COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.,* 2017 BCCA 346

Date: 20171012
Docket: CA43444

Between:

The Owners, Strata Plan LMS 3259

Respondent
(Plaintiff)

And

Sze Hang Holding Inc. and Leon Lam

Appellants
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Savage

On appeal from: Orders of the Supreme Court of British Columbia, dated January 12, 2016, February 17, 2016 and October 3, 2016 (*The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32, 2016 BCSC 246 and 2016 BCSC 1808, Vancouver Registry Docket L050030).

Appearing on behalf of Appellant, Sze Hang Holding Inc.:	L. Lee
The Appellant, Leon Lam:	Appearing In Person
Counsel for the Respondent:	P. Mendes J.M. Chatten
Place and Date of Hearing:	Vancouver, British Columbia June 9, 2017
Place and Date of Judgment:	Vancouver, British Columbia October 12, 2017

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Savage

Summary:

The Strata Corporation sued two strata unit owners to recover unpaid fines levied for bylaw violations. The owners counterclaimed alleging the Strata Corporation's actions were significantly unfair. At trial, the Strata Corporation was awarded judgment for a number of unpaid fines. However, the owners were granted partial relief to remedy the Strata Corporation's significantly unfair actions in pursuing certain fines. Post trial, the judge awarded the Strata Corporation special costs for 10 trial days, special costs for events before May 2009, and the balance of its costs on a party and party basis. The owners were entitled to 70% of their costs for the partial success of the unfairness issue in their counterclaim.

The owners appeal the awards made against them and the costs award. The Strata Corporation appeals the finding that its actions were significantly unfair. Held: appeal and cross appeal dismissed; costs appeal allowed in part. The trial judge's findings of fact were supported by the evidence and should not be disturbed. On the issue of costs, the trial judge made no error in awarding special costs for 10 trial days. There was no basis, however, to award special costs prior to May 2009, as there was no evidence before the trial judge about that time period. As for the balance of the costs award, neither party was substantially successful in their claim and therefore the trial judge ought to have ordered that each party pay their own costs.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] The respondent, The Owners, Strata Plan LMS 3259 (the "Strata Corporation"), together with the owners of the strata units, operates the Pacific Plaza Shopping Centre. 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 appellants, Sze Hang Holding Inc. (the "Company") and Leon Lam (collectively, "the Owners"), owned two strata lots in Pacific Plaza: unit #1010 and unit #1380. The units were purchased on April 19 and August 28, 2000, respectively. Ms. Lee is the principal of the Company. The Company owned unit #1380 and 99% of unit #1010. Mr. Lam purchased a 1% interest in unit #1010 in 2002.

[3] From July 2003 through to December 2007, the Strata Corporation fined the Owners $127,714 for breaches of the strata's open for business bylaw and sign bylaw. The fines for violating the open for business bylaw totaled $83,114 while the signage violations totaled $44,600. By way of consent order dated October 22, 2009, which arose in circumstances which will be further described below, the parties reduced the fine claim to $108,000. The open for business fines were reduced on a proportionate basis to $70,284 while the sign violation fines were reduced to $37,716.

[4] After a 26-day trial, in reasons indexed at 2016 BCSC 32 (the "Trial Reasons"), the trial judge:

(1) awarded the Strata Corporation $17,467.74, plus interest, for removal and storage costs incurred in relation to the Owners' contravention of the bylaws for leaving furniture and other items in front of their units;

(2) awarded the Strata Corporation $37,716.00, plus interest, in relation to the Owners' violation of the signage bylaw, based on a proportionate share of the $108,000.00; and

(3) ordered the Strata Corporation to pay the Owners $55,284.00, plus interest, as a remedy for the Strata Corporation's significantly unfair actions in fining the Owners for not being open for business while exempting other strata owners from fines. The amount was calculated as a proportionate share of the $108,000.00 which was attributable to fines for not being open for business, less $15,000.00 for the Owners' failure to request a hearing.

[5] In separate reasons indexed at 2016 BCSC 1808 (the "Costs Reasons") the trial judge awarded the Strata Corporation special costs for 10 days of trial, special costs for matters occurring prior to May 24, 2009, together with the balance of its costs on a party and party basis. She awarded the Owners 70% of the costs of their counterclaim and directed that costs should be set off between the parties.

[6] The Owners appeal the awards made against them while the Strata Corporation by cross appeal challenges the order that it must return certain monies to the Owners. The Owners also appeal the costs award.

[7] For the reasons that follow I would dismiss the appeal and cross appeal. I would allow a portion of the costs appeal.

BACKGROUND

A. Procedural History

[8] Litigation between the parties has been ongoing since 2001 and has involved multiple actions. Madam Justice Garson summarized the history of the various actions in *Extra Gift Exchange Inc. v. The Owners, Strata Plan LMS3259*, 2014 BCCA 228 at paras. 12–31. As the trial judge noted, 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 resulted from a conspiracy between the Strata Corporation and the developer of Pacific Plaza.

