IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 1590 v. Yip,* 2018 BCSC 2185

Date: 20181210
Docket: S181301
Registry: Vancouver

Between:

The Owners Strata Plan LMS 1590

Petitioner

And

Yuk Hing Yip and

Shing Hing Hong Trading Co. Ltd.

Respondents

- and -

Docket: S184049
Vancouver Registry

Between:

Shing Hing Hong Trading Co. Ltd.

Petitioners

And

The Owners Strata Plan LMS 1590

Corrected Judgment: The text of the judgment was corrected on the front page on December 20, 2018.

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for The Owners Strata Plan LMS 1590:	I. Knapp, E. Dvorak, Articling Student
Counsel for Shing Hing Hong Trading Co. Ltd:	M. Morinaga

Counsel for Yuk Hing Yip:	R. Wu
Place and Date of Hearing:	Vancouver, B.C. October 1-2, 2018
Place and Date of Judgment:	Vancouver, B.C. December 10, 2018

Table of Contents

INTRODUCTION

[1] These petitions concern the interpretation and enforcement of strata bylaws at the Richmond Public Market (the "Market") that restrict the business which may be conducted in a strata lot.

[2] Yuk Hing Yip (the "Owner"), deceased, is the registered owner of a strata lot at the Market. Kui Ming Yip ("Mr. Yip") is the executor of the estate of Yuk Hing Yip. Since November 2016, the strata lot has been leased to Shing Hing Hong Trading Co. Ltd. (the "Tenant").

[3] The dispute between the parties turns on whether the Tenant's business constitutes a permissible use under the Market's strata bylaws (the "Bylaws"), which were enacted pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43. The Market's Strata Council has approved the use of the strata lot for the sale of ginseng products. There is evidence that the Tenant has been selling health supplements and other non-ginseng products that are said to be outside of the scope of this permissible use.

[4] There are two petitions in issue.

[5] The owners of the Market, Strata Plan LMS 1590 (the "Strata"), have filed a petition seeking declarations and orders compelling the Owner and the Tenant to comply with the Bylaws by restricting the business carried at the strata lot to the sale of ginseng products. The Owner and Tenant dispute that they are in breach of the Bylaws, and the Tenant has filed a separate petition seeking remedies for what is alleged to be unfair enforcement action by the Strata.

[6] Given the overlapping issues raised in the two petitions, the parties agreed that they should be heard together.

FACTUAL BACKGROUND

The Strata's change in use Bylaws

[7] The Market is a commercial strata development that is located at 8620 Westminster Highway in Richmond. A variety of retail and service businesses operate within the Market. There are 86 strata lots in total.

[8] At the time the Market opened in 1994, strata lots were developed and marketed with a view to creating diversity in the retail businesses and limiting competition among the business owners. A useful description of this history is provided by Madam Justice Ross in *Lee Men International Enterprises Company Limited v. Siegle Properties BC Limited,* 2007 BCSC 1128 [*Lee Men*]:

> [8] The original owner and developer of the market was RPM Ventures Ltd. (the "Developer"). George Kropinski was a director of the Developer. The Developer sold Lots to purchasers. In some cases, where it was unable to find a purchaser for a Lot, the Developer leased Lots directly to tenants. In order to attract businesses to the Market in the early years of the project, the Developer took certain measures to ensure a suitable "merchandise mix" and to limit certain forms of competition amongst the owners and tenants of the Lots.
>
> [9] It appears that from about 1993 to about 1994, when the Developer entered into a sale and purchase contract for the sale of a Lot (the "Initial Purchase Contract"), each Initial Purchase Contract contained a Clause 14, entitled "Restrictive Covenant", which read as follows:
>
> > 14.1 The Purchaser agrees that the Strata Lot shall be used exclusively for the trade or business of: [USE] for a period of three (3) years, commencing on the Closing Date, and thereafter, the Purchaser will not use the Strata Lot for any other trade or business except with the express written approval of the Strata Corporation, in accordance with Article XVII, Clause 18 of the Bylaws.
> >
> > 14.2 In order to produce a suitable merchandise mix for the [market], the Vendor believes that it is appropriate to initially control the retail uses of the individual Strata Lots. Accordingly, the vendor hereby covenants and agrees with the Purchaser that it will not sell more than [ ] strata lot(s) to any other purchaser(s) who has an identical and directly competing use to that of the Purchaser.
>
> (the "Restrictive Covenant")
>
> [10] The original bylaws of the Strata (the "Original Bylaws") were filed with the Land Title Office on September 15, 1994. Article XVII, Clause 18 of the Original Bylaws reads as follows:

> 18. An owner shall not carry on any trade or business, other than the original trade or business, without a Special Resolution of the Strata Corporation, which requires approval of 75% of all Strata Lot owners.

