unclear, but it also appears that three parking stalls were assigned to the other strata lots owned by BPYA, plus the one parking stall that has been used by BPYA for storage.

[24] At no time have any signs been erected identifying the stalls allocated to BPYA or the pub.

[25] Originally, when BPYA became an owner in Lonsdale Court, the parkade had no signs restricting use. While there were no signs specifically allocating parking stalls to BPYA's pub, this did not pose a problem for the pub's business since there were plenty of stalls available in the parkade.

[26] Eventually the developer of the complex sold all of its units and there was a change in the composition of the Strata Council. Mr. John Ribalkin became president of the Strata Council. Signs were then erected in the parkade limiting parking to two hours. These large notices also stated that cars would be towed at the owners' expense if the two hour parking limit was exceeded. Indeed, this threat was carried out and on several occasions cars parked for more than two hours were towed away at the direction of the Strata Council.

[27] Within the last three years, after the commencement of this lawsuit, the parking signs have been modified to show in smaller print that the 2-hour restriction

is only in effect from 9:00 a.m. until 5:00 p.m. This is still not satisfactory to BPYA because it does not allow customers to park for more than two hours during the day. Mr. Fournogerakis asserts that a reasonable way to provide the parking to which BPYA is entitled is to mark a continuous group of stalls as available for the pub's patrons without time restrictions.

[28] The two hour parking restrictions are a problem for the pub business. Many patrons like to drive to the pub, leave their cars overnight and walk home safely, returning the following morning to recover their cars. Having overnight parking at a pub serves the general public at large because it decreases the chance someone will drive while impaired. This is no doubt one of the policy reasons underlying the City's parking requirements for the pub.

[29] Mr. Fournogerakis complained to the Strata Corp. in 1994 concerning the failure to assign the appropriate number of 24-hour parking stalls for the pub operating at Strata Lot 30, but these concerns have never been fully addressed.

PUB PARKING

[30] BPYA argues that the Strata Corp.'s Bylaw 16.6 requires that as long as Strata Lot 30 is being used for a pub, the Strata Council must allocate to the owner of Strata Lot 30, for the exclusive use of Strata Lot 30, such number of parking spaces as are required by the City of North Vancouver's zoning bylaw. This requires the Strata Council to allocate 15 parking stalls for the exclusive use of Strata Lot 30, if rounded down to the nearest whole parking stall.

[31] The Strata Corp. argues that it is not bound by its own Bylaw 16.6 because:

(a) parking space is common property, and the City bylaw usurps the ultimate statutory authority of the Strata Corp. to control, manage and administer the common property (the parkade) for the benefit of all owners; and

(b) BPYA has by its conduct or inaction, acquiesced in or accepted the allocation of parking spaces established from time to time by the Strata Corp.

[32] It is correct that the parkade is common property. The Strata Corp. conceded in argument that it does not assert that Bylaw 16.6 is *ultra vires* the Strata Corp. This is a concession that the Strata Corp. does have power to allocate parking stalls to individual owners. This power is found in section 77 of the **Strata Property Act**, which provides that a strata corporation may give an owner exclusive use or a special privilege in relation to common property, but not for more than one year, although this may be renewed.

[33] The **Strata Property Act** contemplates designation of some common property as limited common property by amendment to the strata plan. In section 1, limited common property is defined as “common property designated for the exclusive use of the owners of one or more strata lots”. Section 258 of the **Strata Property Act** specifically contemplates an owner-developer amending the strata plan to designate parking stalls as limited common property for the exclusive use of owners of strata lots in the strata plan. None of the parking stalls at issue have been designated as limited common property.

[34] In my view, having decided to incorporate the City parking requirements with respect to Strata Lot 30 in its own Bylaw 16.6, the Strata Corp. is not free to then ignore these parking requirements. The same Strata Corp. bylaws provide in Bylaw 1.12 that Bylaw 16.6 “shall not be amended except by unanimous resolution”.

