IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Semmler v. The Owners, Strata Plan NES3039,* 2018 BCSC 2064

Date: 20181123
Docket: S27182
Registry: Cranbrook

Between:

Kristen Semmler, Matt Semmler and Cobblestone Creek Cottage & Lodging Co.

Petitioners

And

The Owners, Strata Plan NES3039

Respondent

- and -

Docket: S-26708
Registry: Cranbrook

Between:

The Owners, Strata Plan NES3039

Petitioners

And

Kristen Semmler, Matt Semmler and Cobblestone Creek Cottage & Lodging Co.

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Kristen Semmler, Matt Semmler and Cobblestone Creek Cottage & Lodging Co.	J.E. Wittmann
Counsel for The Owners, Strata Plan NES3039:	A. Bird
No other appearances made.	
Place and Date of Hearing:	Cranbrook, B.C. August 13 and 14, 2018
Place and Date of Judgment:	Cranbrook, B.C. November 23, 2018

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I. INTRODUCTION

[1] There are two petitions before me. In the first Kristen Semmler, Matt Semmler and Cobblestone Creek Cottage & Lodging Co. ("Cobblestone ") seek relief from certain Bylaws of the strata corporation, The Owners, Strata Plan NES3039, (the "Strata"). These petitioners seek an order that a rent restriction bylaw is significantly unfair to them or, in the alternative, that the bylaws are inapplicable to the short term licences they grant to people to use their property, and a return of fines levied under the bylaws pursuant to the *Law and Equity Act,* R.S.B.C. 1996, c. 253. At the outset of the hearing the petitioners Matt Semmler and Cobblestone conceded that they did not have standing as petitioners as they were not seeking any relief; all relief sought relates to Kristen Semmler who is the sole owner of the strata lot at issue.

[2] In the second petition, the Strata seeks to enforce certain bylaws against the Semmlers and Cobblestone, including bylaws relating to prohibitions on business purposes and short-term rentals. The Strata also seeks an order for compliance of the Semmlers and Cobblestone with section 146 of the *Strata Property Act,* S.B.C. 1998, c. 43 (the "*Act*"). The Strata seeks to enforce bylaws against both the Semmlers and Cobblestone.

II. BACKGROUND

[3] The Strata is comprised of recreational lots and is known as Valley's Edge Resort. It is located in Edgewater BC. There are 201 recreational lots in the Strata, made up of 94 cottage lots, 6 park model lots, and 101 recreational vehicle lots.

[4] Valley's Edge Park Ltd. ("VEP") was the developer of the Strata and began selling lots in about 2006. Mr. Glenn Ortt is the President of and a council member of the Strata. He is also the sole director of VEP.

[5] As part of its disclosure in the development of the Strata, VEP filed a Form J rental disclosure statement. This disclosure statement set out that VEP reserved the right to rent out 201 residential strata lots and that there was no bylaw of the Strata that restricted the rental of strata lots.

[6] Kristen Semmler purchased strata lot 21 in June 2008. She did not purchase the strata lot from VEP, but rather purchased it from a previous owner.

[7] The Strata Bylaws which were deposited in 2006 contained Bylaw 4(11) which restricted the use of strata lots for any business purpose.

[8] Kirsten and Matt Semmler are directors of Cobblestone. Cobblestone is a company which manages vacation properties for homeowners in a number of locations, including three lots which form part of the Strata. Strata lots 12, 19 and 21 in the Resort are managed by Cobblestone.

[9] The owners of strata lot 12 use their lot for their own purposes and when they purchased the lot they intended to offer it to guests for short-term vacations when they were not using the property. They purchased the lot in September 2007 and managed the property themselves for number of years, including online through various agencies as well as their own website. In 2011 they retained Cobblestone to manage the property for them.

[10] The owners of strata lot 19 purchased their lot for their personal use with the intention that in the future they would generate some revenue from the property to cover expenses. In 2011 the owners of strata lot 19 retained Cobblestone to manage the property for them.