[9] The Strata Corporation commenced this action in Provincial Court in February 2004 to recover fines and costs owing for alleged contravention of the strata's bylaws. The action was transferred to the Supreme Court in January 2005.

[10] On April 7, 2009, the then case management judge in reasons indexed at 2009 BCSC 473 (the "Pleadings Decision"), on application of the Strata Corporation brought pursuant to R. 19(24) (now R. 9-5(1)), struck out the Owners' statements of defence and counterclaim, denied the Owners permission to redraft any of their pleadings and granted judgment to the Strata Corporation. The quantum of fines was referred to the Registrar. The case management judge awarded the Strata Corporation special costs of the action.

[11] On May 25, 2009, the special costs award was by consent settled at $43,187.33, and a certificate of costs was entered in that amount (the "Costs Judgment").

[12] On October 22, 2009, in lieu of appearing before the Registrar, the parties entered the consent order referenced at para. 3 above that settled the quantum of the fines claim for $108,000 (the "Fines Judgment").

[13] In 2010, the Owners' strata units were sold by way of a court ordered sale. From the proceeds of sale the Strata Corporation was paid the Costs Judgment and the Fines Judgment together with post-judgment interest on each.

[14] On May 4, 2012, this Court released its reasons allowing the Owners' appeal of the Pleadings Decision: *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2012 BCCA 196 (the "Pleadings Appeal"). In the result the orders made in favour of the Strata Corporation striking out the Owners' statements of defence and counterclaim, denying the Owners permission to redraft any of their pleadings, granting judgment to the Strata Corporation and awarding special costs, were all set aside. This Court struck certain portions of the Owners' pleadings but permitted them to defend the claims on limited grounds. It also allowed the Owners to file a counterclaim. The counterclaim essentially consisted of additional defences to the Strata Corporation's claims and sought repayment of all monies the Stata Corporation had collected as fines.

B. The Trial

[15] The trial commenced on December 2, 2013. It lasted some 26 sitting days. It did not conclude until April 23, 2015.

[16] The Strata Corporation submitted the action was a straightforward debt claim to collect fines arising from the Owners' contravention of the bylaws and to recover costs it incurred in remedying the Owners' bylaw infractions. The Strata Corporation's specific claims were:

a) The Owners' units were not open for business in contravention of the bylaws;

b) The Owners posted signs in the window of unit #1010 that contravened the bylaws;

c) The Owners stored items on the common property in front of their units in contravention of the bylaws and the Strata Corporation incurred expenses removing and storing the items.

[17] The Strata Corporation relied on the provisions of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*SPA*") and its bylaws to fine the Owners for contravention of the bylaws and related costs. In particular, the Strata Corporation relied on ss. 129–133 of the *SPA* which allows it to enforce its bylaws and specifically to impose fines and remedy any contravention of the bylaws. It also relied on ss. 170 and 171 of the *SPA* which allow it to sue for monies owing, including monies owing as a fine.

[18] The Strata Corporation alleged the Owners breached the open for business, signage and storage bylaws. The Strata Corporation bylaws, which were established when the developer controlled the strata council, required all strata units to be open for business, with certain exceptions. Sections 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;

[19] These bylaws were amended in 2003 to address concerns that they operated unfairly by excluding the developer and were contrary to 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.

[20] The maximum fine imposed on owners for violating the bylaw was reduced to $200 per week.

[21] The Strata Corporation sign bylaw regulated signs and displays. This was set out in s. 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.

[22] That bylaw was carried forward in the 2004 version of the bylaws in ss. 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.

[23] 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.

[24] 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.

[25] At trial, the Owners argued the bylaws were not valid because the strata council members did not have proxies from the strata members for whom they purported to vote. Alternatively, they submitted they did not violate the bylaws. In that regard they submitted that their units were always open for business, their signs did not contravene the bylaws and they were entitled to store their goods on what they claimed was limited common property. The Owners further submitted the fines were levied to punish them for challenging the authority of the strata council. In the further alternative, they submitted that if the court found their units were not open for business, the court should find the Strata Corporation's application of the open for business bylaw was oppressive and significantly unfair. In this regard, the Owners argued the Strata Corporation caused significant unfairness by treating owners

differently in that certain owners were exempted from fines for not being open for business.

[26] By way of counterclaim, the Owners claimed the Strata Corporation breached its fiduciary duty to the Owners. The allegations in the counterclaim were founded on the alleged wrongful actions of strata council members and were premised on the Strata Corporation being vicariously liable for the council members' wrongful acts. In the counterclaim the Owners repeated their allegations that the bylaws were invalidly passed and sought repayment of all fines the Strata Corporation had collected.

C. The Trial Reasons

[27] The Trial Reasons consist of some 270 paragraphs over 78 pages. They are thorough and complete. The trial judge canvassed in great detail the conflicting evidence and made the findings of fact necessary to resolve the issues raised in the litigation.

[28] The background giving rise to the current dispute is summarized at paras. 14–38. These background facts are well-known to the parties and have been oft-repeated in many of the related reported actions. There is no need to set them out again.

[29] After reviewing the submissions of both parties, the trial judge at para. 66 set out the essential issues to be determined:

> 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?

