IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NW499 v. Kirk,*
2018 BCSC 1249

Date: 20180725
Docket: S149448
Registry: New Westminster

Between:

The Owners, Strata Plan NW499

Petitioner

And

**Nancy Jamieson Kirk, Executrix of the Will of Patricia Vernon Louis, Deceased
Reginald Timothy Vernon Louis, Roderick Louis and
Vancouver City Savings Credit Union**

Respondent

- and -

Docket: S154156
Registry: New Westminster

Between:

Roderick V. Louis

Petitioner

And

The Owners, BC Strata Plan #NW 499

Respondent

Before: The Honourable Mr. Justice Armstrong

Supplementary Reasons to *Strata Plan NW 499 v. Louis Estate*, 2015 BCSC 1487.

Reasons for Judgment

Counsel for the Owners, Strata Plan NW499 in both actions: S.M. Smith

Roderick Louis Appearing on his own behalf in both actions:	R.V. Louis
Place and Date of Trial/Hearing:	New Westminster, B.C. November 14, 2017
Place and Date of Judgment:	New Westminster, B.C. July 25, 2018

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Introduction

[1] The original judgment on this matter was given August 25, 2015, after five days of argument. The reasons are indexed at 2015 BCSC 1487 (the "original reasons"). Following an appeal decision with reasons indexed at 2016 BCCA 494, several issues were remitted to this Court for further consideration. These reasons will address Mr. Rodrick Louis' ("Mr. Louis") unresolved claims as directed by the Court of Appeal.

[2] There are two petitions at issue here. The first belongs to Owners, Strata Plan NW499 ("NW499") and is filed under number S149448. The second belongs to Mr. Louis and is numbered S154156. Both petitions concern a dispute over the management of a White Rock Condominium at 1390 Martin St., White Rock, BC, and Unit 206 occupied by Mr. Louis ("Unit 206").

[3] The litigation began with a claim by NW499 in S149448 for payment of outstanding strata fees in the amount of $2,115.10 plus costs owing on Unit 206. The dispute was expanded to include issues around NW499's failure to abide by terms of the *Strata Property Act*, S.B.C. 1998, c. 43 [the *SPA*], when managing the White Rock Condominium. Specifically, Mr. Louis raises issues concerning NW499's breaches of the rights of the owners of Unit 206.

[4] Mr. Louis defends against the NW499 petition on the basis that the strata fees claimed were not due or owing because NW499 purported to act under invalidly approved bylaws.

[5] In his own petition (S154156) Mr. Louis advanced a similar but separate challenge, alleging that resolutions passed at special and annual general meetings between April 2010 and the present were invalid and of no force and effect. He also asked for an order compelling NW499 to: (1) comply with the *SPA* and its Standard Bylaws; and (2) schedule meetings to address the unauthorized actions NW499 had taken since 2010.

Background

[6] Unit 206 was owned by Mr. Louis' mother until her death in 1999. In her will, she bequeathed Unit 206 to Mr. Louis and his brother Timothy Louis and appointed Nancy Jamieson Kirk ("Ms. Kirk") executrix. Although Mr. Louis lived at Riverview Hospital intermittently between 1999 and 2006, he has also occupied Unit 206 since 2000, and assumed sole responsibility, as between himself, Timothy Louis and Ms. Kirk, to pay all strata fees, special assessments, property taxes, utilities and mortgage interest payments associated with the condominium.

[7] Title to Unit 206 is held in the name of Ms. Kirk and Timothy Louis as tenants-in-common, although Mr. Louis owns a one-half beneficial interest in Unit 206. Notwithstanding that Mr. Louis was under the minimum age allowed by NW499's by-laws, his right to occupy Unit 206 was confirmed by the Court of Appeal in reasons indexed as *The Owners, Strata Plan NW 499 v. Louis*, 2009 BCCA 54.

[8] On May 3, 2012, NW499 adopted an entirely new set of bylaws (the "2012 bylaws") in accordance with s. 128 of the *SPA* at an annual general meeting.

[9] The dispute erupted in 2012 after Mr. Louis stopped paying strata fees on Unit 206. He refused to pay the fees because he disputed the Strata Corporation's right to collect those fees for a number of reasons going back to a 2008 dispute. Settlement of that dispute was achieved under a May 1, 2009, written agreement that included the following terms:

> 6. NW 499 shall accept payments, starting May 1, 2009, from Mr. Louis for the monthly strata fees and any other sums payable in relation to unit 206; and
>
> 7. The NW 499 shall provide Mr. Lewis with the same rights as all other residents of NW 499 in relation to access to NW 499's common areas… And shall provide him with keys to the same.

[10] As a result of his refusal to pay strata fees, in 2012 NW499 registered a lien against title to Unit 206 under s. 116 of the *SPA*. In February 2013, NW499 commenced its petition (S149448) for judgment on the debt owing for strata fees and levies, and for an order seeking sale and conduct of sale of Unit 206. NW499

seeks an order that if Mr. Louis and/or the respondents have not paid the amount of the debt owing within 30 days from the date of an order then it should have exclusive conduct of sale.

[11] In response, Mr. Louis filed a response to petition and an affidavit alleging that NW499's failure to: give proper notice of meetings; recognize a proxy given by Ms. Kirk; provide proper information about the meetings; and to prepare and keep proper minutes of strata meetings, renders all votes at special and annual general meetings of the Strata between April 1, 2010, and the present invalid and without force or effect. Thus, he claims the strata fees claimed are not currently owing. He further challenged the authority of NW499 to file a lien under the *SPA* alleging strata fees arrears against title to Unit 206.

[12] In his own petition (S154156) he was seeking relief based on the claims that the results of all general meetings held since April 2010, including the adoption of the current bylaws were invalid.

Original Decision

[13] The original reasons addressed NW499's filing of a lien under ss. 116 and 118 of the *SPA* in November 2012 and its claim under s. 117 to enforce payment of the arrears by way of an order for sale of Unit 206. The Court ordered a stay of proceedings on the NW499 petition pending a motion of the strata to approve commencement of its petition. The Court of Appeal determined that the motion was not necessary and directed this Court to decide the issues in NW499's petition.

[14] Mr. Louis' petition S154156 was dismissed, in part because the court concluded he was limited to relief under s. 165 of the *SPA.*

[15] Mr. Louis advanced ten defences to petition S149448 including a constitutional challenge relying in part on ss. 164 and 165 of the *SPA* and in his petition (S154156) expanded on his claims concerning NW499's breaches of the *SPA* to including his reliance on s. 163.

[16] After the hearing of both petitions, some of Mr. Louis' defences to NW499's petition, including the constitutional challenge, were dismissed. NW499's petition (S149448) was stayed pending steps to be taken by NW499. An order was also made against NW499 under s. 165 of the *SPA* in Mr. Louis' favour but he was refused relief under s. 164 of the *SPA* because he did not have standing to make that claim.