[11] The Semmlers use strata lot 21 for their own purposes and, since June 2010, they have licensed the use of their property to guests on a short-term basis through Cobblestone.

[12] On March 10, 2015 a revised rental restriction Bylaw was passed which restricted rentals of strata lots for terms less than 30 consecutive days. This Bylaw came into force on March 10, 2016.

III. ISSUES

[13] The issues before me centre on Cobblestone's business of permitting short-term guests to reside in strata lots. The issues can be described as follows:

a) Are the short-term occupancies managed by Cobblestone in breach of Bylaw 4(11)?

b) Are the short-term occupancies managed by Cobblestone prohibited by Bylaw 4(47)?

c) Are the Semmlers and Cobblestone in breach of s. 146 of the *Strata Property Act* by failing to submit to the Strata Form Ks for short term occupants?

d) Is Ms. Semmler entitled to relief under section 164 of the *Strata Property Act* in relation to the enforcement of Bylaws 4(47) or 4(11)?

e) Is Ms. Semmler entitled to relief from forfeiture with respect to fines issued by the Strata?

A. Are the short-term occupancies managed by Cobblestone in breach of Bylaw 4(11)?

[14] The Strata relies on the language of Bylaw 4(11) to submit that to permit the use of a strata lot for any occupancy on a commercial basis is a business purpose, and a business purpose is prohibited in the use of any strata lot.

[15] The Semmlers and Cobblestone argue that Cobblestone is located in Radium Hot Springs, and that all of its business is conducted at its office in Radium Hot Springs. All of the employees of Cobblestone work out of the Radium Hot Springs office. The Semmlers do not work out of strata lot 21.

[16] The language of Bylaws 4(11) and 4(47) are of assistance in construing the meaning of Bylaw 4(11). The two relevant sentences in Bylaw 4(11) are as follows:

> "No strata lot shall be used for any business purpose whatsoever without prior approval by the Council. No inventory for the purpose of a business shall be visibly stored upon any strata lot."

[17] Bylaw 4(47) states that

> "No strata lot may be rented for term of less than thirty (30) consecutive days."

[18] While the Strata Bylaws are not a statutory enactment, it is my view that basic rules of statutory interpretation should be employed in understanding how the Bylaws work together. As such, I find that in determining the meaning of an individual bylaw, the Bylaws must be read as a whole. An interpretation which allows the Bylaws to work together harmoniously and coherently should be preferred: *Carnahan v. Strata Plan LMS522*, 2014 BCSC 2375 at para. 25.

[19] Bylaw 4(47) does not prohibit all rentals of strata lots. Rather, it only restricts the rental of strata lots for periods of less than 30 consecutive days. By implication, rentals in excess of 30 consecutive days are permitted. If Bylaw 4(11) were to be construed to prohibit the rental of a strata lot as a business purpose, Bylaw 4(47) would be inconsistent with Bylaw 4(11).

[20] The Strata relies on certain tax law to argue that any income earned from rentals greater than 30 days would be passive investment income from property, rather than income from a business, and therefore such rentals would not violate the business purpose restriction in Bylaw 4(11). I cannot accept this argument. Bylaw 4(47) would clearly permit Kristen Semmler to enter into an arrangement with a renter to live in strata lot 21 for a period of 31 days, and such an arrangement would not be prohibited by Bylaw 4(11). I do not agree that a 31 day rental equates to passive investment income, whereas a 30 day rental equates to business income.

[21] The Strata in its argument confuses the role of Ms. Semmler as strata owner with her role in the business of Cobblestone. While it may be Cobblestone's business to manage vacation properties on behalf of owners, such as the owners of strata lots 12, 19 and 21, there is no evidence that Ms. Semmler in her personal capacity is anything other than an owner receiving passive income on her investment.

