IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brown v. The Owners, Strata Plan VR 42, VR 64, VR 153,* 2022 BCSC 812

Date: 20220516
Docket: S220055
Registry: Vancouver

Between:

Alan H. Brown

Petitioner

And

The Owners, Strata Plan VR 42, VR 64, VR 153 and Civil Resolution Tribunal

Respondents

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

The Petitioner, appearing in person:	A.H. Brown
Counsel for the Respondents:	No One Appearing
Place and Date of Hearing:	Vancouver, B.C. March 24, 2022
Place and Date of Judgment:	Vancouver, B.C. May 16, 2022

Overview

[1] This dispute arises from a claim brought by a strata owner before the Civil Resolution Tribunal (CRT). The CRT claim was brought to address an alleged overpayment of strata fees, which were not in conformity with the Strata Plan's Unit Entitlement system for calculating contributions, and to compel the Strata Council to adopt that calculation system. The CRT claim is not before this Court, and the owner who brought the CRT claim is not a party to this proceeding.

[2] The petitioner, Alan Brown, is an owner of two strata lots, both in Strata Plan VR 42. He is also a past president of VR 42's Strata Council (the "Strata Council") and has served on several strata councils. Mr. Brown's petition seeks to resolve the outstanding conformity issues under s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43, which permits an owner or tenant to apply to this Court for judicial intervention in the event of significant unfairness on behalf of a strata corporation. Specifically, the petitioner seeks to amend the Schedule of Unit Entitlement ("UE") and adopt a Schedule of Interest on Destruction ("IOD"). These remedies sought are beyond the jurisdiction of the CRT.

[3] Mr. James Bruce is the president of the Strata Council for the respondent, The Owners, Strata Plan VR 42. The issue involving Mr. Bruce is whether service upon Mr. Bruce constitutes service upon The Owners, Strata Plans VR 42, VR 64 and VR 153.

Background

[4] Adventures West Lakeside ("AWL") is a residential strata development located in Whistler, British Columbia. AWL consists of three sets of buildings, known as B Block, C Block and D Block. Each Block in turn has three separate buildings, typically containing three to five separate strata lots. All strata lots have patios.

[5] On April 28, 1972, the strata plan for AWL, Strata Plan VR 42 ("VR 42"), was registered in the Land Title Office, under the *Strata Titles Act*, S.B.C. 1966, c. 46

(the "*1966 Act*"). The *1966 Act* was the first statute allowing for the creation of strata properties in BC.

a) Unit Entitlement Issue

[6] Pursuant to s. 4(1)(f) of the *1966 Act*, the Schedule of UE determines the voting rights of owners, the quantum of the undivided share of each owner in the common property, and the proportion payable by each owner of contributions levied on them for expenses related to the control, management, and administration of the common property ("Contributions").

[7] The *1966 Act* did not contain any requirements related to UEs aside from mandating that UEs be expressed in whole numbers. The *1966 Act* did not contain any provision allowing for amendment of UEs. All strata legislation subsequent to the *1966 Act* has required that UEs be expressed in whole numbers.

[8] The history of the various strata enactments in effect in BC includes the:

a) *Strata Titles Act*, S.B.C. 1966, c. 45 (the "*1966 Act*");

b) *Strata Titles Act*, S.B.C. 1974, c. 89 (the "*1974 Act*");

c) *Strata Titles Amendment Act*, S.B.C. 1975, c. 74 (the "*1975 Amendment*");

d) *Condominium Act*, R.S.B.C. 1979, c. 61 (the "*1979 Act*"); and

e) *Strata Property Act*, S.B.C. 1998, c. 43 (the "*SPA*").

[9] According to the Schedule of UE filed with VR 42:

a) UE of "1" is assigned to SLs ranging from 476 to 507 square feet (area variance between units with the same UE is up to 6.5%);

b) UE of "3" is assigned to SLs ranging from 720 to 789 square feet (area variance between units with the same UE is up to 9.6%); and

c) UE of "4" is assigned to SLs ranging from 1,196-1,372 square feet (area variance between units with the same UE is up to 14.7%).

[10] VR 42's 1\3\4 UE system includes a crude approximation of the relative sizes of the SLs. VR 42 indicates that patios are included in the area measurements of its SLs.

[11] Originally, the Schedule of UE established UEs of “3” for 14 medium-sized SLs and “4” for 15 larger SLs, with a total UE of 102. In 1972, VR 42 SL’s were first offered for sale pursuant to a Sales and Rental Agreement ("1972 Sales Agreement"), which assigned a UE of "2" to the smallest SLs although they had been assigned a UE of "1" on the Strata Plans. In the earliest days of AWL until 1981, Contributions, including strata fees and special assessments, were charged as if the UEs were 2/3/4.

[12] On November 10, 1972, Strata Plan VR 64 ("VR 64") was registered in the Land Title Office and re-subdivided five of VR 42's UE "4" SLs into five smaller SLs assigned a UE of "1" and five medium sized SLs assigned a UE of "3". The total SLs increased from 29 to 34, but the total UE remained 102.

[13] On May 10, 1974, Strata Plan VR 153 ("VR 153") was registered in the Land Title Office and re-subdivided one more of VR 42's large "4" UE SLs into one smaller SL assigned a UE of "1" and one medium sized SL assigned a UE of "3". The total SLs increased from 34 to its current total of 35, but the total UE remained at 102.

