

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *King Day Holdings Ltd. v. The Owners,
Strata Plan LMS3851 (Re),*
2018 BCSC 1772

Date: 20181015
Docket: S170920
Registry: Vancouver

Between:

King Day Holdings Ltd.

Petitioner

And

The Owners, Strata Plan LMS3851

Respondent

Before: The Honourable Madam Justice Loo

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

R. D. Lee

Counsel for the Respondent:

G.S. Hamilton

Place and Date of Hearing:

Vancouver, B.C.
May 18, 2018

Place and Date of Judgment:

Vancouver, B.C.
October 15, 2018

I. INTRODUCTION

[1] The issue in this petition relates to the applicability of s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43 [SPA].

[2] The petitioner, King Day Holdings Ltd. (“King Day”) seeks a declaration that the strata fees levied against it by the respondent strata corporation constitute a significantly unfair action and seeks relief under s. 164. The strata corporation argues that s. 164 has no application, and that s. 99 of the SPA and Regulation s. 6.4(2) require the strata corporation to apportion common expenses to all strata lots in accordance with their unit entitlement.

[3] The background facts are not really in dispute, so I will generally follow the facts as set out in the petition and the response.

II. BACKGROUND

[4] The strata corporation is a 26-storey building known as The Westin Grand (“the hotel”) located at 433 Robson Street, Vancouver. The building contains the hotel, some commercial properties (a restaurant, lounge/bar, and convenience store), and a four level underground parkade.

[5] There are 207 strata lots associated with the hotel (Strata Lots 1 to 207 – known as the Hotel Lots), nine commercial strata lots (Strata Lots 208 to 215, and 217 – known as the Commercial Lots) and 12 strata lots associated with the parkade (Strata Lots 216 and 218 to 228 – known as the Parkade Lots).

[6] The Hotel Lots have a unit entitlement of 42,393, or 59.90% of the total unit entitlement. The Commercial Lots have a unit entitlement of 7,279, or 10.28% of the total unit entitlement. The Parkade Lots have a unit entitlement of 21,105, or 29.82% of the total unit entitlement.

[7] The common property consists primarily of corridors, walkways, stairways, and elevators. Most of the common property is designated as limited common property for the exclusive use of the Hotel Lots or the Commercial Lots, including the

elevator and hallway corridors on floors 3 and 25, the recreational facilities on the third floor, the balconies for the Hotel Lots, and certain of the patios and decks.

[8] The strata corporation was developed under the *Condominium Act*, R.S.B.C. 1996, c. 64 [CA], which was repealed and replaced by the *SPA* on July 1, 2000.

[9] King Day was the original purchaser of the Parkade Lots in or around 1998, at the time the building was under construction. King Day tried to obtain separate utility meters, since no heating or hot water is provided to the parkade, and hydro use to provide parkade lighting is minimal compared to the remainder of the property. However, at the time, King Day was informed by the developer (The Grand Development Partnership) that construction had progressed past that point and having separate meters was not feasible.

[10] The developer tried to deal with the potential inequity in allocating expenses by proposing that unit entitlement be based upon interest on destruction. This proposal was in the initial disclosure statement. Based on that proposal, the Parkade Lots unit entitlement would be 5.21%. However, King Day was informed by the developer that the proposal was not accepted by the Superintendent of Real Estate.

[11] King Day requested that the strata plan be divided into sections, but this was refused by the developer over concern that the change might allow existing purchasers to walk away. As an alternative, it was proposed that bylaws be put in place to make sure that the future operating costs and special levies would be allocated fairly. On April 9, 1999, the strata corporation amended its CA Part 5 bylaws to provide:

128 (2) Notwithstanding the foregoing, if any particular common expense is attributable to more than one type of strata lot but the benefit derived from the common expense is not enjoyed equally by the strata lots of those types, the strata council will apportion that expense between the strata lot types to which it is attributable on such fair and equitable basis as the strata council may determine, and the portion of such common expense apportioned to a particular type of strata lot will be borne by the owners of that type of strata lot in the proportion that the unit entitlement of that strata lots bears to the aggregate unit entitlement of all strata lots of that type.

(2.1) To recognize the separate interests of the three different types of strata lots in the strata plan, each type of strata lot in the strata plan, that is Strata Lots 1 to 207 inclusive (the "Hotel Lots"), Strata Lots 208 to 215 inclusive and 217 (the "Commercial Lots") and Strata Lots 216 and 218 to 228 inclusive (the "Parking Lots") shall have a separate budget calculated in accordance with the principles set out in subsection (2).";

...

GENERAL

135 The strata corporation must deal with each strata lot and its owners and occupants in a fair, reasonable and equitable manner and, in particular, must recognize the different purposes and use of the different types of strata lots and treat such strata lots and their owners accordingly.

[12] The bylaw amendments were made before King Day purchased the Parkade Lots (the closing was on April 13, 1999), and was a condition of King Day's purchase of the Parkade Lots.

[13] Starting from the first annual general meeting of the strata corporation in 1999, in accordance with bylaw 128(2) and 128(2.1), three separate budgets were prepared for operating costs. Until 2007, on average, the expenses allocated to the Parkade Lots were approximately 5% to 6% of the total operating costs.

[14] All of the Hotel Lots were owned by individuals or companies who leased their strata lots to the operator of the hotel under a hotel management and rental pool agreement.

[15] In late December 2006, strata council (then made up entirely of owners of Hotel Lots) put forward an operating budget for 2007 for consideration at the January 16, 2007 annual general meeting. The budget was based solely on unit entitlement, and proposed that 29.82% of all the operating costs be allocated to the Parkade Lots. This would have resulted in a very large increase in expenses for the Parkade Lots, from a \$26,241 budget allocation in 2006, to \$183,561 in 2007.