[22] It makes no difference to the analysis if Ms. Semmler offered her strata lot for rent directly or through a management company. Ms. Semmler is not renting her strata lot to Cobblestone as a location from which Cobblestone may conduct its business; rather, she is hiring Cobblestone to manage her strata lot. There is nothing

in the Bylaws which states an owner cannot hire a third party to assist with their strata lot.

[23] The second sentence of Bylaw 4(11), referred to above, also assists in understanding the meaning of Bylaw 4(11). It prohibits the display of business inventory on a strata lot. Business inventory suggests materials created through or on behalf of a business being operated out of a strata lot. I find that Bylaw 4(11) is intended to prohibit the use of a strata lot as the location of a business, meaning the strata lot cannot be used for such things as a business office, a retail outlet, or a production facility for a business.

[24] For the reasons stated above, I find that the rental of a strata lot is not a business purpose prohibited by Bylaw 4(11).

[25] The Strata also relies on the zoning bylaws applicable to the Resort. The Strata argues that strata lots 12, 19 and 21 are zoned R–1(B) (Single Family Residential) and that this zoning prohibits the operation of a short-term rental business. I have already found that the owners of strata lots 12, 19 and 21 are not operating businesses out of their strata lots. Nothing in zoning bylaw R–1(B) prohibits the rental of a dwelling house. As such, this argument fails.

B. Are the short-term occupancies managed by Cobblestone prohibited by Bylaw 4(47)?

[26] In support of its argument that the short-term occupancies managed by Cobblestone are prohibited by Bylaw 4(47), the Strata relies on the business purpose prohibition in Bylaw 4(11) and the conflict with the zoning bylaw R–1(B). For the reasons stated above, neither of these arguments can succeed.

[27] The final legal argument which the Strata advances is that Bylaw 4(47) prohibits rentals of less than 30 days, and the Semmlers and Cobblestone are clearly in contravention of this Bylaw through the short-term occupancies managed by Cobblestone. This argument hinges on the meaning of the word “rented” in Bylaw 4(47).

[28] The Semmlers and Cobblestone argue that Bylaw 4(47) applies only to rentals and that Cobblestone is offering short-term licenses, not rentals, to temporary occupants. As such, the Semmlers and Cobblestone say that they are not caught by Bylaw 4(47).

[29] To determine whether temporary occupants of strata lots 12, 19 and 21 gain their occupancy under a rental agreement or a license agreement, an examination of the facts is required.

[30] Cobblestone manages strata lots 12, 19, and 21 under vacation rental management agreements with the owners. Cobblestone then enters into agreements with each of the short-term occupants.

[31] The vacation rental management agreements between Cobblestone and the strata lot owners have terms beyond 30 days. For example, the agreement with the owners of lot 19 has an initial term of 6 months, following which it will be renewed automatically each year for a further 1 year term. Under these agreements, the owners make their property available to Cobblestone on an exclusive basis. Cobblestone agrees to provide various services, including maintenance, housekeeping, purchase of supplies, and arranging for occupancies of their property.

[32] The owners have certain responsibilities, and do not have the right to use the property when it is occupied by guests. The owners must supply furniture, bedding, towels, etc. to ensure the property is in a state where guests can move in and use the property.

[33] The owners and Cobblestone share the revenue received from guests according to a formula.

[34] With the management agreement in place, Cobblestone then enters into short term occupancy agreements with guests. Various good housekeeping obligations are placed on guests. Importantly, Cobblestone retains a right of access, and the guests must agree to not part with possession of or share the residence with any

person other than those included in the application. The guests have no right to, or interest in, the property. Cobblestone has the right to find alternate accommodation for the guest or provide them with a refund if the property is not available for some reason.

[35] Originally the agreements with guests referred to rentals and tenants. By 2016 the agreements had been changed to use terms such as licence and guest. I find that the terms used to describe the agreements are not material. It is the substance of what is agreed to by each of the owners, Cobblestone, and the guests which is material. The substance of the agreements has not changed, notwithstanding the change in nomenclature.