[30] The trial judge commenced her analysis by discussing the credibility and reliability of the witnesses at paras. 67–89. She found the testimony of the witnesses called by the Strata Corporation to be generally credible. She felt otherwise concerning the testimony of Mr. Lam and Ms. Lee. In regard to Mr. Lam, she found his allegations of a conspiracy perpetrated by the developers of Pacific Plaza and members of the strata council to be incredible. She noted that he made serious accusations of bribery and payoffs which were unsubstantiated. She noted numerous inconsistencies in his evidence and found that he frequently did not answer questions asked of him in a straightforward way, often giving rambling, extraneous explanations. In regard to Ms. Lee, the trial judge found that her evidence was not always reliable and that certain of her explanations were internally inconsistent.

[31] The trial judge then turned to the issues she had identified. She commenced at paras. 90–150 with a lengthy discussion concerning the validity of the bylaws. She carefully reviewed the evidence and rejected the Owners' contentions that the bylaws were improperly passed. She found there was no merit to the Owners' position. She specifically rejected the Owners' submission that the bylaws were not valid because the strata council members did not actually have proxies from the strata owners that they voted at the meeting. She rejected the Owners' alternative submission that the strata council members had improperly obtained proxies by waiving outstanding fines. She further rejected the Owners' submission that strata owners who voted to amend the bylaws were ineligible to vote because they had outstanding fines.

[32] She then went on to consider whether the Owners had contravened the bylaws and the related questions as to whether or not the Strata Corporation followed the required procedure in imposing the fines. At paras. 151–170, she reviewed the evidence in regard to whether or not the Owners' units were open for business. Having considered the totality of the evidence, she concluded at para. 170

that she preferred the evidence of the Strata Corporation's witnesses over the evidence of the Owners' witnesses and found that neither of the units was open for business within the meaning of the bylaw during the period from 2003 to 2010.

[33] The trial judge then considered, commencing at para. 171, whether the Owners received notice of the bylaw violations. In this regard, she rejected the Owners' evidence that they did not receive the bylaw violation notices. Instead, she found that bylaw violation notices, as well as warning letters and invoices, were issued to the Owners in relation to their not being open for business. She found that the Owners were informed through the notices of their right to request a hearing if they disputed the bylaw violation notices, and that the Owners did not avail themselves of this opportunity.

[34] She next considered at paras. 177–180 whether the Owners' failure to open for business contravened the bylaws. She found that on the evidence the Owners were not open and operating their business, and was satisfied that they had contravened bylaw 2.8.1.

[35] Commencing at para. 181, the trial judge discussed whether the posting of signs in unit #1010 alleging fraud and impropriety by strata councillors, the developers and others, contravened the signage bylaw. The trial judge found that the purpose of the bylaw was to regulate signage in displays, 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 trial judge found that the signs impugned the reputation of the mall and were not of a quality or design that was in keeping with the overall presentation of the shopping centre. She inferred that the content and prominent placing of the postings in the window of unit #1010 was intended to criticize and embarrass strata council members, and was part of the Owners' campaign of opposition to the developers and the strata council. She accepted that the Strata Corporation had a legitimate interest in seeking to remove signs which could negatively affect the mall's reputation and the commercial interest of strata lot owners.

[36] At paras. 202–209, the trial judge considered whether the Owners were adequately notified that they had violated the sign bylaw. After reviewing the evidence, she concluded that the Strata Corporation had substantially complied with the procedural requirements and was entitled to judgment in relation to the fines imposed for the notices posted on the windows of unit #1010.

[37] The trial judge next went on to consider at paras. 210–224 the question of whether the Strata Corporation was entitled to charge for the removal and storage of property (large boxes, desks, buckets, etc.) that the Owners had stacked in the limited common area in front of their units. The items were left outside the units and not taken in at night. She found that the Strata Corporation was entitled to arrange for the seizure and storage of the Owners' items and was entitled to judgment for the expenses it incurred in the amount of $17,467.74. She found the Owners had notice that the Strata Corporation considered their use of the limited common property a violation of the bylaws, but did not take any steps to remedy the action, dispute the bylaw violation or retrieve the property. She found that by allowing the storage costs to accumulate, the Owners were wholly responsible for the costs incurred.

[38] The trial judge then turned at paras. 225–259 to whether the Strata Corporation's enforcement of its bylaws was significantly unfair to the Owners. She first considered s. 164 of the *SPA*, which 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 of its members. That section reads:

> **Preventing or remedying unfair acts**
>
> 164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
>
> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of subsection (1), the court may
>
> (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

> (b) vary a transaction or resolution, and
>
> (c) regulate the conduct of the strata corporation's future affairs.

[39] The trial judge noted this Court's decision in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, in which the Court emphasized the remedial nature of s. 164, and that the section provides a remedy to an owner who has been treated significantly unfairly. In *Dollan*, Garson J.A., at para. 30, set out 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?

