IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Allard v. The Owners, Strata Plan VIS 692,* 2018 BCSC 1066

Date: 20180504
Docket: S1711290
Registry: Vancouver

Between:

James Allard

Petitioner

And

The Owners, Strata Plan VIS 962 and Civil Resolution Tribunal

Respondents

Before: The Honourable Mr. Justice Schultes

On appeal from: An order of the Civil Resolution Tribunal, dated November 8, 2017 (*Allard v. The Owners, Strata Plan VIS 962*, 2017 BCCRT 111, ST-2016-00369).

Oral Reasons for Judgment

Counsel for the Petitioner:	C.L. Vickers
Counsel for the Respondent The Owners, Strata Plan VIS 963:	C. Wilson (Attending via teleconference)
Counsel for the Respondent Civil Resolution Tribunal:	V. Ryan (Appearing via teleconference)
Place and Date of Hearing:	Vancouver, B.C. February 21, 2018
Place and Date of Judgment:	Vancouver, B.C. May 4, 2018

1. INTRODUCTION

[1] In this petition, Mr. Allard is seeking leave to appeal a decision of the Civil Resolution Tribunal ("the Tribunal") that the respondent strata corporation ("the Strata") was not required to include the solarium of his unit in a renewal project that it undertook for the building.

[2] In addition to counsel for Mr. Allard and the Strata, counsel for the Tribunal also participated in the hearing, to provide background information on its purpose and operation and to make submissions on the test for granting leave to appeal and the procedure to be followed if leave is granted.

[3] Pursuant to the *Civil Resolution Tribunal Act,* S.B.C. 2012, c. 25, ("the *CRTA*") the Tribunal has jurisdiction to deal with a list of matters arising under the *Strata Property Act,* S.B.C. 1998, c. 43, such as the dispute in this case. As the Tribunal's counsel explained in his material, it is intended to provide dispute resolution services in a manner that is "accessible, quick, economical, flexible and informal, with a focus on electronic communication and co-operative dispute resolution." The hearing that resulted in the decision here would have taken place after preliminary stages of the process, which are focused on dispute resolution.

2. ESSENTIAL FACTS

[4] The building in question is on Wharf Street in Victoria. It contains 54 units. Mr. Allard bought the unit that is the subject of this dispute in 2000. He and members of his family own other units in the same building. When he bought it, this unit already had the solarium attached to it, which had been constructed by its previous owner. Another owner had built a solarium for their unit as part of that same process.

[5] The original conditions imposed by the Strata for the approval of both of these solaria were that their future repair, maintenance and insurance costs would be borne by the owners of the units to which they were attached. Mr. Allard's position was that he was not aware of these conditions when he bought the unit and that he

was not subject to any agreement with the Strata to that effect. No agreements were produced by the Strata as part of the evidence before the Tribunal.

[6] The Strata made relevant amendments to its bylaws in the ensuing years.

[7] In 2003 an amendment to one of the bylaws required owners to repair and maintain, as the Tribunal member described it in his decision, "… limited common property and common property for which the owner had exclusive use, including windows, balconies and changes made by the owner to the original structure or exterior appearance". Another of the bylaws amended at the same time similarly provided that "the repair and maintenance to limited common property, including changes to the original structure or exterior appearance, was the responsibility of the owner."

[8] Further amendments were made in February 2015. They kept the requirement that owners repair and maintain alterations but added the significant change that "the strata must maintain and repair a strata lot, restricted to among other things, to balconies, exterior walls between the exterior of a strata lot and the balcony and other things attached to the exterior of the building."

[9] In October of 2015 the Strata approved the renewal project that became the subject of Mr. Allard's complaint, to address the condition of the windows and doors in the building. It was funded by special assessments from the unit owners, including Mr. Allard. Before it embarked on the project the Strata had several reports from a building engineering company and one from a glazing expert. Mr. Allard's solarium, and the other one that had been built at the same time, were not included in the project, which was completed in December 2016.