[36] Counsel referred me to *Strata Plan VR 2213 v Duncan*, 2010 BCPC 123 ("*Duncan*"). While not binding upon me, *Duncan* contains an extremely helpful analysis which I find to be persuasive. In *Duncan* the court considered s. 146 of the *Strata Property Act*, which requires a landlord to give a prospective tenant the current bylaws and rules and a notice of tenant's responsibilities in a prescribed form (Form K). Section 146 of the *Act* was considered along with the strata's bylaw 6.1 which required an owner to submit to the manager a Form K within two weeks of renting out a suite.

[37] In *Duncan* the owner rented its suite to a management company, and the management company licenced persons to stay in the suite. At issue in *Duncan* was the applicability of s.146 of the *Act* and section 6.1 of the bylaws in circumstances where a lot was licenced through a management company.

[38] The court extensively reviewed the law of tenancies within strata corporations, the law of licensees and leases, and general tenancy law. The principles set out in *Duncan* make it clear that a tenancy tends to arise where the tenant is given a grant of exclusive possession of the premises, and a license is normally created where person is granted the right to use the premises without an entitlement to exclusive possession. The courts look to the intention of the parties to determine whether there was an intention to create an interest in the land. If the

parties intended to create an interest in the land, a tenancy is created. If not, the arrangement is a license.

[39] The court in *Duncan* also considered the *Strata Property Act* in which an occupant is defined to be a person other than an owner or tenant who occupies a strata lot. The court concluded that the scheme of the *Act* and the bylaws contemplated persons lawfully occupying units, where those persons are neither owners nor tenants or subtenants, and that the strata was only entitled to receive Form Ks from tenants or subtenants. Where there was a change in occupancy that was not a tenancy, no Form K was required to be delivered.

[40] *Duncan* was considered in *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478*, 2017 BCSC 1039 ("*HighStreet*"). In *HighStreet* the owner of a strata lot leased the lot to a management company. The management company then entered into contracts with guests to provide furnished accommodation on short-term bases. The strata passed a bylaw restricting the occupation of residential lots. It prohibited an owner, tenant or occupant from permitting a residential lot "to be occupied under a lease, sublease, contract, license or any other commercial arrangement for periods of less than 180 days."

[41] The issue in *HighStreet* was whether the management company, which was the tenant, could take the benefit of s.143 of the *Strata Property Act*. Section 143 of the *Strata Property Act* provides that a bylaw prohibiting or limiting rentals does not apply to a strata lot until one year after a tenant who is occupying the strata lot at the time the bylaw is passed ceased occupying as a tenant.

[42] Relying on *Duncan* and other law, the court in *HighStreet* found that while HighStreet had exclusive use and control of the strata lot, which confirmed its interest in the lot as a tenant, the contracts it entered into with guests did not convey that interest or any rights such as the right of exclusive possession to the guests. The guests of HighStreet were occupants and the relationship between HighStreet and its guests was one of licensor and licensee. The guests of HighStreet did not become tenants as a result of the license agreement. The occupancy of the strata lot

was governed by the license agreements between HighStreet and its guests, and the tenancy was governed by the agreement between the strata lot owner and HighStreet.

[43] In *HighStreet* the court found that s. 143 could not be used by HighStreet because while it was a tenant, it did not occupy the strata lot. Section 143 was only available to tenants occupying a strata lot when the bylaw was passed.

[44] In *HighStreet*, the bylaw at issue expressly prohibited the occupation of a strata lot under any commercial arrangement for a term less than 180 days. As such, the license agreements of HighStreet were caught by the bylaw and no grace period was afforded to HighStreet as tenant under section 143.

[45] These two cases establish the following principles, which I agree with:

a) A person may occupy a strata lot under a tenancy agreement or a license agreement.

b) A tenant is a person who rents all or part of a strata lot and who, through that arrangement, receives an interest in the property including exclusive possession of the premises.

c) An occupant is a person other than an owner or tenant who occupies a strata lot.

d) A licensee is an occupant but not a tenant.

e) Provisions of the *Strata Property Act* which relate to tenants and tenancies do not apply to licencees.