[16] King Day did not believe that was a fair or appropriate allocation of expenses. In its view there is not much in the way of common property that is used or needed

by the Parkade Lots, and to the extent there was, various common areas had been converted to hotel use by blocking areas out, including:

- (a) the addition of a wall and door in a common corridor on level P1, to create a space for the hotel staff room and numerous lockers;
- (b) the mechanical room on level P 1 has been converted to general storage for hotel operations and storage for the hotel TV system;
- (c) the loading and receiving area at the ground floor is fully utilized for storage for the hotel;
- (d) a mechanical room (common area) on level P2 has been converted to an office and storage space for the hotel;
- (e) two demise walls on level P2 between strata lot 208 and a mechanical room/common corridor have been removed and the whole area is now used for hotel operations;
- (f) a vestibule common area on level P2 has been blocked off by adding a wall and a door, and lockers installed for hotel staff;
- (g) a common area mechanical room on level P4 has been converted to storage for tools used by the hotel staff, and a working station;
- (h) a common corridor on the second floor has been converted for hotel use; and
- (i) the hotel has blocked off access to the service elevator to anyone but hotel staff and people the hotel authorizes.

[17] At a meeting in early 2007 with the strata manager Barry Burko, strata council and the hotel management's accountant, it was learned that the actual operating expenses for the property was set by the hotel management company. That led to further discussions about King Day's concerns about the proposed budget, which included:

- (a) gas/propane - the Parkade Lots have no equipment that use gas and/or steam, contrasted to the high use for the limited common property for the hotel (such as HVAC and the swimming pool);

- (b) water/sewer - the Parkade Lots do not have much compared to the hotel operations, which include use by 207 hotel rooms, the restaurant, swimming pool, sauna, hot tub, and in-house laundry;
- (c) landscaping - the only landscaping in the common area is two pots of trees at the front door;
- (d) security - there was no security guard for the parkade;
- (e) common area cleaning - this relates mainly to the Hotel Lots, Commercial Lots, and limited common property related to the Hotel Lots (like the 3rd floor patio); only a small portion of the common area needs regular cleaning;
- (f) HVAC - the Parkade Lots have no HVAC; the majority of the HVAC is located in the Hotel Lots (the hotel rooms, the Hotel Lots' limited common property corridors on each floor, the lobby lot and function rooms, etc.);
- (g) repair and maintenance - this is the same as the HVAC, since most repairs and maintenance are for the Hotel Lots and limited common property related to them; and
- (h) elevator - the service elevator is locked off and reserved for the hotel use only, and the elevators serving the hotel guest are locked by access control.

[18] It was ultimately agreed in the spring of 2007 that the Parkade Lots would be responsible for 30% of some expenses and 6% of others, with some expenses for which the Parkade Lots would not contribute any amount. The overall percentage of the expenses paid by the Parkade Lots was 11%.

[19] For the next two or three years, discussions continued about whether certain expenses were appropriately charged to the Parkade Lots and the appropriate

percentage split for various expenses in the budget and special levies. King Day paid on average about 11% of the total operating expenses related to common property.

[20] In late 2009, the strata corporation called a special general meeting which purported to approve a \$400,000 special levy for repairs to the hot water system, of which 29.82% was allocated to the Parkade Lots. The Parkade Lots have no hot water service, and so King Day objected to that special levy.

[21] According to the engineering reports provided to strata members, the building has two hot water systems: one located on the rooftop servicing only the Hotel Lots between floors 6 to 31, and another one located on P4 servicing the ground floor to the fifth floor, including common property and limited common property on those floors. All of the repairs and upgrades were related to the hot water system servicing the Hotel Lots between floors 6 to 31. The actual repair work was located inside the Hotel Lots. None of the common property or limited common property would benefit from the upgrade.

[22] As a result of the disagreement over the special levy, and to streamline the budgeting process, in mid-2010 discussions ensued and continued through to the annual general meeting on January 31, 2011 when an agreement was reached between the strata council and King Day on common property expenses. It was agreed that the Parkade Lots would pay 18% of all operating expenses and special levies which were related to common property, the Commercial Lots would pay 10%, and the Hotel Strata Lots would pay 72% (the "Agreement"). The 2012, 2013 and 2014 budgets were in accordance with the Agreement: an 18% share of operating expenses for common property was allocated to the Parkade Lots.

[23] Since King Day's purchase of the Parkade Lots, under the terms of a revenue sharing agreement with the hotel operator (on behalf of the Hotel Lots), until June 2013, King Day paid the hotel operator 11.67% of self-parking and 30.26% of valet parking gross revenue for each vehicle a hotel guest parked in the parkade. On June

1, 2013 King Day entered into a revised parking revenue sharing agreement with the hotel operator which requires King Day to pay to the hotel operator 20% of self-parking and 38% of valet parking gross revenue. King Day entered into the revised revenue sharing agreement on the basis that it would be paying 18% of operating expenses and special levies.

[24] In 2014, the majority of the owners of the Hotel Lots decided to sell their ownership interests to Retirement Concepts Ltd. (“Retirement Concepts”), a large company that handles numerous hotels and retirement homes.

[25] On August 27, 2014, Azim Jamal, president and CEO of Retirement Concepts, called George Ng, vice-president of King Day, to see whether King Day was interested in selling the Parkade Lots to Retirement Concepts. King Day suggested what it thought was a fair price, but discussions went no further.

