Citation: ☼ The Owners, Strata Plan NW2275 v. Emerson
2019 BCPC 207

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Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Small Claims

BETWEEN:

THE OWNERS, STRATA PLAN NW2275

CLAIMANT

AND:

SUSAN EMERSON

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE V. CHETTIAR

Counsel for the Claimant:	Trevor E. Hande
Counsel for the Defendant:	Michael D.Carter
Place of Hearing:	Surrey, B.C.
Dates of Hearing:	May 18, September 13, and December 7, 2018
Dates of Written Submissions:	January 31; February 28, and March 15, 2019
Date of Judgment:	August 1, 2019

INTRODUCTION

[1] The Claimant, The Owners, Strata Plan NW2275 (also referred to as the "Strata Corporation") seeks to recover certain amounts, totalling $4,753.42 (the "Remuneration"), that were paid to the Defendant, Ms. Susan Emerson, in 2015, for building manager services she provided to the Strata Corporation in December 2014 and January 2015 (the "Transaction") while she was the President of the Strata Corporation's strata council (the "Council"). The Claimant also seeks court costs totalling $236.00.

[2] The Claimant says that the Defendant was in a conflict of interest with the Strata Corporation, and yet she arranged for payment of the Remuneration without holding a valid Council meeting and following the disclosure of conflict of interest provisions in s. 32 of the *Strata Property Act*, SBC 1998, c. 43, (the "*SPA*"), or having the Transaction ratified by a resolution passed by a ¾ vote at an annual or special general meeting as provided in s. 33(1) of the *SPA*. Therefore, the Claimant seeks relief under s. 33(3) of the *SPA*.

[3] All section numbers referenced herein are sections of the *SPA*, unless stated, or the context requires, otherwise.

[4] The Defendant contends that:

(a) this court has no jurisdiction to hear this claim as the amount of the claim is less than $5,000, and it should be dismissed because it is within the jurisdiction of the Civil Resolution Tribunal (the "CRT");

(b) the Defendant is not liable under s. 33 because she complied with s. 32, and, furthermore, the Transaction was not unreasonable or unfair to the Strata Corporation at the time it was entered into; and

(c) even if the Claimant has a claim under s. 33, it is barred by the *Limitation Act*, SBC 2012, c. 13, because the Claimant filed its Notice of Claim in this court on May 5, 2017, past the two-year limitation period from when the Remuneration was paid to the Defendant in January and February of 2015.

[5] She seeks dismissal of the Claimant's claim.

[6] On the first day of the trial, after hearing submissions from counsel, I ruled that this court has jurisdiction to hear this claim. For the sake of completeness, I will discuss the jurisdiction issue here and set out the reasons for my ruling.

BACKGROUND

[7] The Claimant is a strata corporation incorporated under the laws of British Columbia.

[8] Strata Plan NW2275 is a condominium complex located at 10698 151A Street, in Surrey, British Columbia, and the building at issue is known as Licoln's Hill – Building 5.

[9] The Defendant is an individual who has been the owner of a strata lot in Strata Plan NW2275 since 1992. She was the President of the strata council from approximately April 2014 until July or August 2016, when she was removed from strata council.

[10] The Strata Corporation is governed by its bylaws (the "Bylaws"), the *SPA*, and the *Strata Property Regulation*, BC Reg 43/2000 (the "*Regulation*").

[11] The Strata Corporation functions through its council. Bylaw 12.1 states that council must have at least four and not more than seven members.

[12] The annual general meetings of the Strata Corporation are generally held in February of each year.

[13] The Council, between April 2014 and February 2015, comprised the following members: the Defendant (President), Su Kui Cheong (Vice-President), Andrew Bralski (Treasurer), and Margaret Phillips and Terry McIntosh (Members at Large).

[14] Mr. Cheong has been the owner of a strata lot in Strata Plan NW2275 since 1992. He has been serving on strata council since 2009.

[15] The Defendant's counsel informed me that Mr. Bralski was summoned to testify at the trial on behalf of the Defendant, but he refused to attend. The documentary

evidence indicates that Mr. Bralski was an owner of a strata lot in Strata Plan NW2275 and was on strata council for a number of years.

[16] Ms. Phillips has been the owner of a strata lot in Strata Plan NW2275 since 1991. She served on strata council first in 1992, and then two or three more times.

[17] Mr. McIntosh has been the owner of a strata lot in Strata Plan NW2275 for some time. He served on strata council for approximately four years.

[18] The Strata Corporation, by agreement dated October 1, 2014, appointed Paragon Realty Corporation ("Paragon") as its exclusive agent, effective June 1, 2014, for a term of one year with automatic renewals of one-year terms, to provide management services for the Strata Corporation's common property and its affairs.

[19] Mr. Alfred Marchi has been Paragon's managing broker since it was formed in 1991. He, along with his associates, assisted the Council with management of the Strata Corporation's common property and its affairs.

[20] The Defendant provided onsite building manager services from approximately May 2014 to November 2014 on a gratuitous basis.

[21] For the onsite building manager services the Defendant provided in December 2014 and January 2015 (collectively, the "Services"), she billed the Strata Corporation by way of two invoices (sales orders), one dated January 6, 2015 (the "First Invoice") for $2,160.42 and another dated January 29, 2015 (the "Second Invoice") for $2,593.00 (the First and Second Invoices, collectively referred to as the "Invoices"), totalling $4,753.42, being the amount of the Remuneration.

[22] A cheque for $2,160.42, dated January 9, 2015, was issued to the Defendant in payment of the First Invoice.

[23] A cheque for $2,593.00, dated February 1, 2015, was issued to the Defendant in payment of the Second Invoice.

[24] From approximately July 3, 2014 to February 12, 2015, there were ongoing negotiations and communications between the Defendant and the other Council members about the possibility of hiring the Defendant as a part-time building manager (the "Building Manager Position"). However, the negotiations failed as the Defendant and the Council could not agree on the terms of the contract the Defendant had drafted. As a result, the contract was not signed and the Defendant was not hired for the Building Manager Position.

[25] On or about April 16, 2016, Mr. Cheong filed a written complaint with the Royal Canadian Mounted Police, Surrey Detachment, alleging the Defendant forged his signature on the Building Manager Position contract she drafted and used that document to cause payment of the Remuneration to her.

[26] At the annual general meeting of the Strata Corporation, held in early 2016, Mr. Iser came onto the strata council as Vice-President.

[27] At the strata council meeting on August 29, 2016, the strata council voted to terminate Paragon's services and remove the Defendant as a member of the strata council "due to allegations of fraud including payment of invoices without Council approval".

[28] After the Defendant's removal as a strata council member, the 2016 strata council comprised the following members: Mr. Cheong, Mr. Iser, Mr. Savelieff, Ms. Naomi Cooke, Mr. McIntosh and Mr. Nelson Leung (collectively, the "2016 Council").

[29] On May 24, 2017, a special general meeting of the Strata Corporation was held, wherein a motion to approve remuneration to a strata council member (who was Mr. Iser) also performing duties as a part-time caretaker of the building was defeated. Therefore, Mr. Iser resigned from strata council, after which he was appointed as a part-time caretaker of the building for remuneration.

[30] At the annual general meeting of the Strata Corporation held on February 16, 2018, Mr. Iser was voted back onto strata council.

ISSUES

[31] The issues to be determined in this case are as follows:

(a) does this court have jurisdiction to hear the Claimant's claim or should it be dismissed because it is within the jurisdiction of the CRT?

(b) if this court has jurisdiction to hear the Claimant's claim, is the Claimant entitled under s. 33 of the *SPA* to recover the Remuneration paid to the Defendant? and

(c) even if the Claimant is entitled under s. 33 of the *SPA* to recover the Remuneration from the Defendant, is the Claimant's claim barred by the *Limitation Act*?

DISCUSSION

Evidence and Credibility of Witnesses

Evidence

[32] Mr. Cheong, Mr. Iser and Mr. Savelieff testified on behalf of the Claimant, and Mr. McIntosh, Ms. Phillips and Mr. Marchi testified on behalf of the Defendant. The Defendant also testified. Various documents were also entered into evidence.

Credibility of Witnesses

[33] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognize as reasonable in that place and in those conditions: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (C.A.) at 357; *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd. 2012 BCCA 296. The trier of fact may believe a witness' testimony in whole, in part, or not at all (*R. v. R. (D)*, [1996] 2 S.C.R. 291 at para. 93), and it may accord different weight to different parts of a witness' evidence.

[34] Of the key witnesses, I found Ms. Phillips to be a forthright, genuine and thoughtful witness. She truthfully acknowledged that the Defendant was a close friend of

hers. Regardless, she did not exaggerate or embellish her evidence. She stated the events as she remembered them, and admitted that in certain circumstances the strata business could have been conducted differently than it was. I have no hesitation in accepting her evidence.

[35] I cannot say the same of the Defendant. Her evidence, including the documentary evidence she submitted, was selective and self-serving. On the stand, she was argumentative and, at times, combative. I had to direct her to answer the questions that were put to her. There were also inconsistencies between her evidence and that of some of the other witnesses. Where her evidence contradicted the evidence of Ms. Phillips or Mr. Cheong, I prefer to accept their evidence.

[36] I have no hesitation in accepting Mr. Cheong's or Mr. Iser's evidence. On the whole, their evidence was consistent and corroborated by the documentary evidence. While Mr. Cheong had difficulty expressing himself in the English language (as English is a second language for him), I did not find him to be confused about the events surrounding the issues at hand. He did not remember details such as exact dates of certain events. For example, he did not remember exactly when in 2016 he received from a former member of the Council the Strata Corporation's financial statements, to which the First Invoice was attached. Mr. Iser admitted that he was not very good with dates, but I did not find that that impacted the thrust of his evidence.