[14] Pursuant to s. 16 of the *1966 Act*, VR 64 and VR 153 are not additional bodies corporate but are members of VR 42, as they are re-subdivisions of VR 42. I will therefore refer to these plans collectively as “VR 42” or “the Strata Plans”.

[15] An amendment to s. 1 of the *1974 Act* introduced a requirement that, subject to a narrow exception, UE must be based on square footage. However, a transitional provision under s. 66(2) of the *1974 Act* continued the application of s. 4(1)(f) of the *1966 Act* for UEs created under the *1966 Act*.

[16] Section 66(2) of the *1974 Act* was amended by s. 28 of the *1975 Amendment* to add subsection (c), which allowed some strata corporations to amend their Schedule of UE and adopt a Schedule of IOD as follows:

> 66 (2) Where a strata plan has been deposited with the Registrar under the *Strata Titles Act* repealed by this Act, herein referred to as the "former Act", the following provisions apply:
>
> ...
>
> (c) notwithstanding paragraph (a), a strata corporation may, by special resolution, amend its schedule of unit entitlement, and, if it does not have a schedule of interest upon destruction, it shall at the same time adopt such a schedule;

[17] This special resolution (3/4 vote) process for amending UE and adopting a Schedule of IOD was continued in s. 113 of the successor statute, the *1979 Act*, the relevant portion of which read:

> 113(1) Where a strata plan has been deposited with the registrar under the *Strata Titles Act*, S.B.C. 1966, c. 46, herein referred to as the "former Act", the following provisions apply:
>
> (c) notwithstanding paragraph (a), a strata corporation may, by special resolution, amend its schedule of unit entitlement, and, if it does not have a schedule of interest on destruction, it shall at the same time adopt such a schedule;

[18] In 1977 and 1979, the AWL owners approved and paid two special assessments based on a UE of 2/3/4: $8,499.92 in 1977 to allow VR 42 to purchase SL 11A, and $126,193.00 in 1979 for a new metal roof.

[19] On November 27, 1980, an Extraordinary General Meeting of AWL owners was held to discuss and vote on altering the UE system to a system based on the SL square footages. The proposed UE alteration was not approved at that meeting.

[20] On November 4, 1981, at the AWL Annual General Meeting ("AGM"), a resolution to change the UE to an area-based system excluding the patios was presented and defeated. However, a resolution to change the UE to an area-based system including the patios was approved ("1981 Resolution"). The AWL owners agreed to use the SL areas as determined in a survey to be prepared for that purpose.

[21] Section 113 of the *1979 Act* was in force, and was the applicable statutory authority, at the time VR 42 passed the 1981 Resolution to adopt its area-based Schedule of UE. However, VR 42 did not complete the statutory process by registering its 1981 Resolution and adopting a Schedule of IOD. There is no available record showing that the 1981 Resolution was fully documented and registered as required by the *1979 Act*. No existing record shows that a Schedule of IOD was adopted. Contributions for AWL owners were calculated using the 1981 Resolution area-based UE system without any owner complaint until 2019.

[22] From 1975 until 2000, BC's strata legislation expressly authorized strata plans like that of VR 42 to amend its Schedule of UE and adopt a Schedule of IOD through a special resolution with a 3/4 vote. VR 42 adopted a statutorily noncompliant solution to its UE issues through the 1981 Resolution.

[23] As of July 1, 2000, BC strata legislation became silent on how a strata corporation established under the *1966 Act* could amend its Schedule of UE and adopt a Schedule of IOD. Such amendment and adoption were neither prohibited nor expressly allowed under the *SPA.* An equivalent to s. 113 of the *1979 Act* was not continued into the *SPA,* which repealed the *1979 Act* and contained the following transitional provision:

> 293(1) Except as otherwise provided by this Act and the regulations, this Act and the regulations apply to a strata plan deposited and a strata corporation created under the *Condominium Act*, R.S.B.C. 1996, c. 64 or any former Act.

[24] The *SPA* contains provisions allowing for amendment of Schedules of UE, principally in s. 261. However, none of them apply to VR 42 since the provisions limit their application to:

a) Situations where there are facts, such as an error in the strata plan or a conversion of common property to a strata lot or the reverse (which do not apply to VR 42); and

b) Strata plans where the UE is calculated on the basis of habitable area under the *SPA* or on the basis of square footage in accordance with s. 1 of the *1979 Act*.

[25] In 2004, an owner noted that the UEs being used by AWL to calculate Contributions were noncompliant with strata legislation.

[26] In 2006, a detailed report was prepared by an owner and VR 42's volunteer accountant, Irving Buckwold. Mr. Buckwold concluded that amending VR 42's Schedule of UE was complicated and might not be possible. No steps were taken to alter the longstanding area-based system of assessing Contributions, including strata fees and special assessments.

[27] In February 2020, the new owner of SL10, the largest VR 42 unit, asserted that she was being overcharged for Contributions and that AWL was required to apply the 1/3/4 UE in the Strata Plans as the basis for calculating Contributions. At the same time, she questioned AWL's ability to charge her the same amount as had been charged to the previous SL10 owner for an encroachment of SL10 onto VR 42 common property.

