

Case Name:

Strata Plan VR 2654 v. Mason

Between

The Owners, Strata Plan VR 2654, petitioner, and
Carolyn Mary Mason and Hongkong Bank of Canada,
respondents

(Vancouver Registry No. H030648)

And between

Carolyn Mary Mason, petitioner, and
The Owners, Strata Plan VR 2654, respondent
(Vancouver Registry No. H031146)

[2004] B.C.J. No. 1061

2004 BCSC 685

Vancouver Registry Nos. H030648, H031146

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

Heard: February 16 - 17, 2004.

Judgment: May 21, 2004.

(59 paras.)

Counsel:

Counsel for The Owners, Strata Plan VR 2654: Adrienne Murray

Counsel for Carolyn Mason: Herbert Rosner

JOYCE J.:—

INTRODUCTION

¶ 1 These proceedings involve a dispute between The Owners, Strata Plan VR2654, which I will refer to as "Deer Ridge", and Ms. Mason, who is the owner of one of the townhouse units in Deer Ridge. Specifically, the dispute concerns the manner in which Deer Ridge has allocated operating fund expenses and contingency reserve fund expenses between the two different types of units within the strata development.

¶ 2 Deer Ridge is comprised of two types of strata lots - townhouses and apartments - and was constructed in phases. Ms. Mason owns a townhouse in Phase Four. This dispute arises because of special levies imposed by Deer Ridge to raise money to repair water ingress problems with some of the strata lots. In particular, a number of the special levies related to townhouses constructed in Phase One.

Under the system of cost allocation by type of strata lot, only the owners of townhouses are responsible for the special levies that relate to townhouses. Ms. Mason is unhappy that she, as an owner of a strata lot in Phase Four, which has not experienced water ingress problems thus far, has to contribute to the cost of repairs to Phase One when the owners of the apartments do not.

¶ 3 Ms. Mason contends Deer Ridge has no authority to allocate the expenses as it has done. As a consequence, she has refused to pay assessments charged against her strata lot. Deer Ridge has brought this proceeding, inter alia, to recover unpaid strata fees and special levies.

¶ 4 Ms. Mason has brought a counter-petition seeking a declaration that Deer Ridge's method of assessment is invalid. She seeks to have Deer Ridge converted into four separate strata sections with separate budgets. Alternatively, she seeks to have all assessments made on the basis of unit entitlement without any allocation of expenses based on different types of units.

FACTS

¶ 5 Deer Ridge, a strata corporation located in West Vancouver, was created in four phases during the period 1990 to 1997. It contains a mix of apartments and townhouses. Phase One, comprised of 11 apartments (Tower One) and eight townhouses, was completed in 1990. Phase Two, comprised of 20 apartments (Tower Two), was completed in 1993. Phase Three, comprised of 25 apartments (Tower Three) and four townhouses, was completed in 1995 and Phase Four, comprised of eight townhouses, was completed in 1997.

¶ 6 Ms. Mason owns a townhouse in Phase Four.

¶ 7 Starting in 1991, operating costs and capital expenditures at Deer Ridge were allocated between apartments and townhouses. In November 1992, Deer Ridge amended its bylaws to provide, by Bylaw 2.2, that both operating and contingency reserve fund expenses would be allocated based on the type of strata lot. Bylaw 2.2, which was filed in the Land Title Office on November 26, 1992, reads as follows:

Prior to the commencement of each fiscal year, or as soon thereafter as possible, the Strata Corporation shall approve by majority vote of its owners at its Annual General Meeting an operating budget for the next fiscal year, which shall include all anticipated common expenses of the Strata Corporation allocated to each type of strata lot where so attributable in accordance with statutory bylaw 128, and the allocation of money to the contingency fund on the same basis.

¶ 8 Deer Ridge allocated operating expenses and the contingency reserve fund to the two types of strata lots until 2000, at which time the Strata Council prepared a budget by which it purported to allocate costs to six different cost centres representing each of the three apartment towers and the three phases of townhouses.

¶ 9 The owners of the Phase One townhouses challenged the validity of Bylaws pursuant to which the Strata Council purported to create the six cost centres. On September 5, 2001 Madam Justice Boyd declared the bylaws that the Strata Council relied on to create the six cost centres to be ultra vires the strata corporation (*Lim v. Strata Plan VR2654*, [2001] B.C.J. No. 2040, 2001 BCSC 1386). She held that costs were to be allocated by type of strata lot in accordance with s. 128(2) of the Condominium Act, R.S.B.C. 1996, c. 64 (Repealed).