[40] Applying the first part of the test, the trial judge found the Owners had a reasonable expectation that the bylaws would be consistently enforced within the parameters established by the *SPA*. This included an expectation that fines would not be imposed in a discriminatorily or unfairly prejudicial manner. She then considered whether the evidence established that the Owners' reasonable expectation was violated by the Strata Corporation's significantly unfair actions.

[41] In regards to this proposition, the trial judge accepted the Owners' submission that the Strata Corporation acted in a significantly unfair manner in exempting other owners from fines for not being open for business, or waiving their fines, while continuing to fine the Owners. The evidence indicated that various strata unit owners whose units were not open for business were not being fined during the same period the Owners were being fined. In that regard, the evidence indicated that owners who posted a "for sale" sign in the front window and used a real estate agent were exempted for the fines for not being open for business. Similarly, owners who posted contact information in the window were exempted from the fines, provided the strata council was satisfied that their work took them outside their units. In addition, owners

who allowed their units to be used for display purposes were not fined, nor were owners who abandoned their units.

[42] The trial judge found that the exemptions allowed by the strata council exceeded the discretion that the Strata Corporation had in respect to enforcement of the bylaws. She concluded that the Strata Corporation's actions, in exempting certain owners from being open for business while fining other owners, violated the Owners' reasonable expectation that the bylaws would be consistently enforced and were, in the circumstances, significantly unfair to the Owners. Given that finding, the trial judge found the Owners were entitled to a remedy under s. 164 of the *SPA*. In the result, she ordered the Strata Corporation to return the open for business fines already collected, less $15,000 to account for the Owners' failure to request a hearing with the strata council when they had an opportunity to do so.

[43] The trial judge then considered whether the Strata Corporation had breached its fiduciary duties to the Owners. This issue was canvassed at paras. 260–268 of the Trial Reasons. The trial judge, after reviewing the evidence, found she was unable to conclude that the strata councillors had a conflict of interest or otherwise breached any fiduciary duty they might owe to the Owners. While acknowledging that she had found the strata council acted in an unfair manner in administering the open for business bylaw, she concluded they did so in good faith with the intention of ameliorating the financial situation of owners who were seeking relief. She found no evidence to support the Owners' contention that the strata council members derived any personal financial benefit from voting in support of the impugned bylaws, using proxies obtained from other owners, exempting certain owners from fines, or levying fines against the Owners. She rejected the Owners' contention that the strata council members conspired with the developers for their personal financial benefit.

[44] The trial judge summarized her findings at para. 269:

> [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.

D. The Supplemental Reasons

[45] Following the release of the Trial Reasons, the parties were unable to settle the terms of the order and sought clarification of para. 269 of the Trial Reasons. The Strata Corporation submitted that the effect of item 3 of the summary was that it was entitled to judgment in the amount of $70,284 being the proportionate share of the $108,000 which relates to fines for contravening the open for business bylaw, less the award to the Owners in their counterclaim.

[46] The trial judge did not agree. In supplemental reasons indexed at 2016 BCSC 246, she held that the Strata Corporation was not entitled to judgment for fines which she found were imposed in a matter that was significantly unfair to the Owners. She rejected the Strata Corporation's submission that it was entitled to judgment in the amount of $70,284 for contravention of the open for business bylaw. The entered order in regards to this issue is as follows:

> 3. The Defendants are entitled to the return of $55,284.00 of the $70,284.00 collected by the Plaintiff, being the proportionate share of the $108,000.00 the Plaintiff has already collected in fines which are attributable to the Defendants' failure to open for business less $15,000.00 for the Defendants' failure to request a hearing, plus interest, as a remedy in relation

to the Plaintiff's significantly unfair action in fining the Defendants for not being open for business while exempting others.

E. The Costs Reasons

[47] Following the release of the Trial Reasons, the parties made submissions on costs. The Strata Corporation sought special costs throughout and in the alternative, double costs. The basis of the double costs submission was a July 17, 2012 offer to settle in which the Strata Corporation offered to settle its claim for $50,000. In the further alternative, it submitted it was entitled to party and party costs.

[48] The Company submitted that it was successful on the key issue at trial, that being whether the Strata Corporation was entitled to fine the Owners for not being open for business during the material period. On that issue, as the court found, the Owners had been treated significantly unfairly. The Company asserted that the issue of fines levied against the Owners, in relation to the storage of items on common property and posting materials on the window of the units, did not occupy a significant amount of time at trial and was less important to the Strata Corporation. The Company acknowledged on a global view of the outcome of the litigation that neither party was substantially successful.

[49] In Mr. Lam's submission on costs, he repeated many of the submissions he made at trial, with little or no regard for the scope of the pleadings or the findings and conclusions of the court in its judgment. He submitted that the Owners were mainly successful and that the case was of more than ordinary difficulty.

[50] The trial judge, after first reviewing the general principles that govern awards of costs, began her discussion by observing that success at trial was divided. She found that the Strata Corporation was successful in its claims that the Owners had breached the open for business and signage bylaws, and was entitled to charge for storage of items removed from outside the Owners' units. However, the Owners were successful in a significant aspect of their counterclaim that the Strata

Corporation's open for business bylaw operated in a manner which was significantly unfair to them.

