IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.,* 2016 BCSC 32

Date: 20160112
Docket: L050030
Registry: Vancouver

Between:

The Owners, Strata Plan LMS 3259

Plaintiff

And

Sze Hang Holding Inc. and Leon Lam

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 12, 64, 83, 196, 230 and 266 on January 15, 2016.

Before: The Honourable Madam Justice Harris

Reasons for Judgment

Counsel for the Plaintiff:	P.G. Mendes J.M. Chatten
Counsel for the Defendant, Sze Hang Holding Inc.:	R.P. Hamilton
The Defendant, Leon Lam	In Person
Place and Date of Trial:	Vancouver, B.C. December 2-6 and 9-10, 2013, May 5-9, August 11-15, November 17- 21, 2014, January 26-28 and April 23, 2015
Place and Date of Judgment:	Vancouver, B.C. January 12, 2016

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Introduction

[1] The plaintiff, The Owners, Strata Plan LMS 3259, is a commercial strata corporation (the "Strata Corporation"), commonly known as "Pacific Plaza", on Oldin Crescent in the City of Richmond. The Strata Corporation is comprised of 265 strata lots: 190 lots are for business use, 73 strata lots are parking stalls and 2 strata lots are for signage.

[2] The defendants, Sze Hang Holding Inc. (the "Company") and Leon Lam, were owners of two strata lots in Pacific Plaza: unit #1010 and unit #1380. The units were purchased on April 19, 2000 and August 28, 2000, respectively. Ms. Lee is the principal of the Company.

[3] The Company owned unit #1380 (also referred to as "Richmond Liquidation Sales") and 99% of unit #1010 (also referred to as the "Noodle House"). Mr. Lam purchased a 1% interest in unit #1010 in 2002.

[4] A dispute arose between the parties as a result of, among other things, fines for bylaw violations assessed against the defendants by the Strata Corporation and costs incurred in relation to the removal and storage of various items left by the defendants outside their strata unit. The fines were for failing to keep their stores open during the designated mall hours and for posting notices in their units which were intended to criticize and embarrass the Strata Corporation.

[5] The plaintiff stopped fining the defendants in December of 2007, although the costs accumulated. The defendants' units were ultimately sold for non-payment of the fines by a court ordered sale. The plaintiff seeks judgment for the fines it has already collected.

[6] The defendants deny they violated the bylaws, and contend that the defendants did not have the authority to enact and enforce the bylaws used to fine the defendants. They also contend that the property of Mr. Lam was improperly seized.

[7] The defendants brought a counterclaim against the plaintiff claiming that strata council members improperly obtained voting rights and proxies to pass the unlawful and oppressive strata fine bylaws and to levy fines, in breach of their duty to the defendants. The defendants seek an accounting of monies, equitable tracing of monies, repayment of the fines levied, and damages, including punitive and exemplary damages.

[8] There is a long history of litigation involving the Strata Corporation, Mr. Lam, the Company and entities related to the Pacific Plaza. The various actions were summarized by Madam Justice Saunders in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc*., 2012 BCCA 196 and, more recently, by Madam Justice Garson in *Extra Gift Exchange Inc. v. The Owners, Strata Plan LMS3259*, 2014 BCCA 228. The first action began in 2001 and there have been various actions since that time. Most of the actions have concluded.

[9] The action before me was commenced in Small Claims Court by the plaintiff in January of 2004 to recover fines and costs owing by the defendants for the alleged contraventions of the strata's bylaws. The action was transferred to this court in 2005, as the fines had increased to $27,513 and the storage costs to $2,295. By the time the Amended Statement of Claim was filed in 2009, the plaintiff's claim against the defendants was $91,571 for unpaid fines and $7,743 for moving and storage, plus costs and interest.

[10] The trial of the action has been long delayed. The Court of Appeal found the delays were largely due to the inadequacy of the defendants' pleadings and Mr. Lam's decision to represent himself and the Company. At trial, the Company was represented by counsel. Mr. Lam represented himself.

[11] When the defendants' units were sold, the plaintiff collected $108,000 from the proceeds of the sale. There is an October 22, 2009 Consent Order with respect to the quantum of fines awarded to the plaintiff against the defendants in this amount.

Background

[12] The history related to this dispute is complicated by the number of legal actions between the parties, the level of animosity that developed, and Mr. Lam and Ms. Lee's belief that the fines in issue result from a conspiracy between the plaintiff and the developer of the Pacific Plaza, Ernest & Twins.

[13] The following highlights the background giving rise to the current dispute.

The Defendants' Purchase of Units in Pacific Plaza

[14] The defendants purchased units in Pacific Plaza with a view to establishing retail businesses. Mr. Lam testified he put down an $8,000 deposit on March 27, 2000. It was envisioned that he and Ms. Lee would have a 50/50 partnership.

[15] Before the completion of the purchase of unit #1010, Mr. Lam learned that the existing tenant, who operated a restaurant in the unit, did not want to move out. Mr. Lam and Ms. Lee, therefore, decided to purchase a second unit, unit #1380. Their plan was to start a liquidation sales business, through Extra Gift Exchange Inc., in unit #1380, in which business Mr. Lam had experience.

[16] As Mr. Lam bought certain inventory for the liquidation business, he did not have the necessary cash to buy into the partnership. Ms. Lee raised the money to complete the purchase of the units, which she did through a company, Sze Hang Holding Inc. Mr. Lam was given credit for the $8,000 he expended and had a right to purchase a 50% interest in the company.

[17] Ms. Lee had a full time job outside of the mall as a legal secretary, but testified she would come to the units after work and on the weekends. She said the stores were open from 8 a.m. to 9 a.m. until 10 p.m. to 12 a.m., unless they had to go to court or to buy inventory.

[18] The purchase price for each unit was $83,000.

[19] Mr. Lam testified that at the first meeting of the strata council he met strata owners, Sammy Chung, Thomas Sun, Martin Lee and others, who were upset with

the developer and the developer controlled strata council. Among the issues of concern were whether the mall was actually a first class retail/commercial mall; whether the developer's units should be exempt from the requirement to be open for business; and the insufficiency of public parking for customers of the mall.

[20] Mr. Lam said that these factors created a situation where retail businesses at the mall could not succeed. He testified that approximately 50% of the units were not open for business and were, therefore, fined by the strata council. The fines levied were $50 a day for each day the unit was not open for business. The defendants were fined for not being open for business, as were other strata unit owners.

[21] Mr. Lam was elected to the strata council in 2001 and became its president. He sought to take a number of actions to address the concerns of the owners, including: seeking a refund of monies charged for signage; not continuing to collect lease payment for signage; engaging an accountant to conduct an audit and improve financial records; engaging a lawyer to foreclose on the developer units; and, most significantly, bringing an action against the developer. Mr. Lam testified that these actions upset certain strata council members who Mr. Lam alleged were aligned with the developer.

[22] Mr. Lam suggested that the strata council members' unwillingness to pursue legal proceedings against the developer was because they personally stood to gain financially from their connection with the developer. Mr. Lam testified that the strata council members did everything to benefit the developer, including the misuse of proxies and misapplication of strata funds.

[23] Mr. Lam claimed that because he pursued action against the developer and the plaintiff, he was vindictively targeted by the strata council, who immediately started fining the defendants for not being open for business. Subsequently they fined him for contravening the signage bylaw for posting notices in unit #1010 and billed him for the cost of removing and storing materials in front of the defendants' units.

[24] Mr. Lam asserted that the strata council took other action against him such as not fixing sewage leak in unit #1380 and calling the police, health and fire departments alleging, for example, that he had a marihuana grow operation and that he was living in one of the strata units. Mr. Lam said that the strata council acted vindictively in complaining to these authorities. Ms. Lee testified that the strata council members hate Mr. Lam for his pursuing an action against the developer and for trying to get compensation for strata owners.

The Strata Corporation and Mr. Lam

[25] The plaintiff does not dispute that Pacific Plaza had difficulties in its early years. Mr. Chung testified that there was high vacancy rate, which negatively affected businesses. The developer had difficulty selling units and owners had difficulty finding tenants.

[26] The plaintiff also does not dispute that there was considerable unhappiness amongst the strata owners with the developers and the development at Pacific Plaza. The strata owners were concerned about the vacancy rate, the insufficient customer parking, the fines which the developer council had imposed on owners for not being open for business, and the preferential treatment given to the units owned by the developers.

[27] The plaintiff acknowledges that the strata unit owners initially welcomed Mr. Lam's involvement in seeking to gain control of the Strata Corporation from the developers, which they did in 2001. The new strata council was first elected on October 19, 2001. Mr. Lam was one of the council members elected and became the president of the strata council. The new council was elected with a mandate to address the issues facing strata owners at the mall.

[28] Mr. Lam's approach to these issues was to take legal action against the developer and various other entities associated with the development. While his fellow strata council members had confidence in Mr. Lam's leadership, they quickly became disenchanted with him and with his approach. They considered the litigation he advocated was expensive and would not ultimately be productive. Mr. Chung

testified that the developer did not have sufficient funds to justify pursing legal proceedings against it. Mr. Chung vehemently denied that strata council members had any financial connection to the developer.

[29] Relations between the new strata council members and Mr. Lam deteriorated to the point that Mr. Lam was removed from the position of strata council president on July 15, 2002 and from council on October 29, 2002. The remaining members have continued on the strata council and have been elected by the owners each year since 2002.

[30] After Mr. Lam was removed from the council, he proceeded with his litigation against the developer and others. Mr. Chung testified that Mr. Lam engaged in disruptive conduct at annual general meetings and at the mall. For example, he placed "junk" in the front of the defendants' units and posted signs on the windows of unit #1010 - designed to embarrass the strata council and further his opposition to the developer.

2003 Bylaw Amendment and Fine Amnesty

[31] After Mr. Lam was removed from the strata council, the remaining council members sought to address the situation of strata owners. Mr. Chung testified that the strata council took a number of actions including: amending the bylaws on March 27, 2003 to reduce the amount of the maximum weekly fine and making the developer subject to the open for business bylaw.

[32] Subsequently, at the April 23, 2003 strata council meeting, the council instituted a general amnesty in relation to fines imposed against owners by the developer controlled council. The amnesty was to be a means of encouraging compliance with the newly amended open for business bylaws. Mr. Chung's evidence was that, despite the difficulties of operating a business at the mall, an open for business bylaw was necessary in order to retain and attract both customers and investors. Accordingly, the strata council began to impose fines against owners who were not open for business commencing in July of 2003.

[33] Mr. Lai and Mr. Leung gave evidence as to the procedure they followed where owners were not open for business and the issuance of bylaw violation notices to the defendants and others. The bylaw violation notices referred to a right to request a hearing where the allegation violation was disputed.

[34] Following a number of appeals from bylaw violation notices for units not open for business, the strata council took further action to ameliorate the effect of the open for business bylaw, including exempting fines for owners: who had to conduct certain business off site; who were selling or leasing their units with the assistance of a real estate agent; or who assigned their units to the council for display purposes.

[35] Mr. Chung testified that the strata council sought to address the lack of public parking problem by offering to parking strata lot owners that they could assign their parking spaces for public use. The strata owners who wished to do so would be exempt from their monthly strata fees and their voting rights would be assigned to the Strata Corporation.

[36] According to the evidence of the plaintiff witnesses, the defendants' units were not open for business within the meaning of the bylaw during the period from 2003 to 2010, when the units were put up for sale. They were issued warnings and were ultimately fined for contravening the open for business bylaw commencing in July of 2003. As noted above, the plaintiff ceased levying fines against the defendants in December of 2007.

Posting of Signs and Storage of Items

[37] The defendants were also issued warnings and ultimately fined in relation to posting signs in the windows of unit #1010 that were critical of the Strata Corporation commencing in August of 2003.

[38] Further, the defendants were charged for the costs of removing and storing items the defendants placed in front of their units, which the plaintiff considered to detract from the appearance of the mall.

Strata Corporation Bylaws

[39] The bylaws of the Strata Corporation, the plaintiff alleges were breached in this case, include the following:

Open for Business

[40] The bylaws of the Strata Corporation, which were established at the time that the developer controlled the strata council, required all strata units to be open for business, with certain exceptions. Section 2(q) and (s) of the 1999 Bylaws provided that:

> 2. An owner shall:
>
> …
>
> (q) open for business to the public and commence business operation from his strata lot within 365 days after the completion of the purchase of this strata lot from the developer. Owner(s) violating this bylaw shall be fined $50.00 per day. Fines will be levied beginning July 15, 1999;
>
> …
>
> (s) (excluding developer's units that are not sold or under renovation) subject to applicable federal, provincial and municipal legislation, operate business from the Owner's strata lot (except those strata lots used primarily for offices, financial institutions, medical or dental clinics, entertainment businesses and educational facilities) must be open five (5) days per week and six (6) hours a day, at a minimum. All strata lot's interior lights must be fully lighted during the minimum operating business hours outlined in this section with no exception and at least 25% of the strata lots' interior lights must be lighted after the said minimum hours. Owner(s) violating this bylaw shall be fined $50.00 per day. This new bylaw will be effective after 90 days from the day of registration;

[41] These bylaws were amended in 2003 to address concerns that they operated unfairly by excluding the developer and were contrary to the *Strata Property Act,* S.B.C. 1998, c. 43 (the "*SPA*") by imposing a fine of $50 a day. The revised bylaws provided that:

> An owner of a strata lot in the Commercial Section shall:
>
> 2.8.1 Open for business to the public and commence business operation from his strata lot:
>
> (a) in the case of a strata lot owned by the owner developer, no longer than 90 days after the registration of this bylaw; and

> (b) in all other cases, within 365 days after the completion of the purchase of his strata lot from the developer or in the case of resale, within 90 days after the completion of the purchase of his strata lot from another owner.
>
> Open for business to the public and commence business operation from his strata lot within 90 days after the termination of the leasing contract from the tenant(s).
>
> 2.8.2 Subject to applicable federal, provincial and municipal legislation, operate business from the owner's strata lot (except those strata lots used primarily for offices, financial institutions, medical or dental clinic, entertainment businesses and educational facilities) and must be open five (5) days per week and six (6) hours a day, at a minimum. All strata lot's interior lights must be fully lighted during the minimum operating business hour outlined in this section with no exception and at least 25% of the strata lots' interior lights must be lighted after the said minimum hours.

[42] The maximum fine for owners for violating the bylaw was reduced to $200.00 per week.

Signage

[43] The Strata Corporation bylaws also regulated signs and displays. This was set out in section 24 of the 1999 version of the Bylaws as follows:

> Signage and Displays
>
> 24. (a) Owners and tenants of strata lots in the Commercial Section and Parking Section will be permitted to install signs or notices within their strata lots as to be visible from the exterior of such strata lot and on the exterior of such strata lot, on the condition that the size and design of such signs or notices (i) are in compliance with the Statutory Building Scheme, (ii) have received any approvals required from the City of Richmond, and (iii) are in keeping with the overall presentation of the shopping centre in terms of quality, design and colour and otherwise comply with the Statutory Building Scheme. All such signs and notices shall be installed, operated, maintained, in first-class condition, repaired and replaced at the sole expense and risk of the owner or tenant that has installed them and such owner or tenant shall take out and maintain insurance for such signage as a reasonable owner or tenant displaying similar signage would obtain.
>
> (b) Owners and tenants of strata lots in the Commercial Section may install displays in their strata lots which are visible from the exterior of their strata lots, provided such displays face the windows, are constructed from new materials, are maintained in first-class condition and otherwise comply with the Statutory Building Scheme and these Bylaws.