[17] The original reasons included the following pertinent findings:

i. Since April 2010 the respondent has intentionally failed to provide notices of annual and special meetings "to registered owners and eligible voters".

ii. Section 45 of the *SPA* requires notice of upcoming annual and special general meetings to all owners and delivery of certain information.

iii. NW499 deliberately failed to provide the required notices of meetings and votes and minutes of meetings.

iv. Section 47 of the *SPA* did not exempt the Strata Corporation from the need to give notice to Ms. Kirk.

v. Since January 30, 2011, Mr. Louis has held a general proxy given by Ms. Kirk and NW499 refused to honour Ms. Kirk's proxy from January 2011 to the present.

vi. In October 2012, Ms. Kirk directed the strata council to mail all documentation regarding her interest in NW499 to her at 206-1390 Martin St., White Rock BC.

vii. Ms. Kirk directed NW499 that all documentation, including minutes of meetings and notices of meetings, were to be sent to Mr. Louis at the Martin Street address and they were to consult with him on issues relating to Unit 206.

viii. Ms. Kirk directed the Strata Corporation not to send any information and/or documents to her Vancouver address.

ix. Mr. Louis attended NW499 General Meetings in June, September and November 2011, but was refused the opportunity to participate because Ms. Kirk's proxy was not accepted.

x. On May 3, 2012, the owners approved replacement bylaws for NW499 with new provisions governing payment of strata fees, interest and penalties. It also limited the right of owners to be elected to counsel or vote if strata fees were in arrears.

xi. Notices of the above-noted meetings were sent to Timothy Louis.

xii. NW499 council withheld notices to Ms. Kirk including the May 3, 2012, annual general meeting notice.

xiii. As of January 2014, NW499 claimed $6370.78 for strata fee arrears, $4719.96 for legal fees; a bylaw charge of $100; and a special assessment of $2812.

xiv. Ms. Kirk was entitled to complain that her rights under the *SPA* to receive notice of meetings and assign her proxy were breached.

xv. It would be exceedingly prejudicial to NW499 to set aside all the votes in elections conducted by it since 2011 because notices were not given to Ms. Kirk and her proxy was ignored.

The Appeal Decision

[18] On appeal, Mr. Louis' constitutional challenge was dismissed as were some of his defences to the NW499 petition. Groberman J.A. held that Mr. Louis might be entitled to other relief under s. 163 of the *SPA* and directed this Court to consider his claims for declaratory relief in his petition under the broad authority of s. 163. Thus, Mr. Louis' petition was remitted to this Court to address the question of his "claims for declarations that votes and bylaws of the Strata Corporation since 2010 are invalid". Because Mr. Louis' claims may have been taken in the wrong form (a petition rather than a Notice of Civil Claim) the Court of Appeal also said that, if necessary, his claim could be converted to a civil action and a declaration made. The Court of Appeal also cautioned that any discretionary remedy available may take into account delay, acquiescence and other factors informing the exercise of discretion.

[19] The Court of Appeal deemed the stay of NW499's petition pending the taking of steps to obtain the owners' approval unnecessary. Thus, it is necessary in these reasons to consider NW499's claims in its petition.

The Issues to be Determined

[20] Addressing the issues in Mr. Louis' petition (S154156) will also involve consideration of the defences he advanced in response to NW499's petition. This is so because of NW499's claims for judgment for strata fees and an order for sale of Unit 206 depend on findings concerning the validity of its bylaws and strata fees assessment resolutions that are also challenged in S154156.

[21] In supplementary submissions from the parties on a question related to Mr. Louis' status under his mother's will to defend an action against her estate, Mr. Louis informed the court he became the registered owner of his one half interest in Unit 206 in his new capacity as the administrator of his mother's estate in place of Ms. Kirk's daughter on December 14, 2017. Nothing in these reasons turns on Mr. Louis' ownership in his capacity as administrator of his mother's estate.

[22] In Mr. Louis' petition, he asks the court to declare that all motions and resolutions of NW499 from April 2010 to the present were conducted invalidly and therefore of no consequence, force or effect.

[23] The prayer for relief in petition S154156 includes the following:

> a. a declaration as to invalidity of all special and annual general meetings between April 2010 and August 27, 2013;
>
> b. a declaration that the respondent's bylaws filed in the Land Title Office are of no force and effect;
>
> c. that an annual general meeting be scheduled within 60 days of the court order that all registered owners "and <u>their designates</u>" must be provided with written notice of the AGM in compliance with the core requirements of ss. 40-65 of the *SPA*;
>
> d. notices of annual general meetings must include indications of date time and location, agenda, proposed budget for each year, names of council members not seeking re-election and names of owners/persons who have put their names forward for election to counsel.
>
> [Emphasis Added.]

[24] In both petitions he challenges the bylaws and all actions taken since 2012 because:

a) Ms. Kirk was not given notice of the meeting at which the 2012 bylaws were adopted and the proxy she had given Mr. Louis was rejected by NW499;

b) As a result of this failure to give notice and recognize her proxy the bylaws were invalid and that all proceedings taken under those bylaws are invalid—including the strata fee assessments forming the basis of NW499's claim for judgment;

c) NW499's continued deliberate refusal to give notice of meetings renders its decisions invalid and in particular its claims against Ms. Kirk for strata fees; and

d) NW499's failure to give notice is not saved by the provisions of s. 47 of the *SPA* and because no effort was made to give the required notice.

[25] In substance, he argues if all NW499 meetings and motions decided at those meetings are set aside, then none of the NW499 elections, budgets or strata fee levies were validly made; thus Ms. Kirk was not obligated to make the payments alleged to be due. Thus, if no monies are owed to NW499, the petition claiming the lien and debt should be dismissed and no order for sale of Unit 206 can be made.

[26] The issues raised by NW499 in S149448 are:

a. Is NW499 entitled to judgment on the debt claimed for unpaid strata fees and charges as set out in its lien?

b. Is NW499 entitled to an order for sale in default of the payment of those fees owed by the owners of Unit 206?

c. Does Mr. Louis have standing to claim a remedy under s. 163 in petition S154156 or to oppose its petition?

d. Is Mr. Louis entitled to a remedy under s. 163?

e. Are all corporate management steps taken by NW499 since 2011 invalid?

f. Should the court import into this analysis provisions of s. 85 of the *Society Act*, R.S.B.C. 1996, c. 433 (now replaced by s. 105 *Society Act*, S.B.C. 2015, c. 18) to relieve against or remedy defects in compliance with its bylaws?

g. Should the court exercise it discretion to decline to make an order that all corporate management steps of NW499 since 2011 are invalid because of undue prejudice to NW499?

h. Should Mr. Louis' petition be dismissed due to laches and/or acquiescence?

