

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Nomani v. The Owners, Strata Plan LMS
3837,***
2007 BCSC 276

Date: 20070228
Docket: L050472
Registry: Vancouver

Between:

Syed Nomani also known as Jewel Nomani

Petitioner

And

The Owners, Strata Plan LMS 3837

Respondent

Before: The Honourable Mr. Justice Blair
in Chambers

Reasons for Judgment

Syed Nomani appeared on his own behalf

Counsel for the Respondent

A. Murray

Date and Place of Trial/Hearing:

December 11 – 15, 2006
Vancouver, B.C.

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[1] The petitioner, Syed Nomani, seeks the appointment of an administrator to exercise the powers and perform the duties of the Strata Corporation LMS3837 (the "Strata Corporation"), pursuant to s. 174 of the ***Strata Property Act***, S.B.C. 1998, c. 43 (the "***Strata Act***").

[2] The Strata Corporation occupies a building at 567 Hornby Street in Vancouver and consists of 127 hotel-style strata lots and three commercial strata lots. Mr. Nomani owns two of the hotel strata lots. The developer, American Corporate Suites Canada Inc. ("ACS") created the Strata Corporation in 1999 with the intention of operating a hotel business. The purchasers of the strata lots had the opportunity to either occupy their lots or lease them to ACS.

[3] Prior to the registration of the strata plan in 1999, ACS leased the underground parking lot to an affiliated company and after the registration the Strata Corporation leased to ACS the common property within the building to allow it to operate the hotel known as Le Soleil Hotel & Suites. I will refer to these as the leases. ACS became insolvent in 2001, and in January 2002 a group of strata owners known as the Le Soleil Owners Group (the "LSOG") petitioned ACS into bankruptcy. In March 2002 ACS's Receiver offered its assets for sale, including the leases, with the caveat that there existed the possibility of litigation with respect to the legality of the leases.

[4] The LSOG sought to acquire ACS's assets to achieve its goal of taking over the hotel's operation, but a higher bid was made by Sunbelt Hotel Management Services Ltd. ("Sunbelt"), an affiliate of Le Soleil Hotel and Suites Ltd. which

continued the hotel's operation. In March 2003 Le Soleil Hospitality Inc. ("Hospitality") assumed operating the Le Soleil hotel and continues to do so with approximately 95 of the 127 owners presently leasing their strata lots to the Le Soleil hotel operation to manage as hotel units. The Le Soleil hotel utilizes the leased properties obtained from ACS's bankruptcy as part of its hotel operation, including the lobby on the main floor entrance and the underground parking lot. The owners of the remaining 32 units either use the units for their own purposes or make their own arrangements for the rental of their strata lots. Mr. Nomani, through a company called Hornby Apartment Ltd., operates a hotel known as the Hornby Hotel within the hotel and manages approximately 18 strata lots.

[5] The operation of the Strata Corporation is distinct from the operation of the Le Soleil hotel and in 2000 the Strata Corporation retained Crosby Property Management Ltd. ("Crosby") to provide strata management services. Although the LSOG originally comprised a majority of the owners of the Strata Corporation, it now numbers just some 21 owners. When the majority of the owners belonged to the LSOG they controlled the Strata Corporation's strata council, but diminishing support led to their losing control of the strata council at the Strata Corporation's annual general meeting on January 31, 2005.

[6] When in control of the strata council, the LSOG challenged directly or indirectly the validity of the leases of the common property and the underground parking acquired from the bankruptcy of ACS with a view, I gather, of taking over the operation of the hotel. Mr. Nomani's position, like that of the LSOG, is that the leases are invalid and should be challenged.

[7] In *Ang v. Spectra Management Services Ltd.*, 2002 BCSC 1544, Mr. Justice Lowry (as he then was) dismissed a petition brought by Sim Wee Betty Ang, a strata lot owner, in which she sought to have the leases declared void. At ¶17, Lowry J. noted that the LSOG were unable to obtain the three-quarters vote from among the owners of the Strata Corporation to commence an action to challenge the validity of the leases and LSOG had Ms. Ang apply to circumvent the governance provisions of the Strata Act “and achieve what it could not achieve through a special meeting of the owners”. Lowry J. concluded that Ms. Ang lacked the standing to make the application, holding that a challenge to the leases must come from the Strata Corporation after obtaining the approval of three-quarters of the owners of Strata Corporation.

