Court of Appeal for Saskatchewan
Docket: CACV3063

Citation: ***Harvard Developments Inc. v Park Manor Condominium Corporation,*** **2018 SKCA 81**

Date: 2018-10-22

Between:

Harvard Developments Inc. and Western Surety Company

Appellants
(Applicants)

And

Park Manor Condominium Corporation

Respondent
(Respondent)

Before:	Richards C.J.S., Herauf and Ryan-Froslie JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Madam Justice Ryan-Froslie
In concurrence:	The Honourable Chief Justice Richards The Honourable Mr. Justice Herauf
On Appeal From:	2017 SKQB 83, Regina
Appeal Heard:	February 8, 2018
Counsel:	Eric Marcotte for the Appellants Jason Clayards and Marc Kelly for the Respondent

Ryan-Froslie J.A.

I. INTRODUCTION

[1] Harvard Developments Inc. and Western Surety Company [appellants] own units in a condominium operated by the respondent, Park Manor Condominium Corporation [Park Manor]. They appeal a Queen's Bench Chambers decision upholding an amendment to Park Manor's bylaws that changed the scheme by which contributions to the common expense and reserve funds are apportioned among the unit owners. The appellants objected to the new scheme of apportionment and applied to the Court of Queen's Bench pursuant to s. 99.2 of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [*Act*], and s. 49 of *The Condominium Property Regulations, 2001*, RRS c C-26.1 Reg 2 [*Regulations*], for an order prohibiting the amendment. Section 99.2 of the *Act* sets out an oppression remedy, while s. 49(1)(a) of the *Regulations* provides for an application to the court to object to an apportionment scheme. At issue in this appeal is the interplay between s. 49 of the *Regulations* and s. 99.2 of the *Act*, and whether the Chambers judge erred in his interpretation or application of those provisions. In my view, the Chambers judge erred in his application of s. 99.2, but that error did not affect the overall correctness of his decision. Accordingly, I would dismiss the appeal.

II. BACKGROUND

[2] Park Manor was incorporated in 2007. Its condominium project originally included 21 residential units. Most of those units range in size from approximately 1,300 square feet to 1,400 square feet. Three of the units, however, are significantly larger – almost twice the size of the other units. Harvard Developments Inc. owns the largest unit, which is close to 3,000 square feet.[1]

[3] In the original condominium plan filed with Information Services Corporation (the land titles registry in Saskatchewan), the developers calculated the unit factors used to determine the

[1] Approximate square footage has been used because the evidence pertaining to square footage was not consistent. For example, the square footage set out in Exhibit A attached to the affidavit of Ross Keith sworn February 7, 2017, varies from that contained in Exhibit E attached to the affidavit of Maureen Wagner, sworn March 3, 2017.

owners' contributions to the common expense and reserve funds solely on the size of the units.[2] After receiving professional advice, the developers amended the condominium plan to reflect a recalculation of the unit factors based on both the size of the individual units and usage of the common elements (hybrid unit factors). This was done because many of the common costs, including things such as security, common hallways, entry door maintenance, external landscaping maintenance and parking maintenance would be expended for the benefit of all unit owners regardless of the size of their units. Other common elements, such as roof repairs and utilities, would be consumed based on square footage. The developers believed using unit factors that reflected both square footage and an equal sharing of some of the common expenses was fair and equitable.

[4] At the time the condominium units were sold, the owners' contributions to the common expense and reserve funds were to be calculated using the hybrid unit factors. While the evidence establishes the appellants' representative was told by one of the developers at the time of purchase that the unit factors took both size and usage into account, other owners, namely Maureen Wagner and Lana Axelson, attested that when they purchased their units they did not know the unit factors were based on a hybrid of square footage and usage. Ms. Wagner attested she believed the unit factors were based on square footage alone as that was how unit factors had been calculated in a condominium previously owned by her.

[5] In May 2013, Ms. Axelson purchased the unit next to her suite. With the consent of Park Manor's Board, she knocked out the wall between her two units to expand her living space. The two units thus became a single residential unit consisting of 2,720 square feet. About a year after purchasing the second unit, Ms. Axelson became aware that the owners of the three largest units paid significantly less condominium fees than her even though the square footage of their units was similar to hers.[3]

[2] Unit factors are a measurement of a unit holder's ownership share in a condominium corporation (there are 10,000 unit factors in a condominium). Pursuant to s. 9(1)(e) of the *Act*, the condominium plan must have attached to it a unit factor schedule that specifies in whole numbers the unit factor for each unit in the condominium project.

[3] For example, in Ms. Axelson's affidavit, sworn March 2, 2017, paragraph 6 states Ms. Axelson's condominium fees in 2014 were $801.46 per month. The condominium fees for unit 17, which is 2,746 square feet, were $619.82 per month, almost $200 per month less than Ms. Axelson's.

[6] Ms. Axelson, who was a member of the Park Manor Board, raised the issue at a Board meeting. The Board resolved to look into the matter. The condominium property management company was approached and it provided the Board with the unit factor schedule that had originally been attached to the condominium plan. That schedule showed that the developers had changed the unit factors from square footage to a "hybrid". One of the developers attested the square footage of the units was amended to a "compressed range", but there was no evidence how either that compressed range or the hybrid unit factors themselves were calculated.

[7] In June 2014, a letter was sent by the Board to all unit owners notifying them that the original unit factors based on square footage were altered in 2007.[4] The Board indicated that as a result of that alteration the unit factors for the 18 smaller units had increased causing an increase in their condominium fees while the unit factors for the 3 largest units had decreased, causing a corresponding decrease in their condominium fees. The Board advised that it would like to amend the condominium plan to change the unit factors "back to the original unit factors issued in 2006". To do so required the approval of 80% of the unit owners. The Board was unable to obtain that percentage and, accordingly, the condominium plan could not be amended.