Mr. Louis' Standing to Defend S149448 and to Pursue S154156

[27] NW499 submits that Mr. Louis does not have standing to bring his petition. I infer they also contend he does not have a right to defend against their petition.

[28] In his petition Mr. Louis relies on ss. 163, 164 and 165 of the *SPA* as the basis for his claims. In the original reasons, relief was refused to Mr. Louis under s. 164 because he was not entitled to an order preventing or remedying significant unfairness of NW499's actions. His claim failed because he was not a "registered owner" as defined by the *SPA*. Under s. 165, relief was granted because he was an interested party in regard to prospective remedies but could not claim retroactive correction of past procedural errors.

[29] The Court of Appeal affirmed these conclusions but decided that granting remedies under ss. 164 and 165 did not preclude Mr. Louis from suing NW499 under s. 163 which provides:

> **Strata corporation may be sued**
>
> 163. (1) The strata corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the strata corporation.
>
> (2) An owner may sue the strata corporation.

[30] The *SPA* does not prescribe any remedies for suits under s. 163 and it is unclear what causes of action or remedies may be available to a person in Mr. Louis' position suing a Strata Corporation for claims "involving acts or omission of the strata Corporation" independent of ss. 164 and 165. To reiterate, on the issue of s. 163 the Court of Appeal discussed the scope of s. 163 (1) and (2) as follows:

> [61] In my view, the appellant's claim for declarations fell squarely within s. 163. I note that s. 163(2) does not limit the scope of s. 163(1). Section 163(2) merely pre-empts any argument that an owner is precluded from suing the strata corporation because such a suit would amount to an owner suing him or herself. Nothing in s. 163(2) suggests that *only* owners may sue a strata corporation.

[31] I assume the Court of Appeal intended to endorse Mr. Louis' right to sue under s. 163 without endorsing his right to succeed on the claims set out in his petition. Thus, although he is competent to sue NW499, his claim must still be based on a right under the legislation (or the bylaws) for declaratory relief or some other cause of action but he is not entitled to relief set out in s. 164 or additional relief

under s. 165. Mr. Louis must establish a cause of action and standing to bring a claim under s. 163.

[32] I concluded in the original reasons that NW499 failed to notify Ms. Kirk, the registered owner of Unit 206 of meetings (including May 2012 when the 2012 bylaws were adopted).

[33] On this point, Mr. Louis contends that, because he is a beneficial owner and "delegate" of Ms. Kirk, he had acquired a separate right that has been breached entitling him to declaratory relief that would require the Strata Corporation to revisit all of the bylaws, elections and decisions made since the impugned 2012 bylaws were passed. He also contends NW499's refusal to honour Ms. Kirk's proxy, her directions regarding service of documentation and her direction to consult with him is fatal to enforceability of any bylaws adopted in breach of their rights.

[34] I do not accept Mr. Louis' contention that as Ms. Kirk's designate he too was entitled to notice of those meetings. There is no provision in the *SPA* that permits a registered owner to assign or transfer a right to notice or other procedural rights to third person. The registered owner is entitled to appoint a proxy and direct the Strata Corporation to deliver notice to a specific address, but nothing in the *SPA* allows for an assignment of a "procedural right" such as notice to a proxy or beneficial owner. If Mr. Louis succeeds in his petition, NW499 would likely be compelled to convene meetings retroactively to 2011, conduct new elections for board members and present new budgets and strata fee levies for each year (although Mr. Louis does not want to put NW499 to such an extensive re-visitation of its past actions). Similarly, if he is successful in challenging all by-laws and administrative processes since 2011 in response to petition 149448, Unit 206 would not be subject to claims for unpaid levies. In the result, petition S149448 would be dismissed insofar as no debt will be created until the passage of new bylaws and assessments.

[35] In my view, Mr. Louis' claim, if any, depends on his status as beneficial owner of the land and, to the extent that financial charges are levied against the land, they are a charge on his beneficial interest.

[36] I was not informed during the argument in 2015 that Ms. Kirk had died in 2014 but during argument on this part of the trial, Mr. Louis informed the court that Ms. Kirk's estate was then being administered by her daughter Ms. Diane Jamieson (Ms. Kirk's daughter). No effort was made to substitute Ms. Jamieson as a respondent to NW499's petition. Mr. Louis became the administrator of his mother's estate in 2017.

[37] I invited the parties to make submissions with regard to s. 105 of the *Wills Estates and Succession Act*, S.B.C. 2009 c. 13 [*WESA*], which sets out the requirements that a beneficial owner must take before standing in the shoes of a trustee in bringing or defending litigation.

[38] Counsel informed the court that *WESA* is legislation post dating the commencement of both petitions and thus no application could be made under that legislation. They contend that Mr. Louis has no standing to participate in either lawsuit. I am persuaded that the submissions regarding *WESA* are correct and that the statute does not have any impact on the issue in this case.

[39] NW499 contends that if the *WESA* provisions concerning actions by or against executors apply and Mr. Louis wished to be in the shoes of the executrix, he must apply to be granted leave on the test set out in s. 151(3) of *WESA*: see *Bunn v. Bunn Estate,* 2016 BCSC 2146, at para. 32; and *Gordon Estate (Re)*, 2018 BCSC 487.

[40] I accept the NW499 submissions that *WESA* does not apply in the circumstances. However, I am satisfied that the common law, before *WESA*, permitted beneficiaries to defend trust property in any case where a trustee was unwilling or unable to take steps necessary to defend an attack on property. In, *Mayer v. Osborne Contracting Ltd.*, 2012 BCCA 77, beginning at para. 239, the court said:

> [240] The Supreme Court of Canada set out the elements of a claim for knowing receipt in *Citadel* at paras. 19, 21, and 24. In essence, a beneficiary may claim against a stranger to the trust for knowing receipt of trust funds

> where the stranger has improperly and knowingly received trust property for her own benefit.
>
> [241] A beneficiary's first avenue of redress to recover trust property wrongly taken by a stranger to the trust lies, however, against the trustees to compel them to carry out their duties. It is only if the trustees are unwilling or unable to take action that a beneficiary may assume the position of the incapacitated trustees and sue to recover the trust property: *Waters' Law of Trusts*, at 1204. In *Hayim,* the principle was stated in these terms at 748:
>
> > These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate.

