2012 CarswellBC 1471, 2012 BCSC 726

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Poloway v. Strata Plan K692

James Michael Poloway, John Wayne Toljanich, Lorraine Dorothy Toljanich, William Rutherford Bradley, Deborah Louise Bradley, Gusbertus Bastiaan Bouma, Emma Josephine Bouma, Victoria Crompton, Nicholas John Kozuska, Elizabeth Gail Kozuska, Randall Yatscoff, Nancy Christine Yatscoff, Sherry Linn Priebe, David Gibbons and Carol Ponsford, Petitioners and The Owners, Strata Plan K692, Respondents

British Columbia Supreme Court

G.M. Barrow J.

Heard: January 11-12, 2012
Judgment: May 22, 2012
Docket: Kelowna S84849

Counsel: J.D. Metherell, for Petitioners

A. Murray, for Respondents

Subject: Property

Real property.

***G.M. Barrow J.*:**

1 The petitioners are owners of townhouse-style strata lots within the respondent **Strata Corporation** (the "**Strata Corporation**"). They argue that the respondent has acted, and will act in the future, in a significantly unfair manner. The past unfairness relates to a special resolution put before a general meeting on April 30, 2011 (the "Special Resolution"). The future unfairness relates to costly repairs that are needed to the apartment tower within the development. The **Strata Corporation** proposes that those costs be borne by all of its members, including the owners of townhouses, on the basis of unit entitlement. The petitioners argue that to do so will result in them subsidizing repairs to a building that they have little connection with. They seek an order under s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43 creating "sections" within the **Strata Corporation** - one section for the townhouse-style strata lots and another for the apartment-style lots. They seek ancillary orders allocating the repair costs to the sections based on the building involved. The respondent argues that to allocate costs on the basis of unit entitlement is simply to follow the statutory regime, and in the absence of some reasonable expectation that another method would be used, that cannot be significantly unfair.

Background

2 The **Strata Corporation** was created with the filing of a strata plan in the Land Title Office in 1988. The property is comprised of 29 residential units housed in three buildings. Building A is a four-storey building containing 17 apartment-style strata units. Buildings B and C are single-storey buildings each containing 6 townhouse-style strata units. The petitioners are the owners of 10 of the 12 townhouse units.

3 The apartment building houses several amenities which benefit all of the strata lots in the development. Those amenities include a mailroom, a garbage collection room, and the primary water, cable and telephone hook ups for the development.

4 Between its creation and the year 2000 when the *Strata Property Act* came into force, the **Strata Corporation** functioned under the statutory framework contained in the *Condominium Act*, R.S.B.C. 1996, c. 64. Part 5 of the *Condominium Act* sets out the bylaws of **strata corporations**, and by s. 26 those bylaws applied until altered or repealed in a manner provided for by the *Act*. Part 5 included s. 128 which dealt with the allocation of common expenses. Although the *Condominium Act* did not define different types of strata lots, s. 128 (2) required that common expenses attributable to one or more types of strata lots be allocated to and shared by the owners of those particular strata lots in proportion to their unit entitlement. All other common expenses were required to be shared by all the owners in proportion to their unit entitlement to the entire condominium development. Section 128 read:

> (2) If a strata plan consists of more than one type of strata lot, the common expenses must be apportioned in the following manner:
>
> > (a) common expenses attributable to one or more type of strata lot must be allocated to that type of strata lot and must 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;
> >
> > (b) common expenses not attributable to a particular type or types of strata lot must be allocated to all strata lots and must be borne by the owners in proportion to the unit entitlement of their strata lots.

5 Despite this statutory regime, the **Strata Corporation** did not allocate common expenses attributable to one type of strata lot solely to the owners of that type of lot; rather, except for the year 1991, the **Strata Corporation's** budgets simply allocated all common expenses to all owners, regardless of whether the expenses were attributable to only one type of strata lot or not. The amended disclosure statement filed on March 22, 1989, foreshadowed the approach to common area expenses that the **Strata Corporation** would follow. Under the heading "Budget", paragraph 6 (o) of that document provides in part as follows:

> An estimated operating budget for a typical full year of operating expenses of the **Strata corporation**, based on current costs, is attached .... These common expenses will be allocated among the individual Strata Lot owners in the proportions that the Unit Entitlements of their respective Strata Lot bear to the total Unit Entitlements of all Strata Lots, and Exhibit "C" hereto gives the estimated monthly assessment for each Strata Lot based on the budget.

6 For the year 1991 the **Strata Corporation** changed the manner in which it treated the common area expenses that were attributable to one type of strata lot but not to others. Further, it seems that consideration was given to a similar approach in 1992. Uncertainty about this stems from a lack of minutes for that period indicating which of two proposed budgets was adopted by the **Strata Corporation**. There is a schedule of strata fees for 1991 and if fees were in fact levied based on that schedule then common area expenses were allocated according to the method prescribed in s. 128 of the *Act*. There is a "proposed" schedule of fees for 1992, and if it was adopted then common area expenses were shared by all strata lots in accordance with their unit entitlement and regardless of whether the expenses related to only one type of strata lot.

