

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VIS4686 v. Craig*,
2016 BCSC 90

Date: 20160122
Docket: VI 14-0853
Registry: Victoria

Re: **Strata Plan VIS4686**

In the matter of amending the Bylaws of Strata VIS4686
pursuant to the *Strata Property Act*, S.B.C. 1998, c 43
and the Owners, Strata Plan VIS4686

Between:

The Owners, Strata Plan VIS4686

Petitioners

And:

**Yvette Craig, Robert Garry, Nova Pacific Care Homes
Limited Partnership, and Alison Investments Ltd.**

Respondents

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the Petitioners:

M. Abraham

Counsel for the Respondents,
Nova Pacific Care Homes Limited
Partnership, and Alison Investments Ltd.:

C. G. White

Counsel for the Respondent
Robert Garry:

D. Juteau

Respondent, Yvette Craig

Appearing in Person

Place and Date of Hearing:

Victoria, B.C.
March 3 - 4, 2015

Place and Date of Judgment:

Victoria, B.C.
January 22, 2016

INTRODUCTION

[1] The petitioner, the Owners, Strata Plan VIS4686 (the “Strata”) seeks a declaration under s. 171(1)(a) of the *Strata Property Act*, S.B.C. 1998, c. 43, that its Bylaw 116(i) relating to the provision of support services to all of its members is valid and enforceable.

[2] Nova Pacific Care Homes Limited Partnership (“Nova Homes”) and its affiliate, Alison Investments Ltd. (“Alison Investments”) collectively own a majority of the Strata’s lots. Although they are respondents to this petition, both endorse and support the relief being sought by the Strata.

[3] Yvette Craig is a retired business woman and Rob Garry is a realtor. Each own one strata lot. Ms. Craig acquired her interest in her strata lot in November 2010, as a joint tenant with her mother. When Ms. Craig’s mother died in July 2013, her half interest in the property passed to Ms. Craig by right of survivorship. Mr. Garry purchased his strata lot in September 2013 from Ms. Dianne Dares. Ms. Dares’ parent had been the strata lot’s original owners, having purchased it from the developer in 1998.

[4] Ms. Craig and Mr. Garry are the only two members of the Strata who are opposed to the petition. They argue that the Strata does not have the ability or legal authority to compel owners to pay for support services they do not need, want or use.

[5] For the sake of clarity and ease of reference I will refer to Ms. Craig and Mr. Garry collectively as the “Respondents”.

BACKGROUND FACTS

[6] Strata Plan VIS4686 is a four-level condominium building known as the “Camelot”. Located in the James Bay neighborhood of Victoria, the Camelot was developed in the 1990s as a supportive living residence for senior citizens. It comprises 35 strata lots: 34 residential lots and one commercial lot (the “Commercial

Lot”). The Camelot is not an assisted living residence as that term is defined in section 1 of the *Community Care and Assisted Living Act*, SBC 2002, c. 75.

[7] Together, Nova Homes and Alison Investments own 22 of the Camelot’s residential lots as well as the Commercial Lot. The remaining 12 residential lots are owned by private individuals.

[8] From the outset, the developer’s intention was to establish the Camelot as a for-profit “Care-a-Minium” (an obvious play on the word “condominium”). That is, the Strata would contract with a third party to provide defined support services to all of the Camelot’s residents. The Strata would pay that third party for the services and then allocate the expense to all of the residential strata lot owners as an additional fee beyond their regular strata fees.

[9] In December 1997, the developer filed a disclosure statement with the Superintendent of Real Estate, which listed and explained the key details of the Camelot. The most recent amended disclosure statement, dated 24 December 1999, explains some of these features as follows:

- a) The Strata is required to retain a company to provide support services to all occupants of the residential strata lots.
- b) The provision of the support services is mandatory and all owners are required to pay a share of the expenses the Strata incurs for those services.
- c) The Commercial Lot, owned by the developer, would be used as a large social centre and leased to a non-arm’s length company that would be retained under contract to supply the required support services. The Commercial Lot would consist of:
 - i. a lounge
 - ii. a dining room
 - iii. a commercial kitchen

