Case Name:

Strata Plan NW2212 (Re)

IN THE MATTER OF Amending the Strata Plan of Strata Plan NW2212 Under the Strata Property Act, S.B.C. 1998, c. 43 and The Owners, Strata Plan NW2212

[2010] B.C.J. No. 680

2010 BCSC 519

Docket: S097446

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

J.R. Dillon J.

Heard: March 16, 2010.
Judgment: April 19, 2010.

(49 paras.)

Counsel:

Counsel for the Petitioner: G.S. Hamilton.

Counsel for The Owner, Strata Lot 40, Vesa Matti Kolman and Kirsti Annikki Kolman: J.D. Buchan.

In Person for The Owner, Strata Lot 31: L. Ribeiro.

Reasons for Judgment

1 J.R. DILLON J.:-- This petition is brought by the **strata corporation,** The Owners, Strata Plan NW 2212 (the "**strata corporation**"), for an order to amend the strata plan registered in the Land Titles Office to remove a designation of limited common property made by the owner

developer at the time that Strata Plan 2212 (the "strata plan") was deposited at the Land Titles Office. The **strata corporation** seeks to amend the strata plan to designate private yards for strata lots as limited common property in a manner consistent with existing fence enclosures and to designate visitor parking areas as common property visitor parking. To accomplish this, the **strata corporation** first seeks an order dispensing with the unanimous vote required by s. 257(a) of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*SPA*") to amend the strata plan. The **strata corporation** also seeks in further direction an order that the **strata corporation** survey the property so as to provide the registrar with an acceptable explanatory plan to establish limited common property boundaries for private yards consistent with existing fence enclosures and visitor parking areas. The petitioner also seeks an order approving a special levy not to exceed $20,000 to accomplish amendment of the strata plan, or such other amount as the Court deems just and necessary. Finally, the **strata corporation** seeks liberty to apply for further orders to give effect to the relief sought. All of this relief is sought pursuant to ss. 164, 171, and 257 of the *SPA*.

2 The owners of 37 out of the 40 strata lots in the development have filed responses to the petition which consent to the grant of the relief sought by the **strata corporation.** The owners of Lot 40, Vesa Matti Kolman and Kirsti Annikki Kolman (collectively called the "Kolmans"), and Lot 31, Mr. and Mrs. Ribeiro, oppose the petition. The **strata corporation** has been unable to contact one other owner whose position remains unknown.

3 The Kolmans have filed a notice of motion, which was heard at the same time as the petition, to require the **strata corporation** to comply with the strata plan and relocate the fences delineating the boundary between Lots 31 and 40 in accordance with the strata plan, pursuant to s. 165(a) of the *SPA*. The owners of Lot 31 agreed with this motion and also sought compliance with the strata plan. The Kolmans seek special costs throughout.

Facts

4 The strata development comprises 40 townhouse style strata lots and common property in Richmond, British Columbia, known as "The Estates". The strata plan was deposited and registered at the Land Title Office on November 27, 1984. Each strata lot includes a carport and yard area, with the yard area designated on the strata plan as limited common property. The strata plan designates the boundaries of each limited common property yard. The problem is that the boundaries as designated in the strata plan do not conform to the fences and hedges that were established by the developer and that have existed for over 25 years. Specifically, the registered strata lot boundary between lots 31 and 40 provides for an additional approximate 500 square feet of yard to Lot 40 than is presently allocated by the fence line. As a result, the owners of Lot 40 are denied use of a private yard designated for their exclusive use on the strata plan; instead, the yard is used by the owners of Lot 31. While both the owners of Lots 40 and 31 agree to change the fence line to accurately reflect the strata plan, 37 of the 40 owners seek to amend the strata plan to conform to the fence lines, regardless of the wishes of the owners of lots 31 and 40. Many owners have built garden sheds and landscaped in reliance upon the fence boundaries.