7 What is clear from the material is that by 1993 the method of allocating common area costs associated with only one type of unit was becoming an issue within the **Strata Corporation**. The issue arose because expensive repairs to the fire sprinkler system in the apartment building were in the offing. One of the townhouse owners wrote to the Deputy Superintendent of Real Estate inquiring about how costs of that sort could be allocated. The Deputy Superintendant responded, and his letter and the issue more generally was the subject of discussion at an extraordinary general meeting of the **Strata Corporation** on September 29, 1993. The minutes of that meeting include the following:

> Discussion of both letters [that is the letter to and the letter from the Deputy Superintendent] ensued. Owners recognized that there were a number of costs borne by the townhouse type units which were directly attributable to the highrise type units. However, it was stated that owners had agreed from the inaugural General Meeting onward that the **Strata Corporation** was to be treated "all as one" with the costs being apportioned among all units. It was decided to proceed with the meeting, but mention that the contents of the letter from [the Deputy Superintendent] had been received, and duly noted.

While nothing was decided at this meeting regarding the manner in which common area costs should be allocated, the minute is relevant in three respects. First, it tends to support the conclusion that the proposed budget that would have allocated common area costs according to unit type was not adopted. Second, it is an indication of what the owners knew about the cost sharing arrangements when they purchased their units. Third, it demonstrates that the **Strata Corporation** turned its corporate mind to the manner by which common area expenses should be shared.

8 It is clear that in the years since 1993 common area expenses have been shared by all strata units in accordance with their unit entitlement and without regard to whether the expenses related to one type of unit or another. This has been the case notwithstanding that on February 17, 1994 the owners adopted changes to the **Strata Corporation's** bylaws. The changes were voluminous, and among them was the adoption of the cost allocation scheme envisioned by s. 128 of the *Condominium Act*. Thus, from 1994 forward the **Strata Corporation** should have been accounting for common area expenses by allocating those referable to one type of strata lot to strata lots of that type. In spite of the adoption of this approach in its bylaws, the **Strata Corporation** did not change the method by which it accounted for such expenses.

9 The ability to allocate common area expenses according to unit type changed with the coming into force of the *Strata Property Act* on July 1, 2000.

10 From 1993, when the fire suppression system in the apartment tower was replaced at a cost of just over $14,000, until 2007, there were at least four special levies imposed to cover the cost of various repairs. According to John Tolijanich, one of the petitioners, those levies totalled $213,922, and of that sum $42,000 was for repairs that benefited the complex as a whole; $51,717 was for repairs that benefited only the townhouse units; and $120,205 was for repairs associated with the apartment complex. In addition the **Strata Corporation** spent a further $90,000 to repair the balconies attached to the apartment units and to fix some associated water damage. These costs were treated as common area expenses and borne by all units regardless of type.

11 There remains some dispute as to whether the foregoing amounts are properly categorized as benefiting the apartment tower or the townhouses. When this petition initially came on for hearing in August 2010 Burnyeat J. adjourned the matter. He said that it would be of assistance if the **Strata Corporation** had its auditors prepare a list of past and future expenses allocating them according to the unit type benefited. That exercise has not been done for reasons I will mention below. All I am now asked to take from the evidence about how past expenses have been allocated is that it demonstrates that the townhouse owners have not disproportionately benefited from the uniform sharing of expenses. In other words this is not a situation in which the apartment owners have subsidized repairs to the townhouses, and that the townhouse owners are now seeking to avoid doing the same for in relation to repairs needed to the apartment tower. This conclusion is well supported by the evidence even if the cost of past repairs or their characterization is not entirely accurate.

12 What is not in dispute, and what prompted this petition, is that there are much needed and very expensive repairs necessary to address water ingress in the apartment tower. These expenses may exceed $2 million. The deficiencies that give rise to these costs first surfaced in 2007. From the outset, at least some of the townhouse owners have been concerned about how these costs would be allocated. In February 2009 the **Strata Corporation** held its annual general meeting. In advance of that meeting some of the townhouse owners, including the petitioners, requested that a resolution be placed before the meeting as provided for by s. 46 of the *Strata Property Act*. The resolution read:

> The Bylaws of the **Strata Corporation** KAS692 be amended to provide for the creation and administration of separate sections for the town house style strata lots (strata lots 18 to 29) and the apartment style strata lots (strata lots 1 to 17) in accordance with Section 191 and 193 of the *Strata Property Act*. ...

The resolution was defeated by a vote of 10 in favour and 16 opposed.

13 The next event of consequence occurred in the spring of 2009 when the **Strata Corporation's** insurers carried out an inspection of the development. In April 2009 they wrote to the corporation advising of a number of issues which, in an effort to reduce and manage future risks, needed to be addressed. On that list was water ingress in several of the apartment-style units. At a September 2009 meeting, council authorized the expenditure of $4,000 to have a professional building inspection done. In October 2009 this petition was filed. On January 31, 2010 the building inspection report prepared by Aqua - Coast Engineering Ltd. was released. The report noted significant water penetration problems primarily in relation to the cladding, the balconies and the skylights in the apartment tower. While it is not entirely clear exactly how much of these repairs relate to the apartment tower and how much relate to the townhouses, it is reasonable to assume that close to 90 percent of the costs would be for the apartment building.

14 Aqua - Coast provided three options for remedying the problems and the costs of those options ranged from just over $1 million to $1.14 million. The petitioners sought a second opinion and that opinion was provided by Timothy Spiegel, a professional quantity surveyor, on June 17, 2010. He estimated the costs, exclusive of soft costs, mark ups and the like, at $1.14 million. Of that sum, $954,035 was for repairs to the apartment tower and $186,665 was for repairs of the townhouses.

15 Votes at meetings of the **Strata Corporation** are allocated according to units; each unit has one vote. Given that there are 29 units of which 17 are apartments, the apartment owners hold 58 percent of the available votes and townhouse owners the remaining 42 percent. Allocation of common expenses is done according to unit entitlement, and the apartments have 57.9 percent of the units of entitlement while the townhouse owners have 42.1 percent.