[8] An annual general meeting of the condominium corporation was held on August 16, 2016. The appellants sent their lawyers to explain the law with respect to amending condominium unit factors. After hearing the appellants' lawyers, the Board decided to obtain legal advice. As a result of that legal advice, it resolved to amend the corporation bylaws to provide a new scheme of apportionment based on unit size.

[9] A special general meeting was held on December 15, 2016, to approve the amendment. The minutes of the special meeting reflect the discussions that occurred with respect to the proposed change.[5] No details of those discussions were provided but it is clear from the minutes they included the history regarding the unit factors; the creation of the current expense structure; the average difference in dollars per year in contributions paid by the owners; the timeline and the right of dissenting owners to object to the amendment. The amendment passed with 75% of

[4] Exhibit E to the affidavit of Maureen Wagner, sworn March 3, 2017.
[5] Minutes of the special meeting attached as Exhibit I to the affidavit of Maureen Wagner, sworn March 3, 2017.

the unit owners voting in favour of it consenting in writing to the change. Four of the unit owners, including the two appellants, did not consent.[6]

[10] As a result of the amendment, Harvard Developments Inc.'s condominium fees would increase from $730.81 to $910.52 per month (an increase of $179.71 per month). Western Surety's condominium fees would decrease from $448.47 to $423.83 (a decrease of $24.64 per month).

[11] The appellants applied pursuant to s. 99.2 of the *Act* and s. 49 of the *Regulations* for an order prohibiting the amendment.

III. CHAMBERS JUDGE'S DECISION

[12] The Chambers judge concluded s. 49 of the *Regulations* permits a unit owner to bring an application to the court objecting to a scheme of apportionment. He indicated s. 49(5) of the *Regulations* appears to grant broad discretion to the Court, but there must be a basis for exercising that discretion. The Chambers judge went on to state at paragraph 13 of his judgment that the appellants had argued such a basis existed because the proposed scheme of apportionment was the result of oppressive or unfairly prejudicial conduct by Park Manor, which unfairly disregarded the appellants' interests.

[13] The Chambers judge concluded the amendment introducing the new scheme of apportionment had been made in accordance with the procedures set out in the *Regulations* and that discussions had taken place with respect to those amendments. As such, the Chambers judge found he was "in no position to interfere with Park Manor's decision to amend its bylaw" unless he was satisfied Park Manor's conduct in amending the bylaw was oppressive, unfairly prejudicial or that it unfairly disregarded the interests of appellants as set out in s. 99.2 of the *Act*.

[14] The Chambers judge then turned to consider s. 99.2 of the *Act*. Citing the Ontario Court of Appeal's decisions in *Metropolitan Toronto Condominium Corporation No. 1272 v Beach*

[6] At paragraph 7 of his judgment, the Chambers judge referred to five unit owners not consenting. This was in contradiction to what was stated in the affidavit of Maureen Wagner, sworn March 3, 2017, at paragraph 11. The judge's error is, however, of no consequence as even using his figures, 75% of the unit owners consented to the amendment.

Development (Phase II) Corporation, 2011 ONCA 667, 285 OAC 372, and *3716724 Canada Inc. v Carleton Condominium Corporation No. 375*, 2016 ONCA 650, 77 RPR (5th) 1 [*Carleton Condominium*], he found the test for oppression had two parts. An applicant must demonstrate (1) there has been a breach of his or her reasonable expectations; and (2) that, considered in the commercial context, the conduct complained of amounts to oppression, unfair prejudice or unfair disregard. The Chambers judge went on to quote with approval the analysis set out in *Ryan v York Condominium Corporation No. 340*, 2016 ONSC 2470 [*Ryan*], a decision of the Ontario Superior Court of Justice that dealt with the application of the oppression remedy contained in Ontario's *Condominium Act, 1998*, SO 1998, c 19.[7]

[15] The Chambers judge concluded the appellants had failed to meet their onus of demonstrating that Park Manor's conduct was oppressive, unfairly prejudicial or that it unfairly disregarded their interests. He found it was not reasonable for the appellants to expect the unit factors or apportionment scheme would never change because the *Act* and *Regulations* provided for such changes. He agreed with Park Manor that the appellants had a reasonable expectation the allocation of the common expenses would only change if those changes were made in accordance with the *Act*, the *Regulations* and Park Manor's bylaws. As the process followed in amending the apportionment scheme complied with the requisite procedures, the appellants had not met the first branch of the oppression test.

[16] The Chambers judge then went on to conclude the evidence did not establish Park Manor's actions were unfairly prejudicial or that they unfairly disregarded the appellants' interests:

> [22] … Park Manor began its inquiry into the apportionment of common expenses based on a question raised by one unit owner. The matter was subsequently explored, investigated, debated, and canvassed at a duly constituted special meeting of the owners. Each of the unit owners had the opportunity to attend the meeting and participate in the discussion. Each of the unit owners had the opportunity to "vote", by either consenting or not consenting to the proposed amendment. The scheme of apportionment was approved through a form of democratic process, specifically provided for in the relevant legislation.
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> [23] Furthermore, the scheme of apportionment that Park Manor has chosen is not arbitrary, and there is nothing inherently unfair about it. It is based on the size of each unit. It is concrete, ascertainable, and attached to a characteristic of each unit that makes sense in the context of real estate.

[7] Section 135 of the *Condominium Act, 1998*, is similar to s. 99.2 in that it applies to conduct that is or threatens to be "oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant".

