

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stewart v. The Owners, Strata Plan KAS 2601*,
2020 BCSC 809

Date: 20200601
Docket: S39558
Registry: Penticton

Between:

Brian Campbell Stewart

Plaintiff

And

The Owners, Strata Plan KAS 2601

Defendant

Docket: S41503
Registry: Penticton

Between:

The Owners, Strata Plan KAS 2601

Plaintiff

And

Brian Campbell Stewart

Defendant

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

M.F. Welsh, Q.C.

Counsel for the Defendant:

S.W. Abramson

Place and Date of Trial/Hearing:

Penticton, B.C.
September 20, 23–26, 2019
Kelowna, B.C.
May 19, 2020

Place and Date of Judgment:

Kelowna, B.C.
June 1, 2020

I. Introduction

[1] These two actions concern a three-unit strata building at 1070 Lakeshore Road in Penticton, BC (the “Strata Building”). Mr. Stewart, the plaintiff in Penticton Action No. 39558 (the “Winding up Action”), owns the bottom commercial unit (“Unit 101”) out of which he operates a seasonal recreational equipment rental business. Mr. Roc Marten owns the two residential units on the second floor, one personally (“Unit 202”) and one through a corporation he owns (“Unit 201”). Mr. Marten operates a bed and breakfast business out of both residential units. The owners will be referred to jointly in these reasons as the “Owners”.

[2] Strata Plan KAS 2601 is the registered strata corporation that governs the Strata Building’s affairs (“Strata Corporation” or “Strata”). The Strata was created in December 2003 when the Strata Building was completed.

[3] Mr. Stewart, age 60, and Mr. Marten, age 61, have been feuding ever since the Strata Building was constructed. Mr. Stewart says that his relationship with Mr. Marten is irreversibly poisoned and in the Winding up Action seeks a “divorce” in the form of a dissolution of the Strata Corporation. He says there are no other available options.

[4] Mr. Marten has been effectively running the Strata Corporation on his own because Mr. Stewart refuses to be involved in it. He refuses to attend Strata Council meetings and Annual General Meetings (“AGMs”). Mr. Stewart also refuses to pay strata fees as required. Accordingly, the Strata filed a lien against Unit 101 for unpaid strata fees (“Lien”) and in Penticton Action No. 41503 (the “Lien Action”) seeks to enforce the Lien.

[5] In the Winding up Action Mr. Stewart seeks:

- a) an order pursuant to s. 284 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the “Act”), to wind up the Strata Corporation; and

- b) ancillary orders to determine how title to the strata lots and/or property shall be held going forward and what parts, if any, shall be owned in fee simple.

[6] In the Lien Action, the Strata Corporation seeks judgment against Mr. Stewart for outstanding strata fees (which are currently in excess of \$40,000), interest charges and other amounts related to the Strata and conduct of sale of Unit 101 if the Lien is not paid within 30 days. Pursuant to an order made by Master Wilson (as he then was) on September 1, 2016 (“Wilson Order”), Mr. Stewart has paid current and outstanding strata fees related to Unit 101 into his counsel’s trust account and the Strata seeks the release of those funds as well as its costs of filing the Lien and prosecuting the Lien Action.

II. Background

[7] Mr. Stewart’s recreational rental business is known as Fun City Rentals (“Fun City”) and operates out of Unit 101, which is designated as commercial premises. He started that business in 1987, operating on a portion of a larger development property (“Development Property”) where the Strata Building is now located. The Development Property was bare land at the time and Mr. Stewart leased it from its then owner. He purchased the Development Property in approximately 2000 on the expectation that he would develop it.

[8] Mr. Marten has a carpentry background and in around 2001 was building condominiums nearby. Mr. Stewart approached Mr. Marten to inquire if he would be interested in developing the Development Property.

[9] Mr. Marten was interested but did not have the necessary financial resources. He knew a developer in Summerland, Mr. Ron Freeman, and asked him if he might be interested. He was. Mr. Marten proposed that Mr. Freeman would finance the project and Mr. Marten would handle the construction. The plan was to build two buildings, a six-plex and a four-plex, on the majority of the Development Property (“Condominiums”), then subdivide a small piece to create the land upon which the

Strata Building would be built, thus allowing Mr. Stewart to continue operating Fun City.

[10] Mr. Freeman and Mr. Stewart began the negotiations, the upshot of which was that Mr. Stewart transferred the Development Property to a company that Mr. Freeman incorporated, 643776 B.C. Ltd. (“643 Co.”) and the construction of the Condominiums began. Mr. Marten was not involved in these negotiations but was hired by 643 Co. to oversee the construction of the Condominiums.

[11] As the Condominiums were underway, Mr. Freeman initiated the design of the Strata Building to be built on the soon-to-be sub-divided parcel. 643 Co. and Mr. Stewart entered into a joint venture agreement (“Joint Venture Agreement”) dated September 2002 to build what Mr. Stewart understood was to be a two-story building on the site, the ground floor of which would be a commercial suite owned by him in which he would operate Fun City, and the second floor would be residential units owned by 643 Co.

[12] Mr. Marten was not a party to the Joint Venture Agreement and was not aware of its details. He was also not involved in the plans, drawings, design, specifications or the terms of what Mr. Stewart wanted as part of proposed Unit 101. Unbeknownst to Mr. Marten, Mr. Freeman added his name to the City of Penticton’s Development Permit as an authorized agent of 643 Co.