[10] Mr. Allard interpreted the 2015 bylaw amendments that I have described as requiring the Strata to rebuild his solarium to match the changes to the doors and windows of the building that were made during the project.

[11] The Strata amended the bylaws again in 2016, after the project was underway and the controversy with Mr. Allard about not including his solarium in it had resulted in his complaint to the Tribunal. The applicable bylaws now provided, among other things, that: "an owner shall repair and maintain an alteration to the common property, limited common property, strata lot or a fixture made by an owner or his or her predecessor no matter how often the repair or maintenance occurs" and that the bylaw applies "even if an alteration agreement does not exist." For greater certainty, this responsibility on the owner's part was specified to include "alterations conducted by the owner's predecessor."

[12] As part of the evidence before the Tribunal, the Strata submitted an opinion letter from an architect with the building engineering company. He had been involved throughout the project. He concluded that the solarium was built 16 years after the original construction and was installed with minimal disturbance to the existing buildings. As of the date of his examination of the solarium, the sliding glass doors and windows still functioned and he expressed the opinion that it "currently fulfills its original function without the need for any repair or renewal work."

[13] The member pointed out in his decision that Mr. Allard did not provide any expert evidence supporting his position on this issue.

[14] An effect of not having included the solarium in the project is that the windows and frames installed in adjacent parts of the building now have a different appearance than the ones on Mr. Allard's solarium. However, after viewing the photos that had been submitted the member agreed with the Strata's position that "the solaria blend in with the new windows and frames," and that aesthetic changes, such as painting, were not necessary.

3. THE TRIBUNAL'S DECISION

[15] Mr. Allard's position, as described by the member, was that his responsibility for the solarium arose from the operation of the bylaws rather than from any agreement by the previous owner.

[16] The member found that there had been no formal agreement with respect to the responsibility of the unit owner to repair and maintain the solarium and that Mr. Allard had never accepted the conditions that the Strata had attached to granting permission to his predecessor.

[17] The member also found that the repair and maintenance of the solarium were governed by the February 2015 bylaws. Pursuant to those bylaws (in particular, I take it, the requirement that to repair and maintain “balconies and other things attached to the exterior of the building”), the repair and maintenance of it were the Strata's responsibility.

[18] The member found that the 2016 bylaws had been aimed directly at Mr. Allard after he made his claim to the Tribunal. He declined to apply them retroactively to make Mr. Allard responsible for repairs and maintenance.

[19] On the question of whether the Strata was required to include the solarium in the renewal project, the member accepted the opinion of the architect who provided the report for the hearing that the solarium is not in need of repair, maintenance or replacement, being significantly newer than the rest of the building. Therefore, he concluded, it was reasonable for the Strata not to have included it. In particular, the member held that, subject to a claim of unfairness, the Strata can interpret its obligation to repair and maintain the building as it sees fit. In this case, it had done so based on the professional assistance that it had retained.

[20] One of Mr. Allard's arguments was that the Strata's decision not to include the solarium was significantly unfair to him. In addition to an application to the Tribunal, as was made in this case, allegedly unfair actions by a strata corporation may also be addressed by this Court pursuant to s. 164 of the *Strata Property Act*. The member found that the test for finding significant unfairness under s. 164, established in the decision of *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, applied equally to s. 48.1(2) of the *CRTA*, which permitted him to make an order “to prevent or remedy a significantly unfair action [or] decision….”

[21] A critical component of the *Dollan* test, which the member articulated, is whether the owner had an “objectively reasonable expectation” that was violated by the action of the Strata. The Court had emphasized in that decision that a strata corporation’s decision made in good faith and on reasonable grounds would be unlikely to meet that threshold merely because it adversely affects some owners to the benefit of others.