[9] The original Bylaws were amended over time. In 2000, clause 18 was deleted and replaced with the current "change of use" provisions. The relevant passages of the current Bylaws are as follows:

> **2.10 Change of Use**
>
> 2.10.1 An owner, tenant or occupant shall only be permitted to conduct the trade or business in or from his strata lot or use his strata lot as listed in Section 14 of the Purchase and Sale Agreement between the Developer and the initial Purchaser unless otherwise modified. An owner shall be permitted to change the designated use of a strata lot upon compliance with the following criteria.
>
> . . . .
>
> **2.10.3 *For strata lots which have been occupied and opened for an approved use***
>
> An owner must apply to and obtain written approval of the strata council to change the strata lot to a use which is substantially different from the trade/business in which the strata lot is or has been used. The strata council must promptly consider any written request of a change in use which includes the strata lot owner detailing the proposed operator, the proposed use of the premises and any other relevant information, and the strata council shall reply in writing within seven (7) days from the date of the next regularly scheduled strata council meeting held once the written request is received from the strata lot owner. All written requests must be received no less than seven (7) days prior to a strata council meeting to be considered on the agenda of the council meeting. The strata council will base their decision on the guidelines outlined below.
>
> **2.10.4 *Guidelines for strata council considering applications for Change of Use:***
>
> (a)
>
> (i) No owner shall be allowed to change the usage of his/her strata lot to a business of which the primary nature is either actively carried out in one or more of the strata lots in Richmond Public Market, or has been designate (sic) by the developer to a strata lot.
>
> (ii) Sub-section (i) (above) will be applicable in all cases except whereby other strata lot owners allowed to engage in the same business or trade, agree to the proposed change in writing. ….

(Collectively, the "Use Bylaws")

[10] In sum, the original Bylaws of the Market permitted a change to an owner's trade or business if a Special Resolution of the Strata was passed, requiring 75% of owners voting in favour of the Resolution. The current Use Bylaws allow the Strata Council to approve a change in use without a Special Resolution, however the proposed change in the business or trade of an owner will require the consent of all other strata owners engaged in the same business at the Market.

The change in use of the strata lot to sale of ginseng products

[11] These petitions concern the business use that may be made of Unit 1690 in the Market. The Owner purchased Unit 1690 in 1994. From the time of the purchase up to November 2016, the permitted use of Unit 1690 was the operation of a restaurant.

[12] The Owner and the Tenant both delivered change of use requests to the Strata over an overlapping period of time in the fall of 2016. These requests are inconsistent in content. Given the arguments that have been advanced in this proceeding, it is important to be clear on what change of use was sought and what was approved.

The Owner's application for a change in use

[13] On October 6, 2016, the Owner sent a letter to the Strata Council requesting permission to "open a shop in [Unit 1690] that would be selling ginseng gifts". This was followed on October 12, 2016 by the Owner's submission of a "Change of Use Application" to Strata Council. The proposed change in use was described in an accompanying letter as a new shop that would sell "Ginseng, Ginseng candies, Ginseng Drinks". Finally, on November 6, 2016, the Owner sent a further request to the Strata Council to change the use of Unit 1690 to "Ginseng Products & Ginseng-Related Gifts".

[14] I do not find there to be material differences in the various ways in which the proposed change in use was described in the Owner's correspondence. What was anticipated by the Owner's request was a change in use that was restricted to the

sale of ginseng products, which might include ginseng candies, ginseng gifts or ginseng drinks.

[15] The change in use application was considered by the Strata Council at their November 17, 2016 meeting, and the minutes of this meeting reflect the following decision:

> 4. Change in Usage Request: A strata lot owner requested the opportunity to change their usage to allow for the sale of ginseng products. Council agreed to approve this request. The owner will be notified accordingly.

[16] The descriptor "sale of ginseng products" is consistent with the content of the Owner's various requests for a change in use.

The Tenant's request for a different change in use

[17] In late October 2016, the Owner and the Tenant engaged in the negotiation of a lease of Unit 1690. The executed lease is not in evidence in this proceeding.

[18] On November 1, 2016, the solicitor for the Tenant, Sheila Braaten, sent an email to Joanna Alexander, who Ms. Braaten apparently (and mistakenly) believed to be the property manager for the Strata. On behalf of the Tenant, Ms. Braaten requested confirmation that the Strata would permit the use of Unit 1690 as:

> …a food retail store selling ginseng products, health supplements, skin care products, dried and frozen seafood, Chinese grocery products and Canadian souvenir products.

[19] This proposed use is, of course, significantly broader than the change of use to sale of "ginseng products" that the Owner simultaneously sought Strata approval for. It should be noted that the Use Bylaws require a change in use application to come from a strata lot owner.

[20] On November 16, 2016, Ms. Braaten sent a follow-up email to Ryan Fitzpatrick, who was in fact the property manager for the Strata at this time. On the same day, Mr. Fitzpatrick responded to Mr. Braaten, copying Tadhg Egan who was counsel for the Owner:

> We require the request to come from the owner of the strata lot or an agreement in place between the strata lot owner and their lawyer confirming that they are allowing Mr. Egan to act on their behalf. The owner needs to complete the attached form and submit to me. Please reply to all when responding.

[21] Mr. Egan responded by email on the afternoon of November 17, 2016, attaching the change of use requests that were previously sent to the Strata Council by the Owner. Ms. Braaten was copied on this email.

[22] On the evening of November 17, 2016, Mr. Fitzpatrick emailed Mr. Egan to indicate that "the Strata Council has approved this request", with formal documentation to follow. Ms. Braaten was also copied on this email.

[23] This email communication is the basis for the Tenant's argument that there is ambiguity as to which request was approved by the Strata Council. The Tenant says that it was misled into believing that what had been approved by the Strata was the change of use requested in Ms. Braaten's November 1, 2016 email. This is the basis for the Tenant's "estoppel" argument which is addressed in the Analysis section below.