[37] Mr. McIntosh had serious memory lapses and he could not recall details of the email communication he had with the other Council members with respect to the issues at hand, even when those emails were put to him during his testimony. He contradicted himself between his oral testimony and his statements in the documentary evidence. I found his evidence unreliable and, therefore, am unable to give it much weight.

[38] Finally, I found Mr. Marchi to be selective, self-serving, and argumentative, and at times evasive and combative, similar to the Defendant. I had to also direct him to answer the questions that were put to him, without generalizations. I accept his evidence only to the extent I find it to be reliable.

Jurisdiction

Does this court have jurisdiction to hear the Claimant's claim or should it be dismissed because it is within the jurisdiction of the CRT?

[39] The Claimant submits that: because the Defendant was a member of the Council at the time she provided the Services and was expecting the Strata Corporation to pay her for those Services, there was a conflict between her interest and that of the Strata Corporation; under those circumstances, she should have, but failed to comply with s. 32 of the *SPA*, namely, disclose fully and promptly to the Council the nature and extent of her interest, abstain from voting on the Transaction, and leave the Council meeting while the Council discussed and voted on the Transaction; also, no proper Council meeting was held, wherein the Council discussed the Transaction or voted on it, and no minutes were produced of any such discussion or approval; not only was this a violation of s. 32, but also a violation of the Bylaws and the *SPA* in general with respect to how the powers of the Council are to be exercised (that is, no backroom deals are permitted); and the Transaction was not ratified by a resolution passed by a ¾ vote at an annual or special general meeting as provided in s. 33(1).

[40] For these reasons, the Claimant says it brings an application for an order under s. 33(3) of the *SPA* to a court having jurisdiction.

[41] Sections 32 and 33 of the *SPA* read as follows:

> **Disclosure of conflict of interest**
>
> **32** A council member who has a direct or indirect interest in
>
> (a) a contract or transaction with the strata corporation, or
>
> (b) a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member,
>
> must
>
> (c) disclose fully and promptly to the council the nature and extent of the interest,
>
> (d) abstain from voting on the contract, transaction or matter, and
>
> (e) leave the council meeting

(i) while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and

(ii) while the council votes on the contract, transaction or matter.

Accountability

33 (1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 vote at an annual or special general meeting.

(2) For the purposes of the 3/4 vote referred to in subsection (1), a person who has an interest in the contract or transaction is not an eligible voter.

(3) If, on application under subsection (1), the court finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into, the court may do one or more of the following:

(a) set aside the contract or transaction if no significant injustice will be caused to third parties;

(b) if the council member has not acted honestly and in good faith, require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;

(c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

[42] The Claimant argues that the words “a court having jurisdiction” in s. 33(1) includes this court. It also pointed to s. 3 of the *Small Claims Act*, RSBC 1996, c. 430, which sets out the general jurisdiction of this court. It referred to the following version of s. 3 of the *Small Claims Act,* that was in effect between June 1, 2017 and December 31, 2018:

Claims the court may hear

3 (1) The Provincial Court has jurisdiction in a claim for

(a) debt or damages,

(b) recovery of personal property,

(c) specific performance of an agreement relating to personal property or services, or

(d) relief from opposing claims to personal property

> if the amount claimed or the value of the personal property or services is equal to or less than an amount that is prescribed by regulation, excluding interest and costs.
>
> (2) The Provincial Court does not have jurisdiction in a claim for libel, slander or malicious prosecution.
>
> (3) This section is subject to sections 14.1 and 56.3 of the *Civil Resolution Tribunal Act*.

[43] Section 14.1 of the *Civil Resolution Tribunal Act*, SBC 2012, c.25 (the "*CRTA*"), that was in effect between November 30, 2017 and December 31, 2018, read, in part, as follows:

> **Small claims must go through tribunal before going to Provincial Court**
>
> **14.1** (1) A person may not bring a tribunal small claim as a claim in the Provincial Court unless one or more of the following apply:
>
> . . .
>
> (b) the tribunal does not have jurisdiction to adjudicate the claim;
>
> . . .

[44] Section 3.6(2)(a) of the *CRTA*, that was in effect at the time, read, in part, as follows:

> **3.6** (2) The tribunal does not have jurisdiction in relation to a claim that may be dealt with, by the Supreme Court, under any of the following provisions of the *Strata Property Act*:
>
> (a) section 33 [accountability]; . . .

[45] Parenthetically, I note that the current version of the *CRTA* (in force since April 1, 2019) contains similar provisions with respect to the CRT's jurisdiction (see s. 16.4 and s. 122(1)(a) of the *CRTA*).

[46] The Claimant says that its application under s. 33 of the *SPA* **may** be brought in Supreme Court, in which case, s. 14.1(1)(b) of the *CRTA* applies to bar the CRT from being able to adjudicate the claim; however, that does not prevent the Provincial Court from hearing certain complaints brought under s. 33 of the *SPA*, including its claim.

[47] The Claimant submitted a number of authorities in support of its position. I have reviewed all of them, but I will only refer to the ones pertinent to my discussion of this issue. Before I turn to the authorities, I will state the Defendant's position on this issue.

[48] The Defendant submits as follows: s. 3.6(2) of the *CRTA* states that "[t]he tribunal does not have jurisdiction in relation to a claim that may be dealt with, by the Supreme Court, under any of the following provisions of the *Strata Property Act*:" and it lists 22 sections of the *SPA*, including s. 33, under which the CRT does not have jurisdiction; of these 22 sections, 21 of them specifically refer to the Supreme Court, except s. 33 which permits an application to be made "to a court having jurisdiction"; the words "by the Supreme Court" in s. 3.6(2) of the *CRTA* must be given meaning because according to the principles of statutory interpretation it is presumed that the legislature avoids superfluous or meaningless words, and that it does not pointlessly repeat itself or speak in vain; the legislature must not have intended to exclude from the CRT every claim brought pursuant to s. 33 of the *SPA*, otherwise, it would not have needed to insert the words "by the Supreme Court" in s. 3.6(2) of the *CRTA*; the legislature must have intended to differentiate between those claims the Supreme Court may deal with and those it may not deal with; the question becomes: which s. 33 claims are meant to be dealt with by the Supreme Court and which are meant to be dealt with by the CRT?; the Supreme Court typically has jurisdiction to deal with claims involving corporate governance and claims over the monetary limit of the Small Claims Court (that is, the Provincial Court); the pith and substance of the Claimant's claim is for debt or damages, and the monetary amount of the claim is $4,753.42; the claim is within the jurisdiction of the *CRTA* and not one that would be dealt with by the Supreme Court; and in keeping with the purposes of the *CRTA*, as set out in s. 2 of the *CRTA*, the CRT should adjudicate the Claimant's claim.

[49] The parties agree that the pith and substance of the Claimant's claim is for debt or damages, and, of course, the amount of the Claimant's claim is less than $5,000 (the CRT's monetary limit for a small claim). If the Claimant was not seeking a remedy under s. 33 of the *SPA*, there would be no argument that the CRT would be adjudicating this claim, provided the claim was not statute-barred.

[50] The Defendant pointed out that, effective July 13, 2016, the CRT began accepting claims to resolve disputes under the *SPA*; the Claimant's claim was filed on May 5, 2017; and s. 3.6(e) of the *CRTA* provides that the CRT has jurisdiction over a claim concerning "an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant".

[51] However, s. 3.6(2)(a) of the *CRTA* provides that the CRT does not have jurisdiction in relation to a claim that **may** be dealt with by the Supreme Court under s. 33 of the *SPA*. The assertion here is that the Defendant breached s. 32 of the *SPA*, and, therefore, a remedy is sought under s. 33 of the *SPA*. Section 33(1) of the *SPA* clearly states that the Strata Corporation may apply for an order under s. 33(3) "**to a court having jurisdiction**."

[52] The parties agree with the following statement from *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, at para. 36:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (p. 158).

[53] As the Supreme Court of Canada in *McDiarmid* said, at para. 36, this principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

[54] Keeping this principle in mind, and in addressing the question the Defendant posed in her submissions, that is: which s. 33 claims are meant to be dealt with by the Supreme Court and which are meant to be dealt with by the CRT, I find the following definitions in the *SPA* and the *CRTA* helpful:

(a) Section 1(1) of the *SPA* contains the following definitions:

> "**civil resolution tribunal**" means the Civil Resolution Tribunal established under the *Civil Resolution Tribunal Act*;
>
> "**Supreme Court**" means the Supreme Court of British Columbia;
>
> "**tribunal proceeding**" means a tribunal proceeding under *the Civil Resolution Tribunal Act*;

(b) Section 1(1) of the *CRTA* contains the following definition:

"**tribunal**" means the Civil Resolution Tribunal referred to in section 2 [which refers to the CRT established under the *CRTA*];

[55] Ever since the *CRTA* came into force in 2012, it has gone through many amendments. Section 1(1) of the *CRTA*, in effect from January 1, 2019, includes the following definition:

"**court**" means the Supreme Court or Provincial Court having jurisdiction;

[56] Although there have been further amendments to the *CRTA* since January 1, 2019, the definition of "court" remains intact and current.

[57] There can be no doubt from these definitions and other wording in the *SPA* and the *CRTA* that the tribunal and a court are different forums. The "tribunal" is the CRT and the "court" includes the Supreme Court and the Provincial Court. The legislature could not have intended to use these terms interchangeably.

[58] Therefore, the question the Defendant poses: "which section 33 claims are meant to be dealt with by the Supreme Court and which are meant to be dealt with by the CRT?" is misguided and is the wrong question to ask.

[59] The phrase "a court having jurisdiction" in s. 33(1) of the *SPA* cannot be interpreted to include the CRT. It can only mean the Supreme Court and the Provincial Court.