[13] Mr. Marten was also not involved in the construction of the Strata Building but was able to see its progress from the Condominium project next door. He would regularly be on site talking to the various sub-trades he knew, and to keep an eye on things for Mr. Freeman.

[14] As the Strata Building was nearing completion, Mr. Freeman arranged through his Summerland lawyer for the strata plan to be finalized. It was registered at the Land Title Office on December 31, 2003. Mr. Freeman also arranged for the preparation and registration of the required disclosure statement containing the

Strata Corporation's bylaws ("Disclosure Statement"). Mr. Marten was not involved in drafting the Disclosure Statement nor the Strata's bylaws.

[15] Mr. Marten knew that 643 Co. wanted to sell the residential units. He agreed to purchase Unit 202. He first saw the Disclosure Statement and bylaws when he purchased Unit 202 in the spring of 2004.

[16] From 2004 through 2009, the ownership of the Strata Building units was as follows:

- a) Unit 101 – Mr. Stewart;
- b) Unit 201 – 643 Co.; and
- c) Unit 202 – Mr. Marten.

[17] The Disclosure Statement provided that Unit 101 would have 1.09 votes and Units 201 and 202 would each have one vote.

III. The Dispute

[18] The dispute began in 2004. Essentially, Mr. Stewart says he was duped by Mr. Freeman (and, he suspects, Mr. Marten) who he says ran roughshod over him from the outset. He asserts that the as-built Strata Building was not what was agreed to. For example, instead of it being a two-story building, it was increased to three stories, with each of the residential units having two floors. The building was much larger than anticipated going from a planned "3,200 sq. ft. or larger" to nearly 9,000 square feet. Mr. Stewart says he had no input into the drafting of the Strata's bylaws or the strata rules that Mr. Freeman implemented, including a curfew for Fun City's business operations.

[19] The pressure was on to get the Strata Building completed in time for the 2004 rental season. Mr. Stewart says that Mr. Marten and Mr. Freeman conspired behind his back to build the Strata Building without clearing the plans with him and without his input. Not the least of Mr. Stewart's concerns was the strata plan that designated

what was to be his Limited Common Property as Common Property (“Common Property Issue”).

[20] The first meeting of the strata council (“Strata Council”) occurred on June 16, 2004. Mr. Marten became the president of the Strata Corporation more or less by default. Mr. Marten had no prior experience or expertise in running strata corporations or councils. Mr. Stewart declined to be involved as a strata council member. By this point, relations between the parties had already soured due to the Common Property Issue. Mr. Stewart was adamant that he had been improperly and unfairly dealt with by Messrs. Freeman and Marten and was not happy with what he considered incomplete and/or shoddy construction. He believed that Messrs. Freeman and Marten were aligned, would vote as a block and would effectively operate the Strata Corporation as a dictatorship. As such, he determined that his 1.09 vote was worthless.

[21] In 2005, Mr. Stewart sued Messrs. Marten, Freeman and 643 Co. in action No. 26484, Penticton Registry (“First Lawsuit”). In the First Lawsuit, Mr. Stewart alleged numerous failings including construction deficiencies and defects, however it is evident that his prime concern at the time was the Common Property Issue.

[22] The Strata Corporation (led by Mr. Marten as its president), countered with a claim for payment by Mr. Stewart of fines previously levied by the Strata for his unrelenting violation of the Strata’s bylaws.

[23] By June 2006 with the First Lawsuit in full swing, Mr. Marten retained the local representative of the Condominium Home Owner’s Association (“CHOA”) to provide the Strata Council with assistance and guidance.

[24] By this point, Mr. Freeman indicated that he would be selling Unit 201. Mr. Marten told Mr. Stewart that if he wanted to resolve the Common Property Issue, it was best to negotiate an agreement while Mr. Freeman still owned the unit. If a third-party purchaser bought it, it would become much more difficult to register a new strata plan addressing the Common Property Issue.

[25] In October 2007, after some four years of discussions and negotiations, Mr. Stewart and Mr. Marten negotiated a truce. The truce was accomplished with an agreement revising the Strata bylaws and strata plan to provide Mr. Stewart with much of the limited common property he sought. On January 23, 2008, the strata plan was amended to account for a portion of Mr. Stewart's limited common property. The First Lawsuit was discontinued against Mr. Marten however it continued against Mr. Freeman and 643 Co.

[26] As part of the settlement with Mr. Marten, Mr. Stewart signed a formal, all-encompassing release on January 29, 2008, that stated, in part, that he released Mr. Marten in his capacity as owner and developer from:

. . . of and from all actions, causes of action, claims and demands, whatsoever and wheresoever, which [he] ...can, shall or may have and which have resulted or in any way arisen out of or developed from, or which may at any time in the future result or in any way arise out of or develop from the development of land located at 1070 Lakeshore Drive. . . .”

[27] Revised development plans and strata bylaws were prepared granting Mr. Stewart much of what he sought as limited common property and many of the changes he sought to the bylaws. Mr. Stewart signed off on the amended bylaws in December 2008.

[28] The revised development plans and amended bylaws were registered at the Land Title Office on October 27, 2009. Shortly thereafter, Mr. Marten purchased Unit 201 from 643 Co. He did so through 669003 B.C. Ltd. (“669 Co.”), a company he incorporated for that purpose. Due to his previous unpleasant dealings with Mr. Stewart over strata issues, Mr. Marten assigned Unit 201's proxy to Ms. Tonita, his girlfriend's mother, who had been operating bed and breakfasts out of both units on his behalf.