[8] At the Strata Corporation’s annual general meeting in February 2003, a resolution to initiate a legal challenge to the leases attracted the support of just 55 percent of the owners, well short of the three quarters support needed to initiate such an action. The LSOG-controlled strata council ignored the results of the owners’ vote and continued in 2003 and 2004 to pay legal fees to pursue challenges to the validity of the leases. In June 2004, without obtaining the owners’ approval, the strata council authorized the payment of legal fees to initiate Vancouver Action No. S044720 in the name of the Strata Corporation to challenge the leases. The strata council discontinued the action in February 2006.

[9] On October 29, 2004 two owners, Dockside Brewing Co. Ltd. and Klaus Jurgen Scholz, petitioned in Vancouver Action No. L042671 for a declaration that the strata councils elected May 13, 2002 and February 27, 2003 had acted in a manner

which was significantly unfair to them by using monies from the operating funds of the Strata Corporation to pay legal fees in respect of legal proceedings without obtaining a three-quarters resolution of the members of the Strata Corporation as required by the ***Strata Act***. The petitioners also sought an order that members of the strata council indemnify the Strata Corporation for the unauthorized expenditures.

[10] Mr. Justice Edwards heard the Docksider petition on June 15, 2005 and in his Reasons for Judgment cited as ***Docksider Brewing Co. Ltd. v. Strata Plan LMS 3837 et al.***, 2005 BCSC 1209 at ¶66 he wrote:

Considerable sums of the Strata Corporation's funds were expended on legal fees in a deliberate attempt to advance the LSOG strategy of challenging the leases, with no benefit to the LSOG, let alone to the Strata Corporation.

[11] Edwards J. granted the declaration and found an appropriate remedy to be the repayment to the Strata Corporation by the respondent strata council members of the \$190,398.99 legal fees which they had spent contrary to the ***Strata Act***.

[12] I have referred only to the decisions of Mr. Justice Lowry and Mr. Justice Edwards as they reflect the difficulties which have beset the Strata Corporation largely as the result of the differing views of the owners with respect to the leases of the Strata Corporation's common area and the parking facilities. Counsel for the Strata Corporation advised that there have been some 23 other actions, some settled, some discontinued, others inactive, and some of which are ongoing and

under case management, involving the business operations surrounding 567 Hornby Street.

[13] With such a litigation background, both past and present, it is little wonder that Mr. Nomani, acting on his own behalf, took three days to outline his claim and the history leading to the filing of his petition. Although the petitioner is primarily concerned with obtaining the appointment of an administrator of the Strata Corporation, he also seeks some related relief which I will address later in my Reasons. Counsel for the Strata Corporation filed a 72-page written submission outlining her client's position. The material filed occupied five large binders and the transcripts of the cross-examination of Mr. Nomani on his affidavit filled 538 pages, albeit double spaced. It is questionable whether the fine and painstaking detail was completely necessary to address the questions raised, although the background is of some importance in understanding Mr. Nomani's present quest for relief.

[14] Although Mr. Nomani supports a challenge to the validity of the leases and his submissions canvassed the history of the leases, the question before me is whether in the circumstances there is a basis for granting the relief he seeks, specifically the appointment of an administrator to assume the role presently occupied by the strata council.

[15] The **Strata Act** provides that:

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

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

(3) The court may

(a) appoint the administrator for an indefinite or set period,

(b) set the administrator's remuneration,

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

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

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

(5) The administrator may delegate a power.

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

[16] In *Lum et al. v. Strata Plan VR519*, 2001 BCSC 493, the petitioners sought the appointment of an administrator pursuant to s. 174. Mr. Justice Harvey suggested at ¶11 that the factors to be considered in exercising the court's discretion whether the appointment of an administrator is in the best interests of the strata corporation include:

(a) whether there has been established a demonstrated inability to manage the strata corporation,

(b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation,

(c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,

(d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,

(e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

[17] At ¶12, Harvey J. adopted the comment of Huddart J. (as she then was) in **Cook v. Strata Plan N-50**, 1995 B.C.J. No. 2882 that the democratic government of the strata community should not be overridden by the court except where absolutely necessary.

[18] It is in the context of s. 174 of the **Strata Act** and the factors suggested by Harvey J. in **Lum** that I consider the concerns expressed by Mr. Nomani in petitioning for the appointment of an administrator. I would note that Mr. Nomani brought this petition on February 24, 2005 less than one month after the LSOG supporters lost control of the strata council at the annual general meeting held January 31, 2005. Although involved in a peripheral fashion with the Strata Corporation, acting as agent for Dr. Andrew Louie who owned a number of strata lots, Mr. Nomani only acquired his first strata lot in January 2005 and his second strata lot in July 2006.