5 Additionally, at the time of development, there was no municipal requirement that the developer provide visitor parking amenities. There are, however, six historical assigned visitor parking stalls in the development that are not designated in the strata plan. This parking encroaches onto the limited common property of strata Lots 31 and 36. The owner of Lot 36 has consented to amendment of the strata plan to provide for 3 parking stalls. The owner of Lot 31 has not consented

and seeks enforcement of the strata plan. This would result in removal or movement of the fence that presently demarcates parking on Lot 31 with the resultant loss of 3 visitor parking stalls.

6 It is uncontested that the **strata corporation** is responsible pursuant to Bylaw 11.1(c) to repair and maintain limited common property, including fences that enclose yards. Within this responsibility, the **strata corporation** would be required to change the fences to conform to the strata plan.

7 These issues came to light when the Kolmans, in pursuit of due diligence for the proposed purchase of Lot 40, noticed that the fence location in the back yard did not conform to the strata plan. Their realtor informed the **strata corporation** of the discrepancy on June 29, 2006, and requested to know how the fence could be corrected. Their lawyer followed up on the concern by letter of July 17, 2006, requesting that the **strata corporation** review its records to ascertain whether there had been an alteration to the strata plan and whether there had been a unanimous resolution of the owners passed and registered at the Land Titles Office. The council considered this matter at a meeting on July 24, 2006, and resolved to ignore the matter, as it was concluded that "the yards are common property which includes the fences", without further inquiry. In reliance on the strata plan and the due diligence investigation of their solicitor, the Kolmans completed their purchase of Lot 40 on July 28, 2006, with the expectation that the fence boundary would be resolved to accurately reflect the strata plan.

8 In September 2006, the Kolmans' lawyer contacted the **strata corporation's** representative to confirm that the fence encroachment issue would be formally resolved at the next council meeting. The Kolmans wrote to the council to express dissatisfaction that the matter had not been resolved in a timely fashion, requiring the Kolmans to retain legal counsel on the matter. They again requested any documentation to support amendment to the registered strata plan and put the **strata corporation** on notice that they would seek reimbursement for present and future legal costs incurred.

9 On September 27, 2006, council met and acknowledged that fencing had not been installed according to the strata plan. The council knew that it had to consider changing the fencing to reflect the strata plan and also knew that this would significantly affect the backyards of at least three properties. It was resolved "to obtain a written legal opinion on the matter ... to clarify the next steps that strata will need to take to remedy the situation". The **strata corporation's** lawyer advised the corporation by written opinion of January 4, 2007, that the boundaries were delineated in the registered strata plan, that it appeared that Lot 31's fence encroached upon the limited common property of Lot 40, and that this encroachment meant that the **strata corporation** was required to take steps to remove and relocate the fence within the strata plan boundaries if a voluntary solution was not reached within a reasonable period of time. The lawyer recommended that the **strata corporation** retain a land surveyor and the owner of Lot 31 be advised of this opinion and his cooperation sought to relocate the fence, with costs of the relocation to be borne by the owner of Lot 31, unless he had permission to place the fence there or did not construct it. It is accepted that the fence was placed there by the developer.

10 A resolution to approve an expenditure of not more than $10,000 to relocate the fences as shown in the strata plan for Lots 31-40 was placed before the annual general meeting of the **strata corporation** on February 8, 2007. No owner in attendance moved the resolution so it failed. The information contained in the opinion letter of the **strata corporation's** lawyer was not provided to the owners at this annual general meeting. After much discussion of fencing issues, it became

apparent that the owner of Lot 31 was insisting that his boundaries according to the strata plan also be respected, so that the 3 visitor parking stalls located on his limited common property would be removed at the same time as he lost his backyard to the owners of Lot 40.

11 The **strata corporation** sought more advice from its lawyer. On April 16, 2007, he recommended that the lots in question be surveyed and that a meeting occur after the survey to explain to the affected owners what "needed to occur and why". If an agreement was not forthcoming, then the solicitor recommended that a special general meeting be held to approve proceeding by arbitration to resolve the matter. In that opinion, the solicitor told the **strata corporation** that a unanimous vote of the ownership would be needed to amend the strata plan, or an order of the Supreme Court.