[26] On January 14, 2015, King Day received notice of a special general meeting. As had happened in several instances over 2013 and 2014, the property managers at the time, initially allocated 29.82% of the expense to the Parkade Lots. In the past the error was corrected to reflect the Agreement, and King Day was allocated 18% of the expense.

[27] On January 19, 2015, King Day's counsel wrote to Mr. Burko, the property manager representative, pointing out the error. At the special general meeting on February 4, 2015 the 18% allocation to the Parkade Lots was discussed and Mr. Burko confirmed that 18% was the appropriate figure, but since all the resolutions were defeated, he did not note in the minutes the 18% allocation.

[28] On or about February 15, 2015, Retirement Concepts purchased the majority of the Hotel Lots (126 of the 207, or approximately 60%). Retirement Concepts' majority is greater than 50% of the votes for the strata corporation and sufficient to determine who is elected to strata council.

[29] On March 1, 2015, the property manager Summit Strata Management was purchased by Pacific Quorum Sea to Sky Properties Inc., and Mr. Burko, the long-time representative who dealt with the property, was replaced.

[30] At the March 15, 2015 annual general meeting representatives of Retirement Concepts were elected to strata council and filled the strata council. The new strata council resolved to operate the strata corporation in compliance with the SPA, including the manner in which King Day was contributing to common expenses. At the meeting, King Day put forward a resolution to have at least one non-Retirement Concepts owner on strata council, but the resolution was voted down by Retirement Concepts.

[31] After the meeting, Mr. Jamal again asked whether King Day was willing to sell the Parkade Lots to Retirement Concepts, and suggested that if King Day did not sell, the hotel operations could possibly run its own valet service, which would mean cutting out a portion of King Day's parking revenue.

[32] On August 19, 2015, King Day received notice of a special general meeting to approve a special levy for lighting work. The schedules in the notice indicated that the Parkade Lots would be paying 29.82% of the total special levy.

[33] Over the next few weeks, discussions between the parties and their counsel about the special levy allocation made it clear that the new strata council did not consider itself bound by the Agreement.

[34] On September 8, 2015, the special general meeting was held, and Retirement Concepts used its majority to pass the special levy, allocating 29.82% of the total to the Parkade Lots.

[35] On December 4, 2015, King Day received notice for the 2016 annual general meeting. The annual budget was increased significantly, primarily to account for a \$1,500,000 reserve for renovations to the hotel (the "PIP" or Property Improvement

Plan) and a \$400,000 reserve for modernizations of the elevators servicing the Hotel Lots.

[36] The \$1,500,000 renovation is exclusively focussed on the Hotel Lots and limited common property associated with them, and on the hotel lobby (Strata Lot 208) which is leased to the hotel management company.

[37] The sample Hotel Management and Rental Pool Agreement which was attached to the initial disclosures statement states at s. 3.5 that:

- 1) any revenue earned from or in respect of the Lobby Strata Lot or any portion thereof will be revenue belonging to the [Hotel Lots] Owners (and not to the Strata Corporation or the Manager) and included in the Gross Revenue; and
- 2) any costs or expenses in respect of the Lobby Strata Lot (including, without limitation, amounts payable by the Manager pursuant to the Lobby Strata Lot Lease) will be costs and expenses payable by the [Hotel Lots] Owners (and not by the Strata corporation or the Manager) and included in the Hotel Expenses.

[38] After this Petition was filed the strata council acknowledged that the funds used to renovate the lobby should not be part of the special levy, and approximately \$800,000 will be reimbursed to the strata corporation, or retained for further strata expenses.

[39] After an exchange of letters between counsel for the parties, the \$1,500,000 and \$400,000 reserves were removed from the budget, but then put forward as special levies.

[40] On January 6, 2016, at the annual general meeting, Retirement Concepts used its majority to approve two special levies: one for \$400,000 in respect of elevator modernization and one for \$1,500,000 in respect of the PIP. The special

levies are allocated on the basis of unit entitlement so that the Parkade Lots are to pay 29.82% of the special levies.

[41] King Day objected to departing from its 18% contribution to the operating budget and voted against the proposed budget. However, with a substantial number of votes now being held by representatives of Retirement Concepts, the 2016 operating budget was approved to reflect the use of the unit entitlement formula.

[42] Both special levies relate exclusively to expenses in respect of limited common property areas designated for the exclusive use of the Hotel Lots. The \$400,000 special levy relates solely to upgrades to the hotel elevator designated for the exclusive use of the Hotel Lots, and the \$1,500,000 special levy relates to upgrades to the hotel lobby and to the hotel facilities, corridors, and stairwells designated for the exclusive use of the Hotel Lots.

[43] At the January 6, 2016 AGM, the operating budget was allocated to strata lots on the basis of unit entitlement. As a result, King Day's contribution to common expenses totaled 29.82% of the total operating budget.

[44] On January 6, 2016, Retirement Concepts suggested that it would pay \$1,000,000 for all the Parkade Lots. King Day considers \$1,000,000 to be significantly under-valued as the assessed value for the Parkade Lots for 2015 and for 2016 was \$2,943,600.

[45] On July 5, 2016, King Day was informed that liens had been placed on the Parkade Lots for the unpaid strata fees and special levy assessment.

[46] On January 31, 2017 the petition in this proceeding was filed.

III. LEGAL FRAMEWORK

[47] Section 246 of the *SPA* requires the preparation of a "schedule of unit entitlement", indicating the proportion attributable to each unit, and sets out the

formula for calculating unit entitlement. Section 248 provides for the division of common expenses and assets on the basis of "unit entitlement."