> [24] In the end, the scheme of apportionment chosen by the Board of Park Manor may turn out to be better for some unit owners, and worse for others than the "hybrid" unit factors formula was. It may or may not amount to a more just and equitable overall distribution of common expenses. That is not for me to say at this stage, nor is it the determining factor on this application. …

[17] The Chambers judge dismissed the appellants' application.

IV. ISSUES

[18] The appellants now appeal the Chambers judge's decision. Their notice of appeal contained several grounds, which in effect raise the following issues:

(a) Did the Chambers judge err in his application of s. 99.2 of the *Act*?

(b) Did the Chambers judge apply the proper test with respect to s. 49 of the *Regulations*?

V. LEGISLATIVE PROVISIONS

[19] Section 99.2 of the *Act* reads as follows:

> **99.2**(1) An owner, a corporation, a developer, a tenant, a mortgagee of a unit or other interested person may apply to the court for an order if the applicant alleges that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant.
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> (2) On an application pursuant to subsection (1), if the judge determines that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, the judge may make any order the judge considers appropriate, including:
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> (a) an order prohibiting the conduct alleged in the application; and
>
> (b) an order requiring the payment of compensation.

[20] The relevant portions of ss. 47, 48 and 49 of the *Regulations* provide:

> **47** For the purposes of sections 57 and 58 of the Act, the corporation shall raise the amounts required for the common expenses fund or the reserve fund by levying contributions on the owners of the units:
>
> (a) in proportion to the unit factors of their respective units; or

> (b) if a scheme of apportionment for contributions to the fund has been established pursuant to sections 48 and 49, in accordance with that scheme.
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> **48**(1) Subject to subsection (2), a corporation may establish a scheme of apportionment for owners' contributions to the common expenses fund or a reserve fund that is not in proportion to the unit factors by amending the bylaws of the corporation to include that scheme of apportionment and by filing those bylaws with the Director. …
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> **49**(1) Within 30 days of being served, a person on whom a copy of the amending instrument and notice is required to be served pursuant to subsection 48(3):
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> (a) may apply to the court to object to the scheme of apportionment included in the amending instrument; and
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> (b) shall file with the Director a notice of the application in a form acceptable to the Director.
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> …
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> (5) On an application, the court may:
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> (a) accept any evidence that the court considers appropriate; and
>
> (b) make any order that the court considers appropriate, including an order amending the scheme of apportionment included in the amendment to the bylaws.

VI. PRELIMINARY MATTER

[21] While not included in the notice of appeal, in their factum the appellants contend the Board conducted itself improperly when dealing with the apportionment issue. The appellants submit the Board's conduct in bringing about the changes to the apportionment scheme constituted a further basis for prohibiting the amendment. The conduct raised by the appellants may be summarized as follows:

(a) The Board was operating on a misunderstanding of the facts. It believed the unit factor schedule had been amended after the development was marketed and sold.

(b) The Board's June 2014 letter told the owners there was a "supposed error" in the unit factors "thus perpetuating and facilitating a false understanding and impression amongst the unit holders".

(c) The Board was not acting in a neutral capacity, rather it advocated for the change.

(d) The Board did not "truly investigate" the matter as it never inquired of the developers how the unit factors in place had been determined (one of those developers was a unit owner).

(e) The Board failed in its duty to manage the common property for the benefit of all owners.

(f) The president of the Board (Ms. Wagner) acted as an advocate for the amendment and suggested it was "more fair" than the hybrid unit factor schedule.

(g) Ms. Axelson, who was a member of the Board, sought to amend the scheme to benefit her own interests.

[22] Park Manor contends this "ground" for prohibiting the amendment was not raised or argued before the Chambers judge and as such constitutes a new argument that should not be heard on appeal: *Linn v Frank*, 2014 SKCA 87, [2014] 10 WWR 215 [*Frank*]. It submits that if this argument had been raised before the Chambers judge, it would have provided additional evidence to address the allegations now being made against the Board, Ms. Axelson and Ms. Wagner.

[23] In oral argument, counsel for the appellants conceded the Board's conduct was not raised or argued before the Chambers judge. It is the appellants' position, however, that the argument should be entertained by this Court as no new evidence is required to deal with the issue.

[24] In my view, the appellants should not be allowed for the first time on appeal to raise the Board's conduct as a basis for granting the prohibition order. This is so because to allow the argument would deny Park Manor the opportunity to file evidence explaining or clarifying the conduct in issue. Moreover, this Court would be denied the Chambers judge's ruling and insight with respect to that issue. As stated by Dickson J., as he then was, in *R v Perka*, [1984] 2 SCR 232 at 240:

> In both civil and criminal matters it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to appellants' points of law. **A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial.** …
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> (Emphasis added)

[25] This principle, while not absolute, has been repeated by this Court in numerous decisions including *Frank* at paras 33–34; *Luzny v Town of Craik*, 2013 SKCA 94 at paras 4–7, 423 Sask R 116; *Meier v Saskatchewan Institute of Agrologists*, 2016 SKCA 116 at paras 27–31, 405 DLR (4th) 506; *Saskatchewan (Workers' Compensation Board) v Gjerde*, 2016 SKCA 30 at para 80, 395 DLR (4th) 331; *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58 at para 43, [2017] 12 WWR 779; *Saskatchewan Crop Insurance Corporation v McVeigh*, 2018 SKCA 76 at paras 131–132 .

[26] Given Park Manor's inability to provide further evidence, in my view, there is no justification for allowing the argument in this Court.