12 The surveyor reported to the **strata corporation** in November 2007. The survey established that most of the fences on the property, including those related to Lots 31 and 40, did not line up with the limited common property boundaries as established in the strata plan. A special general meeting was held on April 24, 2008, to approve a resolution for funding for a further survey of the rear property lines of Lots 31-40. The resolution passed by the required 3/4 vote. The second survey delivered on August 13, 2008, also identified numerous discrepancies, some significant, and again confirming the encroachments on Lots 31 and 40. In November, a special general meeting of the **strata corporation** approved spending to obtain estimates of the cost to move fences to comply with the strata plan. The estimates came back at approximately $53,000 to change the fencing, gardens, and sheds for Lots 31 to 40, and approximately $160,000 to change the fencing for Lots 1 to 40. The estimated costs related to Lots 31 and 40 alone were $27,174. The cost to amend the strata plan to accord with current fence locations was estimated to be $20,000.

13 On March 10, 2009, three resolutions related to this issue were placed before the annual general meeting of the **strata corporation.** The first called for an expenditure of not more than $30,000 from the reserve fund to relocate the fences related to Lots 31 and 40, including removal of the visitor parking. This was defeated with only 8/34 votes in favour. Other resolutions were unanimously defeated, including: expenditure of not more than $110,000 by special levy to relocate fences and visitor parking throughout Lots 31 to 40; and expenditure of not more than $160,000 by special levy to relocate fencing in Lots 1 to 29.

14 The Kolmans again demanded, by letter from their lawyer of April 20, 2009, that the fencing be changed so as not to deny them the use of limited common property to which they were entitled. Legal proceedings were threatened with reluctance. The **strata corporation** was put on notice that special costs would be sought for the significant costs incurred to enforce their legal rights if it came to court proceedings. On June 11, 2009, the **strata corporation** had not responded to the demand.

15 However, on July 7, 2009, notice was given of a special general meeting to occur on July 29, 2009. The resolution put forward at the general meeting states:

> **WHEREAS:**
>
> A. The **Strata Corporation** is comprised of 40 strata lots.
> B. Each strata lot in the complex is detached and surrounded by limited common property which is shown on the strata plan as a "private yard" (the "Private Yards").

C. Approximately 20 years ago, fences (the "Fences") were constructed in the complex, separating the Private Yards from each other and from common property.

D. The **Strata Corporation** has become aware that:

(a) the location of the Fences is not consistent with the strata plan; and
(b) certain limited common property shown on the strata plan as a Private Yard is being used for visitor parking.

E. The **Strata Corporation** proposes to make an application to the Supreme Court of British Columbia to amend the Strata Plan to be consistent with the location of the Fences and the use of property for visitor parking, and without limiting the generality of the foregoing:

(a) Where a fence has been constructed between neighbouring Private Yards, to remove the designation of limited common property and re-designate the Private Yards as limited common property for the exclusive use of the relevant neighbouring strata lot; and
(b) Where a portion of a Private Yard is being used for visitor parking, remove the designation of limited common property for that portion of the Private Yard:

(the "Court Application").

BE IT RESOLVED by a 3/4 vote of the **Strata Corporation** that:

The **Strata Corporation** instruct the **Strata Corporation's** lawyer to proceed with the Court Application.

A special levy (the "Special Levy") be assessed against strata lots 1 to 40 inclusive (the "Strata Lots") in the amount of $30,000.00, to be allocated in accordance with the unit entitlement of the Strata Lots as set out in Schedule "A" to this Resolution.

The Special Levy shall be immediately due and payable, but for the purpose of convenience only, shall be collected by the **Strata Corporation** no later than August 31, 2009.

