IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Chow v. The Owners, Strata Plan LMS 1277***
2006 BCSC 335

Date: 20060228
Docket: L041641
L041239
Registry: Vancouver

06 056 038

Between:

Allan Chow, Franklin Chang, Anne Chang, Chan Shung Ching, Chan K. Kuen, Tsang Wai Ping, Se-Se Fang, William Lam, Wynnia Shen, Lai Chun Chan, Mok Wan Fung, Lap Mui, Chin Shen Yang, Yi Sin Shan, Elina Kin Wah Chan, Kam Tai Lui, Kin Wa Chan, Yee Ling Lam, Chi Hung Cheung, Man Fung Szto Mui, Kai-Mee Loo, Muriel Rosemary Joyce Isbaner and Shi Fong Wong, Zhi Ping Wen, Sin Kay Lam, and Wai Ling Lam Au

Petitioners

And:

The Owners, Strata Plan LMS 1277, Heather Hannah, Gloria Dingell, Anna Primeau, Carla Nielsen, Brent Nielsen, Rebecca MacDonald, Leona Baxter, Diane Appleton, Chung Yiu Ho, Marianne Ho, Rosemary Hagiwara, Yuji Hagiwara, Yiu Keung Tang and Hedy King Tang

Respondents

- and -

Between:

Mary Haines, Heather Hannah, John Guilfoyle, Bernice Guilfoyle, Evgeny Mikhlin, Evgenia Mikhlin, Gloria Dingwell, Reuben Sinclair, Anna Primeau, Jessie Heng-Ho, Davis Ho, Carla Nielsen, Brent Nielsen, Rebecca MacDonald, Cary Ka Lap Lau, Suoding Cao, Aimin Cui Kelly Kam, Kent Hong, Alan Berry, Frank Robert Paxton, Leona Baxter, Michael David Fury, Diane Appleton, Chia-Chun Tsai, Chung Yiu Ho, Marianne Ho, Rosemary Hagiwara, Yuji Hagiwara, Yiu Keung Tang, Hedy King Tang, Christy Li and John Siderfin

Petitioners

And:

The Owners, Strata Plan LMS 1277, Allan Chow, Franklin Chang, Anne Chang, Chan Shung Ching, Chan K. Kuen, Tsang Wai Ping, Se-Se Fang, William Lam, Wynnia Shen, Lai Chun Chan, Mok Wan Fung, Carol Leung, James Sha, Lap Mui, Chin Shen Yang, Yi Sin Shan, Elina Kin Wah Chan, Kam Tai Lui, Kin Wa Chan, Yee Ling Lam, Chi Hung Cheung, Man Fung Szto Mui, Kai-Mee Loo, Muriel Rosemary Joyce Isbaner and Shi Fong Wong

Respondents

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

Counsel for the Petitioners, Allan Chow et al	A.M. Murray
Counsel for the Respondents, The Owners, Strata Plan LMS 1277	A.L. Baker
Counsel for the Remaining Respondents	T.A.M. Peters
Date and Place of Hearing:	August 2 and 3, 2005 Vancouver, BC

[1] As a consequence of an order by Curtis J. on July 7, 2004, these applications were heard together. These are two petitions each brought by a specific group of owners in Strata Plan LMS 1277, commonly referred to as "San Marino Estates".

[2] The first petition in terms of filing dates is brought by Mary Haines and a number of, but not all, owners, to whom I shall refer as the "apartment owners". I shall refer to that application as the "Haines petition".

[3] The second petition is brought by Allan Chow and a number of, but not all, owners, to whom I shall refer as the "townhouse owners". This application shall be referred to as the "Chow petition".

[4] I shall enunciate the specific orders sought at the conclusion of my review of the factual underpinnings of these petitions.

[5] Mr. Peters does not represent all the apartment owners named in the Haines petition. Because of issues that arose in the course of submissions, it is necessary to delineate for whom Mr. Peters acted. Those were Hannah, Dingwell, Primeau, MacDonald, Baxter, Appleton, the Nielsens, the Hos, the Hagiwaras and the Tangs. The balance of the petitioners named in the Haines petition did not appoint counsel nor did they appear at the hearing of this application. In the Chow petition, Mr. Peters acted for all of the named personal respondents.

[6] Counsel for Chow represents the townhouse owners. By agreement of counsel I first heard submissions on the Chow petition.

Background to the Application

[7] Strata Plan LMS 1277 ("Strata Plan") is a residential development constructed in the early 1990's consisting of 17 townhouse strata lots and 33 apartment-style strata lots. The strata plan was filed March 11, 1994. The strata plan was developed under the ***Condominium Act***, R.S.B.C. 1996, c. 64, which was repealed and replaced by the ***Strata Property Act***, S.B.C 1998, c. 43, as of July 1, 2000.

