IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Peace v. The Owners, Strata Plan VIS 2165,* 2009 BCSC 1791

Date: 20091224
Docket: S47701
Registry: Nanaimo

Between:

Martha Peace, Rick Seaton also known as Robert Seaton, Betty Seaton, John Wilson, Sheila Wilson, Gwen Brosz, Grace Bennett, Suzanne Stephen, Douglas Stephen, Levonne Martyn, Les Martyn, Pat Davidson, Jack Davidson, Diane Stephens

Plaintiffs

And

The Owners, Strata Plan VIS2165

Defendants

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Plaintiffs:	T.J. Huntsman & A. Murray
Counsel for the Defendants:	C.D. Wilson & Kelly Bradshaw
Place and Date of Trial:	Nanaimo, B.C. December 7-11; 14-17, 2009
Place and Date of Judgment:	Nanaimo, B.C. December 24, 2009

[1] This case involves an unfortunate dispute among the Owners, Strata Plan VIS 2165 (the Strata Corporation). The Strata Corporation, which is called the Colonia Gardens, is an adult only development in which the owners must be at least 55 years of age. It is made up of 41 townhouses in 15 buildings, some of which are duplexes and some are triplexes. Nine of the townhouses have basements and thirty two have only crawl spaces.

[2] Along with many other British Columbians, the Colonia Gardens' owners have had to cope with the consequences of water penetration into the building envelopes of their townhouses. The cost of repairing this problem (the Repair Costs) is almost $3,000,000. The owners have been unable to agree as to how the Repair Costs should be allocated amongst themselves and I am therefore called upon to decide how they should be borne.

[3] As members of a Strata Corporation the plaintiffs' rights and obligations are governed by the *Strata Property Act,* SBC, 1998, Ch 43 (the *SPA*). When the Strata Corporation was developed and registered the unit entitlement for each of the 9 basement townhouses was fixed at 2 and the unit entitlement for each of the 32 crawl space townhouses was fixed at 1. As a result, section 108 of the *SPA* requires each basement unit to pay twice what each crawl space unit pays towards the Repair Costs.

[4] The Plaintiffs are the owners of the basement townhouse units. They say that being required to pay proportionally twice what the crawl space units are required to pay is significantly unfair to them.

[5] When this proceeding was commenced the plaintiffs alleged that the unit entitlement schedule for the Strata Corporation did not comply with the requirements of the *Condominium Act,* R.S.B.C. 1996, Ch. 64, which was at the time the schedule was prepared the governing statute for strata title properties. In the course of this litigation the plaintiffs abandoned that claim. It is agreed that the habitable area of the basement units is slightly more than double that of the crawlspace units, and that

the unit entitlements assigned in the schedule of unit entitlements were fully compliant with the *Condominium Act*.

[6] The plaintiffs have also abandoned their claim for an Order sectioning the Strata Corporation. The combined provisions of section 19 of the *SPA* and section 11.1 of the *Strata Property Regulations* preclude the Strata Corporation from forming sections because sectioning is only permitted for different types of residential units. All of the units in the Colonia are townhouses and are therefore deemed to be of the same type.

[7] Accordingly the only substantial issue left before me is whether the insistence of the majority of the owners of the Strata Corporation that each owner of the 9 basement units pay twice as much per unit as each owner of the 32 crawl space units is significantly unfair to the plaintiffs. I should note that some of the plaintiffs have sold their units since the commencement of these proceedings. However I understand that those who have sold have by contract with their purchasers retained the right to pursue this action and receive the benefit of any judgment they may obtain. In these reasons I will therefore make no distinction among the plaintiffs and treat them all as members of the Strata Corporation.

[8] The plaintiffs also allege that certain other actions of the Strata Corporation were significantly unfair to them. These include the refusal of the Strata Corporation to arrange for separate invoicing from the contractor specifying the amount of work charged to each individual strata unit, and the charging of legal fees incurred by the Strata Corporation in respect of this dispute to all owners contrary to the provisions of the *SPA*. The plaintiffs take particular objection to conduct leading up to the passing of a 3/4 vote resolution on December 12, 2006, and the steps taken pursuant that resolution by the Council.