[48] Operating fees and special levies for the strata are assessed according to s. 99 of the SPA:

- 99 (1) Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.
- (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$

[49] Section 100 allows the strata corporation to depart from the formula in s. 99 and adopt a different method for calculating a unit's share of expenses, but only by a unanimous vote of all of the owners at an annual general meeting:

- 100 (1) At an annual or special general meeting held after the first annual general meeting, the strata corporation may, by a resolution passed by a unanimous vote, agree to use one or more different formulas, other than the formulas set out in section 99 and the regulations, for the calculation of a strata lot's share of the contribution to the operating fund and contingency reserve fund.
- (2) An agreement under subsection (1) may be revoked or changed by a resolution passed by a unanimous vote at an annual or special general meeting.
- (3) A resolution passed under subsection (1) or (2) has no effect until it is filed in the land title office, with a Certificate of Strata Corporation in the prescribed form stating that the resolution has been passed by a unanimous vote.

[50] SPA Regulations allow a strata corporation to designate in its bylaws, different types of strata lots if a contribution to the operating fund relates to and benefits only one type of strata lot, the contribution is shared only by owners of that type. Section 6.4(2) of the SPA Regulations, provides:

- 6.4 (2) For the purposes of section 99 of the Act, but subject to a resolution under section 100 of the Act, if a contribution to the operating fund relates to and benefits only one type of strata lot, and that type is identified as a type of strata lot in the bylaws of the strata corporation, the contribution is shared only by owners of strata lots of that type, and each strata lot's share of that contribution is to be calculated in accordance with the following formula and not in accordance with the formula set out in section 99 (2) of the Act:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots of the type to which the contribution relates}} \times \text{contribution to operating fund}$$

[51] For special levies, the relevant portions of s. 108 of the SPA provides:

- 108 (1) The strata corporation may raise money from the owners by means of a special levy.
- (2) The strata corporation must calculate each strata lot's share of a special levy
 - (a) in accordance with section 99, 100 or 195, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
 - (b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.
- (3) The resolution to approve a special levy must set out all of the following:
 - (a) the purpose of the levy;
 - (b) the total amount of the levy;
 - (c) the method used to determine each strata lot's share of the levy;
 - (d) the amount of each strata lot's share of the levy;
 - (e) the date by which the levy is to be paid or, if the levy is payable in instalments, the dates by which the instalments are to be paid.

...

[52] The SPA Regulations also provide:

- 6.4 (3) Subject to a resolution under section 100 or 108 (2) (b) of the Act, if a strata lot's share of a contribution to the operating fund is calculated in accordance with subsection (1) or (2), each strata lot's share of the total contribution to the contingency reserve fund or a special levy is to be calculated using the following formula:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution to contingency reserve fund or special levy}$$

[53] Section 164 of the *SPA* provides:

Preventing or remedying unfair acts

- 164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
- (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
 - (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
- (2) For the purposes of subsection (1), the court may
- (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
 - (b) vary a transaction or resolution, and
 - (c) regulate the conduct of the strata corporation's future affairs.

IV. ARGUMENT OF THE PETITIONER

[54] There are two aspects to the petition:

- (a) whether the use of the unit entitlement basis for all the operating expenses of the strata is significantly unfair; and
- (b) whether the special levies of \$1,500,000 for the improvement of the Hotel Lots and the \$400,000 for the elevator modernization are significantly unfair.

[55] According to the registered plan, the Hotel Lots have a unit entitlement of 42,393 or 59.90% of the total unit entitlement. The Commercial Lots have a unit

entitlement of 7,279 or 10.28% of the total unit entitlement. The Parkade Lots have a unit entitlement of 21,105 or 29.82% of the total unit entitlement.

[56] On April 9, 1999, the bylaws of the strata corporation were amended in accordance with s. 26 of the CA with the types bylaw, and sections 128(4), (6), (8), (9), and (10) were replaced with provisions to provide three different budgets for the Hotel Lots, Commercial Lots, and Parkade Lots. However, it is not necessary to decide the validity of the April 9, 1999 bylaw amendments as King Day relies on the Agreement relating to operating expenses and special levies, and on s. 164 of the SPA for the relief it seeks.

[57] The strata council (all of the members are representatives of Retirement Concepts) want King Day as the owner of the Parkade Lots, to pay 29.82% of the operating expenses of the strata corporation. The strata council also wants to impose a special levy of \$1,500,000 for improvements to the Hotel Lots and portions of the Commercial Lots, and another special levy of \$400,000 for improvements to the elevators which solely service the Hotel Lots, and wants King Day to pay 29.82% of those special levies.

[58] Based on the Agreement, its reasonable expectations, and the prior course of conduct, King Day should only pay 18% of the operating expenses, no portion of the two special levies, or alternatively, only 18% of the special levies.

[59] No deference should be given to the decision of the strata council. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, Garson J.A. stated, at paras. 24 and 38:

[24] Section 164 is remedial. It addresses that, despite using a fair process and holding a democratic vote, the outcome of majoritarian decision-making processes may yield results that are significantly unfair to the interests of minority owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose. I agree with what Masuhara J. said in *Gentis* [*Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120] that the outcome of the vote is one factor to be considered in determining if the impugned action is

unfair. I do not agree with the suggestion in *Pearce* [sic] [*Peace v. Strata Plan VIS 2165*, 2009 BCSC 1791] that provided the process is fair and democratic, a court should defer to the decision of the strata council or corporation.