[28] In late September 2020, another VR 42 owner circulated a document entitled "Unanimous Resolution" for consideration by the AWL owners (the "2020 UE Resolution"). The 2020 UE Resolution sought to have VR 42 formalize the basis for calculating Contributions based on the respective square footages of the SLs as set out in the Strata Plans, but excluding the patios, as measured in a 1981 Survey. The 2020 UE Resolution also sought that it be registered in the Land Title Office.

[29] Based on one vote per SL, the 2020 UE Resolution received support from 85.7% of VR 42 owners. However, the 2020 UE Resolution could not be registered in the Land Title Office because the owners' approval was not unanimous, as required by s. 100 of the *SPA*.

[30] In March 2021, pursuant to the *SPA*, the owner of SL 10 was granted a hearing before VR 42's Strata Council of her claim for repayment of alleged

overpayment of her Contribution and adoption of the 1/3/4 UE system for allocating Contributions. Following that hearing, the Strata Council issued a decision denying the owner's demands on the basis that: the existing area-based system was fair; adopting the 1/3/4 system would be significantly unfair to many owners; Strata Council considered itself bound by the 1981 Resolution; and the current UE system had been employed for 39 years without a single complaint until then.

[31] On August 6, 2021, the owner of SL 10 commenced a proceeding before the CRT (Dispute Notice ST-2021-006109) asserting the same claim that she argued before the Strata Council in May 2021.

b) Entitlement upon Destructive Event Issue

[32] VR 42 consists of wood frame buildings that are now almost 50 years old. VR 42 does not have a registered Schedule of IOD outlining the distribution of proceeds to owners upon a sale, fire, or other destructive event (collectively, a "Destructive Event").

[33] As mentioned, the Strata Plans in issue were incorporated under the *1966 Act*. The *1966 Act* provided that in a Destructive Event, the distribution of proceeds would be proportional to the UE of the respective SL (ss. 15 and 18). The *1966 Act* did not require a Schedule of IOD to be filed with a strata plan. Thus, VR 42 did not have a Schedule of IOD.

[34] The *1974 Act* introduced a requirement under s. 3(1)(g) that a Schedule of IOD based on unit value be filed with all strata plans. Later, the *1975 Amendment* added a provision allowing strata corporations created under the *1966 Act* to adopt a Schedule of IOD if it did not already have one. This provision was carried over to the *1979 Act* under s. 113. VR 42 still had not adopted a Schedule of IOD.

[35] On October 1, 2020, Strata Council convened an information meeting for the VR 42 owners to discuss UE and encroachment issues. The owner of SL 29 raised a second concern related to VR 42's UE and pointed out that the 1/3/4 UE is significantly unfair as a basis for calculating each owner's entitlement to

payment/compensation in the case of a Destructive Event, which she said would apply in a winding up of VR 42.

[36] Assuming the values of the SLs are as listed by the BC Assessment Authority for 2021 and owner entitlement after a Destructive Event is based on UE, then:

a) the smaller UE "1" SLs would receive between $198,010–$313,810 less than they would receive based on 2021 assessed values. At $198,010 less than the SL's value, the UE "1" owner would receive 60% and lose 40% of the value of their SL. At $313,810 less than the SL's value, the UE "1" owner would receive 49% and lose 51% of the value of their SL;

b) of the mid-sized UE "3" SLs, two SLs would receive less than their entitlement based on assessed values ($10,829 for B1 and $49,729 for B6). The rest of the UE "3" SLs would receive between $23,971–$141,971 more than their entitlement based on assessed values; and

c) of the large UE "4" SLs, three would receive between $48,839–$83,539 less than their entitlement based on assessed values, and the remaining five SLs would receive between $161.00–$157,561 more than their entitlement based on assessed values.

[37] The Strata Council concluded that upon a Destructive Event, the sharing of proceeds among the owners based on the registered UE would be extremely unfair, particularly given that a SL with a UE of "1" would be entitled receive up to 48% less in proceeds than they would receive if the allocation were based on each SL's relative assessed value. While the variances for the other SLs would be smaller, they would still be significant compared to a relative value-based distribution.

c) VR 42's Attempt to Resolve Issues

[38] VR 42's 2021 AGM was held via Zoom video call on November 10, 2021. 32 owners attended out of a total of 35 SLs, either in person or by proxy (some owners

own multiple units). Voting was by secret ballot, pursuant to a request by the owner of SL 10. A Resolution numbered 03-21 was approved by 84.4% of the VR 42 owners.

[39] Pursuant to Resolution 03-21, the majority of owners approved Strata Council cooperating with the petitioner to seek orders from the BC Supreme Court to:

a) Amend AWL's Schedule of UE to an area-based system or, alternatively, deem a resolution to have been passed by the requisite majority that establishes cost sharing on the basis of SL areas as set out in the Strata Plans, excluding the areas of the patios; and

b) Adopt a Schedule of Interest on Destruction, or such other process as may be needed, that establishes the entitlement of the owners in the event of a Destructive Event on the basis of the BC Assessment Authority's assessed values of the SLs, in accordance with Part 16 of the *SPA*.