[9] The evidence before me was that the legal fees charged were in a relatively small amount and appear to have been charged to the Strata Corporation as a whole in error by the Strata Corporation's solicitors. Any amounts so charged were reversed by the Strata Corporation once it was notified of the error by the plaintiffs. I

do not consider that the charging of these fees warrants the intervention of the court. I will deal with the remaining allegations of significantly unfair conduct in the context of dealing with the central issue of allocation of Repair Costs.

[10] Before turning to a history of the events leading to this litigation I will briefly describe the units in question. It is common ground that the only difference between the basement units and the crawl space units is that the basement units have a full basement whereas the crawl space units have only a crawl space. This results in the exterior walls of the basement units being somewhat higher than the exterior walls of the crawl space units. In all other respects the units are essentially similar, although there are differences in such things as decks and access to the units. The basement units are all triplexes and are located together on what may be described as the south east corner of the complex. Some of the crawl space units are in duplexes and some are in triplexes.

[11] The relevant history of this matter begins in 2006. On April 10th of that year Kondra Associates Engineering Inc (Kondra) delivered a report (the Kondra Report) to the council of the Strata Corporation (the Council) which identified significant water penetration of the membrane of the townhouses with resulting rot and mould in the sheathing of the townhouses as well as some structural degradation. Kondra recommended repairs (the Repairs) which at the time were estimated to cost $2,642,677.

[12] On April 12, 2006 the Council passed a motion to hold a special general meeting of the owners to discuss building envelope issues. At that time three of the members of the Council were owners of basement units.

[13] The Strata Corporation held a special general meeting to discuss the Kondra Report on May 17, 2006. At that meeting representatives of Kondra briefed the owners with respect to the contents of the Kondra Report but no decision was made with respect to what action should be taken.

[14] A further special general meeting was held on June 15, 2006. At that meeting a 3/4 vote resolution was put forward to approve a special levy of $2,650,000 to pay the Repair Costs. The resolution provided that if the motion was approved each strata lot's contribution would be calculated in accordance with its unit entitlement. The effect of this would have been that each basement unit would pay twice as much as each crawl space unit towards the Repair Costs. The basement unit owners expressed strong opposition to the funding formula. The owners present voted 29 to 12 in favour of the motion, which in the result was defeated as the necessary 3/4 majority was not obtained.

[15] The defeat of the 3/4 vote resolution prompted Mr. Victor Martin, the then president of the Council, to file a petition in this Court under Nanaimo Registry No. S47642 seeking orders that the Strata Corporation be required to proceed with the Repairs and that the Strata Corporation be directed and empowered to issue a special levy to the owners to pay the Repair Costs in an amount not to exceed $3,000,000, with contributions to be based on the owners' unit entitlement.

[16] In response, on July 7, 2006 the plaintiffs commenced this proceeding by way of petition seeking essentially an Order that the Repair Costs be contributed by the owners based on a formula other than unit entitlement, such formula to be one deemed by this Court to be fair. In the petition the now plaintiffs also applied for a declaration that the Repairs were necessary.

[17] As can be seen from the petitions, there appears never to have been any serious dispute that the Repairs were necessary. In the petitions the essential issue between the parties was how the Repair Costs should be allocated among the owners. Mr. Martin sought an Order that the costs be allocated on the basis of unit entitlement and the plaintiffs sought an Order that the costs be allocated in a manner that the Court deemed to be fair.

[18] On July 13, 2006, Mr. Justice Halfyard made two Orders, one in each petition. His Lordship granted Mr. Martin a declaration that the Repairs were necessary and made the following order in this proceeding.

> The Strata Council of the Owners of Strata Plan V1S2165 is authorized to issue an interim special assessment against all of the Owners of Strata Plan V1S2165 in the sum of $58,835.25, such funds to be used toward the restoration and repair of the buildings owned by the said Owners.

[19] In my view the terms of this Order are clear. It authorized the Strata Corporation to issue one special levy on an interim basis in the amount of $58,835.25 per unit to raise the sum of $2,412,245 to be applied to the Repair Costs. In so doing the Court authorized the Strata Corporation to deviate from the requirements of section 108 of the *SPA*, but only on an interim basis, that is, until the issues raised in the two petitions could be decided on the merits.