[22] In deciding this issue, the member found that "the factual matrix and historical practice appl[y]." In particular, he found that Mr. Allard was aware when he bought the unit that the solarium had been installed with conditions that imposed repair and maintenance obligations on the owner. Further, the member reasoned, the design and cost study by the building engineering company before the project began did not include the two solaria in the scope of work “because they did not require a renewal.” As a result, he found that no reasonable expectation could have been held by Mr. Allard that it would be included, and no significant unfairness resulted from the Strata's refusal to do so.

[23] The member refused Mr. Allard's request for a declaration that the Strata was responsible for future repairs and maintenance of the solarium under the bylaws. He concluded that it was impossible to say what bylaws would be in effect at the time of any such future requirements.

[24] He also refused an application by Mr. Allard to have the Strata pay his legal fees arising from the dispute. He was not satisfied that this was an “extraordinary case”, as is required by the Tribunal's rules before such a payment can be ordered. First of all, he noted, Mr. Allard had not been completely successful in his claims. In addition, he disagreed that the conduct of the Strata was reprehensible and deserving of reproof or rebuke, which is of course the standard for imposing special costs in civil litigation. In reaching that conclusion he accepted a case cited by Mr. Allard – *Garcia v. Crestbrook Forest Products Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) – as the leading authority in this province on special costs. He further noted that the *CRTA* prohibits parties from being represented by lawyers unless the

parties are granted an exemption, which both Mr. Allard and the Strata had been in this case. But the fact that exemptions had been granted, in his view, did not necessarily mean that legal costs should be covered. Nor was the fact that the case was, as he acknowledged, "complex, with a large volume of material" a basis in itself for awarding legal costs[1].

[25] However, the member ordered Mr. Allard to pay the Strata $3,000, which he determined was the portion of the cost of the architect's expert report that related specifically to the question of whether the solarium should have been included in the renewal (other parts of that report had dealt with the structure of the solarium and the member found they would have been necessary in any event). The *CRTA* allows orders to pay another party's reasonable expenses that relate to the conduct of the proceedings and the Tribunal's rules authorize the same kinds of payments.

4. APPEAL PROCEDURES

[26] Appeals of strata property claims from the Tribunal are governed by s. 56.5 of the *Civil Resolution Tribunal Act*.

[27] A party may appeal to this Court "on a question of law arising out of [a] decision" of the Tribunal (s-s. (1)). In the absence of consent by all parties, s-s (2) provides that leave to appeal is required.

[28] A general requirement for granting leave under s-s (4) is: "that it is in the best interests of justice and fairness to do so."

[29] In deciding whether or not that is so, the court may take into account several listed factors: whether the issue raised is of such importance that a precedent established by this Court would be beneficial; the presence of a constitutional or human rights component; the importance of the issue to the parties or class of persons of which one of them is a member; and proportionality (s-s. (5)).

[1] The member also declined Mr. Allard's request that the Strata reimburse him for his $225 application fee to the Tribunal. In my original oral reasons, I mistakenly included that decision in Mr. Allard's proposed grounds of appeal and dismissed it in the absence of any legal issue arising from it and the small amount involved.

5. POSITIONS

a. Mr. Allard

[30] He has identified four questions of law on which leave to appeal is sought. Two are substantive and the remaining ones relate to the costs rulings by the member, only coming into play if the substantive appeals are successful.

[31] The first substantive issue is the allegation that the member acted without evidence, or on an unreasonable view of the evidence.

[32] Despite having found that the Strata was responsible for the repair and maintenance of the solarium at the time of the renewal project, and that Mr. Allard was not bound by the conditions governing its original installation, the member nonetheless found that Mr. Allard had no reasonable expectation of the solarium being included in the project, that there was no significant unfairness in refusing to include it, and (based on an after-the-fact report) that the Strata had acted on professional advice when reaching its conclusion.