[29] At this point, Mr. Marten effectively had two strata votes (one personally, and one through 669 Co.) to Mr. Stewart's one vote. Mr. Stewart remained frustrated that he had no effective say in the management of the Strata Corporation.

[30] Following the settlement of the First Lawsuit, relations between Mr. Stewart and Mr. Marten improved for a short time. However, Mr. Stewart was still upset and harboured ill-will towards the entire project.

[31] While Mr. Marten was doing what he could to make the Strata work, Mr. Stewart was not prepared to cooperate and refused to attend meetings, in effect boycotting the Strata. To him, there was no point. He believed Mr. Marten ran the Strata Building as if he was its sole owner. The Strata Corporation continued to routinely fine Unit 101 for various bylaw breaches and other infractions.

[32] The First Lawsuit went to trial in 2011 before Justice Harvey. Mr. Stewart and Mr. Freeman were self-represented. During the trial, and for reasons that are unclear, Mr. Stewart drop his claim against Mr. Freeman personally and proceeded against 643 Co. only.

[33] In written reasons dated April 29, 2011, Harvey J. granted Mr. Stewart judgment against 643 Co. for \$51,433.50 plus interest and costs. It was a hollow judgment and Mr. Stewart has been unable to collect any portion of it.

[34] In May 2012, Mr. Stewart commenced a second lawsuit against Mr. Marten as the only defendant. This second lawsuit was discontinued on June 10, 2014.

[35] On April 15, 2015, Mr. Stewart commenced the Winding up Action against the Strata Corporation. Neither Mr. Marten nor 669 Co. are defendants.

a. Mr. Stewart's Concerns with Mr. Marten

[36] Mr. Stewart remains upset with Mr. Marten for a variety of reasons but mainly because he feels bullied by Mr. Marten's ability to control the Strata.

[37] He says, for example, that Units 201 and 202 were always supposed to be residential units. Instead, Mr. Marten and Mr. Freeman (when he owned Unit 201) operated commercial bed and breakfasts out of them without consultation with or permission from Mr. Stewart. Mr. Stewart points out that after a few years of operating the "illegal" bed and breakfast businesses, Messrs. Marten and Freeman

approached him with the suggestion that if Mr. Stewart were to agree to the bed and breakfasts, the Strata Counsel would drop the significant fines that had by then been levied against him. He felt intimidated and threatened by this gesture.

[38] As another example, Mr. Stewart alleges that the minutes of various Strata Council meetings over the years are inaccurate, do not reflect the discussions that took place and were deliberately written to make him look bad. Mr. Stewart believes that Ms. Tonita, as the Strata's secretary, recorded matters in the Strata Counsel meeting minutes that were never discussed and that she made improper disparaging comments about Mr. Stewart's behaviour.

[39] Further, Mr. Stewart complains that Mr. Marten improperly and unilaterally built a third suite between Units 201 and 202 by extending one of the ground floor garages. The third suite is used as part of his bed and breakfast business. He constructed a staircase and a water pipe on the outside of the Strata Building without discussion or agreement.

[40] To add to the insult, Mr. Stewart alleges that, as the strata president, Mr. Marten was proposing to charge Mr. Stewart for expenses related solely to Unit 201 and Unit 202 on the basis that they were common strata expenses.

[41] Further issues and irritants include a fire door closing system that Mr. Stewart installed without the Strata's permission and fines levied against Mr. Stewart for unauthorized work on the interior of Unit 101.

[42] Mr. Stewart also complains that Mr. Marten and/or his guests frequently harass Mr. Stewart's customers, contractors, and other passers-by with rude and inappropriate comments. In the summer of 2016, Mr. Stewart sent twenty identical letters to Mr. Marten complaining of improper behavior towards his customers, a charge Mr. Marten vehemently denies.

[43] In the result, Mr. Stewart has had enough of Mr. Marten and, while he would like to continue to operate Fun City out of Unit 101, he wants nothing to do with Mr. Marten, the Strata or its bylaws.

b. Mr. Marten's Concerns with Mr. Stewart

[44] Over the years, Mr. Marten has become increasingly exasperated by Mr. Stewart's behavior, his boycott of Strata Council meetings, his failure to abide by the Strata's bylaws, pay fines that were levied, and by generally failing to act reasonably.

[45] By late 2010, Mr. Marten was at his wits' end and enlisted the advice and guidance of the South Okanagan Strata Association ("SOSA") in the management of the Strata Corporation. Since SOSA involvement, all Strata Council meetings and AGMs have been run in accordance with the *Act*. Maximum fines permitted under the *Act* were levied against Mr. Stewart for his alleged misdemeanors.

[46] Prior to 2011, strata fees charged per unit had always been \$96 per month. At the 2011 AGM, which Mr. Stewart did not attend, monthly fees were increased to \$425. The increase was necessary because insurance premiums for the Strata Building had increased, general repairs and maintenance to the Strata Building were required and, on SOSA's advice, a contingency fund needed to be established to cover future emergency expenses.

[47] Because Mr. Stewart was not paying his strata fees despite numerous written demands, the Strata Corporation's expenses were funded entirely by the strata fees paid by Mr. Marten and 669 Co.