[60] As I said earlier, s. 3.6(2) of the *CRTA* states that the CRT does not have jurisdiction in relation to a claim that may be dealt with by the Supreme Court under any of ss. 33, 52, 58, 89, 90, 117, 160, 173, 174, 208, 209, 226, 232, 233, 235, 236, 246, 272, 273.1, 278.1, 279 and 284 of the *SPA*. All of these sections, except s. 33, specifically refer to the Supreme Court as the forum to seek any remedy, whereas s. 33 refers to "a court having jurisdiction". If the legislature had intended the Supreme Court to be the only court for any remedy under s. 33, it would have specifically mentioned the Supreme Court, as it did in the other 21 provisions I have listed.

[61] Therefore, the logical conclusion from this analysis is that an application under s. 33 of the *SPA* may be brought not only in the Supreme Court, but also in the Provincial Court, subject to any other limits to the Provincial Court's jurisdiction. This conclusion is supported by the authorities.

[62] The Claimant referred to a number of authorities, including a few CRT decisions (see *Napoleone v. The Owners, Strata Plan BCS 2460 et al*, 2018 BCCRT 246, at para. 28; *Ho v. The Owners, Strata Plan LMS 1178*, 2018 BCCRT 245, at paras. 60-62; *Nass v. The Owners, Strata Plan BCS 2025*, 2018 BCCRT 243, at para. 67), wherein the CRT concluded that it had no jurisdiction to adjudicate a claim under s. 33 of the *SPA*.

[63] In *Grantham v. The Owners, Strata Plan*, 2013 BCPC 146, there is a comprehensive discussion of the scope of the Provincial Court's jurisdiction generally and with respect to complaints under the *SPA*, and there are also references to relevant authorities (at paras. 64 to 89).

[64] Although most of these authorities predate the coming into force of the *CRTA*, the jurisdictional analysis vis-à-vis the Supreme Court and the Provincial Court is still applicable. On this point, where the *SPA* contemplates a "court" as the forum for bringing a cause of action, the authorities establish that unless the *SPA* provides exclusive jurisdiction to the Supreme Court to deal with a particular matter, the Provincial Court also has jurisdiction to deal with a cause of action under the *SPA*, subject, of course, to the monetary and other limits to the Provincial Court's jurisdiction.

[65] For example, in *Valana v. Law et al*, 2005 BCPC 0587, the court at paras. 6 to 10, said:

> [6] What limitations to the Provincial Court's jurisdiction are found in the ***Strata Property Act***?
>
> [7] In **David v. Vancouver Condominium Services Ltd.** [1999] B.C.J. No. 1869 and in **Owners SPLMS 2604 v. Biamonti** [1999] B.C.J. No. 1267, both decisions of our court, it was held that the Provincial Court had jurisdiction to hear certain disputes between strata property owners and their strata corporations, depending on the nature of the dispute and the nature of the remedy sought. Both of those cases examined the limitations on this court's jurisdiction that were found in the former ***Condominium***

> ***Act*** which has now been repealed and replaced by the ***Strata Property Act***.
>
> [8] In the ***Condominium Act***, "court" was defined as the Supreme Court of British Columbia.
>
> [9] In **Biamonte**, a strata corporation claimed against Biamonte, a strata lot owner, for debt arising from unpaid maintenance fees, NSF fees, and special assessment fees as well as a fee for filing a certificate against the defendant's strata lot. Judge Bruce found that, although "court" was defined in the ***Condominium Act*** as the Supreme Court of British Columbia, Section 35 of the Act permitted the strata corporation to recover monthly contributions and moneys expended by the strata corporation in a "court of competent jurisdiction". Judge Bruce held that the term "court of competent jurisdiction" in reference to this category of disputes was a broader term which denoted both the Provincial Court and the Supreme Court.
>
> [10] In **David**, Judge Dhillon of our court followed the reasoning of Bruce, J. in **Biamonte**, stating:
>
> "I accept the foregoing as the correct analysis. Thus, if the matter is one which falls within the jurisdiction of the Provincial Court, and is not otherwise expressly reserved to the Supreme Court under the *Condominium Act*, the Provincial Court has the jurisdiction to adjudicate it."

[66] After referring to a number of sections in the *SPA* which refer specifically to the Supreme Court, the court in *Valana* went on to state as follows, at paras. 27 to 31:

> [27] I accept that in all of the areas described in the sections of the ***Strata Property Act*** noted above, the Supreme Court has exclusive jurisdiction.
>
> [28] Unlike the ***Condominium Act***, "court" is no longer a defined term in the ***Strata Property Act***. It would appear that the removal of the definition of "court" as the Supreme Court of British Columbia has necessitated these numerous specific references in the ***Strata Property Act*** to that court.
>
> [29] In my view, the removal of the definition of "court" in the ***Strata Property Act*** as the Supreme Court of British Columbia, denotes an intention of the legislature to be less restrictive of the choice of court in respect of disputes involving strata property.
>
> [30] In the former ***Condominium Act***, any reference to "court" denoted the Supreme Court. The Provincial Court had no jurisdiction except where the Act used broader language to describe the court, or where the Provincial Court was specifically referred to.

> [31] Because "court" is no longer a defined term in the ***Strata Property Act***, references to "court" in that Act include both the Supreme Court and the Provincial Court, except where jurisdiction is specifically restricted to one court by the language of the Act or by the monetary limits to the Provincial Court's jurisdiction.

[67] This analysis is still applicable, and I am also of the view, as the court in *Valana* stated at para. 29, that the removal of the definition of "court" in the *SPA* as the Supreme Court of British Columbia denotes the legislature's intention to be less restrictive of the choice of court in respect of disputes involving strata property. More recently, the legislature has seen fit to expand the forum for resolving strata property disputes to the CRT as well. However, as I said before, the CRT is not a court, and where the *SPA* does not specify Supreme Court or Provincial Court, but only refers to a "court", it includes both the Supreme Court and the Provincial Court.

[68] In the final analysis, I conclude as follows:

(a) even though the Claimant's claim is under $5,000, because the remedy sought is under s. 33 of the *SPA*, pursuant to s. 3.6(2)(a) of the *CRTA*, the CRT does not have jurisdiction to adjudicate the Claimant's claim;

(b) in the circumstances of this case, the Provincial Court has jurisdiction under s. 33 of the *SPA* and s. 3(1) of the *Small Claims Act* to adjudicate the Claimant's claim because:

  (i) as the parties agree, the pith and substance of the claim is one of debt or damages;

  (ii) the amount claimed is less than the Provincial Court's monetary limit of $35,000;

  (iii) the condition in s. 14.1(1)(b) of the *CRTA* (which states that a tribunal small claim may not be brought in the Provincial Court unless the tribunal does not have jurisdiction to adjudicate the claim) applies; and

  (iv) s. 56.3 of the *CRTA* (which deals with deposit for claims previously adjudicated by the CRT) does not apply.

Claim

Is the Claimant entitled under s. 33 of the *SPA* to recover the Remuneration paid to the Defendant?

[69] To answer this question, the following questions must first be answered:

(a) did the Defendant have a direct or indirect interest in the Transaction?

(b) if she did, did she comply with s. 32 of the *SPA*?

(c) if she did not comply with s. 32, was the Transaction ratified by a resolution passed by a ¾ vote at an annual or special general meeting of the Strata Corporation after full disclosure of the nature and extent of the Defendant's interest in the Transaction pursuant to s. 33(1) of the *SPA*?

(d) if the Transaction was not ratified pursuant to s. 33(1), was the Transaction unreasonable or unfair to the Strata Corporation at the time it was entered into?

Did the Defendant have a direct or indirect interest in the Transaction?

[70] The Defendant was the President of the Council at the time the Transaction occurred and the Remuneration was paid to her.

[71] The evidence indicates that the Strata Corporation experienced significant problems in the past when a resident of the building who was also the President of the then strata council, namely Paul, assisted by his wife Maisie, took on the role of onsite building manager. There were serious allegations of impropriety, including misuse of the Strata Corporation's funds and loss of the Strata Corporation's records. After an uproar by the owners, it appears that Paul and Maisie left the building.

[72] In light of this bad experience, the owners were reluctant to hire another resident, who was also on strata council, to take on the role of onsite building manager. However, according to Ms. Phillips' evidence, the building was in dire need of maintenance, and the Defendant, with some assistance from Ms. Phillips, attended to the immediate maintenance needs of the building.

[73] The Defendant testified that from May 2014 until approximately the early part of 2015, she put in close to 40 hours per week attending to the building maintenance issues.

[74] She said she raised the issue of hiring a building manager with the other Council members, but nothing was done. The emails in evidence indicate a lot of discussion amongst the Council members from approximately June 2014 to February 2015 regarding this issue.

[75] The Defendant's evidence was that by October 2014, she was tired of volunteering her services as a building manager, and she told the Council at their October 30, 2014 Council meeting that she wanted to be paid for her services as a building manager.

[76] In an email dated January 27, 2015 to the other Council members, in an angry tirade, because her conduct and some of her work were questioned, in particular by Mr. Cheong, the Defendant wrote:

> . . . I am seriously considering withdrawing my application for PT Building Manager/On-Site Administrator. . . . I applied for the job because I liked getting back into Construction again, I am good at documentation and organization **plus steady part time work would help me financially.** . . .
>
> You guys get Su Kui [Mr. Cheong] on board by Thursday [January 29, 2015] or my application is withdrawn. . . .
>
> (my emphasis)

[77] Clearly, the Defendant had a personal financial interest in providing building management services to the Strata Corporation, both with respect to the Transaction and the Building Manager Position.

[78] The Defendant does not dispute that she was a member of the Council and had a direct interest in the Transaction.

Did the Defendant comply with s. 32 of the *SPA*?

[79] In other words, did she:

(a) disclose fully and promptly to the Council, the nature and extent of her interest in the Transaction (s. 32(c)),

(b) abstain from voting on the Transaction (s. 32(d)), and

(c) leave the Council meeting

(i) while the Transaction was discussed, unless she was asked by the Council to be present to provide information, and

(ii) while the Council voted on the Transaction (s. 32(e))?