[38] I agree with the appellant that courts should be most reluctant to interfere in the affairs of a strata corporation where the process adopted to arrive at a decision is one that is fair and democratic. But where an owner invokes s. 164 to remedy alleged unfairness, a court is mandated to consider if the action rises to the threshold of “significant unfairness”, in which case the court is required to intervene.

[60] At paras. 26 to 36 Madam Justice Garson considered extensively the meaning of the phrase “significantly unfair” in s. 164 as consistent with the test for oppressive conduct in a shareholder’s oppression application. The definitions of “significantly unfair” includes oppressive conduct, unfairly prejudicial conduct or resolutions, unjust and inequitable, beyond mere prejudice or trifling unfairness. She then adopted a two-part test from oppression jurisprudence:

[30] In the case of a strata unit owner seeking redress under s. 164, I would adapt the test, suggested by Grezell J. [in *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173] slightly to the context of s. 164 and articulate it in this manner:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

[36] If the chambers judge had asked the two-part test set out above, she would have had to conclude that, looked at objectively, Dollan and Woodford had a reasonable expectation that the spandrel windows would be vision glass. That is what they agreed to purchase. The second question – whether the evidence establishes that the reasonable expectations of the owners were violated by action that was significantly unfair – was implicitly answered in the positive by the judge. ...

[61] In allowing the appeal Mr. Justice Hall in *Dollan* stated:

[43] ... If it was a question of process and procedure only, I would certainly not be inclined to interfere with the decision made by the Strata Council in this case.

[44] I do not, however, consider that in the unusual circumstances of the present case, that we can properly limit our consideration solely to the practice and procedure adopted by the Council. If such were to be the only consideration in a case raising such an issue as the present one, a court would have no ability to look beyond a majority supported decision to take

account of the position of one or more parties in a minority. I might consider it an appropriate approach to a matter like the present controversy to adopt something of a presumption of regularity about a decision of a strata council supported by a majority of owners but to afford some limited ability in a court to address a decision that imposes a too heavy burden on a minority. That is rather how I see the present case.

[45] As outlined in her reasons by my colleague Garson J.A., I consider that the decision of the appellant Council cast too heavy a burden on the respondents in this disputed issue. In terms of previous authorities, it could be characterized as “unduly burdensome” and therefore fairly capable of being within the purview of the language of the statute “significantly unfair”. Perhaps, without express articulation, that was the unexpressed major premise underpinning the conclusion of the judge at first instance.

[62] The two-part test enunciated by Garson J.A. was not adopted by Hall J.A. and from the decision in *Radcliffe v. The Owners, Strata Plan KAS1436*, 2015 BCCA 448, it is not clear whether the two-part test is the applicable test.

[63] Here, the following facts demonstrate that determining operating expenses on the basis of unit entitlement is significantly unfair:

- (a) at the time King Day’s purchase of the Parkade Lots, there were numerous discussions about addressing the potential inequity, including interest on destruction for unit entitlement, sectioning, separate utility meters, and it was finally agreed that amendments to the bylaws include three separate budgets;
- (b) even after the CA was replaced by the SPA, until 2007 operating expenses were attributed on the basis of what expenses were appropriate for the three types of strata lots. The average percentage of the expenses attributed to the Parkade Lots was 5-6%;
- (c) in 2007 there was discussions about using unit entitlement but it was agreed in the spring of 2007 that the Parkade Lots would be responsible for 30% of some expenses, 6% of others, and some expenses for which the Parkade Lots would not contribute any amount. The overall percentage of the expenses paid by the Parkade Lots was 11%;

- (d) in 2009 there was a disagreement about who was to pay for a \$400,000 special levy for improvements to the hot water system; the Parkade Lots have no hot water;
- (e) in January 2011, after lengthy discussions between the owners, it was agreed that the Parkade Lots would pay 18% of all operating expenses and special levies related to common property, the Commercial Lots would pay 10%, and the Hotel Lots would pay 72%. The Agreement was confirmed in the minutes, although a special resolution was not passed;
- (f) for the budgets in 2009 up to and including 2015, the percentage split for the operating expenses was as set out in the Agreement;
- (g) since King Day's purchase of the Parkade Lots it has had a revenue sharing agreement with the hotel operator, on behalf of the Hotel Lots. On June 1, 2013 King Day entered into a revised parking revenue sharing agreement with the hotel operator which requires King Day to pay to the hotel operator an increase from 11.67% to 20% of self-parking and an increase of 30.26% to 38% of valet parking gross revenue. King Day entered into the revised revenue sharing agreement on the basis that it would be paying 18% of operating expenses and special levies;
- (h) once Retirement Concepts purchased the majority interest in the Hotel Lots, within months there were significant special levies to be divided on the basis of unit entitlement, and Retirement Concepts used its majority to pass a budget for 2016 which allocated the operating expenses on the same basis.

[64] Based on the foregoing facts, King Day has a reasonable expectation that operating expenses and special levies would be based on 18%. The unilateral change carried out by Retirement Concepts using its majority of votes is significantly

unfair. Further, the steps taken by Retirement Concepts to force King Day to pay for a larger portion of the operating expenses and special levies than is appropriate, were taken at the same time that Retirement Concepts was discussing its potential purchase of the Parkade Lots from King Day.

[65] In *Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335, Taylor J. found that the imposition of a single budget after three years of a segregated budget, and significant differences between the expenses of the townhouse versus the apartment owners were significant factors in finding significant unfairness.

[66] In *Fraser v. Strata Plan VR1411 et al*, 2006 BCSC 1316, Cullen J. found that the owner purchased property on the understanding that she would only be responsible for building A and the other two owners would be responsible for building B. But for those representations she would not have purchased the property or offered less for it. She would also suffer significant financial prejudice by increasing her liability to the contingency reserve fund and special levies.