[48] Other issues arose in the summer of 2011, involving the painting of windows and trellises, cleaning windows, Mr. Stewart propping a rear door open and a fence Mr. Stewart constructed in the rear of the Strata Building for storage of his rental equipment. Mr. Stewart resisted all attempts made by Mr. Marten or the Strata to discuss the issues. Mr. Marten says that Mr. Stewart maintained a defiant attitude towards him. Any time Mr. Stewart met with Mr. Marten, formally or by chance, the atmosphere was tense and was not conducive to discussing problems, let alone solving them.

[49] By the March 2013 AGM, Mr. Stewart had finally caught up on his delinquent strata fees. He last made any strata fee payments in December 2013 and has paid nothing since, except for pursuant to the Wilson Order.

[50] By April 2013, Mr. Marten had had enough of running the Strata. He was doing his best but felt he was being persecuted by Mr. Stewart at every turn. He looked at bringing in a professional strata manager to take over, but it was cost-prohibitive. He got advice from representatives of CHOA and educated himself on the *Act* and how strata corporations should operate. He decided to limp along as best he could because Mr. Stewart made it clear that he was not interested in being involved, and the Strata would not otherwise function.

[51] Further conflicts arose, including in March 2014 when Mr. Stewart accused Mr. Marten of threatening him. Mr. Marten agreed there were verbal altercations between them but took the position that he always attempted to keep discussions short, polite and civil. He denies ever threatening Mr. Stewart.

[52] At the May 2014 AGM, which was chaired by a representative of CHOA, and at the behest of CHOA, the Strata moved to change the strata fee allocation to be by unit entitlement. From that point, Unit 101 was to pay \$631.54 per month, Unit 201 was to pay \$523.96 per month, and Unit 202 would pay \$639.52 per month.

[53] Mr. Stewart refused to acknowledge the increase and refused to accept any written communications sent to him, calling them “harassing letters”. He returned all letters sent to him by the Strata unopened and marked “return to sender”.

[54] Shortly after the Wilson Order, the Strata sent a “white flag” letter to Mr. Stewart indicating that it would no longer fine him for his bylaw breaches, preferring instead to try to work things out. This letter too was ignored and returned to the Strata unopened.

[55] The last six or so years have been difficult. The Strata limps along with its expenses being paid solely by Unit 201 and Unit 202. Mr. Marten continues to run

his bed and breakfast business in the upstairs units and Mr. Stewart continues to run Fun City in Unit 101 downstairs. The Owners do not communicate at all.

IV. Mr. Stewart's Position

[56] Mr. Stewart says that this action is in reality a divorce between two people who have had a long, poisoned, tortuous and untenable relationship for years. The only realistic solution, he argues, is an order under seldom-used s. 284 of the *Act* to wind up the Strata Corporation. Ancillary orders would be needed to determine how title to the Strata Building would be held.

[57] Citing the oppression remedies and other provisions of the *Business Corporations Act* as analogies, the Mr. Stewart asserts that he is the victim of oppression and unfair prejudice at the hands of the Strata. He asserts that Mr. Marten uses his control of the Strata to oppress him. That oppression includes the ongoing assessment of fines against him for alleged bylaw infractions, scheduling Strata meetings when he is unable to attend, causing the Strata to pass resolutions prejudicing him, limiting his use and activities of Unit 101 and restricting his use of his limited common property.

[58] Mr. Stewart points to the history of the Development Property, history of unfulfilled expectations, breaches of the Joint Venture Agreement, the conflict between Messrs. Freeman, Marten and himself and the conflict between Mr. Marten's bed and breakfast business and Fun City. He references multiple examples of personality conflicts he has had with Mr. Marten over the years and what he views as unreasonable demands by Mr. Marten, who is able to use his two-thirds majority to dictate how the Strata is operated.

[59] He justifies his boycott of all Strata council meetings after April 2012 on the basis that attending was a futile waste of time because Mr. Marten had full control of the Strata. He complains that issues important to him were not discussed or were summarily dismissed and the Strata moved ahead with decisions that he did not agree with. As a way of protesting, he ceased paying his strata fees.

[60] In sum, Mr. Stewart submits that the Strata Corporation is dysfunctional, that he has been subjected to oppressive and unfair treatment by Mr. Marten to the point that the relationship cannot be salvaged. The Strata is at a deadlock leaving only two possibilities: i) either an order winding up the Strata under s. 284 of the *Act*, or ii) one of Mr. Marten or Mr. Stewart sells out.

[61] Mr. Stewart's preference is that the Strata be wound up because he feels it is in the best interests of the Owners, would end the significant unfairness to Mr. Stewart and would end the uncertainty and confusion that currently exists.

[62] He proposes that after the wind up the parties would enter into an air parcel plan/air parcel agreement as permitted under Part 9 of the *Land Title Act*.

V. The Strata's Position

[63] The Strata's position is straight forward. It submits that there is no legal basis for winding up the Strata and that Mr. Stewart's proposal to divide the strata into fee simple ownership or enter into an air parcel agreement will not work.

[64] Making an order to wind up the Strata in the circumstances of this case is unheard of and would set a dangerous precedent for the attempted resolution of situations where minority owners of a strata disagree with majority owners.

[65] It is not in the best interests of the Owners that the Strata be wound up, a prerequisite to any order under s. 284 of the *Act*, because:

- a) The Strata's current bylaws were freely agreed to by both Mr. Stewart and Mr. Marten as part of the resolution of Mr. Stewart's claim against Mr. Marten in the Joint Venture Action;
- b) Mr. Stewart has already litigated his claim against 643 Co. respecting the Joint Venture Agreement. The Strata was not in existence at the time the Joint Venture Agreement was entered into; and

- c) There is no legal basis for the court to make an order restricting Mr. Marten's right to vote. Neither Mr. Marten nor 643 Co. are parties to the Winding Up Action and accordingly their rights should not be affected by any orders made.