16 When the petition came on before Burnyeat J. he had two concerns. One related to resolving the evidentiary conflict surrounding how to characterize the past expenses, that is, whether they related to the townhouses, the apartment tower or both. Burnyeat J.'s other concern was that the petition was premature insofar as the **Strata Corporation** had not yet resolved to proceed with the repairs. He therefore asked for the accounting noted above and ordered that the **Strata Corporation** convene a special general meeting prior to November 15, 2010 for the purpose of considering a special resolution to be prepared by the strata council dealing with the levy by which the repair costs would be funded. The resolution the council was to prepare was to be "fair to all owners".

17 Following Burnyeat J.'s decision the owners of the **Strata Corporation** established an *ad hoc* committee with four members, two from each type of strata unit (the "Committee"). The Committee was charged with exploring the possibility of a consensual solution to the issue of cost allocation between the different types of units and with providing input on the resolution ordered by Burnyeat J.

18 Not long after the Committee was struck there was a serious rain storm in Kelowna which caused flooding in

three of the apartments. Aqua - Coast was asked to revisit its recommendations in light of this additional damage. It issued its second report on January 17, 2011 (the "2011 Report") (in the interim the parties had filed a consent order extending the deadline imposed by Burnyeat J.). In the 2011 Report the cost of remediation is estimated at just over $2 million. Of those costs, $1.88 million relate exclusively to the apartment tower and $137,838 relate to the townhouses. In percentage terms, just over 93 percent of the costs relate to the tower and just under 7 percent relate to the townhouses.

19 Armed with this new information, the Committee set about attempting to agree on an acceptable resolution to be placed before the special general meeting. The townhouse representatives on the Committee proposed that townhouse owners pay for the repairs to the townhouses recommended in the 2011 Report and contribute $200,000 towards the repairs necessary to the apartment tower. Further, they recommended that going forward any common area repairs to the apartment tower would be paid for by the owners of the units in the tower, and the townhouse owners would pay for repairs to their buildings; in neither case would there be contribution by owners in buildings housing one type of strata unit to repairs made to buildings housing another type of unit. The townhouse owners on the Committee thought that if the Committee could not agree on a resolution, then each faction on the Committee would put forth a draft resolution and council would put them in final form for presentation to the owners.

20 The apartment owners provided a counter proposal in which they suggested the townhouse owners would only contribute 33 percent of the cost of the remediation of the apartment tower (down from the 42 percent that would otherwise apply) but that all future repairs would be paid for in accordance with unit entitlement regardless of which type of building needed the repairs.

21 These drafts were given to the council who, after seeking legal advice, proposed the Special Resolution that would have had the townhouse owners contribute $300,000 to the remediation of the apartment building as well as pay for all the repairs to the townhouse buildings. As a percentage of the total cost, this amounted to just under 22 percent. Further, the Special Resolution included an explicit rejection of future sharing of costs otherwise than on the basis of unit entitlement without regard to which building the repairs may relate to. The Special Resolution was put before a special general meeting on April 30, 2011, and defeated by a vote of 19 opposed and 6 in favour.

22 After the April 30 meeting, the respondent retained Ms. Murray. She advised that it was not legally possible for the **Strata Corporation** to allocate costs otherwise than by unit entitlement unless the **Strata Corporation** passed a unanimous resolution to that effect or created sections. Given Ms. Murray's advice on the matter, further attempts at a consensual resolution appeared doomed and the parties reset their petition.

Analysis

23 The petitioners seek relief under s. 164 of the *Strata Property Act* which provides that:

> (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
> >
> > (b) exercise of voting rights by a person who holds 50% or more of the 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,

(b) vary a transaction or resolution, and

(c) regulate the conduct of the **strata corporation's** future affairs.

24 The parties agree that the definition of "significantly unfair" is that set out in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, 12 B.C.L.R. (4th) 67. In that case Ryan J.A. approved of the definition of "significant unfairness" in *Gentis v. Strata Plan VR 368*, 2003 BCSC 120, 8 R.P.R. (4th) 130, where at paras. 27-29 Masuhara J. held:

> [27] The scope of significant unfairness has been recently considered by this Court in ***Strata Plan VR 1767 v. Seven Estate Ltd.*** (2002), 49 R.P.R. (3d) 156 (B.C.S.C.), 2002 BCSC 381. In that case, Martinson J. stated (at para. 47):
>
> > The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: ***Reid v. Strata Plan LMS 2503***, [2001] B.C.J. No. 2377.
>
> [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 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.
>
> [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.

25 The *Strata Property Act* recognizes and permits the creation of "sections" within a **strata corporation**. Section 191 provides that:

> (1) A **strata corporation** may have sections only for the purpose of representing the different interests of
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> (a) owners of residential strata lots and owners of nonresidential strata lots,
>
> (b) owners of nonresidential strata lots, if they use their strata lots for significantly different purposes, or
>
> (c) owners of different types of residential strata lots.
>
> (2) For the purposes of subsection (1) (c), strata lots are different types if they fall within the criteria set out in the regulations.

26 Section 11.1 of the *Strata Property Regulation*, B.C. Reg. 43/2000, establishes three types of strata lots, including apartment-style and townhouse-style lots. Sections may be established either by the owner developer on depositing the strata plan or by the **strata corporation** following its creation. In relation to the latter, s. 193 of the *Act* provides in part that:

(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, ...

(3) The resolution referred to in subsection (2) (a) must be passed

(a) by a 3/4 vote by the eligible voters in the proposed or existing section, and

(b) by a 3/4 vote by all the eligible voters in the **strata corporation**.