The Special Levy be used to pay the cost of legal fees and disbursements and related survey costs with respect to the Court Application.

16 The resolution passed with 26 votes in favour and 4 opposed. Thirty owners were present at the meeting and the results of the vote demonstrate approval by 3/4 of those present at the meeting.

17 The **strata corporation** has never initiated a resolution or held a vote pursuant to s. 257 of the *SPA* to amend the strata plan to remove a designation of limited common property or to otherwise amend the registered strata plan. Pursuant to s. 1(1) of the *SPA*, such a resolution requires

unanimous approval of all eligible voters and not just of those present at a meeting of the **strata corporation.** From their lawyer's correspondence, it is apparent that the petitioner knew of the requirements of such a vote. From submissions before me and from statements made at the special general meeting of March 10, 2009, it is apparent that the owners of Lots 31 and 40 would oppose such a resolution. One owner has been unable to be contacted throughout all of this. The potential opposing votes are, therefore, not less than 5 percent of the **strata corporation's** total potential votes.

Analysis

18 The **strata corporation** seeks relief from the requirements of s. 257 of the *SPA* through s. 171 of the *SPA* and by application under s. 164 of the *SPA*. Each of these sections must be considered in turn.

19 The requirements to amend a strata plan to designate limited common property are set out in s. 257 of the *SPA*. It says:

Amending strata plan to designate limited common property

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

(a) a resolution approving the amendment must be passed by a unanimous vote at an annual or special general meeting;
(b) an application to amend the strata plan must be made to the registrar accompanied by

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

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

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

20 A "unanimous vote" is defined in s. 1 to mean "a vote in favour of a resolution by all the votes of all the eligible voters". "Eligible voters" means "persons who may vote under sections 53 to 58". For relevant purposes, those sections allocate one vote to the owner of each strata lot.

21 There is a limited exception to the requirement for unanimous votes where, as here, the **strata corporation** is comprised of 10 or more strata lots. Section 52 says:

Unanimous votes

52 (1) This section applies only to strata corporations comprised of 10 or more strata lots.

(2) If a resolution required to be passed by a unanimous vote under this Act is supported by all of the **strata corporation's** votes except for

(a) the vote in respect of one strata lot, in a **strata corporation** comprised of at least 10 strata lots, or
(b) the votes in respect of more than one strata lot, if those votes together represent less than 5% of the **strata corporation's** votes,

the **strata corporation** may, by a resolution passed by a 3/4 vote at an annual or special general meeting, apply to the Supreme Court for an order under subsection (3).

(3) On application under subsection (2), the court may, if satisfied that the passage of the resolution is in the best interests of the **strata corporation** and would not unfairly prejudice the dissenting voter or voters, make an order providing that the vote proceed as if the dissenting voter or voters had no vote.
(4) In making an order under subsection (3), the court may make any other order it considers just, including an order that the **strata corporation** offer to purchase a strata lot owned by a dissenting voter at its fair market value or that the **strata corporation** otherwise compensate a dissenting voter.

22 The **strata corporation** did not proceed under subsection 2 of this section. In fact, counsel for the **strata corporation** did not mention this section in argument. However, it is apparent that at least 5 percent of the **strata corporation** votes would be cast against, or at least not in favour, of a resolution to amend the strata plan to conform to present fencing, therefore denying the **strata corporation** the ability to proceed under this section. The **strata corporation** conceded that it would be unable to obtain a unanimous vote to amend the strata plan to accord with current fence locations. It should also be noted that the **strata corporation** has not apparently considered and certainly has not offered any compensation to those owners who oppose amendment of the strata plan to conform to fencing and who stand to lose limited common property as a result of the amendment.

23 Instead, the **strata corporation** applies under s. 164 through its ability to sue under s. 171. The latter section states:

Strata corporation may sue as representative of all owners

171 (1) The **strata corporation** may sue as representative of all owners, except any who are being sued, about any matter affecting the **strata corporation,** including any of the following matters:

...