[66] The Lien Action for unpaid strata fees should be allowed. Mr. Stewart has improperly refused to pay strata fees since January 1, 2014, as required by the *Act*. Those fees must be paid from the funds currently being held in trust pursuant to the Wilson Order.

VI. S. 284 of the Strata Property Act

[67] Section 284 of the *Act* provides the authority for a strata corporation to be wound up. The relevant portions are:

- 284 (1) An owner, . . . of a strata lot . . . may apply to the Supreme Court for an order winding up the strata corporation.
- (2) On application . . . the court may make an order appointing a liquidator to wind up the strata corporation.
- (3) In determining whether to make an order under subsection (2), the court must consider
- (a) the best interests of the owners, and
 - (b) the probability and extent, if the liquidator is appointed or not appointed, of
 - (i) significant unfairness to one or more
 - (A) owners,
 - (ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners.

[68] Accordingly, before an order under s. 284 winding up the Strata is made, I must consider what is in the best interests of the Owners, the probability and extent of significant unfairness to one or more of the Owners and whether there will be significant confusion and uncertainty in the affairs of either the Strata Corporation or of the Owners, if a liquidator is appointed or not appointed.

VII. Discussion

[69] The overall purpose of the *Act* is to allow the shared ownership of a building on a cooperative basis. The nature of strata ownership is that owners engage in a form of communal living with the majority of the owners dictating and determining the direction of the strata.

[70] The *Act* clearly sets out the roles, duties and responsibilities of a strata corporation and its strata council. For any strata to work, all owners are required to follow the *Act*, and its regulations, as well as the strata's bylaws and rules. Without bylaws and rules, dysfunction, disharmony and chaos exist. Strata corporations are self-governing and are made up of *all* owners, each of whom has a responsibility to contribute, cooperate, and ensure compliance with the legislation, bylaws and rules.

[71] As was aptly put by Justice Voith in *Oldaker v. The Owners, Strata Plan VR 1008*, 2010 BCSC 776 at paras. 38 and 39:

[38] A central thesis underlying the interaction of owners within a strata corporation is that they engage in a form of communal living. The majority of owners dictates and determines the direction of the corporation. The following statements establish and expand on these propositions:

- a) Owning a strata lot and sharing ownership of the common property in a condominium development is a new system of owning property and has required the development of new mechanisms and procedures. Living in a strata development, as the Nova Scotia Court of Appeal stated, combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times: *Shaw Cablesystems v. Concord Pacific Group et al.*, 2007 BCSC 1711, 288 D.L.R. (4th) 252, at para. 10.
- b) The general rule under the SPA is that within a strata corporation "you are all in it together": *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085, 17 B.C.L.R. (4th) 63, at para. 35.
- c) It is not for this court to interfere with the democratic process of the strata council. Those who choose communal living of strata life are bound by the reality of all being in it together for better or for worse: *Oakley v. Strata Plan V1S1098*, 2003 BCSC 1700, 14 R.P.R. (4th) 242, at para. 16.
- d) It is obvious that public policy requires a methodology for resolving issues among owners in a strata corporation. That methodology is set out in the Strata Property Act. Without reference to or use of that statute, there would exist a form of anarchy in a strata building

and it would therefore be unlikely that the essential repairs and maintenance would ever get done. That the majority make the rules is an accepted way in which our democracy functions. In the case of the Strata Property Act that majority must be 75% of all the eligible votes: *Strata Plan VR386 (The Owners) v. Luttrell*, 2009 BCSC 1680, at para. 37.

[39] These cases establish that for better or worse the majority of owners make the rules. For better or worse the minority of owners are to abide by those rules. . . .

[72] If one or a minority group of owners refuses to follow the rules or acts unreasonably, discord will result. Cooperation requires all parties to act reasonably and make compromises. Regrettably, if one owner is by nature unreasonable, there is little the other owners can do to solve issues.

[73] On the evidence before me, I am easily satisfied that the Owners are at loggerheads and have been for a very long time. They cannot communicate civilly or at all. There have been confrontations between them that on occasion resulted in police involvement. Mr. Stewart's position is that throughout, Mr. Marten has provoked and bullied him and has used his power in the Strata Corporation to make his life as difficult and unpleasant as possible, and that therefore his poor behaviour is justified.

[74] Mr. Stewart struck me as a bitter man who does not believe he got a fair deal from Mr. Freeman at the outset, believed Mr. Marten was aligned with Mr. Freeman, and has never been prepared to make the Strata work. He has been stubborn and uncompromising throughout. He has "buyer's remorse" respecting both the Joint Venture Agreement and the 2008 amended bylaws. Overall, I found his evidence was clouded by his unhappy dealings with Mr. Freeman which in turn clouded his judgment concerning the Strata and Mr. Marten.

[75] I conclude that of the two, Mr. Stewart is the more blameworthy and unreasonable owner and is the main reason for the deadlock, animosity and dysfunction that exists with the Strata. Mr. Stewart withdrew from the Strata without a legal right to do so. He allowed his bitterness over the Joint Venture Agreement to get the better of him.