[35] Bylaw 16.6 may be read consistently with section 77 of the ***Strata Property Act*** as requiring the Strata Corp. to allocate parking stalls for the exclusive use of Strata Lot 30 on an annual basis in accordance with the City parking requirements. It appears that the Strata Council does have a practice of allocating parking on an annual basis. This practice should continue, but it should be done in accordance with Bylaw 16.6 which, based on the current use of Strata Lot 30, means that Strata Lot 30 should be allocated 15 parking stalls for its exclusive use.

[36] The Strata Corp. has not made out its defence of estoppel based on acquiescence. There is nothing about BPYA’s past conduct which makes its present assertion of its rights to parking somehow unconscionable, inequitable or unjust. The Strata Corp. has not been led to believe by any conduct of BPYA that BPYA was abandoning any of its rights.

[37] BPYA throughout made it known that it wanted to have adequate parking for patrons of the pub located at Strata Lot 30 and when the parking was not adequate, Mr. Fournogerakis complained to the Strata Council. His frustration reached the breaking point in 2002 when he caused BPYA to bring this lawsuit to enforce its rights to parking.

[38] Therefore, I order that the Strata Corp. comply with its own Bylaw 16.6 by immediately allocating 15 parking spaces for the exclusive use of the owner of Strata Lot 30, BPYA, for one year, which stalls are to be available without time limits; and by installing appropriate signage which reflects this allocation to enable customers of the pub to know which stalls they may use.

[39] Current parking signs, which place time restrictions on parking, must be removed or altered to make it clear that they do not apply to the 15 stalls allocated to the pub. As well, there must be changes made to the automated security gate to the parkade so as to allow unrestricted access to the 15 parking stalls.

[40] I am not prepared to make an order for future annual parking allocation given that there could be changes to Bylaw 16.6 (if by unanimous resolution); changes to City Bylaw CD 124; or changes to the floor area of the pub. However the Strata Corp. will know by this judgment that it will face repeated litigation if it does not comply with Strata Corp. Bylaw 16.6 and City Bylaw CD 124 in the future.

[41] Counsel for BPYA also sought an order that the parking stalls allocated to Strata Lot 30 be located in the same area of the parkade, rather than scattered throughout the parkade. This certainly makes practical sense. However, Strata Corp. Bylaw 16.6 does not specifically require contiguous parking stalls and, therefore, I am not prepared to make this part of my order. I will not speculate as to whether anything less than contiguous parking stalls will be "significantly unfair" to B.P.Y.A. until the parking stalls are actually assigned.

[42] All the evidence indicates that BPYA has acted as a good neighbour over the years. Hopefully, if there are other practical points of concern to each other the Strata Corp. and BPYA will be able to iron out a resolution by agreement.

PARKING FOR OTHER STRATA LOTS

[43] There is no other Strata Corp. bylaw dealing with the allocation of parking spaces to owners of strata lots, other than Bylaw 16.6 dealing only with Strata Lot 30.

[44] However, the City of North Vancouver Zoning Bylaw CD 124 does require, for all other commercial uses, one parking space for each 500 square feet of floor area. The same allocation of parking space is required for the beer and wine store use, based on BPYA's approved variance application.

[45] Counsel for BPYA did not argue that a strata owner has standing to require a Strata Corp. to act in accordance with a City bylaw and did not point me to any legal authority for this proposition. Rather, counsel for BPYA framed the issue as one of "significantly unfair" conduct by the Strata Corp. requiring a remedy pursuant to section 164 of the **Strata Property Act**, set out above.

[46] The meaning of "significantly unfair" was discussed in **Reid v. Strata Plan LMS 2503**, 2003 BCCA 126. This phrase encompasses conduct which is oppressive and unfairly prejudicial, with the word "significant" denoting something more than mere prejudice or trifling unfairness.

[47] As noted, the City bylaw requires that each commercial space provide one parking space per 500 square feet of space. Since all strata lot owners have been allocated one parking stall per strata lot for their exclusive use, it would appear that the Strata Council has adopted a policy and practice of complying with the City bylaw with respect to owners of strata lots that are less than 1,000 square feet, which is the vast majority of owners other than BPYA.