- iv. a washroom
 - v. a patio / deck off the dining room
 - vi. a guest suite and washroom
 - vii. an office
 - viii. commercial laundry facilities
 - ix. a janitor's room on each floor of the building
 - x. a parking space
 - xi. a supply room in the underground parking lot
- d) The proposed operating budget for the Camelot included an allocation for monthly support services fees that was distinct from the identified monthly allocations for strata fees. The support service fee was to be the same amount for each residential strata lot.
- e) Pursuant to s. 219 of the *Land Title Act*, a restrictive covenant in favour of the City of Victoria would be registered against title to all 34 residential strata lots restricting occupancy to tenants 55 years of age or older. The covenant also provided that "the multiple dwelling use of the land shall be augmented at all times by the provision within the building containing that use, by or through the strata corporation, of basic support services" (the "Restrictive Covenant").

[10] Attached as an exhibit to Camelot's disclosure statement, for all potential strata lot purchasers to see, is a draft contract between the developer and an unnamed support services company. Also attached as an exhibit is a draft agreement to be signed by a strata lot purchaser. This agreement confirms that the purchaser is aware that the Strata must retain a support services provider and agrees to pay a share of the expenses associated with those services. Neither Ms. Craig nor Mr. Garry signed such an agreement when they purchased their strata lots; however the owners from whom they purchased their lots had.

[11] In March 1998, the City of Victoria issued the developer a building permit and construction of the Camelot started soon thereafter.

[12] In October 1998, prior to the sale of any strata lots, the Strata amended its bylaws to add Bylaw 116(i). That bylaw provides as follows:

The Strata Corporation shall:

- (i) at all times retain the services of a support services company who shall provide to the Owners at least those services set out in Schedule “A” attached hereto.

[13] Schedule “A” to Bylaw 116(i) includes a draft support services contract between the Strata and the contemplated support service company (the “Support Services Contract”). According to that agreement, the support services to be provided to all of the residents of the Camelot included:

- a) 24 hour on-site staffing by qualified personnel who are certified in First Aid and CPR;
- b) one nutritious meal per day served in the Social Centre;
- c) light housekeeping services to each Strata Lot once a week. Such services shall include the minimum of dusting and vacuuming;
- d) weekly heavy laundry services (linens and towels) for owners;
- e) monitoring the well-being of all owners in an informal, regular, and supportive way and maintain up-to-date personal records that will enable the management company to respond to medical emergencies;
- f) recommending resources in the community to owners and their families;
- h) organizing, in conjunction with the Strata Council, such social activities as are wanted by the owners;
- i) developing and supporting in conjunction with the Strata Council, a sense of community within the building;
- j) overseeing and monitoring the use of the Emergency Response System and acting as the first alternate contact with outside agency.

[14] These support services incorporate the same “basic support services” referenced in the Restrictive Covenant.

[15] At the same time Bylaw 116(i) was enacted, the Strata also enacted Bylaw 131(3)(b), which provides as follows:

No person shall own or occupy a residential strata lot unless the Owner pays to the strata corporation the amount required to be paid by the strata

corporation to the support services company for the provision of personal the services [*sic*] referred to in section 116(i).

[16] In the result, the Strata was obliged to retain a support services company to provide meals, housekeeping, laundry, and 24 hour onsite staffing for the benefit of the residential strata lot owners. Additionally, no person could own or occupy a strata lot unless its owner paid for these support services.

[17] On 2 December 1998 the City of Victoria issued an occupancy / completion permit for the Camelot.

[18] There was a delay registering the Restrictive Covenant and during this period of time, a number of strata lots were sold, including those that Ms. Craig and Mr. Garry now own. In April of 1999 the covenant was registered.

[19] Birch Care Services Inc. ("Birch Care"), a non-arm's length company related to the developer, entered into a Support Services Contract with the Strata and became the first entity retained to provide support services for the residents of the Camelot. The Support Services Contract was for a period of 10 years, with the parties negotiating and agreeing upon the annual cost of the services.