[76] Where Mr. Stewart's evidence conflicts with Mr. Marten's evidence, I prefer and accept that of Mr. Marten.

[77] Until the beginning of the trial in this case, Mr. Stewart sought various orders including that the 2008 amended bylaws be declared null and void, that Mr. Marten's right to vote be restricted (even though he is not a party to the Winding up Action), that common property be declared limited common property in favor of Unit 101 and that the Court appoint an administrator to oversee the affairs of the Strata Corporation. At the outset of the trial, Mr. Stewart abandoned that relief, seeking instead to have the Strata Corporation wound up pursuant to s. 284 of the *Act*.

[78] Section 284 of the *Act* is a rarely used remedy, and for good reason. The fact that the section refers to the use of a "liquidator" implies that it is intended to be used in drastic circumstances such as where the strata building is to be sold or demolished, where the strata is insolvent, or as was the case in *Buchanan v. S.P. VR 1411*, 2008 BCSC 977 ("*Buchanan*"), where the building is physically unsalvageable. In such a case, it would make sense to appoint a liquidator to do all things necessary to wind up the Strata. The section can only be invoked in cases where the court is satisfied that it is in the strata owners' best interests, and involves a balancing of significant unfairness to one or more of the owners and the nature and extent of confusion and uncertainty in the affairs of the strata corporation if a liquidator is appointed, or not appointed as the case may be. In my view, s. 284 was not designed for the situation that exists in this case where one disgruntled minority owner disagrees with the management of the Strata by the other two owners. The Strata cannot simply be "wound-up" as Mr. Stewart suggests without causing untold future issues and problems. Such a remedy will not solve anything.

[79] There is a dearth of case law dealing with s. 284. Counsel have only been able to refer to one case where it has been used in a similar situation. *Buchanan* involved a three-unit "leaky condo" strata in Vancouver that required significant and costly repairs that two of the three owners could not afford. A previous order had been made for the appointment of an administrator under s. 174 of the *Act* to run the

strata corporation. His fees and legal expenses had mounted to a significant level, adding to the difficulty. There were multiple previous court applications seeking directions on how to proceed.

[80] An application was brought by one owner that the strata be wound up and that the ownership continue as tenants-in-common. Similar to this case, the owners were in fundamental disagreement, could not cooperate with each other and it was unlikely that if repairs were ordered, the situation would improve. Justice Curtis stated at para. 37:

The good intention of the **Strata Property Act** notwithstanding this strata property, is dysfunctional both on a structural and organization level.

[81] That case cried out for one person to own the entire building. The upshot was that Curtis J. dismissed the application that the building be repaired, as he was satisfied that the value of the repaired property after the cost of repairs would be less than the value without repairs. The matter was adjourned to allow the parties to agree on a method of disposing of the unrepaired property. In other words, although a provisional order under s. 284 order was made on the basis that the strata property was dysfunctional on a structural and organizational level, Curtis J. deferred the order to allow the parties to consider the matter. At para. 39 he stated:

[39] . . . I am prepared to order the winding up of this strata property but before doing so, I wish to allow counsel and the parties to contemplate the possibilities as there may be better ways to realize their respective interests.

[82] He allowed the parties liberty to apply for the appropriate order once they had the opportunity to consider their respective positions. What ultimately happened in *Buchanan* is unknown.

[83] In my view, *Buchanan* is a unique case unique on its facts. It does not support Mr. Stewart's position that a similar order should be made in the Winding up Action which is not about significant repair costs to the Strata Building that, if ordered, would exceed its value, but rather is about Mr. Stewart being disgruntled because of decisions he made respecting the Joint Venture Agreement over 16 years ago, and his settlement with Mr. Marten respecting the First Lawsuit and the Common

Property Issue 12 years ago. Both the Joint Venture Agreement and the Common Property Issue are water under the bridge.

[84] In this case, I am not persuaded that the Strata's dealings with Mr. Stewart were unfair, done in bad faith, unjust, inequitable or unreasonable in the circumstances. To the contrary, it was Mr. Stewart's stubborn refusal to work with Mr. Marten and the Strata that is, I conclude, the reason the parties are deadlocked.

[85] For better or worse, Mr. Stewart must understand that he is the owner of one of three units in the Strata Building. He must accept that he entered into the Joint Venture Agreement voluntarily and, while it has not worked out to his liking, he is obliged to comply with the duties and obligations imposed on him under the *Act*, including the mandatory payment of strata fees. He cannot ignore the realities of strata property ownership.

[86] Mr. Marten, quite properly in my view, argues that winding up the Strata Corporation is not an effective solution. There would be no bylaws, guidelines or rules in place for the current and future owners to follow. Financing of future purchases would be problematic. It is likely that the value of the units would be negatively impacted. There would be nothing in place to deal with issues related to ongoing repairs and maintenance to common areas, walls, roof, mechanical equipment etc. There would be nothing in place for the payment of common utilities. Other issues would include concerns:

- a) That the Owners' property values would be adversely affected;
- b) About how maintenance of common portions of the building will be undertaken;
- c) About how the property would be divided;
- d) About whether the City would allow it;
- e) About whether lenders, past and future would have an issue;

- f) About the lack of control each owner would have over what other owners do in their space;
- g) About a loss of curb appeal if one owner decided to paint his/her share of the outside of the building a colour that did not fit in;
- h) About the challenge of getting access to the upper units from the outside of the building for maintenance purposes; and
- i) About how a roof leak would be dealt with if not all owners were impacted,

to name a few. I find these concerns to be reasonable and appropriate.