> (b) the common property or common assets;
>
> ...
>
> (2) Before the **strata corporation** sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.

24 To "sue" is defined in s. 1 of the *SPA* as "the act of bringing any kind of court proceeding". In this case, the **strata corporation** brings application under s. 164(1)(a).

25 Section 164 says:

> **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, ...
>
> (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.

26 The **strata corporation's** position is that it would be significantly unfair to the large majority of owners to move the fences at an estimated cost of $160,000 in order to comply with the strata plan, and says that "in keeping with the strata concept of community living, the greatest good for the greatest number of owners is best achieved by amending the strata plan and maintaining the *status quo*." The **strata corporation** continues by saying that it would be unfair to the rest of the owners to lose the visitor parking, established landscaping, and 25 years of *status quo*. The **strata corporation** also says that the Kolmans knew about the discrepancy when they purchased Lot 40 and knew that the matter was unresolved within the **strata corporation.** The Kolmans purchased "at their own risk". The **strata corporation** does not comment about the failure to pass the resolutions on February 8, 2007, or March 10, 2009, to accommodate the owners of Lots 40 and 31 to conform to the strata plan for those lots at considerably less expense than $160,000 and with the loss of only 3 visitor parking stalls. The corporation appears to have chosen the cheapest route, amendment of the whole of the strata plan at an estimated cost of $20,000, through direct application to court, notwithstanding the failure to comply with s. 257.

27 The **strata corporation** was unable to cite one case where a **strata corporation** had itself sought redress under s. 164. In fact, in all of the cases cited, one or some owners sought redress for conduct of the corporation (*Carney v. Strata Plan VR 634* (1981), 30 B.C.L.R. 324 (S.C.); *Matthias*

v. The Owners, Strata Plan VR 2135, 2000 BCSC 519; *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, 12 B.C.L.R. (4th) 67; *Poole v. The Owners, Strata Plan VR 2506*, 2004 BCSC 1613; *Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335; *Browne et al. v. The Owners, Strata Plan LMS 582*, 2007 BCSC 206; *Oldaker v. The Owners, Strata Plan VR 1008*, 2007 BCSC 669; *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791; *Liverant v. The Owners, Strata Plan VIS-5996*, 2010 BCSC 286). Additionally, I have found no case decided under s. 42 of the *Condominium Act*, R.S.B.C. 1996, c. 64, as rep. by *SPA*, s. 294, the predecessor to s. 164 of the *SPA*, where this section was used in the manner proposed by the **strata corporation** here.

28 That no case where the **strata corporation** itself has sought redress under s. 164 has been identified is sensible when one considers the different headings under which ss. 164 and 171 appear in the *SPA*, the former under "Suits Against the **Strata Corporation**", and the latter under "Suits by the **Strata Corporation**". In *Arts Umbrella v. Vancouver (Assessor) Area #09*, 2007 BCCA 45 at para. 3, Huddart J.A. confirmed that section headings can be used as a guide to interpret a statute. While in this case the headings themselves are not determinative, it strains logic to suggest that it was the legislature's intention to draft the *SPA* in a manner that would allow a **strata corporation** to bring a suit under s. 171 alleging a significantly unfair action against itself under s. 164.

29 In *Chow* at paras. 74-75, the context of s. 164 was described as the application of the concept of unfairness to the conduct of a **strata corporation** within the realization that strata corporations must make decisions in the best interests of all owners which may conflict with the interests of particular owners. The section is intended to allow the court to interfere when the conduct of the majority becomes oppressive to a minority (*Reid* at paras. 27-29; *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597 at paras. 23-24, 34 B.C.L.R. (4th) 229). The section allows the court to act as a final check on the powers of the **strata corporation** (*Reid* at para. 23). Taylor, J. concluded in *Chow* at paras. 98-99:

> [98] Section 164 refers to decisions of the **strata corporation,** "including the council". If this section was intended to apply only to decisions that do not require a resolution of the owners, then there would have been no reason to add the phrase "including the council". The use of the phrase must, I conclude, mean that the court's jurisdiction applies to all manner of decisions of the corporation, including owner resolutions. I am reinforced in this view by the wording of s. 164(2)(b), which parallels the language of s. 43(a) of the ***Condominium Act*** by including the phrase "a transaction or resolution".
>
> [99] Sections 164 and 165 permit statutory recourse to the courts where there is no other way to rectify acts of significant unfairness within a **strata corporation.** Section 164 concerns itself with acts of unfairness and s. 165 with failures to act. Absent recourse to this court under s. 164, there is simply no way for affected parties to address significantly unfair conduct.

30 The wording of s. 164 led Sewell J. to state in *Peace* at para. 44:

> [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.

31 *Peace* at para. 44 was relied upon in *Liverant* by N. Smith J. to say at para. 13:

> [13] This Court also pointed out in *Peace* that, in order for s. 164 to have any application at all, the alleged unfairness must arise from some action or decision of the **strata corporation** (at para. 44).

32 For this reason, the section could not be used in *Liverant* to rectify unit entitlements established by the developer because the conduct could not be said to be the result of an action or decision of the **strata corporation.**

33 Following this line of authority, it is questionable whether the **strata corporation** itself can seek relief under s. 164 from its own statutory duty to maintain fencing according to the registered strata plan by seeking court approval to amend the strata plan on the basis that to comply with its statutory duty would be oppressive to itself. I do not think that this is the intention of the legislation, especially in the context here, where the *SPA* includes a specific provision to allow the court to amend the strata plan, but only in certain circumstances.

34 Section 257 provides a mechanism for amendment of the strata plan by passing of a resolution by unanimous vote at an annual or special general meeting. This is the only legal means to amend a registered strata plan. Section 57 provides for court relief from the unanimity requirement, but only in limited circumstances. In proceeding to the court for relief from the unanimous voting requirements of s. 257 by invoking s. 171 through a resolution requiring only 3/4 vote approval, the **strata corporation** seeks to avoid the rigours of s. 257 and the limited relief provided in s. 57. Further, the **strata corporation** does so by proceeding in a manner not open to the **strata corporation** itself, under s. 164.

35 This situation is similar to *Liverant* in the sense that the **strata corporation** there, who was not the petitioner, had not considered proposing a resolution under s. 100 to change the formula for funding contributions to the operating fund. The petitioner argued that there was no point in putting forward such a resolution because he could never obtain the required unanimous approval. The court considered that if significantly unfair and oppressive conduct is to be found, the **strata corporation** should be given the opportunity to remedy the problem through the statutory process before the court could be in a position to consider unfairness. The court said at para. 28:

> [28] The facts of this case are distinguishable from those in *Shaw, [2008] B.C.J. No. 655.* First of all, although the petitioner has made his objection known to the other owners and to the strata council, there is no evidence that any resolution under s. 100 has ever been put before an annual general meeting. The petitioner suggests that this would be a pointless exercise because he could never obtain the required unanimous agreement. That may be so, but the procedural requirements of the *Act* are not to be dismissed as empty formalities. If the **strata corporation,** made up of all of the owners, is going to be accused of significantly unfair, oppressive, or unfairly prejudicial conduct, all of the owners must be presented with the evidence and argument in support of that allegation and be given the opportunity to remedy it. It is only when they are given that opportunity and

specifically refuse to act that the court is in a position to consider whether their conduct is significantly unfair.

36 The same can be said here because the **strata corporation** has not sought to pass a resolution to amend the strata plan under s. 257 because it considers that it would not pass. While the failure to pass a special resolution may not be determinative if the underlying conduct is significantly unfair (*Chow* at para. 95), s. 57 provides a specific legislative solution in the face of the requirement for unanimity which cannot be ignored. In this circumstance, the judicial attitude towards the exercise of discretion in *Liverant* is preferred so that the **strata corporation** must have tried to seek unanimity through the legislated process before it can seek redress from the court, if indeed it is even entitled to do so under s. 164.