[20] Birch Care also became the Camelot's property manager. In this capacity, it began invoicing the residential strata lot owners for fees payable to the Strata. The strata fees and the support services fees that Birch Care collected were invoiced separately.

[21] By 2001, a number of strata lots at the Camelot remained unsold. Nova Pacific purchased those lots from the developer. Concurrent with this, Nova Pacific Care Ltd. ("Nova Care"), a company affiliated with Nova Homes, purchased all of Birch Care's assets. As a result, Nova Care became the Camelot's support services provider and property manager. As Birch Care had done in prior years, Nova Care continued collecting strata fees and support services fees directly from each strata lot owner.

[22] Concerns about increases to the support service fees began to emerge around 2003. The general awareness of the residents and owners of the Camelot with respect to these fees is recorded in the minutes from what have been called “coffee meetings”. These are regular meetings of strata lot owners, above and beyond Strata Council meetings, Special General Meetings and Annual General Meetings. Generally, a representative from Birch Care and then Nova Care was present at these coffee meetings and participated in the discussions. For example, the minutes of the coffee meeting held on 8 June 2004 include the following:

Guest Jim Norman from Nova Pacific Care talking about Service Fees -

Bill Rozel introduced Jim Norman. Jim spoke on the background of Nova Pacific Care and the need for increases. He explained that the company is a member of the BC Retirement Association and that he had a letter from them quoting some of the average prices and that we were well below them in service fees. Typically the other places were \$1150 - \$1200 per month in service fees as we were \$905... Some wanted to know what portion of the Service Fee were meals, housekeeping, etc. Jim explained that it was hard to break it down individually, per person. Jim explained that service fees consisted of staffing, eve meals, cleaning, lifeline, maintenance, security and upkeep of the building not covered by strata. Jim also explained the roles of the shareholders, who they are and how the companies work.

...Jim then answered questions from the Residents. One Resident wanted to know if we could expect increases every year. Jim said yes but each year it would have to be reviewed as to how much due to cost of living and increases in expenses. Jim let everyone know that they could come the office to see the letter & budget that was presented to Strata Council... [Emphasis in original]

[23] The issue of increasing support service fees continued to be a topic of discussion at coffee meetings. The minutes from a meeting held 14 June 2005, record the following:

Guest speaker is Jim Norman General Manager for Nova Pacific Care. Jim opened the discussion by introducing himself and then opened the floor to questions.

...

Service Fee Increase 6% History & Presentation Jim stated that Nova Pacific Care Inc. has a 10 year contract with Strata and in that contract is a clause which allows for an annual strata service fee increases. He went over some of the history of how NPC had bought 4 residences from Birch Care Services Ltd. Birch Care Services Ltd. had gone bankrupt and half of the buildings were empty and losing money.

When the new owners took over, the service fees were much lower than the industry average. In order to fall in line with the industry average for services the new owners wanted to increase the service fees by 25%. However, they realized that this was such a significant amount and felt that it would be too much all at once. [Emphasis in original]

[24] The minutes of the 15 July 2008 coffee meeting indicate:

Jim [Norman] spoke on behalf of Nova Pacific Care regarding the need for Service Fee increases. Jim read a letter that was presented to Strata Council regarding the proposed increase...A general discussion was held and Jim noted that if the increase became a financial concern to an individual then they only need to call Jim to make alternative arrangements.

[25] At its 15 July 2008 meeting, the Strata Council approved the renewal of the Strata's Support Services Contract with Nova Care for a further 10 years, effective 1 August 2008.

[26] The rising cost of the support services has continued to be a concern for some of the owners and residents of the Camelot. Up until 2012, increases to these expenses were approved by the Strata Council. That is, they were not presented and approved at the Strata's Annual General Meetings. The minutes of a coffee meeting held on 24 July 2012 confirm that commencing that year, support service fee increases would be voted on by all owners at Annual General Meetings.

[27] Pursuant to its Support Services Contract, Nova Care bills the Strata for the services it provides to the Camelot's residents. Instead of allocating the support services fees according to unit entitlement pursuant to the *Strata Property Act*, the Strata has been allocating them to each residential strata lot owner on a flat-fee basis, dependent upon the number of residents in each unit. When the Camelot was first built, the support services fee allocated to each strata lot was \$810.00 per month. Due to annual increases over the years, the current amount for each owner of a residential strata lot is \$1,466.80 per month.