[20] The claims for all other relief in both petitions were adjourned generally. No one appealed these Orders.

[21] On September 11, 2006 the Strata Corporation passed a 3/4 vote resolution to carry out the directions and authorizations given by Mr. Justice Halfyard in his July 13, 2006, Orders. The resolution assessed a special levy on each strata lot in the amount of $58,800 for a total levy of $2,410,800 and authorized the Council to utilize those funds for the purposes of paying for the Repairs.

[22] At this meeting, the basement unit owners also sought approval of a resolution that would have had any contractor retained to carry out the Repairs provide separate invoicing showing the amounts expended on each unit. This resolution was defeated.

[23] The amount of this special levy was not sufficient to pay the full Repair Costs. By the fall of 2006 it had become apparent that $3,000,000 was a more realistic budget for that purpose. At a Council meeting held on November 17 and 22, 2006, the funding dispute was discussed. The basement unit owners on Council sought mediation of the dispute. However, no agreement was reached and by a majority vote the Council passed a resolution to call a special general meeting of the Strata Corporation to conduct a 3/4 vote on a resolution to proceed with the Repairs, to be paid for on the basis of unit entitlement. The solicitors for the Strata Corporation were instructed to draw up an appropriate resolution to that effect.

[24] The special general meeting took place on December 12, 2006. By that time it was considered that, in addition to the amounts already levied, a further $589,200 would be required to bring the total amount assessed to $3,000,000. The resolution which was voted on and passed required the owners of basement units to pay $61,200 per unit and the owners of crawl space units to pay $1,200 per unit. The stated reason for the levying of these amounts was that the result of the new levy together with the September levy would be to allocate the total anticipated Repair Costs in a 2 to 1 ratio for basement units and crawlspace units in accordance with unit entitlement.

[25] The December 12 meeting was extremely contentious. The owners of the basement units took the position that the 3/4 vote resolution was contrary to the July 13, 2006, Order of Mr. Justice Halfyard. There was also extensive discussion about the fairness of requiring the basement unit owners to pay on the basis of unit entitlement. The resolution passed by a vote of 31 to 10. However, both through their counsel and in the testimony which some representatives of the plaintiffs gave at trial, the plaintiffs have taken the position that they were not bound by the resolution.

[26] It took some time to commence the Repairs. By July 2007 a contractor, Heatherbrae Restoration Co Ltd (Heatherbrae), had been chosen to carry out the Repairs with Kondra as owner's representative and project manager. Heatherbrae commenced work on the Repairs in September 2007.

[27] In the meantime most owners in Colonia Gardens made application for loans from the Homeowners Protection Office (HPO) to pay for the amounts levied against them. HPO is a provincial government agency which was set up to provide financial assistance to owners of units in condominium projects to help them to pay for repairs necessitated by water ingress.

[28] Although most owners made arrangements with HPO to raise the funds necessary to pay the Repair Costs, very few actually paid the September or

December special levies. By July 2007, only approximately $420,000 had been paid to the Strata Corporation.

[29] Beginning in July 2007 counsel for the basement owners and counsel for the Strata Corporation exchanged a good deal of correspondence about the budget for the Repairs and what should be done to raise funds. I do not find it necessary to review this correspondence in detail. I think it sufficient to say that counsel for the basement unit owners took the position that his clients were obligated to contribute only the amounts specified in Mr. Justice Halfyard's July 13, 2006 Order, which he acknowledged should be adjusted to $70,000 to pay the increase in the Repair Costs. Counsel for the Strata Corporation took the position that the basement unit owners were bound to pay both the original $58,800 levy amount and the additional amount levied by the December 12, 2006, special resolution for a total of $120,000.

[30] According to the documents put in evidence before me eight of the basement unit owners amended their applications for financing with HPO to reduce the amount sought from $120,000 to $70,000. Counsel for the Strata Corporation wrote demand letters to the owners of at least one of the basement units threatening to lien their unit unless they paid the December special levy. Neither party took steps to have a hearing of the two outstanding petitions in 2007.

[31] Financial matters came to a head late in 2007 and early in 2008. In January 2008 Heatherbrae began pressing the Strata Corporation to provide proof that the Strata Corporation had sufficient financial resources to pay for contracted work as it was performed. While I am somewhat sceptical about the role that the Council played in these demands there is no doubt that by January 2008 it was clear that the Strata Corporation needed to have assured financing of $3,000,000 in place to ensure that the Repairs could be completed and paid for.