27 In *Chow v. Strata Plan LMS 1277*, 2006 BCSC 335, 54 B.C.L.R. (4th) 380 Taylor J. ordered the creation of sections pursuant to the remedial power in s. 164. The parties agree that this Court has the authority to order the creation of sections under s. 164; they disagree on whether anything done or proposed to be done by the **Strata Corporation** has been or will be significantly unfair.

28 The petitioners argue that two actions, one that has occurred and the other which is proposed, has been or will be significantly unfair. The past action is the manner in which the **Strata Corporation** dealt with the Special Resolution which Burnyeat J. wanted the **Strata Corporation** to consider. The proposed action is the imposition of a special levy that will be necessary to fund the repairs to the apartment tower.

29 It is the prospect of the special levy which is at the core of the petitioners' concern and I will therefore deal with that issue first. The *Strata Property Act* prescribes how operating and other costs are to be shared. Section 99 sets out how the owners' contribution to the **Strata Corporation's** operating and contingency reserve fund are to be calculated. It provides that each owner is to pay that portion of such costs that the owner's unit entitlement bares to the total unit entitlement of all the lots in the **Strata Corporation**. Repairs of the kind necessary to the apartment tower are not operating expenses and the contingency reserve fund does not and will not have a sufficient balance to cover them. As a result they will have to be funded by a special levy. Section 108 of the *Act* provides that:

(1) The **strata corporation** may raise money from the owners by means of a special levy.

(2) The **strata corporation** must calculate each strata lot's share of a special levy

(a) in accordance with section 99, 100 or 195, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

(b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.

...

30 The **Strata Corporation** has a total unit entitlement of 3,537. The unit entitlement of the apartments range from 108 to 138 per lot and total 2,041 units or 58 percent of the total. The townhouse lots range from 118 to 150 per lot and total 1,496 or 42 percent of the total unit entitlement.

31 The 2011 Report groups the recommended repairs according to the urgency of undertaking them. The two most urgently needed repairs relate exclusively to the apartment tower. As noted above they are estimated to cost $1,882,406. The third category of repairs, those that are the least urgently needed, relate to the two townhouse buildings and are expected to cost $137,838. Assuming all the repairs are undertaken, the cost per unit of entitlement will be $571. The cost for each apartment-style lot will range from a low of $61,668 to a high of $78,798. The cost for the townhouse lots will range from $67,378 to $85,650. If the **Strata Corporation** is divided into sections and the repair costs are borne by the type of units to which they relate, the cost per unit of entitlement for the apartment-style lots would be $922 per unit. The cost to each apartment owner would range from a low of $99,576 to a high of $127,236. The townhouse owners' cost per unit of entitlement would be $92. The individual owners would have to pay from $10,856 to $13,800.

32 Put in other terms, some 93 percent of the repairs relate to the apartment tower. If they are paid for by all of the owners contributing according to their unit entitlement, the townhouse owners will pay 42 percent of these costs. In terms of the impact on individual townhouse owners, they will be paying from between $56,522 to $71,850 more than if they were paying only for repairs to the buildings housing their units. This, they say, is significantly unfair.

33 The apartment owners on the other hand argue that they purchased lots in the **Strata Corporation** as a whole and on the assumption that every owner would contribute as provided for by the *Act*. If sections are created and costs allocated according to unit type and building benefited, then they will pay from between $37,908 to $48,438 more than they reasonably expected to pay. They also say that there is no history of treating the townhouse buildings differently than the apartment tower. Further, they argue they will be saddled with the additional administrative costs associated with running what will be in effect three **strata corporations** - the two sections and the umbrella **Strata Corporation**. Those costs they argue are not insignificant. Finally, they point out that there are amenities and services housed in the apartment tower which benefit the townhouse owners. To the extent that is so, repairs to the apartment building benefit the townhouse owners. Section 195 of the *Strata Property Act* provides that only the expenses that relate "solely" to the strata lots in a section are section expenses to be paid for by that section. If the townhouses benefit from the cost of repairs to the apartment building, then arguably the expense does not relate "solely" to the apartment-style units and is not an expense to be borne by only one section.

34 The petitioners argue that their situation is similar to that dealt with in *Chow* and to a lesser extent *Shaw v. Strata LMS 3972*, 2008 BCSC 453, 71 R.P.R. (4th) 255. The respondents argue that support for their position is found in *Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085, 17 B.C.L.R. (4th) 63; *Terry v. Strata Plan LMS 2153*, 2006 BCSC 950; *Peace v. Strata Plan VIS 2165*, 2009 BCSC 1791; *Liverant v. Strata Plan VIS*-5996, 2010 BCSC 286, *The Owners, Strata Plan VR1767 v. Seven Estate Ltd.*, 2002 BCSC 381, 49 R.P.R. (3d) 156 and *Large, McCall v. Strata Plan No. 601*, 2005 BCSC 1128, 34 R.P.R. (4th) 62.

35 An examination of this jurisprudence should begin with *Alvarez*, a decision of Bauman J. (as he then was). The issue in *Alvarez* related to the cost of repairs to the building envelop. The threshold legal question was whether the regime created by the *Strata Property Act* or the *Condominium Act* governed the allocation of those costs. In the course of answering that question Bauman J. considered the overall scheme of the *Strata Property Act*. He held at paragraph 35 that the organizing principle of the *Strata Property Act* is that "you are all in it together".