[24] As is evident in the minutes of the November 17, 2016 meeting of Strata Council, the actual change of request that was approved for the Unit was the request of the Owner to allow the sale of "ginseng products", and not the broader use for which approval was sought by Ms. Braaten in her November 1, 2016 email.

The complaint and the Strata's enforcement steps

[25] In May of 2017, the Strata Council received a complaint from the owner of Unit 1120, an adjacent strata lot, that the Tenant was conducting business in Unit 1690 that was not consistent with the use that had been approved. The tenant of

Unit 1120 was engaged in the business of selling health products and supplements under the business name Maxwell Nutrition Supplements ("Maxwell").

[26] The Market's strata manager, Stanley Kong, attended Unit 1690 and found that the Tenant was selling health supplements and other products that were not ginseng products.

[27] By letter dated June 19, 2017, the Strata gave notice of the complaint to the Owner, and advised the Owner of her right under the *Strata Property Act* to request, within 14 days, a hearing to address the allegations. The notice was sent by mail, emailed, and hand-delivered to an adult working at Unit 1690. The Strata received no response from the Owner.

[28] It should be explained that Mr. Yip, the executor of Yuk Hing Yip's estate, is the Owner's spouse. The address for delivery that the Owner provided to the Strata – 8760 Cullen Crescent in Richmond – was the address at which Mr. Yip continued to reside. It was this address to which the Strata's letters were sent.

[29] Following the expiry of the 14-day period, the Strata Council determined that the business conducted from Unit 1690 violated the Use Bylaws.

[30] On July 13, 2017, the Strata sent a further letter to the Owner advising of the Council's determination and demanding that she comply with the Use Bylaws. The Owner did not respond to this letter.

[31] On July 26, 2017, at a regular council meeting, the Strata Council decided to impose fines on the Owner for breach of the Use Bylaws. The Owner was fined the sum of $50, together with an ongoing fine of $200 every seven days until the infraction was corrected. The Strata sent a notice of the fines to the Owner by letter dated August 14, 2017, which was copied to the Tenant.

[32] Mr. Yip has deposed that for a period of approximately one year from April 2017 to April 2018, he did not receive any mail or notices from the Strata. He

specifically deposed that he "does not recall" receiving the Strata's letters of June 19, July 13, and August 14, 2017.

[33] I do not find it necessary to determine whether Mr. Yip in fact received the correspondence from the Strata as nothing in this proceeding turns on this issue. Section 61 of the *Strata Property Act* deems notice to have been given to an owner by the Strata if it is mailed to the address that is provided for service of documents. The Strata mailed the correspondence to the address that the Owner had provided. Therefore notice is deemed to have been given by the Strata.

The Strata's commencement of litigation

[34] In July 2017, the owner of Unit 1120 requested that the Strata initiate legal proceedings against the Owner to enforce compliance with the Use Bylaws.

[35] The Strata convened a Special General Meeting to consider the request on November 29, 2017. At the meeting, litigation to enforce the Bylaws as against the Owner and Tenant was authorized by a ¾ vote of Strata owners. The following resolution was passed:

> **BE IT RESOLVED** BY A ¾ vote of the Strata Corporation that, pursuant to sections 171 and 172 of the Act, the Strata Corporation be and is hereby authorized to commence legal action against the owner of Unit 1690 and/or any tenant of Unit 1690 in any manner giving rise to the Bylaw Infraction and such further and other relief as may be necessary to ensure compliance with the Strata Corporation's bylaws in respect of the authorized or permitted use of a strata lot.

[36] As a condition of the resolution, the owner and tenant of Unit 1120 agreed to "indemnify and save harmless" the Strata for all legal costs and expenses incurred.

[37] The Strata's petition and supporting material was filed in January 2018. The Strata's petition material included the affidavit of Kam Chow, an investigator retained by the Strata. Mr. Chow's affidavit appended a report detailing his observations of the business carried on at Unit 1690 in the course of his surveillance carried out in December 2017.

[38] In March 2018, the Tenant filed a petition seeking relief against the Strata on the ground that the actions of the Strata were significantly unfair within the meaning of s. 164 of the *Strata Property Act.*

[39] The Owner filed a petition response to the Strata's petition in June 2018, which generally adopts the Tenant's position.

RELIEF SOUGHT

Relief sought by the Strata

[40] In Part 1 of its petition, the Strata has sought a variety of relief in relation to the alleged breach of the Bylaws. This includes a declaration, an injunction, and orders terminating the tenancy at Unit 1690 and permitting the filing of a certificate of pending litigation against the property.

[41] At the hearing of the petition, counsel for the Strata advised that the Strata is in fact only seeking two forms of relief at this time:

a) Declarations that the respondents have failed to abide by the *Strata Property Act* and bylaws of the Owners, Strata Plan LMS 1690, specifically Bylaw 2.10.1, and that the respondent Owner has failed to control the Tenant to stop its continuous breaches of the bylaw;

b) An injunction:

(a) requiring the Tenant to within 24 hours remove from the subject unit all products which it offers for sale which are inconsistent with the approved usage for the unit set by the Strata Council; and

(b) prohibiting the Tenant from conducting any further business which is not consistent with the approved usage for the subject unit set by the Strata Council.

