

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: ***Shaw v. The Owners Strata LMS 3972  
et al.,***  
2008 BCSC 453

Date: 20080416  
Docket: S078169  
Registry: Vancouver

Between:

**Susan Shaw, Jacqueline Jamieson, Peter Topliss,  
Margaret Hepworth, Jonathan Agnew, and Mary  
Lou Reigh**

Petitioners

And

**The Owners Strata LMS 3972, Mews Holdings Ltd.,  
and Delany's Coffee House Ltd.**

Respondents

Before: The Honourable Madam Justice Koenigsberg

**Reasons for Judgment**

Counsel for the Petitioners:

Paul G. Mendes

Counsel for the Respondents

Hector MacDonald

Date and Place of Hearing:

April 9, 2008  
Vancouver, B.C.

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## INTRODUCTION

[1] These are written reasons following oral delivery of these reasons on April 9, 2008. For the factual background I have utilized almost in its entirety the written submissions of the petitioners. No exception was taken to the statement of facts by the respondents.

[2] This is a petition for the reallocation of certain common expenses in a 23-unit mixed use condominium located at 2418 Marine Drive, West Vancouver, known as Dundarave Mews (the "Condominium").

[3] The petitioners apply for declarations and orders pursuant to s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "Act"), including:

- (1) a declaration that the respondents have conducted themselves in a manner that is significantly unfair to the petitioners; and
- (2) an order for the reallocation of certain common expenses according to the resolution attached to the petitioners' outline.

## FACTS

### Background

[4] The Condominium has seven residential strata lots over top of 16 commercial strata lots. The Condominium was built in 1999 by Dundarave Village Mews Inc. (the "Developer"), whose principal at the time was Mr. Stefen Elmitt.

[5] The petitioners individually own six of the seven residential strata lots. The respondent Mews Holdings Ltd. ("Mews") and Delany's Coffee House Ltd.

("Delany's") own the 16 commercial strata lots. Mews owns 14 of the commercial strata lots and Delany's owns the other two. Mews bought its strata lots from the Developer in 2005.

[6] Mews rents out its strata lots to a variety of tenants including a Starbucks coffee shop, a fitness centre, a beauty salon, a dentist office, a dog food manufacturing business, a fresh fruit arrangement business, an interior designer and some accounting offices.

### **The Bylaws**

[7] The Condominium's bylaws (the "Bylaws") provide that the strata corporation is organized into separate sections to represent the interests of the commercial and residential owners (the "Commercial Section" and the "Residential Section").

[8] The Bylaws further provide that the strata corporation's common expenses are to be allocated either between the Sections or to both Sections, and that the owners must contribute to those expenses through their monthly strata fees.

[9] Under Bylaw 18, expenses allocated to either Section are borne by the owners of that Section in proportion to their unit entitlement within that Section. Common expenses allocated to both Sections are allocated to all owners and are borne by them in proportion to their unit entitlement within the strata plan, or as otherwise set out in the budget of the strata corporation.

### **Unit Entitlement and Control of the Strata Corporation**

[10] The unit entitlement of the Condominium is based on 1986.2 m<sup>2</sup>. The unit entitlement and the votes in the Condominium are split 62% and 38% between the Commercial Section and the Residential Section, respectively. Mews alone has 54% of the unit entitlement and votes. Mews, therefore, controls the strata corporation. Starbucks and Delany's coffee shops occupy approximately 168 m<sup>2</sup> each, or 18% of the total floor area of the Condominium.

[11] From 2000 to 2005, while the Developer still owned units, the Condominium was managed by Hunter McLeod Realty Corp. ("Hunter McLeod"). Hunter McLeod became the property manager for Mews, and unilaterally assigned its contract to manage the Condominium to Ascent Real Estate Management Corporation ("Ascent").

[12] From 2000 to 2005, the president of the strata council was Stefen Elmitt, who was elected at each Annual General Meeting ("AGM"). As noted above, Mr. Elmitt was a principal of the Developer. The other members elected to the strata council were chosen from the residential owners.