[40] At the 2021 AGM, 87.5% of VR 42 owners also approved Resolution 07-21. Pursuant to Resolution 07-21, the owners approved amending the bylaws to indicate that VR 42 calculates strata fees and special assessments in accordance with the 1981 Resolution.

d) The CRT Claim

[41] As mentioned, the owner of SL 10 commenced her CRT claim on August 6, 2021 (ST-2021-006109).

[42] On December 23, 2021, the CRT claim was adjourned to give VR 42 until January 21, 2022 to provide the CRT with a copy of this petition filed in the BC Supreme Court. If VR 42 provides the filed petition by that date, the CRT claim "may be re-escalated to consider whether the CRT should refuse to resolve the dispute under [s. 11 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25]." If VR 42 does

not provide the filed petition by that date, then the CRT claim will proceed through the normal CRT process.

[43] VR 42 provided the CRT with a copy of the filed petition, and on March 1, 2022, the CRT released its summary decision finding that the issues in the CRT claim by the owner of SL 10 overlapped with those raised in these proceedings and that the issues were "more appropriately dealt with alongside the BCSC petition in the BCSC". Accordingly, the CRT refused to resolve the claims of SL 10's owner.

Discussion

a) Service on VR 42

[44] The petitioner seeks an order that service upon James Bruce, president of the VR 42 Strata Council, at 5025 Connaught Drive, Vancouver, British Columbia, shall constitute service upon the respondent, The Owners, Strata Plans VR 42, VR 64 and VR 153. I find that it does.

[45] Section 64 of the *SPA* provides:

> 64. Despite section 63 but subject to another enactment or a court order, service on a strata corporation of a notice of a proceeding in any court may be effected by
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> (a) personal service on a council member, or
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> (b) mailing it, by registered mail, to the strata corporation at its most recent mailing address on file in the land title office

[46] Therefore, s. 64(a) of the *SPA* allows me to find that service upon Mr. Bruce, as an owner of SLs in VR 42 and council president, is effective service on the Strata Plans. Because subdivisions of VR 42, VR 64 and VR 153 are not additional bodies corporate, but are members of VR 42: the *1966 Act*, s. 16, service upon Mr. Bruce is sufficient.

[47] I find that service upon James Bruce constitutes service upon the respondent.

b) Significantly Unfair Action, Threatened Action, or Decision

[48] The petitioner seeks a declaration that the proposed adoption by VR 42's Strata Council of the 1/3/4 UE system constitutes a significantly unfair action, or threatened action, by, or decision of, the Strata Council, contrary to s. 164(1) of the *SPA*.

[49] Section 164 of the *SPA*, provides, in part:

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

[50] The petitioner contends that the Strata Council's decision to not fully and vigorously defend the CRT claim by the owner of SL 10 and subsequent communication of that decision to the owners constitutes a significantly unfair action, threatened action, or decision under s. 164(1)(a) of the *SPA*. As a result, Strata Council has exposed all VR 42 owners to the prospect of being forced to adopt the 1/3/4 UE system, unless the relief sought in his petition is granted.

[51] Thus, the petitioner asserts that I must consider whether the Strata Corporation has taken an action, threatened an action, or made a decision, and if so, whether it is significantly unfair. If these first two factors are established, then I must consider the appropriate remedy.

[52] The petitioner contends that the CRT's decision refusing to resolve the CRT claim does not change the situation, including his qualification for relief under s. 164 of the *SPA.* The CRT found that the issues in the CRT claim were more appropriately dealt with alongside the petition in this Court, leaving the claim unresolved. Accordingly, the petitioner argues that VR 42 is still in jeopardy of being forced to adopt the registered 1/3/4 UE system.

1. Action, Threatened Action, or Decision

[53] The terms "action" and "decision" in s. 164 must be interpreted in a broad and inclusive manner that comports with the statutory scheme and objectives of the *SPA*: *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 at para. 60 [*King Day*].

[54] In *King Day* at paras. 61–62 and 64, Dickson J.A. explained:

> [61] … the object of the *Strata Property Act* is to provide a framework of rules for cooperative group living within a democratic community in which no owner possesses, or can possess, exclusive control of the building. Among other things, this involves the fair sharing of common expenses and the prevention of significantly unfair conduct among community members. The statutory framework is designed to achieve these objects by providing that owners' contributions must be calculated based on each strata lot's unit entitlement, which is set at the outset with a view to achieving a fair cost allocation: *Strata Property Act,* ss. 99. 108, 195, 246(3) and (5); *Strata Property Regulation*, s. 6.4(2). However. the framework also empowers a strata corporation to decide to use a different formula for the same purpose and enables the court to act as a final check on its powers and to resolve significant dysfunction within the community: *Strata Property Act,* ss. 100, 108, 164, 165; *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 at para. 23; *Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW 3271*, 2016 BCCA 118 at para. 69.
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> [62] As Justice Garson explained in *Dollan*, s. 164 is a remedial provision. Where the outcome of majoritarian decision-making yields results that are significantly unfair to the interests of a minority owner, the court is empowered to step in and provide a remedy: at para. 24. By this means, the framework protects against the risk of minority oppression and unfairly prejudicial conduct, the former being an inherent weakness within majority-ruled democracies. An interpretation of "action" and "decision" that encompasses such conduct on the part of a strata corporation, regardless of whether it may be otherwise permissible, best affords such protection.
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> …

> [64] In addition to safeguarding minority rights, a broad and inclusive interpretation of the words "action" and "decision" in s. 164 is consistent with their grammatical and ordinary meaning. An action or decision is not identifiable as such based on whether it is unlawful or noncompliant with statutory criteria. On the contrary, ordinarily an action may be either lawful or unlawful, compliant or noncompliant. The same is true of a decision.
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> [Emphasis added.]