Appointment of an Administrator

[87] One thing that is clear in this case is that the personality conflict between Mr. Marten and Mr. Stewart makes the smooth running of this Strata Corporation impossible if the Owners are involved. There is no sign of the clash between them abating. A workable solution to the problem (and I have already determined that a s. 284 order is not a solution) is required.

[88] During submissions both Mr. Stewart and the Strata suggested that, while not a preference for either of them, the appointment of an administrator under s. 174(1) of the *Act* to oversee the Strata's affairs might work.

[89] Section 174 of the *Act* provides:

174 (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.

(2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.

(3) The court may

- (a) appoint the administrator for an indefinite or set period,
- (b) set the administrator's remuneration,

(c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and

(d) relieve the strata corporation of some or all of its powers and duties.

(4) The remuneration and expenses of the administrator must be paid by the strata corporation.

(5) The administrator may delegate a power.

(6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.

(7) Unless the court otherwise orders, if, under this Act, a strata corporation must, before exercising a power or performing a duty, obtain approval by a resolution passed by a majority vote, 3/4 vote, 80% vote or unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[90] In the Winding up Action, Mr. Stewart sought the appointment of an administrator under s. 174(1) as part of his relief sought. That relief was abandoned at the outset of the trial, but was resurrected during submissions with the Strata's agreement, as an alternative form of relief.

[91] The Strata's primary position remains that Mr. Stewart's request that the Strata be wound up should be dismissed. However, given the untenable circumstances the parties find themselves in and that Mr. Marten no longer wishes to run the Strata, if the Court considers that intervention is required, the appointment of an administrator for a period of one year and whose remuneration is paid for by the Owners in accordance with their respective unit entitlement would be a workable solution.

VIII. Decision

a. Stewart v. Strata Corporation KAS 2601

[92] I have already concluded that Mr. Stewart failed in his obligation to contribute to the Strata's affairs, cooperate with the Strata and Mr. Marten, and comply with the Strata's bylaws. He protests the fact that, as matters turned out, Mr. Marten has control over the Strata. Although Mr. Stewart is in the minority, he has mostly himself

to blame for the resulting discord. I am satisfied that Mr. Marten has made futile attempts at reasonable accommodations for Mr. Stewart.

[93] Mr. Stewart has the burden of proving that the Strata should be wound up. To do so, s. 284 of the *Act* requires that he show that:

- a) winding up the Strata is in the best interests of the Owners;
- b) it would be significantly unfair to one or more Owners not to wind up the Strata; and
- c) there would be significant confusion and uncertainty in the affairs of the Strata if it was not wound up.

[94] In my view, Mr. Stewart has failed to meet this burden. I can see no benefit to either party in making such an order. It would not solve the dispute or dysfunction that the parties suffer from or make the ownership of the Strata Building any more functional. If a winding up order was made, there would be nothing governing how future repairs and/or maintenance of the building would be managed or how utilities, taxes, or common property would be managed that minimized or eliminated conflict.

[95] In its written submissions, the Strata argued:

Much of Mr. Stewart's anger and frustration in the current claim relates to his continued unhappiness with the result of the joint venture he entered into with 643376. The Strata submits that Mr. Stewart seeks an order to wind up the Strata not because it is in the best interests of the owners, but because it would be a step towards reversing the Joint Venture Agreement that he has regretted since he signed it. For him, a wind up is a means to an end. The Strata cannot be held responsible for perceived injustices that pre-date its existence and which have already been litigated.

[96] I agree with these submissions.

[97] In the result, Mr. Stewart has not proven the requirements needed for a s. 284 order. In particular, he has not shown that such an order would be in the best interests of the Owners, including himself. Indeed, I conclude such an order would be detrimental to the Owners. Further, I conclude that that appointment of a

liquidator under s. 284 of the *Act* would be significantly unfair to Mr. Marten and 669 Co. who, while not blameless, are far less blameworthy than Mr. Stewart. A “divorce” would not allow Mr. Stewart to operate Fun City with impunity and without consideration for the Owners, present or future, of Unit 201 and Unit 202.

[98] Furthermore, in my view, there is no significant confusion or uncertainty that currently exists in the affairs of the Strata. It is continuing to operate under the *Act*, but without Mr. Stewart. If the Strata was ordered wound up, there would be significant confusion and uncertainty because there would be no framework under which the Strata Building could operate. Unless the parties agreed, which I find unlikely, there would be no basis for the payment of expenses, maintenance and repairs, and there would be no ability to govern the management of the Strata Building or the Owners’ behaviour.

[99] In sum, Mr. Stewart seeks the court’s intervention to wind up the Strata to solve a problem of his own making. In my view, s. 284 of the *Act* is not designed nor intended as a remedy in such circumstances. It is not intended as a method of breaking deadlocks between owners of a small Strata, where one owner is acting unreasonably and where the owners are intending to continue to own and occupy the building.

[100] A s. 284 order winding up the Strata Corporation is neither a viable nor reasonable solution in this case. Nor is an air space agreement (at best an extremely complicated arrangement) that would not resolve the deadlock and would likely create even more problems for the Owners.

[101] Accordingly, to the extent that the Winding up Action seeks an order to wind up the Strata under s. 284 of the *Act*, it is dismissed.