[41] Where a trustee has failed or refused to defend an action concerning trust property it is appropriate that the beneficiary either be joined as a party or, in any event be permitted to defend the action as beneficiary: see *Franklin v. Franklin*, [1915] W.N. [CH.]. See also *Bessette v. Goddard* (1952), 4 W.W.R. (N.S.) 407 (affirmed [1952] 3 D.L.R. 828) where the court held a beneficiary can be made a party to litigation where concerned with defence of trust property. It is clear to me that Ms. Kirk, by her actions and communications to NW499 gave over to Mr. Louis all dealings with NW499 because she did not want to be involved. Thus she declined to be involved in the affairs of the strata and Unit 206 and either refused to or would have refused to defend Mr. Louis' interest in the property.

[42] Although the NW499 petition is against Ms. Kirk and Timothy Louis, it was defended only by Mr. Louis. He did not have a power of attorney and Ms. Kirk's proxy did not give him the power to commence or defend legal proceedings. However, I am satisfied that because Ms. Kirk did not defend his beneficial interest in Unit 206 and told NW499 they were to deal with Mr. Louis on all matters concerning Unit 206, Mr. Louis had standing as a beneficiary to defend petition S149448 on his own behalf and could be made a respondent with access to any defences available to Ms. Kirk. There is no doubt, Ms. Kirk was not going to defend the claims against Unit 206.

[43] I conclude that NW499's petition constitutes an immediate financial threat to Mr. Louis' interest in Unit 206 to the extent that, if strata fees were not paid within 30 days, the NW499 would be entitled to an order for sale with the proceeds first used to pay the strata's debt. I reject NW499's contention that Mr. Louis, not being a registered owner, has no standing to oppose its application for judgment or to bring a claim for a declaration concerning its non-compliance with the *SPA* over the years, at least as it impacts the debt for strata fees claimed by NW499.

[44] It had also been clear to NW499 since at least 2009 that Mr. Louis possessed a beneficial interest in Unit 206. They had negotiated with him extensively and entered into an agreement to accept strata fees from him. It is disingenuous of them to oppose his standing on their petition.

[45] Two Rules in the *Supreme Court Civil Rules*, [the *Rules*], further support Mr. Louis' standing to defend S149448. Rule 16-1(3) required NW499 to serve Mr. Louis with copies of the petition and affidavits because he was a person whose interests might be affected by the order. Rule 16-1(3) provides:

> **Petitions**
>
> (2) A person wishing to bring a proceeding referred to in Rule 2-1 (2) by filing a petition must file a petition in Form 66 and each affidavit in support.
>
> **Service**
>
> (3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.
>
> **Response to petition**
>
> (4) A person who has been served with a copy of a filed petition under subrule (3) of this rule must, if the person wishes to receive notice of the time and date of the hearing of the petition, do the following:
>
> (a) file a response to petition in accordance with subrule (5);
>
> (b) file, with the response to petition, all affidavits that have not already been filed and on which the person intends to rely at the hearing of the petition;
>
> (c) unless the court otherwise orders, serve on the petitioner 2 copies and on every other party of record one copy of each document filed under paragraph (a) or (b) as follows:
>
> (i) if the petition respondent was served with the petition anywhere in Canada, within 21 days after that service;

[46] Rule 16-1(3) is similar to R. 8-1 which also contemplates notice to interested parties to enable those parties to make representations concerning any order that might affect their interest in a property. Support for this conclusion can be found in *Alexis v. Duncan*, 2015 BCCA 135, where, in the context of joining parties, the Court of Appeal said:

> [24] An application to join a party should only take place after all parties who may have an interest, including the existing parties to the proceedings and the proposed new party, have notice. Notice gives the parties the opportunity to make submissions and the submissions, in turn, provide context to the chambers judge to determine whether or not joinder of the party is just and convenient. To the extent that the decision in *Hartoft v. Bell et al.*, 2006 BCSC 413 suggests otherwise, that decision was, with respect, wrongfully decided and should not be followed.

[47] A situation such as this was discussed in *Bassi v. Bassi*, 2013 BCSC 284, aff'd 2013 BCCA 422, where Joyce J. said:

> [83] Unlike the former rule, R. 8-1(7) no longer exempts a party who is not a party of record from service. The amendment must have been intentional. The defendant in this case fell within the category of persons defined by the expression "every other person who may be affected by the orders sought". I conclude that he was entitled to notice of the application under the *Rules*.

[48] I am satisfied that NW499 was required to serve Mr. Louis with the petition and he was entitled to respond to defend his interest in the property.

[49] Although Mr. Louis was entitled to be served with the petition and affidavits and to defend by filing his response to the petition, R. 16-1 does not contemplate giving him status as a full party to the proceeding. That status can be obtained only by application under R. 6-2(7): see *Kitimat (District) v. Alcan Inc*., 2006 BCCA 562, at para. 1.

> [24] An application to join a party should only take place after all parties who may have an interest, including the existing parties to the proceedings and the proposed new party, have notice. Notice gives the parties the opportunity to make submissions and the submissions, in turn, provide context to the chambers judge to determine whether or not joinder of the party is just and convenient. To the extent that the decision in *Hartoft v. Bell et al.*, 2006 BCSC 413 suggests otherwise, that decision was, with respect, wrongfully decided and should not be followed.

[50] Mr. Louis was not a respondent to that petition but I conclude he was a person entitled to notice of the application and to file a response and make submissions. As such, he was entitled to argue that flaws in the Strata Corporation's procedures and bylaws that violated Ms. Kirk's democratic rights and operated to render the claim for strata fees invalid and unenforceable. To the extent he was defending his own beneficial interest in Unit 206, he may also have been entitled to status as a respondent.

[51] I am also satisfied that an order might also be made under R. 6-2(7)(c) of the *Rules*, making Rodrick Louis a respondent to petition S149448.

[52] Finally, NW499 contends that even if the strata meetings and bylaws were improperly passed, that Mr. Louis is not entitled to a remedy other than what was provided for in s. 165 and that he is precluded from seeking any other relief under s. 163.

[53] I conclude that, to the extent that bylaws and resolutions passed by NW499 since 2011 purport to create a debt owing by Ms. Kirk, and this debt is *in personam* against her, the practical effect of the lien becomes a charge against Mr. Louis' beneficial interest.

[54] It is important to note that the filing of a lien under s. 116 does not constitute evidence of the debt owing. Section 117(3) of the *SPA* requires the court to try the debt issue and order judgment in favour of the Strata Corporation "for an amount that the court, as a result of the trial, finds owing…"

[55] To the extent that the bylaws or resolutions of NW499 creating the strata fee levies constitute an attack on his beneficial interest in Unit 206, then as beneficiary, Mr. Louis has standing to oppose petition S149448 and challenge the claim that Ms. Kirk or Timothy Louis are indebted to NW499.