Relief sought by the Tenant

[42] The Tenant's petition seeks a series of orders relating to the alleged unfairness in the Strata's enforcement steps to date. The relief sought includes:

a) Orders and declarations that the Tenant is not in breach of the Bylaws, and setting aside the imposition of fines;

b) Directions to the Strata to assist in the resolution of the dispute among the parties regarding the proper uses of Unit 1690 and Unit 1120;

c) An order that the Strata obtain legal representation that is independent of Maxwell's interests; and

d) An order varying the Strata resolution of November 29, 2017 to sever the indemnity agreement with the owner of Unit 1120.

ISSUES

[43] The petitions filed by the Strata and the Tenant give rise to the following issues:

I. Is the Tenant's use of Unit 1690 a breach of the Use Bylaws?

II. Is the Strata estopped from enforcing the Use Bylaws?

III. Are the Use Bylaws unenforceable under s. 121 of the *Strata Property Act*?

IV. Has the conduct of the Strata been significantly unfair to the Owner or Tenant within the meaning of s. 164 of the *Strata Property Act*?

V. In the event that the arguments advanced on either petition succeeds, what is the appropriate remedy?

ANALYSIS

Issue I: Is the Tenant's use of Unit 1690 a breach of the Use Bylaws?

[44] This proceeding has been rendered complicated by the diverse array of defences and challenges raised by the Owner and the Tenant. These various collateral issues tend to obscure the question that is at the core of this proceeding: is the business conducted at Unit 1690 in breach of the Use Bylaws? I will address this issue first.

The nature of the business conducted at Unit 1690

[45] Section 2.10.1 of the Bylaws provides that an owner or tenant may only conduct a trade or business at a strata lot in the Market that is listed in the original Purchase and Sale Agreement, or in accordance with a permitted change of use.

[46] Under the original Purchase and Sale Agreement, Unit 1690 was authorized for use as a restaurant. In November 2016, the Strata Council approved a change in use for Unit 1690 to "the sale of ginseng products".

[47] Unit 1690 is listed on the Market directory as "Bill Beauty and Health Products", although the name displayed on the front store sign is "E&F Natural Products".

[48] The evidence adduced in this proceeding is not entirely consistent as to the nature of the business conducted at Unit 1690 since the Strata approved a change of use to sale of ginseng products in the fall of 2016.

[49] The report of the investigator retained by the Strata to conduct surveillance of Unit 1690 in December 2017 establishes that at that time, about 2/3 of the products displayed in the store were not ginseng products. The non-ginseng items primarily consisted of health supplements, along with (to a lesser extent) skin care products, and Chinese grocery products.

[50] The Tenant's store manager swore an affidavit in March 2018 stating that the store's display and layout had been altered as a result of the litigation so that 2/3 of

the displayed product are now ginseng products. The remaining products, according to the Tenant's store manager, consist of dry stock (15%), supplements (9%), and "other products" (9%).

[51] The Tenant's evidence appears inconsistent with photographic evidence from the Strata's current property manager Rodolfo Recio. Mr. Recio's affidavit appends photographs he took of Unit 1690 between March and June 2018 which show that the sale of non-ginseng health products has remained a predominant aspect of the Tenant's business.

[52] The Owner and Tenant dispute in this proceeding that there is any restriction on their ability to sell health supplements, and other non-ginseng products. I will therefore address the compliance issue not from the perspective of a point-in-time snapshot of store displays, but rather on the basis that the Tenant wishes a substantial volume of their products to consist of the sale of non-ginseng health supplements, skin care products and Chinese grocery products. The question, therefore, is whether this is a permitted use.

The applicable test

[53] The very Bylaws in issue in the present case were also in issue in *Lee Men*. *Lee Men* was an action brought by an owner of strata lots at the Market who alleged that two neighbouring businesses were selling products outside their approved usage, and therefore in contravention of the Use Bylaws. The plaintiff had complained to the Strata, who investigated the complaints and determined that there had been no breach of the Use Bylaws.

[54] The two businesses that were the subject of the plaintiff's complaint in *Lee Men* were Peppers Produce Ltd. ("Peppers"), and New MacDonald Poultry and Meat Supplies ("New MacDonald"). The plaintiff sued both Peppers and New MacDonald, and also the Strata for failing to enforce the Bylaws.

[55] In *Lee Men*, Ross J. articulated the following test by which to measure an owner or tenant's compliance with the Use Bylaws:

> [121] ….I find that an owner or tenant may offer products or services as part of their business, trade, or use which may result in incidental similarity with a product or service offered by another owner or tenant in their business trade or use, without the strata council's approval, provided that:
>
> a. the new product or service is reasonably related to the original business, trade or use; and
>
> b. the primary nature of the business, trade or use remains substantially the same as the business trade or use.
>
> [122] The primary nature of the business, trade or use may become different if the promotion of or quantity of the new product or service becomes substantial compared to the original products or services offered in the business, trade or use. In such a case the owner, tenant or occupier would be obliged to seek approval pursuant to the Bylaws.