[67] The strata council which is wholly controlled by Retirement Concepts, hides behind the fact the Agreement was not technically in compliance with the SPA, and not approved by a unanimous vote under s. 100 of the SPA.

[68] *The Owners, Strata Plan VR1767 v. Seven Estates Ltd. et al*, 2002 BCSC 381, was a leaky condo case which resulted in a special levy to cover the cost of repairs to the building envelope. The owner of the parking lot strata argued that it should not have to pay for the costs of repairing the building envelope. Martinson J. found that an attempt to use the 4093 unit entitlement as the basis for contribution to a special levy was significantly unfair, as that number was an error in the original schedule and the unit entitlement ought to have been 2015. However, she found that it was not significantly unfair for the parking lot strata to contribute to the building envelope cost as there had been leaky water damage to the parking lot and the envelope protects the out shell from water ingress which benefits the parking lot.

[69] Here, the \$1,500,000 special levy with respect to the PIP is clearly directed to improvements to the hotel and the hotel lobby, neither of which has any benefit to the Parkade Lots. The \$400,000 special levy for the elevator modernization also has no benefit to the Parkade Lots. The elevators service only the Hotel Lots and are limited common property tied to strata lots 1-208.

[70] The facts here are distinguishable from *Seven Estates Ltd.* The respondent argues that the Parkade Lots benefit from the common expenses which allow the strata corporation to maintain The Westin Grand as a top class hotel and attract customers who use the hotel’s amenities, including the parking facilities. However, parking revenue is driven by location, and to the extent there is parking revenue generated by the hotel, King Day must pay a large portion of that revenue back to the hotel pursuant to the terms of the revenue sharing agreement.

[71] The respondent argues that The Westin Grand even *advertises* the parking lot on the hotel’s website. It is a minor point that speaks volumes. Of the many pages comprising the hotel’s website, under the heading “Hotel Details”, which includes check-in/check-out times, internet access, and pets, this appears:

Current parking prices are as follows:

Valet Parking: \$39 per 24-hour period with in/out privileges

Self Parking: \$34 per 24-hour period with in/out privileges

Overheight Parking – Contact hotel for overheight or specialty parking

Non-Guest Valet Parking: \$4 plus applicable hourly rate

Non-Guest Self Parking: Based on applicable hourly rate

...

[72] That is the extent of the hotel’s advertising of the parking lot.

V. ARGUMENT OF THE RESPONDENT

[73] The general rule under the SPA is that “you are all in it together”: *Poloway v. Owners, Strata Plan K692*, 2012 BCSC 726, at para. 54, applying the statements of Bauman J. (as he then was) in *Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085

at paras. 35 and 40. The general rule is found in s. 99 which requires a strata corporation to apportion common expenses to all strata lots in accordance with their unit entitlement.

[74] An exception to the general rule for changing the formula for calculating strata fees is under s. 100 of the *SPA* which requires a unanimous vote of owners. Therefore, any agreement that King Day would pay only 18% of operating expenses and special levies required approval by a unanimous vote under s. 100. There has not been a unanimous vote.

[75] At the January 6, 2016 annual general meeting, the operating budget was apportioned among the strata lots based on the schedule of unit entitlement and as a result, King Day's contribution totalled 29.82%. While King Day objected to departing from its 18% contribution to the operating budget and voted against the budget, with the majority of the votes now being held by representatives of Retirement Concepts, the 2016 operating budget was approved, as was the special levies.

[76] With respect to allocating operating expenses based on types, s. 6.4(2) of the *Regulations* only permits a strata corporation to deviate from the requirements of s. 99 and allocate expense solely to a type of strata lot "if a contribution to the operating fund relates to and benefits only one type of strata lot", and that type is identified in the bylaws, then the contribution for that item of expense is to be shared by the owners of that one type alone. The section does not provide for any greater apportioning of expenses among types of strata lots, and affords a limited exception to the equal sharing of expenses based on a *pro rata* allocation in accordance with unit entitlement: *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597.

[77] Here the types bylaw created by the developer apportions common expenses on a "fair and equitable basis", which is not permitted by the *CA* or the *SPA*. The

bylaw was also affected by the transition provisions of *Strata Property Regulation*.

Section 17.13 of the *Regulation* reads as follows:

Types of strata lots

- 17.13 (1) Subject to the bylaws of the strata corporation, if a strata corporation's budget, in effect on the coming into force of this section, apportions any common expenses to one or more type of strata lot in accordance with section 128 (2) of the *Condominium Act* or a similar bylaw, the strata corporation may continue to use the type of strata lot identified in the budget as a "type of strata lot" for the purposes of sections 6.4 (2) and 11.2 (2) of this regulation.
- (2) Subsection (1) is of no effect on or after January 1, 2002.
- (3) Before January 1, 2002, a strata corporation may enact a bylaw that identifies the type of strata lot set out in the budget referred to in subsection (1) as a "type of strata lot" for the purposes of sections 6.4 (2) and 11.2 (2).
- (4) Despite section 128 (1) of the Act, a bylaw under subsection (3) may be approved by a resolution passed by a majority vote at an annual or special general meeting.

[78] The legal effect of the types bylaw was therefore informed by s. 6.4(2). In *Wilfert v. Ward*, 2004 BCSC 289 at paras. 28 and 29:

[28] Although the *Condominium Act* determined how an owner's contribution to the common expenses must be levied, the *Strata Property Act* governs the allocation and ends the rights of owners under the *Condominium Act* at the end of the transition period (see s. 293). In the case at bar, there has been no allocation of building repair expenses; hence, the *Strata Property Act* applies.