> (c) This Bylaw 24 may not be amended, modified, rescinded, repealed or replaced except by the unanimous resolution of the owners of all of the strata lots.

[44] That bylaw was carried forward in the 2004 version of the Bylaws in sections 2.3.6 and 2.3.7:

> 2.3.6 Owners and tenants of strata lots in the Commercial Section and Parking Section will be permitted to install signs or notices within their strata lots as to be visible from the exterior of such strata lot and on the exterior of such strata lot, on the condition that the size and design of such signs or notices (i) are in compliance with the Statutory Building Scheme, (ii) have received any approvals from the City of Richmond, and (iii) are in keeping with the overall presentation of the Shopping Centre in terms of quality, design and colour and otherwise comply with the Statutory Building Scheme. All such signs and notices shall be installed, operated, maintained, in first-class condition, repaired and replaced at the sole expense and risk of the owner or tenant that has installed them and such owner or tenant shall take out and maintain insurance for such signage as a reasonable owner or tenant displaying similar signage would obtain.
>
> 2.3.7 Owners of strata lots in the Signage Section will be permitted to install signs or billboards within their strata lots as to be visible from the exterior of the Shopping Centre and on the exterior of the Shopping Centre, on the condition that the size and design of such signs or notices (i) are in compliance with the Statutory Building Scheme registered against title to their strata lots and these Bylaws, (ii) have received any approvals required from the City of Richmond, and (iii) are in keeping with the overall presentation of the Shopping Centre in terms of quality, design and colour. All such signs and billboards shall be installed, operated, maintained, in first-class condition, repaired and replaced at the sole expense and risk of the owner or tenant that has installed them and such owner shall take out and maintain insurance for such signage as a reasonable owner displaying similar signage would obtain.
>
> This Bylaw 2.3.7 may not be amended, modified, rescinded, repealed or replaced except by the unanimous resolution of the owners of all of the strata lots.

Storage

[45] Bylaw 2 established various obligations on owners with respect to their use of property, including an obligation to maintain the unit to the standard of "premises located in a first class shopping centre". The bylaws also regulated the placement of articles on the exterior of the strata lots and in common areas. Bylaw 21(a) provided that:

> (a) an owner shall not:

> (i) place or maintain any articles in any vestibule on the exterior of his strata lot or the common area and common facilities;
>
> …
>
> (viii) use any part of his strata lot for lodging, sleeping or any purpose which may be illegal or injurious to the reputation of the shopping centre.

Duties of Owners

[46] The 2004 Bylaws also prescribed the duties of an owner in bylaw 2, which included the obligations of owners with respect to the use of their own unit and the use of common property. Sections 2.3.1 and 2.3.4 provided that:

> 2.3.1 An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that:
>
> …
>
> (d) is illegal or injurious to the reputation of the Shopping Centre;
>
> 2.3.4 An owner, tenant or occupant shall not:
>
> (a) place or maintain any articles in any vestibule on the exterior of his strata lot or on any walkways or other common areas or common facilities within the strata plan.

Position of the Parties

Plaintiff

[47] The plaintiff submits that this is a straightforward debt claim arising from the defendants' contraventions of the bylaws and for costs related to remedying bylaw infractions. The plaintiff claims that:

a. The defendants' units were not open for business in contravention of the bylaws;

b. The defendants posted signs in the window of unit #1010 that contravened the bylaws;

c. The defendants stored items on the common property in front of their units in contravention of the bylaws.

[48] The plaintiff submits it has the statutory authority under the *SPA* and under its bylaws to fine the defendants for contravention of the bylaws and related costs. In respect of the authority of the Strata Corporation under the *SPA*, the plaintiff refers to ss. 129 -133 of the *SPA*, which allowed it to enforce its bylaws and, specifically, to impose fines and to remedy any contravention of the bylaws and to ss. 170 and 171 of the *SPA,* which allowed it to sue an owner for money owing, including monies owing as a fine.

> **129** (1) To enforce a bylaw or rule the strata corporation may do one or more of the following:
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> (a) impose a fine under section 130;
>
> (b) remedy a contravention under section 133;
>
> (c) deny access to a recreational facility under section 134.
>
> (2) Before enforcing a bylaw or rule the strata corporation may give a person a warning or may give the person time to comply with the bylaw or rule.
>
> **130** (1) The strata corporation may fine an owner if a bylaw or rule is contravened by
>
> (a) the owner,
>
> (b) a person who is visiting the owner or was admitted to the premises by the owner for social, business or family reasons or any other reason, or
>
> (c) an occupant, if the strata lot is not rented by the owner to a tenant.
>
> (2) The strata corporation may fine a tenant if a bylaw or rule is contravened by
>
> (a) the tenant,
>
> (b) a person who is visiting the tenant or was admitted to the premises by the tenant for social, business or family reasons or any other reason, or
>
> (c) an occupant, if the strata lot is not sublet by the tenant to a subtenant.
>
> …
>
> **170** The strata corporation may sue an owner.
>
> **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:
>
> (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
>
> (b) the common property or common assets;

> (c) the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under this Act, the bylaws or the rules.
>
> (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.
>
> (3) For the purposes of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter.
>
> (4) The authorization referred to in subsection (2) is not required for a proceeding under the *Small Claims Act* against an owner or other person to collect money owing to the strata corporation, including money owing as a fine, if the strata corporation has passed a bylaw dispensing with the need for authorization, and the terms and conditions of that bylaw are met.
>
> (5) All owners, except any being sued, must contribute to the expense of suing under this section.
>
> (6) A strata lot's share of the total contribution to the expense of suing is calculated in accordance with section 99 (2) or 100 (1) except that
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> (a) an owner who is being sued is not required to contribute, and
>
> (b) the unit entitlement of a strata lot owned by an owner who is being sued is not used in the calculations.

[49] The plaintiff also referred to the particular bylaws of the Strata Corporation that it alleges were contravened by the defendants. In respect of the claim that the defendants were not open for business during the designated hours, it refers to bylaw 2(q) and 2(s) of the 1999 Bylaws, which were continued in the 2003 and 2004 iterations of the Bylaws as bylaws 2.8.1 and 2.8.2. Bylaw 2.8.1 required that owners be open for business within 90 days of purchase or termination of a tenancy. It is this bylaw which the plaintiff claims was contravened by the defendants.

[50] The plaintiff contends that the evidence adduced at trial amply demonstrated that the units were not open for business after the Company's tenant vacated the unit #1380, which was in late 2002 or early 2003. The plaintiff referred to the evidence of Mr. Leung and Mr. Lai who testified that they were at the mall on a daily basis and that the businesses were not open for business during the period for which they were fined; the photos of units #1380 and #1010 showed the blinds closed; the open signs for the defendants' units were not illuminated; the videos taken of the interior of the units showed that there was no inventory or other indications of a business being

conducted at those locations; and in the correspondence from Mr. Lam during the material time, the defendants did not assert that the fines were not justified on the basis that the units were open for business. The plaintiff submits that such evidence contradicts the evidence of the defendants that the units were "always" open for business.

[51] In respect to the claim that the defendants contravened the bylaws by posting signs on the windows of unit #1010, the plaintiff refers to bylaw 24 of the 1999 Bylaws, which was subsequently included in bylaw 2.3.6 and 2.3.7 of the 2004 Bylaws. It provides, among other things, that signage had to be in keeping with the overall presentation of the shopping centre in terms of quality, design and colour and had to be maintained in first class condition.

[52] The plaintiff submits that there is no dispute that the signs were posted or what they contained: there were statements both in English and Chinese referring to a "big fraud case", "Pacific Plaza $40 Million Fraud", and to Mr. Lam's legal action against the developers and the strata councillors. The Strata Corporation submits it is also not disputed that these signs stayed up until well after the Strata stopped fining the defendants.

[53] The plaintiff asserts that the signage was clearly offensive and inflammatory and inconsistent with a first class shopping centre. The plaintiff points out that the defendants appeared to concede that they were in contravention of the bylaws when the Company stated in its opening that "it is impossible to imagine the court on an application in chambers seeing the signs posted in unit 1010 could not have been persuaded to have those signs removed as offending the bylaws".

[54] With respect to the furniture and other items located in front of the units, the plaintiff refers to bylaws 2 and 21(a), as well as bylaw 2.3.1(d) which restrict the manner in which an owner may use common property and specifically prohibits an owner from using the common property in a manner which is "illegal or injurious to the reputation of the Shopping Centre". The plaintiff contends that there is no dispute that furniture and other items were placed in front of the unit. Although the

defendants contend that they were entitled to use limited common property in this manner and that the items were merchandise, the plaintiff says that the items were simply junk that was placed outside of the units to injure the reputation of the plaintiff. The plaintiff notes that limited common property is simply a type of common property and is still subject to management by the Strata Corporation.

[55] The plaintiff submits that, through the strata council, it followed the procedures required by the *SPA* with respect to the establishment and enforcement of the bylaws in question. Specifically, the plaintiff says that the evidence establishes that it gave particulars of the complaint to the defendants, gave them a reasonable opportunity to answer the complaint against them, and provided them an opportunity for a hearing - which they never acted upon. The plaintiff referred to the evidence of the numerous bylaw infraction notices sent to the defendants, as well as the correspondence warning them of the bylaw contraventions, seeking their compliance, and providing them an opportunity to request a hearing before the strata council.

Defendants

[56] The Company submits that the units were always open for business between 2003 and 2010, and the "massive fines" which were levied were intended to punish the defendants for challenging the authority of the strata council. The Company suggests that it is not coincidental that the defendants were first fined shortly after it commenced the Extra Gift Exchange action in July of 2003. The Company further suggests that it is unlikely that the strata council would ever have met with the defendants had they requested a meeting, given the level of the animosity the strata council displayed towards them.

[57] The Company contends that there is evidence to support the units being open including: corporate tax returns, business licences, hydro bills, bank statements, financial statements of the Company and Extra Gift Exchange and sales receipts. The Company submits that the defendants would not have incurred such expenses had they not been in business and that it is more probable that they were open at

least some of the time, but there was little business available due to the lack of parking at the mall.

[58] In the alternative, should the court find that the defendants were never open for business, the Company submits the court should find that the application of the bylaws against the defendants was oppressive and significantly unfair. The plaintiff should have taken steps to enforce the bylaws (i.e. by applying for an injunction), and not doing so was significantly unfair, as it resulted in the defendants losing their equity in the units.

[59] The Company submits the Strata Corporation also caused significant unfairness to the defendants in treating owners differently - exempting certain owners from fines for not being open for business (e.g. if they posted a 'for sale' sign, if they posted contact information on the window of their units, or if they assigned their voting rights to the strata council). The Company asserts that the strata council had no authority to waive fines, as the plaintiff "must" enforce the bylaws under s. 26 of the *SPA*.

[60] In respect of its counterclaim, the Company contends that the assignment of parking lot proxies in exchange for waiving strata fees was contrary to ss. 99 and 100 of the *SPA*. Similarly, waiving fines in exchange for assigning proxies was contrary to ss. 26 and 27 of the *SPA*.

[61] The Company submits that the Court should draw an adverse inference from the strata council's decision to destroy the proxies, as it deprived the Court of the opportunity to know how many proxies were obtained from parking lot owners or how many were assigned to have fines waived or avoid being fined.

[62] The defendant, Mr. Lam, brings a somewhat different perspective to the case.

[63] Mr. Lam submits that the plaintiff's action has nothing to do with the alleged enforcement of the strata bylaws. Rather, he says it is a part of a vindictive and oppressive campaign engaged in by the strata councillors "for personal gain and for the benefit of the Developers to suppress the Defendants from further investigating

and exposing the misrepresentation of the Developers carried out in LMS3259". Mr. Lam portrays himself as the whistleblower of the strata's financial malfeasance carried out by the strata councillors and its agents, in conjunction with the developers.

[64] It is difficult to summarize Mr. Lam's lengthy written submission and I note that certain parts of Mr. Lam's submissions were primarily directed at the developer and at the strata council's failure to pursue legal action against the developer. For example:

1. The strata bylaws were void *ab initio* as they were inconsistent with the *Condominium Act*, R.S.B.C. 1996, c. 64.

2. The *SPA* prohibits a developer from making parking stalls and signage lots into separate strata sections but the bylaws allowed these strata units to be used in calculating the entitlement to vote.

3. The developer bylaws were adopted without the approval of the Superintendent of Real Estate.

4. The strata council had a positive duty to manage and protect the common property in accordance with the development permit. By failing to provide the amount of parking stalls required by the City, the strata councillors were not acting in good faith for their personal gain and interest and have been acting in a manner significantly unfair to the defendants.

5. The strata council members sought to protect the developers from liability associated with their failure to provide a first class shopping center by refusing to collect outstanding fees owed by the developers.

6. The strata council allowed retail and educational businesses to operate which were not authorized under the development permit and failed to take any steps to rectify the parking deficiencies.

[65] For the most part Mr. Lams' submissions were connected to the pleadings. I summarize them as follows:

1. The fines bylaw adopted by the strata council used proxies which did not exist.

2. There was not a ¾ majority required to pass the fine bylaws at the March 27, 2003 and May 10, 2004 meetings.

3. The strata council were using the fine bylaw for personal gain to force owners to surrender their proxies as a means of ensuring that the council maintained control and the wrongdoing and financial malfeasance of the strata councillors and the developers would not be exposed.

4. The fines bylaw was, on its face, unfair as it did not treat all owners equally: it exempted certain owners from being fined (i.e. strata lots used primarily for offices, financial institutions, medical/dental clinics, entertainment businesses and educational facilities).

5. The strata council administered the fines bylaw arbitrarily, unfairly and in breach of its fiduciary duty. It fined the defendants while allowing numerous other owners to be exempt from fines for not being open for business (i.e. if they were trying to lease or sell their unit and had engaged a realtor; if their business engaged them in work outside of the unit and they displayed contact information; if they allowed their units to be used for display purposes). He was not aware of these rules. The strata council knew that it was impossible for a business to function due to the lack of sufficient customer parking and where it was known that the mall was not a retail shopping center.

6. The strata council and the plaintiff's property managers, AA Property, fabricated the violation notices. In the initial provincial court action filed in 2004, the allegations of bylaw violations only applied to unit #1010. The claim involving unit #1380 was only added after the plaintiff filed an amended

statement of claim in 2009. The invoices were created after November of 2007 for the purpose of maintaining this action.

7. There were no violation notices in respect of placing goods on common property. The plaintiff knew that the limited common property in front of the defendants' units was included in the floor area for their units.