Disclosure of interest (s. 32(c))

[80] As I said earlier, the Defendant's evidence was that because the Council did not do anything about hiring a building manager and she was tired of volunteering her services as a building manager, she told them at the end of their October 30, 2014 Council meeting that they had to look into hiring a building manager because she was not going to continue providing her services for free and asked the Council to consider the issue and get back to her.

[81] She claims this to be adequate disclosure for purposes of s. 32(c). I disagree.

[82] The minutes of the October 30, 2014 Council meeting contain no reference to this alleged disclosure. It only contains the following reference under the heading New Business:

> **5. Building Manager** – Council noted that not having a full time building manager is a cost savings to the strata. The excess amount budgeted for the building manager will be added to the Repairs & Maintenance budget.

[83] The evidence indicates that after the October 30, 2014 Council meeting, there were only two in-person Council meetings: one on November 27, 2014 (the minutes of which are not in evidence) and another on January 29, 2015, just before the annual general meeting on February 25, 2015 (the "2015 AGM").

[84] Since the minutes of the November 27, 2014 meeting are not before me, I do not know if any discussion with respect to the Transaction took place at that meeting, and none of the witnesses who testified at trial made any reference to any discussion about

the Transaction at this meeting. The only reference in the January 29, 2015 meeting minutes is the following under the heading New Business:

> **3. Additional AGM Agenda Items** – Council instructed the Strata Manager [Paragon] to place the following items on this year AGM Agenda . . . b) Part-Time Caretaker

[85] While the evidence suggests that there was some discussion between the Defendant and the other Council members about the Building Manger Position, there is insufficient evidence regarding any disclosure by the Defendant with respect to the Transaction. Even if I accept that the Defendant told the Council at the October 30, 2014 Council meeting that she would not continue to provide building manager services for free and that this statement should be interpreted to mean that the Defendant wanted to be paid from November 2014 onwards, this disclosure is only one of a number of factors that must be satisfied under s. 32.

Abstain from voting and leave the Council meeting while discussion and voting on the Transaction (ss. 32(d) and (e))

[86] The Defendant's evidence was that: after she disclosed her interest at the October 30, 2014 Council meeting, the Council went off to discuss what they wanted to do, and that she left them alone for a month; she then asked them what they had decided and whether she should look for a job; and they told her that they would like to hire her on a temporary basis and pay her for the Services until the new strata council elected at the 2015 AGM decides what it wants to do about hiring a building manager on an ongoing basis.

[87] The Defendant submits that the Council discussed the Transaction by email and approved payment of the Remuneration to her, and that she did not participate in their discussions or vote on the Transaction.

[88] She points to the following Bylaws which allow for council meetings to be held by electronic means:

> 21.1 The council may meet together for the conduct of business, adjourn and otherwise regulate its meetings as it thinks fit.

21.2 At the option of the council, council meetings may be held by electronic means, so long as all council members and other participants can communicate with each other.

21.3 If a council meeting is held by electronic means, council members are deemed to be present in person.

[89] It is not entirely clear as to which email discussion the Defendant is referring to, wherein the Council approved the Transaction and agreed to pay her on a temporary basis. According to the Defendant's evidence, this presumably happened in November 2014, a month after the October 30, 2014 Council meeting.

[90] The only email communication in November 2014 that is in evidence is a short exchange between Ms. Phillips and Mr. Cheong, between November 10, 2014 and November 14, 2014, wherein they discuss the need for a building manager. At Ms. Phillips' suggestion that the Defendant might be able to carry out some of the building manager work, Mr. Cheong responds that council members work as volunteers and they must not enter into a conflict of interest situation, and that the issue of the need to hire a building manager must be brought to the owners' attention at the next annual general meeting. Ms. Phillips agrees with Mr. Cheong.

[91] Ms. Phillips testified that while the discussion of hiring the Defendant for the Building Manager Position was ongoing, the Council members, with the exception of Mr. Cheong, were in agreement that the Defendant should be paid for the Services on a temporary basis. She said these discussions took place by email and at other "in-house" and informal budget meetings. She said there was a lot of "chit chat."

[92] If the Council discussed the Transaction, it probably occurred sometime after the October 30, 2014 Council meeting and before the first informal budget meeting on January 6, 2015, at which, according to Ms. Phillips' evidence, the Defendant submitted the First Invoice for payment. That is a span of slightly over two months.

[93] The evidence indicates that there was a lot of email discussion amongst the Council members about the thorny and highly contested issue of hiring the right person for the Building Manager Position. Amid these emails, the following were the only

references to any suggestion that some of the Council members were aware that the Remuneration had been paid to the Defendant:

(a) email dated January 29, 2015 from Mr. Bralski to the Defendant, with a copy to Ms. Phillips, Mr. McIntosh and Mr. Cheong:

> There are a lot of people in the building that strongly disagree with hiring an in-house building manager. As Su Kui [Mr. Cheong] has pointed out in his letter, there were major issues that came up as a result of hiring Paul and Maisie . . .
>
> . . . **You are now being paid for your services as a PT building manager**, so I am not quite sure what the rush is about, we just need to make sure everyone is happy with the final contract before it's signed. . . .
>
> (my emphasis)

(b) email dated February 6, 2015 from Ms. Phillips to Mr. McIntosh, Mr. Cheong and Mr. Bralski, with a copy to the Defendant:

> We seem to have come to an impasse re the pt building manager. I myself, am very disappointed it has gone this way. . . .
>
> I would hope that you all **want to continue to pay** Susan [the Defendant] month by month until the new council decides what they will do. . . .
>
> (my emphasis)

(c) email dated February 6, 2015 from Mr. McIntosh to Ms. Phillips in response to her email in the preceding paragraph:

> Well the thing is that susan [the Defendant] should be pay [*sic*] and as far as Andrew [Mr. Bralski] like my dad said you only get what you pay for and susan is the person best for this building thankyou terry

[Although, at trial, Mr. McIntosh said that he did not recall writing this email.]

[94] As these and the November 2014 emails indicate, the focus of the Council's discussion was the hiring of the right person for the Building Manager Position. Nowhere in these emails is there any reference to the discussion of the Transaction.

[95] The Claimant submits that any discussions regarding the Transaction the Council may have had by email cannot be considered to have taken place at a valid Council meeting. It says no votes on the Transaction were taken or recorded, and no minutes of

any such discussion were produced. Furthermore, it says, the Defendant was privy to the Council's discussions by being copied on their emails, and at times she directly engaging with them.

[96] The Claimant says that the Strata Corporation's Bylaws require that the strata council make its decisions in an open and transparent manner so that the owners may be fully informed as to what decisions are being made and why they are being made.

[97] It points to the following Bylaws:

> 22.1 At council meetings, decisions must be made by a majority of council members present in person at the meeting.
>
> 22.3 The results of all votes at a council meeting must be recorded in the council meeting minutes.

[98] The Defendant submits that the Claimant's argument that the Council's email communications did not constitute a valid Council meeting because the meeting was not held in person and no minutes were produced, obfuscates the point of ss. 32 and 33 of the *SPA*. She says the point is not whether the meetings were properly convened and held, and minutes produced, but rather whether the Defendant disclosed the conflict of interest to the Council and let the Council independently decide whether to approve the Transaction. I disagree.

[99] Sections 32(d) and (e) of the *SPA* require the conflicted council member to abstain from voting and **leave the council meeting while** the transaction is discussed and voted on by the remaining council members. This suggests contemporaneity. It is essential that a council meeting be convened, according to the Bylaws, for the requirements of these sections to be met. Not all communications, gatherings or interactions amongst council members can be characterized as valid council meetings. That would defeat the purpose of having specific bylaws dealing with council meetings, such as Bylaws 18 to 23.

[100] For example, Bylaw 18 deals with notice provisions relating to council meetings:

> 18.1 Any council member may call a council meeting by giving the other council members at least one week's notice of the meeting, specifying the reason for calling the meeting.
>
> 18.2 The notice in bylaw 18.1 does not have to be in writing.
>
> 18.3 A council meeting may be held on less than one week's notice if
>
> (a) all council members consent in advance of the meeting, or
>
> (b) the meeting is required to deal with an emergency situation, and all council members either
>
> (i) consent in advance of the meeting, or
>
> (ii) are unavailable to provide consent after reasonable attempts to contact them.

[101] If a Council meeting was convened for the purpose of discussing the Transaction, there is no evidence to suggest that the notice provisions in Bylaw 18 were complied with.

[102] However, I note that in other instances, proper notice was given before convening a Council meeting. For example, with respect to the January 29, 2015 Council meeting, the Defendant wrote as follows in an email dated January 21, 2015 (I assume to the other Council members as the addressees have been omitted from the copy in evidence):

> Reminder that we have a Council meeting January 29/15.
>
> Limited Agenda:
>
> - Finalize budget
> - Call AGM date
> - Finalize Building Manager decision
>
> If we have time we can talk about other stuff.
>
> Please confirm if you will be attending or not.

[103] This indicates to me that the Defendant was aware of the notice provision in Bylaw 18.1. The January 29, 2015 strata council meeting was held and minutes of that meeting were produced.

[104] Also, from other documents in evidence, I note that in-person strata council meetings were also held on June 24, 2014 and September 30, 2014, and minutes of those meetings were also produced.

[105] All of this indicates to me that the Defendant and the other Council members were aware that proper Council meetings had to be held and minutes of the business conducted at those meetings had to be recorded and produced.

[106] That being the case, I find it hard to accept that the Council intended any of their email communications to be a properly constituted Council meeting.

[107] On the issue of the Council's voting on the Transaction, the Defendant refers to the following emails, and submits that she abstained from participating in such voting:

(a) email, dated January 3, 2015, from Mr. McIntosh to Mr. Bralski:

> yes andrew [Mr. Bralski] I agree with susan [the Defendant] being part building manager thankyou terry
>
> [However, at trial, Mr. McIntosh said that he did not recall writing this email.]