[19] At the January 31, 2005 meeting the membership of the strata council changed significantly and Mr. Nomani became a member of the strata council. The owners voted 69 to 52 with three abstentions in favour of a resolution directing the strata council to support the complaint lodged by Dockside Brewing and Mr. Scholz in Action No. L042671 against the Strata Corporation and members of the previous

strata council. The resolution led to the Strata Corporation's legal counsel advising Mr. Justice Edwards that the Strata Corporation would no longer be taking a position in the Dockside action.

[20] The owners on January 31, 2005 also resolved by a vote of 71 to 52 with one abstention that they were strongly in favour of retaining the current use of the common areas and their property as a hotel and directed the new strata council to ensure that the current use was maintained and any decisions to the contrary or resolutions passed by the previous strata council to undermine or affect the use be overturned. The latter resolution was the result of certain action taken by the previous strata council which would have impacted on the common property utilized by the Le Soleil hotel pursuant to its lease.

[21] I am satisfied that the changed composition of the strata council has resulted in a different approach to the operation of the Strata Corporation. The previous LSOG dominated strata council conducted itself in a manner which drew rebuke from both Mr. Justice Lowry and Mr. Justice Edwards. The previous strata council also made decisions involving mail boxes, signage, kitchen facilities in the strata units, and the apparent termination of certain hotel facilities which appear to have been contrary to the lease of the common LMS property under which the Le Soleil hotel operated. The previous strata council also failed to call an annual general meeting from February 2003 to January 2005.

[22] Mr. Nomani objects to the conduct of the January 31, 2005 meeting and seeks in his petition an order that the election of the strata council at that meeting be

set aside and a new election held. I have reviewed his complaints with respect to the conduct of the voting process at the January 2005 election and find his complaints unfounded. More germane, perhaps, is that two further elections for the strata council have since been held and Mr. Nomani has taken no objection to the conduct of those elections or their results.

[23] I turn now to Mr. Nomani's specific complaints about how the Strata Corporation exercises its powers and performs its duties. These complaints must be considered in the context of s. 174 of the **Strata Act** and the factors outlined by Mr. Justice Harvey in the **Lum** decision. The complaints include the following:

- (a) the inability to access the room housing the building's telephone switching system and equipment;
- (b) his inability to readily access the garbage disposal bin at the rear of 567 Hornby;
- (c) his inability to obtain parking in the underground parking facility;
- (d) his inability to place signage on the building for his own hotel operation;
- (e) problems with mail directed to the building's occupants;
- (f) the installation of kitchen facilities in strata lot units;
- (g) the costs related to security for the building; and
- (h) the Strata Corporation's legal costs.

[24] The strata council has restricted access to the room housing the telephone switching system because it contains equipment owned by Sunbelt and wiring owned by a third-party which the owner of a strata unit occupied by Mr. Nomani sought to modify. The owner, 587019 B.C. Ltd., brought Vancouver Action No.

S060357 against the Strata Corporation to obtain entry into the telephone room.

The action has been largely resolved, although costs remain outstanding.

[25] Mr. Nomani also criticizes the strata council for his inability to access the garbage disposal facility adjacent to the building as some of the doors through which access might be gained are kept locked for security purposes, including the security of the common areas housing Le Soleil's restaurant facility. The strata council has arranged for garbage from the strata units not managed by the Le Soelil hotel operation to be picked up from the stairwells in the building.

[26] I see nothing amiss in a Strata Corporation imposing restrictions on access to certain common areas such as those housing sensitive equipment owned by third parties and important to all the owners of the Strata Corporation or those which are necessary to secure certain of Le Soleil hotel's operations.

[27] Mr. Nomani also criticizes the strata council for not providing monthly parking spaces for owners of strata lots such as himself. He has been advised there are no such spaces available for rent as the underground parking facility is leased to the hotel operation, although he has been offered valet parking through the hotel. Mr. Nomani has found parking at an adjacent building. The parking situation for Mr. Nomani and others who occupy their strata units remains the same as it has been since 1999 when ACS in developing the hotel facility leased the parking facilities and there have been no changes since Mr. Nomani purchased his first strata lot in 2005.

[28] Mr. Nomani also complains of his inability to place signage at or near the entry into the building at 567 Hornby Street for the Hornby Hotel which he operates

with 18 units in the building. The Le Soleil hotel operation through its lease of the common area controls such signage and that too is a situation which is unchanged since 1999.