[56] If necessary, it might serve the purposes of justice to grant Mr. Louis the right to be a respondent and defend NW499's petition and that an order may be made adding him as a respondent *nunc pro tunc*. In *The Owners, Strata Plan LMS 3259 v.*

Lam, 2017 BCCA 170, the Court of Appeal addressed a similar question where a Strata Corporation improperly commenced a proceeding without leave of the court. In granting leave *nunc pro tunc*, the court set out the factors to be considered in determining whether such an order should be granted:

> [60] In discussing the *nunc pro tunc* doctrine in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, Madam Justice Côté said this about the factors that inform a decision whether to make such an order:
>
> > [90] In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice [citations omitted]. None of these factors is determinative.
>
> [61] In my view, a *nunc pro tunc* order is appropriate in this case. I say that for the following reasons:
>
> > (a) In making the February 26, 2009 order, Sinclair Prowse J. did not intend to permanently enjoin the parties to the various related actions she was case-managing from ever commencing new actions against each other without leave of the court. Rather, her order was intended as a temporary management tool;
> >
> > (b) In light of the 2013 judgments of Fenlon J. in the Fines Action and Extra Gift Action, the Strata could reasonably believe the leave requirement in the February 26, 2009 order was no longer operative; and
> >
> > (c) Had the Strata applied for leave to commence its action, leave would have been granted. Refusing leave would have been contrary to the interests of justice, as it would have enabled Mr. Lam to avoid liability under the costs order forever.

[57] This issue was not addressed by the parties and I am reluctant to make any order without submissions on the point. I invite Mr. Louis and NW499 to make further submissions on whether I can order that he be made a respondent to the NW499 petition *nunc pro tunc* (“now for then”) if necessary before judgment is rendered. I

am satisfied that even if he is not a respondent to the petition, he has the standing as an interested party and as a beneficiary of the estate to oppose the relief claimed.

[58] Mr. Louis' petition S154156 involves objections to the same procedural steps that inform his response to S149448. In petition S154156 he also seeks declarations concerning past meetings, resolutions and election that he claims are invalid due to the lack of notices. Although the factual basis for his petition is practically the same in both proceedings, I find that Mr. Louis' interests in the petition S154156 are different because his status as beneficial owner does not give him the same democratic rights held by Ms. Kirk. He cannot compel NW499 to perform its obligations to her nor can he obtain the relief claimed in his petition. He is entitled to shield his beneficial interest in Unit 206 because Ms. Kirk's rights as legal owner were breached and the strata fee levies are invalid but, he cannot obtain a remedy under s. 163 forcing NW499 to take any steps to rectify its past failures. This is abundantly clear when considered in light of the restrictive definition of owner in the *SPA*:

> "owner" means a person…shown on the register of land titles…whether or not entitled to it in the person's own right or in a representative capacity…"

[59] Based on my overall findings concerning the claims made in petition S149448, the result may obviate the need to address Mr. Louis' claims for declarations in his petition. Nevertheless, it is important to address his claims stemming from his beneficial ownership of an interest in Unit 206. I find that as a beneficial owner only, he was not personally entitled to the notices described in his petition and he has not raised any claim entitling him to relief against NW499; he is not entitled to succeed in petition S154156.

Discretionary Remedy

[60] If I am incorrect in my conclusions regarding petition S154156 I will comment on NW499's argument that s. 163 of the *SPA* contains no specific remedy clause and thus "it falls to the inherent jurisdiction of the court to fashion one." This principle was endorsed by Groberman J.A. at para. 64.

[61] I will comment on this question also because it may be perceived as an issue stemming from my conclusions in petition S149448 concerning the validity of NW 499's bylaws forming the basis for its debt claims.

[62] To guide the court in fashioning a remedy, NW499 submits that the court should consider remedial measures similar to those in s. 85 of the previous *Society Act* that permitted courts to intervene where there has been an "omission, defect, error or irregularity" in the conduct of the affairs of a society. Section 85 reads:

> **Court may remedy irregularities**
>
> **85** (1) Despite anything in this Act, if an omission, defect, error or irregularity occurs in the conduct of the affairs of a society by which
>
> (a) a breach of this Act occurs,
>
> (b) there is default in compliance with the constitution or bylaws of the society, or
>
> (c) proceedings at, or in connection with, a general meeting, a meeting of the directors of the society or an assembly purporting to be such a meeting are rendered ineffective,
>
> the court may
>
> (d) either of its own motion or on the application of an interested person, make an order
>
> (i) to rectify or cause to be rectified or to negate or modify or cause to be modified the consequences in law of the omission, defect, error or irregularity, or
>
> (ii) to validate an act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity, and
>
> (e) give the ancillary or consequential directions it considers necessary

[63] NW499 argued that s. 85 could serve as a reference point to exercising the court's inherent jurisdiction to relieve against NW499's non-compliance with its constitution or bylaws, thus validating its actions since its defective compliance.

[64] In my view, the rights and expectations of members of a society or shareholders of corporations are substantially different than those of owners of strata property. In both societies and corporations, there exist comprehensive

statutory protections that may be invoked when directors act contrary to the bylaws or in oppressive ways and against the rights of some members, shareholders or others. That is not the case of the *SPA*.

[65] In submissions NW499 referred the court to *Omnicare Pharmacy Ltd. v. Strata Plan LMS 2854*, 2017 BCSC 256 [*Omnicare*]. Counsel concedes this case represents a hurdle for NW499 because of its conclusion concerning the democratic rights of members. *Omnicare* held that strict compliance with the democratic rights contained in the *SPA* is necessary and there is no authority to relieve against compliance failures causing breaches of an owner's democratic rights even where prejudice to an aggrieved owner is overshadowed by greater prejudice to the strata corporation.

[66] In *Omnicare*, a Strata Corporation had adopted new bylaws contrary to the manner required by s. 128(1)(c) of the *SPA*. The strata council had not been validly constituted since 2002, and in 2009 Omnicare commenced proceedings asserting that the Strata Corporation was treating it in a manner that was significantly unfair. In 2015, the Strata Corporation repeated its assertions that Omnicare was in breach of various bylaws and levied a fine.

[67] NW499 argued that *Omnicare* should be distinguished because s. 128(1)(c) created a specific right protecting minority owners (i.e. the commercial owners in the strata from the tyranny of residential owners). This section created a veto power that was extremely important in maintaining the balance between commercial and residential owners. The tension between those two interests animated the court's decision to reject the bylaw because it was improperly adopted. They also argue that the court in *Omnicare* did not consider s. 163 of the *SPA*.

[68] NW499 further contends that the strict compliance approach taken by the court in *Omnicare* is too onerous and is not in keeping with the discretionary remedies provided in ss. 164 and 165 of the *SPA*. It claims the compliance failures in this case did not cause any significant prejudice to Mr. Louis or Ms. Kirk, and if its

bylaws and resolutions are found to be void, there will be enormous prejudice to the Strata Corporation.