[27] Park Manor also contended that the appellants did not raise s. 49 as a stand-alone basis for granting the prohibition order. In my view, Park Manor's position with regard to s. 49 is untenable. The appellants' originating application in the Court of Queen's Bench listed s. 49(5) of the *Regulations* as a separate ground and the Chambers judge addressed that subsection at paragraphs 11–16 of his decision. Moreover, whether s. 49 allows for relief in the nature of the order requested is a matter of statutory interpretation. It is a question of law that does not require the filing of additional evidence. In my view, the interplay between s. 49 of the *Regulations* and s. 99.2 of the *Act* was clearly before the Chambers judge and is properly before this Court.

VII. ANALYSIS

[28] Typically condominium property is comprised of individually-owned units and common property, which is owned by the unit owners collectively. A condominium corporation is created to administer the condominium property. A common expense fund is established to finance the operating costs associated with the condominium property including things such as insurance, maintenance, administrative costs and utilities. A reserve fund is also established to cover the cost of inevitable capital expenditures pertaining to the common property. Both funds are financed by contributions from the unit owners. At the heart of this appeal is how the contribution to those funds is to be apportioned among the Park Manor unit owners.

[29] In Canada, every province and territory has enacted legislation dealing with condominiums. That legislation varies significantly and, accordingly, jurisprudence from other

jurisdictions often has limited application in Saskatchewan. Most provinces have provisions that establish an oppression remedy. Section 135 of Ontario's *Condominium Act, 1998*, is very similar to s. 99.2 of the Saskatchewan *Act*. However, no other province has a provision similar to s. 49(1)(a) of our *Regulations*.

A. Did the Chambers judge err in his application of s. 99.2 of the *Act*?

1. The Law

[30] Section 99.2 was recently considered by this Court in *Goertz v The Owners Condominium Plan No. 98SA12401*, 2018 SKCA 41 [*Goertz*], leave to appeal to SCC pending No 38260, a decision rendered after the Chambers judge's decision in this case. In *Goertz*, at paragraphs 138–140, Ottenbreit J.A. found the oppression remedy under s. 99.2 addresses three kinds of unfair conduct, namely: (i) oppressive conduct, (ii) unfairly prejudicial conduct, and (iii) conduct that unfairly disregards the interests of the applicant. He went on to adopt the following description of those types of conduct as set out at paragraphs 78 and 79 of *Ryan*:

> [78] Oppressive conduct is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance [citations omitted].
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> [79] In *Walla Properties Ltd. v. York Condominium Corporation No. 478*, *supra*, at paras. 23-24, Justice Harvison Young described conduct that falls within the oppression remedy of the *Condominium Act, 1988* as follows:
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> > 23. In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier, supra*, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:
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> > > … "unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, *Condominium Law and Administration*, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.

> 24. When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of.

[31] The Supreme Court of Canada had occasion to consider the oppression remedy in a corporate context in *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 [*BCE*]. At paragraphs 58 and 59, the Court *per curiam* described oppression as an equitable remedy that seeks to ensure fairness, saying "[i]t gives a court broad, equitable jurisdiction to enforce not what is legal but what is fair." Because oppression is "fact-specific", conduct that may be oppressive in one situation may not be oppressive in another.

[32] In *BCE*, the Court held what is fair and equitable depends on an applicant's reasonable expectations. The Court went on to state that what amounts to a reasonable expectation must be viewed objectively as opposed to subjectively. A reasonable expectation is not what an applicant thought but, rather, what "is reasonable having regard to the facts of the specific case, the relationships at issue and the entire context, including the fact there may be conflicting claims and expectations": *BCE* at para 62.

[33] Not every breach of a reasonable expectation warrants the application of the equitable remedy of oppression. Rather, the court must be satisfied the conduct falls within the concepts of oppression, unfair prejudice or unfair disregard (*BCE* at paras 56, 68 and 89). Thus, the test for oppression is two-pronged. To establish oppression, an applicant must establish (i) a reasonable expectation, and (ii) that his or her reasonable expectation was breached or threatened to be breached by conduct that was oppressive, unfairly prejudicial or unfairly disregarded the interests of the applicant.

[34] While the Chambers judge in this case did not have the benefit of *Goertz* when he rendered his decision, he relied on the same jurisprudence as this Court did in *Goertz*. His description of the test for oppression and the principles surrounding its application accords with what this Court stated in *Goertz*.

2. Position of the Appellants

[35] The appellants acknowledge the Chambers judge correctly identified the test for oppression but contend he incorrectly applied that test. The appellants submit they had a reasonable expectation that the apportionment scheme would not change fundamentally and that any change would only be made after full information had been gathered, notice had been given to the unit owners and those unit owners had been given a voice in whether the change should occur. Moreover, the appellants contend that any change to a scheme of apportionment should not be less fair than the one it replaces. The appellants submit the hybrid apportionment scheme in place when the units were sold was a fair scheme as it took into account not just square footage, but also the fact that some of the common areas were used equally by all unit owners, regardless of the size of their units. It is the appellants' position that the larger units will pay a disproportionate amount of those common expenses under the new scheme.

[36] The appellants acknowledge Park Manor's conduct was not oppressive but submit the Chambers judge erred by concluding there was no unfair prejudice or unfair disregard of the appellants' interests merely because the procedure followed to effect the change was a democratic one. The appellants contend a "democratic process" is not a complete shield to the operation of the oppression remedy. Rather, the appellants argue if the democratic process results in action that is unfairly prejudicial to the minority, the oppression remedy must operate to intervene and correct the failure of the democratic process: *Leeson v Condominium Plan No. 9925923*, 2014 ABQB 20, 581 AR 364.