8. The bylaw under which they were fined for posting notices on the windows of unit #1010 had no application. Mr. Lai issued violation notices without an understanding of the bylaw. Further, other owners with similar signs were not fined.

9. There were also no "complaints" that they contravened the bylaws. The only person who was involved in the bylaw infraction notices was the strata mall manager, Mark Lai, who had not read the bylaws, and simply copied from the notices previously issued.

10. The strata council refused to meet with the defendants regarding the fines levied despite their numerous requests to meet, and despite the obligation to provide an opportunity to answer the complaint.

11. The strata council acted maliciously and oppressively against the defendants, e.g. by not repairing damage due to a sewage leak, by not issuing a Form F so the defendants could sell their unit, by preventing them from changing the usage of their units, by installing security cameras, and by hiring a bailiff to seize their merchandise.

Issues

[66] I find that the essential issues to be determined in this case are:

1. Are the impugned bylaws valid? Were there sufficient proxies and other votes to pass the bylaw amendments at the meetings of March 27, 2003 and May 10, 2004? Did the plaintiff improperly obtain proxies to pass the bylaws?

2. Did the defendants contravene the bylaws? Did the plaintiff follow the required procedures in enforcing the bylaws?

3. Was the plaintiff's enforcement of the bylaws significantly unfair to the defendants?

4. Did the plaintiff breach its fiduciary duty to the defendants?

Credibility and Reliability

[67] I will first address the credibility and reliability of the testimony of the witnesses. Some of my comments have relevance to the substantive issues in dispute and will be referenced further in my reasons.

[68] In *Bradshaw v. Stenner*, 2010 BCSC 1398, Madam Justice Dillon summarized the factors to be considered when assessing credibility:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*,[1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[69] More recently, in *Fotsch v. Begin*, 2015 BCSC 227, aff'd 2015 BCCA 403, Mr. Justice G.C. Weatherill stated as follows:

> [150] In *R. v. Gagnon*, 2006 SCC 17 at para. 20, the Supreme Court of Canada held that assessing credibility is not a science. Credibility of interested witnesses is determined based on the classic criteria set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.):
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal

> demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[70] The events giving rise to this action occurred, in the main, between 2003 and 2010. Witness accounts of what occurred were affected by the passage of time, as well as by the protracted history of the litigation between the parties - which to a greater or lesser extent influenced their accounts.

[71] With respect to the credibility of the witnesses called by the plaintiff and the defendants, I will first consider the evidence of Mr. Lam. He is clearly an intelligent and savvy businessman and a tenacious litigant. However, I found that his belief in the existence of a conspiracy perpetrated by the developers of Pacific Plaza, members of the strata council and various others and the scope of the alleged conspiracy to be incredible. He made very serious accusations of bribery and payoffs against various individuals which were unsubstantiated. For example in describing how the dispute began, Mr. Lam referred to an incident involving certain strata council members and a DJ who was to have performed at a mall event:

> [Mr. Lam]: That's how the dispute began.
>
> …
>
> That's the night the incident with them, the dispute between me.
>
> Now suddenly the DJ don't want to perform the entertainment program anymore, and I questioned them why. Now, those DJ are actually - are the friend that work for CJBB 1470…Mr. Fong is the owner. Used to be Hanson Lau owns it, but he - you know for all kind of reason - I don't want to go behind the shady reason, and he get kicked out from that as well and all that. So that's how Mr. Hanson Lau lost the CJBB thing and turned to another thing called Chinese Voice for 1320. Anyway, it's very complicated issue before the court as well. All kind of court action down there.
>
> So the DJ - that CJBB DJ is the one that hire Mr. and Mrs. Poon and the owner of CJBB connected to our developer. Because in Hong Kong the people handle doing these kind of thing.
>
> Anyway, our developer is a Chinese family, Ernest Wong. We have the court action in here anyway to have how to spell anyway. All kind

> of judgment -- it's a very famous family. They used the name of Ernst & Twin development. So that name is completely new to us. We knew they develop this mall, we would not even up to it. It's because it's involve all kind of homicide and things like that over in Hong Kong. Shook up the whole Hong Kong in 1960 because the homicide case.
>
> What happened is they come to develop this mall and sell it to us. Now, the DJ tied up to the CJBB radio, Mr. Fong, are tied up to the Wong family. So the DJ is no longer going to perform the entertainment program and he don't want to talk to me. He go to Sammy Chung. When he go to Sammy Chung, Sammy Chung come over with him. And I asked him -- I said, why this program now suddenly in the middle stop? They don't give me any reason. No reason at all.
>
> I mean, the way I look at it, I pursue upon it -- I'm assuming it, he must be receive some kind of kickback. So that's the reason why he agree with the DJ not to perform anymore. So he also going to bring the mall down.
>
> So at that point -- and the next day -- next day week or so after the dispute they held a meeting on July the 15th in the office of Colyvan to remove me as strata president. At the same time they nominate Hanson Lau and John Wong to be strata councillor, Hanson Lau to be president in place of me.
>
> So from there on I been isolated from the strata meeting -- I mean, strata council meeting. I been isolated. So -- and then later on I was being removed by them. They said they hold a meeting -- they also in the minute as well. They hold an SGM, volume 1, My Lady.
>
> …
>
> [Mr. Lam]: Yes. The reason why I mention this, My Lady, is this. This actually is a proxy prosecution -- proxy prosecution. Proxy suppression that carried out by these strata councillor for the benefit of developer, with strata fund -- with misapplication of strata fund without owner approval for their own personal benefit. That's what I'm -- that's I want to bring you the background to give a picture -- the entire picture.
>
> …
>
> [Mr. Lam]: … On top of that they also using lots of money to hold -- having party, buying metal. With the strata fund buying gold metal, medallion. To -- to hold those party, invite those city official or their friend to come in for Chinese New Year's and -- and also Christmas party to give them gift. They bribe the city official. Every year lots of money been sent in. Gold metal. Gold medallion metal.
>
> [August 15, 2014]

[72] There were other aspects of this evidence which I found diminished his credibility. For example, he maintained that the did not receive any bylaw violation

notices and that they were fabricated by counsel for the plaintiff, in the face of photograph which shows that he has such a notice in his hand, his evidence on discovery in which he acknowledged he received a stack of such notices and the defendants' list of documents which includes a bylaw violation notice. He maintained that the restaurant in unit #1010 was open for business every day and that he would make whatever the customers wanted, even though he acknowledged that he was not a cook, that he did not really know how to cook, and that he did not have a certificate required by the health authorities.

[73] Although he testified on discovery that he was at the units every day and that the units were "always open", he subsequently qualified this statement to say that they were always open except when he was in court or to get inventory. Later in his evidence he further qualified his evidence to exclude occasions when he was sick or took a day off. When it was put to Mr. Lam that he had told Registrar Blok, as he then was, at a subpoena to debtor hearing that the store was "hardly open", he testified that he meant that there was hardly any business or he was hardly able to make money. Later he said "I was "always open to fulfill the 6 hour requirement". His evidence as to whether the units were actually open for business every day, therefore, changed on a number of occasions (e.g. from "always open" to "mostly open" to "hardly open" to open to "fulfill the 6 hour requirement").

[74] Mr. Lam suggested that this inconsistency can be explained by a lack of precision in his initial response. I consider that it was more a reflection of his willingness to say what would he considered advantageous to his case. For example, when it was put to Mr. Lam that he had represented to Madam Justice Gray in a related proceeding that he was disabled and unable to work during the period from October 2004 to March of 2005, he testified that was because the work at the Noodle House was "easy" and that what he had meant that he could not work outside of the Noodle House. He said there were degrees of injury.

[75] More generally, I found that Mr. Lam frequently did not answer the questions asked of him in a straightforward way, not infrequently giving rambling, extraneous

explanations, challenging the questions asked, and impugning the conduct of counsel for the plaintiff (e.g. alleging evidence was fabricated).

[76] Ms. Lee was the only other witness who gave evidence on behalf of the defendants. I found her evidence was not always reliable. For example, she testified that in 2002 there was a potential purchaser who was interested in buying one or both the defendants' units, but because the Strata Corporation delayed in providing the Form F required for the transaction, the potential purchaser "went away". However, she was unable to give any particulars of the sale (e.g. the price, the name of the potential purchaser) and said there was no written offer to purchase.

[77] When confronted with the fact that there was only four days between the time of the request and the provision of the Form F, she said that there was an earlier verbal request. When asked about why there was reference to a July 30, 2002 completion date in the letter confirming her request for the form, she said that this was not the completion date for a real estate transaction, but just the date she needed the form. She said that when she got the form on July 30, it was too late to go to the registry as she didn't receive the form until 5:00 p.m. which was after the office closed at 3:00 p.m.

[78] I found her description of the sequence of events and the lack of any written confirmation of a potential sale to be highly improbable - particularly given that she ultimately acknowledged in cross-examination that she completed a transfer of unit #1010 to Mr. Lam on July 30, 2002 - the same day that she had suggested the sale to a potential purchaser had been thwarted by the actions of the Strata Corporation. When that fact was put to Ms. Lee she said the following:

> Q So wasn't this form F so that you could transfer the 1 percent to Mr. Lam?
>
> A No, it wasn't the first intention when we ordered the form. When we ordered the form we want to sell the unit, but then after having this experience, we cannot get the form, and so then we have to -- and then Mr. Lam believe that later on they would just impose fine and would never be able to claim any interest in the unit. And so as a result, he claimed that 1 percent interest, tried his best to come up with the money. And so we used that form to do that.

[79] Ms. Lee's account of when the units were open for business also negatively affected my assessment of her evidence. She testified that the units were open from 8 a.m. to 9 a.m. until 10 p.m. to 11 p.m. or 12 a.m., seven days a week from when the fines started in July of 2003 until the units were sold in September of 2010, unless they were in court or to buy merchandise.

[80] I note that Ms. Lee had a full time job working 9 a.m. to 5 p.m. and would not actually know when the units opened. However, even assuming that she came to one of the units after she finished her work, I find it incredible that she would stay in one unit (presumably with Mr. Lam in the other unit) until late in the evening, seven days a week over the course of a number of years, particularly given her own evidence there were very few, if any, customers and no active business to manage. As I will discuss further in my decision, Ms. Lee's evidence stands in stark contrast with the photographs taken of the two units over the course of the period the defendants were fined and the evidence of mall management staff that the defendants units were consistently not open.

[81] Further, certain of Ms. Lee's explanations were internally inconsistent. For example, in respect of the storage of material in front of the units, she said that they put the material in front of the units because of a sewage leak in unit #1010 - which occurred in 2002. However, she also testified that the material was put in front of the units for display purposes. This evidence in difficult to reconcile.

[82] It was also difficult to reconcile her evidence that she did not receive any notices from the Strata Corporation requesting her to remove the items stored in front of the units, with her evidence that she was going to take the items inside but they were seized by the bailiff before she could do so. In that regard, I note the seizure of the items occurred in January of 2004, leaving her ample time to take the items inside the units.

[83] Similarly, it was difficult to reconcile certain aspects of her evidence at trial and that given in earlier proceedings. In cross-examination, Ms. Lee testified that Mr. Lam was not a manager for Sze Hang Holdings, but in a prior affidavit, she

deposed that the Company had authorized its manager, Mr. Lam, to bring the action. And in the earlier Extra Gift Exchange action, Ms. Lee claimed that she was induced into buying the units by, among other things, the statutory building scheme, but at trial she said that she didn't have the registered building scheme until after the units were purchased.

[84] In contrast to the defendants' evidence, I found the testimony of witnesses called by the plaintiff to be generally credible. While Mr. Lam asserts that the evidence of Mr. Chung was evasive and selective, I did not find this to be the case. He endeavored to answer Mr. Lam's questions in cross-examination over the course of four days even though the questions were not infrequently unclear and argumentative.

[85] I have considered the various instances upon which Mr. Lam relies to persuade me that Mr. Chung employed "the tactic of evasive testimony and selective memory". However, I did not find them indicative of a lack of credibility. Among the instances to which I was referred by Mr. Lam, are the following two excerpts of Mr. Chung's testimony on May 6, 2014:

> [Mr. Lam] -
>
> Q: Now, Mr. Chung, you guys systematically issued invoice to owner without justified ground; right?
>
> [Mr. Chung] -
>
> A: What do you mean?
>
> Q: Well, if people are open --
>
> A: Yeah.
>
> Q: -- and you guys just invoice them, and that's the reason why they dispute with you.
>
> You look at the next page, at the same thing, 1659. Do you see that? But anyway, is that the practice you guy doing? You guy issue the people invoice first? You fine them first?
>
> A: Yeah, we fined them first. We give them invoice.
>
> Q: Yeah.
>
> A: If they --
>
> Q: Then you don't give them notice for fining them?

A: No, we give them notice when Mark Lai go -- take a walk around the mall.

Q: Yes.

A: But they see they haven't opened for business, Mark Lai will put the notice on the door.

Q: That's -- that's your document; right?

A: Yeah.

Q: There's no suggestion there was any notice been given to people. They simply say that, in this letter, in this document I just refer you to, they just got the invoice; right?

A: It's about over 10 years ago. How can I remember every step? Yeah.

Q: Your -- your memory is very good; am I right, Mr. Chung?

A: Not very good.

[p. 53]

…

[Mr. Lam] -

Q: Okay. And those vote you use it … Well, you have no evidence in here about the vote anyways, but … You did not produce any of those vote in the -- in this hearing? You did not produce those vote -- you did not list this vote in this hearing? [Indiscernible] --

[Mr. Chung]

A: I cannot remember.

[p. 88]

[86] Mr. Lam also referred me to excerpts of Mr. Chung's evidence on May 7, 2014. I will refer to one example for illustration:

[Mr. Lam]

Q: Mr. Chung, do those -- you also have employed people Impark to patrol the parkade; right?

[Mr. Chung] -

A: Yes.

Q: And they issue a ticket; right?

A: Yes.

Q: After three hour?

A: Yes.

Q: Now, after that, when they get a ticket, the owner, right, they take their ticket to the management office; am I right?

A: Yes.

Q: And then you guy exempt some of them?

A: No. You are wrong.

Q: You're waiving the ticket?

A: No.

Q: You [indiscernible] --

A: We don't have the right to waive the ticket issued by the Impark parking.

Q: I see. You never asked for -- you - your agreement -- okay. Is it true that you pay lump sum of money to Impark every month?

A: I have to check the account book. I cannot remember.

Q: You are not denying that you did?

A: I don't agree and I don't deny. I cannot remember.

Q: Now, as a result -- as a result you have retained certain right to waive a number of ticket you could -- you could -- you could cancel; am I right?

A: No. I disagree.

Q: Disagree. Okay. Now, I also -- I want to suggest to you that as a result you use those [indiscernible] to cancel a ticket to ask owner to give you the voting right?

A: No. You are wrong.