[55] The petitioner argues that, by virtue of *King Day*, the *SPA* enables the Court to resolve the current significant dysfunction within AWL's strata community with respect to establishing a fair UE system for determining Contributions and entitlement upon a Destructive Event. I agree. I find that the Strata Corporation has taken an action, threatened an action, or made a decision for the purposes of s. 164 of the *SPA*, and I must now determine whether that action, threatened action or decision amounts to significant unfairness.

2. Significant Unfairness

[56] The meaning of the phrase "significantly unfair" has been considered by a number of cases, including: *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 [*Dollan*]; *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, aff'd 2003 BCCA 126 [*Reid*]; and *Gentis v. The Owners, Strata Plan* VR 368, 2003 BCSC 120 [*Gentis*].

[57] *Dollan* confirmed that "significantly unfair" encompasses oppressive and unfairly prejudicial conduct, and in *Gentis*, Masuhara J. elaborated:

> [28] I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that [a] court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.
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> [29] I am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) at 1349.

[58] In the Court of Appeal's decision of *Reid*, Ryan J.A. cited *Gentis* and commented further on the meaning of "significantly unfair" at para. 27:

> [27] … I agree with Masuhara J. that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the *Condominium Act*, which was to put the legislation in "plain language" and make it easier to use (British Columbia, *Official Report of Debates of the Legislative Assembly*, Vol. 12 (1998) at 10379). I also note that the term "unfair" is defined in the *Canadian Oxford Dictionary* as "not just, reasonable or objective"...

[59] One of the issues raised in *King Day* was whether imposing compliance with the cost allocation scheme prescribed by the *SPA* (VR 42's incorporating legislation) can ever amount to a "significantly unfair" action or threatened action or decision. Dickson J.A. resolved the issue at para. 69:

> [69] I agree with the strata corporation that, as a general rule, conduct that complies with the prescribed cost allocation scheme in the *Strata Property Act* will not amount to a significantly unfair action or decision for s. 164 purposes. However, I do not agree that virtually no exceptions to this general rule are possible. As cases such as *Seven Estate, Fraser* and *Shaw v. the Owners Strata Plan LMS 3972 et al.,* 2008 BCSC 453 exemplify, on occasion it may be oppressive or unfairly prejudicial for a majority of owners to "stand on their legal rights" and insist on allocating common expenses based on unit entitlement in the absence of a duly authorized resolution to use a different formula: see also comments in *Christensen v. The Owners, Strata Plan KAS468,* 2013 BCSC 1714 at paras. 33–34. In these circumstances, the court is entitled to intervene and provide a remedy. As discussed, a broad and inclusive interpretation of s. 164 that enables judicial intervention of this sort advances the objects of the *Strata Properly Act*. In my view, such an interpretation does not lead to any internal inconsistency.

[60] The petitioner contends that since 1975, a "gold standard" of fairness has been in effect, requiring UE to be based upon each SL's "habitable area" in square footage, excluding patios. Proceeds to owners upon a Destructive Event are therefore based upon the relative values of the SLs in the development, as published by the BC Assessment Authority. The 1/3/4 UE system does not conform to this "gold standard", and the petitioner submits that it is significantly unfair.

[61] On the basis of this Court's power to interfere with a significantly unfair action or decision of a strata council, I will assess the fairness of both VR 42's cost sharing regime and VR 42 owners' entitlement upon a Destructive Event.

(i) Cost Sharing Regime

[62] Throughout its 49-year history, VR 42 has never assessed the Contribution for strata fees and special levies based on the registered 1/3/4 UEs in the Strata Plans. The petitioner contends that this is not surprising, considering its unfairness. From 1972 until 1981, all strata fees and special assessments were assessed and paid on a 2/3/4 UE basis. Since 1981, the area-based system adopted in the 1981 Resolution has been applied to all strata fees and special assessments for the past 41 years without any issue.

[63] Based on their relative areas in square feet, an average SL with a UE of "1" should have been assigned a UE of "1.7", so they were 70% larger than the size represented by the UE; SLs with a UE of "3" should have been assigned a UE of 2.6, so they are 13% smaller than the size represented by their UE; and SLs with a UE of "4" should have been assigned a UE of "4.4", so they are 10% larger than the size represented by their UE.

[64] The petitioner contends that in comparison to an area-based system, applying the 1/3/4 UE system would result in, on average:

a) the UE "1" owners paying only 58% of what they should have;

b) the UE "3" owners paying 16% more than they should have; and

c) the UE "4" owners paying only 90% of what they should have.

[65] The petitioner submits that I should find that adoption of the 1/3/4 UE as the cost sharing regime for VR 42 would result in variances that are far beyond mere prejudice or trifling unfairness. He argues that enforcing VR 42's UE as the basis for setting annual Contributions—in compliance with s. 99 of the *SPA*—would involve enforcing a UE-based cost allocation system when the UE itself is noncompliant with

s. 246 of the *SPA* and has been noncompliant with all strata legislation in force since 1974.