¶ 10 Madam Justice Boyd also held that Deer Ridge must revise the budgets for the years ending

2000 and 2001 to allocate costs between two types of strata lots, rather than amongst six cost centres.

¶ 11 Following the decision in *Lim*, Deer Ridge resumed allocating operating expenses and major repairs costs based on the two types of strata lots.

¶ 12 The townhouses in Phase One have required significant repair and remediation as a result of water ingress, the costs of which have been allocated to all townhouse owners, including Ms. Mason. Between November 29, 2001 and October 14, 2003 Deer Ridge has imposed special levies totalling over 2.3 million dollars, of which Ms. Mason's share was \$56,516.28. As of the date the petition was heard, Deer Ridge claimed the sum of \$61,613.72 from Ms. Mason for unpaid strata fees, security charges, special levies and registry fees and disbursements. Since that date further unpaid strata fees in the amount of \$1,517.94 have accrued. Deer Ridge claims a total of \$63,131.66 as of May 10, 2004.

¶ 13 On November 13, 2002, Deer Ridge filed a lien in the amount of \$28,363.03 against Ms. Mason's property under the provisions of the Strata Property Act, R.S.B.C. 1998, c. 43 (the "SPA") relating to unpaid strata fees and special levies to that date. Deer Ridge seeks a declaration of priority with respect to the sum of \$63,131.66, which is the amount it says is secured by the lien, an order that if the amount of the lien is not paid within 60 days after the date of the order Ms. Mason's townhouse be sold to satisfy the lien, personal judgment in the sum of \$63,131.66, costs and liberty to apply for a summary accounting of any amounts that become due to Deer Ridge from Ms. Mason.

ISSUES

¶ 14 There are a number of matters that require determination but the key issues are these:

1. Does Bylaw 2.2 authorize Deer Ridge to allocate operating fund expenses to the apartment-type strata lots and the townhouse-type strata lots:
 - (a) for the period July 1, 2000 to January 1, 2002;
 - (b) for the period subsequent to January 1, 2002; and
 - (c) regardless whether the funds are raised through a budget or by special levy?
2. Does Bylaw 2.2 authorize Deer Ridge to allocate contingency reserve fund expenses to the apartment-type strata lots and the townhouse-type strata lots:
 - (a) for the period July 1, 2000 to January 1, 2002;
 - (b) for the period subsequent to January 1, 2002; and
 - (c) regardless whether the funds are raised through a budget or by special levy?

ANALYSIS

1. Does Bylaw 2.2 authorize allocation by type of strata lot?

¶ 15 Prior to July 1, 2000, there was no need to rely on Bylaw 2.2. The statutory bylaws under Part 5 of the Condominium Act permitted Deer Ridge to allocate expenses based on type of strata lot (see *Lim*, supra). Statutory Bylaw 128(2) provided as follows:

128(2) If a strata plan consists of more than one type of strata lot, the common expenses

must be apportioned in the following manner:

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

¶ 16 While Deer Ridge was entitled to rely on the statutory bylaws, at least until July 1, 2000, it had in fact passed its own Bylaw 2.2, which authorized allocation of expenses by type, and had registered the bylaw in the Land Title Office prior to July 1, 2000.

¶ 17 On July 1, 2000 the Condominium Act was repealed and replaced by the SPA. The scheme under the SPA for permitting allocation of expenses by type of strata lot is different than it was under the Condominium Act. Whereas under s. 128(2) of the former Act, if a strata corporation consisted of more than one type, expenses were to be allocated according to type, as this court has observed in *Strata Plan LMS 1537 v. Alvarez*, [2003] B.C.J. No. 1610, 2003 BCSC 1085, the general rule under the SPA is that all owners are responsible for all expenses in accordance with their unit entitlement - "you are all in it together". That general rule emerges from s. 99 of the SPA, which provides:

- 99(1) Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.
- (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:

Unit entitlement of strata lot	
-----	X total contribution
total unit entitlement of all strata lots	

¶ 18 While s. 99 deals with budgeted amounts for the operating fund and the contingency reserve fund, s. 108 deals with special levies as follows:

- 108(1) The strata corporation may raise money from the owners by means of a special levy.
- (2) The strata corporation must calculate each strata lot's share of a special levy
 - (a) in accordance with section 99, 100 or 195, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
 - (b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.

¶ 19 The general rule is subject to an exception in that, under s. 100 of the SPA, a strata corporation

may, by resolution passed by a unanimous vote, agree to use a formula other than that set out in s. 99 and the regulations to calculate a strata lot's share of expenses. Section 195 of the SPA is engaged where a strata corporation is comprised of different "sections" under Part 11 of the Act.