[48] It appears that the Strata Corp. is discriminating against BPYA by applying the City bylaw to other owners, allocating to them one parking stall per 500 square feet of commercial space, and not applying the same parking allocation to BPYA in respect of its Strata Lots 21 and 26-29. Parking entitlement is of critical importance to a commercial business. The Strata Corp. has acted significantly unfairly in not allocating parking to all commercial owners on the same basis.

[49] Strata Lots 21, 27, 28 and 29 are each less than 1,000 square feet in area. If the Strata Corp. was to apply its parking policy fairly, BPYA should be allocated one parking space for its exclusive use for each of these strata lots. Strata Lot 26, which BPYA purchased in 1991, is more than 1,000 square feet and just less than 1,500 square feet, such that it should entitle the owner to two parking spaces for its exclusive use if the City bylaw was applied fairly by the Strata Corp. to all owners.

[50] I therefore order that the Strata Council immediately allocate 6 additional parking spaces to BPYA for its exclusive use, for one year, in relation to Strata Lots 21 and 26-29.

[51] I will not make an order for future parking allocation past one year. However, the Strata Council will no doubt appreciate the risk of future litigation if it does not govern itself in accordance with these Reasons and treat all owners the same in the future, and not discriminate against BPYA (except for the special treatment with respect to Strata Lot 30 which is required by Bylaw 16.6)

[52] Based on City Bylaw CD 124, there would appear to be no justification on the part of the Strata Corp. to restrict the parking hours for parking spaces allocated to the exclusive use of owners of the strata lots. The Strata Corp. appears to allow owners unrestricted access to the parkade, but has not to date adopted unrestricted customer access for these particular stalls. The Strata Corp. treats all owners the same in this regard. Therefore, I will not make any order in this regard other than with respect to the stalls allocated to Strata Lot 30.

PARKING RENTAL INCOME

[53] The Strata Corp. rented out two or three parking spaces over the years. It was entitled to do this pursuant to its Bylaw 16.5. There are 61 parking spaces in the parkade at Lonsdale Court, more than enough spaces to accommodate compliance with City Bylaw CD 124 for all strata lots and to have additional parking spaces left over. There is, therefore, no correlation between the rental of two or three parking spaces and the Strata Corp.'s failure to allocate a sufficient number of parking spaces to BPYA.

[54] Furthermore, the rental income from parking spaces was applied to the common expenses of the Strata Corp. for the benefit of all owners, including BPYA.

As such, the Strata Corp. has not been unjustly enriched nor has BPYA been deprived as a result of the rental of these few stalls. Therefore, I dismiss BPYA's claim for damages equivalent to the rental income earned by the Strata Corp. from the rental of parking stalls. As the rented parking spaces were common property and BPYA had no specific rights to those spaces, I also dismiss BPYA's claim for damages for trespass and nuisance.

EXCESS USER CHARGES

[55] The Strata Corp. bylaws provide for excess user charges as follows:

5.9 Where the Strata Council, acting reasonably, considers that any owner (the "Excess User") consumes any utility or service supplied to the Lands as a whole (including, without limitation, garbage collection, water and other utilities or services) in a greater proportion than other owners or occupiers of strata lots; or if, as a result of the nature of any business carried on from a strata lot by an the [sic] Excess User or an occupier thereof or other cause, the Strata Council, acting reasonably, considers that any costs of heating, ventilating and air conditioning any common areas, any costs of cleaning or maintaining any common areas, or any other costs, expenses or obligations of the Strata Corporation are expended or incurred on a disproportionate basis with respect to such strata lot, or if any expenses which would otherwise have been incurred by the Strata Corporation are increased as a result of the operation of any such business by the Excess User or by any occupant of his strata lot, then the Excess User shall pay the full amount of those expenses (or the incremental amount of any increased expenses) to the Strata Corporation as additional assessments against his strata lot(s) and the provisions of these By-laws which would otherwise provide for an appointment of Strata Corporation expenses according to unit entitlements shall not apply to such expenses or incremental expenses. Without restricting the generality of the foregoing, to the extent that the Strata Corporation is required to employ any personnel on the Lands or is required to pay higher insurance premiums or to obtain additional insurance coverage beyond what a commercial strata corporation would normally carry as a result of any such business, the full amount of the wages, salary, benefits and other amounts payable by the Strata Corporation to or in respect of such personnel and the full amount of any incremental or