[8] The townhouses were developed as free-standing units that each have, for example, their own entrances and garage entrances. The apartments are, as the word implies, contained in a multiple-level building. There is a common entrance, garage access, elevator, and hot water boiler.

[9] As a consequence of the number of units of apartments and townhouses, the townhouse strata lots have 34% and the apartment strata lots have 66% of the votes within the strata corporation.

[10] In terms of "unit entitlement" (the basis upon which common expenses are shared among strata lots), the proportional unit entitlement of the townhouses is 46.1% and that of the apartments is 53.9%.

[11] In 1994 the first budget was presented by the corporation to the various owners. That budget allocated costs in three ways:

1) for the whole of the Strata Plan;
2) for the townhouse strata lots only;
3) for the apartment strata lots only.

[12] The budget was prepared in accordance with the developer's disclosure statement of November 4, 1993 and was set for approval at the 1994 Annual General Meeting ("AGM").

[13] The developer's disclosure statement, at para. 4.12, makes a distinction between townhouses and apartments in terms of parking. Townhouses had attached to them a double garage (except for two specified units), whereas apartments were each assigned one parking stall located on limited common property.

[14] In para. 4.14, the developer set forth the basis for allocation of expenses and in so doing acknowledged that the apartment lots would have greater operating expenses than would the townhouses:

> 4.14 The estimated operating budget of the strata corporation is attached as Schedule "C". The budget will be allocated among the individual strata lot owners based on the unit entitlement but taking into account that apartment strata lots require a greater operating expense than townhome strata lots. Therefore under section 128(2) of the Condominium Act, common expense attributable to one type of strata lot shall be allocated to that type of strata lot and shall be borne by the owners of that type of strata lot in the proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned. Common expenses not attributable to a particular type of strata lot shall be allocated to all strata lots and borne by the owners in proportion to the unit entitlement of their strata lots.

[15] At the August 18, 1994 AGM, the owners approved the budget by adopting a schedule of maintenance fees (i.e. operating expenses) in amounts ranging from $7.81 to $8.09 per month for townhouses and from $52.51 to $72.91 for apartments.

In addition, the townhouses and apartments were assessed fees for expenses common to both types of strata lots.

[16] The minutes of the 1994 AGM make it clear that the owners were aware of the dichotomy of expenses between the townhouses and apartments and that there were common expenses for both such as insurance. The total operating expenses of $60,220 consisted of townhouse expenses of $1,620; apartment expenses of $25,050; and common expenses of $33,550.

[17] Anyone purchasing a unit from 1993 up to and including 2004 would be aware of this allocation of expenses by a simple review of the budgets passed in the intervening years.

[18] Following its first full year of operation, the strata corporation presented a much more detailed budget on August 10, 1995. A review of that proposed budget reveals the nature of expenses attributable to apartments, townhouses, and common expenses.

[19] For the apartments, but not the townhouses, there were expenses for elevator inspection, entry phone, and janitorial services. For the townhouses, but not the apartments, there were expenses for utilities, building maintenance, and supplies. The common expenses included such operating expenses as insurance, management, grounds maintenance, and window washing.

[20] The published schedule of maintenance fees for 1995-96 shows substantially lower operating expenses (approximately 1/3 or less) for the townhouses compared

to the apartments. That difference reflects that the townhouse owners provided their own hot water, and maintained their own garage and residence entrances. They did not contribute to maintenance for the elevator or common entrances to the apartment building.

[21] The budgets also allocated fees for the contingency reserve fund ("CRF") separately. In the 1994-95 budget, the townhouses and apartments were assessed CRF contributions of $1,610 and $1,890 respectively. In the 1995-96 budget, the CRF assessments were raised to $3,000 and $4,000 respectively. By May 17, 2004, the townhouse CRF held $23,712 and the apartment CRF held $29,729.

[22] In the years following the 1995 AGM, when specific extra expenses were proposed for the apartments, these were contemplated as being allocated solely to the apartment strata lots.

[23] For example, on February 27, 1997, a proposal was made to install steel front doors in the apartment building (at $2,700) and purchase (at $3,200) or lease (at $1,000 per year) video surveillance cameras for the apartment lobby. The meeting agenda noted that the proposed special levies would be collected from apartment owners only.

[24] The minutes for that meeting report:

> Special Resolution
>
> In order for a special resolution to pass, 75% of all owners present at the meeting must vote yes. Allocation of costs are made by unit entitlement as set out in the Condominium Act.

> In as much as the last three resolutions pertain to the apartment building only, concern was expressed about the outcome of the vote should the townhouse owners abstain from voting. It was suggested that, if the townhouse owners vote, they should also participate in paying for the costs. It was noted that, in accordance with the Condominium Act, all owners have the same voting rights. It was regularly MOVED and SECONDED that:
>
> > Apartment owners only vote for Special Resolutions B., C. and D. – CARRIED.