36 The strata development in *Alvarez* consisted of eight units - two of which were in a heritage house while the other six were in a new building attached to the heritage house. The new building experienced water penetration problems and costly repairs were needed to remedy them. The Alvarezes, who owned one of the heritage units, did not want to contribute to the cost of the repairs, taking the position that the repairs did not benefit them at all. Bauman J. concluded that all of the units in the development were of one type, and thus the option of creating sections was not available. The question of whether the allocation of the repair costs in accordance with unit entitlement was significantly unfair was however considered. At paragraph 97 he wrote:

> From the perspective that this building is an integrated structural unit (albeit marrying old and new construction) there is nothing unfair or oppressive, as urged in the alternative by Mr. and Mrs. Alvarez, in the resolution of 15 October 2001. On the contrary, it is wholly consistent with the implicit representations made by the Alvarezes as owner developers of this project. That is to say, there was never any suggestion in the disclosure statement for this development but that common expenses would be shared by all units in accordance with their unit entitlement.

37 The repair costs in *Alvarez* were estimated at $160,000. The precise implications for the individual owners is not set out in the decision but, assuming relatively equal unit entitlement, the cost to the Alvarezes would likely be $20,000 if all contributed to the repair costs. If only those housed in the newly constructed portion of the building paid, then each of them would pay about $26,666.

38 *Terry* is another decision of Bauman J. It involved a phased strata development. All the units were of the same type and thus sectioning was not available as a remedy if the actions complained of were found to be significantly unfair. Phase 1 of the development had water penetration problems. The other two buildings did not. The cost of repairing the problems was variously estimated at between $2.9 million and $4 million. There were 302 units in the building. The repairs would cost between about $10,000 and $13,500 per unit. If only phase 1 units were required to shoulder the cost, the levy would be about $25,000 per unit (about half the units were in phase 1). The phase 1 owners sought declarations that the repairs were necessary and that there be a special levy applicable to all owners according to their unit entitlement. This was resisted on the ground that it would be significantly unfair. The court held that all owners in all phases were required to contribute to the cost of repairs. In reaching that conclusion Bauman J. adopted the more expansive definition of "significant unfairness" in *Reid* and then noted at paragraph 86:

> I begin by noting that in each of the cases cited by counsel where "significantly unfair" conduct was found, there had been a history of past dealing or conduct which the **strata corporation**, in each case, was ignoring in pursuing the impugned action, usually against a distinct minority within the **strata corporation**...

He then concluded in paragraphs 100 and 102 that:

> [100] Nothing in the conduct of the **strata corporation** before the advent of Phases 2 and 3 can sustain a submission that the corporation has been "significantly unfair" to these new members. ...
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> . . .
>
> [102] The unfairness argument really falls away when one looks at what the Phase 2 and Phase 3 owners knew, or ought to have known, when they purchased their units. Nothing about the problem with the Phase 1 buildings was kept secret. The nature and extent of that problem was disclosed in the minutes of the **strata corporation**. The problem was also, eventually, more fully disclosed by the developer, at least to the extent of putting purchasers on their enquiry in the amended Disclosure Statement of October 2003. There is no suggestion that the Phase 1 owners delayed so as to subject the Phases 2 and 3 owners to responsibility for the repair costs.

39 The declarations requiring the **strata corporation** to effect the necessary repairs and allocate costs based solely on unit entitlement sought in *Terry* were, for the most part, made. The court found that it was not significantly unfair for owners in buildings that did not have water ingress problems to pay, according to their unit entitlement, for repairs necessary to the buildings that did have those problems.

40 The matter at hand has three circumstances that may serve to distinguish it from *Terry*. Those three circumstances are: firstly, in the matter at hand the buildings house different types of units; secondly, the expenses are not ones that anyone anticipated when they purchased; and finally, the expenses per unit of entitlement are significantly higher.

41 The *Peace* case posed a different variation on the cost allocation issue. It was yet another case involving costly repairs necessary to remedy water penetration in a strata development. While the units in the development were all of the same type, some had full basements and others only crawl spaces. The units with basements had twice the unit entitlement of those with only crawl spaces. If the cost of repairs were allocated on the basis of unit entitlement, as the *Act* mandates, the units with basements would be required to pay $120,000 each, while those with crawl spaces would pay only $60,000. Because the basement units had a larger envelop, the repair costs associated to them were 36 percent higher than the costs associated with the crawl space units. As a result, the owners of the units with basements were subsidizing the repairs to the units with only crawl spaces by about $21,000 per basement strata lot. The owners of the basement units argued that such a result would be significantly unfair and sought an order under s. 164 that the cost of these repairs be allocated on a basis other than unit entitlement. Sewell J. refused the relief. At paragraph 53 *et seq.* he wrote:

> I am unable to accept this submission. In my view I would in effect be overruling section 108 of the SPA if I did so. Once it is established that the Repairs are necessary it seems to me that it is legally mandatory for them to be paid for by a special levy assessed on unit entitlement. This assessment is not the result of any action of the **Strata Corporation**. It is in fact the legally necessary consequence of the **Strata Corporation** carrying out its duty to repair the common property.

42 In reaching this conclusion Sewell J. relied on the principles set out by Bauman J. in *Terry*. As to the ambit of s. 164 he wrote at paragraph 55:

> [T]he focus of that section is on the conduct of the **Strata Corporation** and not on the consequences of the conduct. There is no doubt that in making a decision the **Strata Corporation** must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the [*Strata Property Act*] itself.

43 The repairs in *Peace* were both unprecedented and unexpected. None of the owners knew when they purchased their units that expensive repairs would be necessary. Further there was no prior conduct by the **strata corporation** which would have led the owners of basement suites to conclude that repair costs would be allocated otherwise than in accordance with unit entitlement.