[33] The member's finding that the Strata relied on professional advice not to include the solarium is argued to be inconsistent with his finding that it believed that the conditions of approval meant that Mr. Allard was responsible for the solarium. It is also argued to be inconsistent with his incidental finding in his analysis that Mr. Allard did not need to be given a reason by the Strata for the 2016 bylaw making him retroactively responsible, because he already knew that the Strata was relying on the responsibility of succeeding owners of the unit to repair and maintain the solarium.

[34] Further, Mr. Allard contends that the architect's after-the-fact report is not actually evidence of any professional assessment justifying the exclusion of the solarium from the renewal at the time the decision to exclude it was made. The assertion in it that the solarium was not included in the scope of work of the project is not evidence of why that decision was made. The building engineering company's design and cost study at the time of the decision about the project simply said that

the solarium could likely remain undisturbed by the project. It was therefore unreasonable for the member to rely on the report to support such a finding.

[35] The second substantive error alleged is that the member misapplied the test for significant unfairness by the Strata.

[36] Having found that the objective test in *Dollan* applied, that Mr. Allard was not bound by the installation conditions and that the Strata was responsible for repairs and maintenance during the applicable period, the member still found that the decision to exclude the solarium was not significantly unfair, by considering subjective factors to assess Mr. Allard's expectations. Mr. Allard argues that, having found that the conditions for approving the solarium did not apply to him as a subsequent owner, the member's finding that he had knowledge of those conditions was irrelevant to an objective analysis of his expectations.

[37] It is also submitted that the member referred to an unspecified “factual matrix and historical practice” to conclude that there was no reasonable expectation by Mr. Allard, but in doing so failed to consider, in addition, that the 2015 bylaws in effect at the time of the renewal made the Strata responsible for repair and maintenance of the solarium.

[38] With respect to the cost issues, the first ground deals with the dismissal of the legal expenses claim. Mr. Allard argues that the member erred by not finding that this was an extraordinary case for the payment of legal expenses, as the rule sets out; by not defining that term in its context; and by failing to provide any reasoning supporting the conclusory statement that the Strata's conduct was not deserving of reproof or rebuke. The absence of reasons on this point is also said to run afoul of the core requirements of justification, intelligibility, and transparency, to which rulings of administrative tribunals are subject under the Supreme Court of Canada's seminal decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[39] Mr. Allard also wishes to argue that the appellant erred in requiring him to pay for a portion of the expert report, I infer on the same analysis as is applied with respect to the denial of his legal fees.

[40] Applying the criteria for granting leave to appeal set out in the *CRTA*, Mr. Allard argues that the questions of law he has identified are important to the strata community generally and would benefit from the establishment of Supreme Court precedent. The concept of significant unfairness is of fundamental importance in regulating strata relationships and the Tribunal, being relatively new, will be assisted by this Court's direction on that issue as it goes on to adjudicate numerous further allegations of it. The importance of the issue to him is demonstrated by his significant investment of legal fees to date, reflected in the amount in which he sought to be compensated at the hearing. The multi-million dollar scale of the renewal project and his significant contribution through the Strata's assessments to it also mean that proportionality does not in any way militate against granting leave. Further, as an overall consideration, he argues that justice and fairness weigh heavily in favour of requiring strata corporations to adhere to the law through the application of a correct standard.

b. The Strata

[41] It responds that Mr. Allard's expansive view of this Court's ability to entertain appeals from a tribunal must be moderated by the decision of the Supreme Court of Canada in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, para 45. *Teal* makes it clear that courts must be cautious, when being asked to identify a question of law for appeal purposes, to distinguish between the allegations that the legal test has been altered in the course of its application (a question of law) and that the application of the unaltered test should have resulted in a different outcome (a question of mixed fact and law). This distinction is critical, the Strata submits, because it is clear that in this case the member applied the correct test for finding significant unfairness. Since this correct analysis was applied to by the member to

his resolution of the issues, none of the proposed grounds of appeal actually identify errors of law.