[46] I find that the agreements Cobblestone entries into with guests are license agreements. The agreements permit guests to use the property on a short-term basis, and do not purport to convey an interest of any kind in the property to the guests. I find there is no intention to create a tenancy in the license agreements.

[47] The main thrust of the Semmlers and Cobblestone' argument is that Bylaw 4(47) uses the word "rent" and "rent" must mean tenancy. The Semmlers and Cobblestone argue that the Strata could have restricted short-term occupancies of any kind but instead they used the word "rent".

[48] The Strata argues that the Bylaw is intended to limit all short-term rentals, regardless of whether they are tenancies or licenses. The Strata also argues that the scheme of the *Strata Property Act* is that rentals include all occupancies and not just tenancies.

[49] Part 8 of the *Strata Property Act* deals with rentals. Contrary to the position taken by the Strata, Part 8 consistently uses the word "rental" in conjunction with the word "tenancy":

a) s.141 of the *Act* states that the strata corporation "must not screen tenants, establish screening criteria, require the approval of tenants, require the insertion of terms in tenancy agreements or otherwise restrict the rental of a strata lot except as provided in subsection (2)",

b) s. 143 states that …"a bylaw that prohibits or limits rentals does not apply to a strata lot until the later of

(a) one year after tenant who is occupying the strata lot at the time the bylaws is passed ceases to occupy it as a tenant",

c) s. 145 states that "If an agreement for the rental of a residential strata lot contravenes a bylaw that prohibits or limits rentals, the tenant

(a) is not in contravention of the bylaw, and

(b) may, within 90 days of learning of the landlord's contravention, end the tenancy agreement without penalty by giving notice to the landlord.",

d) s. 146 states “Before a tenant rents all or part of a residential strata lot, the landlord must give the prospective tenant

(a) the current bylaws and rules, and

(b) a Notice of Tenant’s Responsibilities in the prescribed form.”

[50] I find that the words rent or rental as used in Part 8 of the *Strata Property Act* must have a consistent meaning within that Part. Given that the sections of the *Act* which I have identified above clearly use the words “rent” and “rental” in the context of the creation of a tenancy, I find that, within the meaning of the *Strata Property Act,* the words “rent” and “rental” do not apply to licenses. Rather, the word rental must be read as describing an intention to create a tenancy.

[51] I further find that the terms used in the bylaws of the Strata must carry the same meaning those words have in the *Strata Property Act*. Unlike the strata in *HighStreet* case, the Strata did not restrict the length of occupancies under any commercial agreement other than a rental. Bylaw 4(47) only restricts short-term *rentals* of less than 30 days.

[52] Because Cobblestone enters into license agreements, and not tenancy agreements, those license agreements are unaffected by Bylaw 4(47).

[53] In the result, I find that the Semmlers and Cobblestone are not in breach of Bylaw 4(47).

C. Are the Semmlers and Cobblestone in breach of s. 146 of the *Strata Property Act* by failing to submit Form Ks for short term occupants to the Strata?

[54] I have already found that Cobblestone licenses short-term occupancies of strata lots 12, 19, and 21. These license agreements do not create tenancies. For the reasons stated by the court in *Duncan*, I find that there is no obligation on the Semmlers and Cobblestone to provide Form K’s to the Strata pursuant to section 146 of the *Strata Property Act.*

D. Is Ms. Semmler entitled to relief under section 164 of the *Strata Property Act* in relation to the enforcement of Bylaws 4(47) or 4(11)?

[55] Ms. Semmler relies on s. 164 of the *Strata Property Act* to obtain a remedial order in the face of the unfairness she says she has suffered under Bylaws 4(47) and 4(11). I have already found that these bylaws do not apply to the activities undertaken by Ms. Semmler. However, as this issue was argued and may be of assistance to the parties, I will address whether relief under s. 164 ought to be granted in the event I am wrong regarding the application of Bylaws 4(47) and 4(11) to the activities undertaken by Ms. Semmler.