[37] The appellants posit that the oppression remedy requires a court to balance unfairness to the minority with the rights of the majority to govern. They say the Chambers judge ignored the need for that balance and instead relied on the democratic process as justification for unfairness.

3. Position of Park Manor

[38] Park Manor contends the appellants bear the onus of establishing what their reasonable expectations were and that those reasonable expectations were breached by conduct that was oppressive, unfairly prejudicial or unfairly disregarded the appellants' interests. Park Manor submits the appellants failed to meet that onus.

[39] Park Manor takes the position that the "reasonable expectation" advanced by the appellants, namely, that the scheme of apportionment would never change fundamentally, is at odds with the *Act* and the *Regulations*. Park Manor contends the *Act* and *Regulations* set out methods for amending unit factors and for condominium corporations to amend their bylaws to implement new schemes of apportionment. Thus, the appellants could not reasonably expect the apportionment scheme would never change "fundamentally".

[40] Park Manor further contends that even if this Court determines the appellants' expectation was objectively reasonable, it was not breached by conduct that was oppressive, unfairly prejudicial or unfairly disregarded the appellants' interests. The appellants' suggestion that the Board proceeded without regard to the reason behind the hybrid unit factors is irrelevant as the issue before the court was whether the vote to create the scheme was oppressive, unfairly prejudicial or unfairly disregarded the interests of the appellants: *Carleton Condominium*.

[41] Park Manor also submits the change to the apportionment scheme was fair and set the condominium fees according to a fixed and ascertainable formula, namely, square footage. Park Manor contends that, as square footage is "the default position for implementing condominium fees", an assessment based on square footage can only be described as equitable.

[42] Park Manor further argues the appellants' interests were not unfairly disregarded as they were given numerous opportunities in the time leading up to the vote to advance their position with respect to the proposed apportionment scheme.

[43] Finally, citing *BCE* at paragraph 90, Park Manor submits that for the oppression remedy to apply the party seeking it must have suffered compensable injury. Here, Western Surety has sustained no such injury as its condominium fees went down as a result of the amendment.

4. Application of the Law in the Context of this Case

[44] The Chambers judge correctly identified the law with respect to s. 99.2. The issue is whether he correctly applied that law to the factual context before him.

[45] First, as pointed out by Park Manor, the onus rests with the appellants to establish the basis for granting the oppression remedy. It is incumbent upon an applicant seeking an

oppression remedy to clearly identify the reasonable expectation it alleges had been violated by the conduct in issue: *BCE* at para 70. As the Supreme Court of Canada *per curiam* indicated in *BCE*, reasonable expectations are "the cornerstone of the oppression remedy": *BCE* at para 61.

[46] In this case, the appellants described their reasonable expectation as being that the unit factors or apportionment scheme would not change fundamentally. The Chambers judge concluded that was not a reasonable expectation in the circumstances because the *Act* and the *Regulations* set out methods for amending unit factors and for a condominium corporation to amend its bylaws to implement new schemes of apportionment. Those provisions do not restrict the changes contemplated to minor changes; rather, the provisions envision change generally regardless of whether that change is minor or fundamental.

[47] In *BCE*, the Court identified some factors that may be used to determine whether a reasonable expectation exists: "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders": *BCE* at para 72.

[48] The Chambers judge in this case incorrectly limited his analysis to the fact the legislation permitted amendments. That was not the question he was called upon to determine. The question was whether, despite the terms of the legislative provisions, the appellants had a reasonable expectation that the scheme of apportionment would not change fundamentally. The legislative framework formed only part of the contextual analysis. The Chambers judge also needed to consider other factors such as those identified in *BCE* to determine whether the expectation alleged by the appellants existed and, if so, whether it was reasonable. However, in my view, that error did not affect the ultimate correctness of the Chambers judge's decision. I say this because there was no evidence to support a conclusion that the appellants had a reasonable expectation that the scheme of apportionment would never change fundamentally. The fact the scheme was in place when the appellants purchased their units and was allegedly fair does not constitute a reasonable expectation that the scheme would never change. No representations were made to the effect it would not be changed. There is no evidence that was the practice among condominium corporations nor does the evidence suggest maintaining the scheme of

apportionment would balance the conflicting interests of the unit owners. In short, as the Chambers judge correctly concluded, the appellants did not meet the onus of establishing their expectation was reasonable.

[49] Having found the Chambers judge did not err in concluding the appellants' expectation was not reasonable, it is unnecessary to address his *obiter* comments with respect to the second part of the oppression test. That said, I would note a court will intervene if the minority is treated unfairly. This is so, even if the decision was made democratically. In this case, the appellants have provided no evidence the new apportionment scheme is unfairly prejudicial to them. The fact that scheme is based solely on square footage does not in and of itself mean the scheme is unfair. It was incumbent on the appellants to provide evidence of unfairness – that is, that they would be paying a disproportionate amount of the common expenses. They provided no such evidence.

[50] In my view, the Chambers judge did not err in concluding the appellants had not established the necessary basis for granting the oppression remedy.

B. Did the Chambers judge apply the proper test with respect to s. 49 of the *Regulations*?

1. Position of the Appellants

[51] The appellants contend the Chambers judge did not properly consider the application of s. 49 of the *Regulations*. Rather, they say the Chambers judge "improperly mingled [s. 49] of the *Regulations* and s. 99.2 of the *Act*" and in doing so applied the wrong test – the oppression test – to the operation of s. 49(1)(a).