[29] Mr. Nomani expressed concerns that mail directed to him at 567 Hornby Street was being returned undelivered and is uncomfortable with the present arrangement in which the mail can be collected from the Le Soleil hotel's front desk at the entry to the building. He wants the strata council to place mail boxes in the entry, a move which would place the strata council in breach of the lease of the common property.

[30] Another of Mr. Nomani's concerns lies in the strata council's policy which requires owners wishing to add kitchen facilities to their units to obtain written consent of the strata council before altering piping, wiring and other common property located within their strata lot. The policy covers all the strata units and was introduced by the council on the basis of legal advice it had obtained.

[31] Mr. Nomani also questioned why the Strata Corporation should bear the cost of security for the whole structure, including the hotel operation. The security expense has been included in the Strata Corporation's budget and approved by the majority of owners since 1999.

[32] He further queried the legal fees incurred by the Strata Corporation which, at the November 2006 annual general meeting, were budgeted at \$60,000. Counsel for the Strata Corporation noted that for the period ending September 30, 2006, 75 percent of the legal fees incurred by the Strata Corporation were related to Mr.

Nomani's petition which is the subject of this hearing and Vancouver Registry Action No. 587019 B.C. Ltd. which related to the action instigated by Mr. Nomani and involving access to the telephone switching room. Mr. Nomani appears to criticize the Strata Corporation for defending itself against legal challenges in which he has personally been involved. I find nothing in those legal costs which might support Mr. Nomani's attack on the Strata Corporation's exercise of its powers and performance of its duties.

[33] Mr. Nomani raised several other specific issues with respect to the administration of the Strata Corporation. They are of similar ilk to the matters raised in (a) to (h) above and I find nothing in them which might support a finding that the Strata Corporation has been unable to manage its own affairs, at least since January 31, 2005. I do not view the behaviour of the strata council prior to January 31, 2005 as an appropriate basis upon which the appointment of an administrator should be considered. If an administrator need be appointed, it must be based on the conduct of the strata councils in control since January 31, 2005.

[34] The strata council since January 2005 has continued to operate the Strata Corporation with the involvement of Crosby. In that period the arrears in strata fees payable by the owners have been reduced from \$238,000 to approximately \$20,000. The strata council regularly meets and reports to the owners. No complaints appear to have arisen with respect to the operation of the Strata Corporation, but for those raised by Mr. Nomani who brings this petition on his own behalf. The strata council, which has largely remained the same since January 2005, although Mr. Nomani served just one term on the council, has appeared to effectively manage the Strata

Corporation. I find Mr. Nomani has not established an inability by the council to manage the Strata Corporation nor has he demonstrated substantial or any misconduct or mismanagement or both in relation to the Strata Corporation's affairs.

[35] If there was disorder in the affairs of the Strata Corporation it occurred prior to January 31, 2005, and there is no material before me which would suggest that an administrator is necessary at this time to bring order to the Strata Corporation's affairs.

[36] There is no question that there remains a struggle within the Strata Corporation between those such as Mr. Nomani and the remaining LSOG faction who want the Strata Corporation to challenge the leases, but that struggle is not impeding or preventing the proper governance of the Strata Corporation. Nor can I find substance to Mr. Nomani's contention that a particular group involved in the Le Soleil hotel operation controls the strata council. The voting pattern of the owners suggests that there are a healthy number of divisions within the owners, but that a majority can be found to clearly indicate to the strata council the wishes of the majority. There is no deadlock within the Strata Corporation.

[37] Finally, I do not see the affairs of the Strata Corporation needs the involvement of an administrator to bring order to its affairs.

[38] As an alternative to the appointment of an administrator to exercise the powers and perform the duties of the Strata Corporation under s. 174(1), Mr. Nomani asked the court to appoint pursuant to s. 174(3)(c) an administrator to perform the powers and duties of the strata council and Strata Corporation in respect

of all matters involving Vancouver Action No. S044720, the action brought to challenge the validity of the parking and common property leases. That action was brought in the name of the Strata Corporation and financed with the approval of the pre-January 2005 strata council.

[39] The relief sought by Mr. Nomani to pursue the challenge to the leases is contrary to the resolution passed at the January 31, 2005 annual general meeting in which the owners directed that the strata council should not take any action to alter the existing hotel operation. The owners at a special general meeting on November 4, 2005 defeated a resolution proposed by Mr. Nomani that the Strata Corporation proceed with the challenge to the validity of the leases, the vote being 62 owners opposed, 42.14 in favour and 13.1 owners abstaining, a result well below the three quarters vote required. The Strata Corporation discontinued the action in February 2006.