[51] The trial judge then went on to consider the Strata Corporation's claim for special costs. She found that Mr. Lam made a number of unsubstantiated allegations against the Strata Corporation's legal counsel, alleging that they "fabricated" evidence, "concealed" evidence, falsified court documents and fraudulently entered orders in the action. She also noted that he had made serious allegations of impropriety against strata council members, including that they had participated in a $40 million fraud with the developers; engaged in the misappropriation of strata funds; colluded with the developers for personal financial gain; mismanaged the strata for their personal benefit; vandalized the Owners' strata units; bribed public officials; and protected the developers by concealing the fraudulent sale of Pacific Plaza as a first class commercial retail shopping centre.

[52] In the result, the trial judge concluded Mr. Lam had been reckless in repeatedly making unsubstantiated accusations of serious wrongdoing against the Strata Corporation's counsel and other persons. Given Mr. Lam's conduct, she determined an award of special costs was appropriate and necessary. While acknowledging that special costs are generally awarded for the entire proceeding, she concluded that in the circumstances of this case, it was appropriate to award special costs for less than the entire proceeding and held that the Strata Corporation was entitled to special costs for 10 days of trial in relation to its claim. The award of special costs was made against both the Company and Mr. Lam notwithstanding they were separately represented. The trial judge refused to order costs against Ms. Lee personally.

[53] The trial judge, in light of her decision to award special costs for a portion of the trial, did not award double costs. With respect to the Strata Corporation's other costs, the trial judge found it was the successful party and held:

> [58] With respect to the plaintiff's other costs, it was the successful party in its claim and is entitled to its costs against the defendants. I accept that the

> costs prior to May 24, 2009 have already been certified by consent. Costs after that date will be assessed by the Registrar.

[54] The entered costs order contains the following provision:

> 3. The Plaintiff is entitled to the costs of its claim as follows:
>
> a. costs prior to May 24, 2009 in the amount of $43,187.33 as previously certified by consent;
>
> b. costs for 10 days of trial assessed as special costs; and
>
> c costs for the remainder of its claim at scale B.

[55] As the costs prior to May 24, 2009 had been assessed as special costs, the effect of the costs order was to award the Strata Corporation special costs for 10 days of trial, special costs for all steps prior to May 24, 2009, and Scale B costs for the remainder of its claim.

[56] With regard to the costs of the counterclaim, the trial judge found the Owners were successful in relation to one significant aspect of the counterclaim but unsuccessful in respect of other aspects. In this regard, she noted the Owners' failed claim in relation to the validity of the bylaws consumed a substantial amount of court time. She awarded the Owners 70% of the costs of their counterclaim.

THE APPEAL

[57] The Owners raise some 11 grounds of appeal. As noted by the Strata Corporation, much of the Owners' factum is devoted to issues that were previously dismissed, were not open to the Owners on the pleadings or were not otherwise before the trial judge. I do not intend to discuss any of those issues.

[58] The issues raised by the Strata Corporation in their notice of civil claim were whether:

a) the Owners' units were open for business in compliance with the bylaws;

b) the Owners had posted signs on their units contrary to the bylaws; and

c) the Owners were storing items on common property contrary to the bylaws.

[59] The Owners raised the following defences:

a) a bare denial of each fact in the Strata Corporation's claim;

b) that the Owners were actively operating business in their units;

c) that the items seized by the Strata Corporation were not left outside the boundary and property of the Owners' units; and

d) that there were insufficient proxies to effect the passage of the bylaws at issue.

[60] In addition, the Owners were further allowed to make two additional allegations in their counterclaim as follows:

a) the Strata Corporation had oppressively and unfairly levied fines and penalties; and

b) the Strata Corporation arbitrarily and improperly waived fines and penalties.

[61] The Owners properly raise various grounds of appeal which I would restate as follows:

1. Did the trial judge err in finding that the Owners' units were not open for business?

2. Did the trial judge make an error of mixed fact and law in finding that the area in front of the Owners' units was common property?

3. Did the trial judge make an error of mixed fact and law in finding that the signs posted by the Owners on the windows of unit #1010 were governed by the bylaws and contrary to the bylaws?

4. Did the trial judge make an error of mixed fact and law in finding that the Strata Corporation did not oppressively and unfairly levy fines and penalties and arbitrarily and improperly waive fines and penalties in exchange for proxies?

5. Did the trial judge make an error of mixed fact and law in finding that the Strata Corporation levied fines against the Owners in compliance with s. 135 of the *SPA*?

6. Did the trial judge make an error of law in not addressing the Owners' counterclaim for damages?

7. Did the trial judge err in allowing the Strata Corporation to retain $15,000.00 of the fines imposed for violation of the open for business bylaw on account of the Owners' failure to request a hearing?

[62] In support of its appeal, the Owners filed a fresh evidence motion seeking to have all documents included in the Owners' appeal books, except those that had already been marked as exhibits at trial, be adduced as new evidence for the appeal. I would note that the Owners' appeal books contain over 2,000 pages of material. They also seek to have admitted certain documents attached as an exhibit to an affidavit of Mr. Lam, sworn on May 3, 2017, in support of the motion.