[29] Insofar as there may be allocations post January 1, 2002, where there is more than one type of strata lot, that may be governed by *Strata Property Regulation* 6.42 (see s. 17.11 of the *Strata Property Act*). In the case at bar there is more than one type of strata lot identified in the bylaws, but *Regulation* 6.42 relates to the operating fund as defined. In addition, the section specifies that the contributions to the operating fund relate to and benefit only one type of strata lot.

[79] Absent a unanimous vote under s. 100 of the *SPA* there is not basis at law to allocate common expenses in a "fair and equitable manner," or on a percentage basis. A unanimous resolution was not approved, but King Day now asks this Court to set aside the voting rights of owners and impose the unanimous vote resolution.

[80] The strata corporation's reliance on the *SPA* and *Regulations* to establish King Day's contribution to common expenses is not significantly unfair, and there is nothing in the *SPA* or *Regulations* which prevents the strata corporation led by a new council, adopting an allocation of expenses different from the allocations in previous budgets: *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*; *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791; *Poloway v. Owners, Strata Plan K692*.

[81] The observations of Lowry J.A. in *Ernest & Twins Ventures (PP) Ltd.* are apposite to this case. He stated at para. 27:

[27] In my view, the short answer to the point is that nothing amounting to a convention is established here. At best, there were three budgets before the budget that led to the petition. There was, in that period, dissension among the owners which led to the strata council and the strata manager being replaced. Further, I question whether an estoppel of the kind for which the Developer contends here could arise with respect to the broad allocation of operating expenses if it were to serve to entrench an allocation that was inconsistent with the provisions of the Act and Regulation. I see nothing in the Regulation or bylaws which prevents the Corporation, led by a new council, adopting an allocation of expenses different from the allocations in previous budgets.

[82] King Day receives a direct or indirect benefit from most of the common expenses described in the operating budget, as the strata corporation's management, repair and maintenance of the common elements contribute to The Westin Grand's status as a first class hotel and, among other things, likely allows King Day to attract customers to its parking facility at high rates.

[83] King Day's parking strata lots are inextricably linked to the hotel facilities as a commercial enterprise, and its payment of common expense based on a unit entitlement formula is not significantly unfair. As noted in *Peace v. The Owners, Strata Plan VIS 2165*, at paras. 55 and 56:

[55] I have already referred to the wording of section 164 of the *SPA*. I repeat that the focus of that section is on the conduct of the Strata Corporation and not on the consequences of the conduct. There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is

made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the SPA itself.

[56] I do not think that the provisions of the SPA with respect to the allocation of costs can be departed from in the absence of conduct on the part of some of the owners that would make it inequitable for them to stand on their legal rights.

VI. ANALYSIS AND CONCLUSION

[84] The thrust of the respondent's argument is that in the circumstances of this case, absent a unanimous vote pursuant to s. 100 of the SPA, the strata fees must be based on unit entitlement pursuant to s. 99, and as a result of the strata corporation following the statutory requirements, King Day cannot rely on s. 164 to argue that the results are significantly unfair.

[85] However, as King Day argues, it is impossible to achieve a unanimous vote when strata council is controlled by Retirement Concepts. And as Retirement Concepts in its own written argument notes, at the January 5, 2016 annual general meeting, King Day objected to departing from its 18% contribution to the operating budget, but "with a substantial number of votes now being held by representatives of Retirement Concepts, the 2016 operating budget was approved to reflect the use of the unit entitlement formula".

[86] I do not intend to determine the validity of the 1999 bylaw amendments as King Day is not relying on the bylaw for the relief it seeks. However, the bylaw is part of all of the evidence that prior to its purchase of the Parkade Lots in or around 1998, and up to Retirement Concepts' purchase of the majority of the Hotel Lots in February 2015 there was a reasonable expectation by King Day that many of the operating costs that benefitted the Hotel Lots or Commercial Lots but failed to benefit or minimally benefitted the Parking Lots, would be taken into account in establishing the budget each year, and eventually resulted in the Agreement in January 2011 that the Parkade Lots would pay 18% of operating expenses and

special levies which related to common property, the Commercial Lots would pay 10%, and the Hotel Lots would pay 73%.

[87] In my view, the issue in this case, whether the outcome of the majority decision-making process has yielded results that are significantly unfair to King Day, is determined by the decision of the Court of Appeal in *Dollan v. The Owners, Strata Plan BCS 1589*. Madam Justice Garson stated at para. 24:

[24] Section 164 is remedial. It addresses that, despite using a fair process and holding a democratic vote, the outcome of majoritarian decision-making processes may yield results that are significantly unfair to the interests of minority owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose.

[88] Garson J.A. disagrees with the suggestion in *Peace* that provided the process is fair and democratic, the decision of the majority should be given deference. As Hall J.A. stated, the court can look beyond a decision supported by the majority to consider the impact of the decision on those in the minority.

[89] The respondent did not directly respond to King Day's allegations of fact that various common property has been converted to sole use by the hotel, the Parkade Lots benefit little, if at all, from the operating costs related to HVAC system, common area cleaning, gas or propane, hot water, or repair and maintenance and the like. Similarly the respondent did not directly respond to King Day's complaint that the special levies to modernize the elevator servicing the Hotel Lots or renovating the hotel, limited common property related to the hotel and the hotel lobby do not benefit the Parkade Lots. I do not intend to list all of the facts or factors listed by King Day. Suffice to say, that none of it is denied or disputed by the respondent.