[32] In this period the plaintiffs sought access to the construction contract documents with Heatherbrae to support their position that an allocation based on unit entitlement was unfair to them. The Strata Corporation refused to provide the

construction documents to the plaintiffs despite the fact that they appear clearly to fall within section 35 of the *SPA*.

[33] In January 2008 Strata Corporation took steps to enforce the special levy against the basement unit owners. The Strata Council caused liens to be filed against each of the basement unit owners' lots pursuant to the provisions of the *SPA*. The parties' counsel exchanged further correspondence with respect to the appropriateness and propriety of filing these liens.

[34] These circumstances and disagreements over procedural matters in the two outstanding petitions led to further interlocutory applications before Mr. Justice Halfyard in February 2008. On February 8, 2008 he ordered that each of the basement unit owners pay on an interim basis the sum of $70,000 toward the special assessment for repairs. Although it is not clear from the Order, counsel are agreed that the $70,000 was ordered in substitution for and not in addition to the $58,885.25 that he had authorized in July 2006. He also stayed execution on any liens filed by the Strata Corporation against the basement unit owners and made other Orders to facilitate the financing of the amounts the basement unit owners were ordered to pay.

[35] By separate Order on February 8, 2008, Mr. Justice Halfyard ordered that this proceeding be converted to an action and directed what were then the petitioners to file a statement of claim within 14 days, although no Order seems to be have been entered. He did so, at least in part, to facilitate disclosure of the contract documents with Heatherbrae, which were disclosed and produced in this action.

[36] There were further applications heard by Mr. Justice Halfyard on April 1, 2008. On April 17, 2008, he delivered reasons in which he found that the December 12, 2006, special levy was contrary to his July 13, 2006, Orders, but that the Strata Corporation had not intentionally breached the Orders.

[37] On April 1 the parties agreed to a Consent Order requiring each of the basement unit owners to pay a total special levy or $120,000 and directing that the

liens registered against the titles to the basement units be discharged upon receipt of payment in that amount. Each of the plaintiffs subsequently paid the full $120,000 to the Strata Corporation. It is agreed that this Consent Order and the payment made pursuant to it were made on a without prejudice basis. I take that to mean that I am being asked to decide this case without regard to that Order. I will therefore proceed on that basis.

[38] As I understand it, the plaintiffs' principal claim in this action is based solely on an allegation that the decision of the owners to finance the Repairs by allocating the costs on the basis of unit entitlement rather than on the average relative cost of repairing the two types of units is a significantly unfair act or decision of the Strata Corporation and that the Court should intervene pursuant to section 164 of the *SPA* to remedy that significantly unfair act. The remedy sought is for this Court to apportion the Repair Costs based on a formula which reflects the actual cost of repairing each type of unit.

[39] The total amount of the Repair Costs was $2,914,129.91. However the Strata Corporation was eligible for certain credits and rebates, including a rebate of social services tax on the Repair Costs. After crediting these rebates the total net amount paid by all owners was $2,774,000. Each owner received a refund of a portion of the special levies paid. In the end each basement unit owner paid $110,960 and each crawl space unit owner paid $55,480 towards the net Repair Costs.

[40] Mr. Hoffman of Reid Jones Christoffersen prepared an expert report giving his opinion on behalf of the plaintiffs as to what portions of the Repair Costs were attributable to the basement units and crawl space units respectively. In Mr. Hoffman's opinion, on average, the Repair Costs including GST attributable to a basement unit were approximately $90,000 and to a crawl space unit approximately $66,000.

[41] Mr. Hoffman arrived at this conclusion by measuring the wall area of all buildings and making certain adjustments to the actual wall areas as measured to

reflect extra complications relating to the basement units. These adjustments resulted in what he described as an equivalent wall area for the basement units and crawl space units. Mr. Hoffman then allocated the Repair Costs proportionately based on the equivalent wall areas and then made certain further specific adjustments to arrive at his conclusion.