The apartment owners then voted on the proposed special levies for the steel doors and video camera, all of which were defeated.

[25] A special resolution for the purchase and installation of an irrigation system that would have benefited both the apartment and townhouse strata lots was voted on by all owners. It also was defeated.

[26] The issue of security cameras in the lobby of the apartment building again arose on March 7, 2000 at a meeting attended by 18 owners in person and 8 by proxy. The meeting was called to address the "need for increased security at San Marino Apartments".

[27] The proposed special resolution states only that the "Owners of Strata Plan LMS 1277" have decided to install a new security camera system. The resolution was defeated 21 to 1 with one abstention; a second similar resolution that would have involved leasing a security system at a lower price was also defeated 14 to 5 with one abstention.

[28] The minutes make no distinction between apartment and townhouse owners; nor do they record who was to vote on the special resolution although it benefited

only the apartments. Given that 26 votes were present, however, it is a reasonable assumption that, as at the 1997 meeting, any townhouse owners present did not vote on the resolution. That is also confirmed by the "Special Assessment Fee Schedule" attached to the special resolution that shows the proposed special assessment would be made only against the apartment strata lots.

[29] As mentioned above, on July 1, 2000, the ***Strata Property Act*** repealed and replaced the ***Condominium Act*** under which this strata plan was created. By way of transition, the ***Strata Property Act*** permitted differential allocation of expenses between different types of strata lot until January 1, 2002.

[30] Strata Plan LMS 1277, however, continued to allocate expenses between the two different types of strata lot up to and including the proposed 2003-04 budget. That budget showed strata fees from apartments, townhouses, and combined at $48,815, $7,556, and $51,649 respectively for a total of $108,020. It showed corresponding expenses of $43,339, $2,080, and $53,149 for a total of $98,568. It also set the CRF contribution for both apartments and townhouses at $5,476.

[31] Counsel for the Haines petitioners in written argument suggested that the continued differential allocation from January 1, 2002 until the 2004-05 budget was due to inadvertence. This assertion does not fit with the acknowledgement, in the minutes of the strata council meeting of March 17, 2003, that the allocation "is being done in accordance with past practice". Further, the owners discussed the seeking of a legal opinion as to sectioning the Strata Plan at a special general meeting on

April 8, 2003. The council must, by this time, have been aware of the inconsistency between their practice and the provisions of the ***Strata Property Act.***

[32] San Marino Estates has not been immune from "leaky condo syndrome" as that architectural/engineering/construction malaise has come to be known. The strata corporation obtained three engineering reports between 2001 and 2003.

[33] The 2003 report of RDH Building Engineering Ltd. ("RDH") confirmed "significant moisture problems" in the apartment building and "localized damage and elevated moisture contents" in the townhouses. The report recommended full repairs to the apartment building and provided two options for the townhouses. While noting that targeted or partial repair was viable, the report raised the possibility that a "more significant rehabilitation program may [be] required at some point in the future". The report also noted that full rehabilitation would "eliminate the risk of future performance problems, and result in a fully rehabilitated complex with the potentially positive impact on property values".

[34] There is no evidence as to what that might portend either in terms of absolute or relative values, but common sense dictates that a potential purchaser would take into account the potential of future water intrusion problems where only a targeted or localized repair had been made.

[35] RDH's options were costed out as follows:

Option #1	Full Repair	Apartment Building	$1,264,000
	Full Repair	Townhouses	$1,572,000

		Total	$2,836,000
Option #2	Full Repair	Apartment Building	$1,264,000
	Partial Repair	Townhouses	$431,000
		Total	$1,695,000

[36] A special levy will be required to pay for the repairs, as the current contingency funds, combined, will not pay for even a fraction of the costs. Under the *Act*, special levies, like common expenses, are allocated in proportion to unit entitlement. Thus, 53.9% of the repair costs would be allocated to the apartment owners and 46.1% to the townhouse owners.

[37] If Option #1 was followed, the townhouse owners would contribute $1,307,396 against the cost of their own repairs of $1,572,000. The apartment owners would therefore "over-contribute" $264,604, or approximately $8,018 per apartment. Option #2 would mean that the townhouse owners would contribute $781,395 and the apartment owners $913,605. Thus, the townhouse owners would "over-contribute" $350,391, or approximately $20,611 per townhouse.

[38] On March 3, 2003, the strata corporation held a meeting of the owners to consider the two RDH options. The voting record makes no distinction between apartment and townhouse owners. Option #1 was supported by 15 and opposed by 24; option #2 was supported by 21 and opposed by 19. Neither resolution obtained the requisite 3/4 majority and each was defeated.