[102] Given the somewhat unique situation in which the Owners find themselves, the lack of cooperation between them, their personality conflicts, distrust for each other and inability to live in harmony, I conclude that the appointment of an

administrator under s. 174(1) of the *Act*, is the most reasonable solution going forward, and I make that order.

[103] The appointment of an administrator is the best interests of the Strata and the Owners. Mr. Stewart refuses to have anything to do with the Strata with Mr. Marten as its president. Mr. Marten is frustrated with Mr. Stewart's boycott of the Strata, his disregard of its bylaws and would like an unbiased third party involved. A third party administrator will take over operations, exercise the powers and perform the duties of the Strata. Hopefully, once in place the administrator will bring order to the chaos that now exists.

[104] If nothing else, an administrator would act as a buffer between the Owners to allow the Strata to function with some degree of normalcy.

[105] No prospective names of administrators or the cost of an administrator were put forward. I will leave it to the parties to agree on who the administrator will be, the fees that administrator will be paid and the administrator's terms of reference. Failing an agreement within thirty days of this judgment, the parties are to arrange a telephone hearing before me with their respective proposals. I shall then appoint the administrator and set the administrator's fees and his/her terms of reference.

b. Strata Corporation KAS 2601 v. Stewart

[106] Payment of strata fees are mandatory for all strata owners and cannot be withheld. For the foregoing reasons, I am amply satisfied that the Strata action against Mr. Stewart must succeed. The strata fees were properly assessed; however, as part of his protest against Mr. Marten and the Strata, Mr. Stewart has refused to pay them. This protest related to collateral complaints against Mr. Marten, and against decisions the Strata made that Mr. Stewart did not like. It had its genesis in the Joint Venture Agreement to which the Strata was not a party. The protest is ill-conceived. Mr. Stewart's refusal to pay his portion of the Strata's expenses has resulted in Mr. Marten and 669 Co. having to pay the entirety of the common expenses, including maintenance, upkeep and insurance for the past over six years.

[107] Those delinquent fees must be paid by Mr. Stewart to the Strata and, to the extent either or both of Mr. Marten and 669 Co. paid Strata expenses on behalf of Unit 101, those funds must be reimbursed by the Strata to them (“Reimbursement Funds”).

[108] Respecting the Lien Action, I make the following declarations and orders:

- a) A declaration that the Lien filed in the Kamloops Land Title Office on September 3, 2014, under number CA 3941374 on SL1 ranks in priority to every other lien or charge of whatever kind except those under the *Builder’s Lien Act*, S.B.C. 1997, c. 45 and those of the Crown, other than mortgages in favour of the Crown;
- b) A declaration that Mr. Stewart has made default of strata fees and certain monies secured by the Lien which are now due and owing to the Strata;
- c) A declaration that the amount due and owing to the Strata by Mr. Stewart, as of September 1, 2015, respecting SL1, which takes priority over every other lien or charge of whatever kind except those under the *Builder’s Lien Act* and those of the Crown, other than mortgages in favour of the Crown, is \$12,023.10 plus s. 118 charges and costs (the “Redemption Amount”);
- d) A declaration that the amount due and owing to the Strata by Mr. Stewart shall increase as further strata fees accrue and as the Strata incurs reasonable legal costs, land title and court registry fees, and other disbursements;
- e) An order that the Strata be granted judgment against Mr. Stewart for the Redemption Amount, subject to a further accounting of amounts due and owing to the Strata as at the date of judgment, less fines and other non-lienable charges, to be determined based on the date of the judgment;
- f) An order that within thirty days of the date of this judgment, the Redemption Amount, subject to a further accounting of amounts due and

owing to the Strata as at the date of judgment, less fines and other non-lienable charges, determined based on the date of the judgment, be paid to the Strata from monies being held in trust by Mr. Stewart's counsel pursuant to the Wilson Order;

- g) An Order that to the extent that the Reimbursement Funds were paid to replace Unit 101's delinquent strata fees, they shall be reimbursed by the Strata to either Mr. Marten or 669 Co., as the case may be; and
- h) Should the parties be unable to agree on the amount of the Reimbursement Funds, there shall be a reference to the Registrar to determine that amount.

[109] If required, the parties are at liberty to apply for additional orders to put the intent of my orders into effect.

IX. Costs

[110] The Strata Corporation seeks its reasonable legal costs and disbursements for registering and enforcing its lien: *Owners, Strata Plan KAS 2428 v. Baettig*, 2017 BCCA 377.

[111] Mr. Stewart suggests, and I agree, that the time at trial dealing with the lien issue was minimal. I allow one-half day of trial time, one-half day of preparation time and a reasonable amount for preparation and filing of the lien and pleadings, on a full indemnity basis, subject to review by the Registrar.

[112] There will be an Order pursuant to s. 118 of the *Act* that the actual reasonable legal costs incurred by the Strata in bringing the Lien Action be taxed before the Registrar of the Court, and that the full amount of the approved taxed legal costs be awarded to the Strata from Mr. Stewart. Those costs will rank in priority to every other lien or registered charge of whatever kind except those under the *Builder's Lien Act*, S.B.C. 1997, c. 45 and those of the Crown, other than mortgages in favour of the Crown.

[113] I understand that even though the Strata Corporation was successful in having the Winding up Action dismissed, it is not seeking costs against Mr. Stewart. If my understanding is incorrect, the parties are at liberty to make further submissions on the point provided they are made within 30 days of the date of this judgment.

“G.P. Weatherill J.”