[42] Further, the Strata argues that the additional requirement that the grounds have arguable merit, which *Teal* says is also necessary for leave to appeal on a question of law, is certainly not present here. The Strata asks if, as the member found, the solarium blended in, did not require additional work, and was much newer than the rest of the doors and windows that were to be replaced, how could Mr. Allard have had a reasonable expectation it would be included in the project? Most critically, the Strata asks how such an expectation can arise in the absence of any evidence put forward by Mr. Allard that repairs or maintenance of it were required. In the objective analysis required under *Dollan*, Mr. Allard's subjective desires to have certain things done do not carry any weight.

[43] In fact, if the member had found that the solarium should have been included the project in the absence of any evidence supporting that conclusion (the burden of which was on Mr. Allard to provide) that would have constituted an error of law. While there was actually considerable evidence of the factual matrix and historical practice with respect to the solarium, according to the Strata the member's decision really turns on the absence of evidence that inclusion in the project of the solarium was ever necessary.

[44] In this regard, the Strata submits that it was not an error to rely on the architect's report prepared for the hearing. That architect was involved throughout the project and if the solarium did not need repair as of the report for the hearing, which is what the architect asserted, it certainly would not have required it at the time of the renewal project.

[45] The member correctly placed weight on the report as an independent analysis and made findings of fact on it that were determinative and should not be subject to appeal. A reasonable expectation of inclusion cannot co-exist with the inescapable factual finding that the solarium did not need repair.

[46] No error of law arose in the determination of significant unfairness, it is argued, because the member cited the test correctly and self-evidently did not alter it in the course of its application.

[47] Despite Mr. Allard's $105,000 contribution to the over $4.5 million renewal project, the Strata submits that proportionality actually weighs against granting leave. In the absence of evidence that the solarium needed repair, he can point to no actual loss that he has suffered. His recovery in that respect would be zero. His contribution to the renewal project through special assessments was amply justified by the recommendations of the professional reports, in light of the age and condition of the building as a whole.

[48] On the question of receiving his legal costs, the Strata points that he chose to have a lawyer when it was explicitly not required (and in fact presumptively excluded) under the *Civil Resolution Tribunal Act*. In any case, success at the hearing was clearly divided.

[49] In contrast, there is no requirement in the Tribunal's rules that the circumstances be extraordinary for the Strata to recover the relevant portion of its expert witness expenses as it did.

[50] Overall, the Strata submits that justice and fairness tends not to favour granting leave here. Contrary to Mr. Allard's assertion, the issues raised are of importance only to him and the value of a resolution as a precedent is restricted to the unique facts of the case.

c. The Tribunal

[51] The Tribunal stresses that questions of law are about "what the correct legal test is", as set out in the leading authority of *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. Such questions must be distinguished from questions of mixed law and fact, which are about whether the facts satisfy the legal test.

[52] The Tribunal echoes the concerns raised by the Strata about courts reframing questions of mixed fact and law too readily in order to gain appellate jurisdiction. This approach would be inconsistent with the principles of finality and deference to findings of fact in administrative decisions.

[53] The Tribunal's primary position is that the principles enumerated in s. 56.5 alone should govern this application. In particular, it pointed out that the requirement of arguable merit in the arbitration appeal context is the result of a specific provision of the *Arbitration Act*, R.S.B.C. 1996, c. 55, a provision that is not present in the *CRTA*. If I conclude that it is necessary to look outside of s. 56.5, the Tribunal referred me to the review of potential considerations that can guide a decision whether to grant leave in appeals from statutory bodies (in addition to whatever requirements are set out in the governing statute) in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 (C.A.). If I do conclude that any additional criteria, such as the considerations listed in *Queens Plate* or arguable merit apply, the Tribunal asks that their relevance to the granting of leave be explained in my reasons, in the interests of future clarity.

6. DISCUSSION

[54] A threshold issue to be decided here is the test to be applied in determining whether leave should be granted – specifically, whether there should be any mandatory considerations beyond the statutorily listed ones.