[56] The leading authority on the application of s. 164 is *459381 v. The Owners, Strata Plan* BCSC 1589, 2012 BCCA 44 ("*Dollan*"). In *Dollan* the court found:

> [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* 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* that provided the process is fair and democratic, a court should defer to the decision of the strata council or corporation.
>
> ….
>
> [30] In the case of a strata unit owner seeking redress under s. 164, I would adapt the test, suggested by Greyell J. 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?
>
> …
>
> [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.

[57] In the recent decision in *Sherwood v. The Owners, Strata Plan* VIS 1549, 2018 BCSC 890, at paragraph 266, the court confirmed that significant unfairness may be found if the impugned or threatened actions are oppressive (burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith), unfairly prejudicial (unjust and inequitable), or transcend beyond mere prejudice or trifling unfairness, bearing in mind that a strata must always balance the personal interests of one owner against the interests of all owners.

[58] In the case before me the *Act* which is said to violate the reasonable expectations of Ms. Semmler is the passage of a bylaw at an Annual General Meeting ("AGM"). In *Dollan*, the court found a strata owner's reasonable expectations could be violated through the outcome of a decision taken at a special general meeting. As such, I find that a strata owner's reasonable expectations can be impacted through the passage of a bylaw at a special or annual general meeting. This is not to say that every proposed bylaw which is objected to by an owner at an AGM will give rise to relief under s. 164. Each case must be considered on its own facts, and both the reasonable expectations of the strata owner, and the unfairness arising from a violation of such reasonable expectations must be considered in the s. 164 analysis.

1. Reasonable expectations of Ms. Semmler

[59] At the time Ms. Semmler purchased her strata lot, there were no restrictions on rentals in the bylaws. In the Form J Rental Disclosure Statement appended to the developer's disclosure statement filed on April 7, 2006 it was stated that there was no bylaw of the strata that restricted the rental strata lots.

[60] Kristen Semmler stated that she and her husband Matt Semmler had discussions with Glenn Ortt during the time leading up to the purchase of strata lot 21 wherein Mr. Ortt told them that the owners of another strata lot had purchased their property for the purposes of generating rental income. This was consistent with the purpose for which Ms. Semmler purchased strata lot 21.

[61] Mr. Ortt denies having such a conversation with the Semmlers. I accept the evidence of Kristen Semmler. The conversation would stand out in her memory as it was a factor she considered when deciding to purchase the lot. As Mr. Ortt was not the vendor, it is reasonable that he may not remember the conversation 10 years later.

[62] The evidence before me also confirmed that rental have always been a part of the resort as VEP routinely rents out its RV lots.

[63] I accept that the evidence before me supports the reasonable expectation of Ms. Semmler that she would be permitted to generate income through the rental of her strata lot.

[64] Bylaw 4(47) was passed after Ms. Semmler purchased her lot, and changed the facts from those stated in the Rental Disclosure Statement at the time of her purchase. Because Bylaw 4(47) purports to restrict rentals of strata lots, the reasonable expectations held by Ms. Semmler were violated by Bylaw 4(47).

2. Was the violation of Ms. Semmler's reasonable expectations significantly unfair?

[65] The Strata argued before me that Bylaw 4(47) was required to maintain the family atmosphere of the resort, and to address complaints about short term renters.

[66] I was provided with evidence of certain owners of strata lots complaining about the behaviour of short term guests in properties managed by Cobblestone. The Strata takes the position that the number of complaints required them to take steps to limit rentals on a short-term basis. The position of Cobblestone and the Semmlers is that they have acted responsibly in allowing guests to occupy the strata lots and, while there were initially some issues, those have been resolved and there are no longer any particular issues arising from the behaviour of the short-term guests.