[42] I accept Mr Hoffman's opinion that it is reasonable to conclude that the portion of the total Repair Costs consumed to repair a basement unit on average was approximately 36% greater than the cost of repairing a crawl space unit. Each basement unit owner however contributed twice what each crawl space owner contributed to the Repair Costs.

[43] The plaintiffs base their claim on section 164 of the *SPA,* which provides 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.

[44] It is important to recognize that section 164 gives the Supreme Court the power to intervene only if there has been a significantly unfair action, threatened action or decision of the Strata Corporation in relation to an owner. In my view this means that for the section to apply some action or decision of the Strata Corporation must be the source of the unfairness complained of.

[45] In my view, the December 12 special levy was significantly unfair because its effect was to negate Mr. Justice Halfyard's Order of July 13, 2006. As I have already stated, the clear intent of that Order was to require the parties to the litigation before him to fund the repair costs on an interim basis equally among all units pending a decision of the underlying issue as to whether it was appropriate to do so in the circumstances of this case. It also seems clear to me that the effect of Mr. Justice Halfyard's February 8, 2008, Order was to reinforce the Order he had made in 2006 and absolve the plaintiffs of any obligation to comply with the December 12, 2006, 3/4 vote resolution.

[46] The resolution was also unlawful because it did not comply with the requirements of section 108 of the *SPA*. The only permissible ratio for the December 12, 2006, special levy pursuant to section 108 of the *SPA* would have been 2 to 1 as between the basement unit owners and crawlspace owners. On the face of it the December 12 special levy was assessed on a ration of more than 25 to 1. I do not think that the fact that the effect of aggregating this levy and the September 2006 levy was to result in a 2 to 1 contribution ratio to the Repair Costs saves the December 12 special levy from being unlawful as being contrary to the provisions of section 108.

[47] It seems to me that the Strata Corporation should properly have gone back to Mr. Justice Halfyard to seek a further Order with respect of how to fund the balance of the Repair Costs or, at most, passed a 3/4 vote resolution authorizing those additional costs to be paid according to unit entitlement. The Strata Corporation did neither and accordingly is not entitled to place any reliance on that 3/4 vote resolution.

[48] In this case I heard submissions with respect to the jurisdiction of the court to review a decision made by a vote of a Strata Corporation at a meeting. I tend to the view that the Court does have statutory jurisdiction to review resolutions of a Strata Corporation even if they be lawfully passed in the sense that they comply with the strict provisions of the *SPA*. However I think the Court would give great deference to

*a lawfully passed resolution and would interfere only in the most extreme circumstances. Because I have concluded that the December 12, 2006, resolution was unlawful, I do not find it necessary to decide that issue to resolve the issues before me.

[49] I have concluded that the appropriate course of action for me to follow is to disregard the December 12, 2006 3/4 vote resolution and proceed to determine the underlying dispute over the allocation of the Repair Costs on the merits. This was clearly what Mr. Justice Halfyard envisioned would happen when he made his interim Orders in this action. For the reasons outlined above, it is also consistent with my view that the December 12, 2006, 3/4 vote resolution was invalid in any event.

[50] The only legally permissible means available to the Strata Corporation to fund the Repair Costs is a special levy pursuant to section 108 of the *SPA*. Section 108(2) of the *SPA* requires owners to contribute to a special levy in accordance with section 99, which in turn requires owners to contribute proportionately to their unit entitlements. Thus in certain circumstances owners may find themselves contributing to common expenses in a different proportion from the relative direct benefit they receive from the expenditure.

[51] The provisions of the *SPA* with respect to allocation of special levies are mandatory. They require that special levies be allocated according to unit entitlement. The plain meaning of section 108 was confirmed in *Alvarez* v. *Owners Strata Plan LMS 1537,* 2003 BCSC 1085 and *Coupal v. Owners Strata Plan LMS 2503,* 2004 BCCA 55. However, Ms. Murray has submitted that I have the jurisdiction to order the Strata Corporation to deviate from an allocation of the Repair Costs based on unit entitlement if I conclude that such an allocation is significantly unfair to the plaintiffs. Her submission is that I am entitled to consider the result of the imposition of the special levies on the plaintiffs and that if I conclude that the impact of assessing the cases on the basis of unit entitlement is significantly unfair I have the power under section 164 of the *SPA* to reallocate the burden of the Repair

Costs so that it is allocated to the owners in a manner which is different from unit entitlement.