37 While it does not deal with s. 257 specifically, *Ang v. Spectra Management Services*, 2002 BCSC 1544, contains a useful discussion of what use can be made of s. 164 to overcome a specific statutory voting requirement. In that case, the petitioner applied pursuant to s. 164(1) of the SPA to have two leases of common property in a 127 unit boutique hotel strata development declared void. The petitioner was associated with a group of owners who sought to take over the operation of the hotel, for which control of the leases in question was necessary. The court dismissed the petition on the basis that the petitioner did not have standing to pursue the claim. As the leases in question related to common property, and under s. 3 of the *SPA* the **strata corporation** is responsible for managing the common property, it was the **strata corporation,** and not an individual owner, that must bring the action on behalf of all owners. Having failed to muster sufficient support among the other owners to obtain the requisite 3/4 vote that would authorize the **strata corporation** to make the application under s. 171, the petitioner was not entitled seek relief in her personal capacity. Put simply, the petitioner could not rely on s. 164 merely because she was unable to meet the rigours of the governance procedure in s. 171. While the issues in *Ang* are different than in this case, the reasoning with respect to s. 164 is apposite. Section 164 is not a catch-all provision that permits dissatisfied petitioners to obtain relief from the court every time they fail to secure the required number of votes at a council meeting to effect their wishes. Rather, s. 164 does no more than authorize proceedings by an owner to redress the actions of a **strata corporation** that are significantly unfair to that owner (*Ang* at para. 21).

38 Courts have been reluctant to use their discretion to override specific legislative requirements under the *SPA* based upon significant unfairness. Section 164 could not be used to override the specific requirements under s. 108 of the *SPA* for the allocation of special levies according to unit entitlement in *Peace*, notwithstanding that the allocation meant repair costs had to be paid on a 2:1 ratio. The consequence of the conduct conferring a benefit on some and not others is irrelevant when the conduct itself is pursuant to the *SPA* and exercised in good faith and on reasonable grounds. Just because conduct adversely affects some to the benefit of others is not a basis for a finding of significant unfairness under s. 164, particularly when the consequence is mandated by the requirements of the *SPA* itself. Direct compliance with governing legislation cannot be considered significantly unfair (*Peace* at para. 22).

39 Here, the **strata corporation** seeks a declaration that compelling it to comply with the strata plan at a projected cost of $160,000 is significantly unfair such that the court should order that the strata plan be amended. Is not the cost a consequence of the conduct? The conduct complained of is changing the location of fences to meet the strata plan as required by the *SPA*. This cannot be considered significantly unfair in itself, especially when the **strata corporation** has not sought to

pass a resolution to amend the strata plan. The concept of "significant unfairness" means unfairly prejudicial or oppressive conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith (*Reid* at paras. 27-29; *Chow* at para. 75). This is not such a situation.

40 To summarize, the petition of the **strata corporation** under s. 164 of the *SPA* to relieve it of its obligation to maintain strata property according to the strata plan by amending the strata plan to conform to existing fencing is dismissed for the following reasons:

(a) the **strata corporation** cannot bring an application against itself under s. 164 of the *SPA*;
(b) the **strata corporation** has not proceeded to follow the process to amend the strata plan as set out in s. 257 of the *SPA*; and
(c) the conduct complained of, being required to adhere to the obligations imposed under the *SPA*, is not significantly unfair.

41 This leaves for consideration the application of the Kolmans, joined by Mr. Ribeiro, for an order to compel the **strata corporation** to relocate the fences delineating the private yards between Lots 40 and 31 and demarcating visitor parking stalls on Lot 31 to accord with the strata plan pursuant to section 165(a) of the *SPA*.

42 Section 165(a) states:

> **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).