[69] They submit a finding in Mr. Louis' favour that would require recasting of all budgets and a reassessment of strata fees from 2011. NW499 submits the process of collecting strata fees retroactively will be difficult to rectify. They submit an assessment of NW499's past conduct should involve a balancing of prejudice to Ms. Kirk or Mr. Louis against the prejudice and burdens that may fall on the strata.

[70] NW499 contends that a balancing of the prejudicial impact on an owner resulting from procedural breaches must be weighed against the cost and disruption resulting from rigid application of the bylaws and statute in granting relief. It referred the court to *The Owners, Strata Plan NW 971 v. Daniels*, 2009 BCSC 1235, aff'd 2010 BCCA 584 [*Daniels*] and *Blue-Red Holdings Ltd. v. Strata Plan VR 857*, [1994] B.C.W.L.D. 2769 (S.C.) [*Blue-Red*].

[71] NW 499 argues for consideration of the framework similar to s. 85 of the former *Society Act* (now s. 105) to obviate the results of declaring its bylaws and resolutions void and ameliorate any prejudice to the other owners.

[72] In cases decided under the previous *Society Act*, the court had jurisdiction to address "omission, defect, error or irregularity" in the conduct of the Society's affairs while taking into account and balancing the interests of the society and its members. Section 85(2) of the *Society Act* provided:

> The court must, before making an order, consider the effect of it on the society and its directors, officers, members and creditors.

[73] NW499 referred to several cases, including *Gill v. Johal et al.*, 2002 BCSC 449; *George v. BC Wildlife Federation*, 2016 BCSC 718, and several decisions concerning *Kaila v. Khlasa Diwan Society*, 2004 BCSC 1399, and *Garcha v. Khalsa Diwan Society-New Westminster,* 2006 BCCA 140.

[74] NW499 argues the authorities inform the court of the need to be sensitive to the difficulties created by disgruntled society members, and to be cautious in

imposing onerous remedial measures that might adversely affect a society and its members. Further, delay in seeking relief should be a factor taken into account in deciding to exercise remedial discretion.

[75] NW499 focused on the distinctions between the s. 128 breaches in *Omnicare* and the notice failures in this case in an effort to persuade the court to engage in an analysis adopting principles derived from the *Society Act* and the cases decided under that statute. In *Omnicare*, the Strata Corporation acknowledged its bylaws were not passed in compliance with the *SPA* but claimed this resulted from a technical failure and the court was asked to uphold the validity of bylaws. It claimed the fines levied against Omnicare were justified and denied treating the owner in a significantly unfair manner.

[76] In *Omnicare*, Adair J. concluded that s. 128 of the *SPA* could not be interpreted in a way that allowed the court to exercise discretion overriding the democratic rights provided in the *SPA*. She said:

> [116] In my opinion, s. 128(1)(c) of the *Strata Property Act* cannot be interpreted in a way that leaves the court with a discretion to override the democratic rights provided for in that section.
>
> [117] Under s. 128(1)(c) of the *Act*, a nonresidential owner has the democratic right to vote separately from the residential owners and to have its voice heard. There are no other provisions in the *Act* that would empower either the strata council or the court to dispense with the statutory requirement for separate residential and nonresidential voter approval of a bylaw amendment under s. 128, and clearer wording would be needed to override such a fundamental right. Treating the Current Bylaws as valid (as the Strata Corporation asks the court to do) deprives nonresidential owners of their democratic right to vote as a separate group, a right given to them under s. 128(1)(c) of the *Act*.
>
> [118] In that light, and contrary to the Strata Corporation's submissions, the court cannot exercise a "discretion" in favour of upholding the validity of the Current Bylaws in the face of non-compliance with s. 128(1)(c). Rather, the consequence of the failure to comply with s. 128(1)(c) is that the Current Bylaws are invalid, and I so find.

[77] The Court concluded that the new bylaws were invalid and the standard bylaws prescribed by the *SPA* applied.

[78] In *Daniels*, Madam Justice Smith considered whether the chambers judge erred in upholding the validity of a special assessment because of flaws in the notice and whether the trial judge erred in considering the prejudice to a Strata Corporation outweighed the prejudice to the appellant owner.

[79] The court upheld the chambers judge on the question of the validity of the assessment but commented on the court's jurisdiction to consider prejudice to a Strata Corporation that adopts an invalid bylaw. In *Daniels*, the Court of Appeal at para. 42 stated:

> [42] I find it unnecessary to address this ground of appeal in view of my finding that the chambers judge was correct in upholding the validity of the April 23, 2007 vote on the special resolution. However, with respect, I would also note that counsel has not referred to any authority that would give a court the "inherent jurisdiction" to make orders with respect to the internal management of a private organization in the circumstances of this case.

[80] NW499 also relied on the comments of Dorgan J. in *Blue-Red* where she was asked to declare certain special resolutions of the Strata Corporation void and of no effect because several special resolutions passed at an extraordinary general meeting did not comply with s. 18 of *Condominium Act*, R.S.B.C. 1979, c. 61 [the *Act*]. The court also concluded that, under s. 42 of the *Act*, four of the special resolutions were "unfairly prejudicial" to the petitioner. She decided this case against the Strata Corporation stating that:

> I have already concluded that although the special resolutions to amend the bylaws were proposed by an improperly constituted strata council, that irregularity is not fatal. I have also concluded that, as both the notice and the quorum requirements were met, the meeting was properly convened.
>
> However, regardless of the validity of the strata council proceedings on April 5, 1994, the question is whether the affairs or powers of the corporation have been exercised in an oppressive or unfairly prejudicial manner. As Melvin J. stated in *Vold v. The Owners, Strata Corporation 202* (1993), 31 R.P.R. (2d) 129 at 134 (B.C.S.C.), when considering whether the affairs or powers or acts of a strata corporation have been exercised in an oppressive or unfairly prejudicial manner the court should look at the cumulative effect of the conduct complained of.

[81] *Blue-Red* was a case decided under oppression sections of the former *Condominium Act* that allowed owners to obtain injunctive relief requiring strata

corporations to remedy oppressive or unfair actions against owners: see ss. 40 and 42 of the *Condominium Act*. Those sections parallel s. 164 of the *SPA*.

[82] NW499 also referred this Court to *Presch v. Alma Mater Society of British Columbia*, 2017 BCSC 963, at para. 30, indicating that the same discretionary principles found in s. 85 of the former *Society Act* still apply.