[p.53]

[87] Given the lack of clarity of Mr. Lam's questions and the manner in which he asked them, I found Mr. Chung's inability to provide a more substantive response understandable. Further, while Mr. Chung did not recall the particular circumstances pertaining to the various units, on a consideration of the whole of his evidence, I am not persuaded that his lack of recall was indicative of an evasive response. While he did not have a good recollection of certain events, given the time which had elapsed since the events at issue, the number of units in the mall, and the limitations of his role on the strata council, I did not find his lack of recollection of certain events out of the ordinary. Although his evidence was vague on occasion, he generally made an effort to respond to the questions.

[88] Mr. Lam submits that Mr. Lai's evidence was also untruthful and unreliable. The evidence of Mr. Lai, who was one of the mall managers at the material time, led

me to question the sufficiency of the instructions provided to the property managers and, ultimately, the fairness of the plaintiff's actions, as I will explain further in my decision. However, I did not find Mr. Lai to be an untruthful witness. His evidence showed a lack of sophistication in carrying out his job functions rather than a disregard for the truth. I did not find that he tailored his evidence to assist the plaintiff.

[89] Mr. Lam further submits that Mr. Leung's evidence was untruthful and unreliable. The excerpts upon which he relies as evidencing the frailties of his evidence do not, in my view, support this conclusion. I found that Mr. Leung was generally a truthful and reliable witness.

Discussion

1. The Validity of the Bylaws

[90] The defendants claim that the bylaws were adopted using proxies which did not exist. Alternatively, the defendants assert that proxies were improperly obtained in exchange for a waiver of fines for not being open for business or to avoid parking lot strata fees.

[91] On their first position, the defendants submit that an adverse inference should be drawn as to the existence of the proxies because the plaintiff did not retain and produce the proxies despite being repeatedly asked to do so by the defendants. The defendants rely on the law on spoliation.

[92] The plaintiff asserts that the impugned bylaws were passed using in person and proxy votes, as was permitted under the bylaws and the *SPA* and as was the practice of strata owners. The plaintiff notes that s. 56 of the *SPA* entitles an owner to vote in person or by proxy and that there is no obligation on the part of a strata corporation under the *SPA* to retain proxies. While a strata corporation is required to maintain various records and to allow for their inspection under ss. 35 and 36 of the *SPA*, it is not required to keep proxies.

Adverse Inference/Spoliation

[93] I will first address the defendants' submission that an adverse inference should be drawn as to the existence of the proxies used to vote at the March 27, 2003 and May 10, 2004 meetings of the Strata Corporation.

[94] As noted by the plaintiff, a strata corporation was not required to retain the proxies issued by owners. The *SPA* does not contain a provision similar to s. 173 of the *Business Corporations Act*, S.B.C. 2002, c 57, which requires that a company keep ballots and proxies for at least 3 months after a meeting of shareholders.

[95] Nevertheless, the defendants submit that an adverse inference should be drawn that the proxies would have been unfavourable to the plaintiff's case because the proxies were not retained by the plaintiff in circumstances where the defendants requested them to do so.

[96] The defendants referred me to the ruling of Mr. Justice Burnyeat in *Dyk v. Protec Automotive Repairs* (1997), 41 B.C.L.R. (3d) 197 (S.C.), in which he reviewed the law on the concept of spoliation. In addressing the admissibility of evidence relating to the repair of vehicle which had subsequently been destroyed, the learned judge referred to the judgment of this court in *Dawes v. Jajcaj* (1995), 15 B.C.L.R. (3d) 240 (S.C.):

> While I am not persuaded this admissibility issue ought to be resolved in the strict order that Mr. Baker proposes, I do accept that in order to obtain the relief sought (exclusion of the expert reports), the Court must at least be satisfied that the object in issue was intentionally destroyed through bad faith and not as a result of mere negligence on the part of the party or his expert (Brissette v. Milner Chevrolet Company, 479 S. W. 2d 176 (Miss. App. 1972). As the Court pointed out in State of Iowa v. Langlet, 283 N.W. 2d 330 (Iowa, 1979) at 333:
>
> > Spoliation involves more than destruction of evidence. Application of the concept requires an intentional act of destruction. Only intentional destruction supports the rationale of the rule that the destruction amounts to admission by conduct of the weakness of one's case.
> >
> > …
>
> And at p. 334:

> Neither the rationale of the spoliation inference nor any authorities found support submission of the inference in the case of unintentional destruction.

[97] Based upon his review of the authorities, Mr. Justice Burnyeat concluded that in order to support an inference of spoliation, there must be evidence that has been destroyed; the evidence destroyed was relevant to an issue in the lawsuit; legal proceedings were pending; and the destruction of documents was an intentional act indicative of fraud or intent to suppress the truth.

[98] Subsequently, in *Patzer v. Hastings Entertainment Inc*., 2010 BCSC 426, aff'd 2011 BCCA 60, Madam Justice Fisher, after reviewing *Dyk*, noted at para 90, that "there is no common law duty to preserve property which may possibly be required for evidentiary purposes but such an obligation may be imposed by court order pursuant to the Rules of Court: *Dawes v. Jajcaj*, 1999 BCCA 237, aff'g (1995), 15 B.C.L.R. (3d) 240, leave to appeal ref'd [1999] S.C.C.A. No. 347." She then referred to the *Holland v. Marshall*, 2008 BCCA 468, in which the Court of Appeal commented on the difficulty of finding an appropriate remedy for spoliation including procedural remedies, evidentiary presumptions, contempt proceedings, cost orders as well as preventative measures such as preservation orders.

[99] Applying the first two factors established in *Dyk*, I accept that the proxies were destroyed and that the proxies were relevant to an issue in the proceedings.

[100] With respect to the third factor, the lawsuit which is the subject of this litigation had not commenced at the time the defendants first requested that the proxies be retained. The lawsuit had commenced by the time of the impugned May 10, 2004 meeting. After that meeting, the defendants requested on a number of occasions to "review and inspect all proxies" at special and annual general meetings. There was no specific request to "retain" the proxies until approximately 2007, although that may be inferred.

[101] With respect to the fourth factor, I am not persuaded that the plaintiff destroyed the proxies with an intention to suppress the truth. The ballots and proxies

were initially preserved and sent to the lawyer for the Strata Corporation. Mr. Chung's evidence was that the strata council sent the proxies to the office of Rupert Shore, who was then the counsel for the Strata Corporation. This is confirmed in the meeting minutes. The minutes of the March 27, 2003 meeting reflect that a motion was passed that the proxies and ballots would be placed in a sealed envelope and sent to legal counsel. The May 10, 2004 minutes reflect a similar resolution, although it also specifically provided that proxies and ballots would be destroyed after a period of 90 days. I note that a similar motion that ballots be destroyed had been passed at the special general meeting of October 29, 2002. In my view, there is nothing inherently wrong with this type of resolution, given the lack of a statutory requirement to keep such records.

[102] Further, as noted above, when the defendants requested that the proxies be retained (i.e. by letter dated April 15, 2003), this action had not yet been commenced. The lawsuit which was pending related to the defendants' action against the developer. By the time of the impugned May 10, 2004 meeting, the defendants knew of the resolutions of the strata council with respect to the disposition of the ballots and proxies and had the opportunity to seek a preservation order, which they did not do.

[103] I accept Mr. Chung's evidence that the council followed the advice of their legal counsel with respect to the retention and ultimate disposition of the ballots and proxies. While it is unfortunate, with the benefit of hindsight, that the proxies were not retained, there is some evidence from the sign in sheets which show who voted in person or by proxy at the meetings in question.

[104] In light of the above, I am satisfied that the plaintiff has provided a reasonable explanation as to why the proxies were not retained beyond 90 days and that no adverse inference or presumption that the proxies would have been unfavourable to the plaintiff's case should be drawn.

[105] Further, for the reasons that follow, I am not persuaded that there is merit to the position of the defendants.

Existence of Proxies

[106] The defendants claim that the March 27, 2003 and May 10, 2004 Bylaw amendments were not valid because the strata council members at the meetings did not actually have any proxies from strata owners when they voted on their behalf.

[107] Ms. Lee testified that the proxies "don't exist". She stated that after Mr. Lam was removed from council, the strata council claimed they had proxies in their hand and cast them to pass resolutions but would not allow the proxies to be examined by herself or Mr. Lam, despite their repeated requests. I take from her evidence that she did not believe that they existed because the strata council did not show them to her or Mr. Lam.

[108] Mr. Lam's evidence on the existence of proxies is difficult to reconcile. He testified that the proxies used to pass motions at the March 27, 2003 meeting and May 10, 2004 meetings "did not exist at all" but were created by council members. However, at the same time, much of the focus of his evidence at trial was that the proxies were improperly procured by strata council members in exchange for a waiver of fines for the strata units not being open for business.

[109] Mr. Chung denied that proxies were obtained by strata council members in exchange for a fine waiver. He gave evidence that strata owners gave proxies to various strata council members and suggested that this practice was long standing. It is apparent from the minutes of meetings both before and after March 27, 2003 and May 10, 2004, including when Mr. Lam was on the strata council, that proxies were used to pass motions. In that regard, Mr. Lam acknowledged in his submission it had been the practice at meetings of the Strata Corporation when he was on the strata council, for various owners to vote by proxy.

[110] The minutes of the March 27, 2003 and May 10, 2004 meetings record the number of proxy votes. According to the evidence, the plaintiff used sign-in sheets containing the handwritten initials of the proxy holders next to the unit owner who gave their proxy. The sign-in sheets support the conclusion that proxies existed and were used at these meetings.

[111] I accept the evidence of Mr. Chung that sign-in sheets were used at these meetings to record the owners who voted in person and those who voted by proxy. Mr. Chung identified initials of various proxy holders on the sign-in sheets as members of the strata council. I note that at the time of trial these sign-in sheets had been on the plaintiff's list of documents for at least 7 years, which contradicts the suggestion of recent fabrication.

[112] More significantly, there were no strata unit owners called by the defendants to say that they did not give their proxy to the strata council members. Such evidence would have been readily available to the defendants, if it existed. I am satisfied that proxies were obtained and used by the strata council at March 27, 2003 and May 10, 2004 meetings in the ordinary course as recorded in the minutes of the meeting. I accept the evidence of Mr. Chung that proxies were obtained and reject the contention that they were fabricated or never existed.

[113] Further, as the plaintiff points out, if the proxies did not exist, how could the strata councillors have waived fines to obtain proxies and use them at the March 27, 2003 meeting? I agree that the defendants' primary and alternative position do not sit well together.

Improperly Obtaining Proxies in Exchange for Fine Waiver

[114] With respect to the defendants' claim that the proxies were improperly and unlawfully obtained from strata owners, the plaintiff contends that this issue was already dealt with by the Court of Appeal in this action. In *The Owners, Strata Plan LMS 3259, supra*, the Court of Appeal stated, at paras. 48-52, that the manner of collecting proxies does not affect their validity. To the extent that the defendants continue to challenge the manner in which the proxies were obtained from owners, the plaintiff says the Court of Appeal has already ruled on this matter.

[115] That said, the plaintiff concedes that the Court of Appeal allowed the defendants to plead the sufficiency of proxies to pass the impugned bylaws. The defendants' pleading that the strata council members obtained proxies by improperly and arbitrarily imposing fines and penalties and then waiving fines and penalties in

exchange for voting rights and proxies, was amended to take into account the Court's ruling.

[116] I observe that the defendants' pleading was framed in relation to the use of proxies by the strata council to pass the amendments to the bylaws at the March 27, 2003 annual general meeting, which was the meeting at which the open for business bylaw was amended. This is set out in para. 2 of the defendants' counterclaim. However, at trial the defendants also seek to invalidate the bylaws amendments at the May 10, 2004 meeting, which was the meeting at which the bylaws were updated.

[117] I will, therefore, address the defendants' claim as set out in the revised pleading, that is, whether the defendants have established that the plaintiff, through the strata council, obtained proxies by improperly and arbitrarily imposing fines and then waiving the fines which had been incurred by strata owners. I have not addressed the issue of "penalties", as this claim was not pursued at trial.

[118] I note, first of all, that in the strata council minutes and related documentary evidence from October of 2001 to March of 2003, there was no reference to fines being imposed by the new strata council. While there was evidence of fines having accumulated against owners prior to the March 27, 2003 meeting as a result of fines imposed by the developer council, as the plaintiff emphasizes, the first evidence of fines being imposed by the new council was in July of 2003.

[119] In the absence of evidence that the new council members imposed fines prior to the March 27, 2003 meeting, in my view, there is no evidentiary foundation for the defendants' contention that fines were improperly imposed and then waived in order to obtain proxies for use at this meeting.

[120] I also note that the proposal for a general amnesty in respect of fines which had accumulated from those imposed by the developer council was passed on April 24, 2003, which was one month after the March 27, 2003 meeting at which the impugned open for business bylaw amendments were passed.

[121] I find it to be improbable that the strata council would have sought proxies from certain owners in exchange for an agreement to waive fines in March of 2003, when they granted a general amnesty to all owners for outstanding fines in April of 2003.The defendants did not suggest that they were offered a fine waiver in exchange for their proxy and, again, they did not call any other strata owners to say that they gave their proxies on a promise that their fines would be waived.

[122] I would add that I am not satisfied that the general fine amnesty, given the manner in which the developer had imposed fines when it controlled the strata council, could be said to be an improper or arbitrary waiver of fines by the "new" strata council and, indeed, I note that the defendants benefitted from the fine amnesty.

[123] With respect to the May 10, 2004 meeting, Mr. Lam, in his submission, refers to various occasions which he contends show that there were "secret deals" by which owners were exempted from fines for not being open for business in exchange for obtaining their proxies.

[124] Mr. Lam refers to a memorandum from "Sammy" [Chung] to AA Management confirming the decision of the strata council on September 9, 2003 to waive fines in relation to certain units. There is no reference to proxies being given to these owners, but the defendants suggest that I should infer from the memorandum that strata council members received proxies in exchange for waiving fines.

[125] Mr. Chung's evidence was that the strata council did not fine these unit owners as they agreed to put a realtor's signs in the windows of their units. He said that when owners were fined and asked for a meeting with council, if they were able to demonstrate to the council's satisfaction that they were actually open for business or that their unit became vacant and they were using a realtor to obtain new owners or tenants, the council would not fine them. He denies that this was done in exchange for proxies.

[126] There is only one reference in the September 9, 2003 memorandum to the strata council obtaining a proxy, which is in relation to unit #2225: "(Hold and Wait For Their Fulfillment) Seller agreed to accept council's suggestion and buyer agreed to sign the proxy to the council". The defendants contend that this is evidence that the strata council waived the fines in exchange for obtaining a proxy which was subsequently provided to a member of the strata council. However, the memorandum states that it was the buyer not the seller who agreed to give a proxy. As the buyer would not have accumulated fines, I am unable to conclude from this evidence that the proxy was obtained in exchange for a waiver of fines for this unit.

[127] Mr. Lam also refers to the strata council minutes of December 3, 2004 regarding unit #2260, in which Mr. Chang, the unit owner, was apparently seeking information regarding the assignment of his vote to the strata council in lieu of non-opening fines and was asking the strata council to rent out his unit for him. The minutes state that the Chairman explained the assignment procedure and referred him to Mr. Lai for processing of forms. Mr. Lam suggests that I can infer from this evidence that Mr. Chang did, in fact, assign his voting rights in exchange for a fine waiver.