44 In *Liverant* the petitioner argued that the **strata corporation** had acted significantly unfairly by allocating operating expenses according to unit entitlement, that is, as required by s. 100 of the *Strata Property Act*, and sought relief under s. 164. N. Smith J. dismissed the application for various reasons but among them was his conclusion at paragraph 22 that "[d]irect compliance with a specific provision of the governing legislation cannot, by definition, be significantly unfair."

45 *Seven Estate Ltd.* was another case involving a leaky condominium. The condominium consisted of 25 residential lots, two commercial lots, and a parking lot. Seven Estate Ltd. owned the parking lot and argued that it would be significantly unfair if it was required to contribute to the significant repairs needed to the building envelop. The other owners argued that the *Act* mandated that costs be allocated according to unit entitlement and that it would not be unfair to follow that approach.

46 Although, as Bauman J. pointed out in *Alvarez*, some aspects of the analysis in *Seven Estate Ltd.* were flawed, those flaws do not affect the court's analysis of whether there was significant unfairness. The court found there was significant unfairness primarily because the **strata corporation** had historically treated the parking lot as having a particular unit entitlement, one that everyone recognized the developer had intended it to have. In fact the strata had

passed a resolution some years before which purported to reduce by half the unit entitlement of the parking lot. Although the strata thereafter assessed costs on that basis, it did not amend its bylaws to bring them into accord with the change. When it came time to allocate responsibility for the building envelop repairs, the **strata corporation** sought to do so, not in the way it had in the past, but in accord with what its bylaws continued to provide. As a result the parking lot owner was to be charged twice what it would otherwise have had to pay. The court directed that the strata plan in the Land Title Office be amended to reflect the reduced unit entitlement of the parking.

47 It is appropriate at this juncture to consider *Chow*. The **strata corporation** in *Chow* consisted of 17 townhouses and 33 apartment-style lots. There were moisture penetration problems in both the townhouses and the apartment building. There were two options open to the strata development in pursuing remedial work. One option involved the full remediation of the apartment building and only a partial repair of the townhouse building. If that option were chosen, and the costs allocated by unit entitlement, the townhouse owners would be "over-contributing" in the sense of paying for repairs to the apartment building by about $20,611 per townhouse. This option, and another option which would have had the apartment owners subsidizing the townhouse owners, were put before a meeting of the **strata corporation** and both were defeated. The corporation then considered a resolution to create sections as provided for in s. 193 of the *Act*. That resolution was also defeated, again with the vote apparently dividing according to type of unit. As in *Seven Estate Ltd.* there were cross-petitions. The apartment owners originally sought orders that would have had the effect of imposing the first repair option. The townhouse owners sought an order creating sections, similar to the order the townhouse owners in the matter at hand seek.

48 Taylor J. found that there was and would be significant unfairness to the townhouse owners if the remediation expenses were not accounted for separately as between the two types of strata lots. At paragraph 101 he explained that the unfairness manifested itself in the following ways:

> 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.

He ordered that the **strata corporation** create sections.

49 The **strata corporation** in *Chow* was created in the early 1990s under the *Condominium Act*. As noted above, the default approach to allocating common costs in the *Condominium Act* is found in s. 128. As Bauman J. noted in *Alvarez* at paragraph 16, "[t]hese provisions have been held to require discrimination in the allocation of repair costs to building envelops between different types of strata lots". The **strata corporation** in *Chow* allocated operating and other costs according to whether they benefited the apartment-style lots, the townhouses, or both. That approach was adopted in the first budget proposed by the owner developer in 1994. The **strata corporation** continued to deal with its expenses in that way notwithstanding the repeal of the *Condominium Act* and the enactment of the *Strata Property Act* and the consequent change to the default rules for dealing with such expenses.

50 In *Chow* the **strata corporation** continued to follow its original practice until 2003 when the issue of the costly repairs to the building envelop arose. The position initially taken by the apartment owners was that the repairs should be paid for according to unit entitlement and without regard to which type of strata lot the repairs benefited. If this were done it would amount to a change in the manner in which such expenses had historically been treated. It was in this sense that Taylor J. found an element of unfairness. He also found unfairness in the significant differences be-

tween the townhouse repairs and the apartment repairs, at least if the first option for repairs were adopted, as the apartment owners initially sought.

51 The last case of significance is *Shaw*. The **strata corporation** under consideration in that case had two sections, one for the commercial strata lots and the other for the residential lots. A portion of some of the common operating expenses were assigned to the residential lots and the remainder were treated as combined expenses. The commercial strata lot owners relied on the combined budget for its expenses, although the residential lots paid 38 percent of those costs. Over time certain combined expenses such as water and repairs and maintenance increased significantly. The residential owners installed an internal water meter to determine where, within the corporation, water was being consumed. They discovered that the commercial units were consuming 99 percent of the water. There were other less dramatic discrepancies between the use of and payment for other combined expenses.

52 The residential owners put forth a resolution at an annual general meeting to address this imbalance. They sought to have water and sewer expenses allocated 80 percent to the commercial owners and all other expenses allocated 75 percent to those owners. Because of s. 100 of the *Strata Property Act*, the motion required unanimous approval. The owners of commercial units voted against it, and it was defeated. The residential owners filed a petition seeking a declaration that the allocation of the common expenses was significantly unfair and an order that they be reallocated to conform, at least generally, to the consumption by the different sections.