[52] The appellants submit that, while the Chambers judge recognized at paragraph 13 of his decision that s. 49 grants courts a broad discretion to review apportionment schemes, he erred by then looking beyond the subsection and applying s. 99.2 of the *Act*. It is the appellants' position that s. 49 of the *Regulations* provides a separate remedy from s. 99.2. Section 49 applies where schemes of apportionment are amended. The operation of that section is totally independent of the oppression remedy set out in s. 99.2 of the *Act*. The appellants submit the test to be applied under s. 49 is a broad one, namely, whether the scheme of apportionment is fair and equitable:

Winnipeg Condominium Corp. No. 12 v Edwardian Estates Ltd. (1995), 123 DLR (4th) 16 (Man CA) [*Winnipeg*]; *York Region Condominium Corp. No. 771 v Year Full Investment (Canada) Inc.* (1993), 100 DLR (4th) 449 (Ont CA) [*Year Full Investment*].

2. Position of Park Manor

[53] Park Manor contends the appellants' application before the Court of Queen's Bench proceeded only on the basis of oppression and thus the Chambers judge applied the correct test. Park Manor also indicates there is some conflict in the jurisprudence over what "test" should be applied to an application under s. 49 of the *Regulations*. It says that a plain reading of ss. 48 and 49 suggests the right to object to a scheme of apportionment is limited to procedural defects: *Ehman v Albony Place Condominium Corporation*, 2017 SKQB 82 [*Ehman*]. Park Manor submits that if that proposition is correct, the appellants' appeal with respect to s. 49 must fail as there is no suggestion Park Manor failed to comply with the prescribed procedure in amending its bylaws to include the apportionment scheme.

[54] Alternatively, Park Manor submits s. 49 creates a specific right to claim oppression where an amendment to the bylaws results in a new scheme of apportionment. Park Manor suggests this was the approach adopted by the Chambers judge and that the Chambers judge was not "clearly wrong" in proceeding as he did. Further, Park Manor argues that the wording of s. 49(5)(b) of the *Regulations* that addresses the court's powers is "identical" to s. 99.2(2) of the *Act* that addresses the court's power in granting an oppression remedy. It submits that linguistic similarity suggests the test for oppression is the appropriate test to be applied to applications pursuant to s. 49, albeit crafted in a way that deals with the specific requirements of s. 48.

[55] Further, Park Manor contends s. 49 does not require a lower "standard" than the oppression remedy. It submits that if the appellants are suggesting the standard of proof should somehow be less in a s. 49 application, that suggestion cannot be maintained as there is only one civil standard of proof, namely, proof on a balance of probabilities: *F.H. v McDougall*, 2008 SCC 53 at para 49, [2008] 3 SCR 41. If the appellants' reference to a "higher standard" is a suggestion that the oppression remedy is more difficult to obtain than a remedy under s. 49(1)(a), then Park Manor submits that position is untenable in light of the history and purpose of the oppression remedy, which as Juriansz J. stated in *McKinstry v York Condominium Corp. No. 472*

(2003), 68 OR (3d) 557 (Ont Sup Ct) (quoted in *Ryan*), is one of the broadest remedies designed to protect owners from unfair treatment.

[56] Finally, Park Manor argues that the cases relied on by the appellants – *Winnipeg* and *Year Full Investment* – simply require the court to take account of the factual matrix and context of the dispute and do what is fair and equitable. That is precisely what the Chambers judge did in this case. Park Manor contends the oppression remedy is appropriately applied when concepts of fairness and equity are considered.

3. Proper Interpretation of s. 49 of the *Regulations*

[57] Pursuant to s. 47 of the *Regulations*, a condominium shall raise amounts required for the common expense fund and the reserve fund from the owners in proportion to the unit factors of their respective units or if a scheme of apportionment for contribution to the funds has been established then in accordance with that scheme.

[58] Typically, unit factors are proportional to the size of the condominium units. That is evident from Form GG, the estoppel certificate provided by condominium corporations to owners pursuant to s. 64 of the *Act*. Those certificates certify the amount of a contribution levied on an owner, the manner in which the contribution is payable, the extent to which the contribution has been paid and other matters as required by the form.

[59] Paragraph 42 of Form GG reads as follows:

> 42. The corporation states that the **unit factors** among the units included in the condominium plan **have been apportioned for each unit by the approximate area of that unit**:
>
> ☐ Yes
>
> ☐ No If no, explain how apportioned:
>
> _____
>
> (Emphasis added)

[60] Section 48 of the *Regulations* provides that a condominium corporation may establish a scheme of apportionment for contributions to the common expense fund or the reserve fund that is not in proportion to the unit factors by amending its bylaws and filing those bylaws with the Director of Corporations. Such an amendment requires the written consent of at least 75% of the owners.

[61] Section 49 of the *Regulations* gives owners of a condominium unit the right to apply to the court to object to an amended scheme of apportionment.

[62] The Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, set out the proper approach to statutory interpretation adopting E.A. Driedger's statement in *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87:

> ... [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[63] In addition, s. 10 of *The Interpretation Act, 1995*, SS 1995, c I-11.2, provides that every enactment is to be interpreted as being remedial and shall be given the "fair, large and liberal construction and interpretation that best ensure the attainment of its objects".