¶ 20 The general rule is also subject to the following formulas under s. 6.4 of the Strata Property Regulation, B.C. Reg. 43/2000 (the "Regulation"):

6.4(1) For the purposes of section 99 of the Act, but subject to a resolution under section 100 of the Act, if a contribution to the operating fund relates to and benefits only limited common property, the contribution is shared only by owners of the strata lots entitled to use the limited common property, and each strata lot's share of that contribution is to be calculated in accordance with the following formula and not in accordance with the formula set out in section 99(2) of the Act:

unit entitlement of strata lot

----- x contribution to operating fund
total unit entitlement of all
strata lots whose owners are
entitled to use the limited
common property to which the
contribution relates

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

Unit entitlement of strata lot

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

(3) Subject to a resolution under section 100 or 108 (2)(b) of the Act, if a strata lot's share of a contribution to the operating fund is calculated in accordance with subsection (1) or (2), each strata lot's share of the total contribution to the contingency reserve fund or a special levy is to be calculated using the following formula:

unit entitlement of strata lot

----- x total contribution to contingency reserve fund or special
levy
total unit entitlement of all
strata lots

6.5(1) For the purposes of section 99 of the Act, but subject to a resolution under

section 100 or 108(2)(b) of the Act, if a strata corporation has, by a bylaw passed under section 72(3) of the Act, taken responsibility for the repair and maintenance of specified portions of some but not all of the strata lots, a contribution to the operating fund or a special levy in respect of the repair or maintenance of those portions is shared only by the owners of the strata lots to which the contribution or special levy relates, and each strata lot's share of the contribution or special levy is to be calculated in accordance with the following formula and not in accordance with the formula set out in section 99(2) of the Act:

unit entitlement of strata lot
----- x contribution to operating fund or special levy
total unit entitlement of all
strata lots to which the
contribution or special levy
relates

- (2) Subject to a resolution under section 100 of the Act, if a strata lot's share of a contribution to the operating fund or special levy is calculated in accordance with subsection (1), each strata lot's share of the total contribution to the contingency reserve fund is to be calculated using the following formula:

unit entitlement of strata lot
----- x total contribution to contingency reserve fund
total unit entitlement of all
strata lots

¶ 21 Thus, as Mr. Justice Bauman concluded in Alvarez, supra at [paragraph] 54, where a strata corporation consists of more than one type of strata lot, contributions to the operating fund may be allocated by type (6.4(2)) but contributions to the contingency reserve fund or a special levy will be allocated to all strata lots in accordance with their unit entitlements (6.4(3)).

¶ 22 Mr. Justice Bauman summarized the scheme under the SPA as it relates to the contingency reserve fund and special levies at [paragraph] 55 as follows:

I would summarize the statutory scheme in relation to the allocation of contributions to the contingency reserve fund or to a special levy, the two sources of funds to pay for typical leaky condo repairs, in this manner:

Absent an agreement under s. 100 of the SPA, those contributions are to be allocated to all strata lots in accordance with their unit entitlements and regardless of their type (s. 99) unless:

- (i) in the case of a special levy, an alternative "fair division" has been approved by a unanimous vote of the strata lot owners (s. 108(2)); or
- (ii) "sections" have been created under Part 11 of the SPA Regulation.

¶ 23 While that is the general scheme under the current legislation, the SPA and Regulation contain transition provisions that are relevant to this issue:

Strata Property Act

- 293(1) Except as otherwise provided by this Act and the regulations, this Act and the regulations apply to a strata plan deposited and a strata corporation created under the Condominium Act, R.S.B.C. 1996, c. 64 or any former Act.
- (2) On the coming into force of this subsection, a regulation of a strata corporation is deemed to be a rule and the provisions of this Act that apply to rules apply to regulations made by a strata corporation.
- (3) The coming into force of this Act does not affect the deposit of a strata plan if the application for deposit was made before the coming into force of this Act.
- (4) The Lieutenant Governor in Council may make regulations for meeting or removing any difficulty arising out of the transition to this Act from the Condominium Act, R.S.B.C. 1996, c. 64, and for that purpose disapplying or varying any provision of this Act.

Strata Property Regulation

17.11(1) Except as provided in section 17.9 of this regulation, the Standard Bylaws do not apply to a strata corporation created under the Condominium Act until January 1, 2002, and on that date apply only to the extent set out in this section.