[39] Because there are 33 apartment strata lots (i.e. 66%) and 17 townhouse strata lots (i.e. 34%), a special resolution can never be approved by the owners as neither side can alone muster the requisite 3/4 majority unless one side or the other crosses party lines.

[40] A further meeting was held on April 8, 2003, to explore the creation of separate sections for the townhouse and apartment strata lots. The meeting minutes noted that "this option [sectioning under Part 11 of the ***Strata Property Act***] might provide the solution to the impasse". The minutes confirmed:

> Accordingly, there was general consensus that the property agent raise the matter with the strata corporation's legal counsel (Clark, Wilson) for an opinion and an estimate of costs. If feasible the owners would be asked to formally approve the creation of separate sections at which time the budgets and financing for each section would be independent of the other.

[41] The decision to seek a legal opinion as to sectioning raised the ire of one of the Haines petitioners, Rebecca MacDonald, who decried this further expenditure of funds following upon the three engineering reports. In correspondence to the strata council dated April 22, 2003, Ms. MacDonald suggested that she might take legal proceedings to appoint an administrator to assume authority over the strata corporation.

[42] At a special general meeting on August 18, 2003, the owners considered a resolution to amend the bylaws to create sections under s. 193 of the ***Act***. Section 193 provides:

> (1) To create or cancel sections, the strata corporation must hold an annual or special general meeting to consider the creation or cancellation.
>
> (2) The notice of meeting must include
>
> > (a) a resolution to amend the bylaws to provide for either the creation and administration of each section or the cancellation of the sections, and
> >
> > (b) any resolutions to designate limited common property, in accordance with section 74, for the exclusive use of all the strata lots in a section or to remove a designation in accordance with section 75.
>
> (3) The resolution referred to in subsection (2) (a) must be passed
>
> > (a) by a ¾ vote by the eligible voters in the proposed or existing section, and
> >
> > (b) by a ¾ vote by all the eligible voters in the strata corporation.
>
> . . .

The townhouse owners voted 15 to 1 in favour of the motion, while the apartment owners opposed it 15 to 3. The consequence was the defeat of the resolution to create sections.

[43] On October 30, 2003, a further meeting was held to consider a request of the townhouse owners to separate common expenses according to type of strata lot. This resolution was defeated 21 to 17, with owners for the apartments generally voting against the resolution.

[44] At another special general meeting on January 12, 2004, a further vote occurred on a special resolution to amend the bylaws to create sections. Again, the

resolution was defeated, with townhouse owners voting 13 to 0 for the resolution and apartment owners voting 17 to 6 against it.

[45] On May 20, 2004, the Haines petition was filed. It named only the strata corporation as a respondent. None of the townhouse owners were served with the petition although it suffices to say they became aware of its existence. That petition sought relief by way of an order that RDH Option #2 be approved. It made no mention of the $20,611 that each townhouse owner would be contributing to full apartment rehabilitation over and above the cost of partial townhouse repairs. Later, the petition was amended to seek RDH Option #1 in the alternative.

[46] The strata council rejected a request to retain counsel to defend the corporation against this petition.

[47] The Chow petition was then issued on June 30, 2004, and despite its pleadings that raised very fundamental issues of governance, counsel for the Haines petitioners refused to adjourn the application set for hearing on July 7, 2004.

[48] Curtis J. ordered the adjournment of the Haines application and ordered that both applications be heard together. Later, the Chow petitioners were joined as respondents to the Haines petition, and the represented Haines petitioners were joined as respondents to the Chow petition, by consent.

[49] The 2004 AGM was held on November 2, 2004, after the adjournment and amendments. The agenda for that meeting shows that "this year's [2004-05] budget

is a "single" budget, therefore, all expenses would be divided among the townhomes and apartment owners on a straight unit entitlement basis".

[50] The vote on this so-called "single budget" saw 20 in favour and 14 opposed. While the breakdown of the vote is not recorded, the minutes show 34 voters were present. On a subsequent special resolution to adopt RDH Option #1, which required a 3/4 majority, 21 apartment owners voted in favour with 1 opposed and 15 townhouse owners voted in opposition with 2 abstentions. Once again, the resolution did not pass.

[51] This resolution would have seen the apartment owners in effect subsidize the townhouse repairs; but, given what had occurred immediately prior to its presentation, it is clear that a new direction was being adopted in terms of the allocation of expenses, whether operating or remedial.

[52] Following the order of Curtis J., the strata council retained counsel to act for it on the Chow petition despite its refusal to so do on the Haines petition, and informed all owners that such legal costs would be charged to all owners.

Positions of the Parties

[53] In a moment of inspired common sense, counsel on both petitions have agreed that the strata council need not appear given that the real issues to be determined are those between the two groups of owners.