[56] The defendant New MacDonald was permitted under the Bylaws to engage in the business of "poultry". The plaintiff argued that the sale of sauce and sauce mixes was not permissible under this approved use. Applying the above test, Ross J. found that the sale of sauce and sauce mixes was a permitted use:

> [129] It was not contested, and I find, that poultry stores often sell sauces or sauces mixes as an incidental part of their business. In the case of New MacDonald, I find that all of the sauces and sauce mixes offered for sale could be used for the cooking of chicken. I find further that the display of sauces or sauce mixes was small, by no means a prominent or dominant part of the shop. The volume of sales was very modest in relation to the total sales, amounting to approximately $50 - $60 per month of total sales of $10,000 - $12,000 per month. I find that the sale of sauces and sauce mixes in the circumstances by New MacDonald did not amount to a change in its trade or business. Its trade or business remained "poultry". It follows that the incidental sale by New MacDonald of sauces and sauce mixes that could be used in the cooking of checking did not constitute a breach of the Bylaws.

[57] In relation to Peppers, the original permitted business or trade use was "the sale of raw fruits, nuts on a seasonal basis and vegetables not intended for immediate consumption, honey, and bottled fruits and vegetable juices packaged in 1 litre or larger packages". Madam Justice Ross held that this restriction on use did not bind the current owner. The original lease was surrendered in 1999, with the landlord and tenant releasing each other from further liability. The current owner acquired title to the lot pursuant to the vesting order of the court which conveyed the lot "free and clear of any restrictions", except those in the original Crown grant.

[58] Accordingly, Ross J.'s primary finding in *Lee Men* in relation to the complaint about Peppers was that the current owner acquired the strata lot free of any restrictions on use.

[59] In the alternative, Ross J. held that the trade or business conducted at Peppers was a permissible use. The plaintiff alleged that Peppers had breached the Bylaws by selling products that included preserved vegetables, peeled and/or packaged chestnuts and bamboo, and bottled fruit and honey products that could be used to make juice. Madam Justice Ross held that all of these items fell within the express description of Pepper's permissible use.

Applying the Lee Men test

[60] The *Lee Men* test contemplates that products beyond those expressly permitted may be sold at the Market if they are reasonably related to the permitted use and do not substantially change the primary nature of the business. The fact pattern of *Lee Men*, which concerned the sale of a small volume of cooking sauces for poultry that is complementary to the sale of poultry, is a useful example. In *Lee Men*, the sale of the disputed cooking sauces constituted 0.5% of New MacDonald's overall sales volume.

[61] The facts of the present case differ. It appears that the Tenant wishes to conduct a business that includes, as a substantial component, the sale of products (notably health supplements) that are not ginseng products. This is not the incidental sale in small volumes of a product that is reasonably related to the permitted business use of a strata lot, as contemplated by *Lee Men*. What the Tenant has done is embark on a new business that has not been approved by the Strata Council.

[62] The Owner argues that the test from *Lee Men* is not whether the new products are actually related to the current products being sold, but rather whether it makes "good business sense" for a new product to be sold. In this case, the Owner says it makes business sense for the Tenant to sell health supplements because customers who buy ginseng products may also be interested in buying non-ginseng

health supplements. The Tenant advances a similar argument that customers who purchase ginseng are health-conscious and may wish to purchase health supplements in order to achieve "total body health".

[63] I do not agree that the Owner and Tenant have accurately stated the test from *Lee Men*. *Lee Men* asks whether the new product is reasonably related to the original business, and whether the primary nature of the original business remains substantially the same despite the sale of the new product. As applied by Ross J. in *Lee Men*, the test is directly tied to the sale of products that are approved, and not to what makes "good business sense" by way of product expansion. The test proposed by the Owner and Tenant would define permissible use by reference to the subjective views and convenience of customers, which is a test without clearly-defined parameters. Health-conscious ginseng consumers might also wish to purchase health foods, exercise equipment, or running gear, but the sale of these products are not a permitted business use under the Bylaws.

[64] The *Lee Men* test is consistent with the intent of the Use Bylaws, which is to ensure the diversity of products in the Market, and limit competition among merchants so that businesses can be sustained: *Lee Men* at para. 8. In this manner, the Use Bylaws serve the collective objectives of strata owners and tenants at the Market.

[65] If Mr. Yip, on behalf of the Owner wishes to expand the business that may be conducted in Unit 1690, his remedy is to request a change in use from the Strata Council to permit the sale of health supplements and other non-ginseng products. No such application has ever been brought. In the absence of approval from the Strata Council for such a change in use, the Owner and Tenant are in breach of the Bylaws in carrying out a business at Unit 1690 that is not within the approved use of "sale of ginseng products".

Allegation of unfair enforcement

[66] Before turning to the various defences raised by the Owner and Tenant with respect to their contravention of the Use Bylaws, I should acknowledge the

argument advanced by both the Owner and the Tenant that Maxwell is also in breach of the Bylaws.

[67] Under the Initial Purchase Agreement, Unit 1120 (in which Maxwell conducts its business) may be used for the sale of "Health food and/or vitamins, or herbs and spices, or specialty foods". The Owner and Tenant both made lengthy arguments as to why the sale of health supplements did not fit within the meaning "health food and/or vitamins".

[68] I do not find it necessary to resolve the question of whether Maxwell is operating its business in compliance with the Use Bylaws in relation to Unit 1120 in order to determine whether the Owner has breached the Bylaws in relation to Unit 1690. Even if Maxwell is in breach of the Use Bylaws, this would not excuse the Owner's non-compliance with clause 2.10.1 of the Use Bylaws.