[28] Ms. Craig is critical of the yearly support services fee increases. She describes them as simply being announced each year, without the strata lot owners having an opportunity to investigate them. She says the elderly members of the Strata Council made no attempts to question these increases on behalf of the owners who

were required to pay them. She also complains that the support service fees collected by the Strata were not included and published in its annual budgets until 2013.

[29] According to Mr. Garry, the Camelot has been run for many years as though it was owned by Nova Homes and its affiliates. In making this assertion, he points to the fact that Mr. Norman Jones, the owner of Nova Homes and Alison Investments, ostensibly controls a majority of the voting shares of the Strata and was granted membership on the Strata Council in 2002.

[30] Since 2012, increases to the support service fee have been presented, discussed and approved by the owners at the Strata’s Annual General Meetings. Evidently, however, this change in process did not resolve matters. With respect to the circumstances leading to this petition, the record discloses the following chronology:

- February 2013 Ms. Craig’s mother moved out of her condominium due to age related health issues, and Ms. Craig temporarily moved into the suite.

- 14 May 2013: The Strata received a letter from the City of Victoria indicating it had “recently received enquiries which suggest [the Camelot] may not be operating in complete compliance with the Registered Covenant”. The letter requested that the Strata provide evidence confirming that all of the residential strata lots were occupied by “Elderly Citizens” (i.e., aged 55 and over) and that all of the strata lots were “augmented, at all times, through or by the strata corporation, of “basic support services””.

- 28 May 2013 Ms. Craig, through her lawyer, gave notice to the Strata that she would not be paying the support services fee, although she would continue to pay the strata fee. Sometime thereafter Ms. Dares, the preceding owner of Mr. Garry's strata lot, informed the Strata that she also refused to continue paying the support service fee.
- Summer 2013 The Service Covenant was discovered to have been registered on a number of the strata lot titles in error. The Victoria Land Title Offices corrected the errors in due course.
- September 2013 Counsel for the Strata wrote to Ms. Craig and Ms. Dares, informing them that the Strata would be taking steps to enforce the payment of the support service fees, including possibly registering a lien against the title to their respective strata lots.
- 17 September 2013 At the Strata's 15th Annual General Meeting, a motion to increase the support service fee was approved by a majority of the owners in attendance. Another resolution requiring the support services fee to be included in the Strata's annual financial statement was passed unanimously.
- 30 September 2013 Mr. Garry purchased his strata lot from Ms. Dares.

5 December 2013

The Strata held a Special General Meeting. A resolution was passed adopting a flat-fee formula for the support services, and ratifying the past use of the flat-fee formula in lieu of a fee based on unit entitlement. There were 36 votes in favour of this resolution. Ms. Craig and Mr. Garry voted against the resolution.

[31] The original petition was filed on 4 March 2014. In it, the Strata sought an order amending its bylaws so that they would accord with the 5 December 2013 resolution regarding the flat-fee formula for support services. In its amended petition filed 22 September 2014, the Strata added a claim for a declaration that Bylaw 116.1 is valid and enforceable, and a claim for costs.

[32] The first part of the relief sought has been adjourned generally. That leaves for determination the question of Bylaw 116(i)'s validity and enforceability and costs.

Discussion

[33] The Respondents' opposition to the petition raises four issues:

- a) Does the Strata have the authority to charge support services fees?
- b) Is Bylaw 116(i) *ultra vires* the *Strata Property Act*?
- c) Are the expenses associated with the support services "common expenses"?
- d) Are the support services fees unfair and oppressive?

Does the Strata have the authority to charge support services fees?

[34] The Respondents maintain that there is no contractual obligation for either of them to pay a share of the Strata's support services expenses. In support of this

position the Respondents argue that the Support Services Contract presently in place has never been adopted or approved by all of the strata owners. Moreover, they point to the fact that they never signed a contract with Nova Care for the provision of support services and the Restrictive Covenant is not registered against their respective strata lots.