[90] The respondent argues that The Westin Grand's status as a first class hotel likely allows King Day to attract customers at high parking rates. However, the opposite is true. A hotel without a parking lot is not a first class hotel. The argument also fails to take into account that under the terms of the revenue sharing agreement

King Day must pay 20% (self-parking) and 38% (valet parking) of gross parking revenues generated by the hotel.

[91] King Day argues that it may be coincidental that Retirement Concepts keeps exploring the prospect of purchasing the Parkade Lots and when King Day declines the low offer, there is an increase in operating expenses and special levies based on King Day's unit entitlement. However, I agree with King Day's contention that while there is no direct evidence, it does suggest that the strata council comprised of members of Retirement Concepts may not be acting fairly towards King Day.

[92] I find for the reasons articulated by King Day that the strata fees levied by the respondent against the petitioner King Day on the basis of unit entitlement and the special levies levied against King Day on the basis of unit entitlement, to constitute a significantly unfair action in relation to King Day contrary to s. 164(1) of the *SPA*. The decision of the strata council to do so is oppressive, unduly burdensome, unjust, and inequitable for King Day.

[93] King Day is entitled to the orders it seeks as set out in the petition, namely:

1. An order that the resolution attached hereto as Schedule "A" be deemed to have passed unanimously as of January 31, 2009 (the "Resolution"); and
 - (a) the respondent file the Resolution at the Land Title office;
 - (b) the respondent revise its 2016/2017 Common Property Budget according to the Resolution and prepare an accounting of the owners' contributions to the Common Property Budget according to the Resolution (the "Accounting");
 - (c) the owners of the Hotel Lots and Commercial Lots, repay to the petitioner any over-contributions made by King Day to the Common Property Budget arising from the Accounting and the Resolution;

2. A declaration that the two special levies – one for \$400,000 and one for \$1,500,000 – passed by the respondent on January 6, 2016, at its annual general meeting (the “2016 Special Levies”) constitute a significantly unfair action in relation to the petitioner contrary to s. 164(1) of the *Strata Property Act*, S.B.C. 1998, c. 43.
3. An order that the 2016 Special Levies be apportioned solely among the owners of the Hotel Lots and Commercial Lots;
4. An order that any amounts paid to the respondent by the petitioner on account of the 2016 Special Levies be returned to the petitioner immediately, with interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79;
5. An order that the respondent immediately remove the liens filed by the respondent on the petitioner’s strata lots;
6. An order that the respondent pay costs of and incidental to this petition to the petitioner;
7. An order that the petitioner is exempted from contributing to the costs or expense of defending this proceeding pursuant to s. 167 of the *Strata Property Act*.

“Loo J.”

The Honourable Madam Justice Loo

Schedule "A"

THE OWNERS, STRATA PLAN LMS 3851

(Westin Grand)

Unanimous Vote Resolution

Reallocation of Common Area Expenses

WHEREAS the strata corporation, legally known as The Owners, Strata Plan LMS 3851 (the "Strata Corporation") is a strata corporation under the Strata Property Act (the "Act") consisting of 228 strata lots;

AND WHEREAS there are certain strata lots associated with the:

- (a) hotel (Strata Lots 1 to 207 the "Hotel Lots" and "Hotel Owners");
- (b) commercial strata lots (Strata Lots 208 to 215, and 217 the "Commercial Lots" and "Commercial Owners"); and
- (c) the parkade (Strata Lots 216 and 218 to 228 - the "Parkade Lots" and "Parkade Owners");

AND WHEREAS each fiscal year the Strata Corporation approves a budget for contributions to the operating fund and contingency reserve fund of the combined common property expenses of the Strata Corporation (the "Common Property Budget");

AND WHEREAS the Act requires that, subject to s. 100 of the Act, all owners must contribute to the operating fund and contingency reserve fund according to the Schedule of Unit Entitlement included on the Strata Plan;

AND WHEREAS Section 100 of the Act provides that the owners of the Strata Corporation may, by unanimous vote, agree to use some other formula to calculate each strata lot's share of its contribution to the common expenses of the Strata Corporation;

AND WHEREAS the Hotel Owners, Commercial Owners and Parkade Owners wish to establish a more equitable allocation of common property expenses between the Hotel Owners, the Commercial Owners and the Parkade Owners in the Common Property Budget;

IT IS RESOLVED AS A UNANIMOUS VOTE RESOLUTION pursuant to section 100 of the Strata Property Act that:

1. effective for the fiscal year ending January 31, 2009, expenses properly included in the Common Property Budget be allocated as follows:

- (a) 18% to the Parkade Lots;
- (b) 10% to the Commercial Lots; and

-2-

- (c) 72% to the Hotel Lots;
2. effective for the fiscal year ending January 31, 2009, any special levy in respect of the common property will be allocated as follows:
- (d) 18% to the Parkade Lots;
 - (e) 10% to the Commercial Lots; and
 - (f) 72% to the Hotel Lots;
3. for each subsequent fiscal year, the expenses properly included in the Common Property Budget and special levies in respect of the common property will be allocated on the above basis, unless agreed otherwise between the parties, with the liberty to any party to apply to the Supreme Court of British Columbia for a re-allocation for a given year on the basis that the allocation would be significantly unfair, as contemplated by s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43;
4. each strata lot's share of its contribution to the Common Property Budget and special levies as set out above will be borne by the owner in the proportion that the unit entitlement of that owner's strata lot(s) bears to the aggregate unit entitlement of all strata lots of that particular type (e.g. Hotel Lots).