

Case Name:

**Ernest & Twins Ventures (PP) Ltd. v. Strata Plan
LMS 3259**

Between

Ernest & Twins Ventures (PP) Ltd., and No. 213
Cathedral Ventures Ltd., petitioners, and
The Owners, Strata Plan LMS 3259, respondent

[2003] B.C.J. No. 2710

2003 BCSC 1769

Vancouver Registry No. L023505

**British Columbia Supreme Court
Vancouver, British Columbia
Warren J.**

Heard: September 17, 2003.

Judgment: November 24, 2003.

(25 paras.)

Real property — Condominiums — Rights and obligations of unit holders — Common expenses — Apportionment of.

Petition by Ernest & Twins Ventures for a declaration that strata fees imposed by Strata Plan 3259 were illegal. Ernest owned parking units in 3259's commercial strata mall. The other types of units included offices and stores. 3259's budget did not attribute any common expenses for landscaping, garbage, water, administration, or other general expenses to Ernest's units. However, the membership of 3259's strata council changed, and the new council decided that because common expenses benefitted all units, common expenses were to be attributed pro rata to all units including Ernest's. The benefit received by Ernest's units from common expenses differed from the benefit received by office and store units. The bylaws of 3259 required common expenses attributable to a section of units to be allocated pro rata among the units in that section, and common expenses not attributable to a section to be allocated pro rata among all units. The Strata Property Act's regulations provided that, subject to a special resolution of the strata corporation, all members' units were required to contribute pro rata to common expenses which related to and benefitted them. Ernest argued that the change in attribution of common expenses to its parking units was illegal and significantly unfair since it required a special resolution of the strata membership, and because the benefit to its parking units differed from that to other types of units.

HELD: Petition dismissed. Under 3259's bylaws and under the Act and regulations, common expenses were attributable to units which related to and benefitted from them. Therefore, the allocation of common expenses to Ernest's parking units was valid. The difference in the degree of benefit and the possibility of other more precise attribution formulas were not determinative, given that the success of commercial units benefitted all units, and any unfairness was not oppressive or harsh.

Statutes, Regulations and Rules Cited:

Condominium Act, R.S.B.C. 1996, c. 64.

Strata Property Act, S.B.C. 1998, c. 43, ss. 99(1), 99(2), 100(1), 100(2), 100(3), 164(1), 164(2).

Strata Property Act Regulations, B.C. Reg. 43/200, s. 6.4(2).

Counsel:

J.C. McKechnie, for petitioners.
R. Shore, for respondent.

¶ 1 **WARREN J.**— The petitioners seek a declaration that the strata fees levied by the respondent against the petitioners for the 2002 financial year contravene the strata corporation bylaws and are illegal and constitute a "significantly unfair action" in relation to these petitioners. The petitioners ask that this Court order the respondent to comply with section 18 of the bylaws and section 6.4 of the regulations made under the Strata Property Act, S.B.C. 1998, c. 43 (the "Act"), and for an order restraining the respondent from levying and collecting the strata fees other than in a manner contemplated by the existing bylaws.

¶ 2 The property in question is a commercial strata which was built in 1998 under the provisions of the Condominium Act, R.S.B.C. 1996, c. 64, as rep. by the Act, s. 294. The value of the property has declined since the late 1990s and there are hard feelings between certain owners of strata lots and the builder and owner of other strata lots. There has been a good deal of litigation involving this property.

¶ 3 The strata corporation - Pacific Plaza - comprises food court strata lots as well as stores and offices. There are 265 units, of which 73 are for parking, 190 are commercial storefront or office units including the food court, and 2 units are devoted to signage.

¶ 4 Under the bylaws of the strata corporation presently in force, the 73 parking units comprise the "parking section" of the corporation; the 190 commercial units comprise the "commercial section"; and the 2 signage units comprise the "signage section". The petitioner, Ernest & Twins, was the developer and original owner of all of the units in Pacific Plaza but has sold off most of its units and, at the date of filing the petition, owned 61 strata lots comprising 38 parking units, 19 commercial units and the two signage units. The petitioner, No. 213, is the owner of 5 strata lots, of which 4 are parking units and 1 is a commercial unit.