53 Koenigsberg J. found that the allocation of the water and sewer expense was significantly unfair having regard to the meaning of that phrase adopted in *Reid* and *Chow*. She was not prepared to find that the allocation of the other common expenses had been shown to be significantly unfair because, although they were disproportionately used by the commercial lot owners, the degree of that discrepancy was not established and thus the allocation, while perhaps unfair, could not be said to be significantly unfair.

54 From the foregoing several considerations emerge. First, it is important to bear in mind the scheme of the *Strata Property Act* when determining whether past or proposed actions are significantly unfair. As Bauman J. observed in *Alvarez*, the general rule is that within the **strata corporation** "you are all in it together". In the course of reaching that conclusion he noted the change between the way the *Condominium Act* and the *Strata Property Act* deal with common expenses. Under the former the default approach was that set out in s. 128(2), which provided that "common expenses attributable to one or more type of strata lot must be allocated to that type of strata lot and must be borne by the owners of that type of strata lot". Under the *Strata Property Act* the opposite is the case. All common expenses are born by all strata lot owners in accordance with their unit entitlement. A **strata corporation** can change that approach, but the threshold that must be met in order to do so is very high. One way is to change the formula (that is individual unit entitlement as a percentage of total unit entitlement). To do that requires a resolution passed by a unanimous vote (s. 100(1)). Another way is to change the unit entitlement of one or more strata lots; that too requires a unanimous resolution (s. 261). Yet a further way is for the **strata corporation** to create sections. A unanimous vote is not required to create sections but a series of votes, each of which requires a three-quarters majority, is (s. 193). Thus the general rule is "you are all in it together" and that general rule cannot and ought not be lightly displaced.

55 A second matter of importance to the assessment of whether conduct is significantly unfair is the historical approach to similar issues. If the **strata corporation** has approached similar issues, such as the treatment of expenses, in one way and then changes its approach to the substantial detriment of one group or type of strata lot owner, that will often be cogent evidence of unfairness. It was found to be such in both *Chow* and *Seven Estate Ltd.* In fact in *Seven Estate Ltd.* such a change alone grounded the finding of significant unfairness.

56 The historical treatment of expenses in the case at hand does not support a finding of significant unfairness; in fact it militates against such a finding. In 1991 the **Strata Corporation** budgeted for common expenses on the basis of whether they benefited the apartment building, the townhouses, or both. Although there is some doubt as to the 1992 budget, I am satisfied that in every year other than 1991 the **Strata Corporation** made no distinction between expenses which benefited one type of strata unit or another. Moreover they did this notwithstanding that their bylaws,

which incorporated s. 128 of the *Condominium Act*, required them to do otherwise.

57 If the **Strata Corporation's** historical treatment of expenses could be explained as an oversight or a matter to which no thought was given it may not be significant. It was not a matter of oversight however; rather it was the result of a conscious decision. The issue was squarely before an extraordinary general meeting on September 29, 1993. Everyone then knew that expenses that were attributable to one type of strata unit, as opposed to those that related to both types of units, could be charged to the type of unit that benefitted. They also knew that apartments and townhouses were, for purposes of the *Condominium Act*, different types of units. They knew all of this because they sought the advice of the Deputy Superintendant of Real Estate and he explained as much in his September 22, 1993 letter. The issue was discussed at the extraordinary meeting, and while no formal vote was taken the minutes record that

> ...Owners recognized that there were a number of costs borne by the townhouse type units which were directly attributable to the highrise type units. However, it was stated that owners had agreed from the inaugural General Meeting onward that the **Strata Corporation** was to be treated "all as one" with the costs being apportioned among all units. ...

58 At the time of that meeting one of the petitioners, Bert Bouma, was the strata council president. Thus, unlike the situation in *Chow*, spreading the cost of the remediation according to unit entitlement and without regard to strata lot type is not a derogation from past practice but rather a continuation of a course of action consciously followed for many years.

59 A third factor to be considered is other conduct on the part of the **Strata Corporation**. This may be relevant to both the threshold question of whether there has been significant unfairness and the question of the appropriate remedy if significant unfairness is found. The petitioners argue both points and liken their situation to that in *Chow*. In *Chow* the **strata corporation** considered the issue of creating sections at several general meetings. Each time the resolutions failed to garner the necessary votes. The apartment owners then filed a petition naming the **strata corporation** as respondent. They did not have the petition served on any of the townhouse owners, although they learned of it soon enough. The petitioners then sought an order which, if granted, would have seen the apartment building repaired completely, and the townhouses repaired only to a limited extent. It would have required all owners to contribute according to their unit entitlement. Notwithstanding that the petition raised "fundamental issues of governance", the apartment owners refused to adjourn the hearing of it to allow a competing petition filed by the townhouse owners to be heard at the same time. Only after the adjournment was ordered did the apartment owners amend their petition to seek the sharing of the cost of all of the necessary repairs. The townhouse owners argued at paragraph 73 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**.

60 Taylor J. did not consider this evidence of significant unfairness, but he did find it relevant to the question of remedy. He wrote at paragraph 107:

> Further, given the manner in which the [apartment owners'] petition was advanced and the conduct that led Mr. Justice Curtis to adjourn that application so that the [townhouse owners'] 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.

As noted above, he ordered that sections be created.