additional insurance premiums shall be allocated to and borne by the Excess User, then the Strata Council and the Strata Corporation will be entitled to allocate the costs, expenses or charges related to any such utilities or services or any such other costs, expenses or obligations among to [sic] the Excess Users of the strata lots so consuming them on such basis as the Strata Council in its discretion shall consider appropriate, which need not be in accordance with the unit entitlements of any such strata lots. In addition to the foregoing, the Strata Council may at any time require any Excess User have his strata lot separately metered for utilities and other services, and in the event that any such utilities or services are separately metered to a strata lot, the Excess User shall be solely responsible for the cost of all such utilities or services consumed by his strata lot.

[56] BPYA claims that it has been wrongly charged excess user charges, purportedly based on Strata Corp. Bylaw 5.9. These excess user charges relate to water usage, garbage removal and caretaker services. More recently, BPYA has been paying the excess user charges assessed against it into the trust account of legal counsel for the Strata Corp., with the charges being held subject to the outcome of this lawsuit.

[57] The parties agree that the total amount of excess user charges paid by BPYA over the years since it first became an owner of strata lot 30, including the amount held in trust, net of its share of common expenses had these expenses been assessed against all owners on a proportionate unit entitlement basis, is \$89,138.91.

[58] There has never been any evidence-based justification for the quantum of excess user charges assessed against BPYA as owner of Strata Lot 30. The developer of Lonsdale Court, who was the original owner of the strata lots, simply imposed his own formula for charging excess user fees to some units which were assumed by the nature of the business to have higher water usage, produce more

garbage and require more caretaker time than other units. No actual measurement of excess usage of these services was ever undertaken, nor was there any consideration for the fact that Strata Lot 30 was substantially bigger than most units and so was already paying a larger proportionate share of expenses based on the ordinary rule of sharing of expenses proportionately based on unit entitlement.

[59] Successive strata councils and their accountants found it convenient to simply carry forward the original developer's formula for excess user charges in the budgets put to owners each year, although there was some debate about the excess user charges for caretaker's fees in 1994. Naturally, the majority of owners were self-interested in not wanting to challenge the practice of charging excess user fees as this practice reduced the proportionate share of expenses of all other owners.

[60] BPYA says that Strata Corp. does not have the legal authority to impose excess user charges. It seeks a declaration that the Strata Corp. Bylaw 5.9 is *ultra vires*.

[61] An analysis of whether or not Bylaw 5.9 is *ultra vires* the Strata Corp. needs to be considered in light of the governing legislation: the **Condominium Act** which is applicable from the date of the original incorporation of the Strata Corp.; and the **Strata Property Act** which for these purposes is applicable from January 1, 2002.

[62] Both the **Condominium Act** and the **Strata Property Act** provide for proportionate allocation of common expenses based on unit entitlement.

[63] Section 35(1) of the **Condominium Act** provides:

35 (1) A strata corporation must do all of the following:

(a) establish a fund for administrative expenses sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation;

(b) establish a contingency reserve fund not exceeding an amount calculated in the manner set by regulation and determine the annual levy for the contingency reserve fund; and the levy must, if the amount of the reserve is less than 25% of the total annual budget of the strata corporation, be not less than 5% of that budget; and the strata corporation must hold the fund as a reserve fund to pay unusual or extraordinary future expenses;

(c) determine the amounts to be raised for the purposes set out in this section and notify the strata lot owners of those amounts;

(d) raise the amounts so determined by levying contributions on the owners in proportion to the unit entitlement of their respective strata lots in the manner provided for in the by-laws.