[69] The evidence before me is that the Strata has made no determination of whether Maxwell is operating its business in a manner consistent with its permitted use because no one (including the Owner) has asked the Strata to do so. Mr. Kong, the Strata manager, deposes:

> I am aware of the business conducted in Unit 1120 and have been for some time. I am of the view that the business there likely conforms to the approved usage for that unit, which is "health food and/or vitamins", both terms which have potentially broad meaning. That being said, the [Strata] has received no complaint from any other tenant about the business being conducted from Unit 1120 and thus, since the [Strata] may not take action against that unit without a prior complaint, it has not considered whether the business carried on there contravenes its bylaws.

[70] Mr. Kong's observation about the need for a complaint as a precondition to the Strata undertaking enforcement action is a reference to s. 135 of the *Strata Property Act*. Section 135 provides that a strata corporation may not take certain enforcement steps against an owner or tenant for a contravention of strata bylaws unless the strata has received a complaint about the contravention.

[71] If the Owner applies for a change of use for Unit 1690 to permit the sale of non-ginseng health supplements, it may be necessary for the Strata to determine

whether Maxwell is permitted to conduct the business of selling health supplements. This is because s. 2.10.4 of the Use Bylaws would require the consent of another strata owner to a change of use to permit a business that is the same as that carried out in another strata lot at the Market. As the Owner has not applied for such a change in use, it is unnecessary to say more.

Issue II: Is the Strata estopped from enforcing the Bylaws?

[72] The Tenant next argues that the Strata is estopped from enforcing the Use Bylaws because the Tenant was led to believe that the Strata had approved the change in use requested by the Tenant's counsel in her email of November 1, 2016. That is, the Tenant argues that the Strata is estopped from refusing the Tenant the right to use Unit 1690 to carry on a food retail store selling "ginseng products, health supplements, skin care products, dried and frozen seafood, Chinese grocery products and Canadian souvenir products".

[73] I reject this argument. The communication relevant to this argument is set out at paras. 13-24 of these reasons for judgment. It is evident from a comprehensive review of the relevant email communication, which I note was not adduced in evidence by the Tenant, that the change in use approved by the Strata was that requested by the Owner: a change in use to permit the sale of ginseng products.

[74] The Strata made no representation to the Tenant that the broader use of Unit 1690 requested by Ms. Braaten was approved. On the contrary, the Strata declined to address Ms. Braaten's request at all, and instead expressly advised her that a change of use request had to come from the owner of the strata lot. As such, an essential element of an estoppel by conduct – a representation by words or conduct done with the intention that they be acted upon - are absent: *Beavis v. Beavis*, 2014 BCSC 590 at para. 45.

Issue III: Are the Use Bylaws unenforceable under s. 21 of the *Strata Property Act*?

[75] The Owner argues that the Bylaws are unenforceable as against the Owner under s. 121 of the *Strata Property Act* either because they are contrary to the

common law rule against unreasonable restraint on trade (s. 121(1)(a)), or alternatively because they prohibit or restrict the right of an owner to freely sell or lease a strata lot (s. 121(1)(c)).

Section 121(1)(a): the doctrine of restraint on trade

[76] The Owner relies on to s. 121(1)(a) of the *Strata Property Act* which provides that a bylaw is not enforceable to the extent that it contravenes "this *Act*, the regulations, the *Human Rights Code* or any other enactment or law" (emphasis added). The Owner argues that the reference to "law" in this provision is broad enough to capture the common law doctrine of restraint on trade. Under this doctrine, covenants which are found to be a restraint on trade may be unenforceable as contrary to public policy.

[77] I will assume without deciding the point that the Owner is correct in her interpretation of s. 121(1)(a) of the *Strata Property Act*, and that a strata bylaw may be unenforceable under s. 121(1)(a) to the extent that it contravenes a common law rule. I conclude, however, that the Use Bylaws do not constitute an unreasonable restraint on trade.

[78] The present case is indistinguishable from the judgment of Tysoe J., as he then was, in *Kok v. Strata Plan LMS 463*, [1999] B.C.J. No. 921 [*Kok*]. In *Kok*, a strata owner similarly argued that the use bylaws applicable to strata lots in a shopping mall in Richmond, B.C. were a restraint on trade. As in the present case, the use bylaws in issue in *Kok* provided that an owner or tenant could not change the nature of the business conducted in a strata lot to a business that was actively carried out in one or more strata lots in the same area of the mall, without the consent of the other owner(s).

[79] Mr. Justice Tysoe rejected the argument that such bylaws constituted an unreasonable restraint on trade. He noted that it was usual for shopping centre leases to contain use clauses, and that such clauses have been regularly enforced by the courts: *Kok* at para. 32. The relevant considerations are whether there are legitimate reasons for the restraint and whether the restraint is reasonable.

Mr. Justice Tysoe held that the use bylaws at issue in *Kok* were neither illegitimate nor unreasonable: *Kok* at para. 34.

[80] The Owner has identified no compelling reason to depart from the authority of *Kok* under the principles set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) at 592. There are no subsequent decisions which have affected the validity of *Kok*, no binding authority was ignored in that case, and the judgment was not rendered *per incuriam*.