[128] I note that the December 3, 2004 minutes relate to a period after the May 10, 2004 meeting. In any event, I am not persuaded that there is sufficient evidence for me to conclude that Mr. Chang did, in fact, proceed in the manner which was being considered. In that regard, I note that Mr. Chang previously gave his proxy to strata council members on a number of occasions prior to December of 2004 (i.e. March 27, 2003, March 12, 2004 and May 10, 2004).

[129] The defendants also refer to evidence that the plaintiff would not fine units for not being open for business if they agreed to assign their units to the Strata Corporation. The evidence of Mr. Chung was that where owners assigned their units for display purposes, the units would not be fined for not being open for business and the strata council would obtain their proxies from the owners. The evidence of Mr. Chung was that not many owners agreed to assign their units to the strata council.

From the minutes of strata council in evidence, this offer was first made on July 25, 2003.

[130] I will discuss the impact on the defendants of the plaintiff's exempting owners from fines in these circumstances later in this decision, however, at this juncture I would observe that I am not satisfied that it was improper or arbitrary for the strata council to have determined that one means of making the mall look more attractive to customers and investors was to have units which were not actively in business to be used for promotion as display units. As the units had been assigned to the strata council and were to be used for a business purpose (and assuming they were in fact used for promotion), fines against an owner for not being open for business would not have been appropriate.

[131] On a consideration of the whole of the evidence, I am not satisfied that the defendants have established that the strata council improperly fined strata unit owners and then waived the fines in exchange for proxies for the May 27, 2003 or March 10, 2004 meetings.

Parking Stall Proxies

[132] The defendants submit that the passage of the March 27, 2003 and May 10, 2004 Bylaws were tainted by the decision of the strata council to allow owners to assign their parking stalls in exchange for a waiver of parking strata lot fees, as a means of obtaining more parking for public use. I note that the waiver of fees, as opposed to fines, was not pleaded by the defendants. In light of the history of litigation associated with the pleadings in this case, I ruled in the course of trial it would not be just or appropriate to the plaintiff to allow the defendants to amend the pleadings at that juncture to include an allegation that strata council members obtained proxies by improperly waiving fees. However, I allowed evidence which might establish a course of conduct on the part of the plaintiff that supported the defendants' position in the counterclaim.

[133] In the latter regard, it is apparent from the evidence of Mr. Chung and the minutes of the strata council meetings that the concept of generating more public

parking by renting owners parking stalls and waiving the monthly fee was proposed by the strata council when Mr. Lam was its president in April of 2002. Subsequently, the new strata council formalized this arrangement by providing that strata unit owners could assign their parking stalls to the strata for public use and, if they did so, they would not be charged their strata parking lot fees. Given that the concept originated when Mr. Lam was strata council president and in light of the pressing need to address the lack of parking in the mall, I find it difficult to accept that the proposal to waive strata parking lot fees was improper or that it assists the defendants' position.

[134] Nevertheless, I have considered Mr. Lam's contention that the strata council was not entitled to use proxies obtained from owners of parking strata lots to pass the bylaw amendments. Mr. Lam claims that the *Condominium Act* and *SPA* precluded the developer from making parking stalls into strata units and that, therefore, the bylaws should be declared void. The plaintiff does not join issue with this proposition but simply submits that it would not have made any difference to the outcome of the ¾ vote for the resolutions that amended the bylaws.

[135] Mr. Leung's evidence was that there were 19 votes for parking strata lots but not all of them voted via proxy: only 13 were voted by proxy; 3 were voted by the owners in person; and 3 owners did not sign in. According to Mr. Leung, even if all 19 votes had been used and were removed from the vote count at the March 27, 2003 meeting, the bylaws would still have passed by a significant margin.

[136] The plaintiff submits that the removal of the 19 votes also did not affect the quorum for the meeting. At that time the bylaws provided that "one quarter of the persons entitled to vote present in person or by proxy constitutes a quorum."

[137] I accept the evidence of Mr. Leung, which is reflected in the minutes of the March 27, 2003 meeting, that there were 193 eligible voters and 107 votes present in person and by proxy. The quorum was, therefore, 49. Even if the 19 votes related to the owners of parking strata lots were subtracted from that number, I find that there would still be 88 votes. This was sufficient to constitute a quorum.

[138] Further, if the 19 votes were subtracted from 98 votes cast in favour of the passing of the resolution (on the assumption they all voted in favour of the motion), the result would be 15 opposed and 79 votes in favour or 84% of the votes in favour of the amendment to bylaw 2(q), which would have been sufficient to meet the 3/4 requirement to pass the amendment to the bylaw.

[139] With respect to the amendment to 2(q), if 19 votes were subtracted from the 103 votes cast (on the assumption that they all voted in favour of the motion), the result would be 13 opposed, 84 votes in favour or 86% in favour of the amendment which, again, would have been sufficient to meet the 3/4 requirement to pass the amendment.

[140] Mr. Leung's evidence was to the same effect with respect to the May 10, 2004 meeting: there would have been a quorum and the bylaws would still have passed. If all 20 parking strata units were used to vote, removing them would not affect the quorum or the passage of the bylaws.

[141] I accept Mr. Leung's evidence that the vote would not have affected the quorum or outcome of the vote of the impugned meetings. In that regard, I observe that Mr. Justice Burnyeat in *Azura Management (Kelowna) Corp. v. The Owners of Strata Plan KAS2428*, 2009 BCSC 506, at paras. 105-106, addressed the issue of whether the result of a vote at a general meeting was invalid because the strata council used votes of certain strata lots when it should not have done so. Mr. Justice Burnyeat upheld the vote, noting that he was satisfied that if the impugned votes had not been cast, the resolutions would still have passed by a ¾ vote at the annual general meeting.

[142] I agree that the court should be hesitant to interfere with the will of the majority where disputed votes would not have made a difference to the outcome of the vote. This is particularly the case here where the vote in question occurred over 10 years ago and where the defendants' claim was not squarely pleaded.

Non-Eligibility of Owners

[143] The defendants also submit that the March 27, 2003 bylaw amendment should be declared void because the strata council allowed proxy votes for units which were ineligible to vote due to outstanding fines. He contends that, given the evidence that one half of the units were not open for business there "should have been hundreds of thousands of outstanding fines against them on top of monthly fees" which would have rendered them ineligible to vote at the meeting. The defendants refer to the evidence of Mr. Lai that "numerous units" were not open for business and the evidence of Mr. Chung that there was a "vacancy rate" of about 50 per cent.

[144] The defendants suggest I should infer from this evidence that one half of the units were not open for business and, therefore, had fines against them rendering them ineligible to vote.

[145] Section 53 of the *SPA* provides that a strata corporation may, by bylaw, provide that a strata owner may not vote where the strata corporation is entitled to register a lien against the strata lot. The bylaws of the Strata Corporation contain such a provision in bylaw 15(f).

> Except in cases where, under this Act, a unanimous resolution is required, an owner is not entitled to vote at a general meeting unless all contributions payable for his strata lot have been paid.

[146] Section 116 of the *SPA* prescribes the circumstances in which a strata corporation may register a lien against a strata lot: if an owner fails to pay strata fees, a special levy; reimbursement of the cost of work referred to in s. 85; and the strata lot's share of a judgment against the strata corporation. Section 116(3)(c) excludes fines as a circumstance which would allow a strata corporation to file a lien.

> 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;

> (c) a reimbursement of the cost of work referred to in section 85;
>
> (d) the strata lot's share of a judgment against the strata corporation;
>
> (3) Subsections (1) and (2) do not apply if
>
> …
>
> (c) the amount owing is in respect of a fine or the costs of remedying a contravention.

[147] It is apparent from the legislative scheme that an entitlement to vote is a fundamental right of an owner. The existence of outstanding fines is expressly excluded as one of the circumstances for which a lien may be registered against a strata lot. Although the legislation authorizes a strata corporation to enact a bylaw limiting an owner's entitlement to vote in s. 53, the strata corporation's authority to do so is circumscribed by reference to s. 116.

[148] I interpret the lack of inclusion of fines in s. 116(1) to mean that a strata corporation may not disentitle strata lot owners from voting because they have outstanding fines. I note that this interpretation is supported by the decision of Master Taylor in *Strata Plan VR386 (The Owners) v. Luttrell*, 2009 BCSC 1680.

[149] In any event, I am not persuaded that I can reliably draw the inference suggested by the defendants. The existence of a high vacancy rate does not necessarily mean that the businesses were not open for business within the meaning of the bylaw. Strata lots were also vacant because they had not yet been sold by the developer. Further, the open for business bylaw itself contained exceptions from the requirement that a strata owner be open for business.

[150] I, therefore, reject the defendants' submission that strata owners who voted in person or by proxy at the March 27, 2003 meeting were ineligible to vote because they had outstanding fines.

2. Did the defendants contravene the bylaws? Did the plaintiff follow the required procedure?

Were the defendants' units open for business?

[151] The defendants' position was that their businesses were "always open" during the period from July 2003 to the time the units were sold in 2010. Both Mr. Lam and Ms. Lee testified that they were always open or open every day.

[152] The evidence of the defendants was that it was Mr. Lam and Ms. Lee who worked at the units, with only occasional help from Mr. Lam's son. Although Ms. Lee had a full time job as a legal assistant, her evidence was that she was at the mall after her work concluded, on the weekends and sometimes before work. As noted above, I found her evidence that the units were open from 8:00 a.m. or 9:00 a.m. every morning to 10:00 p.m. to 11:00 p.m. or 12:00 at night, 7 days a week except when she went to court or to buy merchandise was not to be credible or reliable given her day job and the breadth of her assertion. I similarly found Mr. Lam's evidence on the hours he was at the units to be unreliable.

[153] The defendants' evidence was also contradicted by the evidence of the mall management staff, Mr. Leung and Mr. Lai. Mr. Lai, who was the mall manager, gave evidence that one of his duties was bylaw enforcement. He testified that he patrolled the mall once or twice a day for this purpose and he made note of any strata unit which was not in compliance with the bylaws. Upon his return to the office he would fill out a bylaw violation form in which he noted the bylaw he alleged had been infringed. A copy of this bylaw violation notice was then provided to the owner of the unit.

[154] Mr. Lai testified that he delivered such notices to units #1010 and #1380, as well as other units. He said that he seldom was able to deliver the bylaw violation notices by hand at the defendants' units and that they were there maybe once in a few months. He said that he attached envelopes containing the notices to the door of their units, and said that they were still there when he would leave at the end of his shift. He also testified that he never saw units #1010 and #1380 open for business

during the period from 2003 to 2007; he never saw the open sign above the door to the units lit; and he did not see any customers coming in or out of the unit. He said that normally he could see no one inside the units. Mr. Lai took photos of the units over the period from 2003 to 2007, which showed the blinds of both units shut.

[155] I found the evidence of Mr. Lai regarding whether the defendants' units were open for business was more consistent with the whole of the evidence than the evidence of the defendants.

[156] I note, as well, that the records produced by the defendants do not support the Noodle House in unit #1010 being open for business after the tenants left in late 2002 or early 2003. The grocery store receipts referred to by the defendants are not indicative of an active restaurant business. There was only a small amount of food items that was purchased. The receipts were mainly for less than $10 or $20 and the purchases were irregular. Although the defendants contend that the small amount of food reflects the fact that the business was not very successful, in my view the quantity and nature of the items purchased are more consistent with an individual or a couple buying food items for daily living than the purchase of food and supplies required for a restaurant which was actively in business. In that regard, certain of the receipts for food produced by the defendants do not correspond to the very few sales invoices produced by the defendants and other grocery receipts do not correspond to the "traditional Chinese style" food the restaurant purported to sell.

[157] The defendants did not provide any credit card or debit receipts, or receipts from the cash register Ms. Lee said was used for a period of time. There were only a small number of sales receipts from the Noodle House. The receipts do not identify any customer and the form of receipt suggests they were prepared for some purpose other than actually providing a receipt to a customer.

[158] Further, the photographs in evidence for the period from August of 2003 to 2009 which were put in evidence by the plaintiff show the blinds of unit #1010 were consistently closed. Various documents pertaining to Mr. Lam's action against the Ernest & Twins and others associated with the Pacific Plaza development were

posted on the windows. One of the statements in the posted documents asserts that strata units in the mall are unable to open for business. Some of the photographs of unit #1010 show furniture piled in front of the unit.

[159] The photographs also showed that the "open" sign above the door to unit #1010 was not illuminated. Mr. Lai's evidence was that he never saw the sign illuminated on his daily patrols of the mall. I note that Ms. Lee had little recollection of there being an open sign at the unit - which is inconsistent with her evidence that the restaurant was "always open" and that she was there every day after she finished her "regular" job.

[160] Additionally, I note that the video of the 2009 inspection showed that unit was not being actively used as a restaurant: there were no foodstuffs in evidence, the interior was is a state of disarray, the appliances were not clean or in apparent use, and there were three unplugged cash registers stored on the counters.

[161] The photographic and video evidence submitted by the plaintiff, particularly when considered along with the other evidence in relation to the units, supports the conclusion that the defendants' restaurant in unit #1010 was not open for business from 2003 to 2010. It is telling that the defendants did not call evidence from any customer or other strata unit owner to support their contention that the restaurant in unit #1010 was open for business.

[162] With respect to unit #1380, the plaintiff contends that the evidence of Mr. Lai and Mr. Leung that they did not see the unit open for business, together with the photographs throughout the period 2003 to 2009 prove that the defendants' unit #1380 was also not open for business. The defendants respond by relying on their business records and the photographs they put in evidence, which they submit support the conclusion that unit #1380 was open for business.

[163] I note that the defendants also adduced photographic evidence. However, none of the defendants' photographs showed any customers and few showed the

interior of unit #1380. Those taken by the defendants of the interior show a bicycle, boxes, clothing, and equipment on shelves.

[164] Even accepting that the items inside and outside of the unit were merchandise, the central issue is not whether Mr. Lam had purchased merchandise but whether the unit was open for business to the public during the prescribed business hours during the period for which they were fined. I must weigh the evidence of Mr. Lam as to the operation of the business against the evidence of Mr. Lai and Mr. Leung that during these years unit #1380 was not open on a daily basis; that the blinds were shut; and that Mr. Lam did not respond when Mr. Lai knocked on the door of his unit.

[165] In that regard, as the plaintiff points out, Mr. Lam testified that he bought $250,000 worth of inventory for the store at the time the liquidation business was started and that $100,000 of it was destroyed in a flood in 2003. If accepted, this should have left $150,000 worth of inventory. However, the accounts produced by the defendants total $37,822, and, of that amount, approximately 75% of sales involved invoices for items allegedly sold to Pepper's Produce Ltd. - which is a company of which Mr. Lam has an interest as a director.