[emphasis added]

[64] Under the **Strata Property Act**, ss. 99 and 100 provide as follows:

Calculating strata fees

99 (1) Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.

(2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$

Change to basis for calculation of contribution

100 (1) At an annual or special general meeting held after the first annual general meeting, the strata corporation may, by a resolution

passed by a unanimous vote, agree to use one or more different formulas, other than the formulas set out in section 99 and the regulations, for the calculation of a strata lot's share of the contribution to the operating fund and contingency reserve fund.

(2) An agreement under subsection (1) may be revoked or changed by a resolution passed by a unanimous vote at an annual or special general meeting.

(3) A resolution passed under subsection (1) or (2) has no effect until it is filed in the land title office, with a Certificate of Strata Corporation in the prescribed form stating that the resolution has been passed by a unanimous vote.

[65] Unit entitlement is defined in both the **Condominium Act** and the **Strata Property Act**. When a strata plan is filed, each strata lot is assigned a "unit entitlement" which factors in the proportionate size of that strata lot in comparison to the whole and any adjustments to take into account factors which may be relevant to that strata lot's contribution to common expenses.

[66] The position of the Strata Corp. is that it is entitled by its bylaws to deviate from the unit entitlement basis for allocating common expenses set out in the **Condominium Act** and the **Strata Property Act**.

[67] Section 26 of the **Condominium Act** provides that a strata corporation must have bylaws providing for, amongst other things, the management of common property. The bylaws are those set out in Part 5 until they have been altered or repealed. In the case of a strata corporation administering a strata plan in which there is not more than one residential strata lot, the bylaws may be amended or repealed at any time after the changes have been approved by special resolution or,

if a unanimous resolution is required under the **Act** or the bylaws, by unanimous resolution.

[68] The Strata Corp. argued that Bylaw 5.9 was lawfully adopted pursuant to s. 26 of the **Condominium Act**, in place of the standard bylaw set out in s. 128.

[69] Section 128 of the **Condominium Act** provides rules according to which a strata lot owner's contribution to the common expenses of the strata corporation must be levied:

128 (1) The strata lot owner's contribution to the common expenses of the strata corporation must be levied in accordance with this by-law.

(2) If a strata plan consists of more than one type of strata lot, the common expenses must be apportioned in the following manner:

(a) common expenses attributable to one or more type of strata lot must be allocated to that type of strata lot and must be borne by the owners of that type of strata lot in the proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned;

(b) common expenses not attributable to a particular type or types of strata lot must be allocated to all strata lots and must be borne by the owners in proportion to the unit entitlement of their strata lots.

(3) If a strata plan includes limited common property, expenses attributable to the limited common property which would not have been expended if the area had not been designated as limited common property must be borne by the owners of the strata lots entitled to use the limited common property in proportion to the unit entitlement of their strata lots.

...

(11) At each annual general meeting after the first annual general meeting, the strata corporation must prepare an annual budget for the following 12 month period and, after that, all owners must, subject to

subsections (2) and (3), pay a monthly assessment in accordance with their unit entitlement.

[70] At first glance, s. 128 might appear to create exceptions to the duty on a strata corporation, imposed by s. 35 of the **Condominium Act**, to levy contributions on owners in proportion to the unit entitlement of their respective strata lots. On closer inspection, this is not so. Although s. 128 may attribute certain expenses to a subset of strata lots, these expenses are shared among the concerned strata lots in proportion to the unit entitlements of the concerned strata lots.

[71] Subsection 128(2) applies only if a strata plan consists of more than one type of strata lot. "Type" within the meaning of s. 128 has been interpreted to denote the character or form of structure, such as a townhouse structure as opposed to a unit in a high rise apartment building: **Smith v. Read**, [1993] B.C.J. No. 1348 (QL) (S.C.). Section 128 is not at variance with the overall scheme of the **Act** which provides for common expenses to be allocated proportionately amongst owners. Owners of "types" under s. 128 still share expenses on a proportionate basis.