[54] All counsel, including counsel for the strata corporation, agree that the strata corporation may be made subject to any orders as to itself in the course of determination of issues between the apartment and townhouse owners.

[55] The Haines petition originally sought an order that the strata council proceed with RDH Option #2 (full apartment and partial townhouse repairs) with costs of the repairs assessed as a special levy against all owners on the basis of unit entitlement. It also sought certain ancillary orders necessary to implement and collect the special levy as well as costs against the strata corporation.

[56] The original Chow petition sought an order for the strata corporation to be sectioned into townhouse and apartment strata lots due to significant unfairness in the operation of the strata corporation. It also sought orders that both repair and operating costs (including the 2004-05 budget) be allocated by such sections save where they are combined or common expenses.

[57] In their "amended amended petition", the Chow petitioners pled, in the alternative, an order for full repairs to both strata lot types. They did not pursue this relief because the same relief was pled in the amended Haines petition.

[58] The Chow petition also sought reimbursement from the apartment owners of an over-payment by the townhouse owners of a total of $8,142.21 to defray the 2003 operating deficit. Finally, it sought costs either as special costs or party-and-party costs as well as an order exempting the Chow petitioners from any costs of the respondent strata corporation in relation to this petition.

[59] The parties agree that under the ***Strata Property Act***, the common expenses must be borne by all units, regardless of configuration, on the basis of their unit entitlement. The Chow petitioners seek sectioning of the strata corporation so that each section will bear expenses unique to their type strata lot on a unit entitlement basis within each of the sections.

[60] Section 191 of the ***Act*** permits sectioning, and subsequent provisions of the ***Act*** set forth the manner of governance of a section:

> 191(1) A strata corporation may have sections only for the purpose of representing the different interests of
>
> . . .
>
> (c) owners of different types of residential strata lots.

[61] The ***Strata Property Regulation***, B.C. Reg. 43/2000, provides in s. 11.1:

> For the purposes of section 191(1)(c) of the Act, the following are the different types of residential lots:
>
> (a) apartment-style strata lots;
>
> (b) townhouse-style strata lots;
>
> (c) detached houses.

This strata plan has only apartment-style lots and townhouse-style lots.

[62] Once a strata plan is filed, the strata corporation can create or cancel sections under s. 193 by way of a special resolution. As I have already discussed in my review of the factual background to these petitions, every proposed special

resolution, whether for repairs or for sectioning, has failed to attain the requisite 3/4 majority.

[63] The Chow petitioners now seek an order from this court that the strata corporation be sectioned on the basis of the historical division of expenses. They argue that it would be significantly unfair to them as townhouse owners to do otherwise, and that under the original Haines petition they would receive only a partial repair of their units whilst the apartment building would be fully restored. They argue that the amended Haines petition is a subterfuge to mask the unfairness that continuation of the status quo would cause.

[64] The Chow petitioners also argue that the "single budget" is significantly unfair to them because the historical budget allocation recognized that each type of strata lot has different expenses. A "single budget" seeks to impose a "one size fits all" approach to vastly different types of expenditures. For example, apartment owners pay for hot water as a common expense while each townhouse owner pays for their own. These distinctions involve a myriad of other expenses such as maintenance to the garage entrance, apartment entrance, and parking area, as well as janitorial services for the apartment building.

[65] The Chow petitioners argue that while the strata corporation has acted within the statutory provisions in terms of its duties and obligations, the manner in which it has so acted has created significant unfairness in the allocation of operating expenses and in the apportionment of rehabilitation costs. The Chow petitioners rely

upon the inherent jurisdiction of this court to order sectioning upon a finding of significant unfairness.

[66] The relevant provisions of the ***Strata Property Act*** are:

> 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
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant . . .

[67] Counsel for the Haines petitioners argues that the ***Act*** itself creates an imbalance of power where different types of units exist in unequal numbers. They argue that an imbalance of power in and of itself is neither unjust nor creates unfairness. What the Chow petitioners complain of is simply the way in which the majority has exercised its statutory powers.

[68] Counsel for the Haines petitioners therefore suggests that this court give directions that would not usurp the democratic process but would ensure an element of fairness in the administration of this strata plan. Counsel concedes the historical division of expenses and argues that the differential allocation should, in fact, be continued but without creating sections.

[69] The Haines petitioners further argue that the townhouse and apartment owners never regarded themselves as sections in the past despite the fact of ten years spent dividing expenses on the basis of uniqueness of costs for each type of strata lot.

[70] While it is true that each group of owners did not in essence act as a mini-strata corporation within the strata plan itself, it is clear that their finances were separately administered even to the point that only the owners of the type of strata lot affected by an expenditure could vote on the expenditure.