[166] The total amount of the defendants' invoice for goods sold to Pepper's Produce which is in evidence was $31,073.28, which was the same amount that was the subject of an unsuccessful claim for business losses in *Pepper's Produce Ltd. v. Medallion Realty Ltd*., 2013 BCSC 2314. In that case, Mr. Justice Smith found that there was no evidence that Pepper's Produce actually paid the invoice it claimed:

> [42] In those circumstances, I cannot accept the invoice, standing alone, as evidence of a *bona fide*, arms-length transaction in which the plaintiff actually paid the amount it now claims. On a balance of probabilities, I find the plaintiff has failed to prove this loss. There is no evidence of any other loss that the plaintiff failed to recover through its settlement with Gaotam.

[167] I note that, other than the invoice to Pepper's Produce, there are no sales receipts or other evidence as to who were the defendants' customers or who purchased the items the defendants' claim were sold. I am not satisfied that the

defendants' record of sales is reliable. In that regard, certain sales receipts in evidence relate to a period for which Mr. Lam deposed during discovery that there were no sales for Richmond Liquidation Sales.

[168] The defendants maintain that the business licences, hydro and telephone bills, income tax and GST returns, and bank statements confirm that both units #1010 and #1380 were open for business. The defendants submit they would not have incurred these costs if they were not in business. While that argument has some initial attraction, the financial statements of Extra Gift Exchange do not support the conclusion that the liquidation business was a going concern.

[169] In any event, as stated above, the issue is whether the defendants were actually open for business as required by the bylaws. While the defendants maintain they were always open for business, in the numerous letters written by the defendants to the strata council over the years from 2003 to 2010, I consider it significant that they did not assert they should not be fined because they were open for business. Instead the defendants complained about the illegality of the bylaws.

[170] Having considered the totality of the evidence, I prefer the evidence of plaintiff's witnesses over the evidence of defendants' witnesses and conclude that neither of the units was open for business within the meaning of the bylaw during the period from 2003 to 2010.

Whether defendants received notice of the bylaw violations

[171] The defendants contend that the bylaw violation notices were fabricated by the plaintiff. Mr. Leung and Mr. Lai gave evidence that they issued bylaw violation notices to the defendants on a regular basis. The plaintiff put in evidence the many notices which it submits were issued by the property management staff to the defendants over the period they were fined (i.e. from July of 2003 to December of 2007).

[172] According to the evidence, mall management staff used a standard bylaw violation notice form which was issued to any owner in apparent violation of the

bylaws. The form allowed the property management staff to tick off the applicable bylaw which was alleged to have been violated. At the bottom of the notice the recipients were advised of their opportunity to request a hearing regarding the notice of violation.

[173] The plaintiff witnesses gave evidence of warning letters and bylaw violation notices issued to the defendants starting in 2003 in respect of the open for business violation, as well as signage violation notices, and the storage of goods in front of the defendants' units.

[174] Mr. Lam's contention that he did not receive the bylaw violation notices is contradicted not only by the evidence of Mr. Leung and Mr. Lai but also by Mr. Lam's own evidence on discovery. On his examination for discovery Mr. Lam admitted to getting "a stack of the thing every six months". Additionally, at trial, the plaintiff introduced a photograph which showed Mr. Lam, while he was an owner, with a bylaw violation notice in his hand.

[175] Further, Ms. Lee admitted on discovery to having received bylaw violation notices when she was an owner. While at trial she testified she only initially received bylaw violation notices from Mr. Lai for one or two weeks, I observe that the bylaw violation notices were not issued by Mr. Lai until 3 months after the plaintiff started fining the defendants in July of 2003.

[176] I, therefore, do not accept the defendants' evidence that they did not receive the bylaw violation notices from the plaintiff. I find that the bylaw violation notices, as well as warning letters and invoices, were issued to the defendants by the plaintiff in relation to their not being open for businesses and the defendants received such notices. They were notified through the notices of their right to request a hearing if they disputed the bylaw violation notices. The defendants did not avail themselves of this opportunity.

Whether the defendants' failure to open contravened bylaws

[177] With respect to whether the defendants' failure to open units for business constituted a contravention of the open for business bylaw 2.8.1, the defendants submit that bylaw 2.8.1 has no application as it simply requires a unit owner to commence opening for business within a prescribed time period - which requirement was met. The defendants contend that because their units were open for business after they bought the units in 2000, there was no breach of bylaw 2.8.1.

[178] The defendants also contend that the provision governing the obligation to remain in business is article 2.8.2 - which was not relied upon by the plaintiff.

[179] Even accepting that the defendants have established that both units initially were open for business after they bought their units in 2000, in my view, bylaw 2.8.1 does more than the defendants suggest. Bylaws are to be given their plain and ordinary meaning, *Harvey v. The Owners, Strata Plan NW 2489*, 2003 BCSC 1316. Interpreting the bylaws in that manner, I find that bylaw 2.8.1 requires an owner not only to open within the prescribed time period but to continue to operate the business out of the unit. This interpretation gives effect to the language of the bylaw which places an obligation on an owner to be "open for business to the public and commence business operation from his strata lot".

[180] Bylaw 2.8.2, in my view, has a separate purpose which is to establish the minimum hours of operation for the business. I, therefore, reject the contention of the defendants that bylaw 2.8.2 would be the operative provision. While the defendants could have been fined under bylaw 2.8.2, as I have found that they were not open and operating their business out of units #1010 and #1380, I am satisfied that they contravened bylaw 2.8.1.

Whether posting of signs contravened bylaws

[181] The plaintiff claims that they were entitled to fine the defendants for posting signs in unit #1010 alleging fraud and impropriety by the strata councillors, the developers and others.

[182] The number of signs varied over time but included the defendants' pleadings from the Extra Gift Exchange litigation, an open letter from Mr. Lam to other strata owners. as well signs in English and Chinese which stated "Pacific Plaza $40 Million Dollar Fraud", "Big Fraud Case".

[183] The open letter from Mr. Lam to strata owners concludes as follows:

> As a result, the Pacific Plaza constantly has over 40 strata units which suffered structural deficiency and inequitable style management of the strata by the current strata councillors, have not been able to open for business nor capable to retain or attract renters. The majority, 99 percent of business, had not been able to sustain the non-viable business environment in the Pacific Plaza and left within six months of operation.

[184] In the August of 2003 photograph of unit #1010, the signs were displayed in a prominent manner on the window, visible from the exterior of the unit. Copies of pleadings and the signs alleging a fraud at Pacific Plaza were posted. The latter were in large, bolded print in a red frame.

[185] The plaintiff's evidence was that the strata council was directed by the owners to strictly enforce "inappropriate sign displayed within individual stores" at the March 27, 2003 annual general meeting. The plaintiff warned the defendant company in writing on a number of occasions about the posting on the window of unit #1010 before fining it. The plaintiff commenced fining the defendant company on July 4, 2003.

[186] The bylaw violation notices which were issued in respect of unit #1010 refer to a violation of bylaw 24 of the 1999 Bylaws and, subsequently, to bylaw 2.3.7 of the 2004 version of the Bylaws. That said, even after the 1999 bylaws were amended in 2004, certain of the bylaw violation notices continued to refer to former bylaw 24. I note that bylaw 24 applied to strata lots in the commercial section, which would include unit #1010 by virtue of the definition of "commercial section" in the bylaws.

[187] The evident purpose of bylaw 24 was to regulate signage and displays and, specifically, what signs or notices a strata owner was permitted to install within a strata unit where it would be visible from the exterior of the unit. The Strata

Corporation sought to ensure that any signs or notices were in compliance with the statutory building scheme, had received any approval required by the municipality, and was in keeping with the overall presentation of the shopping center. All such signage and notices were to be installed, operated and maintained in "first class condition". Bylaw 24 contained similar restrictions on displays which are visible from the exterior of the lot.

[188] The defendants assert that the wrong section of the bylaws was relied upon by the plaintiff. Mr. Lam points out that what is regulated in bylaw 24 and its successor provision is the size, design, quality and colour of signs and notices and not the content of them. As the plaintiff's objection was to the content of the defendants' notices, the defendants submit that there could be no bylaw violation.

[189] Mr. Lam also points out the successor provision, bylaw 2.3.7, was restricted in its application to strata lots in the signage section, which was defined in bylaw 1 to mean "Strata Lots 71 and 140." The section of the bylaws which regulated signage for units in the commercial section was bylaw 2.3.6, which was virtually identical to bylaw 2.3.7, but was not specifically referred to in the violation notices issued by the plaintiff to the defendant company.

[190] The defendants further assert that the plaintiff has not proved the allegation in the pleadings that the defendants intended to criticize or embarrass strata council members. Mr. Lam states that the defendants were simply trying to inform other owners of the legal action being taken and that other owners had similar postings but were not fined.

[191] With respect to the application of bylaw 24 of the bylaws to the defendants' notices, as noted above, the bylaw should be given its plain and ordinary meaning. The bylaw allowed owners to install signs and notices provided that they met certain requirements. One of the requirements was that they "are in keeping with overall presentation of the shopping center in terms of quality, design and colour". Another requirement is that such notices are "installed, operated, [and] maintained in first-class condition".

[192] I do not agree with the defendants that the bylaw had no application to the content of signs and notices. In my view, the outward appearance of a sign or notice cannot be wholly separated from its content, given the requirement that its quality and design, for example, are to be in keeping with the overall presentation of the shopping center and maintained in first class condition.

[193] The word "quality" has a subjective aspect in that it takes its meaning from the context in which it is used. Quality is defined as "the standard of something as measured against the things of a similar kind" or "general excellence", *Concise Oxford English Dictionary*, 11th ed. (Oxford University Press, 2004).

[194] The word "design" also takes its meaning from its context. The dictionary definition of the word "design" indicates it means, among other things, "a plan or pattern from which a picture, building, machine, etc. may be made"; "an idea as executed, the combination of elements in the finished work"; and "the selection and arrangement of artistic or functional elements making up a work of art, machine or other object", *The New Shorter Oxford Dictionary*, 1993 ed., (Oxford University Press). I take from these meanings of "design" that it may include content if that was part of the idea which was intended to be executed.

[195] In any event, in light of the subjective nature of these words, it is appropriate to interpret the requirement that signage be "in keeping with the overall presentation of the shopping center in terms of quality, design and colour" in the context of the bylaws as a whole. In that regard, I find it significant that this bylaw also refers to a requirement that signage be maintained in "first class condition" and that, in bylaw 2, the duties of owners include a requirement to maintain strata lots "to the standard of premises located in a first class shopping center" and that storefronts be "professionally displayed in good taste and in a manner consistent with a first class shopping center". Further, bylaw 21 prohibits owners from, among other things, using strata lots in a manner which would be "injurious to the reputation of the shopping center". These provisions reflect an intention that the shopping center be operated to a high standard and in a manner which is protective of its reputation.

[196] Considering the defendants' signage in this context, I conclude that it was not unreasonable for the plaintiff to have concluded that it was not of a quality or design that was in keeping with the overall presentation of the shopping center. It was not aesthetically attractive, it was not connected to promotion of the defendants' business, it impugned the reputation of the mall and, insofar as it alleged a $40 million fraud and a conspiracy by the developers and strata council of Pacific Plaza, was *prima facie* defamatory.

[197] I would add that while it was unlikely that the framers of the bylaw contemplated the particular situation which has arisen in this case, one of the principles derived from both contractual and statutory interpretation is that contracts and statutes should not be interpreted in a manner which would lead to an absurd result (see for example: *Sullivan on the Construction of Statutes*, 6th ed., Markham, ON: LexisNexis Canada, 2014 at 12). In this case, interpreting the bylaw as the defendants contend, would lead to the absurd consequence that a beautifully designed sign or notice with an offensive message would be permissible under the bylaws.

[198] With respect to the defendants' submission that the plaintiff has not proved that the signs were intended to embarrass and criticize the plaintiff, as noted above, the posted signs were visible from the exterior of unit #1010 and included notices in English and Chinese that alleged a fraud at Pacific Plaza. The documents posted stated, among other things, that strata council members, the developer and various other individuals had conspired to injure the owners and cause the businesses at Pacific Plaza not to be viable; that Pacific Plaza is incapable of retaining and attracting businesses; that the developers engaged in financial suppression of the owners; and that the strata councillors have disregarded the interests of the owners to benefit themselves and the developers.

[199] I infer from the content and prominent placement of these postings in the window of unit #1010 that the defendants intended, by posting the signs, to criticize and embarrass strata council members. I find that it was a part of the defendants'

campaign of opposition to the developer and the strata council. I do not accept the defendants' contention that the notices were merely to inform other owners of the defendants' legal action. There were other means available to the defendants if that was the purpose.

[200] Further, I reject the defendants' submission that there were other units with signs in their windows that were not subject to fines. Mr. Lai's evidence that the signs posted by other owners related to the promotion of their businesses is consistent with the photographic evidence. The signs posted by the defendants were not in any way similar to what other owners had posted in their windows.

[201] I accept that strata council had a legitimate interest in seeking the removal of signs which impugned the mall's reputation and could negatively affect the reputation of the mall and the commercial interests of strata lot owners.

Whether defendants received adequate notice of violation

[202] The next question which I must address is whether the defendants received adequate notice of the bylaw violation such that they were not prejudiced by the reference in the notices to bylaw 2.3.7, as opposed to bylaw 2.3.6. As noted above, the provisions of the two bylaws are substantially similar in terms of what is regulated, however, it is bylaw 2.3.6 which has application to the defendants' units.

[203] Section 135 of the *SPA* prescribes the minimum procedure required of a strata corporation prior to imposing a fine.

> **Complaint, right to answer and notice of decision**
>
> 135 (1) The strata corporation must not
>
> (a) impose a fine against a person,
>
> (b) require a person to pay the costs of remedying a contravention, or
>
> (c) deny a person the use of a recreational facility
>
> for a contravention of a bylaw or rule unless the strata corporation has
>
> (d) received a complaint about the contravention,
>
> (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the

> complaint, including a hearing if requested by the owner or tenant, and
>
> (f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.
>
> (2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).
>
> (3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

[204] On the evidence, the defendants received a number of written warnings commencing in 2003 from the plaintiff's property management company that the defendants' postings in unit #1010 were in violation of the window display/signage bylaw. On May 16, 2003, the defendants were advised by letter that the enforcement of the signage bylaw had been directed by the owners. The defendants were asked whether they would comply with the bylaw or appeal. Subsequently, in response to the defendants request for details of the signage violation, by letter to the defendants dated July 18, 2003, the plaintiff attached a photograph of the offending signage. I note that while Ms. Lee said she doesn't remember receiving these letters, she does not deny that they were sent to her. The defendants' request for information on the sign violation leads me to conclude that they did receive the warning letter.

[205] As the defendants did not remove the posting on the window of unit #1010, they were subsequently issued bylaw violation notices. The notices of bylaw violation for unit #1010 showed a tick beside the box "Failure to maintain Signage & Display in first class condition in Violation of Bylaw #24". The notices also showed a tick beside the box which stated: "If you do not within 7 days of the date below dispute this allegation and/or request a hearing with the Strata Corporation, a fine will be assessed against you forthwith as provided by the Bylaws of the Strata Corporation."