[55] There are still relatively few reported decisions on the question of leave to appeal under the *CRTA*. The first two, *The Owners, Strata Plan BCS 1721721 v. Watson*, 2017 BCSC 763 and *McKnight v. Bourque*, 2017 BCSC 2280, held that in addition to considering the statutory criteria the court should also be satisfied that the appeal has "arguable merit". As the Tribunal's counsel pointed out, that standard is used in the context of granting leave to appeal from arbitration awards, which are similarly restricted to errors of law: for example, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 74. However, in *McKnight*, Justice Masuhara made it

clear that the relationship between that standard and the explicit statutory factors should be considered in a "holistic manner". Quoting from para. 32:

> A merely arguable case may be sufficient where other factors pull in favour of granting leave, whereas a case may need a very high level of merit where other factors are weak or absent. Obviously, though, a case with no merit should not be granted leave.

[56] I note as well that the inclusion of arguable merit as a criterion in *Sattva* was predicated on the standard of review on the appeal being one of reasonableness. In this case the standard to be applied to an appeal of the Tribunal decision has yet to be determined, and all counsel agree that it is best dealt with by the court hearing the appeal, if leave is granted.

[57] In the more recent decision of *The Owners, Strata Plan BCS 1589 v. Nacht*, 2018 BCSC 455, which the parties provided while this matter was on reserve, the Tribunal had submitted, as it did in this case, that the requirement of arguable merit was restricted to the specific context of arbitration appeals. In addition, it was submitted that applying such a standard invites a premature consideration of the standard of review on the actual appeal, which should be litigated fully at that later stage. As a result, Justice Funt concluded that he "did not need to engage in an arguable merit test" before granting leave.

[58] Funt J.'s conclusion clearly involved an acceptance of the Tribunal's position on this point. That acceptance raises a potential question of judicial comity – whether any of the conditions for departing from the previous decisions in *Watson* and *McKnight* on this point, as identified in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), were present.

[59] Ultimately, however, I have concluded that there is no meaningful inconsistency among the decisions and that the use of the term "arguable merit" in *Watson* and *McKnight* is a distinction without a difference from the test that was applied in *Nacht*.

[60] Quite aside from the question of whether there is a sufficient analogy in the *CRTA* to appeals pursuant to the *Arbitration Act* (which the Tribunal has cast into doubt), practically speaking it will never be in the interests of justice and fairness, either in general or in light of the additional specific criteria listed in s. 56.5, to grant leave to appeal on questions of law that have no arguable merit, or as that term has sometimes been defined, “no reasonable prospect of success”. Put another way, legal issues that are unlikely to be resolved in a prospective appellant's favour do not engage general justice or fairness concerns. Nor do they engage the specific considerations of establishing precedents of general importance, resolving constitutional or human rights issues, advancing matters of importance to a party or class, or upholding the value of proportionality. If they cannot support even a reasonable argument in their favour, such questions will certainly not change the outcome to be appealed from, and therefore will advance none of those statutorily-identified goals. The minimal quality control standard of excluding fanciful or tenuous questions of law created by the use of the term arguable merit is inherent in the application of both the general and specific considerations listed in s. 56.5.

[61] Even in the absence of arguable merit as a stand-alone criteria, the flexible analysis applied by Masuhara J., in which the strength of the question of law identified can support or be supported by the specific enumerated grounds as the particular circumstances dictate (excluding appeals that have no merit regardless of the particular dynamic), strikes me as the correct approach. Indeed, it is clear from reading Funt J.'s analysis in *Nacht* that he considered the proposed grounds to have meaningful potential merit – after rejecting an explicit arguable merit test he then granted leave on the basis of justice and fairness, holding that the questions of law raised "live and important issues."