[35] Section 38 of the *Strata Property Act* authorizes strata corporations to enter into contracts that relate to its powers and duties under its bylaws and the *Act*.

[36] Although the minutes of the Strata Council's meeting on 15 July 2008 are not very detailed, I accept the petitioner's and Nova Homes' arguments that the Support Services Contract that is currently in place was approved at that meeting.

[37] In my view there is a valid and binding contract between the Strata and Nova Care. The Respondents are correct when they contend that they are not signatories to that agreement; however in my view that is of no consequence. The analogy that counsel for Nova Homes raised in his submissions is an apt one. The Strata's contracting for the provision of support services is no different than if it had retained a company to install a new roof on the Camelot. That roofing company would only have a contractual relationship with the Strata, not the individual strata lot owners. As such, it would make no sense for the company to also have separate contracts with the individual owners.

[38] Since 2012, all strata owners have been able to vote at the Strata's Annual General Meetings on proposed changes to the support service expense Nova Care charges the Strata and the fees owners are consequentially charged. In other words, they have the ability to influence the amount the Strata pays to Nova Care for the support services and the resulting fees that are passed on to them.

[39] With regard to the Restrictive Covenant not being registered on the title to the Respondents' respective strata lots, I am not persuaded this fact provides any justification for their refusal to pay support services fees. The fact that the Restrictive Covenant is registered on title to some of the Camelot's strata lots and not others, is

an anomaly but it does not determine the issue in favour of the Respondents. In my opinion, the answer lies in Bylaw 116(i) and Bylaw 131. These bylaws were filed and registered long before any of the Camelot's strata lots were sold, including those that the Respondents eventually purchased. These are the provisions that oblige the Strata to provide support services to the owners and the owners to pay for those services. I am satisfied that when the Respondents purchased their respective strata lots, they were aware of the bylaws in question and understood that there was an expectation and obligation on every owner to pay a share of the expenses that the Strata had to pay pursuant to the Support Services Contract.

[40] In my opinion, the Strata has the contractual authority and obligation to incur the support services expenses and to require all of its members to pay the resulting support services fees.

Is Bylaw 116(i) *ultra vires* the *Strata Property Act*?

[41] Mr. Garry contends that the Strata is attempting to compel him to pay for services he does not need or want. In his affidavit sworn 24 April 2014, he explains:

[25] The [Support Services Contract] attempts to require me to pay for:

- a. Emergency services that I do not need,
- b. Food services provided by a third party on property that is not my strata lot and not common property.

I believe that neither of these charges has anything to do with the control, management, maintenance or use and enjoyment of my strata lot or common property. In fact, the evidence suggests that it is placing an obligation on each individual resident.

[42] Mr. Garry's position on this issue is neatly summarized in his counsel's written submissions:

[61] Bylaw 116(i) has nothing to do with Mr. Garry's Condo, nothing to do with the common property and nothing to do with the common assets of the Strata Corporation.

[62] The Strata Corporation cannot oblige Mr. Garry to pay for the cost of another Owner's business.

[43] In addition to the arguments raised by counsel for Mr. Garry, Ms. Craig maintains that Bylaw 116(i) offends s. 121(c) of the *Strata Property Act*, in that it prohibits or restricts a residential strata lot owner's free use of their lot, including their ability sell or encumber it.

[44] Section 119(1) of the *Strata Property Act* requires that all strata corporations have bylaws. Subsection (2) sets out the general parameters of those bylaws:

(2) The bylaws may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation.

[45] Section 121 describes when a bylaw will not be enforceable:

Unenforceable bylaws

121 (1) A bylaw is not enforceable to the extent that it

(a) contravenes this Act, the regulations, the *Human Rights Code* or any other enactment or law,

(b) destroys or modifies an easement created under section 69, or

(c) prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot.

[46] In my opinion, the Strata had the statutory authority, pursuant to s. 119 of the *Strata Property Act*, to enact Bylaw 116(i). The bylaw addresses services that the residents of the Camelot can freely use as they see fit. These services, in my view, do form part of the use and enjoyment of the strata lots and common property.