61 The petitioners argue that the events that followed Burnyeat J.'s decision in August 2010, and which culmi-

nated in the Special Resolution at the general meeting on April 30, 2011, support a finding of significant unfairness. Burnyeat J. ordered that the strata council prepare the resolution that they believed to be fair to all owners. To their credit, the apartment owners and the townhouse owners through the *ad hoc* Committee worked co-operatively to resolve what is for all concerned a very difficult issue. They negotiated in apparent good faith, but reached an impasse. As to the language of the resolution, the members of the Committee exchanged the views of their respective constituents but could not reach an agreement. Nicholas Kozuska, one of the townhouse owners on the Committee, has deposed that it was his

> ...expectation that if the Committee members could not come to an agreed upon resolution to be put forward, that each group would put forward their own resolution and allow the owners as a whole to decide whether either resolution had sufficient support to be passed as a Special Resolution.

Meanwhile, the members of council who were charged with the preparation of the resolution sought legal advice. Based on that advice the Special Resolution was placed before the meeting. The Special Resolution did not address the creation of sections, but did contain a compromise solution to the funding of all of the remedial work recommended in the 2011 Report. The resolution was defeated by a vote of 19 opposed to 6 in favour. The petitioners argue that the Special Resolution should have addressed the sectioning issue, and that the failure to do so amounts to conduct that is significantly unfair and is also a matter relevant to the question of the appropriate remedy.

62 I am not persuaded there was anything unfair in the approach taken by the **Strata Corporation**. First, there is no suggestion that there was a lack of good faith on anyone's part. The strata council proposed the resolution based on the advice it had received. Second, it is at least arguable that the Special Resolution presented by the strata council had a better chance of succeeding, and thus resolving the immediate issue, than would a resolution which included the creation of sections. Viewed from this perspective, the Special Resolution represented a reasonable attempt to address the immediate issue. Finally, the fact that Special Resolution did not include the creation of sections, did not preclude that issue from being raised, debated and addressed either at the special general meeting or in future.

63 The last and arguably the most important consideration in the context of this case is the sheer magnitude of the expense and the degree to which it may be said to benefit the apartment-style units as opposed to the townhouse units. The petitioners say that just over 93 percent of the repairs are for the apartment building and just under 7 percent relate to the townhouses. Because of their unit entitlement, the townhouse owners will be paying 42 percent of the costs. From the townhouse owners' perspective, if the costs are borne according to unit entitlement they will end up subsidizing the apartment owners by between about $56,000 to $65,000 per townhouse. This represents the difference between those repairs that are related to the townhouses (which would give rise to a cost per lot of between $10,856 and $13,800) and those which relate to both types of strata lots (which would give rise to a cost per townhouse of between $67,378 and $85,650).

64 Of course it should be noted that this is not an entirely accurate description of the issue, because the repairs to the apartment building do benefit the townhouse owners in as much as the apartment building houses common amenities which are used by the townhouse owners. While the space occupied by these amenities in the apartment tower is not particularly large, their value to the townhouses may be greater than the space they occupy. The point is, however, that some of the expense associated with the repair of the apartment building will benefit the townhouse owners. That said, the benefits of the repairs do not match the burden of the cost.

65 The cost of these repairs is significant; much greater on a per-strata-lot basis than those at issue in the other cases. The cost in *Alvarez* to the units which claimed to receive no benefit from the needed repairs was about $20,000 per strata lot. The repairs were about $160,000 spread among six or eight owners. In *Terry* the owners in the two phases that received no benefit from the repairs were required to pay between $10,000 and $13,000 per strata lot. In *Peace* the "subsidy" paid by the owners of the townhouses with basements was about $21,000 per strata lot. In *Chow* the **strata corporation** consisted of 17 townhouses with 46 percent of the unit entitlement, and 33 apartment-style lots with 54 percent of the unit entitlement. The cost of repairs to the apartment building was $1,264,000. The repairs to the

townhouses were expected to cost $431,000. In total the repairs would be $1,695,000. The townhouse lots would be responsible for just under $46,000 per lot for the repairs, if allocated according to unit entitlement. If allocated according to the type of unit benefited, the townhouse owners would pay just over $25,000 per lot. In *Seven Estate Ltd.* the contribution of the parking lot owner was either $127,000 or half that amount depending on which unit entitlement was used. Although the unfairness was rooted in the disproportionate allocation of benefits, the decision turned on the historical record. In summary, the effect on the owners of the townhouses, of the repairs necessary in this case, will be substantially greater than in any of the cases in which no significant unfairness was found.

66 To return to the basic issue, is it significantly unfair for the townhouse owners to contribute to the cost of the repairs needed to the apartment building? The issue may be viewed from two perspectives. The **Strata Corporation** argues that all that is being proposed is the allocation of costs according to unit entitlement which is what the *Act* requires. That, it is said, cannot be unfair. As Sewell J. held in *Peace* at paragraph 55:

> ... if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the [*Strata Property Act*] itself.

67 The petitioners argue that in *Peace*, and several of the other cases in which the court found no significant unfairness, the option of creating sections was not available. They argue that the results may have been different had that remedy been available. I cannot agree. It seems to me that conduct is either significantly unfair or not; its essential quality does not change depending on the available remedy. That said, the question which remains is whether a difference of degree can amount to a difference of kind. The conduct in question is not "wrong", it does not lack "probity", nor can it be said to be the product of bad faith. It is difficult to characterize the proposed course of action as unjust, given that what is being proposed is not simply consistent with the *Strata Property Act* but prescribed by it. It may be viewed as burdensome but, without more, I am not persuaded that is synonymous with significant unfairness, at least not in this context. As Sewell J. held in *Peace*, the focus of the remedial provision in s. 164 is on the conduct of the **strata corporation** and not on the consequences of the conduct.

68 It follows that the petition is dismissed. I will hear from the parties on the question of costs.

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