[67] Glenn Ortt exhibited a number of documents evidencing what he said were the ongoing breaches by Cobblestone. In 2010 there was an incident where guests

were using amenities they were not permitted to use. Ms. Semmler agreed that there were four incidents where oversized dogs were brought on site by guests; the documents produced on this application demonstrate three incidents which occurred once in July 2013, once in October 2014, and once in February 2015. In July 2014 there was a note of some noise and related complaints. In August 2014 there was one incident involving fireworks. All other complaints, notes in council minutes, and fines issued, related to breaches of Bylaw 4(11) (business purpose) and Bylaw 4(21) (no signs posted).

[68] The Semmlers were noted as being present when the issue about guests using the amenities was raised in 2010 and they agreed to ensure their guests did not do that again, and to not provide their guests with keys for the amenities. It does not appear that any further issues arose regarding guests of Cobblestone using amenities. Following the dog complaints, Cobblestone prohibited its guests from bringing any pets, and that seems to have resolved the issue about oversized dogs. The fireworks incident appears to a one-off issue.

[69] Mr. Ed Hone, the manager of the Strata addressed the complaints he received that he says originated with short term renters. However, in his affidavit he dealt mostly in generalities and to the extent he provided any detail, the complaints came from one particular resident, Tammy Lambert, a neighbour of Ms. Semmler.

[70] Mr. Hone refers to the oversized dogs and the guests using the amenities on an occasion in 2010. I have dealt with these issues above.

[71] Mr. Hone made generalized statements that he has seen renters speeding, and had to deal with noise complaints from them. I cannot accept at face value these generalized statements without any particulars given, and without any evidence in council minutes to confirm such issues (other than the one reference in July 2014).

[72] Similarly, Ms. Lambert and Ms. Lamb make generalized statements about what they say is the bad behaviour of short terms guests of Cobblestone. These

complaints are not corroborated with any evidence of enforcement taken by the Strata (other than the issues described above).

[73] The behaviours alleged to be exhibited by the guests of Cobblestone, on a review of all of the evidence, appear to be behaviours which are also exhibited by owners of other strata lots, including speeding, parking in driveways, obstructing traffic, issues with the pool, issues with children, parking of RVs, etc.

[74] The evidence before me as it relates to the supposed nuisance arising from short-term occupancy of the three strata lots managed by Cobblestone does not persuade me that the guests are behaving in any manner different than the owners of this strata resort. I am not satisfied that short term guests of Cobblestone represent a real problem with bylaw violations or behaviour outside the norms of the resort.

[75] VEP and original purchasers are not subject to the rental restriction bylaw, by virtue of the *Strata Property Act*, s. 143. VEP currently rents its 101 RV lots, and at least one original purchaser rents their strata lot. As such, a majority of the rentals will continue notwithstanding the passage of the rental restriction bylaw. The bylaw has the effect of targeting a minority of the owners who wish to offer their stratas to guests, such as Ms Semmler and the owners of units 12 and 19.

[76] The first time the rental restriction bylaw was brought forward was November 27, 2014, and the reason advanced for the bylaw was that renters took up an inordinate amount of the manager's time. As noted above, I am not satisfied that renters were involved in bylaw infractions to an inordinate degree. Glenn Ortt stated that he had a concern that short-term rentals cause a loss in value for all the other owners and that short-term renters create excessive wear and tear on common property and amenities. No evidence was presented to substantiate these opinions.

[77] At an AGM in March 2015 the rental restriction bylaw was passed. At that time, VEP owned 74 strata lots and had 74 votes. The respondent Glenn Ortt and his wife owned three properties and had three votes. There were 111 votes in favour

of the bylaw and 24 votes against. Of the 111 votes in favour, 77 were cast by the Ortts and VEP. If the Ortts and VEP were taken out of the equation, there would have been 34 votes in favour of the bylaw, and 24 against. This would not have met the ¾ vote required to amend a bylaw.