[66] I agree with the petitioner and find that adoption of the 1/3/4 UE system would result in a significantly unfair cost sharing regime for VR 42 owners, which is contrary to s. 164 of the *SPA*.

(ii) Entitlement upon a Destructive Event

[67] The petitioner further argues that the 1/3/4 UE would produce an even more significantly unfair result for distributing proceeds after a Destructive Event.

[68] Pursuant to the *1966 Act*, distribution upon a Destructive Event was linked to UE. However, in the *1974 Act*, and for the past 46 years, the BC legislature has adopted a value basis for the distribution of proceeds in the event of a Destructive Event. The values of SLs are determined by reference to the most recent assessments by the BC Assessment Authority; therefore, dispute over the calculated value pursuant to the statute is avoided.

[69] The petitioner argues that the value-based system specified in the *SPA* for the distribution of proceeds after a Destructive Event is evidence of the legislature's intention to produce a reasonable and fair result to all strata owners. Like the area-based cost sharing system, the value-based system should be considered the "gold standard" of fairness for the calculation of distributions after a Destructive Event.

[70] Despite the legislative implementation of a value-based system, VR 42 does not have, and has not ever had, a registered Schedule of IOD.

[71] The petitioner argues that a 1/3/4 UE basis for calculating each owner's entitlement upon a Destructive Event is significantly unfair, particularly to the UE "1" owners. At $198,010 less than the unit's value, the UE "1" owner would receive 60% and would lose 40% of the value of their unit upon a Destructive Event. At $313,810 less than the unit's value, the UE "1" owner would receive 49%, so they would lose 51% of the value of their unit upon a Destructive Event.

[72] I accept the petitioner's submission that the distribution of proceeds upon a Destructive Event based on the 1/3/4 UE system is significantly unfair given the entitlement of each owner would not be proportionate to the value of their SL. I find this result to be unreasonable and transcends beyond mere prejudice or trifling unfairness.

c) Remedy

[73] The petitioner seeks an order that the Schedules of UE for the Strata Plans be amended so that the UE of each SL shall be the total area of the SL as set out in each of the Strata Plans, excluding the patio, converted into square metres, rounded to the nearest whole number. The petitioner also seeks an order that such amendments be deemed to have been passed unanimously or by the requisite majority.

[74] The petitioner seeks an order that VR 42's Strata Council forthwith register its resolution at the Land Title Office, and the Registrar of Land Titles accept and register any order arising from this petition as well as the amended Schedules of UE for VR 42. The petitioner further asks this Court to order that the registered resolution and amended Schedules of UE be retroactive to November 1, 2019.

[75] The petitioner seeks a declaration that VR 42 adopt a Schedule of IOD pursuant to which the interests of the VR 42 owners and their entitlement to proceeds upon a Destructive Event are set out in Part 16 of the *SPA*, including ss. 273(1)(d)(ii) and 278(1)(f). The petitioner seeks an order that VR 42's Strata Council forthwith register such resolution at the Land Title Office and that such resolution be retroactive to November 1, 2019.

[76] I grant all orders sought. As discussed in *King Day*, s. 164 "enables the court to act as a final check on [a strata corporation's] powers and to resolve significant dysfunction within the community": at para. 61. Such changes would bring VR 42 into full compliance with the statutory scheme in the *SPA* and its "gold standard" of fairness, and I find that they are supported by the majority of VR 42 owners and are in their best interests as a community.

1. Deeming Unanimous Passage of a Resolution

[77] Section 100 of the *SPA* allows a strata corporation to use an alternate formula for the calculation of Contributions (other than the mandated formula under s. 99) as long as a resolution is passed by a unanimous vote:

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

[78] In most cases, absent unusual circumstances, a petitioner is required to seek resolution under s. 100 before bringing an application under s. 164: *King Day* at para. 77; *Liverant v. The Owners, Strata Plan VIS-5996*, 2010 BCSC 286; *Biles v. The Owners, Strata Plan LMS749*, 2017 BCSC 1560.

[79] At the 2021 AGM, VR 42's Resolution 07-21 was approved by an 87.5% majority, which confirmed a desire to continue assessing Contributions using an area-based system. Resolution 03-21 was approved by an 84.4% majority, which allowed the Strata Council to seek a remedy from this Court adjusting the Schedule of UE to an area-based system and adopting a value-based Schedule of IOD. However, neither Resolution 07-21 nor Resolution 03-21 met the unanimous vote requirement under s. 100.

[80] In *Dollan*, Garson J.A. explained that s. 164 is a remedial provision:

> [24] … The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose. I agree with what Masuhara J. said in *Gentis* that the outcome of the vote is one factor to be considered in determining if the impugned action is unfair. I do not agree with the suggestion in [*Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791] that provided the process

> is fair and democratic, a court should defer to the decision of the strata council or corporation.