[13] During that period, however, and until only very recently, there were no strata council meetings and there are no strata council minutes. The petitioners believe and say that management decisions at the Condominium were made unilaterally by Hunter McLeod, acting under the direction of the Developer, and then by Ascent acting under the direction of Mews and its agent Hunter McLeod.

[14] The petitioners say that as a result of the Developer's (and now Mews) voting control of the strata corporation, Hunter McLeod has acted as the *de facto* "landlord" of the Condominium, and exercised unilateral control of the Condominium's budgets and the allocation of common expenses between the Sections.

[15] From 2000 to 2005, the budgets of the strata corporation, including the Common Budget and the Sections Budget were set by Hunter McLeod, without any input from, or consultation with, the residential members of strata council.

[16] While Ascent manages the Condominium, the strata corporation's budgets were set by Ascent acting in consultation with Hunter McLeod, as the agent for the Mews, without any input from the strata council.

[17] As stated above, no strata council meetings were convened prior to 2008. The petitioners, relying on the advice of Hunter McLeod and Ascent, believed that strata council meetings were not required because the strata corporation had separate Sections.

[18] The lack of strata council meetings has meant that the Commercial Section has been able to act unilaterally with respect to strata corporation decisions, including the approval of changes to strata lots and common property, and the allocation of common expenses under the budgets.

[19] There is one other item which deserves comment. The petitioners complain that no meeting of the strata council was held between 1999 and 2008. It is conceded that the residents/petitioners hold the majority in that body. They say they

did not understand they could call for budgets – line item explanations and consultation, because the property manager who is, under the Bylaws, answerable to them on settling budgets – told them it was not necessary to meet.

[20] There is no evidence before the Court that the property manager deliberately misled or used undue influence over them. The residents could have simply called a meeting and assumed what power they have. Any problems occasioned by the failure of the residents to assume and exercise the power they have cannot be remedied by resort to a finding of significant unfairness.

#### **Common Expenses and Budgets Historically**

[21] The strata corporation and the Sections' expenses are paid out of budgets contributed to by the owners through monthly strata fees in proportion to their share of unit entitlement.

[22] The Developer included estimates of the annual budgets for a typical full year in the Disclosure Statement. The Disclosure Statement was provided by the Developer to all original purchasers, and included estimates for what is referred to as a "joint use" budget and Residential section budget. No budget estimate was provided for the Commercial Section.

[23] Under the **Act**, a strata corporation must approve a budget by a simple majority at each AGM. From 2000 to 2006, the budget included expenses allocated to both Sections (the "Combined Budget"), and expenses allocated exclusively to the Residential Section (the "Residential Budget"). During that period, there was no

budget for expenses allocated to the Commercial Section. Only the 2007 budget included expenses allocated exclusively to the Commercial Section.

[24] Until that time, the Commercial Section had no budget and relied solely on the Combined Budget, for its common expenses. This is important, because the residential owners pay for 38% of the expenses in the Combined Budget.

[25] Historically, the Combined Budget has included the following expenses: management fees; insurance; electricity; fire and safety; janitorial; window cleaning; landscaping; water and sewer; and repairs and maintenance.

[26] Historically, the Residential Budget has included the following expenses: air conditioning and heating; elevator maintenance; enter phone, garbage; and natural gas.

[27] As time passed, certain line items in the Common Budget saw significant increases and the residential owners began to ask questions about the allocation of common expenses between the Sections, especially in view of the heavy traffic being attracted to the Condominium by the Commercial Section tenants.

[28] In 2004, two areas in the Combined Budget saw significant increases that year: water and sewer was over budget by 40%; and repairs and maintenance were over budget by 135%. As a result, the Combined Budget for 2005 was increased to reflect these increases in Combined Budget spending.

[29] In 2005, the Developer signed a lease with Starbucks and sold its interest in the Condominium to the respondent Mews. This resulted in further increases in

common area expenses. In 2005, actual expenses water and sewer rose by a further 26% and repair and maintenance rose by another 53%. Other expenses also saw significant increases over budget from the previous year, including landscaping (112%), and previously unbudgeted expense for "drain basins" in the amount of \$2,313.99.