[62] The parties have identified the necessary threshold for a question of law here: the application of an incorrect legal test, including, as *Teal* notes, the process of altering a test in the course of applying it, such as by omitting a required component. In this regard, I accept that making findings in the absence of evidence is, in effect, the application of an incorrect legal standard and constitutes an error of law: see for

example *Sheddy v. Law Society of British Columbia*, 2007 BCCA 96 at para. 18; *Nguyen v. Chartered Professional Accountants of British Columbia*, 2018 BCSC 620 at paras. 108-109.

[63] Slightly modifying the strictness of that threshold, the Court of Appeal, when considering other legislation raising this issue, has concluded that it permits appeals "to be brought on questions that are predominantly, if not exclusively, issues of law": *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55, para. 41. This was referred to in the *CRTA* context in *McKnight*.

[64] Turning to the first proposed substantive ground of appeal, I think there is at least an arguable basis to assert that the member erred in law by treating the architect's report as the evidence of the contemporaneous considerations of the Strata and of the professional advice that it received in reaching its decision, despite the absence of evidence in it on those issues and in the face of his findings that the Strata's view of its obligations with respect to the solarium was based on the original conditions of approval. A crucial finding of fact by the member was that the solarium was not included because it did not need repairing. This could arguably have been a finding in the absence of evidence or on an unreasonable view of the evidence.

[65] This question of law could also be framed as being whether a strata corporation can justify an action towards an owner that is alleged to be significantly unfair by reference to reasons that were not actually the ones that motivated its action at the time, but that have been identified since the action was taken.

[66] This is an issue that would be beneficial to address by means of a Supreme Court precedent. It is a significant one for Mr. Allard and there would be no disproportionality in having it heard on appeal, in light of the significant value of the renewal project and his contribution. Leave will be granted on this question.

[67] The second substantive ground is closely related. While the member stated the test for significant unfairness accurately, it is again at least arguable that he misapplied it, by considering Mr. Allard's reasonable expectations only in light of his

awareness of the conditions of approval of the solarium for the original owner (even although it was also found by the member that those conditions did not apply to him), rather than as those expectations might have been modified by the bylaw that was in effect at the time the renewal was initiated, which the member found made the Strata responsible.

[68] This also raises a question of law, one that would be desirable to establish a precedent on in this Court for the same reason as the first ground, since it engages the scope of considerations that should inform an owner's objectively reasonable expectations in relation to the actions of a strata corporation. Again, the importance of the matter to Mr. Allard and the sufficient degree of proportionality are the same as the first issue. I will grant leave on this issue as well.

[69] The correct application and meaning of “extraordinary case” with respect to repayment of legal fees clearly engages a question of law. The member's justification for not finding this to be such a case dealt with several issues, including a comparison to the special costs regime in civil litigation; the related concept of divided success among parties; and the influential factors of the complexity of the matter and the volume of material. There is no reasoning by him to speak of on these issues – only conclusory statements underlying his ultimate rejection of the request. I think this is quite an important matter to have some clarity on at the Supreme Court level, given the amounts at issue, and both the personal importance to Mr. Allard and others in his situation and the necessary proportionality are quite obvious.

[70] The same is true of the requirement that Mr. Allard pay for the expert report. The rule permitting it to be imposed on him was applied quite baldly by the member. Quite aside from his assessment of what portion of the report’s cost that was relevant to the issue before him, there is an at least arguable threshold question of when and if an owner like Mr. Allard should bear any of the costs of such a report, particularly in view of the divided success on the application. I would grant leave in relation to it as well.

[71] Accordingly, leave to appeal is granted on all of the proposed grounds.

[72] I accept the procedural submissions with respect to the Tribunal made by the Tribunal, and direct that Mr. Allard must now file a Form 73, Notice of Appeal Direction Required, after which the parties will seek agreement on a procedure to be followed. Failing an agreement there can be an application to the Court for directions.

[73] Costs as between Mr. Allard and the Strata will be costs in the cause on the appeal. There will be no cost against the Tribunal at any point.

The Honourable Mr. Justice T.A. Schultes