[71] Counsel for the Haines petitioners now seeks, in the alternative, a declaration that RDH Option #1 (full repairs to both types of strata lots) be carried out pursuant to the direction of this court. This latter submission comes rather late in the process that saw the Haines petitioners issue a petition that named only the strata corporation as a respondent, and then use their majority on the strata council to decline to fund representation for the strata corporation. The amendments to the Haines petition came only after the order of Curtis J.

[72] These steps do little to inspire a sense of reasonableness being applied to those in the minority. Such conduct, the Chow petitioners argue, is not the conduct of those who may be expected in the future to treat others of diverse interests with fairness.

[73] They argue that the last-minute adoption of a proposal for full restoration work framed as an alternative to full/partial restoration does not suggest an "all in it together" approach. Rather, it suggests domination that upon failure leads only to a further alternate being considered. Such a constellation of conduct does not bode well for the future of this strata corporation.

Discussion

[74] The concept of unfairness was considered in ***Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*** (2004), 34 B.C.L.R. (4th) 229, 2004 BCCA 597, where Lowry J.A. at paras. 23-24 observed:

> It must be accepted that some actions of a strata corporation will be unfair to one or more strata lot owners in that the will of the majority may often serve the interest of the majority of owners to the detriment of a minority. Thus, to obtain relief, an owner must establish significant unfairness.
>
> What amounts to significant unfairness was addressed by this Court in ***Reid v. Strata Plan LMS 2503*** (2003), 12 B.C.L.R. (4th) 67, 2003 BCCA 126. There, at paras. 26-27, it was accepted that while it might relate to conduct that was less severe, at least for the purposes of that case, "significantly unfair" was equated with that which is oppressive and unfairly prejudicial.

[75] In ***Reid***, Ryan J.A. approved of Masuhara J.'s extended definition of "significant unfairness" in ***Gentis v. Strata Plan VR 368*** (2003), 8 R.P.R. (4th) 130, 2003 BCSC 120 at paras. 27-29:

> The scope of significant unfairness has been recently considered by this Court in ***Strata Plan VR 1767 v. Seven Estate Ltd.*** (2002), 49 R.P.R. (3d) 156 (B.C.S.C.), 2002 BCSC 381. In that case, Martinson J. stated (at para. 47):
>
> > The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: ***Reid v. Strata Plan LMS 2503***, [2002] B.C.J. No. 2377.
>
> I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata

> Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.
>
> 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.

[76] Bauman J. considered the matter of allocation of repair expenses in ***Strata Plan LMS 1537 v. Alvarez*** (2003), 17 B.C.L.R. (4th) 63, 2003 BCSC 1085, a decision approved by the B.C. Court of Appeal in ***Coupal v. Strata Plan LMS 2503*** (2004), 36 B.C.L.R. (4th) 238, 2004 BCCA 552. The strata plan in ***Alvarez*** consisted of a 90-year-old heritage house combined with a new six-unit apartment building. The apartment suffered water damage; the house did not. The Alvarezes, who owned one of the two strata lots in the heritage house, petitioned for a declaration that they were not liable to contribute to the repair costs for the apartment building.

[77] Bowman J. observed, at para. 35, that the general rule under the ***Strata Property Act*** was that "within a strata corporation 'you are all in it together'". He concluded that the building was an integrated structure that married old and new construction, and thus no difference in the type of unit could be said to exist.

[78] He declined to conclude that there was any unfairness in assessing those in the older portion a share of expenses based on their unit entitlement for the repairs necessary for the new portion.

[79] In ***Coupal***, a similar marrying of old and new construction occurred with the new suffering water problems. Special resolutions were passed funding the repairs. There were 88 new units and 12 old units. The Court of Appeal approved of Bauman J.'s observation as to the effect of the ***Strata Property Act*** when no distinction has been made between types of units under ss. 100, 108(2), or Part 11 of the ***Act***.

[80] No argument was raised before Bauman J. in respect of s. 164.

[81] Subsequent to oral submissions on August 2, 2005, I became aware of the decision of Mr. Justice Shabbits in ***Large v. Strata Plan 601*** (2005), 34 R.P.R. (4th) 62, 2005 BCSC 1128, which was issued on August 4, 2005. I sought and received further submissions of counsel as to the effect of that decision, if any, upon this matter.

[82] The case involved a complaint about a resolution voted upon by the owners of the strata plan to create two sections. As in the present case, the resolution was defeated. The petitioners argued that this court had an inherent jurisdiction to make an order for sectioning and consequently relied upon ss. 164 and 165(c) of the ***Strata Property Act***.

[83] Mr. Justice Shabbits held, at para. 29:

> I am of the opinion that the Court should not order sectioning of the respondent corporation. The Legislature has enacted specific provisions relating to the creation of sections. For that reason, I am of the opinion that the court does not have the inherent jurisdiction to create sections in the respondent corporation. Furthermore, even if the Court had the discretion to order sectioning, the applicants have not shown that an order for sectioning ought to be made, given the

> consequences of sectioning other than the allocation of common expenses.