(b) email, dated January 5, 2015, from Mr. Bralski to Ms. Phillips and Mr. Cheong:

> I got a yes vote from Terry regarding the building manager position.
>
> I am also in agreement, so this means we have 3 yes votes. I have not yet heard from Su Kui [Mr. Cheong].

[108] Nowhere in this discussion is there any reference to the Transaction or the payment of the Remuneration. The emails only refer to the Building Manager Position the Council was grappling with.

[109] As the following email indicates, Mr. Bralski had changed his mind about supporting the hiring of the Defendant for the Building Manager Position:

> email, dated February 11, 2015, from the Defendant to Ms. Phillips, Mr. McIntosh, Mr. Cheong and Mr. Bralski:
>
> > We seem to be at a stale mate over the offer I made before the posted closing date and have extended twice to

> accommodate negotiations. 2 yes and 2 no (according to Andrew's reply to my offer last Thursday it appears he has joined the no camp).
>
> Under normal circumstances I get the deciding vote but in this case that would be a conflict of interest.

[110] These emails indicate that the "voting" (as the term was loosely used by the Council members) only related to the hiring of the Defendant for the Building Manager Position and not to the approval of the Transaction or the payment of the Remuneration.

[111] The last email from the Defendant, referenced above, also shows that she was fully engaged in the Council's deliberations on whether or not to hire her for the Building Manager Position. Also, according to Ms. Phillips' evidence, the Defendant was present at the two informal budget meetings held in January 2015, at which the Defendant presented the Invoices directly to Mr. Bralski for payment.

[112] The Council's email discussion was fluid over a period of slightly more than two months. Did that discussion comprise one or more meetings? When did a meeting start and when did it end? Clearly, this conundrum could not have been what was intended by Bylaw 21.2, which allows for the holding of council meetings by electronic means.

[113] I believe the intent of Bylaw 21.2 was to say something similar to what s. 49(1) of the *SPA* permits. Section 49(1) of the *SPA* reads as follows:

> **Electronic attendance at meetings**
>
> > **49** (1) A strata corporation may, by bylaw, provide for attendance at an annual or special general meeting by telephone or any other method, if the method permits all persons participating in the meeting to communicate with each other **during the meeting**.
> >
> > (my emphasis)

[114] While I agree that strata council meetings can be conducted by electronic means, it only makes sense that they be conducted in real time, at a specific date and time set for the meeting, with appropriate notice, so that all participants can communicate with each other **during** the meeting.

[115] The Defendant also argues that the fact that the Council did not produce minutes of the Council meeting it held by email is simply a technical irregularity, and that not every irregularity regarding holding meetings or producing minutes will negate a strata council's decision.

[116] The parties referred to a number of cases with respect to how courts have dealt with procedural irregularities relating to strata meetings: *Yang v. Re/Max Commercial Realty Associates (482258 BC Ltd.)*, 2016 BCSC 2147 (affirmed 2017 BCCA 341), *Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428*, 2009 BCSC 506, (varied on another point, 2010 BCCA 474), and *Kayne v. Strata Plan LMS 2374*, 2007 BCSC 1610.

[117] I do not intend to discuss these cases in any detail, as they are very fact-specific. Depending on the factual circumstances, some procedural irregularities may not amount to significant prejudice or unfairness to the aggrieved party, and in those circumstances the irregularities may be dismissed.

[118] However, in the case before me, the procedural irregularities are not insignificant and they did not occur as a result of any inadvertence. Mr. Cheong repeatedly reminded the Council members that decisions should not be made without proper processes being followed. The Council members, and in particular, the Defendant as President of the Council, knew the rules relating to holding council meetings, and the need to produce minutes and so on, as there is evidence of other strata council meetings that have been held in accordance with the Bylaws.

[119] Based on the evidence before me, I find as follows:

(a) the email communications amongst the Council members between November 10, 2014 and February 1, 2015 (when the Second Invoice was paid) were not properly constituted strata council meeting(s) in accordance with the Bylaws;

(b) any discussion, whether by email or otherwise (including at any in-house meetings or informal budget meetings), of the Council members regarding the Transaction or payment of the Remuneration to the Defendant did not occur at one or more properly constituted strata council meeting(s);

(c) no votes, within the meaning of the Bylaws, were taken or recorded with respect to the Transaction or the payment of the Remuneration to the Defendant; and

(d) even during the email communications and at the two informal budget meetings in January 2015, wherein any discussion of the payment of the Remuneration may have taken place, the Defendant did not leave the discussion, but rather actively participated in it.

[120] Therefore, I conclude that the Defendant did not comply with s. 32 of the *SPA*.

Was the Transaction ratified?

[121] There is no evidence to suggest that the Transaction was ratified by a resolution passed by a ¾ vote at an annual or special general meeting of the Strata Corporation after full disclosure of the nature and extent of the Defendant's interest in the Transaction.

Was the Transaction unreasonable or unfair to the Strata Corporation at the time it was entered into?

[122] The Claimant argues that the Defendant, in adopting a secretive process that produced no record of any deliberations, vote or decision regarding the Strata Corporation's payment of several thousand dollars to her, effectively hid the conflict and decision-making process from the owners, and ensured her conflict of interest and the Transaction were not disclosed to the owners. This, the Claimant submits, is in itself unreasonable and unfair to the owners, and it resulted in a very real prejudice to the owners: a denial of their right to be informed of what the Council was doing with their money, particularly in circumstances where a strata council member was receiving that money.

[123] The Defendant submits that the Transaction was not unreasonable to the Strata Corporation because the Council was aware that she had been performing the building manager services for approximately seven months without any remuneration, and she had researched the pay rate for building managers in the area and used the going rate, which is supported by Mr. Marchi's evidence that the Remuneration was reasonable based on the building managers' rates in other properties he has managed.

[124] She submits that the Transaction was not unfair to the Strata Corporation, as it benefitted from her services, and also it currently pays Mr. Iser, who is also on strata council, for his services as caretaker of the building. She says it would be unfair for the Strata Corporation to reap the benefits of her services without paying for them, especially when the Strata Corporation's budget provided for building manager services.

[125] There is no dispute that the Defendant performed building manager services for approximately seven months (May 2014 to November 2014) without remuneration. However, she is not the only Council member who performed services on a gratuitous basis. All Council members rendered their services as volunteers. Ms. Phillips even assisted the Defendant with the building manager services, but there is no suggestion that she claimed any remuneration for her services.

[126] Section 34 of the *SPA* states that any remuneration paid to a council member for exercise of council powers or performance of council duties must be approved in advance of payment. While the Services the Defendant performed are not council duties, the point is that the *SPA* requires approval of any payment to a council member (for example, as required by s. 34 and s. 32) because of the fiduciary nature of the position the council member holds.

[127] The Defendant's submission that the quantum of the Remuneration was commensurate with market rates or that the Strata Corporation's operating budget for 2015 included a provision for part-time caretaker expenses is irrelevant.

[128] The Claimant does not take issue with the quantum of the Remuneration as being unreasonable. Its concern is that the Remuneration was not authorized, and the owners were not informed that such a payment had been made to the Defendant, who was on Council at the time. Also, the Remuneration could not have been an expenditure that was included in the only relevant item in the 2015 budget, noted as "Part-time Caretaker (March – December)." This appears to be an allowance ear-marked for any caretaker expenses for the period of March to December 2015.

[129] The Defendant further submits that even if the Transaction is found to be unreasonable or unfair, she did not act in bad faith and did not profit from the Transaction.

[130] Finally, she says that it would be unreasonable if she were to be held liable for the Council's failure to follow the technical requirements regarding holding a meeting and producing minutes, and that such irregularity does not create a basis for imposing liability on her under s. 33 of the *SPA*.

[131] The parties agree that the purpose and intent of s. 33, as stated by the Defendant, "is to prevent hidden conflicts or controlling council's decisions, not ordinary conflicts that are disclosed, freely entered into and fair."

[132] A helpful authority on the issue of a remedy under s. 33 of the *SPA* is *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 (CanLII).

[133] The British Columbia Court of Appeal described the appeal in *Dockside* as follows:

> [1] This appeal concerns a dispute between two groups of owners of lots in a strata corporation. One group, represented by the appellants, took control of the strata council, and approved expenditures for legal expenses to support litigation in circumstances where the statutorily required approvals for the litigation could not be obtained. The other group, which included the respondents, continuously objected to the strata council's actions on the basis that the strata council was acting in conflict of interest and contrary to the best interests of the strata corporation.

[134] The Court of Appeal, in dismissing the appeal, agreed with the chambers judge that the appellants were in a conflict of interest with the strata corporation, and that the contracts at issue were unreasonable and unfair for purposes of s. 33 because, in part, they were entered into by circumventing the requirements of the *SPA*.

[135] The chambers judge found that the appellants' failure to disclose their conflict of interest in accordance with s. 32 did not meet the standard of care set out in s. 31.

[136] Section 31 of the *SPA* reads as follows:

> **Council member's standard of care**
>
> **31** In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[137] In *Dockside*, the chambers judge found that:

> [13] . . . [t]he actions of the appellants could not be characterized as acting "honestly and in good faith", and did not meet the standard of "care, diligence and skill of a reasonably prudent person in comparable circumstances."

He further found that:

> [14] . . . s. 171(2) [of the *SPA*] indicates the intention of the legislature that only litigation approved by three-quarters of the owners is in the best interests of the strata corporation. He reasoned that by attempting to circumvent s. 171(2), the appellants acted for their own gain,… which failed to meet the standard of care of a "reasonably prudent person in comparable circumstances" as required by s. 31. He found the contracts to pay legal expenses were "unreasonable and unfair" to the strata corporation", satisfying s. 33(3) . . .