[72] Subsection 128(3) applies only if a strata plan includes limited common property. If s. 128(3) applies, expenses attributable to limited common property must be borne by the owners of the strata lots entitled to use the limited common property in the proportion to the unit entitlement of their strata lots. It is implicit that the proportion is in relation to the sum unit entitlement of the strata lots entitled to use the limited common property. Thus, like s. 128(2), s. 128(3) is not in conflict with s. 35 of the **Condominium Act**. It should also be noted that in this case none of the expenses at issue were in respect of limited common property.

[73] In Ontario, the **Condominium Act**, R.S.O. 1990, c. C.26, provides in s. 3(5) that any amendment to a by-law that is inconsistent with the terms of the **Act** will be void and of no effect:

3(5) Where any provision in a declaration or by-law is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the declaration or by-law is deemed to be amended accordingly.

[74] The British Columbia **Strata Property Act**, the successor to the **Condominium Act**, contains a similar provision:

121 (1) A by-law is not enforceable to the extent that it

(a) contravenes this Act, the regulations, the Human Rights Code or any other enactment or law, ...

[75] The British Columbia **Condominium Act** does not contain a similar provision or any provision which expressly sets out that the **Act** is paramount over any inconsistent strata corporation bylaw.

[76] The **Condominium Act** does contain a provision, s. 29, which sets out that the bylaws do not operate to prohibit or restrict devolution, transfer, leasing or mortgage of a strata lot subject to s. 30. Section 30 simply allows for some limitation on the number of residential strata lots that may be leased. A number of authorities have concluded that bylaws of strata corporations that are inconsistent with ss. 29 and 30 of the **Condominium Act** are *ultra vires*. In **453048 British Columbia Ltd. v. Strata Plan KAS 1079** (1994), 43 R.P.R. (2d) 293 (B.C.S.C.), the court held that a bylaw that effectively restricted the devolution, transfer, leasing or otherwise

dealing with strata lots was *ultra vires* because it contravened an express statutory limit, embodied in ss. 29 and 30 of the **Condominium Act**, on passing such bylaws.

[77] Similar conclusions on the same point were reached in **Cowe v. Strata Plan VR1349** (1994), 92 B.C.L.R. (2d) 327 (S.C. in Chambers) at paras. 10-14, in **Mattiazo v. Strata Plan VR1144**, [1985] B.C.J. No. 1122 (QL) (S.C.) at para. 10, and in **McEville Holdings Inc. v. Strata Plan No. V.R. 314**, [1984] B.C.J. No. 763 (QL) (S.C. in Chambers) at para. 2.

[78] In **McEville Holdings**, the court referred to an English text, S.G.G. Edgar, ed., *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971). That text explains at p. 326 that bylaws may be treated as *ultra vires* on the ground that they are repugnant to the statute under which they are made:

There are five main grounds on which the by-laws may be treated as *ultra vires* –

...

(c) That they are repugnant to the statute under which they are made.

[79] At p. 329 of *Craies on Statute Law*, this ground is explained as follows:

(c) Inconsistency with the statute under which they are made. By-laws made in pursuance of a statutory power must not go beyond, nor be repugnant to the enactment under which they are made.

[80] There are no other express restrictions on the operation of bylaws in the **Condominium Act** other than ss. 29 and 30 dealing with leasing of residential units. Nevertheless, in **Mott v. Leasehold Strata Plan LMS2185 (Owners)**, 1998 CanLII 3972 (B.C.S.C.), the court held that while a strata corporation is authorized to pass

bylaws, it cannot pass bylaws contrary to the provisions of the **Condominium Act** (para. 33):

While the Strata Corporation is authorized to pass further by-laws, rules and regulations, it does not follow that those provisions can be contrary to the provisions set out in the Act or the Lease. By-laws must be consistent with the Act and with any Lease: see, for instance, *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 38 D.L.R. (4th) 430 (Ont. C.A.).