[83] In this case, NW499's error was not technical or accidental. They deliberately ignored the express wishes of Ms. Kirk in refusing to recognize Mr. Louis as her proxy and to communicate with him concerning all matters related to Unit 206. NW499 made these decisions because they knew Mr. Louis would attend meetings and that his voice at those meetings could be disruptive. By doing so, NW499 interfered with Ms. Kirk's democratic rights under the bylaws and her ability to be represented at meetings by Mr. Louis.

[84] NW 499 obviously knew that he was the sole occupant of Unit 206, he was paying all charges connected with the residence and he was the beneficial owner.

[85] Absent properly adopted bylaws of the Strata Corporation, the Schedule of Standard Bylaws attached to the *SPA* are the default bylaws of a strata in BC.

[86] Neither Ms. Kirk nor Mr. Louis were given notice of the annual general meeting at which the 2012 bylaws were adopted. There are significant differences between the 2012 bylaws and the *SPA*'s Standard Bylaws that would otherwise have applied to Unit 206. For example, the Standard Bylaws do not allow for fines or interest charges on unpaid strata fees whereas the 2012 bylaws prescribed a rate of 10% coupled with a $25 per month fine. Section 130 of the *SPA* permits a fine for breaches of bylaws and rules but before enforcement of a bylaw or rule notice must be given with a time limit for compliance.

[87] Notwithstanding any hardship that might flow, I am not satisfied that NW499's reliance on the previous *Society Act* and the provisions allowing the court to make discretionary and declaratory orders are apposite to this dispute. The legislature

could have made an allowance for technical mistakes or errors in procedure in the *SPA* to address prejudice that might result from invalidation of bylaws—it did not.

[88] NW499's difficulty in the context of this case is its deliberate decision to disenfranchise Ms. Kirk of her democratic rights within the strata. It is significant that when Ms. Kirk directed that notices and information concerning NW499 be delivered to Unit 206, she intended and fully expected that Mr. Louis would receive notices, attend meetings, and vote with the proxy given to him. On balance, NW499's behaviour cannot be excused.

[89] Overall, the differences between the Standard Bylaws and the 2012 bylaws are significant in view of NW499's refusal to provide notices and accept Ms. Kirk's proxy. It would be inappropriate to exercise any discretion, if that option were available to the court, which would obviate the deliberate wrong done to Ms. Kirk and indirectly, to Mr. Louis.

[90] Taking into account the court's conclusions in *Omnicare* and *Daniels*, I am satisfied there is no discretion to relieve against NW449's failure to give the notices required under the *SPA* and conclude that the 2012 bylaws are invalid. It follows that the bylaws setting the budgets and strata fees are also invalid. There must be valid bylaws in place to set budgets and strata fees and to collect those fees and fines in regard to Unit 206. Absent the necessary authority, NW499 is not entitled to judgment because the strata fee debt is not yet owing.

NW499's Debt Claim and Lien on Unit 206

[91] The debts owed by Mr. Louis are somewhat complex. The initial lien filed by NW499 claims a debt of $2,115.10 plus costs. The amount claimed in the NW499 petition increased to $3,010.96 as of February 1, 2013. Presumably, the difference between the two numbers is the accumulation of strata fees between December 1, 2012, and February 1, 2013. That difference is not explained in the material. In another document presented by NW499 on January 13, 2014, the total amount claimed was $14,002.74. On April 1, 2017, NW499 claimed the amount outstanding was $29,726.77. Then, in an outline of relief and facts, NW499 claims the total

amount is $26,856.75 including $3,962.66 as a special levy; $19,478.88 for strata fees; and $3,415.21 for interest. The strata also claims taxable costs and disbursements. These amounts may include the interest and fines levied against Unit 206 in accordance with the 2012 bylaws.

[92] On the basis of these debts, NW499 filed a lien under the *SPA*. Section 116 of the *SPA* authorizes the Strata Corporation to register a lien against a strata lot if an owner fails to pay the Strata Corporation's strata fees. On the registration of a certificate of lien, the registration of that certificate creates a lien against the owners of a strata lot "for the amount owing." That lien ranks in priority to every other lien and registered charge.

> **Certificate of Lien**
>
> 116 (1) The strata corporation may register a lien against an owner's strata lot by registering in the land title office a Certificate of Lien in the prescribed form if the owner fails to pay the strata corporation any of the following with respect to that strata lot:
>
> (a) strata fees;
>
> (b) a special levy;
>
> (c) a reimbursement of the cost of work referred to in section 85;
>
> (d) the strata lot's share of a judgment against the strata corporation;
>
> …
>
> (2) The strata corporation may register a lien against any strata lot, but only one strata lot, owned by an owner as owner developer, by registering in the land title office a Certificate of Lien in the prescribed form if the owner developer fails to pay an amount payable to the strata corporation under section 14 (4) or (5), 17 (b) or 20 (3).
>
> (3) Subsections (1) and (2) do not apply if
>
> (a) the amount owing has, under section 114, been paid into court or to the strata corporation in trust,
>
> (b) arrangements satisfactory to the strata corporation have been made to pay the money owing, or
>
> (c) the amount owing is in respect of a fine or the costs of remedying a contravention.
>
> (4) On registration the certificate creates a lien against the owner's strata lot in favour of the strata corporation for the amount owing.
>
> (5) The strata corporation's lien ranks in priority to every other lien or registered charge except

> (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation,
>
> (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or
>
> (c) if the other lien or charge is made under the *Builders Lien Act*.
>
> (6) On receiving the amount owing, the strata corporation must within one week remove the lien by registering in the land title office an Acknowledgement of Payment in the prescribed form.

[93] Section 117 of the *SPA* provides:

> **Forced sale of owner's strata lot to collect money owing**
>
> 117 (1) After the strata corporation has registered a Certificate of Lien against a strata lot, the strata corporation may apply to the Supreme Court for an order for the sale of the strata lot.
>
> (2) If the strata corporation has obtained a judgment for the amount owing, the court may, after considering all the circumstances, make an order for the sale of the strata lot.
>
> (3) If the strata corporation has not obtained a judgment for the amount owing, the court may try the issue and may
>
> (a) order that judgment be entered against the owner in favour of the strata corporation for the amount of the lien or for an amount that the court, as a result of the trial, finds owing, and
>
> (b) if judgment is entered against the owner, make an order for the sale of the strata lot after considering all the circumstances.
>
> (4) An order for the sale of a strata lot must provide that, if the amount owing is not paid within the time period required by the order, the strata corporation may sell the strata lot at a price and on terms to be approved by the court.

[94] Finally, s. 118 of the *SPA* states:

> **Costs added to amount owing**
>
> 118 The following costs of registering a lien against an owner's strata lot under section 116 or enforcing a lien under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:
>
> (a) reasonable legal costs;
>
> (b) land title and court registry fees;
>
> (c) other reasonable disbursements.