- (2) Subject to subsections (3) to (5), a strata corporation bylaw existing under the Condominium Act immediately before the coming into force of this section, including a bylaw under Part 5 of the Condominium Act or under a former Act which was deemed, by section 26(2) of the Condominium Act or a similar section of a former Act, to be a bylaw of the strata corporation, continues to have effect despite any provision of the Act or this regulation.
- (3) On January 1, 2002,
 - (a) the Standard Bylaws are deemed to be the bylaws for all strata corporations created under the Condominium Act, except to the extent that conflicting bylaws are filed in the land title office, and
 - (b) any bylaws under Part 5 of the Condominium Act or under a former Act which were deemed, by section 26(2) of the Condominium Act or a similar section of a former Act, to be bylaws of the strata corporation cease to have effect.
- (4) Subject to subsection (5), if a strata corporation bylaw filed in the land title office conflicts with a Standard Bylaw, the filed bylaw prevails.
- (5) On January 1, 2002, a strata corporation bylaw filed in the land title office ceases to have effect to the extent that it conflicts with a provision in Parts 1 to 17 of the Act or this regulation.
- (6) Subsection (5) does not apply to a bylaw that was filed in the land title office before July 1, 2000 to the extent that the bylaw provides for the apportionment of contributions to a contingency reserve fund as a common expense according to type of strata lot, if that type of strata lot is a type identified in the bylaws of the corporation or a section.

...

17.13(1) Subject to the bylaws of the strata corporation, if a strata corporation's budget, in effect on the coming into force of this section, apportions any common expenses to one or more type of strata lot in accordance with section 128(2) of the Condominium

Act or a similar bylaw, the strata corporation may continue to use the type of strata lot identified in the budget as a "type of strata lot" for the purposes of sections 6.4(2) and 11.2(2) of this regulation.

- (2) Subsection (1) is of no effect on or after January 1, 2002.
- (3) Before January 1, 2002, a strata corporation may enact a bylaw that identifies the type of strata lot set out in the budget referred to in subsection (1) as a "type of strata lot" for the purposes of sections 6.4(2) and 11.2(2).
- (4) Despite section 128(1) of the Act, a bylaw under subsection (3) may be approved by a resolution passed by a majority vote at an annual or special general meeting.

¶ 24 Thus, it will be seen that under s. 17.13(1) during the transition period from July 1, 2000 to January 1, 2002, a strata corporation could rely on the former Statutory Bylaw 128(2) to allocate expenses by type in certain circumstances if it had a budget in place prior to July 1, 2000 that allocated expenses on the basis of type. Deer Ridge submits it had such a budget in place and that the transition provisions provided the authority to allocate by type.

¶ 25 What Deer Ridge seems to ignore in making this submission is that s. 17.13(1) permits allocation by type "for the purposes of sections 6.4(2) [relating to an operating fund] and 11.2(2) [relating to "sections"] of this regulation". As Bauman J. said in Alvarez, supra at [paragraph] 69, this transition provision:

permits a pre-SPA strata corporation to continue to allocate certain common expenses to one or more types of strata lot in accordance with s. 128(2) of the CA. But it is only for the purposes of ss. 6.4(2) and 11.2(2) of the SPA Regulation, which cover contributions to the operating fund, not to the contingency reserve fund or a special levy, the sources for funding extraordinary building envelope repairs.

¶ 26 Deer Ridge submits, however, that it need not rely on the transition provisions set out in s. 17.13 because it had enacted and filed its own Bylaw 2.2 prior to July 1, 2000 and that bylaw continued in effect pursuant to the transition provisions.

¶ 27 Under s. 17.11(1) and (2), up to January 1, 2002 the Standard Bylaws under the SPA did not apply while the bylaws created prior to July 1, 2000, including Bylaw 2.2 did apply. I am of the opinion that during the transition period Deer Ridge Bylaw 2.2 was in effect.

¶ 28 Pursuant to s. 17.11(3), on January 1, 2002 the Standard Bylaws under the SPA came into effect and the statutory bylaws under the former Condominium Act ceased to have any effect. That subsection says nothing about bylaws that had been filed in the Land Title Office. I conclude that Bylaw 2.2, which was filed in the Land Title Office prior to July 1, 2000, survived after January 1, 2002. Under s. 17.11(4) of the Regulation, bylaws filed in the Land Title Office took precedence over Standard Bylaws. Section 17.11(5) provided that effective January 1, 2002 a bylaw filed in the Land Title Office that was in conflict with a provision in Parts 1 to 17 of the SPA ceased to have effect. However, s. 17.11(6) provides that s. 17.11(5) does not apply to a bylaw that was filed in the Land Title Office before July 1, 2000 to the extent that the bylaw provides for allocation of a contingency reserve fund by type of strata lot, "if that type of strata lot is a type identified in the bylaws of the corporation".