[84] In the case at hand, there is a significant difference between what exists here and what existed in ***Large***, that being that the allocation sought by the sectioning proposal extends beyond the allocation of common expenses. The costs of the proposed remedial repairs are quite distinct from the annual operating expenses that have historically been differentially allocated between the townhouses and apartments.

[85] The concept of inherent jurisdiction was considered in ***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** (2003), 13 B.C.L.R. (4th) 236, 2003 BCCA 344, where Newbury J.A., at para. 45, adopted the view of I.H. Jacob in "The Inherent Jurisdiction of the Court" (1970) 23 Curr. Legal Probs. 23 at 27, that the jurisdiction of the superior courts to punish for contempt and to prevent abuse of process:

> was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent."

[86] Newbury J.A. observed, at para. 46, that in any approval of a "plan of arrangement under the CCAA . . . the court is not exercising a power that arises from its nature as the superior court of law, but is exercising the discretion given to it by the CCAA" [emphasis in original].

[87] Mr. Justice Shabbits does not appear to have been referred to this authority that distinguishes between inherent jurisdiction and the jurisdiction to make discretionary orders that arises under a statute.

[88] If, in the alternative, Mr. Justice Shabbits reached his conclusion on the basis that s. 164 did not apply to the actions of the owners, and if he thus relied upon the inherent jurisdiction of the court, then that concept was considered by Smith J.A. in ***Aviawest Resort Club v. Chevalier Tower Property Inc.*** (2005), 43 B.C.L.R. (4th) 1, 2005 BCCA 267, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 296 (QL). The Court concluded that an administrator appointed under s. 174 of the ***Strata Property Act*** did not have the power to act without a resolution passed by the members of the strata corporation in situations where the corporation could not act without such a resolution.

[89] In ***Aviawest***, Smith J.A. was not called upon to consider the effects of s. 164 and 165 as the chambers judge had not referred to them in the decision appealed from. The Court did make reference to those sections at para. 35:

> It may be, as was suggested in ***Toth***, that the difficulties facing these parties may be resolved by applications to the court under s. 164 or s. 165 of the ***Act***.

[90] The Chow petitioners submit that s. 164 provides the court with the same power of discretion that existed under ss. 42 and 43 of the former ***Condominium Act*** as those sections were considered by Huddart J., as she then was, in ***Cook v. Strata Plan N-50*** (1995), 16 B.C.L.R. (3d) 131, [1995] B.C.J. No. 2606 (QL) (S.C.).

[91] That case considered the powers of an administrator appointed under s. 71 of the ***Condominium Act*** and Huddart J., at para. 15, contrasted limitations in the power of an administrator with the power of the court in cases where there has been oppressive or prejudicial behaviour:

> I find yet further support for my interpretation of section 71(4) in the oppression provisions of the Act. If oppressive or prejudicial behaviour is proved on an application under section 42, then the court has power under section 43 to "make the interim or final order it considers appropriate" including to "direct or prohibit an act of council or vary a transaction or resolution" and to "regulate the conduct of the corporation's future affairs." While I need not decide the extent of this power on this application, it is clear that oppressive acts by the strata corporation or council, or prejudicial behaviour on the part of the strata corporation, owners or a class of owners, give rise to a much broader power to intervene in the governance of a strata corporation than those given to the court under section 71. An owners' resolution can be varied. It appears that includes a special resolution. The "conduct of the corporation" can be regulated permanently.

[92] In ***Toth v. Strata Plan LMS 1564*** (19 August 2003), Vancouver L022502 (B.C.S.C.), Pitfield J. correctly concluded, as noted by Smith J.A. in ***Aviawest***, that the reasoning in ***Cook*** applied equally to the new provisions of the ***Strata Property Act***.

[93] Mr. Justice Shabbits does not appear to have been referred to these various cases from which I respectfully conclude that ss. 164 and 165 do create a discretionary jurisdiction to make orders as sought in this case and that this includes the jurisdiction to make a sectioning order.

[94] This jurisdiction arises from the wording of s. 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
>
> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant . . .
>
> (2) For the purposes of subsection (1), the court may
>
> > (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
> > (b) vary a transaction or resolution, and
> > (c) regulate the conduct of the strata corporation's future affairs.

[95] The regulation of future affairs of the strata corporation may be done in a multitude of ways, one of which is by sectioning. The absence of a special resolution either rejecting or approving sectioning, in my view, is irrelevant if the underlying conduct is found to be "significantly unfair" as that term is used in s. 164.