[52] The Plaintiffs point out that the owners have not benefitted to the same degree from the Repairs. They say that as a result of the actions of the Strata Corporation in requiring the Repair Costs to be allocated on the 2:1 ratio of unit entitlements they have been forced to subsidize the crawl space unit owners to the extent of approximately $21,000 per basement unit and this is significantly unfair. I understand their position to be that this unfairness is exacerbated by the disparity in the number of crawl space and basement units which means that if the costs were to be reallocated each crawl space unit would be required to pay approximately $6,000 more while each basement unit would be reimbursed $21,000. Thus the Order sought would provide a substantial benefit to each plaintiff while imposing a much more modest burden on each crawl space unit owner.

[53] I am unable to accept this submission. In my view I would in effect be overruling section 108 of the SPA if I did so. Once it is established that the Repairs are necessary it seems to me that it is legally mandatory for them to be paid for by a special levy assessed on unit entitlement. This assessment is not the result of any action of the Strata Corporation. It is in fact the legally necessary consequence of the Strata Corporation carrying out its duty to repair the common property.

[54] I think that the applicable legal principles governing this case are the same as those that led Mr. Justice Bauman, as he then was, in *Terry v the Owners Strata Plan LMS 2153* 2006 BCSC 950, to reject an argument that the owners of units in newer phases in a phased strata corporation should not have to contribute to repairs to older phases because the owners of the older phases had not taken appropriate steps to remediate their units prior to the completion of the newer phases. I agree with the analysis of the elements necessary for a finding of significant unfairness contained in that case.

[55] I have already referred to the wording of section 164 of the *SPA*. I repeat that the focus of that section is on the conduct of the Strata Corporation and not on the

consequences of the conduct. There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the *SPA* itself.

[56] I do not think that the provisions of the *SPA* with respect to the allocation of costs can be departed from in the absence of conduct on the part of some of the owners that would make it inequitable for them to stand on their legal rights.

[57] In *BCE Inc. v 1976 Debenture Holders* 2008 SCC 69 the Supreme Court reviewed the principles underlying the exercise of the courts' power to grant statutory oppression remedies under the *Canada Business Corporations Act.* In that case the Supreme Court affirmed that statutory provisions giving the court the power to intervene in the affairs of a company give the court an equitable jurisdiction to address conduct that, while not unlawful, is nevertheless inequitable or oppressive. The Court stressed the importance of the complainant establishing a reasonable expectation that the affairs of the company would be conducted in a certain way and showing conduct on the part of the majority that defeated that reasonable expectation. While *BCE* dealt with a company law statute, there is authority that the jurisprudence dealing with corporate oppression is relevant to cases under the *SPA*; see *Aviawest Resort Club v Chevalier Tower Property Inc* 2005 BCCA 267.

[58] In this case there is simply no conduct by the majority of owners that would make it inequitable for them to assert their legal right to require that the Repair Costs be allocated in accordance with unit entitlement. All of the plaintiffs had access to the schedule of unit entitlements for the Strata Corporation and all who testified confirmed that they knew that their strata fees were higher than those of the crawl space units. The crisis which faced the owners in 2006 was unprecedented. There was no suggestion that any previous course of conduct of the Strata Corporation or

its owners would have led a basement unit owner to conclude that the provisions of the *SPA* would not apply to the Repair Costs. I can therefore find no basis for finding that the conduct of the majority in insisting on allocating the Repair Costs by unit entitlement violates any reasonable expectation of the plaintiffs.

[59] I am also unable to find that the conduct of the majority of owners in so insisting was unfair. While I accept Mr. Hoffman's allocation of the Repair Costs to the basement and crawlspace units, I question how helpful his opinion is in deciding whether allocation of costs by unit entitlement is significantly unfair. The contract with Heatherbrae was a lump sum contract which included the cost of reroofing the units. All of the owners benefitted from the remediation and upgrading of the common property beyond the physical improvements to the buildings within which their units were located. All benefitted from the economies of scale realized from having the work done all at once. While the cost of remediating the basement unit buildings was not twice the cost of remediating crawl space buildings, it was substantially more. Given this conclusion, I do not think that it was unfair for the Strata Corporation to refuse to have the contractor issue separate invoices for each unit.