¶ 29 It is my opinion that after January 1, 2002 Deer Ridge was entitled to rely on s. 6.4(2) to allocate the contribution to its operating fund according to type of strata lot and to rely on Bylaw 2.2 to

apportion contributions to a contingency reserve according to type of strata lot if that type of strata lot is a type identified in its bylaws.

¶ 30 Counsel for Ms. Mason submits that the effect of s. 17.13(2) of the Regulation is to render inoperable Bylaw 2.2, which he says is a bylaw "similar to" Statutory Bylaw 128(2), effective January 1, 2002. As I understand the submission, counsel says that s. 17.13 provides a transition period during which a strata corporation may continue to allocate common expenses, presumably including a contingency reserve or special levy, by type in accordance with the statutory bylaw or, if it has passed its own bylaw permitting allocation by type, according to that bylaw. But he says the authority to allocate common expenses by type ceases as of January 1, 2002 unless the strata corporation passes a bylaw in accordance with s. 17.13(3) prior to January 1, 2002.

¶ 31 In my view, such an interpretation is contrary to s. 17.11(6) which clearly envisages the continued effectiveness of bylaws filed prior to July 1, 2000 that provide for allocation of expenses by type. In my view, the reference in s. 17.13(1) to "similar bylaw" means a similar statutory bylaw in a predecessor statute.

¶ 32 Counsel for Ms. Mason submits that even if Bylaw 2.2 is in effect, it does not define types of strata lots. Deer Ridge submits that ss. 6.4(2) and 17.11(6), which speak of a type of strata lot identified in the bylaws of the strata corporation, do not mean that the identification must occur in the specific bylaw that allocates expenses on the basis of type of strata lot. Counsel for Deer Ridge points to a number of bylaws that refers to the two types of strata lots (i.e., apartments and townhouses), including Bylaws 6.1, 6.2, 6.9 and 6.10.

¶ 33 I am satisfied that the requirements of sections 6.4(2) and 17.11(6) regarding the need to identify the types of strata lots are met by Deer Ridge's bylaws. There can be no doubt, in my view, that the present owners and any prospective purchasers would appreciate that there are two types of strata lots and what differentiates those types.

¶ 34 The remaining question that has to be answered is whether Bylaw 2.2 authorizes the allocation of special levies based on type of strata lot. Counsel for Ms. Mason submits that even if Bylaw 2.2 is in effect, it does not provide for or authorize special levies, the issue with which these proceedings are concerned.

¶ 35 Bylaw 2.2 refers to "anticipated common expenses ... and the allocation of money to the contingency fund on the same basis". The SPA defines "common expenses", "contingency reserve fund" and "operating fund" as follows:

"common expenses" means expenses

- (a) relating to the common property and common assets of the strata corporation, or
- (b) required to meet any other purpose or obligation of the strata corporation;

"contingency reserve fund" means a fund for common expenses that usually occur less often than once a year or that do not usually occur, as set out in section 92(b);

"operating fund" means a fund for common expenses that usually occur either once a year or more often than once a year, as set out in section 92(a);

¶ 36 Section 92 of SPA requires a strata corporation to establish both an operating fund and a

contingency reserve fund to meet its common expenses and requires the owners to contribute to the funds by means of strata fees.

¶ 37 Contributions to the operating fund and contingency reserve fund are calculated pursuant to s. 99 of the SPA:

- 99(1) Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.
- (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:

unit entitlement of strata lot
----- x total contribution total unit entitlement of all
strata lots

¶ 38 A "special levy", while not a defined term in the SPA, is provided for by s. 108:

- 108(1) The strata corporation may raise money from the owners by means of a special levy.
- (2) The strata corporation must calculate each strata lot's share of a special levy
 - (a) in accordance with section 99, 100 or 195, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
 - (b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.

¶ 39 A strata corporation must use funds raised by a special levy to pay common expenses which will generally be extraordinary expenses that cannot be met through the contingency reserve fund. There are differences in the way in which funds are raised by special levy compared to the contingency reserve fund. The most significant of these differences is that while a special levy requires a resolution passed by a 3/4 vote at an annual or special general meeting, the contingency reserve fund is set by the budget, which requires a majority vote. A special levy must identify the purpose for which the funds are being raised and the funds must be used for that purpose and no other. Any funds not used for the specific purpose must be returned to the owners. Additionally, the special levy may be collected all at once or in instalments, while the contingency fund is collected by way of regular strata fees.