[96] In ***Aviawest***, Smith J.A. noted, at para. 31, that the differences between s. 71 of the ***Condominium Act*** and s. 174 of the ***Strata Property Act***:

> do not manifest a legislative intention to change the law. Rather, they are merely stylistic.

The same observation applies to the differences in wording between ss. 42 and 43 of the ***Condominium Act*** and s. 164 of the ***Strata Property Act***.

[97] There is, in my view, one change that necessitates comment. Section 42 referred to "some resolution of the owners" whereas s. 164 has no such wording.

[98] Section 164 refers to decisions of the strata corporation, "including the council". If this section was intended to apply only to decisions that do not require a

resolution of the owners, then there would have been no reason to add the phrase "including the council". The use of the phrase must, I conclude, mean that the court's jurisdiction applies to all manner of decisions of the corporation, including owner resolutions. I am reinforced in this view by the wording of s. 164(2)(b), which parallels the language of s. 43(a) of the ***Condominum Act*** by including the phrase "a transaction or resolution".

[99] Sections 164 and 165 permit statutory recourse to the courts where there is no other way to rectify acts of significant unfairness within a strata corporation. Section 164 concerns itself with acts of unfairness and s. 165 with failures to act. Absent recourse to this court under s. 164, there is simply no way for affected parties to address significantly unfair conduct.

[100] Pursuant to the principles enunciated in ***Re Hansard Spruce Mills Ltd.***, [1954] 4 D.L.R. 590, I accordingly decline to follow the finding in ***Large*** that this court does not have inherent jurisdiction to make the orders sought. The consideration and ordering of sectioning does not fall under the inherent jurisdiction of this court, but rather under the specific jurisdiction set out in s. 164.

[101] I conclude that here, in contrast to the circumstances in ***Large***, significant unfairness has been inflicted upon the townhouse owners as a consequence of a number of proposed or completed acts of the corporation. These are:

1. the perpetuation of differential allocation of expenses for some three years beyond the end of the statutory transition period followed by imposition of a single budget;

2. significant differences between the expenses of the townhouse owners and those of the apartment owners;

3. the proposed unequal treatment of townhouse and apartment owners regarding repairs and the costs attendant upon those repairs; and

4. the merging of two unequal contingency funds for significantly different expenses.

Conclusion and Orders

[102] Having concluded that significant unfairness exists, the question then remains whether it can be remedied only by sectioning as opposed to some lesser order that would not create two "mini-corporations" functioning under the mantle of the respondent strata corporation.

[103] The creation of sections is a draconian measure and has the potential, as was noted by Mr. Justice Shabbits in ***Large***, at para. 28, to "have an effect more far reaching than the mischief [the petitioners] seek to remedy."

[104] I am not unmindful that this Strata Plan operated in a generally harmonious manner from its inception until aspects of self-interest appear to have taken over the interest in the common good in the post-2004 period. The minutes of the various special and annual general meetings disclose a lack of harmonious functioning of the corporation since 2004.

[105] 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 to remedy past conduct.

[106] In my view, given what has occurred since 2004, both aspects of conduct need remediation. Sectioning would end the potential for future disagreements between the two disparate types of strata lots in terms of both operating and remedial expenses.

[107] Further, given the manner in which the Haines petition was advanced and the conduct that led Mr. Justice Curtis to adjourn that application so that the Chow petition could be heard at the same time, I am not at all satisfied that simply making directions in the form of orders under s. 164 will restore the previous state of relative harmony.

[108] In my view, there is little to suggest that what has occurred since 2004 will not continue unless there is a separation of the interests of these two disparate groups. Accordingly, I order the creation of sections to represent the different interests of the apartment and townhouse owners, as contemplated by s. 191(1)(c) of the ***Act***. I also order attendant adjustments to the 2005 budget to reflect the appropriate apportionment of the interests of the two sections.

[109] I do not propose to deal with the Haines respondents' submission with respect to estoppel, given that it was neither pled nor argued by counsel for Mr. Chow and his fellow petitioners. It was not suggested by Chow that there was some

convention, only that significant unfairness occurred in 2005 when he and his fellow petitioners were required to pay for a significant list of expenses that solely benefited the apartment owners without an approximate corresponding benefit to the townhouse owners.

[110] The relief sought in Haines petition is dismissed save and except as the order for sectioning incorporates those submissions made by the Haines petitioners for separate interests.

[111] Given the manner in which these petitions proceeded, which was in part a basis for the order of Mr. Justice Curtis, the Chow petitioners are entitled to their costs on Scale 3 against the strata corporation in respect of their own petition and that of defending the Haines petition.

[112] These costs and the costs of the respondent strata corporation, being those paid to the corporation's counsel, are not to be borne by any of the named Chow petitioners.

The Honourable Mr. Justice Taylor