[78] There is nothing improper about how the votes were cast and the Ortts and VEP were entitled to vote as they did. However, in the context of a s. 164 analysis, I am not bound by the decision taken at the AGM. As stated in *Dollan*, "the outcome of the vote is one factor to be considered in determining if the impugned action is unfair." In the case before me, the disproportionate number of votes exercised by the Ortts and VEP, coupled with the fact that the Ortts and VEP are exempt from the bylaw itself, does cause me to place less weight on the outcome of the vote than I would have had 77 votes not been cast by, essentially, one party.

[79] I was provided with the revenue for Ms. Semmler and Cobblestone arising from licences of strata lots in the resort. From 2010 to September 2015, Ms. Semmler received $142,108.08 in revenue from strata lot 21. Cobblestone received a total of $179,191.09 from its services in licencing strata lots 12, 19, and 21 from June 2010 to September 2015. I was provided with licences anticipated for 2016, but at the time of the hearing I was not provided with actual revenue for 2016 or any years after 2015. However, it appears that each owner receives revenue of approximately $20,000-$25,000 a year from licencing their strata lot. Cobbletsone receives revenue of approximately $35,000 a year for its services.

[80] Ms. Semmler says that the revenue from the resort represented, in 2015, approximately 21% of Cobblestone's revenue. I was not provided with updated information at the time of hearing.

[81] Ms. Semmler states that the loss of revenue in licencing the lots would result in a significant loss to the owners and Cobblestone. I agree.

[82] I am satisfied that the passage of Bylaw 4(47) is significantly unfair to Ms. Semmler. The bylaw was passed with a majority provided by VEP, which itself is

exempt from the operation of the bylaw. I am not satisfied that the interests of all owners are fairly met by the bylaw. Cobblestone, on behalf of Ms. Semmler and the owners of units 12 and 19, has acted responsibly to manage its guests within the bylaws of the Strata. The disturbances originating with the guests have been exaggerated and the effect of the bylaw is to take a sledgehammer to kill a fly.

[83] Ms. Semmler had a reasonable expectation that she could obtain investment income from her strata lot. If Bylaw 4(47) applies to licencing of her strata lot, the effect of the bylaw is significantly unfair in its violation of her reasonable expectation.

[84] In the event I am wrong in my construction of Bylaw 4(47), I would suspend the operation of Bylaw 4(47) against Ms. Semmler permanently.

E. Relief from Forfeiture

[85] Section 24 of the *Law and Equity Act,* provides that the court may relieve against all penalties and in so doing may impose any terms it considers just. This is a discretionary remedy.

[86] In *Sechelt Golf & Country Club Ltd. v Sechelt (District)*, 2012 BCSC 1105, para. 139, the court summarized the principles to be exercised in the granting of such discretionary relief. These principles include a consideration of whether it would be unconscionable for the relief not to be granted.

[87] As I have found that the activities of the Semmlers and Cobblestone are not in breach of Bylaws 4(11) and 4(47), I find that it would be unconscionable for the Strata to retain any fines levied against any of the Semmlers or Cobblestone in relation to these Bylaws.

IV. CONCLUSION

[88] The petition brought by the Strata is dismissed.

[89] Bylaw 4(11) has no application to the business conducted by Cobblestone, and short term licencing of strata lots is not a business purpose prohibited by Bylaw 4(11).

[90] The short-term licences managed by Cobblestone on behalf of individual owners including Ms. Semmler are not prohibited by Bylaw 4(47).

[91] The Semmlers and Cobblestone are not in breach of s. 146 of the *Strata Property Act* and are not required to submit to the Strata Form Ks for short term occupants.

[92] The Strata shall return to the Semmlers and Cobblestone, or any of them, all fines levied and paid in relation to purported infractions of Bylaws 4(11) and 4(47).

[93] Ms. Semmler is entitled to her costs in her petition (No. 27182), and the Semmlers and Cobblestone are entitled to their costs in the Strata's petition (No. S-26708).

"Baker J."