¶ 40 The manner of determining each strata lot's contribution to a special levy is identical to that of determining the contribution to the contingency reserve under the SPA.

¶ 41 Despite the differences between the manner in which the funds are raised and the fact that a special levy must be for a specific purpose, it is my opinion that s. 108 of the SPA provides an alternative way of raising funds to meet common expenses rather than creating a third type of fund in addition to the operating fund and the contingency reserve fund. In my view, the funds raised by the special levy can be viewed as forming a subset of a strata corporation's contingency fund for extraordinary expenses.

¶ 42 Therefore, I conclude that the words "to the extent that the bylaw provides for the apportionment of contributions to a contingency reserve fund as a common expense according to the type of strata lot" in s. 17.11(6) includes a special levy.

¶ 43 It would be illogical and lead to an absurdity if Bylaw 2.2 were held to be effective to permit allocation by type with regard to the contingency reserve fund created through the strata fees but not in the case of a special levy. That would mean that the manner of allocation would be dependent on whether the strata corporation chose to raise the funds through the budgetary process over the period of a year or chose to impose a special levy payable over a one-year period. In my view, the allocation of expenses should not depend on manner of collection.

¶ 44 It appears to me that the scheme of the legislation, in relation to existing strata corporations that had allocated both operating and contingent expenses by type, was to permit the corporation to continue such allocation provided it had passed and filed a bylaw to that effect prior to July 1, 2000. Otherwise, a strata corporation that has a bylaw that identifies more than one type of strata lot can only allocate operating expenses by type under s. 6.4(2) of the Regulation if it passes a unanimous resolution under s. 100 or if it is sectioned under Part 11 of the SPA.

¶ 45 Counsel for Ms. Mason also submits the assessments in question were not made in accordance with Bylaw 2.3, which he says must also have continued to be in effect if Bylaw 2.2 survived the new legislative regime. Bylaw 2.3 dealt with the manner of determining the amount of the contingency reserve fund to be included in the strata corporation's annual budget, not with special levies. Furthermore, it did not deal with the allocation of expenses. In any event, the provisions of Bylaw 2.3 with regard to voting on the budget conflicts with s. 103 of the SPA and, in my view, ceased to be effective after January 1, 2002.

¶ 46 Ms. Mason raises an issue relating to the reconciliation between budgeted expenses for the two types of strata lots and the actual expenses attributed to those types. It appears that the owners of the townhouses have paid more than the actual expenses in relation to the townhouses while the owners of the apartments have paid less than was actually expended. Ms. Mason submits that no order should be made against her for the payment of fees or levies until an accounting has been completed.

¶ 47 Deer Ridge concedes that a reconciliation is required and that the matter of surpluses and deficits needs to be dealt with, but submits that the lack of reconciliation to date does not affect the validity of Bylaw 2.2 and Deer Ridge's authority to continue to allocate costs by type of strata lot. I accept that submission. The matter of rationalizing actual expenditures by type of strata lot with budgeted expenses is ongoing and will have to be completed and ultimately approved by the owners. If the owners are unable to reach an agreement on the result of the reconciliation and the manner in which the surpluses and deficits are to be rectified, that may result in further litigation. I am, however, not persuaded this issue affects Deer Ridge's authority to assess and collect fees and special levies pending the determination of that matter.

¶ 48 In summary, on this aspect of the case I conclude that Bylaw 2.2 authorizes Deer Ridge to allocate operating fund expenses and contingency reserve expenses, including those raised by special levy, according to type of strata lot (i.e., townhouse or apartment), both before and after January 1, 2002.

IS THE ALLOCATION OF COSTS BY TYPE OF STRATA LOT SIGNIFICANTLY UNFAIR?

¶ 49 Ms. Mason says that if Bylaw 2.2 is valid its use is unfair to her and suggests that the unfairness should be remedied under s. 164. As I understand her position, she suggests that s. 164 is broad enough

to permit the court to direct the owners to pass a resolution to create sections under Part 11 of the Strata Act. Section 164 provides:

- 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.