[81] As noted by Tysoe J. in *Kok*, use clauses in shopping mall leases have been regularly enforced by the courts. While not expressly referenced in *Kok*, the relevant cases include the decision of the Supreme Court of Canada in *Russo v. Field*, [1973] S.C.R. 466 [*Russo*]. In *Russo*, the Court observed that shopping malls are often planned on the basis that shops within the mall are not to be competitive with each other as a means of ensuring the mall's overall success. The public policy which favours restrictively construing such clauses in other contexts is of limited importance in this context: *Russo*, at p. 487. See also: *Woolworth (F.W.) Co. Ltd. v. Hudson's Bay Company et al.* (1985), 61 N.B.R. (2d) 403 (N.B.C.A.) at paras. 35-40.

[82] Accordingly, I find that the Use Bylaws do not constitute an unreasonable restraint on trade.

Section 121(1)(c): prohibition or restriction on sale or lease

[83] The Owner argues, in the alternative, that the Use Bylaws are unenforceable under s. 121(1)(c) of the *Strata Property Act*, which provides that a strata bylaw is unenforceable to the extent that it:

> (c) prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot.

[84] This same issue was also addressed in *Kok*, although in relation to provisions in the *Condominium Act*, R.S.B.C. 1996, c. 64. The *Condominium Act* has since been repealed and replaced by the *Strata Property Act*. Under s. 29 of the *Condominium Act*, a strata bylaw could not operate to "prohibit or restrict" the

devolution, transfer or lease of a strata lot. In rejecting the argument that s. 29 rendered the use bylaws in issue in *Kok* unenforceable, Tysoe J. stated:

> [26] In my view, s. 29 was not intended to prevent bylaws, which have been enacted for some other proper purpose, from incidentally having the effect of making a strata lot less desirable to some heirs, purchasers, lessees and mortgagees. Like many other features of a strata lot, a use bylaw may make the strata lot less desirable to some persons but more desirable to other persons. This does not constitute a prohibition or restriction on the devolution, transferring, leasing or mortgaging of the strata lot because the owner is still entitled to devise, transfer, lease or mortgage the strata lot to any other person.

[85] The Owner places heavy emphasis on the fact that s. 29 of the *Condominium Act* did not contain the term “freely”, which is contained in s. 121(1) of the *Strata Property Act*. I do not agree that this difference in wording between the provisions has the significance placed on it by the Owner. The point in *Kok* was that the strata’s use bylaws may have made the strata more or less desirable to potential lessees or purchasers depending their objectives in buying or leasing the lot, but in any event the bylaws did not prohibit or restrict the transfer or lease of a strata lot. The same is true under s. 121(1)(c) of the *Strata Property Act*.

[86] Furthermore, the analysis in *Kok* has been subsequently applied in the context of a challenge to bylaws under s. 121(1)(c) of the *Strata Property Act*: *The Owners, Strata Plan VIS46876 v. Craig*, 2016 BCSC 90, at paras. 43-50.

[87] I therefore reject the argument that the Use Bylaws are unenforceable under s. 121(1)(c) of the *Strata Property Act*.

Issue IV: Has the Strata acted unfairly?

[88] The Tenant’s petition seeks remedies in relation to the alleged unfairness of the Strata’s enforcement action in this case. The Tenant relies on s. 164 of the *Strata Property Act*. Section 164 provides that the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a “significantly unfair” action or threatened action of a strata corporation in relation to an owner or tenant.

[89] The test for significant unfairness under s. 164 of the *Strata Property Act* was summarized in *Lee Men* as follows:

> [155] The meaning to be given to the phrase "significantly unfair" in the context of s. 164 of the *Act* has been described as follows by Masuhara J. in *Gentis v. The Owners Strata Plan VR 368*, 2003 BCSC 120 at para. 27 and 28. 8 R.P.R. (4th) 130:
>
> > The scope of significant unfairness has been recently considered by this Court in *Strata Plan VR 1767 v. Seven Estate Ltd.* (2002), 49 R.P.R. (3d) 156 (B.C.S.C.), 2002 BCSC 381. In that case, Martinson J. stated (at para. 47):
> >
> > > The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: *Reid v. Strata Plan LMS 2503*, [2001] B.C.J. No. 2377.
> >
> > I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.
>
> And see also *Reid v. Strata Plan LMS 2503*, [[2003] B.C.J. No. 417 (C.A.)].

[90] Courts have consistently applied the language used in *Gentis* and *Reid* in determining whether the actions of a strata council have been significantly unfair: *Dollan v. The Owners v. Strata Plan BCS 1589*, 2012 BCCA 44, at para. 28; *Allwest International Equipment Sales Co. v. Strata Plan LMS 4591*, 2018 BCCA 187, at paras. 27-30.

[91] I conclude that the conduct of the Strata in taking steps to enforce the Use Bylaws against the Owner was not significantly unfair. The Strata has not acted in a manner that could be considered oppressive, prejudicial, harsh or inequitable. The Strata was entitled to undertake an investigation on receipt of a complaint against Unit 1690, and upon being satisfied of a breach of the Use Bylaws the Strata was

also entitled take steps to enforce compliance. The fact that the Owner and Tenant may face consequences from the enforcement steps taken by the Strata does not amount to significant unfairness.

[92] While this is sufficient to dispose of the Tenant's petition, I will briefly address the three primary factors cited by the Tenant as constituting significant unfairness: (i) the Strata's choice of counsel, (ii) the Strata's failure to investigate Maxwell, and (iii) the Strata's failure to give appropriate consideration to the Tenant's settlement offer.