[81] The conclusion that a strata corporation cannot pass bylaws inconsistent with the governing legislation is consistent with the analysis of the Alberta Court of Appeal in *Condominium Plan No. 82229009 v. Francis*, 2003 ABCA 235, [2003] 11 W.W.R. 469. In *Francis*, the court noted that under Alberta legislation similar to the British Columbia **Condominium Act**, a condominium corporation is a creature of statute that does not enjoy the powers of a natural person. As such, it must look to the governing legislation for authority to make decisions and take actions. The court in *Francis* noted that the only statutory provision dealing with the collection of fees provided that fees were to be assessed on a proportionate per unit basis and, as such, the condominium corporation did not have the power to collect fees based on any other consideration.

[82] The **Condominium Act** does not state an express limit on the powers of a strata corporation to allocate common expenses among strata lot owners. However, a strata corporation under that **Act** is a creature of statute and does not have powers wider than provided for in the **Act**. Section 35 of the **Condominium Act** dictates that a strata corporation must raise the amounts necessary to fund its common expenses by levying contributions on the owners in proportion to the unit entitlement

of their respective strata lots in the manner provided for in the bylaws (emphasis added). Section 35 is a mandatory provision. Any bylaw which purports to authorize a strata council to levy contributions on an owner, other than in proportion to the unit entitlement of his or her strata lot, is inconsistent with s. 35.

[83] Bylaw 5.9 provides that the Strata Council may designate a strata lot owner as an excess user and that an owner so designated must pay the full amount of the excess expenses. Bylaw 5.9 purports to oust the operation of bylaws that allocate expenses in proportion to unit entitlement: “the provisions of these bylaws which would otherwise provide for an apportionment of Strata Corporation expenses according to unit entitlement shall not apply ...”

[84] In my view, Bylaw 5.9 is repugnant to the statute which empowered its enactment, the **Condominium Act**, and it is, therefore, *ultra vires* the Strata Corp.

[85] Even if Bylaw 5.9 was *intra vires* the Strata Corp. when it was passed, it would have only continued in effect until January 1, 2002. After that date, a bylaw which conflicted with the **Strata Property Act** (which came into force on July 1, 2000) ceased to have effect to the extent of the conflict. Furthermore, after that date s. 128(2) of the **Condominium Act** ceased to have effect and no strata corporation could allocate expenses amongst “types” of strata lots.

[86] As noted above, s. 99 of the **Strata Property Act** requires all owners to contribute to the common expenses in proportion to the unit entitlement of their strata lots, unless the strata corporation at a general meeting passes a resolution by unanimous vote to use a different formula for calculating such contribution, pursuant

to s. 100. Since there has been no unanimous vote on Bylaw 5.9, that bylaw is in conflict with s. 99 of the **Strata Property Act** and, therefore, ceased to be effective on January 1, 2002: see **Smith v. Strata Plan No. VIS4673**, 2008 BCSC 28 at paras. 28-29.

[87] It is worth observing that unlike the **Condominium Act**, under the **Strata Property Act** a strata corporation has been given the power and capacity of a natural person, but "subject to any limitation under this Act": ss. 2(2). The **Strata Property Act** also contains a provision that a bylaw is not enforceable to the extent it contravenes the Act: ss. 121(1)(a).

[88] Even if Bylaw 5.9 were *intra vires*, the allocation of excess user charges to BPYA was not in accordance with its own terms. I interpret Bylaw 5.9 as only allowing for charging of the actual incremental increase in expenses that were incurred due to the operations of a business carried on from a strata lot, if the owner of that strata lot were consuming any utility or service in a greater proportion than unit entitlement would indicate. The Strata Corp. never measured any actual increase in common expenses due to the operations of the pub and has never shown that the pub uses utilities and services in greater proportion than other owners when analyzed on a unit entitlement basis. Rather, the Strata Corp. simply assumed the pub was responsible for more expenses than would be provided for if expenses were divided on a unit entitlement basis, and then applied an arbitrary method for assessing those expenses against Strata Lot 30. This method of allocating excess user charges was never authorized by Bylaw 5.9.