[206] I conclude that the plaintiff met the procedural requirements of s. 135 to notify the defendants of the particulars of alleged contravention and to provide the defendants with an opportunity for a hearing to answer the complaint that they had violated the signage bylaw.

[207] Although bylaw violation notices issued after the bylaws changed in 2004 did not refer to the correct bylaw section, I note that the same box was ticked with respect to failing to maintain the signage and display in first class condition and these notices addressed the same signage on the windows of unit #1010. I am satisfied` that the defendants knew that it was the signage bylaw which it was alleged they were contravening.

[208] The defendants had the opportunity to request a hearing with the Strata Corporation, but declined to do so, instead they kept the offensive notices in the windows and let the fines accumulate. While the defendants suggest that the plaintiff could have immediately sought an injunction to have the notices removed, rather than let the fines accumulate, in my view under the scheme of the *SPA*, the defendants had an obligation to either rectify the contravention or challenge the bylaw violation notice. If the defendants did not agree that the fines were properly levied, the proper course of action was for the defendants to have requested a hearing with the Strata Corporation.

[209] Accordingly, I conclude that the plaintiff substantially complied with procedural requirements of s. 135 of *SPA* and is entitled to judgment in relation to the fines imposed for the notices posted on the windows of unit #1010.

Whether the plaintiff entitled to charge for removal and storage of property?

[210] The photographs in evidence for the period from 2003 to 2009 show an assortment of items stacked in front of the defendants' units #1380 and #1010, including large boxes, desks, buckets, shelving, building materials, smaller boxes, and other items. It is not disputed that the items were left outside and were not taken inside at night. There is a dispute as to whether some of the larger items were secured with a chain, but clearly most of the items were not secured. Some of the larger boxes were open.

[211] The plaintiff submits that it is entitled to judgment in relation to expenses it incurred in the amount of $17,467 for the removal and storage of these items. The

plaintiff refers to evidence that the defendants received written warnings commencing in September of 2003 to remove the items in front of unit #1380, but the defendants did not respond or move the items. Further, the defendants subsequently also placed items in front of unit #1010, resulting in warnings in relation to both unit #1010 and #1380 in December of 2003 and January of 2004.

[212] In a letter to the defendants dated January 19, 2004, the plaintiff attached a photo of the items which it said were improperly displayed in the common area in front of the defendants' units and warned that the items had to be moved inside by January 23, 2004. In a final warning dated January 29, 2004, the plaintiff advised the defendants that if they did not move the items inside, they would be moved without notice.

[213] In the January 29, 2004 letter to the defendants, the plaintiff stated that the defendants were in violation of bylaw 2 and 21(a). Bylaw 2 provided that the owners have various duties, including a requirement to maintain areas assigned for the owner's exclusive use to "the standard of premises located in a first class shopping centre" and to use the common property "in a manner that will not unreasonably interfere with their use and enjoyment by other owners, their agents and customers". Bylaw 21(a)(i) stipulated that an owner shall not "place or maintain any article in any vestibule on the exterior of his strata lot or the common areas and common facilities."

[214] Mr. Chung testified that the items in front of the defendants' units looked like junk and made the mall look bad. He also said that the items impeded the walkway, particularly when it rained and customers would want to walk by the shop windows where it was drier.

[215] After the plaintiff engaged a bailiff to remove the items and place them in storage, the plaintiff's evidence is that the defendants were given written notice to retrieve the items from storage. The items were not retrieved from storage by Mr. Lam until 2010 after the matter was raised in a summary trial application in a related action before Mr. Justice Masuhara and a consent order was made on February 17, 2010.

[216] Mr. Lam's evidence was that the items were merchandise and not junk. He asserts that the defendants were entitled to keep the merchandise where it did, as it was limited common property for the exclusive use of the defendants. The defendants also assert that other owners used the common property in a similar manner. Alternatively, the defendants submit that the judgment in the amount claimed should not be allowed where the plaintiff could have sought timely injunctive relief rather than allowing the fines to accumulate.

[217] While it is conceivable that the property in front of the units could be merchandise for a liquidation business, the defendants have not established that the particular items were purchased by the defendants for its business. There were also no signs visible adjacent to the items indicating the items were for sale and they were not displayed in a manner which would invite a sale. By leaving the items outside day and night and leaving most of the items unsecured, the defendants did not treat the items in a manner which demonstrated that the property had value and that they wished to preserve it for sale. The fact that the items were placed outside unit #1010, which they said was operated as a restaurant, casts doubt on the defendants' suggestion that it was merchandise for the liquidation business.

[218] In that regard, I do not accept the defendants' contention that other unit owners used the area in front of their property in any way akin to the manner in which the defendants used the walkway area. The photographic evidence adduced by the defendants does not support such a finding. A small table under an umbrella and two chairs; a pop machine; and a sandwich board are not comparable to the defendants' cluttered assortment of materials.

[219] I also do not accept that the defendants had an unqualified right to place whatever they wanted in front of their units because it was limited common property. "Limited common property" is defined in s. 1 of the *SPA* as "common property designated for the exclusive use of the owners of one or more strata lots". It is not part of the defendants' strata units. Sections 3 and 119 of the *SPA* confirm that a

strata corporation is responsible for managing the common property and may, through its bylaws, regulate the use of strata lots and the common property.

[220] Section 133 specifically authorizes a strata corporation to remedy a contravention of the bylaws by removing objects on common property.

> **Strata corporation may remedy a contravention**
>
> 133 (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including
>
> (a) doing work on or to a strata lot, the common property or common assets, and,
>
> (b) removing objects from the common property or common assets.

[221] In this case, the Strata Corporation regulated the use of common property through, among other provisions, bylaw 2 and 21(a), referred to above. I accept Mr. Chung's evidence that the way the items were stored in front of the defendants' units reflected poorly on the mall and the first class image it was endeavoring to maintain. I conclude that the plaintiff was entitled to take action to enforce the bylaws by removing the items.

[222] While the defendants suggest that the plaintiff should not have allowed the removal and storage fees to accumulate, I find that the plaintiff provided the defendants with both an opportunity to remove the items before they were seized by the bailiff to remove the items and a further opportunity to retrieve them from storage.

[223] The fact that the defendants left the items in storage for at least 6 years after they were seized by the bailiff casts further doubt that the items were truly a part of the defendants' inventory. Indeed, I find it is more likely that the defendants left the property in front of their units as part of their campaign of opposition to the strata council, the developers and others involved in the Pacific Plaza development.

[224] Accordingly, I conclude that the plaintiff was entitled to arrange the seizure and storage of the defendants' items and is entitled to judgment in the amount claimed. The defendants had notice that the plaintiff considered the use of the limited common property a violation of the bylaws but did not take any steps to remedy the

action, to dispute the bylaw violation or to retrieve the property. By allowing the costs of storing the items to accumulate, the defendants were wholly responsible for the costs which were incurred.

3. Was the plaintiff's enforcement of the bylaws significantly unfair to the defendants?

[225] Section 164 of the *SPA* allows an owner to seek relief from the court in relation to an act of a strata corporation that is significantly unfair to one or more owners.

> **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.

[226] In *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597, Mr. Justice Lowry addressed the concept of "unfairness" under the *SPA*:

> [23] 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.
>
> [24] What amounts to significant unfairness was addressed by this Court in *Reid v. Strata Plan LMS 2503* (2003), 12 B.C.L.R. (4th) 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. I do not understand the Developer to contend otherwise here.

[227] In *Reid,* Madam Justice Ryan accepted the definition of "significant unfairness" provided by Mr. Justice Masuhara in *Gentis v. The Owners, Strata Plan VR 368,* 2003 BCSC 120 at paras. 27-29:

> [27] 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*, [2001] B.C.J. No. 2377.
>
> [28] I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.
>
> [29] 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.

[228] More recently, the Court of Appeal in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, considered the meaning of "significantly unfair". Madam Justice Garson emphasized the remedial nature of s. 164 and stated that the focus should not be limited to considering the process used by the strata corporation.

> [24] Section 164 is remedial. It addresses that, despite using a fair process and holding a democratic vote, the outcome of majoritarian decision-making processes may yield results that are significantly unfair to the interests of minority owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose. I agree with what Masuhara J. said in *Gentis* that the outcome of the vote is one factor to be considered in determining if the impugned action is unfair. I do not agree with the suggestion in *Pearce* that provided the process is fair and democratic, a court should defer to the decision of the strata council or corporation.

[229] She adopted a two part test for determining whether conduct is significantly unfair:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

Entitlement to Claim under Section 164

[230] In this case, the plaintiff submits, first of all, that the defendants are not entitled to make a claim under s. 164 of the *SPA* as they are no longer "owners" within the meaning of that section. The plaintiff makes the distinction between s. 164 which applies to "owners and tenants" and s. 165 which applies to "other interested persons", as well as owners, tenants and mortgagees. The plaintiff also refers to s. 1(1) of the *SPA* which defines "owners" as the registered owner of the strata lot and s. 35(1.1) which entitles a "former owner" to inspect records of a strata corporation. The plaintiff submits the legislative scheme suggests that "owner" does not include a former owner and refers to *Owners of Strata Plan NW2212 (Re),* 2010 BCSC 519 at para. 48 and *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791 at para 44.

[231] In my view, neither of these cases support the interpretation advanced by the defendants. In *Owners of Strata Plan NW2212 (Re*), Madam Justice Dillon was considering whether a strata corporation could take action against itself under s. 164; and in *Peace v. The Owners, Strata Plan VIS 2165,* Mr. Justice Sewell was, as I read his decision, simply confirming that some act of the strata corporation has to be the source of the unfairness complained for s. 164 to apply. Further, the fact that the legislation recognizes the right of former owners to inspect records of the strata corporation is consistent with their continuing to have remedies which derive from the time when they were owners.

[232] Under s. 8 of the *Interpretation Act,* R.S.B.C. 1996, c. 238, every enactment must be construed as remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[233] As noted by Madam Justice Garson in *Dollan*, s. 164 is a remedial provision. It is intended to provide a remedy to an owner or tenant who has been treated significantly unfairly. Given the purpose of the provision, an entitlement to a remedy under s. 164 cannot reasonably be interpreted to depend on whether the owner or tenant continues to be an owner at the time the action is commenced. In my view, it is consistent with the purpose of s.164, that an entitlement to seek a remedy be based upon whether the person was an owner or tenant at the time of the alleged unfairness. In that regard, I note that under s. 164, the court is given a broad authority not only to prevent a significantly unfair action but also to provide a remedy for action which has already occurred.

[234] That said, if I am wrong in the interpretation of s.164, in this case, I find that the defendants initiated their claim that they had been treated unfairly when they were still owners of the units.

[235] While the defendants did not file the counterclaim in its current form until after the units were sold in 2010, the defendants had previously pleaded that the Strata Corporation had acted in an unfair and oppressive manner. As their initial pleadings were struck by Madam Justice Prowse, the defendants had to await the Court of Appeal's decision authorizing their action before they could proceed with their claim. In these circumstances, I consider it would be unfair to now disentitle the defendants from seeking relief under s. 164. Applying the legislation in the manner suggested by the plaintiff would unreasonably restrict the relief available to the defendants, which but for the action of the plaintiff in obtaining a court ordered sale of the units, would have been available to them.

Whether plaintiff's actions were significantly unfair

[236] I turn to the question of whether the plaintiff's action in fining the defendants was significantly unfair. Applying the first part of the test established in *Dollan*, I have

considered whether the defendants had a reasonable expectation that the bylaws would be consistently enforced.

[237] I begin by observing that I do not accept the defendants' contention that s. 26(1) of the *SPA* means that the Strata Corporation had no discretion with respect to the enforcement of bylaws. Section 26(1) is, on its face, "Subject to the Act" and, therefore, must be read together with other provisions of the *Act* which, for example, require the strata council to act reasonably and in good faith (s. 31); allow the strata corporation to give an owner a warning or time to comply with a bylaw (s. 129); provide the strata corporation with the ability to do what is reasonably necessary to remedy a bylaw contravention (s. 133); and to consider an appeal from a bylaw violation (s. 135). Similarly, for example, a strata corporation need not enforce a trifling or trivial infraction, *Abdoh v. The Owners of Strata Plan KAS2003*, 2014 BCCA 270.

[238] That said, I find that a strata corporation's discretion not to enforce the bylaws is limited. In this case, when considered objectively, the defendants, like other owners, had a reasonable expectation that the bylaws would be consistently enforced within the parameters established in the *Act*; *Strachan v. Strata Corp. VR 574* (1992), 28 R.P.R. (2d) 279 (B.C.S.C.). This expectation would include an expectation that any fines would not be imposed in a discriminatory or unfairly prejudicial manner.

[239] With respect to the second part of the test, I have considered whether the evidence established that the reasonable expectation of the defendants was violated by action of the plaintiff that was significantly unfair.

Allowing fines to accumulate

[240] The defendants submit that, even if the bylaws relied upon by the plaintiff were valid and a contravention of the bylaws proven, the plaintiff treated the defendants in a manner which was significantly unfair, oppressive or unfairly prejudicial by allowing the fines to accumulate over a long period of time without taking any steps to remediate or enforce the bylaws.

[241] The defendants rely on *Willson v. Highlands Strata Corp.*, 1999 CanLII 2900 (B.C.S.C.). In that case, Madam Justice Stromberg-Stein, as she then was, considered whether fines should be cancelled against the petitioners who had rented their strata unit contrary to the bylaws of the strata corporation. She exercised her discretion under the *Law and Equity Act*, R.S.B.C. 1996, c. 253 to relieve against the fines imposed by the strata council. She said that the key factor in her determination was that the strata council had not sought to enforce its bylaws by way of an injunction. At para. 28 she stated:

> [28] … Accumulating fines in the amount of $10,000 is a form of punishment, not an enforcement of its Bylaws, and is unreasonable. The Strata Council should have taken steps to enforce the Bylaw. Until this petition was filed, the Strata Council did not seek to enforce Bylaw 136 by obtaining an injunction. That failure has directly affected the number of months in which the strata lot was rented in contravention of the Bylaw. As a result the fines which could justifiably be levied against the petitioners has also been affected: *Strata Plan No. VR-333 v. Nunns* [1981] B.C.J. No. 58 (B.C.S.C.).

[242] The learned chambers judge then referred the matter back to the strata council to conduct a "full, fair and proper hearing of the petitioners' appeal for hardship".

[243] Without diminishing the significance of this authority, there are distinguishing features which must be considered. The *Willson* case involved a residential strata corporation in the context of the petitioners' claim for hardship under the *Condominium Act*. Madam Justice Stromberg-Stein said a significant factor in her decision was the petitioner's lack of a real opportunity to appeal the decision not to allow her to rent her unit on the grounds of hardship. Further, in that case, the learned chambers judge did not accept the petitioners' claim that the strata council had acted in an arbitrary or oppressive manner under s. 42 of the *Act*.