¶ 5 Section 18 of the strata corporation bylaws provides that any common expenses attributable to a separate section should be apportioned to, and borne by, the individual units of that separate section in proportion to each unit's unit entitlement. Until the 2002 budget, the corporation's budget had apportioned common expenses and levied strata fees against individual strata units in accordance with that bylaw but, on March 30, 2002, at the annual general meeting of the strata corporation, a majority of the members approved a budget which was in accord with the bylaws but levied strata fees against all strata lots regardless of type in proportion to unit entitlement. The petitioners say this is in contravention of the bylaws.

¶ 6 As a result of the change in the manner in which the strata corporation's budget has been prepared, the petitioners say that the strata fees levied by the corporation in respect of the petitioners' parking strata lots have increased and no longer bear any relationship to the common expenses of the strata corporation fairly "attributable to those units".

¶ 7 The Condominium Act in force when the property was built was repealed and replaced by the Act. Both the Condominium Act and the Act had standard default bylaws in the event that a strata council did not create its own bylaws as this strata council did. It is a requirement of the Act that any of the old bylaws which contravene the new Act are unenforceable. It does not appear on the evidence or argument that any of those old bylaws contravene the new act.

¶ 8 Under both the Condominium Act and the Act, there may be different methods of apportioning the cost of common expenses where a strata corporation has different types of strata lots. Prior to the 2002 budget the parking

expenses were payable only by the parking bay owners. With the 2002 budget the total expenses have been apportioned across all of the strata lots according to a particular strata lot's unit entitlement and not according to its type. Previous budgets had allocated a section's common expenses to a particular section. The change in apportionment according to the 2002 budget was voted on at the annual general meeting and passed, although not unanimously, by a majority. The petitioners say that the new budget was not changed in accordance with the requirements of the Act.

¶ 9 The pertinent sections of the Act are as follows:

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:

unit entitlement of strata lot/
total unit entitlement of all strata lots
x total 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.

¶ 10 The formula for sharing operating expenses for limited common property and types of strata lots is set out in the Strata Property Regulation, B.C. Reg. 43/2000:

6.4(2) For the purposes of section 99 of the Act, but subject to a resolution under section 100 of the Act, if a contribution to the operating fund relates to and benefits only one type of strata lot, and that type is identified as a type of strata lot in the bylaws of the strata corporation, the contribution is shared only by owners of strata lots of that type, and each strata lot's share of that contribution is to be calculated in accordance with the following formula and not in accordance with the formula set out in section 99(2) of the Act:

unit entitlement of strata lot/total unit entitlement of all strata lots of the
type to which the contribution relates x contribution to operating fund

¶ 11 The relevant strata corporation bylaws are as follows:

- 17.11(1) Except as provided in section 17.9 of this regulation, the Standard Bylaws do not apply to a strata corporation created under the Condominium Act until January 1, 2002, and on that date apply only to the extent set out in this section.
- (2) Subject to subsections (3) to (5), a strata corporation bylaw existing under the Condominium Act immediately before the coming into force of this section ... continues to have effect despite any provision of the Act of this regulation.
- (3) On January 1, 2002,
 - (a) the Standard Bylaws are deemed to be the bylaws for all strata corporations created under the Condominium Act, except to the extent that conflicting bylaws are filed in the land title office ...[which was so in the case at bar]
- (4) Subject to subsection (5), if a strata corporation bylaw filed in the land title office conflicts with a Standard Bylaw, the filed bylaw prevails.
- (5) On January 1, 2002, a strata corporation bylaw filed in the land title office ceases to have effect to the extent that it conflicts with a provision in Parts 1 to 17 of the Act or this regulation.

¶ 12 Section 18(a)-(d) of the strata corporation's bylaws provide:

- (a) "Common Expenses" means the total of all expenses incurred or to be incurred or to be incurred by the Strata Corporation in controlling, managing and administering, operating, repairing, maintaining and replacing the common property, common facilities and other assets of the Strata Corporation and in discharging all obligations of the Strata Corporation under the Condominium Act and the Bylaws of the Strata Corporation including, without limiting the generality of the foregoing, the costs of repairs, maintenance and replacement, premiums on insurance policies, landscaping and gardening costs, snow removal, lighting costs, parking lot cleaning, wages, legal and accounting fees, management fees, rental costs, maintenance service and contingency reserve for unusual or extraordinary future expenses whether of a capital nature or not.
- (b) The strata lot owner's contribution to the Common Expenses of the Strata Corporation shall be levied in accordance with this bylaw.
- (c) The contribution by any owner of a strata lot within a separate section to the expenses common to that separate section shall be levied in accordance with this bylaw.
- (d) Common Expenses shall be apportioned between the Commercial Section, Parking Section and Signage Section and to individual strata lots in the following manner:

- (i) Common Expenses attributable to either separate section shall be allocated to that separate section and, subject to Bylaw 18(1) shall be borne by the owners of the strata lots within that separate section in the proportion that the unit entitlement of such strata lot bears to the aggregate unit entitlement of all strata lots within that separate section:
- (ii) Common Expenses not attributable to either separate section, shall be allocated to all strata lots and shall be borne by the owners in proportion to the unit entitlement of their strata lot or as otherwise set out in the current budget of the Strata Corporation; and
- (iii) Common Expenses attributable to any one strata lot be allocated to such strata lot.

[Emphasis added]

¶ 13 Counsel for the petitioners says that regulation 6.4 deals with a situation where there are different types of strata units and that under the bylaws - section 18(d) - the term "section" is synonymous with "type". He argues that since the bylaws of the strata corporation specifically provide for a method of apportioning, and since that method was used until the 2002 budget, it can only be changed by a unanimous vote under section 100 of the Act.

¶ 14 In summary, Mr. McKechnie submits that the present bylaws are not in contravention of the Act or regulations particularly 6.4(2), and accordingly, the purported attempt to apportion common expenses used in the 2002 budget required the unanimous agreement of owners before it could be implemented. Accordingly, not having met with unanimous vote required under section 100, the petitioners seek an order of this Court that: the purported budget is illegal and constitutes a significantly unfair action in relation to the petitioners; an order directing the strata corporation to comply with section 18 of the bylaws and regulation 6.4 of the regulations in preparing an annual budget and levying strata fees; and an order restraining the strata corporation from levying and collecting strata fees other than in the manner contemplated by the bylaws until such time as the bylaws have been amended.

Respondent's submissions

¶ 15 The respondent says that prior to the 2002 budget, it had assumed that the fees for the owners of the parking units were calculated to include all common expenses but, as a result of closer inspection, determined that they were not. The petitioners and the respondent had appeared before Madam Justice Loo in earlier litigation, Ernest and Twins Ventures (PP) Ltd. et al. v. The Owners, Strata Plan LMS 3259 et al. (21 November 2001), Vancouver L013084 (B.C.S.C.), arising out of the termination of strata council membership of the entire strata council and the installation of a new strata council. The 2002 budget was the first to be prepared after the decision of Loo J.

¶ 16 The respondent argues that before the 2002 budget, the owners of the parking lots units were not asked to contribute anything for such costs as landscaping, garbage, water, administration, general maintenance, the bulk of management, the bulk of security, promotions and mortgages. In his report to the strata corporation the new treasurer of the strata council stated, inter alia, "[a]fter reviewing the list of expenses of the strata as a whole, the strata council decided that it was not possible to attribute costs solely to a particular section. Because the common expenses provided benefits to all owners, in assisting and drawing customers to the mall, we decided that all owners should contribute, on a pro rata basis, to all common expenses which could not specifically be attributed to one section".

¶ 17 The respondent says that the petitioners' interpretation of how common expenses are to be apportioned

pursuant to s. 18 of the bylaws is too narrow. Mr. Wong, of the petitioner Ernest & Twins Ventures, was of the opinion that section 18 provided for the apportionment of the strata corporation's common expenses, which are specific to a separate section to that separate section, and for recovery of those expenses from the individual units in a section, in proportion to their unit entitlement. Expenses which are common to all sections were to be apportioned to and recovered from all strata lots in proportion to unit entitlement. Counsel for the respondent submits that bylaw 18(d)(iii) requires the strata council, when putting together a budget, to make an honest estimate of the costs which will be incurred by the strata corporation in the coming year; break down the expenses into categories; consider which of the expenses are unique to a particular section; attribute completely unique expenses to that section which benefits from the expenses; and, attribute all other expenses to all units on a unit entitlement basis.