[64] The *Act* does not contain a provision setting out its purpose or objects. Based on the jurisprudence, *Halsbury's Laws of Canada – Condominiums/Constitutional Law – Division of Powers*, 1st ed (Toronto: LexisNexis, 2015), describes the object and purpose of condominium legislation at 131–132 as follows:

> … The condominium statute permits the creation of a unique scheme for the ownership of land. It provides some guidelines and rules related to their development along with an element of consumer protection. It provides for a mechanism to manage and administer a complex joint ownership structure having regard to the need for responsible and efficient management of the common elements created by the structure. It includes the ability of a majority to control the administration and management of the property which permits infringement upon property rights otherwise enjoyed by fee simple owner of real property. The condominium statute creates a way of holding an interest in residential land unlike anything at common law, but with individual features that are familiar, such as mortgages, priorities, tenancies, liens, attachments of rent, *etc*. Peculiar to the condominium are such features as common expenses and the power of a condominium corporation to make rules affecting an individual's private residence. **As such, a principle object of the Act is to achieve fairness among the parties – owners, their tenants, their mortgagees, and the condominium corporation itself – in raising the money to keep the common enterprise solvent.** Hence the Act provides for owners to contribute to the fund for expenses in their proportionate shares determined by the governing documents. The common expenses fund is the central financial mechanism of the condominium corporation and the duty of contributing to it is the central mechanism to achieve financial fairness among the owners. It has also been found that condominium legislation is remedial and should not be rigidly or narrowly construed to the extent that it confers the rights on the condominium corporation [footnotes omitted].
>
> (Emphasis added)

I would adopt this statement as properly setting out the purpose and objects of the *Act*.

[65] At issue in this appeal is both the meaning of s. 49(1)(a) and (5) of the *Regulations* and the interplay between those subsections and s. 99.2 of the *Act*, which establishes the oppression remedy.

[66] The appellants' contention that s. 49 provides a remedy separate and apart from s. 99.2 has merit. In my view, the two provisions are distinct and meant to address different situations. I say this for a number of reasons.

[67] First, s. 49(1)(a) predates the oppression remedy set out in s. 99.2. The *Regulations*, of which s. 49 forms a part, came into force on June 25, 2001. Section 99.2, on the other hand, was added to the *Act* in 2013 and came into force on June 16, 2014. This supports a conclusion that the provisions create distinct remedies and that s. 49 was not intended as a "gateway" to s. 99.2 as suggested by Park Manor.

[68] Second, the persons who can object to a scheme of apportionment under s. 49(1)(a) are not the same as those who have standing to seek an oppression remedy. Subsection 49(1)(a) applications can only be brought by a non-consenting unit owner, the holder of a registered mortgage interest with respect to a unit where notice of the mortgage has been given to the corporation pursuant to s. 42(2) of the *Act* and the Saskatchewan Housing Corporation where it has a contract with the owner of a unit. In contradistinction, applications under s. 99.2 can be brought by an owner, a corporation, a developer, a tenant, a mortgagee of a unit or any interested person.

[69] Third, s. 49 is very narrow in scope. Based on a plain reading of that provision, it applies only to objections to a scheme of apportionment. Section 99.2, on the other hand, is broad in scope. It applies to any conduct by an owner, a tenant, a corporation, a developer or a mortgagee of the unit that is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. Given the broad scope of s. 99.2, it is possible to apply for relief pursuant to both s. 99.2 and s. 49(1)(a), but only in situations where a scheme of apportionment has been established or amended. This overlap does not change the fact that the provisions create separate and distinct rights to apply for a remedy.

[70] Fourth, what is required to be successful on a s. 49 application is different from what is required to obtain an oppression remedy pursuant to s. 99.2.

[71] Section 49 does not prescribe the grounds for objecting to a scheme of apportionment nor does it set out the circumstances under which an order will be granted. Having said that, it is implicit that the grounds must relate to the scheme of apportionment. Further, in my view, those grounds are circumscribed by the object of the *Act*, which is to achieve fairness and equity. On the other hand, to be successful on a s. 99.2 application, the test for oppression as set out by the Supreme Court of Canada in *BCE* and adopted by this Court in *Goertz* must be met. As indicated earlier in these reasons, the cornerstone of that test is reasonable expectations.

[72] While conduct giving rise to the oppression remedy may qualify as a ground for objecting to a scheme of apportionment, a scheme of apportionment may be unfair and inequitable without meeting the test for oppression. This is so because the oppression remedy relates to reasonable expectations while s. 49 does not depend on such expectations but rather on what is fair and equitable in the circumstances, keeping in mind the interests to be balanced. The analysis required with respect to applications pursuant to the two provisions is thus different. While some elements of the analysis are the same, such as concepts of fairness, equity and the factual context, the lens through which those elements are examined is different. When seeking an oppression remedy, one starts with identifying the reasonable expectations of the applicant. Under s. 49, however, one looks to what is fair and equitable on a purely objective basis. It does not require the same level of unfairness or inequity as is necessary to obtain an oppression remedy – it is a less onerous test.

[73] Park Manor contends applications pursuant to s. 49 are limited to procedural matters. It cites the Queen's Bench decision of *Ehman* in support of that position. In my view, *Ehman* does not support that contention. The court in *Ehman* was dealing with a procedural issue, namely, whether approval of the bylaws implementing an apportionment scheme requires the consent of 75% of the unit owners or 75% of the unit factors. The court found the legislation required the consent of 75% of the unit owners. As that percentage of the unit owners had not consented, the bylaw was not properly passed. The only other basis for the application was an allegation of oppression. The court held it need not consider that ground because the procedural defect was

sufficient to effectively deal with the application. In reaching its decision, the court did not consider the ambit of s. 49.

[74] In my view, while procedural fairness, which would include adherence to the prescribed procedures set out in the *Regulations* for adopting or changing a scheme of apportionment, can ground an objection pursuant to s. 49, it is not the only ground for objecting. A scheme of apportionment may also be objected to on the grounds it is unfair or inequitable in substance. As already pointed out, conduct that would make the oppression remedy available could also warrant relief under s. 49, if that conduct relates to a scheme of apportionment.