[60] It also seems to me that the approach advocated for by the plaintiffs in this case has the potential to promote future disputes over what costs should fairly be allocated to particular units in Strata Corporations. Ms. Murray submitted that the allocation of costs by unit entitlement should only be deviated from when it is shown that a significantly unfair outcome would result from such an allocation. However the case law demonstrates that there will inevitably be a wide divergence of opinion on what is or is not significantly unfair. I think it would be contrary to the purpose and intent of the *SPA* for the courts to engage in a detailed review of the relative costs of repairs to common property on a unit by unit basis to determine whether the outcome of applying section 108 is significantly unfair.

[61] In submitting that the Court has jurisdiction to order that costs be allocated on some basis other than unit entitlement Ms. Murray relied in particular on the decision

of Madam Justice Koenigsberg in *Shaw* v. *The Owners Strata Plan LMS 3972*, 2008 BCSC 453. In that case, Madam Justice Koenigsberg exercised jurisdiction under section 164 of the *SPA* to reverse a resolution passed by the owners of the Strata Corporation allocating water and sewer expenses 72% to the commercial section of the Strata Corporation and 28% to the residential section. In that case, the Court directed that the Strata Corporation pass a unanimous vote resolution pursuant to section 100 of the *SPA* that water and sewer expenses be allocated 94% to the commercial section and 6% to the residential owners.

[62] In my view, however, *Shaw* is distinguishable from this case. In *Shaw* the Court was dealing with a Strata Corporation which had separate sections. The primary dispute was over how the expenses should be allocated as between sections. I think that the decision, properly understood, gave effect to the provisions of the *SPA* which required common expenses incurred exclusively by one section to be borne by that section. In the *Shaw* case, the primary dispute was over water and sewer. The evidence before the Court was that the commercial section used a disproportionately large percentage of the water and sewer capacity of the Strata Corporation. In my view, the *Shaw* case is therefore of little assistance to me in deciding the issues raised in this action.

[63] For the above reasons I have concluded that this action must be dismissed.

[64] I do however consider that the conduct of the Strata Corporation is relevant to a consideration of what costs order is appropriate in this case. In these reasons I have already found that the December 12, 2006 resolution imposing a special levy was unlawful. It was also contrary to the intent of Mr. Justice Halfyard's Order of July 13, 2006, which was intended to permit the Repairs to proceed and reserve the question of how the costs should be allocated to a full hearing of this court on the merits.

[65] It is my opinion that the Strata Council acted in a heavy handed and unnecessarily belligerent manner with respect to the plaintiffs in the management of this dispute. I can see no useful purpose that was served by denying the plaintiffs

access to the contract documents with Heatherbrae and Kondra Engineering. Similarly the tactic of filing liens in respect of what I have found to be an unenforceable special levy was in the circumstance unnecessary and inappropriate.

[66] The type of conduct which has been characterized as significantly unfair is described in *Reid* v. *The Owners Strata Plan LMS 2503,* 2003 BCCA 126. It is not necessary to repeat what was said in these reasons. In my view, the conduct of the Strata Corporation in managing the dispute with the plaintiffs was significantly unfair within the test set out in the authorities.

[67] While this conduct does not change my view as to the proper method of allocating the Repair Costs, I have concluded that the actions of the Council and Strata Corporation with respect to its handling of this dispute were significantly unfair to the plaintiffs. In my view the proper remedy to address that conduct is to deprive the Strata Corporation of its costs in this proceeding.

[68] Ms Murray has submitted that I should award costs to the plaintiffs in any event of the cause. I do not agree. The Strata Corporation has been successful on the critical issue in this case. I think that this case would inevitably have been placed on the trial list if only to allow the parties access to the provisions of Rule 18A. I note that either party could have avoided the cost of a viva voce trial by applying under that Rule. I also consider that the actions of the plaintiffs with respect to providing funds for the Repair Costs are not beyond reproach. Accordingly I am not prepared to order the Strata Corporation to pay the plaintiffs' costs.

[69] The action is therefore dismissed without costs.

"The Honourable Mr. Justice Sewell"