[138] The Court of Appeal, at para. 50, noted that the "appellants did not disclose their conflict of interest as required by s. 32, did not abstain from voting, and did not leave the council meeting when the resolutions approving the retainers of the law firms and the expenditures of strata corporation funds on legal fees were discussed and voted on." At para. 51, the court said, "in acting as they did, the appellants failed to comply with s. 32, and failed to carry out both their statutory fiduciary duty, under s. 31(a), and their statutory duty of care, under s. 31(b)."

[139] The Defendant says that the purpose of s. 33 was properly applied in *Dockside*. However, she says, if *Dockside* were to be applied to her circumstances, it would cause an injustice to her because she, at the very least, substantially complied with s. 32. I disagree that she substantially complied with s. 32.

[140] Even as early as July 4, 2014, Mr. Cheong indicated to the Defendant and the other Council members that he would not agree to a person on council to be hired as a building manager. He did not waiver from this position, at least insofar as hiring the Defendant as a building manager.

[141] In his memorandum, dated January 27, 2015, to the Council members, including the Defendant, Mr. Cheong, on page 2, stated, in part, as follows:

> We have a 'conflict of interest' situation where the Strata Chairperson is attempting to get herself employed by the Strata. Thus it is advisable to get the views of all owners . . .
>
> So it is my wish to clarify that unless appropriate steps are taken, including out-source advertising or a qualified contract with policies in place, I will decline to approve the hiring as proposed by the contract received hereof.
> . . .

[142] In spite of Mr. Cheong's concerns and repeated opposition, and, as a long-time resident of the building, knowing full well of the Strata Corporation's past difficulties with a former council member, Paul, acting as building manger, the Defendant managed to submit the Invoices directly to Mr. Bralski, and arranged to have Paragon issue the cheques to her in payment of the Invoices, without following proper process.

[143] The Defendant knew, or ought to have known, that as President of the Council, she should not have received any monies of the Strata Corporation without complying with the provisions of the Strata Corporation's Bylaws and the *SPA*, which require a proper and transparent process so that the owners can be kept abreast of how their monies are being spent. The following is a sampling of such provisions:

(a) Bylaws: 18 – Calling council meetings, 20 – Quorum of council, 21 – Council meetings, 22 – Voting at council meetings, 23 – Council to inform owners of minutes, 24 – Delegation of council's powers and duties, and 25 – Spending restrictions; and

(b) *SPA* sections: 3 – Responsibilities of strata corporation, 4 – Strata corporation functions through council, 26 – Council exercises powers and performs duties of strata corporation, 27 – Control of council, 31 – Council member's standard of care, 32 – Disclosure of conflict of interest, 33 – Accountability, 34 – Approval of council member remuneration, 35 – Strata

> corporation records, 36 – Access to records, 97 – Expenditures from operating fund, and 98 – Unapproved expenditures.

[144] I note that even an “immediate expenditure” referred to in s. 98(3) of the *SPA* (which I believe was what Ms. Phillips in her testimony was characterizing the Remuneration as an “emergency expenditure”) needs to be disclosed to the owners “as soon as feasible” according to s. 98(6) of the *SPA*. I do not accept that the Remuneration was an expenditure within the meaning of s. 98(3). Even if I did, it was not disclosed to the owners as required by s. 98(6).

[145] Under s. 3 of the *SPA*, “the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.”

[146] Under s. 163(1) of the *SPA*, the “strata corporation may be sued as representative of the owners with respect to any matter relating to the common property, common assets, bylaws or rules, or involving an act or omission of the strata corporation”, and under s. 163(2), an “owner may sue the strata corporation.”

[147] From these provisions, there can be no doubt that the Strata Corporation has an ongoing responsibility to manage the common assets of the Strata Corporation, which would include the Remuneration, for the benefit of the owners. Otherwise, the Strata Corporation could be exposed to legal liability.

[148] Under s. 4 of the *SPA*, the strata corporation exercises its powers and duties through its strata council, unless the *SPA*, the *Regulation* or the Bylaws provide otherwise.

[149] As noted above, s. 31 of the *SPA* imposes a fiduciary duty and a duty of care on each member of the strata council to act in the best interest of the Strata Corporation, and exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[150] At paras. 52 to 56, the Court of Appeal, in *Dockside*, discussed the meaning to be accorded to the fiduciary duty and the duty of care imposed by s. 31 (I note that there has been no change in the wording of s. 31 since the appellate decision in *Dockside*, and, therefore, this discussion still applies):

> [52] In ***Peoples Department Stores Inc. (Trustee of) v. Wise***, [2004] 3 S.C.R. 461, 2004 SCC 68, Major and Deschamps JJ., for the Court, discussed the content of the statutory duties found in s. 122(1) of the ***Canada Business Corporations Act***, R.S.C. 1985, c. C-44, which are identical in wording to s. 31 of the **Act**, except for the reference to the "strata corporation", instead of "corporation", in s. 31(a).
>
> [53] The Supreme Court described (at para. 35), the statutory fiduciary duty, "to act honestly and in good faith with a view to the best interests of the corporation":
>
> > The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-á-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly, and loyally: see K. P. McGuinness, The Law and Practice of Canadian Business Corporations (1999) at p. 715.
>
> [Underlining added in original.]
>
> [54] The Supreme Court acknowledged (at para. 39) that the statutory fiduciary duty does not require that directors and officers in all cases avoid personal gain as a direct result of their honest and good faith management of the corporation. As argued by the appellants in this case, "[i]n many cases, the interest of directors and officers will innocently and genuinely coincide with those of the corporation". The central focus of the statutory fiduciary duty is the "subjective motivation" of the director or officer (para. 63). Evidence of "fraud or dishonesty" (para. 40) or of "a personal interest or improper purpose" (para. 41) is relevant to the determination of whether the statutory fiduciary duty has been breached.
>
> [55] In this case, there is evidence of all of the factors demonstrating breach of the statutory fiduciary duty. The appellants' subjective motivation was to pursue their goal of taking over the operation of the hotel through legal challenges to the Leases. In carrying out their personal objectives, they did not avoid conflicts of interest or abusing their position as

members of the strata council, and acted dishonestly, in their personal interest, for an improper purpose.

[56] The statutory duty of care, to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances, imposes an objective standard that takes into account the context in which a given decision was made (**Peoples Department Stores Inc.** at paras. 62-63). The Supreme Court explained (at para. 67):

> Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors and officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining <u>whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.</u>
>
> [Underlining added in original.]

[151] The statutory fiduciary duty requires each strata council member to act honestly and in good faith vis-à-vis the Strata Corporation. They must avoid conflicts of interest with the Strata Corporation and must also avoid abusing their position to gain personal benefit.

[152] Here, the Defendant did not avoid a conflict of interest with the Strata Corporation. She used her position to gain personal benefit.

[153] The evidence is clear that she was looking for a part-time job and that it would assist her financially. She used her position on the Council, if not directly, through her friendship with Ms. Phillips, to influence the other Council members to hire her as a building manager, purely for her personal benefit. She even engaged with them directly; at times, using disrespectful and threatening language.

[154] For example, in an email dated December 30, 2014, the Defendant says to the other Council members:

> So what is the verdict? Are you going to negotiate with me for the position or should I start looking for a job?

[155] There are other emails in evidence where the Defendant directly admonishes the other Council members because they were not entirely agreeing with her on the issue of hiring her for the Building Manager Position. For example, in an email dated February 12, 2015 to the other Council members, she writes, in part, as follows:

> I still run this council until Feb. 25/15. I am calling an impasse . . .
>
> . . . Extra thanks to Margaret [Ms. Phillips] for playing go between when the boys should have handled this themselves.

[156] In a response email dated February 12, 2015, Mr. Bralski writes, in part, as follows:

> Susan,
>
> You do what you feel you have to, as it shows your true colors. The only confusion and waiting game that has gone on is the one you have caused and played yourself. We were very very clear from the beginning about what changes to the contract we wanted done. You behaved like child playing games and pretended to not understand because it does not suit your needs. Too little too late Susan. I am done with you bullshit. I will make sure we look elsewhere for our next building manager.

[157] These emails and other communication I have referred to earlier clearly demonstrate the Defendant's subjective motivation in securing a contract that suited only her interest, even though she was being told directly by at least two of the other Council members (Mr. Cheong and Mr. Bralski) that what she was asking for was not in the best interest of the Strata Corporation.

[158] While the contract for the Building Manager Position is not directly under consideration in this matter, the circumstances surrounding the negotiations of this contract are relevant to the Transaction and the payment of the Remuneration.

[159] In light of the mounting opposition she was facing from some of the other Council members to her being hired, on her terms, for the Building Manager Position, I find that the Defendant managed to circumvent the s. 32 process with respect to the Transaction by dealing primarily with her friend and main supporter, Ms. Phillips, leaving her to influence the others on the Council.

[160] On the hiring for the Building Manager Position, she openly demands the other Council members to “get Su Kui [Mr. Cheong] on board” within two days, and threatens that if they do not, “[her] application is withdrawn.”

[161] From the above discussion, there can be no doubt that the Defendant did not act honestly and in good faith with a view to the best interests of the Strata Corporation.

[162] It is not uncommon for strata council members to encounter conflict of interest situations; however, it is imperative that they comply with the process set out in s. 32, which is specifically aimed at addressing such situations.

[163] In this case, I have found that the Defendant did not comply with s. 32, and, as a result, I find that she is in breach of her fiduciary duty under s. 31(a) of the *SPA*.

[164] I also find that she is breach of her duty of care under s. 31(b) of the *SPA*, as she failed to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances in ensuring that the Council, including herself as its President, exercised the powers and performed the duties of the Strata Corporation in accordance with the *SPA*, the *Regulation* and the Bylaws, as required by s. 26 of the *SPA*.