[30] In 2006, the strata corporation started allocating certain expenses between the Sections. Water and sewer was allocated 72% to the Commercial Section and 28% to the Residential Section. Repair and maintenance was allocated 47% to the Combined Budget, 23% to the Commercial Section and 30% to the Residential Section. It is important to recall that before this time, there was no Commercial Section budget.

#### **The Reallocation Resolution and the 2007 Budget**

[31] One of the main areas of concern among the residential owners in recent years has been the increase in water, maintenance, landscaping, and janitorial expenses, all of which have historically been included in the Combined Budget.

[32] Water consumption at the Condominium is measured by use of a water meter that is read by the District of West Vancouver (the "Condominium Water Meter"). In February of 2007, the Residential Section installed its own water meter to measure the volume of water consumption by the residential strata lots of the Condominium (the "Residential Water Meter").



[33] By comparing the readings of the Condominium Water Meter with those of the Residential Water Meter, the petitioners discovered that only 1% of the water delivered to the Condominium is consumed by the Residential Section.

[34] In March 2007 the residential owners brought forward a unanimous vote resolution at the AGM to reallocate the expenses in the Combined Budget between the Sections for the fiscal year ending January 31, 2008, and every fiscal year thereafter, the expenses in the Common Area Budget were allocated as follows:

- (1) water and sewer: 80% to the Commercial Section and 20% to the Residential Section;
- (2) all other expenses: 75% to the Commercial Section and 25% to the Residential Section.

[35] The Reallocation Resolution was put to a vote of the owners at the strata corporations March 8, 2007 AGM. The Commercial Section vetoed the Reallocation Resolution and it was defeated.

#### **Use of Common Ares by the Commercial Section**

[36] Following the Commercial Sections veto of the Reallocation Resolution, the petitioners began to monitor and record the use of common property by the occupants and visitors to the strata lots owned by Mews and Delany's. The data obtained by the petitioners confirmed their view that Mews and Delany's derive the overwhelming benefit of common expenses related to parking, storage, access areas within the common property, cleaning, electricity, landscaping and gardening.

## ISSUES

[37] The issues for determination as set out by the petitioners are:

- (1) whether the allocation of common expenses in the Condominium is significantly unfair to the respondents; and
- (2) whether the Court should order the reallocation of common expenses as proposed by the petitioners.

## LEGAL ANALYSIS

[38] Section 164 of the **Act** states:

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.

[39] The phrase "significantly unfair" has been considered in a number of cases pre-dating the **Act** and since.

[40] A useful summary of leading cases in this jurisdiction is set out in *Chow v.*

*Strata Plan LMS 1277*, 2006 BCSC 335, at paras. 74 & 75:

[74] The concept of unfairness was considered in *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259* (2004), 34 B.C.L.R. (4<sup>th</sup>) 229, 2004 BCCA 597, where Lowry J.A. at paras. 23-24 observed:

It must be accepted that some actions of a strata corporation will be unfair to one or more strata lot owners in that the will of the majority may often serve the interest of the majority of owners to the detriment of a minority. Thus, to obtain relief, an owner must establish significant unfairness.

What amounts to significant unfairness was addressed by this Court in *Reid v. Strata Plan LMS 2503* (2003), 12 B.C.L.R. (4<sup>th</sup>) 67, 2003 BCCA 126. There, at paras. 26-27, it was accepted that while it might relate to conduct that was less severe, at least for the purposes of that case, "significantly unfair" was equated with that which is oppressive and unfairly prejudicial.

[75] In *Reid*, Ryan J.A. approved of Masuhara J.'s extended definition of "significant unfairness" in *Gentis v. Strata Plan VR 368* (2003), 8 R.P.R. (4<sup>th</sup>) 130, 2003 BCSC 120 at paras. 27-29:

The scope of significant unfairness has been recently considered by this Court in *Strata Plan VR 1767 v. Seven Estate Ltd.* (2002), 49 R.P.R. (3d) 156 (B.C.S.C.), 2002 BCSC 381. In that case, Martinson J. stated (at para. 47):

The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: *Reid v. Strata Plan LMS 2503*, [2002] B.C.J. No. 2377.