[63] I will deal first with the fresh evidence motion. In *Albu v. The University of British Columbia*, 2015 BCCA 41, this Court endorsed the following summary of the law regarding the admission of fresh evidence in civil appeals:

> [29] In *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263, Mr. Justice Chiasson set out the test for admitting fresh evidence in civil appeals:
>
> > [33] The test for the admission of fresh evidence was stated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:
> >
> > > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].

> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. …
> >
> > [34] …
> >
> > [35] This Court in *Spoor v. Nicholls*, 2001 BCCA 426, confirmed that the *Palmer* criteria apply in civil cases and observed in para. 16 that "in *Palmer* the court said that the due diligence test should be applied more strictly in civil than in criminal cases".
> >
> > [36] In *Scott v. Scott*, 2006 BCCA 504, Ryan J.A. observed in para. 21:
> >
> > > … the nature of an appeal is to examine the record and determine whether there has been an error of law or a palpable error of fact: it is not a continuation of a trial at a different stage. Thus, generally speaking, the need for certainty and finality leaves no room for the admission of fresh evidence on appeal …
> >
> > [30] In *Jens v. Jens*, 2008 BCCA 392, at paras. 31-34, Madam Justice Levine explained new evidence is rarely admitted, but this Court will admit it where the failure to admit would result in a long-term injustice. In this appeal, however, the chambers decision in the civil action is not relevant and should not be admitted.

[64] The Owners have not met the test for admitting new evidence. Almost all of the documents which the Owners wish to admit as fresh evidence were available in advance of the trial. Indeed, as noted in the affidavit in support of the application, most of the documents were listed on the Strata Corporation's list of documents. Mr. Lam has provided no explanation as to why the documents were not put into evidence at the trial. Nor has he explained how the documents which the Owners now wish to seek to introduce would have affected the result of the trial. I would not admit the new evidence.

[65] Turning to the merits of the appeal, the first five grounds of appeal are subject to review on the standard of palpable and overriding error. The Owners are in effect asking this Court to re-try the matter and make factual findings that differ from those of the trial judge. In particular, they say the trial judge erred when she accepted the

evidence of the witnesses called by the Strata Corporation in preference to the evidence of Mr. Lam and Ms. Lee. That is not our role. To succeed on the appeal, the Owners must show that the trial judge erred. As detailed above, the trial judge thoroughly analyzed the evidence. She was aware of the points in dispute. Her findings of fact are well supported by the evidence. The Owners have failed to show any error. I would not give effect to the first five grounds of appeal.

[66] The sixth ground of appeal alleges the trial judge erred in law in not addressing the Owners' counterclaim for damages. This ground is entirely without merit. The trial judge carefully considered the Owners' counterclaim. She rejected the allegations accusing the strata council members of wrongdoing. She ordered the Strata Corporation to repay certain funds to the Owners. I would not accede to this ground of appeal.

[67] The final ground of appeal raises a more nuanced point. It concerns the exercise of the trial judge's discretion in remedying a significantly unfair act of the Strata Corporation.

[68] The trial judge, having found the Strata Corporation acted in a significantly unfair manner in fining the Owners for breaching the open for business bylaws while excusing others who were also in breach, had to determine an appropriate remedy. While the characterization as to whether an action is significantly unfair raises questions of law and mixed fact and law (*Dollan* at para. 16) the determination of the appropriate remedy involves the exercise of discretion.

[69] In *Kish v. Sobchak Estate*, 2016 BCCA 65, Madam Justice Newbury described the characteristics of a discretionary decision:

> [33] The line between the exercise of judicial discretion and the finding of facts is not easy to enunciate. For purposes of this case, I respectfully adopt Lord Bingham's description of judicial discretion given in *The Business of Judging: Selected Essays and Speeches* (2000):
>
> > According to my definition, an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular

> case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. *It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that [he] embarks on the exercise of a discretion*.
>
> I believe this definition to be broadly consistent with the usage adopted in statutes. ...

[70] Discretionary decisions are entitled to deference. The standard of review was set out at para. 34 of *Kish*:

> [34] The standard of review applicable in Canada to the exercise of judicial discretion is found in *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3. There La Forest J. wrote for the majority:
>
> > Stone J.A. cited *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713 (C.A.), which in turn approved of the following statement of Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130, at p. 138:
> >
> > > The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.
> >
> > That was essentially the standard adopted by this Court in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, where Beetz J. said, at p. 588:
> >
> > > Second, in declining to evaluate, difficult as it may have been, whether or not the failure to render natural justice could be cured in the appeal, the *learned trial judge refused to take into consideration a major element for the determination of the case,* thereby failing to exercise his

> > discretion on relevant grounds and giving no choice to the Court of Appeal but to intervene. [...]
>
> This standard was affirmed and supplemented more recently in *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19, where the Court stated:
>
> > A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada* [...]