¶ 50 The meaning of "significantly unfair" was considered by the Court of Appeal in *Reid v. Strata Plan LMS 2503*, [2003] B.C.J. No. 417, 2003 BCCA 126, which was apparently the first case to consider the issue. The chambers judge had referred to s. 42 of the Condominium Act, which provided that an owner could apply to the court to remedy behaviour of a strata corporation that was "oppressive" or acts or resolutions that were "unfairly prejudicial". Oppressive conduct had been defined by the court as "conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith" and "unfairly prejudicial" had been defined as "conduct that is unjust or inequitable". The chambers judge accepted the submission of both parties that the meaning of "significantly unfair" would encompass, at the very least, oppressive and unfairly prejudicial conduct. The Court of Appeal accepted that meaning, subject to a refinement made by Masuhara J. in *Gentis v. Strata Plan VR 368*, [2003] B.C.J. No. 140, 2003 BCSC 120 that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than "mere prejudice or trifling interference".

¶ 51 In my view, it cannot be said that the actions of Deer Ridge in applying Bylaw 2.2 are significantly unfair to Ms. Mason. Bylaw 2.2 was passed by a 3/4 vote at a time when there were 11 apartments and 8 townhouses. A significant proportion of each type of strata lot had to approve of the bylaw. Bylaw 2.2 was in place when Ms. Mason purchased her strata lot in 1997. The allocation of costs was not a decision imposed by the strata council. It was a decision made by the owners on a 3/4 vote.

¶ 52 The SPA recognizes that allocation of costs by strata lot is not unfair. Section 17.11(6) of the Regulation expressly permits such an allocation provided the strata corporation had the necessary bylaw in place before the Act came into force. In my view, the fact that townhouse owners are to continue to pay for repairs to townhouse buildings and apartment owners are to continue to pay for repairs to apartment towers is not wrongful, harsh, unjust or inequitable. They bought into that regime.

¶ 53 In any event, I am of the opinion that it would not be possible under the SPA to create more than two sections - townhouse strata lots and apartment strata lots. That would result in the same allocation as currently exists. Section 191 of the SPA, which permits sectioning, provides:

191(1) A strata corporation may have sections only for the purpose of representing the different interests of

- (a) owners of residential strata lots and owners of nonresidential strata lots,
 - (b) owners of nonresidential strata lots, if they use their strata lots for significantly different purposes, or
 - (c) owners of different types of residential strata lots.
- (2) For the purposes of subsection (1)(c), strata lots are different types if they fall within the criteria set out in the regulations.

¶ 54 Section 11.1 of the Regulation provides:

11.1 For the purposes of section 191(1)(c) of the Act, the following are the different types of residential strata lots:

- (a) apartment-style strata lots;
- (b) townhouse-style strata lots;
- (c) detached houses.

¶ 55 Even if the court had the power or duty to intervene under s. 164, it is not possible under s. 191 to create sub-sections of strata lot types according to which phase of development the strata long belongs, as Ms. Mason would like (see *Oakley v. Strata Plan VIS1098*, [2003] B.C.J. No. 2571, 2003 BCSC 1700).

¶ 56 I therefore conclude that Deer Ridge is entitled to the following declarations:

1. A Declaration that Deer Ridge has the authority to allocate operating fund expenses to the apartment type strata lots and the townhouse type strata lots both before and since July 1, 2000 and regardless whether the funds were raised through a budget or by special levy.
2. A Declaration that Deer Ridge has the authority to allocate contingency reserve fund expenses, to the apartment type strata lots and townhouse type strata lots both before and after July 1, 2000 and regardless whether the funds were raised through a budget or by special levy.

ENFORCEMENT OF STATUTORY LIEN

¶ 57 Sections 116 to 118 of the SPA deal with the registration and enforcement of a lien against a strata lot for unpaid fees and levies. The relevant provisions are set out below:

116(1) The strata corporation may register a lien against an owner's strata lot by registering in the land title office a Certificate of Lien in the prescribed form if the owner fails to pay the strata corporation any of the following with respect to that strata lot:

- (a) strata fees;
- (b) a special levy;

...

- (4) On registration the certificate creates a lien against the owner's strata lot in favour of the strata corporation for the amount owing.

- (5) The strata corporation's lien ranks in priority to every other lien or registered charge except
 - (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation,
 - (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or
 - (c) if the other lien or charge is made under the Builders Lien Act.
- 117(1) After the strata corporation has registered a Certificate of Lien against a strata lot, the strata corporation may apply to the Supreme Court for an order for the sale of the strata lot.
 - (2) If the strata corporation has obtained a judgment for the amount owing, the court may, after considering all the circumstances, make an order for the sale of the strata lot.
 - (3) If the strata corporation has not obtained a judgment for the amount owing, the court may try the issue and may
 - (a) order that judgment be entered against the owner in favour of the strata corporation for the amount of the lien or for an amount that the court, as a result of the trial, finds owing, and
 - (b) if judgment is entered against the owner, make an order for the sale of the strata lot after considering all the circumstances.
 - (4) An order for the sale of a strata lot must provide that, if the amount owing is not paid within the time period required by the order, the strata corporation may sell the strata lot at a price and on terms to be approved by the court.