[81] In *The Owners, Strata Plan VR1767 v. Seven Estate Ltd. et al.*, 2002 BCSC 381 [*Seven Estate*], a parking area's strata lot UE of 4030 was initially set due to an error by the developer. A 1989 resolution was passed reducing the UE of the parking lot SL from 4030 to 2015, but it was not implemented. However, the owners acted for several years as if it had been implemented. The issue of which UE should apply arose when the strata council approved certain special levies. Justice Martinson concluded that the statutory framework does not allow for amendments to the UE under s. 261 of the *SPA* because that section applied only to residential strata lots. However, Martinson J. found that did not prevent her from finding nonetheless that it would be significantly unfair to assess contribution based on a UE of 4030 and allow the owners to benefit from this error. As part of the order, Martinson J. deemed the strata plan amended to provide that the parking lot has a UE of 2015.

[82] In *King Day*, the parkade SL was assigned a UE of 29.82%. This was allegedly unfair since most of the common property was designated as limited common property for the exclusive use of the hotel lots or the commercial lots. By agreement between the strata council and the parkade owner, strata fees were assessed for several years as if the UE of the parkade had been reduced to 18%. The Court of Appeal confirmed the trial judge's finding that calculating the parkade owner's share of Contributions at 29.82%, as specified in the schedule of UE, would be significantly unfair, and therefore should be calculated at 18% instead.

[83] The petitioner contends that the long-standing manner in which VR 42 dealt with the perceived unfairness of its UE is similar to the facts in *King Day,* where Dickson J.A. stated:

> [70] Nor do I agree that the circumstances of this case involve no exceptional features. On the contrary, the perceived unfairness associated with allocating common expenses to the parkade lots based on unit entitlement of 29.82% dates back to 1996, when the property was still under development. That perception has continued unabated since then and has been addressed by a mutually acceptable, albeit technically noncompliant, solution, namely by King Day and the strata corporation, through council,

> agreeing to use a different cost allocation formula, as duly recorded in the minutes... In my view, these unusual circumstances place the case well outside the norm.

[84] The petitioner contends that the circumstances here involve exceptional features similar to those found in *King Day* and *Seven Estate* in that:

a) The 1/3/4 UE has never in the 49-year history of VR 42 been applied to strata fees or special assessments;

b) The 2/3/4 UE utilized from 1972 to 1981 was closer to a fair cost allocation, but not as close to the fairness standard of area-based cost allocations adopted in 1981, which was accepted by the owners until early 2020;

c) Since fiscal 1982, the owners have embraced the area-based cost allocation system because it is fair and not materially different from the "gold standard" of fairness represented by the *SPA*;

d) By 2020/2021, the 2020 UE Resolution received broad support from 87.5% of the owners;

e) At the 2021 AGM, Resolution 03-21 was approved by a 27:5 (84.4%) majority, including owners who would fare worse in an area-based system, that expressed strong support for formalizing:

   (1) an area-based UE system for assessing strata fees and special assessments; and

   (2) a value-based system for distribution after a Destructive Event; and

f) Approval of Resolution 07-21 by a 29:3 majority (90%) at the 2021 AGM confirms the owners' desire to provide notice through VR 42's bylaws that they have chosen to continue with assessing strata fees on an area-based system.

[85] The discretion provided by s. 164 was employed in *King Day*, to deem a resolution to have been passed unanimously under s. 100 of the *SPA* to effect a change in the method of calculating its strata fees and special assessments.

[86] A further example of the broad reach of the jurisdiction under s. 164 and more generally, the *SPA*, in the face of dysfunction within the community, was addressed in *Fraser v. Strata Plan VR1411 et al*, 2006 BCSC 1316 [*Fraser*]. At para. 61, Justice Cullen, as he then was, found that it would be significantly unfair to direct the common expenses at issue to be paid by the owners in accordance with s. 99 of the *SPA.* Cullen J. ordered that the amended bylaws passed on August 11, 2003 be revoked and deemed Appendix B as a unanimous resolution pursuant to s. 100 of the *SPA*: at para. 62.

[87] The petitioner contends that applying the same principles to VR 42 provides the necessary discretion to allow this Court to authorize VR 42 to adopt the system contained in Part 16 of the *SPA* for distribution upon a Destructive Event. He says that there are three factors here which make the circumstances of VR 42 unique, and offer comfort in granting the orders sought by him.

[88] First, this is the only case where the UE is not area-based. In the cases referred to above, the court ordered variations to either UE or the method of calculating strata fees despite the fact that the UE was area-based and therefore in theory at least, inherently fairer than VR 42's UE.

[89] Second, this is the only case where without an order in this proceeding, the distribution among owners following a Destructive Event would likely be determined by the non-area-based UE and not by the value of the SLs.

[90] Third, this is the only case where the orders sought would produce results that were expressly allowed by the legislature for 25 years for strata corporations like VR 42, which were created under the *1966 Act*. The legislation in s. 113 of the *1979 Act* and s. 66 of its predecessor legislation (the *1974 Act*), allowed such strata corporations to correct significant unfairness in both its cost sharing and its

distribution upon a Destructive Event. The strong majority support in this case for both an amended UE and value-based distribution after a Destructive Event easily exceeds the 75% majority required in s. 66 of the 1*974 Act* and s. 113 of the *1979 Act*.