[71] Section 164 of the *SPA* is a remedial provision. It provides a mechanism to remedy any significantly unfair action of the Strata Corporation. Having found the Strata Corporation acted in a significantly unfair manner, the trial judge had to fashion an appropriate remedy. The trial judge's determination of the appropriate remedy is discretionary in nature. It is entitled to deference. The Owners have not shown any grounds to reverse the manner in which the trial judge exercised her discretion. I would not accede to this ground of appeal.

[72] In the result I would dismiss the appeal.

THE CROSS APPEAL

[73] The Strata Corporation challenges the trial judge's finding that the Strata Corporation's decision to fine the Owners for not being open for business was significantly unfair. That finding was based on the trial judge's conclusion that the Strata Corporation's actions in exempting certain owners from being open for business while fining others violated the Owner's reasonable expectation that the bylaws would be consistently enforced and were, therefore, significantly unfair.

[74] The Strata Corporation submits that it was not open to the trial judge to reach that conclusion on the pleadings. It submits that the Owners' claims under s. 164 were limited to the asserted expectation that it was significantly unfair of the Strata Corporation to allow fines to accumulate over an extended period.

[75] I do not agree that the Owners' pleadings are so limited. In their counterclaim, they pled as follows:

> 6. In levying fines against the defendants strata council members breached their fiduciary duty, statutory duty, duty of care or contractual duty as the case may [be] in favour of the defendants and treated the defendants significantly unfair, oppressive or unfairly prejudicial for which the plaintiff is vicariously liable.
>
> 7. In the alternative, if the bylaws upon which the plaintiff purports to rely are valid, and if the allegations against the defendants set out in the notice of civil claim are maintained, then by allowing fines to accumulate over a long period of time to a significant amount without taking any steps to remediate or enforce the bylaws the plaintiff treated the defendants in a manner that is significantly unfair, oppressive or unfairly prejudicial and the defendants plead and rely upon Sections 64 and 65 [*sic*] of the *Strata Property Act*, R.S.B.C. 1998, Chapter 43.

[76] In my opinion, these paragraphs clearly raise the issue that the Strata Corporation's actions in levying fines were significantly unfair, oppressive or unfairly prejudicial. The manner in which the Strata Corporation administered the open for business bylaw was a live issue at trial. It was raised directly in the Company's closing submissions. At trial the Strata Corporation did not suggest that the issue was not properly before the court. It is too late to do so now.

[77] Section 164 of the *SPA* is a remedial provision that provides a mechanism to remedy any significantly unfair action of the Strata Corporation. The trial judge's determination that the actions of the Strata Corporation were significantly unfair was a decision of mixed fact and law. To succeed on the cross appeal, the Strata Corporation must show that the trial judge made a palpable and overriding error. The trial judge carefully reviewed and considered the evidence. She concluded that the Strata Corporation's failure to consistently enforce its bylaw was significantly unfair to the Owners. I can find no error in that conclusion.

[78] I would dismiss the cross appeal.

THE COSTS APPEAL

[79] The costs appeal has three components. The first is the award of special costs for 10 days of trial. The second is the award of special costs up to May 24, 2009. The third is the finding that the Strata Corporation was the successful party in its claim and is entitled to the balance of its costs against the Owners while limiting the Owners to 70% of the costs of their counterclaim.

[80] Trial judges have a broad discretion in awarding costs. An appellate court may only interfere with an award of costs if it can be demonstrated that "the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[81] I turn first to the award for special costs for 10 days of the trial. Special costs are typically awarded when there has been some form of reprehensible conduct by a party which the court determines should be subject to rebuke: *Young v. Young*, [1993] 4 S.C.R. 3 at 134. While special costs are usually awarded for the whole of a proceeding, it is open to a judge to make a partial award of special costs if he or she is of the view that it would be disproportionate to award special costs for the entire proceeding: *Gichuru v. Smith*, 2014 BCCA 414 at para. 91.

[82] In this case, the trial judge found that Mr. Lam had been reckless in repeatedly making unsubstantiated accusations of serious wrongdoing against the Strata Corporation's counsel and other persons, in part as a means of pursuing a dismissed claim and his ongoing campaign of opposition to the Strata Corporation. In these circumstances, she found that special costs for a portion of the trial were appropriate and necessary. I can see no error in the trial judge's analysis and I would dismiss the appeal against the award for special costs for 10 days of the trial.

[83] I would note that there are numerous cases which have awarded special costs for a number of days of trial. For precision and clarity, I think that such awards would be better expressed by awarding a percentage of trial costs as special costs. For example, in this case, 10 days represented 38.5% of the total trial. I would

amend the costs order and direct that the plaintiff recover 38.5% of its special costs of trial.

[84] The second issue on the costs appeal relates to the trial judge's award to the Strata Corporation of its costs through to May 24, 2009. The foundation of that costs determination was the Pleadings Decision in which the then case management judge, on application of the Strata Corporation brought pursuant to R. 19(24), struck out the Owners' statements of defence and granted judgment to the Strata Corporation. She awarded the Strata Corporation special costs. In that regard she said:

> [93] As the successful party, pursuant to R. 57(9), the Strata Corporation is entitled to be awarded costs. Under R. 19(24), the Court may order costs to be paid as special costs.
>
> [94] Given that the Defendants included in their pleadings claims that they knew had been dismissed in other proceedings and that the Defendants contravened previous Court orders by including in these pleadings claims that they had been directed not to bring, I will exercise my discretion and award these costs as special costs.