¶ 18 In Strata Plan VR1767 v. Seven Estate Ltd., 2002 BCSC 381, [2002] B.C.J. No. 755, Madam Justice Martinson interpreted the term "attributable" as found in section 128 of the Condominium Act to mean "relating to and assisting". Mr. Shore argues that in some circumstances some units would receive a greater benefit than others with respect to some expenses and some would, undoubtedly, view this as unfair. The mere fact, however, that attribution of an expense is unfair does not, of itself, allow an owner to challenge, in Court, its obligations to pay for a particular expense. Further, he submits that there is nothing in the strata corporation's bylaws which direct or mandate that the strata council consider the degree to which a particular unit receives a benefit from an expense. He submits that before this Court can step in or intervene I must be satisfied that an action or decision of strata corporation is significantly unfair.

¶ 19 Regarding the Court's jurisdiction on such matters, section 164 of the Act reads:

- (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.

[Emphasis added]

¶ 20 The respondent relies upon the decision in Reid v. Strata Plan LMS 2503, 2003 BCCA 126, [2003] B.C.J. No. 417, which specifically considered the meaning of "significantly unfair". Madam Justice Ryan, for the majority, wrote at [paragraphs] 26 and 27:

...In the case at bar counsel for both parties submitted that the meaning of "significantly unfair"

would encompass, at the very least, oppressive and unfairly prejudicial conduct... and [the judge below, Sinclair-Prowse J., [2001] B.C.J. No. 2377] agreed with them. Counsel continue to take that position on this appeal.

A number of subsequent decisions from the B.C. Supreme Court have cited Sinclair-Prowse J.'s definition of "significantly unfair" with approval. Most recently, Masuhara J. in *Gentis v. The Owners, Strata Plan VR 368*, [2003] B.C.J. 140, referred to Sinclair-Prowse J.'s decision as authority for the definition of significantly unfair. The judge, however, added the following comment:

[28] I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

I agree with Masuhara J. that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the Condominium Act, which was to put the legislation in "plain language" and make it easier to use (British Columbia, Official Report of Debates of the Legislative Assembly, Vol. 12 (1998) at 10379). I also note that the term "unfair" is defined in the Canadian Oxford Dictionary as "not just, reasonable or objective." It may be that this definition of "unfair" connotes conduct that is not as severe as the conduct envisaged by the definitions of oppressive or unfairly prejudicial. However, counsel argued this appeal on the basis that "significantly unfair" has essentially the same meaning as "oppressive and unfairly prejudicial". For the purposes of this appeal the distinction between the definitions makes no difference. On either definition, the resolution passed by the strata council cannot be said to be significantly unfair to Mr. Reid.

¶ 21 Mr. Shore submits that the actions of the strata council in apportioning expenses under the 2002 budget cannot be said to be "significantly unfair". The strata council recognized that the corporation was a commercial strata and every owner benefited if the strata, as a whole, were successful. The success of the stores benefited the parking unit owners and it was that rationale that was applied to apportion significant expenses to the parking lots. The costs are "attributable" to all units and the fact that the extent to which lots benefit is unequal, is not determinative.

Conclusion

¶ 22 I prefer the respondent's interpretation of the term "attributable", and find that the respondent has complied with section 18 of the bylaws and section 6.4 of the regulations.

¶ 23 I do not consider the actions of the respondent in altering the method of allocating common expenses taken during the meeting of March 30, 2002 to be "significantly unfair" as those words have been interpreted in the decisions of this Court and by the Court of Appeal in Reid, supra. While the new method resulted in a substantial increase in the amount of costs of the common expenses to be born by the petitioners, I do not find it meets the test found in Ryan J.A.'s judgment. At [paragraph] 27, she agrees with the decision of Masuhara J. in Gentis, supra that:

. . . a court should not interfere with the actions of a strata counsel unless the actions result in something more than mere prejudice or trifling unfairness.

¶ 24 In my opinion, for this Court to intervene, the actions complained of must be such as can be said to be "oppressive", or "harsh", or "wrongful", or "lacking in probity or fair dealing", or "done in bad faith" or is "conduct which is unjust or inequitable", to use some of the terms found in Blue-Red Holdings Ltd. v. Strata Plan VR 857 (1994), 42 R.P.R. (3d) 421 (B.C.S.C.) and quoted by Ryan J.A. at [paragraph] 26 of her reasons. The fact that some other method, based on a good faith rationale, may have been used to attempt to define with greater precision the degree to which a particular unit benefits from an expense does not amount to conduct which is "significantly unfair".

¶ 25 Accordingly I would dismiss the petition with costs to the respondent.

WARREN J.

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Reported at:

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