[89] The Strata Corp. argues that BPYA has acquiesced in the charging of excess user charges over the years and that it should be estopped from challenging these charges. In this regard, it points to the fact that Mr. Fournogerakis was a member of the Strata Council for several years. In my view, the Strata Corp. did not establish on the evidence that the conduct of Mr. Fournogerakis was such as to amount to acquiescence, giving rise to the defence of estoppel.

[90] Furthermore, estoppel can be no defence where the underlying bylaw was *ultra vires* the Strata Corp.: **Francis**, *supra*, at paras. 35-37.

RETURN OF EXCESS USER CHARGES

[91] BPYA seeks damages in the amount of \$89,138.91 representing the amount of excess user charges assessed against it since 1994, less what would have been its proportionate share of those expenses if they had been allocated amongst all owners on a unit entitlement basis.

[92] The Strata Corp. argues that all or part of BPYA's claim is barred by the **Limitation Act**, R.S.B.C. 1996, c. 266. BPYA argues that the **Limitation Act** does not apply; but that if it does the running of any limitation period was postponed pursuant to s. 6 of that **Act**. Counsel for BPYA did not refer me to any authority which would support either proposition. Furthermore, BPYA did not plead postponement of the limitation period, denying the Defendant the opportunity to any discovery on that issue.

[93] I find that the **Limitation Act** does apply to the present claim. The postponement provision, s. 6, is limited to those causes of action listed in s. 6(3), none of which apply to the present claim.

[94] The applicable limitation period for all of the causes of action advanced in this case is six years pursuant to s. 3(5). There is one exception, which is the claim that renting of parking stalls by the Strata Corp. amounted to trespass. Had the trespass claim not been dismissed on its merits, it would be subject to a two year limitation period pursuant to s. 3(2)(b).

[95] This action was commenced on July 12, 2002. BPYA is entitled to a return of excess user charges assessed against it within six years prior to that date. Counsel for BPYA calculated this amount as being \$78,850.38 and counsel for the Strata Corp. did not take issue with this calculation. Therefore, I assess damages payable by the Strata Corp. to BPYA in the amount of \$78,850.38.

COUNTERCLAIM

[96] The Strata Corp. issued a counterclaim in this proceeding against BPYA for excess user fees, which have been paid by BPYA under protest since this lawsuit was commenced and which are being held in trust by the Strata Corp.'s solicitor. This claim must necessarily fail as a result of the conclusions I have reached above. The Strata Corp. also set out in its counterclaim certain claims having to do with BPYA's signage and air-conditioning units. These latter claims were not pursued at trial. The counterclaim is dismissed.

COSTS

[97] The Plaintiff is entitled to costs.

[98] In its original claim, BPYA alleged that the Strata Corp. acted unreasonably in delaying and denying approval for a development variance application by BPYA to the City, which was connected to its plans to expand its beer and wine store located at Lonsdale Court. Ultimately, this approval was granted by the Strata Corp., but not until well after BPYA's request, after an adjourned Rule 18A application and with this trial on the horizon.

[99] BPYA's claim also alleged that the Strata Corp. had not properly allowed it certain voting rights. This aspect of the claim was rendered moot prior to trial when the Strata Corp. filed amendments to its bylaws which reflected the voting rights asserted by the Plaintiff.

[100] In my view, the whole of the Strata Corp. has benefited from the clarification of issues regarding parking and excess user charges. The Plaintiff is entitled to costs with respect to the whole of its claim and defence to the counterclaim, even though the issues of approval of the development variance application and voting rights were rendered moot prior to trial. No time was taken up at trial with these other issues and the resolution of these other issues prior to trial was in the Plaintiff's favour.