43 It is uncontested that the visitor parking stalls on Lot 31 are on limited common property allocated to Lot 31 and that the border of limited common property between Lots 31 and 40 is improperly fenced. The owners of these lots agree to change the fencing to conform to the strata plan. The **strata corporation** has refused to comply with this request, presumably because to do so will result in the loss of 3 out of 6 visitor parking stalls and a maximum cost of $30,000 to relocate the fencing between the lots and along the parking area.

44 The Kolmans purchased Lot 40 with the reasonable expectation that the **strata corporation** would act to conform the fencing to the registered strata plan. They had exercised due diligence to ascertain the boundaries of their limited common property and informed the **strata corporation** of the situation immediately. The response of the **strata corporation** was to erroneously, almost negligently, identify the area of concern as common property and ignore the problem. There was no suggestion that the contract of purchase and sale included anything other than the proposed transfer of the limited common property allocated to Lot 40. The Kolmans have secured the agreement of the neighbour significantly affected, Mr. Ribeiro, owner of Lot 31, to conform to the strata plan. They have pursued the matter consistently.

45 This distinguishes the situation from that in *Hill v. Strata Plan NW 2477 (Owners)* (1991), 57 B.C.L.R. (2d) 263, 81 D.L.R. (4th) 720 (C.A.), where the issue related to parking stalls that were not registered in the strata plan and the purchaser had attempted to negotiate in the purchase agreement for an extra parking stall that was really common property. Nor is it similar to *Carney v. Strata Plan VR 634* (1981), 30 B.C.L.R. 324 (S.C.), where the petitioners had notice of the unregistered right to exclusive use of parking stalls that had erroneously been registered by the developer as common property when they were in fact limited common property belonging to others. In *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120, the purchaser knew from the purchase agreement that the patio area was common property over which the previous owner held a lease exclusive to his ownership and not necessarily transferable. In that situation, the court considered the expectations of the buyer to determine whether removal of the patio from his use was significantly unfair within the meaning of s. 164. Given the petitioner's awareness of the uncertainty surrounding his use of the patio, it was not a reasonable expectation for the buyer to think that he would have exclusive use of the common property space.

46 In this case, the **strata corporation** acknowledges that it has a duty to conform to the registered strata plan, but sought to be relieved of that duty. It has not been relieved of that duty. The Kolmans and Mr. Ribeiro are entitled to conformity to the strata plan and to the full benefit of their limited common property. The **strata corporation** is ordered to change the fencing between Lots 40 and 31 to conform to the strata plan. The **strata corporation** is also ordered to remove the visitor parking stalls located on Lot 31 and to change the fencing to provide privacy to Mr. Ribeiro's back yard once the fence between Lots 40 and 31 has been relocated.

47 Given this result, I would only add parenthetically that, once the fencing around Lots 31 and 40 is adjusted to conform to the strata plan, there would appear to be little basis for the owners of Lots 31 and 40 to resist an amendment of the rest of the strata plan to conform with existing fence boundaries, and the **strata corporation** may then decide to proceed under s. 257. Such a result is of course mere speculation and this Court should not be seen as expressing a direction on this matter. I leave it to the individual owners of the **strata corporation** to best decide how to proceed.

48 The Kolmans asked for special costs to be awarded to them. However, there is little in their argument to explain why such an award is warranted. The standard for awarding special costs is that the conduct in question is reprehensible in the sense of being scandalous, outrageous, or deserving of rebuke (*Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 at para. 17 (C.A.)). The conduct of the **strata corporation** was not reprehensible. There is no impropriety alleged and no suggestion of pejorative comments about the respondents. In my opinion, there is no basis to depart from the usual rule that costs follow the event. The owners of Lots 40 and 31 will not have to share in the payment of these costs by the **strata corporation.**

Conclusion

49 The petition is dismissed. The application of the Kolmans is allowed with costs to the Kolmans on Scale B.

J.R. DILLON J.

cp/e/qlrds/qlpwb/qljyw