[165] As I have discussed above, the *SPA* and the Bylaws require that valid council meetings be held, deliberations and votes at these meetings be recorded in the minutes of those meetings, and those minutes be made available to the owners. While the evidence indicates that these steps were taken with respect to other business of the Strata Corporation, such as the strata council meetings held on June 24, 2014, September 30, 2014, October 30, 2014, November 27, 2014 and January 29, 2015, no

such steps were taken in dealing with the Transaction and the payment of the Remuneration.

[166] I do not accept the Defendant's argument that the requirements for holding valid strata council meetings and producing minutes of those meetings are simply technical requirements. They are there with reason, and they must be complied with. Otherwise, the owners' right to know, and to be informed of, how, and if, the Strata Corporation is managing its common assets for the benefit of the owners, will be prejudiced.

[167] The Defendant cannot point the finger at the other Council members for these failures and claim that she cannot be held responsible. As the Claimant points out, she could have easily followed the transparent process Mr. Iser did, before he got paid for the caretaker services that he provided to the Strata Corporation. He complied with all of the requirements of the *SPA* and the Bylaws, including involving the owners' direct participation.

[168] In the end, I find that the Transaction was unreasonable and unfair to the Strata Corporation at the time it was entered into, and conclude that because the Defendant did not act honestly and in good faith towards the Strata Corporation, she should compensate the Strata Corporation for the loss arising from the Transaction, being the amount of the Remuneration.

[169] Before turning to the limitation issue, I will briefly address one further submission the Defendant made.

[170] In her concluding submissions, the Defendant states that even if this court were to find that she must repay the Remuneration, the reasonable value of her services to the Strata Corporation should be offset against any judgment in favour of the Claimant on a *quantum meruit* basis.

[171] The pleadings in this matter do not disclose this legal basis, and neither party addressed it in any fashion, or led any evidence, at trial. Besides, the Defendant testified that any building manager services she provided from May 2014 to October 2014 were "free", and she has not made any counterclaim for any other services she

may have provided to the Strata Corporation. Therefore, there is nothing against which to offset the Remuneration.

Limitation Period

Is the Claimant's claim barred by the *Limitation Act*?

[172] The relevant provisions of the *Limitation Act* read as follows:

> **1** In this Act:
>
> "**claim**" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;
>
> **6** (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
>
> **8** Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
>
> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[173] The parties agree that the Claimant's claim falls within the definition of "claim" under s. 1 of the *Limitation Act*, and that the basic limitation period of two years under s. 6 of the *Limitation Act* applies. However, they disagree as to when the claim was discovered.

[174] The Claimant submits that the claim was not discovered until 2016, because it was only after an intense investigation that the 2016 Council discovered that: the Remuneration had been paid to the Defendant; the Defendant had failed to comply with s. 32; neither the Transaction nor the payment of the Remuneration had been authorized; and upon receiving legal advice, it learned that it could bring an action against the Defendant to recover the loss the Strata Corporation had suffered.

Therefore, the Claimant says its claim is not statute-barred, as it filed its claim well before the expiry of the two-year limitation period.

[175] The Defendant, on the other hand, submits that the claim was discovered at the latest by February 25, 2015, when the composition of the strata council changed at the 2015 AGM. She says the claim is statute-barred, as it was not filed before the expiry of the two-year limitation period on February 25, 2017.

[176] The Defendant argues that the Claimant acts through its strata council, and that for the purposes of discovering a claim, it is sufficient if even one member of the strata council discovered the claim. She says: in her circumstances, all members of the Council who were in power at that time, knew, or should have known, the facts underlying the Claimant's claim, and they could have elected to commence a claim at that time; and because strata councils may change from year to year, the new strata council's knowledge should not be used to allow the new strata council to "get a fresh kick at the limitation can." She referred to the following in attributing knowledge to the Council members:

(a) The Defendant's evidence was that she submitted the First and Second Invoices to the Council at the January 6, 2015 meeting and the January 29, 2015 meeting, respectively

(b) (although I note that the Defendant said she submitted the Second Invoice at "a" meeting, and not at the "January 29, 2015" meeting; and Ms. Phillips said that the Defendant submitted the Second Invoice directly to Mr. Bralski at the informal budget meeting in mid-January 2015).

(c) Ms. Phillips testified that she knew that the Defendant was being paid; moreover, she sent an email to the entire Council on February 6, 2015 stating that she hoped the Council would "continue to pay Susan month by month".

(d) Mr. Bralski also sent an email to the Defendant, with a copy to the other Council members, on January 29, 2015, stating that "[y]ou are now being paid for your services as a PT building manager . . ."

(e) In cross-examination, Mr. Cheong confirmed that he read Council emails.

(f) Mr. McIntosh testified that the strata business emails were read to him. He also confirmed that the Defendant should be paid (referring to an email dated February 6, 2015 from Mr. McIntosh's email address to Ms. Phillips).

(g) There were only three signatories on the Strata Corporation's bank account: the Defendant, Mr. Bralski and Mr. Marchi. Mr. Marchi testified that he signed the two cheques to the Defendant and the Defendant testified that she did not sign these cheques. That leaves Mr. Bralski as the other signatory on these cheques, and, therefore, he would have had knowledge of these payments.

[177] The question in any case in determining the limitation period is: when was the claim **discovered** (s. 6(1) of the *Limitation Act*)?

[178] Division 2 of the *Limitation Act* deals with general discovery rules. Section 8 states that a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known **all** of the factors set out in s. 8(a) to (d) of the *Limitation Act*.

[179] As it will become apparent from my discussion below, the evidence indicates that none of the other Council members knew, at the time of the payment of the Remuneration, the facts underlying the Claimant's claim to meet the discovery rule in s. 8(a) to (d) of the *Limitation Act*.

[180] Even in the unlikely event that they knew the underlying facts, I agree with the Claimant that it is highly unlikely that the Council would have brought a claim against the Defendant at that time (or for that matter until the Defendant was removed from strata council in 2016), because that would have required the Defendant, as President of the Council at that time, to have taken an instrumental role in investigating and bringing a claim against herself on behalf of the Strata Corporation.

[181] That, the Claimant submits would have been unrealistic. It says she certainly would not have brought a claim against herself as that would not have been in her interest, and because she was friends with and had influence over some of the other Council members, it is also highly unlikely that they would have brought a claim against her. The only person who was staunchly opposed to the Defendant was Mr. Cheong, but he alone, or even if he had teamed up with Mr. McIntosh who denied writing the emails in support of the Defendant, could have managed to bring an action against the Defendant, as he would have lacked the necessary votes to do so.

[182] The Claimant submits that in this case, the 2016 Council bringing an action against the Defendant, a former council President, for wrong-doing committed by her in the past, is analogous to a derivative action brought by the shareholders of a corporation against a director of the corporation who committed a wrongdoing in the past. It says, to expect the Defendant, while being the President of the Council (similar to a director of the corporation), to sanction an action against herself is unrealistic; therefore, it fell upon the 2016 Council to bring the action against her after she had been voted off the strata council.

[183] The Claimant referred to a number of cases to illustrate the principle that the *Limitation Act* should not be applied to shield a director on a board (by analogy a former council member) who declines to initiate legal proceedings on behalf of the entity (by analogy, the Strata Corporation) he or she controls, against himself or herself: *McAteer v. Devoncroft Developments Ltd.*, 2001 ABQB 917; *Drove v. Mansvelt*, 1998 CanLII 6635 (BC SC); *Carr v. Cheng, Dorset College Inc.*, 2007 BCSC 1693; *Park v. Sunrich Processors Ltd.*, 1999 CanLII 6396 (BC SC).

[184] The Claimant says that the Canadian jurisprudence suggests that the limitation period for derivative actions is calculated from the time that the complainant (by analogy, the 2016 Council), rather than the corporation (by analogy, the Council), knew all the elements of the action.

[185] Even leaving aside the Claimant's preceding argument, which I agree with, the evidence in this case does not support the Defendant's assertion that all Council members knew, or should have known, the facts to meet all of the factors in s. 8(a) to (d) of the *Limitation Act*, to have discovered the claim by February 25, 2015.

[186] The evidence that the Defendant refers to above, to attribute knowledge of the claim to the Council members, only indicates that some of the Council members knew about the payment of the Remuneration, but it does not indicate whether one or more of them knew that the payment was not authorized in accordance with s. 32 of the *SPA*, thereby raising any concerns in their minds at that time that the Strata Corporation

might have suffered a loss as a result of the Defendant's actions, that could have formed the basis of an action against the Defendant.

[187] As I said earlier, the evidence is clear that Ms. Phillips and Mr. Bralski knew about the payments to the Defendant. It is doubtful whether Mr. McIntosh did, as his evidence was internally inconsistent.

[188] There is conflicting evidence as to whether Mr. Cheong was present at the two informal budget meetings Ms. Phillips referred to: the first one on January 6, 2015 when the First Invoice was presented for payment and the second one in or about the middle of January 2015, when the Second Invoice was presented for payment. Ms. Phillips and Mr. Cheong said that Mr. Cheong was not present at these meetings, whereas the Defendant and Mr. Marchi said that he was present.

[189] Mr. Cheong was very clear that the first time he saw the Invoices were in 2016, when one of the former Council members sent him the Strata Corporation's financial statements, to which the First Invoice was attached. He said he questioned Mr. Marchi and the strata council as to who approved payment, but he was told that it was already approved, without any response as to who specifically approved it.

[190] The evidence indicates that in the spring and summer of 2016, Mr. Cheong and Mr. Iser spent considerable time and effort in determining whether the Invoices were properly authorized for payment, and whether the payments were actually made to the Defendant. Their repeated requests for documentation from the Defendant and Mr. Marchi in this respect were met with resistance.