[40] In summary, the commencement of Action S044720 required and lacked the crucial approval of three quarters of the owners either at its commencement or at the special general meeting held November 4, 2005. Further the strata council in February 2006 directed that the action be discontinued. I find the relief sought by Mr. Nomani for an administrator with powers restricted to Action No. S044720 is no longer relevant.

[41] Mr. Nomani requested in March 2005 that a special general meeting of the owners be held to consider his resolutions that the Strata Corporation proceed with the challenge to the common property and parking leases. The meeting was

originally scheduled for April 12, 2005. Counsel for the parties, including Mr. Nomani's counsel, agreed to adjourn the special meeting pending the decision in the Dockside petition. Mr. Nomani submits his counsel did not have his authority to consent to the adjournment and uses the delay as a negative example of how the strata council conducts its business. Mr. Nomani also takes exception to the decision at the November 4, 2005 meeting to vote only on his first resolution which was defeated. I concur with the Strata Corporation's conclusions that the other resolutions proposed by Mr. Nomani became moot after the defeat of Mr. Nomani's initial resolution. I do not find supportable Mr. Nomani's criticism of the strata council with respect to delays in holding the special general meeting and in the manner the Strata Corporation dealt with his resolutions at that meeting.

[42] I find Mr. Nomani has failed to establish the grounds upon which this court might appoint an administrator pursuant to s. 174 of the **Strata Act**.

[43] In his petition, Mr. Nomani also sought that the court direct those owners who voted against his resolution at the November 4, 2005 special general meeting pay special costs or alternatively costs or special costs and damages. I find nothing in Mr. Nomani's submission or his material which would found a basis upon which costs or damages or both might be assessed against the owners who disagreed with Mr. Nomani and accordingly voted against his resolution.

[44] Mr. Nomani also seeks in his petition an order that the Strata Corporation provide him or any other owner free access to the common property of Strata Plan LMS 3837 including that required to reach the garbage disposal bins and an order

that the Strata Corporation provide him, his tenants, or any other owner access to the telephone rooms, electrical rooms or any other common facility rooms to inspect, repair or carry out work necessary to service their strata lot. These are issues which fall squarely within the powers and duties of the Strata Corporation and the owners who make up the Strata Corporation, limited though they are in this situation by the leases granted to third parties. It is not for the court to intervene in the manner suggested by Mr. Nomani.

[45] Mr. Nomani further asks this court for a declaration that the actions and decisions of the Strata Corporation or the strata council or both are significantly unfair to one or more owners, including the petitioner. He seeks the declaration pursuant to s. 164 of the **Strata Act** which states:

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, 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.

(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.

[46] Madam Justice Sinclair Prowse discussed the meaning of "significantly unfair" in *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578 at ¶¶9 to 13 in which she wrote that prior to the *Strata Act* coming into force on July 1, 2000 s. 42 of the *Condominium Act* (which was repealed and replaced by the *Strata Property Act*), an owner could apply to the court for a remedy if the affairs of the strata corporation were being conducted in a manner which was "oppressive", or where some act or resolution of the strata corporation was "unfairly prejudicial" to that owner. Sinclair Prowse J. agreed with counsels' joint submission that the meaning of "significantly unfair" would, at the very least, encompass oppressive conduct and unfairly prejudicial conduct or resolutions. She further stated at ¶12 that 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.

[47] In *Gentis v. Strata Plan VR 368*, 2003 BCSC 120, Masuhara J. referred to Sinclair Prowse J.'s decision as authority for the definition of significantly unfair but added the following comment:

¶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.

[48] In its decision in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, the Court of Appeal approved of Madam Justice Sinclair Prowse’s interpretation of “significantly unfair” found in *Reid*, as well as Masuhara J.’s addition found in *Gentis*.

[49] I have reviewed Mr. Nomani’s complaints with respect to the conduct of the Strata Corporation as well as his largely unsupported comments about the connections between the various strata lot owners. I find nothing in Mr. Nomani’s complaints that might be interpreted as conduct on the part of the Strata Corporation against him that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith or conduct that might be construed as unjust and inequitable towards him. Mr. Nomani has been impacted by decisions of the Strata Corporation as have all the owners, but not in a manner which might be described as significantly unfair.