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 am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) at 1349.

[41] Applying s. 164 of the **Act** and the concept of significantly unfair to the facts of this case leads to the following analysis.

[42] The petitioners have provided compelling evidence that the over 50% control of the strata corporation by the Commercial Section has resulted in the defeat of any resolutions put before the AGM to redress obvious significant unfairness in the allocation of water and sewer common expenses as well as likely unfairness in other common expense allocations.

[43] It was clear prior to the petitioners putting in a water meter to measure the amount of water used by it alone that the amount of water used by the Commercial Section was very disproportionate to that of the Residential Section. Both Delany's and Starbucks use significant amounts of water to make the products they sell and, thus, it can fairly be said that to some degree the residents' contribution to the water and sewer common expense has been subsidizing the cost of running those businesses.

[44] It is also clear that the residents benefit in some small degree from the use of water to maintain the landscaping. I accept the evidence of Ms. MacDonald that the amount of water used to maintain the common landscaping is small because of the

use of specifically placed and timed sprinklers. Some water however is also used to clean and maintain walkways and the parking garage. Again, a disproportionate amount of that is used by the Commercial Section, primarily the coffee shops who service persons outside and whose customers cause more spills and other matter which has to be cleaned up.

[45] The petitioners seek a declaration that expenses related to parking, storage, access areas within the common property, janitorial service, electricity, landscaping and gardening all require reallocation because of the disproportionate use of all of this by the Commercial Section.

[46] The Court is able to say that the evidence put forward demonstrates that the allocation of expense for water and sewer as set out in the Resolutions passed at the last two AGMs is obviously significantly disproportionate, especially after 2005 when Starbucks was added to the Commercial Section. Thus to use the majority vote held by the Commercial Section to defeat any resolution to redress this disproportion is significantly unfair as set out in s. 164.

[47] However, while there is anecdotal evidence and common sense inferences to be drawn that janitorial service, landscaping, repair and maintenance and other common expenses are also disproportionately used by the Commercial Section – there is no evidence before this court which would allow the Court to conclude that any disproportionate use of these expenses results in significant unfairness.

[48] The petitioners seek a declaration that reallocation of expenses go back to cover 2007 expenses. There are two cases of the Court which address the issue of

whether a retroactive remedy is available. In *Large v. Strata Plan No. 601*, 2005 BCSC 1128 the Court specifically rejected a submission that the Court provide redress for past expenses unfairly allocated. At para. 65 of that decision the learned trial judge stated:

The applicants sought an order that the townhouse owners be reimbursed for past operating costs that they have unfairly paid. Section 164(2) permits the court to regulate future affairs. I dismiss the application of the townhouse owners to recover amounts unfairly paid prior to October 1, 2005.

[49] The learned trial judge had no cases cited to support that position. Further, to my mind it ignores the plain wording of s. 164 which has three subsections, only one of which relates specifically to regulating future affairs. Thus, the wording of the statute itself does not prohibit the Court from providing a remedy which has retroactive effect.

[50] In *Chow* the Court concluded at para. 105, that:

Section 164 permits the making of "any interim or final order [the court] considers necessary to prevent or remedy" significantly unfair actions or conduct. Such wording, in my view, permits not only the making of orders to govern future conduct, but also to remedy past conduct.

[51] I agree with that interpretation. That case has not been appealed. I note that in *Chow* the Court relied on *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 to decline to follow the Court in *Large*. Primarily, it seemed clear to the Court in *Chow*, as it does to this Court, that the learned trial judge in *Large* did not have the benefit of a full argument and references to authorities referred to the Court in *Chow*.