[95] I am satisfied in the circumstances that the demand to Ms. Kirk to pay strata fees which, according to the evidence may or may not include penalties, interest or other charges, cannot be sustained because of the 2012 bylaws are invalid.

[96] The 2012 bylaws and subsequent resolutions passed in Mr. Louis' absence cannot be used as a basis for calculating Timothy Louis' and Ms. Kirk's obligation to pay strata fees.

[97] At this juncture, none of the NW499 claims for strata fees after May 2012 have been proven. The amount of the initial lien claimed was only $3,010.96 but for the reasons set out herein, I do not need to reconcile the differences in NW499's affidavits.

[98] This is not to say that the owners of Unit 206 are not obliged to pay their *pro rata* share of strata fees, special levies and costs, but only to conclude the process of obtaining the lien cannot be supported because the debt does not exist until the requisite bylaws and resolutions are passed or adopted.

[99] Under s. 117 of the *SPA*, there was no judgment in favour of NW499 before its petition was filed. As such, it is the court's obligation to "try the issue" and upon doing so it may order judgment entered against the owner in favour of the Strata Corporation for the amount of the lien or an amount that the court, as a result of the trial, finds owing.

[100] Mr. Louis had no independent right to notice or to participate in the affairs of NW499, because s. 45 of the *SPA* prescribes notice of all annual or special general meetings only to registered owners or tenants (this definition of owner applies where interests in the strata lots are held by an owner as trustee). Ms. Kirk was entitled to receive notice at her address of choice (Unit 206). Notices for annual meetings must include the budget and financial statement described in s. 103 of the *SPA*. This information is essential for owners to understand the measure of their financial obligations for the upcoming years. This did not occur.

[101] Valid votes may still take place if waiver of notice is given. Clearly, the legislature intended that owners, or their proxies, would be able to attend meetings, express opinions and vote. The democratic nature of the meetings is important. If Ms. Kirk, or Mr. Louis on her behalf, wished to attempt to persuade the meeting of a certain point of view, it is important to protect that right.

[102] Section 47 of the *SPA* provides that failures to give notice "does not invalidate a vote taken at the meeting as long as the strata corporation made a reasonable attempt to give the notice in accordance with that section." The clear implication of this section is that failure to give notice and failure to make any reasonable attempt to give notice, will result in invalidation of the vote. NW499 did not make a reasonable attempt therefore the 2012 bylaws are invalid. I am satisfied that any hardship brought about by this finding, was caused by NW499's behaviour. They cannot seek to hide behind any prejudice they may experience to escape the repercussions of their deliberate actions.

Laches Acquiescence

[103] NW499 argued that Mr. Louis and Ms. Kirk delayed in bringing their claims that the bylaws were invalid due to the lack of notice. They say he lived in the building and would have known that meetings were being held and that he, on behalf of Ms. Kirk, did not receive notices. He was aware that the proxy had been denied since he was present at the meeting when that first occurred. They say that he nonetheless delayed in seeking relief with respect to those issues and did so only in response to the petition S149448.

[104] They contend that the equitable doctrine of laches should operate to bar the granting of any declaratory relief: see *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2010 MBCA 71, at para. 342:

> 342 Thus, the doctrine of laches, which is based on the conduct of the party seeking relief, may be applied to claims seeking declaratory relief whether declaratory judgments are viewed as equitable in nature or *sui generis*.

[105] NW499 also relied on *Ahone v. Holloway*, 30 B.C.L.R (2d) 368 (C.A.), at para. 48:

> [48] If the trial judge took the view that laches would bar Mr. Ahone's claim, I think he was wrong. Laches is established when two conditions are fulfilled: (1) there must be unreasonable delay in the commencement or prosecution of proceedings, and (2) in all the circumstances the consequences of delay must render the grant of relief unreasonable or unjust.

[106] When assessing whether there was unreasonable delay in Ms. Kirk's or Mr. Louis' claims regarding the notice and the proxy, I observed that:

a. As early as September 13, 2011, Mr. Louis notified NW499 that every owner of a strata unit was entitled to notice of special and general meetings. He also complained about the council's unlawful refusal to recognize Ms. Kirk's proxy;

b. He wrote on October 8, 2011, raising similar issues;

c. Notwithstanding Mr. Louis' complaints, on February 21, 2012, NW499 issued its petition S149488 seeking a determination of the amount of the respondent's debt and an order for sale of Unit 206;

d. On March 28, 2012, Mr. Louis filed a response to the petition which he raised the issue of NW499's refusal to recognize Ms. Kirk's proxy;

e. He amended that response in July 2012, and included claims based on NW499's failure to give notice, recognize Ms. Kirk's proxy and provided information;

f. He explained his refusal to pay strata fees was based on NW499's refusal to recognize Ms. Kirk's proxy; and

g. He filed his petition on August 21, 2013, seeking the declarations referred to above.

[107] I am satisfied by the overall history of the litigation and the interactions between Mr. Louis and NW499 that there has been no unreasonable delay in the commencement or prosecution of his claims concerning the rejection of Ms. Kirk's proxy or Mr. Louis' complaint concerning NW499's refusal to give notice.

[108] Overall, NW499 was aware in February 2012 that Mr. Louis was asserting Ms. Kirk's right to nominate him as proxy to speak and participate at annual general

meetings. It is clear they knew what the dispute was and would have known that the 2012 bylaws were not validly passed without fair and reasonable notice to Ms. Kirk.

[109] The fact that NW499 may have to correct shortcomings from 2012 onward, is a matter almost entirely within their control. I do not accept that there has been laches or acquiescence in the dispute raised by Mr. Louis and would not dismiss his petition on that basis.

Conclusion

[110] I am satisfied that the petition of NW499 bases its claim for strata fees, legal costs, penalties or fines, on bylaws and/or resolutions of NW499 that are invalid. This does not mean that the strata fees necessary to operate NW499 from 2011 to the present will not be payable by the owners (including Mr. Louis); it simply means that the current debt claim arising from resolutions and bylaws passed since the 2012 bylaws fails.

[111] I am prepared to dismiss petition S149448 on the merits without further argument unless NW499 wishes to make additional submissions on the application of R. 16-1 or, if necessary, a *nunc pro tunc* order making Mr. Louis a respondent to the petition. If NW499 does not make further written submissions within 14 days, its petition will stand dismissed.

[112] With regard to petition S154156, I remain satisfied that Mr. Louis did not have a personal right to demand compliance by NW499 with the provisions of the *SPA* and the declarations he seeks cannot be made. That petition is also dismissed.

[113] Finally, either party will have leave to file an application for costs within 30 days. Any responding material as to costs must be filed within 15 days of receiving an application.

"Armstrong J."