[91] The petitioner asserts that the basis for granting the relief sought in the petition, in the absence of the unanimous resolution specified in s. 100(3) of the *SPA,* is the same broad and unfettered discretion authorized in s. 164 and is the form of relief approved by the Court of Appeal in *King Day* and *Fraser.*

[92] However, the petitioner argues that an order to authorize use of a formula other than the one set out in s. 99 of the *SPA* for calculation of owners' Contributions is less helpful and may even be detrimental to the VR 42 community since it would leave unchanged the even more unfair distribution upon a Destructive Event under the 1/3/4 UE. For that reason, the petitioner contends that if the relief is granted according to s. 100, consideration of the remedial nature of the *SPA* commends that I order and declare that VR 42 is bound by the value-based system of distribution after a Destructive Event as contemplated in Part 16 of the *SPA*.

[93] It is apparent from the reasons for judgment in both *King Day* and *Fraser* that, as here, there was opposition to the resolutions that were in each case deemed to be unanimous. However, in the result that the Court finds that a strata corporation has acted in a significantly unfair manner, the Court has discretion under s. 164 to remedy the unfairness by deeming a unanimous resolution.

[94] Therefore, as this Court has broad discretion under the remedial provision of s. 164 of the *SPA*, I grant the relief sought by the petitioner. I deem a resolution has been passed unanimously by The Owners, VR 42, VR 64, and VR 163, approving amendment of the Schedules of UE for the Strata Plans to an area-based system and adoption of a value-based Schedule of lOD, pursuant to which the owners' interests and entitlement to proceeds upon a Destructive Event are set out in Part 16 of the *SPA*.

2. Retroactive Relief

[95] Finally, the petitioner seeks an order that any relief achieved in his petition should be retroactive to November 1, 2019, the date of the purchase of SL 10 by its present owner. He argues that such a remedy exists pursuant to s. 164 of the *SPA.*

[96] A retroactive remedy is available under s. 164 of the *SPA*, and this was determined in *Shaw v. The Owners Strata Plan LMS 3972 et al.*, 2008 BCSC 453 [*Shaw*]. There the Court declined to apply the decision in *Large v. Strata Plan No. 601*, 2005 BCSC 1128 on the basis that no cases were cited to support rejecting a retroactive order, and that it ignored the plain wording of s. 164. At paras. 49–51, Justice Koenigsberg stated:

> [49] The learned trial judge had no cases cited to support that position. Further, to my mind it ignores the plain wording of s. 164 which has three subsections, only one of which relates specifically to regulating future affairs. Thus, the wording of the statute itself does not prohibit the Court from providing a remedy which has retroactive effect.
>
> [50] In [*Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335] the Court concluded at para. 105, that:
>
> > Section 164 permits the making of "any interim or final order [the court] considers necessary to prevent or remedy" significantly unfair actions or conduct. Such wording, in my view, permits not only the making of orders to govern future conduct, but also remedy past conduct.
>
> [51] I agree with that interpretation.

[97] As the petitioner in *Shaw* was granted retroactive relief pursuant to s. 164 of the *SPA*, I order retroactive relief to the petitioner in this case to November 1, 2019.

[98] The present owner of SL 10 purchased that lot based upon the documentation that existed at the date of her purchase. I acknowledge the unfairness of depriving her of remedies that might arguably be available to her. However, I have found that the Strata Plans as registered at the time that SL 10 was purchased by Ms. Learmonth contain a UE system that would result in significant unfairness to a majority of VR 42 owners. As a result, I order that the remedy granted in this petition must be retroactive to November 1, 2019, so that the significant unfairness can be fully remedied without any further uncertainties.

3. Registration in the Land Title Office

[99] According to the petitioner, Mr. James Bruce is prepared to accept such an order and register the resolution of these proceedings at the Land Title Office on behalf of VR 42's Strata Council. Based on that representation, I grant an order that the Registrar of Land Titles accept and register Schedules 1A, 1B and 1C to Resolution "A" to this order as the amended Schedules of UE for, respectively, Strata Plans VR 42, VR 64, and VR 153 and that they be retroactive to November 1, 2019.

Conclusion

[100] Service upon Mr. James Bruce shall constitute service upon The Owners, Strata Plans VR 42, VR 64 and VR 153.

[101] I grant the declaration sought that the proposed adoption by VR 42's Strata Council of the schedule delivered to VR 42 Owners with the Notice of Annual General Meeting constitutes a significantly unfair action or threatened action by, or decision of the Strata Council, contrary to s. 164(1) of the *SPA*.

[102] I order that the Schedules of UE for VR 42 be amended so that the UE of each SL shall be the total area of both floors of that SL as set out in each of the Strata Plans, excluding the area of each SL's patio, converted into square metres, and rounded to the nearest whole number.

[103] I order that Mr. James Bruce, on behalf of VR 42 register this order and any necessary appendices at the Land Title Office, and that the Registrar of Land Titles accept and register my order and any necessary appendices as well as the amended Schedules of UE for, respectively, Strata Plans VR 42, VR 64, and VR 153 and amend those Strata Plans accordingly, effective as of November 1, 2019.

[104] I grant the declaration sought that a Schedule of IOD pursuant to which the interests of VR 42 owners and their entitlement to the proceeds upon a Destructive Event are as set out in Part 16 of the *SPA,* including ss. 273(1)(d)(ii) and 278(1)(f),

be registered forthwith at the Land Title Office, and it be effective as of November 1, 2019.

"The Honourable Chief Justice Hinkson"