The Strata's legal counsel

[93] The Tenant objects that the lawyers for the Strata in this proceeding, MacKenzie Fujisawa LLP, previously acted for Maxwell in disputing the Tenant's use of Unit 1690. The Tenant specifically points to a June 23, 2017 letter sent to the Tenant by counsel at Mackenzie Fujisawa LLP on behalf of Maxwell demanding that the Tenant cease selling health supplements.

[94] The Tenant invites me to draw a series of inferences from the petition material to conclude that Mackenzie Fujisawa is in a conflict of interest in representing the Strata. I am not prepared to draw such inferences on the material before me on these petitions. If the Tenant considered that Mackenzie Fujisawa was in a conflict of interest in representing the Strata then the Tenant ought to have brought a disqualification application. Such an application would have squarely put the issue of conflict of interest before the court, along with an evidentiary record upon which the question could have been considered and resolved.

[95] The Tenant's complaints about the Strata's choice of counsel do not otherwise amount to significant unfairness within the meaning of s. 164 of the *Strata Property Act.*

Failure to investigate Maxwell

[96] The Tenant next argues that the Strata's failure to investigate Maxwell's use of Unit 1120, and Maxwell's alleged non-compliance with the Use Bylaws, establish that the Strata's conduct has been significantly unfair.

[97] For the reasons already stated, I do not find the complaints of either the Tenant or the Owner about Maxwell's use of its premises to be relevant to this proceeding. The Strata has not investigated Maxwell because it has not received a complaint about Maxwell's business use of Unit 1120. The Strata did receive a complaint about Unit 1690, the Strata conducted an investigation, and in good faith undertook enforcement measures to enforce its Bylaws. Whether or not Maxwell is in breach of the Use Bylaws, this would not excuse the Owner's breach.

[98] The Strata's failure to investigate Maxwell in these circumstances does not constitute significant unfairness within the meaning of s. 164 of the *Strata Property Act*.

Failure to engage in settlement negotiations

[99] The Tenant argues that the Strata acted unfairly in continuing its enforcement action despite the Tenant's good faith effort to resolve the dispute by changing the layout of Unit 1690, and offering reasonable settlement terms.

[100] The Tenant put in evidence its offer to the Strata to settle the legal proceedings in June 2018. The proposed settlement terms included that the Strata would consent to allowing the Tenant to display and sell non-ginseng health products in Unit 1690 in a volume that would take up to 25% of the store's display area.

[101] I find that the Strata's failure to make a counter-offer to the Tenant, does not constitute significant unfairness within the meaning of s. 164 of the *Strata Property Act*. The Strata was entitled, indeed one might argue obliged, to take action to enforce compliance with the Use Bylaws rather than to settle the dispute on terms that would be inconsistent with the Use Bylaws.

Issue V: Remedy

[102] I have concluded that the conduct of the Strata has not been significantly unfair within the meaning of s. 164 of the *Strata Property Act*. Accordingly, the Tenant's petition is dismissed.

[103] I have also concluded that the Owner and Tenant are in breach of the Use Bylaws in relation to the business carried on in Unit 1690. The question of remedy then arises.

[104] I consider it appropriate to issue the following declarations:

a) the permitted use of Unit 1690 under the Use Bylaws is the sale of ginseng products;

b) the business that has been conducted by the Tenant at Unit 1690 at least since June 2017 is in breach of clause 2.10.1 of the Use Bylaws;

c) the Owner has failed to take measures to stop the Tenant's breach of the Use Bylaws;

d) the Owner must ensure that the business conducted by the Tenant at Unit 1690 is consistent with the Use Bylaws.

[105] I am not prepared, at least at this stage, to issue injunctive relief. The terms of an injunction order, given its coercive effect, must be clear and specific: see *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 24. The party against whom injunctive relief is issued risks a contempt finding for non-compliance with the court's order. For this reason, the party must know exactly what needs to be done to comply with the court order.

[106] There is merit to the concerns of the Tenant and the Owner about the form of injunction sought by the Strata. The Use Bylaws, in conjunction with the test from *Lee Men*, leave some room for interpretive discretion. Under the current permitted use, the Owner and Tenant may carry on business at Unit 1690 that consists predominantly of the sale of ginseng products, and also the sale of products reasonably related to ginseng products provided the sale of the related products does not substantially change the primary nature of the business.

[107] Short of having the court identify an itemized list of what specific products must be removed from the shelves of Unit 1690, it is difficult to envision how an

injunction could be crafted with sufficient precision to put the Owner and Tenant on notice as to precisely what must be done to comply with the order.

[108] For this reason, I consider it preferable to leave the mechanics of compliance for the parties to resolve going forward. I expect that the precise parameters of compliance will be the subject of cooperative discussions between the Strata and the Owner and Tenant, guided by the declarations I have granted and my reasons for judgment. I have no reason at this time to be concerned that the Owner and Tenant will fail to comply with the declaratory relief.

[109] If the Owner and Tenant have not brought their business into compliance to the Strata's satisfaction within 14 days of the date of this judgment, the Strata will be at liberty to renew its application for injunctive relief. I will remain seized of any such application.

[110] Unless there are considerations of which I am unaware, the Strata should have its costs of this proceeding from the Owner and the Tenant at Scale B. If the parties wish to make further submissions on costs, they should advise the registry within 30 days of the date of this judgment.

"Horsman, J."