118 The following costs of registering a lien against an owner's strata lot under section 116 or enforcing a lien under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:

- (a) reasonable legal costs;
- (b) land title and court registry fees;
- (c) other reasonable disbursements.

¶ 58 Deer Ridge filed its lien on November 13, 2002 at a time when it claimed unpaid fees and levies totalling \$28,363.03. Since that time additional fees and special levies have brought the total amount claimed by Deer Ridge to \$63,131.66, exclusive of costs. It appears from its submission that Deer Ridge takes the position that the registration of the lien on November 13, 2002 entitles it to rely on the provisions of s. 116(5), 117 and 118 of the SPA without the need to file a new lien each time an assessment goes unpaid. Support can be found for this proposition in *Strata Plan VR1008 v. Oldaker*, [2004] B.C.J. No. 74, 2004 BCSC 63 at 28 and *Strata Plan LMS93 v. Neronovich* (1997) 39 B.C.L.R. (3d) 382 (S.C.). Ms. Mason does not appear to challenge this proposition, nor does she challenge the amounts claimed, as opposed to the entitlement to claim them.

¶ 59 Accordingly, Deer Ridge is entitled to the following additional relief:

3. A Declaration that the lien filed in the Vancouver Land Title Office on November 13, 2002, under number BT415846 (the "Lien"), against Ms. Mason's strata lot ranks in priority to every other lien or registered charge except if the

- other lien or charge is in favour of the Crown and is not a mortgage of the land or if the other lien or charge is made under the Builders Lien Act, S.B.C. 1997, c. 45.
4. A Declaration that Ms. Mason is in default of strata fees and special levies, and certain monies secured by the Lien are now due and owing to Deer Ridge.
 5. A Declaration that the amount due and owing to Deer Ridge by Ms. Mason, as of May 10, 2004 that ranks in priority to every other lien or registered charge except if the other lien or charge is in favour of the Crown and is not a mortgage of the land or if the other lien or charge is made under the Builder's Lien Act is \$63,131.66 for strata fees and special levies.
 6. A Declaration that the amount due and owing to Deer Ridge by Ms. Mason shall increase as further unpaid special levies and strata fees accrue, and as Deer Ridge incurs reasonable legal costs, land title and court registry fees, and other disbursements.
 7. An Order that Deer Ridge recover personal judgment against Ms. Mason in the amount of \$63,131.66.
 8. An Order, failing payment to Deer Ridge of the amount owing as set out above within one ninety (90) days after the date of this Order, that Deer Ridge shall have exclusive conduct of sale of Strata Lot 72 at a price and on terms to be approved by the Court or agreed to by the parties.
 9. An Order that after the ninety (90) day redemption period, Deer Ridge will have exclusive conduct of sale and be at liberty forthwith to list Strata Lot 72 for sale with any licensed real estate agent or firm, for a period commencing forthwith until further order of the Court and shall be at liberty to pay to any such real estate agent or firm who may arrange the sale of Strata Lot 72 a commission of not more than seven percent (7%) of the first \$100,000.00 of the sale price of Strata Lot 72, and two-and-a-half percent (2 1/2 %) thereafter, to be paid from the proceeds of the gross selling price, or at such other commission as is the industry standard and is approved by the Court.
 10. An Order that upon expiration of the redemption period without complete payment being made any duly authorized agent on behalf of Deer Ridge be permitted to inspect, appraise or show to any prospective purchaser Strata Lot 72, including the interior, between the hours of nine o'clock in the forenoon and seven o'clock in the afternoon on any day of the week.
 11. An Order that Deer Ridge has liberty to apply to this Honourable Court for a summary accounting of any amounts which become due to it from Ms. Mason.
 12. An order dismissing Ms. Mason's petition.
 13. An Order that Ms. Mason pay Deer Ridge's costs at Scale 3 for both proceedings and an order that these costs rank in priority to every other lien or registered charge except if the other lien or charge is in favour of the Crown and is not a mortgage of the land or if the other lien or charge is made under the Builder's Lien Act.

JOYCE J.

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