[75] While I do not view the appellants as suggesting otherwise, I agree with Park Manor that whether an application is made pursuant to s. 99.2 of the *Act* or s. 49 of the *Regulations*, the standard of proof will be the same, namely, a balance of probabilities. As Rothstein J. stated at paragraph 40 of *F.H. v McDougall*: "there is only one civil standard of proof at common law and that is proof on a balance of probabilities".

[76] The appellants relied on two cases – *Winnipeg* and *Year Full Investment* – in support of their contention that the Chambers judge should have taken a broader view of the issues and determined whether the new apportionment scheme was fair and equitable in the circumstances rather than limiting his analysis to the oppression remedy. Those decisions are of assistance in setting out the general approach to interpreting condominium legislation, namely, that such legislation "is to be interpreted in a fair and equitable way and that considerable latitude should be given to achieve such result" (*Winnipeg* at para 15; see also *Year Full Investment* at para 11). Having said that, neither Manitoba nor Ontario have a provision in their condominium legislation or regulations similar to s. 49(1)(a). Accordingly, *Winnipeg* and *Year Full Investment* did not address such a provision, which is unique to this Province.

[77] Here, the Chambers judge recognized that s. 49 grants a broad discretion to the court. He asserted the obvious – that there must be some ground identified for making an objection under s. 49. The Chambers judge found the appellants' basis for objecting to the scheme of apportionment was the allegedly oppressive or unfairly prejudicial conduct of Park Manor in disregarding the appellants' interests. Because the basis of the appellants' objection was an allegation of oppression, the Chambers judge applied s. 99.2 of the *Act*.

[78] In the end, it did not matter whether the Chambers judge approached the issue using the test for oppression or under s. 49. In either case, it was incumbent on the appellants to present evidence supporting their allegation or objection. While the evidence presented establishes that the unit factors used historically to calculate the owners' contributions to the common expense fund and the reserve fund had been based on a hybrid of square footage and usage, the appellants adduced no evidence as to how those unit factors had been calculated or what expenses under the new scheme of apportionment were being unfairly attributed to them. Whether under s. 99.2 or s. 49, fairness is a relative concept. It cannot be determined in a vacuum. It can only exist relative to something else. To find something is unfair or oppressive, a judge must have sufficient evidence to support that conclusion. Change without more does not necessarily equate to unfairness or inequity. More than one scheme of apportionment may be fair and equitable. Thus, even if the Chambers judge erred by failing to consider an objection to the scheme of apportionment based on fairness and equity, that error would not have affected the ultimate result as there was insufficient evidence to make such a determination.

C. Summary

[79] While the Chambers judge erred in his application of s. 99.2 of the *Act* to the factual context before him, that error did not affect the ultimate correctness of his decision. The Chambers judge identified the basis of the appellants' objection to the scheme of apportionment as being conduct by Park Manor that was oppressive, unfairly prejudicial or unfairly disregarded the appellants' interests. In the circumstances, the Chambers judge did not err in applying the test under s. 99.2 to his s. 49 analysis. Accordingly, the appellants' appeal is dismissed.

VIII. COSTS

[80] Park Manor submitted that if it was successful on the appeal, solicitor-client costs should be awarded against the appellants. They contend that in the context of condominium law there is a presumption in favour of the granting of such costs. In support of their position, they cite *Hallmark Place Condominium Corporation v McKenzie*, 2015 SKQB 260, 482 Sask R 309 [*Hallmark*].

[81] In my view, *Hallmark* did not establish the presumption identified. The factual context giving rise to the decision in *Hallmark* was very different from the factual situation in the case under appeal. In *Hallmark*, the condominium corporation was successful in obtaining a summary judgment against a unit owner for arrears of condominium fees. The condominium corporation sought full reimbursement of its legal fees as a result of having to commence legal action to collect those fees. The unit owner had stubbornly withheld the fees because of an issue over repairs despite the fact the *Act* was clear the owner could not withhold fees in such circumstances. The condominium corporation sought full reimbursement of its legal fees based on the *Act* and the corporation's bylaws. Section 63 of the *Act* provides that a corporation may include in its assessment of condominium fees any costs incurred with respect to the preparation or discharge of a lien pertaining to condominium fees. Moreover, the corporation's bylaws provided that owners must pay costs associated with their breach of a provision of the *Act*, *Regulations* or bylaws. The judge in *Hallmark* held that in the face of an owner defaulting on a statutory duty or bylaw obligation, a condominium corporation should prima facie be entitled to complete indemnity of its legal fees.

[82] In the case under appeal, the appellants have not defaulted on any statutory duty or bylaw obligation. Rather, the issue in this case arises out of the interpretation and application of the identified provisions of the *Act* and *Regulations*. I also note that in the context of this case, based on the principles enunciated by this Court in *Siemens v Bawolin*, 2002 SKCA 84 at para 118, [2002] 11 WWR 246, and *Hope v Gourlay*, 2015 SKCA 27 at paras 47–51, 384 DLR (4th) 235, there is nothing in the appellants' conduct or the circumstances of this case that would warrant the granting of solicitor-client costs. Moreover, while Park Manor was successful on the appeal, errors were identified in the Chambers judge's analysis. As such, the appellants' appeal was not frivolous.

[83] There shall be an order that the appellants pay to Park Manor the costs of this appeal assessed in the usual way.

IX. CONCLUSION

[84] The appeal is dismissed. The appellants shall pay to the Park Manor the costs of this appeal assessed in the usual way.

"Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur. "Richards C.J.S."

Richards C.J.S.

I concur. "Herauf J.A."

Herauf J.A.