[52] Thus, I make the following declaration and orders which flow from the application of s. 164(2)(a), (b) and (c):

- (1) a declaration that the respondents, the Owners of Strata Plan LMS 3972 (the "Strata Corporation"), Mews Holdings Ltd. and Delany's Coffee House Ltd. have conducted themselves in a manner that is significantly unfair to the petitioners, contrary to the **Strata Property Act**, S.B.C. 1998, c. 43, s. 164;
- (2) an order that:
  - (a) the unanimous resolution attached hereto as Schedule A be deemed to have passed as of Thursday, March 8, 2008 (the "Resolution");
  - (b) the Strata Corporation file the Resolution at the Land Title office;
  - (c) the Strata Corporation revise the Strata Corporation's Common Area Budget according to the Resolution and prepare an accounting of the owners' contributions to the Common Area Budget according to the Resolution (the "Accounting");
  - (d) the Commercial Section of the Strata Corporation, being the respondents Mews Holdings Ltd. and Delany's Coffee House Ltd., repay to the Residential Section owners the Residential Section owners' over-contributions to the Common Area Budget arising from the Accounting and the Resolution;
  - (e) the respondent Strata Corporation pay three-quarters of the costs of and incidental to this petition to the petitioners at Scale B;
  - (f) the petitioners are exempted from contributing to the three-quarter expense of defending this proceeding pursuant to s. 167 of the **Act**;
  - (g) interest pursuant to the **Court Order Interest Act**; and
  - (h) such other relief as this Honourable Court deems just.

[53] The result is that the water and sewer common expenses should be reallocated to redress allocations of a significant unfairness and the other allocations of common expenses, although proved to be unfair cannot, on the material before this Court, be found to be significantly unfair.

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The Honourable Madam Justice Koenigsberg



**SCHEDULE "A"**

THE OWNERS, STRATA PLAN LMS 3972  
(Dundarave Mews)  
Unanimous Vote Resolution  
Reallocation of Common Area Expenses

**WHEREAS** the strata corporation, legally known as The Owners, Strata Plan LMS 3972 (the "Strata Corporation") is a condominium consisting of sixteen commercial units and seven residential units (the "Condominium");

**AND WHEREAS** the owners of the Condominium have previously amended the Condominium's bylaws to create separate commercial and residential sections organized as follows:

- (a) strata lots 1 to 16 inclusive (the "Commercial Section" and "Commercial Owners"), and
- (b) strata lots 17 to 23 inclusive (the "Residential Section" and "Residential Owners");

**AND WHEREAS** each fiscal year the Strata Corporation approves separate budgets for contributions to the operating fund and contingency reserve fund of the Commercial Section (the "Commercial Budget"), the Residential Section (the "Residential Budget") and the combined common area expenses (the "Common Area Budget");

**AND WHEREAS** the combined common area expenses set out in the Common Area Budget mainly benefit the Commercial Section and the Commercial Owners;

**AND WHEREAS** the *Strata Property Act* requires that all owners must contribute to the operating fund and contingency reserve fund according to the Schedule of Unit Entitlement included on the Strata Plan;

**AND WHEREAS** Section 100 of the *Strata Property Act* provides that the owners of the Strata Corporation may, by unanimous vote, agree to use some other formula to calculate each strata lots share of its contribution to the common expenses of the Strata Corporation;

**AND WHEREAS** the Commercial Owners and the Residential Owners wish to establish a more equitable allocation of common area expenses between the Commercial Owners and the Residential Owners in the Common Area Budget;

**AND WHEREAS** the Residential Owners installed a water meter at the Condominium to accurately measure the actual water consumption by the Residential Owners (the "Residential Section Water Meter");

**IT IS RESOLVED AS A UNANIMOUS VOTE RESOLUTION** pursuant to section 100 of the *Strata Property Act* that:

1. effective for the fiscal year ending January 31, 2007, and including January 31, 2008, water and sewer expenses be included in the Common Area Budget and the water and sewer expenses in the Common Area Budget be allocated as follows:
  - (a) 94% to the Commercial Section and 6% to the Residential Owners;
2. for each subsequent fiscal year, the water expenses will be allocated based on a formula analogous to that utilized to achieve the formula herein to be agreed between the parties and in the absence of agreement, liberty to apply to this Court;
3. each strata lot's share of its contribution to the Common Area Budget as set out above is to be calculated according to the formula attached as Schedule "A" of this Resolution, which formula is to be agreed between the parties and in the absence of agreement, liberty to apply to the court.

**END OF RESOLUTION**

18P