[47] In *Kok v. Strata Plan LMS 463*, [1999] B.C.J. No. 921 (S.C.), a strata corporation operating as a retail shopping centre enacted a bylaw that restricted the ability of owners to change the nature of their business to one that was similar to that of another owner. The plaintiffs were owners of a strata lot who wanted to change the nature of their business. However they were prevented from doing so because of the Strata's enforcement of the bylaw. The owners petitioned the court for a declaration that the bylaw was unenforceable under s. 29 of the *Condominium Act*, R.S.B.C. 1996, c. 64 (the predecessor to s. 121 of the *Strata Property Act*). In dismissing the petition, Tysoe J. (as he then was), concluded:

[26] In my view, s. 29 was not intended to prevent bylaws, which have been enacted for some other proper purpose, from incidentally having the effect of making a strata lot less desirable to some heirs, purchasers, lessees and mortgagees. Like many other features of a strata lot, a use bylaw may make the strata lot less desirable to some persons but more desirable to other persons. This does not constitute a prohibition or restriction on the devolution, transferring, leasing or mortgaging of the strata lot because the owner is still entitled to devise, transfer, lease or mortgage the strata lot to any other person.

[48] The principles of law articulated by Tysoe J. in *Kok* are apposite to the case before me. In my opinion, Bylaw 116(i) was enacted for a legitimate and valid purpose and the fact that it may have a secondary effect of making a strata lot at the Camelot less desirable or more difficult to sell, does not mean it breaches s. 121(1)(c) of the *Strata Property Act*.

[49] In his written submissions, counsel for Nova Pacific framed the issue as follows:

[23] There is nothing in either Bylaw 116 or Bylaw 131 which restricts an owner from selling, leasing or mortgaging their unit. The services fees are an expense associated with the building which the Strata is obligated to pay and in that respect they are no different than other expenses which are incurred by the Strata and are passed onto the owners in the form of maintenance fees (i.e., landscaping costs, electrical costs, elevator costs, etc.).

[24] If a strata building has a lot of amenities such as a pool, weight room, theatre room, concierge etc., they will pay more in maintenance fees. The increased cost may make such a building less desirable to some purchasers and more desirable to others. The costs associated with such amenities are not a restriction on the sale.

[25] Similarly, the cost associated with the support services do not prohibit or restrict the right of an owner to sell, lease or mortgage their strata lot. While it may impact on the market value of their strata lot, it does not prohibit or restrict an owner from selling, leasing or mortgaging their strata lot.

[50] I accept and agree with these submissions. In my opinion the Strata had the statutory authority to enact Bylaw 116(i). Moreover I find the bylaw does not contravene s. 121 of the *Strata Property Act*.

Are the expenses associated with the support services “common expenses”?

[51] Section 91 of the *Strata Property Act* mandates that a strata corporation is responsible for its common expenses. The term “common expenses” is defined in section 1 as expenses:

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

[52] The Respondents argue the support services provided to the Camelot pursuant to the Support Services Contract are not properly charged to the owners as common expenses. They are critical of the manner in which the support services fees have been determined, managed and collected. In this regard, they point to the fact that, until recently, the fees have not been included in any of the Strata’s financial statements. They are also troubled by the fact that increases to the amount paid to Nova Care for the support services and the resulting fees charged to the owners for these expenses have not, historically, been debated and approved by all members of the Strata. The Respondents further submit that if the fees in question were truly common expenses, then they would have been collected by the Strata and not the Camelot’s property manager, Nova Care. Finally, they contend that Nova Homes’ bypassing of the Strata and payment of its support service fees for its strata lots directly to Nova Care confirms that the fees are not common expenses. According to the Respondents, for the support services fees to be common expenses, they would have to be established and managed by the Strata and authorized and assessed in accordance with the *Strata Property Act*.

[53] I do not agree with the Respondents’ description of the support services fees.

[54] The petitioner admits that the support services fees have been allocated on a flat-fee basis and not a unit entitlement basis as required by the *Strata Property Act*. The petitioner maintains that notwithstanding this apparent deficiency, the nature and character of the fees as legitimate common expenses remain unchanged. I agree.