[85] The parties subsequently settled those costs on May 25, 2009, at $43,187.33. The costs were paid to the Strata Corporation in 2010 following the sale of the Owners' units.

[86] The foundation of the costs award was washed away when this Court in the Pleadings Appeal set aside the Pleadings Decision and the orders that flowed from it, including the costs award.

[87] The trial judge recognized that special costs are generally awarded for the entire proceeding. In this case, however, she concluded it was appropriate to award special costs for less than the entire proceeding and limited the special costs award to 10 days of trial. She then went on to discuss the Strata Corporation's remaining costs, and absent any analysis awarded the Strata Corporation its costs prior to May 24, 2009, as already certified by consent. While it appears from an excerpt of the Strata Corporation's costs submission that the trial judge was told that those costs had been assessed as special costs, there is nothing in her reasons that indicates

she appreciated that the result of her costs order was that the Strata Corporation would receive special costs not only for 10 days of trial but also for all matters prior to May 24, 2009.

[88] With respect, there was no basis to make such an order. The original special costs order arose from the Pleadings Decision and the court's authority under R. 19(24) to award special costs. The trial judge conducted no analysis and had no evidence before her concerning the events prior to May 24, 2009. Given her finding that special costs should be limited to 10 days of trial, it was plainly wrong to award special costs for the events prior to May 24, 2009. I would set aside that portion of the costs order.

[89] I turn then to the balance of the costs award. Pursuant to R. 14-1(9), the costs of a proceeding must be awarded to the successful party unless the court otherwise orders. In considering the question of success it is important to recall the results of the litigation. By the time the case finally came to trial, the units had been sold and the proceeds of sale paid over to the Strata Corporation. The Strata Corporation was awarded judgments amounting to $55,183.74, representing the claims for removal and storage costs ($17,467.74) and violation of the signage bylaw ($37,716.00). The trial judge rejected the Strata Corporation's submission that it was entitled to judgment for contravention of the open for business bylaw and ordered the Strata Corporation to return $55,284.00 to the Owners.

[90] At its most basic, the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or the defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46.

[91] Different considerations, however, arise when the litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45:

> [45] *Gold* now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and

> weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.

[92] While the "substantial success" formula is particularly well suited to family cases when the court has to wrestle with several separate and distinct causes of action, the principles in *Fotheringham* may be applicable in any case in which there are multiple causes of action.

[93] In this case, the Strata Corporation brought three separate and independent causes of actions arising from breach of different bylaws. On two of the claims, it succeeded. On the third, the open for business bylaw, it did not succeed as the trial judge refused to grant it judgment. The Owners' counterclaim also concerned multiple causes of action including the claims for a breach of fiduciary duty and return of monies held by the Strata Corporation following the sale of the strata units. While the Owners did obtain an order returning to them some of the funds, their other claims were dismissed.

[94] In making her costs award, the trial judge commenced the discussion by addressing the question of success. She found that success at trial was divided. In this regard, she said at para. 42:

> [42] Applying these principles to this case, I begin by observing that success at trial was divided. The plaintiff was successful in its claim that the defendants had breached the plaintiff's open for business and signage bylaws and was entitled to charge for storage of items removed from outside of the defendants' units, but the defendants were successful in a significant aspect of its counterclaim that the plaintiff's "open for business" bylaw operated in a manner which was significantly unfair to the defendants.

[95] Despite that finding, at para. 58, the trial judge held that the Strata Corporation was the successful party in its claim. With respect, those findings are inconsistent. The Strata Corporation brought three separate claims. While it

established the breach of the open for business bylaw the remedy sought was not awarded.

[96] In this action, the claim and counterclaim were mirror images of each other. They were completely intertwined. Although in many cases, it may be appropriate to determine the costs of a counterclaim separately from the main action (*Litt v. Gill*, 2016 BCCA 288), this is not one of those cases. While the Strata Corporation obtained judgments for a breach of the signage bylaw and the costs of the clean-up, it was ordered to repay $55,284 to the Owners for the wrongful fines imposed in breach of the open for business bylaw. In the circumstances, with respect, I am of the view that neither party can be said to have been substantially successful. Given that result, the trial judge should have ordered that each side pay their own costs, other than the special costs for 10 days of trial. I would so order.

[97] As noted above, when the Owners' strata units were sold, the Strata Corporation was paid the Costs Judgment which arose from the Pleadings Decision. As the result of this judgment, the Owners are entitled to the return of those funds with interest and I would so order. I would however stay the order for repayment of those funds pending assessment of the special costs award. Once those special costs have been assessed, the amounts so assessed are to be set off against the funds to be returned to the Owners.

[98] There has been mixed success in this matter. I would direct that each side pay their own costs in this Court.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Savage"