[191] In a document (it is not clear whether it was an email or a letter), dated April 27, 2016, addressed to the 2016 Council, Mr. Marchi wrote, in part, as follows:

> . . . Susan [the Defendant] provided services before council decided to hire her, on a trial basis, as the Part-time Building Manager. Invoices (#06700 and #142653) were presented for those service [*sic*], the invoices were approved and paid by the strata. This all occurred in December 2014 and January 2015 . . .

However, when Mr. Cheong asked Mr. Marchi to produce minutes or any written evidence of the approval Mr. Marchi was referring to, Mr. Marchi failed to do so.

[192] Since the Defendant and Mr. Marchi were not forthcoming or cooperative in producing the Strata Corporation's financial or corporate records, Mr. Iser engaged the assistance of legal counsel in this effort.

[193] In due course, with the assistance of legal counsel, and after the authorized signatories on the Strata Corporation's bank account were changed to Mr. Cheong, Mr. Iser and Mr. Savelieff, they were able to access the Strata Corporation's bank records sometime in June or July of 2016, and that is when they found copies of the two cheques made out to the Defendant in payment of the Remuneration. That is when they conclusively knew that the Defendant had been paid and the payments were not authorized, as they were unable to find any written evidence of: the Defendant's compliance with s. 32 of the *SPA*; a valid Council meeting held to discuss and vote on the Transaction, and approve payment of the Remuneration; or a resolution passed by a ¾ vote at an annual or special general meeting of the Strata Corporation approving the Transaction and payment of the Remuneration.

[194] After these findings, the 2016 Council took steps to remove the Defendant from strata council, and also terminate Paragon's services.

[195] As I said earlier, I found Mr. Cheong to be a credible witness. The evidence indicates that he was not swayed by the Defendant's antics, and he insisted that all Council members abide by the Bylaws and the *SPA*. I doubt that it would be an exaggeration to say that he was a stickler for conducting strata business by the book.

[196] Based on the evidence before me, I find that Mr. Cheong did not know about the Invoices until the early part of 2016, and about the payment of the Remuneration to the Defendant until sometime in June or July of 2016.

[197] The Defendant argues that the 2016 Council may have learnt about the exact amount of the Remuneration in 2016, but that all of the other Council members knew in 2015 that she was being paid, and that that knowledge is sufficient for discovery, even if

they did not know the exact amount in 2015. In support of this argument, the Defendant cites *City of Hamilton v. Metcalfe & Mansfield Capital Corporation*, 2012 ONCA 156, wherein the Ontario Court of Appeal, at para. 54, said:

> [54] The City's position that damage occurred when the Devonshire notes matured also fails to appreciate the distinction between damage and damages. Damage is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. Damages, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was damage.

[198] As I have already discussed, for a claim to be discovered, all of the factors in s. 8(a) to (d) of the *Limitation Act*, must be met.

[199] Here, the evidence indicates that even by February 25, 2015, the Council did not know that a loss or damage had occurred to the Strata Corporation (s. 8(a)). The Council members, with the exception of Mr. Cheong, whom I have found was not aware of the payments to the Defendant until 2016, operated on the basis that there was nothing improper about the payments to the Defendant.

[200] While there were murmurs amongst the Council members about the Defendant being in a conflict of interest regarding her being considered for the Building Manager Position, the evidence does not indicate that Ms. Phillips, Mr. Bralski, and perhaps Mr. McIntosh, who knew of the payments to the Defendant, had any inkling that any formal process had to be followed before approving payment of the Remuneration.

[201] Ms. Phillips testified that she viewed the payments to the Defendant as a temporary measure until the subsequent strata council decided what they wanted to do about hiring a building manager on an ongoing basis. She was under the misapprehension that the Council had the authority under the *SPA* to authorize payments up to $2,000 in an emergency situation. She said she considered the Services the Defendant provided to be in the nature of an emergency because the building was in dire need of maintenance. At trial, she acknowledged that the First

Invoice was more than the $2,000 that she thought was allowable. The Second Invoice was even higher.

[202] She said she was not aware, and no one else, including Mr. Marchi who had the responsibility to advise the Council on compliance issues, ever brought to the Council's attention the requirements under s. 32, including the fact that the Defendant should not have been present at the informal budget meetings, at which she presented the Invoices for payment. Ms. Phillips admitted that there were no minutes of these informal budget meetings.

[203] However misguided, the Council, with the exception of Mr. Cheong, operated on the basis that there was nothing improper about the payments to the Defendant. Therefore, at that time, they had no reason to believe any injury, loss or damage to the Strata Corporation had occurred. As a result, the factors in s. 8(b) to (d) were not a consideration.

[204] It was only in June or July of 2016, as I have discussed above, that the 2016 Council knew of all of the factors in s. 8(a) to (d) of the *Limitation Act*, namely:

(a) that a loss had occurred to the Strata Corporation, and the extent of the loss, being the amount of the Remuneration;

(b) that the loss was caused by an act or omission – the failure to comply with the *SPA* and the Bylaws, and submission of the Invoices for payment without proper authorization;

(c) that the non-compliance and the improper act was that of the Defendant, against whom this claim is made; and

(d) that the 2016 Council sought legal advice and determined that in light of the Defendant's breach of s. 32 of the *SPA*, a court proceeding would be an appropriate means to seek remedy under s. 33 of the *SPA* for the loss the Strata Corporation had suffered.

[205] If the Council had truly discovered the claim, in accordance with s. 8 of the *Limitation Act*, by February 25, 2015 as the Defendant asserts, I agree that subsequent strata councils should not "get a fresh kick at the limitation can".

[206] The Defendant also referred to s. 17 of the *Limitation Act*, which provides discovery rules for successors, predecessors, principals and agents. She relies on s. 17(2) of the *Limitation Act*, which reads as follows:

> **17** (2) A claim of a principal, if the principal's agent had a duty to communicate to the principal knowledge of the matters referred to in section 8(a) to (d), is discovered on the earlier of the following:
>
> (a) the day on which the claim is discovered by the principal's agent;
>
> (b) the day on which the claim is discovered by the principal.

[207] The Defendant submits that, as the Strata Corporation's exclusive agent, one of Paragon's duties was to report to the Council regarding any claims or potential claims, and Mr. Marchi, as Paragon's managing broker, had the knowledge to satisfy the requirements of s. 8 of the *Limitation Act* because: he attended the Council meetings, and was familiar with the Strata Corporation's affairs; he signed the cheques for the Remuneration; and he was aware of the Council's discussion about hiring the Defendant for the Building Manager Position and that the Council did not sign a contract with the Defendant to hire her for that Position.

[208] The Defendant submits that even if Mr. Marchi had concerns about reporting to the Council any issues he may have had regarding the Remuneration, he had the opportunity to report them to the subsequent strata council, which was elected at the 2015 AGM, with a different composition of members. She says, at the very least, Mr. Marchi's knowledge as agent should be imputed to the Claimant as of February 25, 2015.

[209] To accede to the Defendant's argument, Mr. Marchi must have discovered the claim by February 25, 2015, in accordance with s. 8(a) to (d) of the *Limitation Act*. The evidence does not support such a conclusion.

[210] The evidence indicates that Mr. Marchi knew of the payments to the Defendant because he confirmed that he signed the cheques. Furthermore, when the Defendant's counsel asked him "do you believe that you had authority to pay these – or to sign these

cheques and issue these cheques?", Mr. Marchi's answer was "I believe so. They were approved by council and once the council approves these . . . we sign".

[211] Clearly, Mr. Marchi was operating on the basis that the Invoices were approved by the Council. Therefore, he would have had no reason to believe, at that time, that a loss had occurred, according to s. 8(a) of the *Limitation Act*. As a result, s. 8(b) to (d) would not have been a consideration. Even in his April 27, 2016 communication to the 2016 Council, referenced above, he states that the two Invoices were approved.

[212] Therefore, I find that Mr. Marchi did not discover the claim by February 25, 2015.

[213] Even under the s. 17(2) of the *Limitation Act* argument, the evidence only supports the conclusion that the date the Claimant's claim was discovered, was in 2016, when the principal, the 2016 Council, discovered it.

[214] Based on the evidence before me, I am satisfied that the Claimant has established, on a balance of probabilities, that its claim was discovered in 2016.

[215] Therefore, I conclude that the Claimant's claim is not barred by the *Limitation Act*, as the Claimant filed its claim on May 5, 2017, well before the two-year limitation period.

CONCLUSION

[216] In summary, my conclusions are as follows:

(a) This court has jurisdiction to hear the Claimant's claim;

(b) The Claimant is entitled under s. 33 of the *SPA* to recover the Remuneration paid to the Defendant; and

(c) The Claimant's claim is not barred by the *Limitation Act*.

[217] While the Defendant may be disappointed with my decision, I would like her to know that I am cognizant of the value of the services she provided to the Strata Corporation on a gratuitous basis, for which the Strata Corporation should be thankful to her. However, as I noted earlier, she is not the only strata council member who provided

services to the Strata Corporation. All strata council members exercise their council duties, or provide such other services, on a gratuitous basis, unless remuneration for such duties or services are specifically approved in accordance with the applicable provisions of the *SPA*, the *Regulation*, and/or the Bylaws.

[218] It is unfortunate that perhaps in her earnest to secure an ongoing part-time job as a building manager, which she is probably good at and enjoys, the Defendant has failed to pay heed to the safety measures the legislature has seen fit to put in place to prevent any abuse of power by strata council members who are entrusted with the duty and responsibility of stewarding the Strata Corporation in the best interest of the Strata Corporation, the members of which are the owners, including the Defendant.

ORDER

[219] I order that the Defendant pay to the Claimant the sum of $4,989.42, comprising the Remuneration of $4,753.42 and costs of $236.00 (filing fees of $156.00 and service fees of $80.00). She shall pay this amount by October 31, 2019, unless she has applied for a payment hearing before this date.

By the Court

The Honourable Judge V. Chettiar
Provincial Court of British Columbia