[55] In my opinion, the support services the Strata provides to all of the Camelot's residents form an essential and integral part of its distinctive nature as a supportive living "Care-a-Minium" residence for senior citizens. The services are an amenity that has been a part of life at the Camelot since its inception. I agree with the submission of Nova Homes that while the provision of the support services in question may not be a feature of many other condominium communities, conceptually it is comparable to other types of common amenities or services typically found in residential strata buildings such as gyms, pools and guest suites.

[56] In support of its contention that the support services expenses are common expenses, the Petitioners rely upon *Mancuso v. York Condominium Corp. No. 216*, [2008] O.J. No. 1737 (ONSC). In *Mancuso*, a strata corporation had entered into a bulk contract for cable television services and had for a number of years, allocated the cost of those services to all of its members as a common expense.

Ms. Mancuso, a non-resident owner of a strata lot eventually objected to being charged for these services, arguing they were not common expenses.

[57] The issue before the court was whether the strata corporation had the authority to allocate the cable television expenses as common expenses to all of its strata lot owners.

[58] Strathy J. (as he then was) began his examination of the issue by addressing what constitutes a "common expense" under Ontario's *Condominium Act*, R.S.O. 1970, c. 77, explaining at paras. 18 to 20:

[18] Section 1(1) of the *Act* defines "common expenses" as "the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration." If the cable TV charges are properly recoverable as "common expenses" they must relate to the performance of the objects and duties of the Corporation or they must be specified as common expenses in the *Act* or the declaration.

[19] As Lane, J. pointed out in *York Condominium Corporation No. 482 v. Christiansen et al.* (2003), 64 O.R. (3d) 65 (S.C.J.), at para. 5, the "common expenses fund is the central financial mechanism of the corporation and the duty of contributing to it is the central mechanism to achieve financial fairness among the owners. If one owner fails to pay, the others must bear his burden; the expenses are not optional and they do not just go away."

[20] Notwithstanding the importance of common expenses, I do not accept the submission of counsel for the Corporation that "whenever the condominium corporation pays, the unit owners pay." The unit owner's obligation is to pay *proper* common expenses. If the Corporation enters into a contract that is not authorized by the *Act*, the declaration or the by-laws, the owner is well within her rights to refuse to pay. On the other hand, it is well-established that unit owners are required to pay for proper common expenses, regardless of whether or not they make use of or want a particular facility or service. The common expenses are not optional: *York Condominium Corporation No. 483 v. Christiansen et al., supra*.

[59] While the services in question fell outside of the statutory objects and duties of a strata corporation (paras. 27 and 30), Strathy J. concluded the expenses were common expenses on account of the strata corporation's own bylaws:

[33] The by-laws of the Corporation give it the standard corporate authority to enter into contracts and By-law No. 7 provides that its duties are *not limited* to the operation and maintenance of the common elements and the supply of utilities to the units. I am satisfied that the duties of the Corporation under By-law No. 7 can reasonably include entering into contracts for the supply of services, such as cable TV or internet, to the unit owners. While these services are not "utilities", they are sufficiently similar to utilities, in this day and age, that in my view they fall reasonably within the duties of the Corporation.

[60] I find the *Mancuso* case is helpful in determining the present dispute. Like the strata corporation in *Mancuso*, the petitioner before me has enacted a valid bylaw (i.e., Bylaw 116(i)). Pursuant to this bylaw, the Strata must provide support services to the residents of the Camelot. In my opinion those support services are necessary to meet a specific obligation of the Strata set out in the bylaw and therefore the cost associated with those services fall within definition of "common expenses" found in s. 1(b) of the *Strata Property Act*.

Are the Support Services Fees unfair and oppressive?

[61] The Respondents contend that the support services fees created by Bylaw 116(i) are unfair and oppressive. In making this argument they maintain that Nova Homes and Alison Investments are in a conflict of interest given they own the majority of the Camelot's strata lots, including the Commercial Lot, and can control and determine how much the Strata will pay Nova Care for the support services it provides.