[244] In this case, Pacific Plaza is a commercial venture. An open for business bylaw was in place when the defendants purchased the units. Mr. Lam was an experienced businessman and Ms. Lee was a legal secretary who was sufficiently knowledgeable to establish a corporate structure to hold the property and operate

businesses out of the units. I am not persuaded that there is anything inherently unfair in enforcing an open for business bylaw by fining owners who did not comply, given the interests of all owners in having mall with operating businesses that would attract and maintain customers. The equitable principles which led the court to intervene in *Willson* do not apply with the same force in the circumstances here.

[245] As I have already noted above, the defendants were afforded an opportunity to meet with strata council regarding the alleged violation of the bylaws which they did not avail themselves of. While I do not discount the ill will between Mr. Lam and at least some members of strata council, I am not prepared to infer, as the defendants suggest I should, that the strata council would not have met with the defendants had they requested a meeting. In that regard, I do not accept that Mr. Lam asked for a meeting with the strata council. This is not reflected in his correspondence with the council.

[246] Further, the plaintiff did not unreasonably delay in bringing the court action against the defendants. The plaintiff started fining the defendants in July of 2003 and the small claims action was initiated by the plaintiff on February 24, 2004.

[247] Accordingly, although the plaintiff did not seek an injunction, they did take steps to enforce the bylaws and remedy the contraventions. While part of the delay in this matter coming to trial was due to the defendants' appeal of the decision of this Court to strike his pleadings, as the Court of Appeal noted at para. 97 of *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.,* the extent of the delay "lies largely at the door of Mr. Lam and the Company".

Exempting other owners from fines

[248] The defendants also submit that the plaintiff was significantly unfair in exempting certain owners from fines for not being open for business or waiving their fines, while continuing to fine the defendants. I consider that the evidence supports the conclusion that the bylaw was not consistently enforced. According to the plaintiff's own evidence, various strata unit owners were not fined for not being open for business during the same period as the defendants were fined. For example:

1. Owners who posted a "for sale" sign in the front window and used a real estate agent, were exempted from fines for not being open for business.

   Mr. Chung acknowledged in his direct examination that the strata council would not fine the defendants who engaged a real estate agent and placed a for sale sign in the window of their unit: "We tell them, if you cannot open for business, you better find a…realtor, to find a tenant for you…if you do it like that and you put the realtor's sign on the shop window, then that's okay because if the realtor cannot find a tenant for you, it's not your mistake".

   Mr. Chung said that in those circumstances the strata council would not fine the owners for not being open for business: "I think the council member should have the right to do something if the people come to talk to them [and] the reason is acceptable, then the council member, we accept it, and we negotiate with them." On cross-examination, Mr. Chung stated that if they use a real estate agent and place a real estate sign in their window but cannot rent out their unit within 90 days, they would not be fined. When asked how long they would be exempted from fine, Mr. Chung said "as long as they can't find a tenant…we haven't mentioned how long they…could put a sign there."

2. Owners who posted contact information in the window were exempted from fines provided the strata council was satisfied that their work took them outside of their units.

   Mr. Chung testified that owners who are not open for business receive violation notices and, if they say that they are doing business, they are required to attend the council meeting to explain their reason. He stated that: "Actually most of them really are doing business. I can't say a hundred per cent of them. But they are not doing business inside the Pacific Plaza Mall." He used the example of someone who went outside of the mall to repair a large printer. The thrust of his evidence was that if the reason was acceptable to the council, they would be asked to put a sign with contact information in the window of the unit and they would not be fined. Mr. Chung testified that

the strata council trusted that the unit owners who told them that those who posted contact information in the window were really conducting business outside their units and were, in fact, open for business.

3. Owners who allowed their units to be used for display purposes were not fined.

   Mr. Chung also confirmed in direct examination that owners would not be fined if they allowed their strata units to be assigned to the Strata Corporation to be used for promotion of the mall.

4. Owners who abandoned their units were also exempted from fines.

   Mr. Chung gave evidence that certain owners who abandoned their units and could not be located were not fined.

[249] While I accept that Mr. Chung and the members of strata council were trying to be responsive to financial and operational circumstances facing strata unit owners and I do not accept that Mr. Chung was acting in bad faith or for an improper purpose as the defendants suggest, the effect of the plaintiff's decisions to exempt certain owners from being fined was to give them a preference that was not available to others.

[250] There was no general notice to owners that they could be exempted from fines, which would otherwise be assessed for not being open for business, in the described circumstances. The references to exemptions were the relatively cursory notes in the strata council minutes regarding the results of individual appeals from the notices of bylaw violations for not being open for business.

[251] For example, the minutes of the July 25, 2003 meeting of the strata council to which I was directed by the plaintiff in response to a question as to how owners were notified as to available exemptions from the open for business bylaw, recorded the directions of the strata council to various owners who had received violation notices for not being open for business. The minutes reflect the direction that the owners or

tenants could place a sign with the name of the business, nature of the business, and contact information to be installed in the window at eye level to "let customers know" the "shop is operated" or to make it "look like an office". The owners were told to "contact the Mall Manager for the sign layout and dimensions."

[252] It is not apparent from the minutes whether there was any inquiry by the strata council as to how often or how long the owners or tenants would be away from their strata units on business or whether the units were being used as represented by the owners. There is no indication of any criteria having been established or applied by the council to those appealing the violation notices from the obligation to be open for business, except for the requirement to place a notice in the window. In my view, the minutes in relation to individual appeals do not constitute adequate notice to other owners that an exemption is generally available or the basis upon which an appeal would be considered.

[253] I note that there was a reference in the July 24, 2003 minutes which was of a more general nature. It referred to owners who are not able to open their stores and who want to avoid paying a fine being able to "assign their units to LMS 3259 but they will still be responsible for their maintenance fees as well as property taxes". Mr. Chung's evidence was that this arrangement allowed the Strata Corporation to use their units for display purposes to attract business. However, this purpose was not reflected in the minutes or in the evidence of the form of assignment which was subsequently created by the plaintiff. In my view, the justification for allowing certain businesses to be exempt if they assign their units to the strata council, while there may well have been a legitimate business rationale for doing so, had the effect of diluting the open for business bylaw and granting a preference to owners who were prepared to assign their units. This created a significant unfairness to the defendants who continued to be fined by the plaintiff for not being open for business.

[254] The unfairness of the approach of the strata council is also evident from Mr. Chung's evidence in relation to owners being exempt from fines for not being open for business if they place "for sale" signs in the windows of their units. While the

bylaw allowed owners 90 days not to be open for business after a resale or loss of tenancy, the consequence of the strata council's decisions not to fine owners who posted "for sale" signs was to eliminate any obligation on an owner to be open for business once the sign was in place. According to Mr. Chung, there was no limit on this arrangement since, if a realtor could not find a new buyer or tenant, this meant that it was not the fault of the owner and there should be no basis for a fine.

[255] The unfairness in the approach of the strata council exempting certain unit owners from the open for business bylaw is further evident in Mr. Lai's evidence. Mr. Lai acknowledged, in response to photographs of units shown to him by Mr. Lam, that various businesses were not open for business for extended periods but had not been issued bylaw violation notices or fined. Even though he was a mall manager responsible for bylaw enforcement, he was unable to explain why the owners of these units were not issued violation notices or fined. He said he relied on information (i.e. the "fine list") which he had received from the previous mall manager, Sunny Cheng, suggesting there was no independent verification by the mall management responsible for bylaw enforcement.

[256] While, as noted above, I do not accept the defendants' contention that the obligation on the strata council to enforce the bylaws in s. 26 of the *SPA* meant that a council had no discretion from strict enforcement, a strata council's discretion in determining appeals is limited and must be measured against the reasonable expectation of all owners that bylaws will be consistently enforced.

[257] I find that the exemptions allowed by the strata council exceeded the discretion that the plaintiff had in respect of the enforcement of bylaws. I note that relatively few owners were fined and that the defendants and the developer owned units incurred the bulk of the fines. In contrast, the exemptions granted to other owners were excessively broad, ill-defined, and were inconsistent with the purpose of the bylaw.

[258] Accordingly, I conclude that that the actions of plaintiff in exempting certain owners from being open for business while fining other owners in the circumstances

outlined above, violated the reasonable expectation of the defendants that the bylaws would be consistently enforced and were, therefore, significantly unfair to the defendants. I consider that the defendants are entitled to a remedy under s. 164 of the *SPA*. That said, the failure of the defendants to appeal their bylaw violation notices to the strata council when they were given the opportunity to do so is a factor which weighs heavily against the defendants.

[259] I, therefore, restrict the remedy to a proportionate amount of the $108,000 (the amount of fines assessed against the defendants' units as per the October 22, 2008 Consent Order) that represents the fines imposed for not being open for business, less $15,000 to account for the defendants' failure to request a hearing with the strata council when they had ample opportunities to do so. In that regard I accept that $83,114 was the total amount of fines levied against the defendants for not being open for business and $44,600 was the total amount of fines for the signage violations, prior to the Consent Order.

4. Did the plaintiff breach its fiduciary duty to the defendants?

[260] The defendants claim that the plaintiff breached its fiduciary duty to the defendants. The defendants' claim is founded on the alleged wrongful actions of the strata council members and is premised on the Strata Corporation being vicariously liable for the council members' breach of their fiduciary duties.

[261] Section 31 to 33 of the *SPA* provides that:

> **Council member's standard of care**
>
> **31** In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.
>
> **Disclosure of conflict of interest**
>
> **32** A council member who has a direct or indirect interest in
>
> (a) a contract or transaction with the strata corporation, or

> (b) a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member,
>
> must
>
> (c) disclose fully and promptly to the council the nature and extent of the interest,
>
> (d) abstain from voting on the contract, transaction or matter, and
>
> (e) leave the council meeting
>
> (i) while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and
>
> (ii) while the council votes on the contract, transaction or matter.
>
> **Accountability**
>
> **33** (1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 vote at an annual or special general meeting.
>
> (2) For the purposes of the 3/4 vote referred to in subsection (1), a person who has an interest in the contract or transaction is not an eligible voter.
>
> (3) If, on application under subsection (1), the court finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into, the court may do one or more of the following:
>
> (a) set aside the contract or transaction if no significant injustice will be caused to third parties;
>
> (b) if the council member has not acted honestly and in good faith, require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;
>
> (c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

[262] The leading authority on the duties and obligations of strata council members is the decision of the Court of Appeal in *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183. The Court described the fiduciary obligation on strata council members at paras. 51 to 54:

> **51** I agree with the chambers judge that in acting as they did, the appellants failed to comply with s. 32, and failed to carry out both their statutory fiduciary duty, under s. 31(a), and their statutory duty of care, under s. 31(b).
>
> **52** In *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, Major and Deschamps JJ., for the Court, discussed the content of the statutory duties found in s. 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, which are identical in wording to s. 31 of the *Act*, except for the reference to the "strata corporation", instead of "corporation", in s. 31(a).
>
> **53** The Supreme Court described (at para. 35), the statutory fiduciary duty, "to act honestly and in good faith with a view to the best interests of the corporation":
>
> > The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-á-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly, and loyally: see K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999) at p. 715.
> >
> > [Underlining in the original.]
>
> **54** The Supreme Court acknowledged (at para. 39) that the statutory fiduciary duty does not require that directors and officers in all cases avoid personal gain as a direct result of their honest and good faith management of the corporation. As argued by the appellants in this case, "[i]n many cases, the interest of directors and officers will innocently and genuinely coincide with those of the corporation". The central focus of the statutory fiduciary duty is the "subjective motivation" of the director or officer (para. 63). Evidence of "fraud or dishonesty" (para. 40) or of "a personal interest or improper purpose" (para. 41) is relevant to the determination of whether the statutory fiduciary duty has been breached.

[263] In the instant case the claims against the strata council members personally were dismissed by Madam Justice Prowse on the basis that owners cannot bring claims on behalf of themselves against strata council members. The claims which were allowed to proceed were claims that the strata council members personally benefitted from actions as a result of a breach by the strata council members of their duties and obligation to the strata corporation; *Extra Gift Exchange Inc. et al. v. Ernest & Twins Ventures (PP) Ltd. et al*, 2007 BCSC 426 at paras. 149 to 152.

[264] I note that Madam Justice Fenlon, as she then was, in *Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.* (October 21, 2013), Vancouver L031802 (S.C.), subsequently dismissed the remaining claim against the strata councillors which had been set out in paragraphs 8 to 10 of the counterclaim.

[265] The strata council members are not a party to this action. While the defendants seek to hold the plaintiff vicariously liable for the actions of the strata council, even if I were persuaded that the strata council members acted in a breach of their fiduciary duty as set out in s. 31 of the *SPA*, it is not clear that the Strata Corporation can be held vicariously liable for the actions of strata council members.

[266] Mr. Justice Jenkins in *Wong v. AA Property Management Ltd.,* 2013 BCSC 1551, noted that the right of owners to commence actions against council members is limited to s. 33 of the *SPA*. After referring to the Court of Appeal's discussion of s. 33 of the *SPA* in *Dockside Brewing*, Mr. Justice Jenkins said this:

> [33] The Court of Appeal did not provide any additional rights upon owners to commence and maintain an action in this court against current or former council members other than set out in the above paragraph.

[267] Further, I note that where there has been a breach of fiduciary duty by strata council members found, as in *Dockside Brewing,* the remedy would generally be for the strata council members to compensate the strata corporation, not individual owners. That is because the duties of strata council members are owed to the strata corporation and not to individual strata unit owners. Accordingly, in my view, the suggestion by the defendants that the Strata Corporation should be held vicariously liable for a breach of fiduciary duty by strata council members is not well founded.

[268] In any event, I am unable to conclude on the evidence before me that the strata councillors had a conflict of interest or otherwise breached their fiduciary duty to the defendants. While I have found that the strata council acted in an unfair manner in administering the bylaws, I conclude that they did so with the intention of ameliorating the financial situation of owners who were seeking relief from the difficult circumstances in which they found themselves. I found no evidence to support the defendants' contention that the strata council members derived any

personal financial benefit from voting in support of the impugned bylaws, using proxies obtained from owners, exempting owners from fines, or levying fines against the defendants. I reject the defendants' contention that the strata council members conspired with the developer for their personal financial benefit.

Summary

[269] In summary, I make the following orders:

1. The plaintiff is entitled to judgment in the amount of $17,467.74 plus interest for removal and storage costs incurred in relation to defendants' contravention of the bylaws for leaving furniture and other items in front of their units.

2. The plaintiff is entitled to judgment in relation to the defendants' violation of the signage bylaw, based on a proportionate share of the $108,000 attributable to signage, which I calculate at $37,716, plus interest.

3. The defendants are entitled to a remedy in relation to the plaintiff's significantly unfair action in fining the defendants for not being open for business while exempting other strata owners from fines. The amount of the remedy is restricted to a proportionate share of the $108,000, which is attributable to fines for not being open for business, which I calculate at $70,284, less $15,000 for their failure to request a hearing in relation to the violation notices, for a total of $55,284, plus interest.

[270] The parties may make submissions in respect of costs, if they are unable to agree.

"Madam Justice Harris"