[50] I conclude that Mr. Nomani has failed to establish a basis upon which this court might properly grant relief to him under ss. 174 and 164 of the *Strata Act* and dismiss his petition.

[51] There are two aspects with respect to costs which I must address. The first relates to the costs applicable with respect to an adjournment application held May 15, 2006 before Master Scarth. At the conclusion of that hearing, Master Scarth

acceded to the adjournment application brought by the Strata Corporation. She further directed the parties to provide written submissions with respect to costs after counsel for the Strata Corporation advised that her client was seeking special costs from Mr. Nomani and had so advised him prior to the hearing of the adjournment application.

[52] Having heard the petition, I considered that the matter of costs might best be addressed by me in these Reasons and Master Scarth concurred. Conduct that is considered reprehensible will attract an award of special costs, with the word reprehensible encompassing scandalous or outrageous conduct but also encompassing milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible in that context must represent a general and all encompassing expression of the applicable standard for the award of special costs: ***Garcia v. Crestbrook Forest Industries Ltd.*** (1994), 9 B.C.L.R. (3d) 242 at ¶17.

[53] Counsel for the Strata Corporation submit that Mr. Nomani's conduct prior to and surrounding the adjournment application is reprehensible and worthy of rebuke in the form of special costs.

[54] Mr. Nomani filed the petition on February 24, 2005 and on the same date obtained an ex parte order restraining the Strata Corporation from dismissing or settling what I have referred to at the Dockside action which was subsequently decided by Mr. Justice Edwards. On March 10, 2005 Madam Justice Wedge set aside the ex parte order and awarded special costs against Mr. Nomani having

found that in obtaining the ex parte order he failed to advise the court of material facts and had made significant misstatements of fact.

[55] I refer to Wedge J.'s decision solely to note that Mr. Nomani, although a self-represented litigant, was aware prior to the May 15, 2006 hearing before Master Scarth that special costs were a means whereby a litigant could be rebuked or admonished for misconduct.

[56] After filing and serving the petition, Mr. Nomani advised counsel on November 24, 2005 that he wanted the petition set for hearing and then unilaterally set the date of March 3, 2006 for a one day hearing. The Strata Corporation's counsel agreed to proceed on March 3, but anticipated the hearing would take two days. Mr. Nomani then unilaterally rescheduled the hearing to April 5 and 6, 2006, which were dates he had been advised the Strata Corporation's counsel was not available. The parties agreed to adjourn the hearing to May 18 and 19, 2006. Although Mr. Nomani had filed his affidavit #3 on March 2, 2006, it was not until May 8, 2006, 10 days before the hearing dates of May 18 and 19, that he provided counsel for the Strata Corporation's counsel with an amended motion which included additional relief as well as his affidavit #2 which exceeded 500 pages and which had been first referred to by Mr. Nomani on January 5, 2006. Given the new and extensive material, counsel for the Strata Corporation asked Mr. Nomani to consent to the adjournment and advised Mr. Nomani that if he did not consent to the adjournment the Strata Corporation would seek special costs. Mr. Nomani did not consent either to the adjournment or to waiving notice for the application to adjourn. Counsel brought a short leave application on May 11, 2006 and on May 15, 2006 the

adjournment application was granted by Master Scarth following which the Strata Corporation sought special costs.

[57] Although Mr. Nomani referred to his affidavit #2 as being in response to the May 2, 2006 affidavit #3 sworn by Sharookh Daroowala on behalf of the Strata Corporation, his affidavit #2 did not respond to the material in Mr. Daroowala's affidavit but provided an exhausting history of the Strata Corporation. In addition Mr. Nomani was less than candid when advising Master Scarth that he would not be seeking the relief outlined in an amended notice of motion. On July 19, 2006 he filed an amended petition which included the new relief described in the amended motion.

[58] I find that Mr. Nomani's delay in serving his affidavit #2 and an amended motion expanding the relief he sought, his refusal to allow the adjournment application to proceed without an order for short leave, his refusal to allow the adjournment required by his own delay in serving affidavit #2 and the amended motion, and the lack of candour before Master Scarth requires rebuke. The Owners will have special costs with respect to the application before Master Scarth.

[59] With respect to the remainder of the steps leading to and surrounding the hearing of the petition, The Owners, Strata Plan LMS 3837, will have their costs against Mr. Nomani at Scale B, pursuant to the amendments to Schedule B of the **Rules of Court** which became effective as of January 1, 2007.

"R.M. Blair, J."
The Honourable Mr. Justice R.M. Blair