[62] Ms. Craig protests against the mandatory nature of the annually increasing support services fees and of the impact they are having on the elderly, fixed income residents of the Camelot. She also complains about the effect the fees are having on her ability to sell her strata lot. Mr. Garry is critical of the Strata's use of the Commercial Lot and the fact that its owner (i.e., Nova Homes / Alison Investments) pays no support services fee. As I have previously noted, Mr. Garry is also troubled by the fact that Nova Homes has, in the past, paid its support services fees directly to its affiliate Nova Care, bypassing the Strata.

[63] Finally, the Respondents are jointly critical of the fact that the support services fees have been allocated and collected in a manner that is not consistent with the *Strata Property Act*.

[64] Many of the concerns the Respondents have raised are genuine; however I am not persuaded they equate to unfair or oppressive behavior on the part of the Strata.

[65] Both Respondents were aware of the distinct "Care-a-Minium" nature of the Camelot community when they purchased their respective strata lots. This included the Strata's obligation to provide support services to its tenants and the reciprocal obligation of the residential strata lot owners to share the expense of those services. They were also aware of the manner in which the fees were allocated. While the Respondents are correct when they argue the Strata did not collect those fees in the manner required by the *Strata Property Act*, the fact of the matter is the flat-fee formula the Strata has used and wishes to continue using in the future has resulted in the Respondents paying less than they would have had the provisions of the *Strata Property Act* been adhered to.

[66] If the Respondents believe the Strata is treating them unjustly or is acting improperly, then they can seek relief under the *Strata Property Act* (e.g., ss. 164 or 174). As far as I am aware, they have not done so.

[67] To address the alleged conflict of interest, one must return to the Camelot's beginnings. The non-arm's length relationship between the original developer and the support service provider was made known from the outset in the Camelot's

disclosure statements. When Nova Homes and Nova Care arrived on the scene, nothing changed. While it is true that a representative of Nova Homes and Alison Investments has attended at many Strata meetings, including coffee meetings and has often participated in the discussions, at the 2013 Annual General Meeting, a motion to increase the support services fees was passed, with Nova Homes and Alison Investments abstaining from the vote.

[68] Counsel for Nova Homes is, in my view, correct that any strata lot owner who feels the support services fees have not been properly adopted or approved because of a conflict of interest, can formally advise the Strata of this objection and seek redress under *Strata Property Act*.

[69] In any event, I fail to see how the alleged conflict of interest could undermine the validity or enforceability of Bylaw 116(i).

[70] I have not been persuaded, on the evidence before me, that Bylaw 116(i) or the support services fees are unfair or oppressive.

Conclusion

[71] From its inception, the Camelot was designed and marketed to be more than just a condominium complex. It was to be a supportive living residence for older members of the community. The fact that the Strata was obliged to provide support services to its members and that in return the members would have to pay for these services, above and beyond their regular strata fees, is clear in all of the documentation relating to the Camelot. In the case of Ms. Craig and Mr. Garry, I am satisfied they were aware of this distinct facet of the Camelot when they acquired their respective strata lots.

[72] In my opinion, the Strata had the capacity and authority to enact Bylaw 116(i) and to enter into a contract for the provision of support services to its members. The bylaw is not *ultra vires* the *Strata Property Act*, notwithstanding the irregularities relating to the determination, management and collection of the support services fees. Moreover and in any event, I find the irregularities do not alter the fundamental nature of the expenses in question. In my view, they are “common expense” as that

term is used in *Strata Property Act*. Finally, I reject the Respondents' contention that the support services fees are oppressive and unfair. The fact of the matter is a strong majority of the individual owners (i.e., 10 of the 12) support the status quo and the position of the Petitioners. I have taken that to mean these senior citizens who call the Camelot home, want and expect the Strata to continue providing them with the support services they have grown accustomed to, and they are prepared to continue paying for these common expenses.

Order

[73] In the result, the relief sought by the Petitioners is granted. There will be a declaration that Bylaw 116(i) is valid and enforceable.

[74] If necessary, counsel may arrange to speak to the issue of costs or any other ancillary matter on which they cannot agree.

“G.R.J. Gaul J.”