IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Azura Management (Kelowna) Corp. v. Owners of the Strata Plan KAS2428,*** 2009 BCSC 506

Date: 20090422
Docket: S087958
Registry: Vancouver

Between:

Azura Management (Kelowna) Corp.

Petitioner

And:

The Owners, Strata Plan KAS 2428, Curtis Darmohray and David Osmond

Respondents

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment (from Chambers)

Counsel for the Petitioner	P.A. Williams
Counsel for the Respondents	B.D. Rhodes & R.M. Grist
Dates and Place of Hearing:	December 8, 2008, January 22 and 23, 2009 February 19 and 20, 2009 Vancouver, B.C.

[1] Pursuant to ss. 164, 165 and 174 of the ***Strata Property Act***, R.S.B.C., 1998, c. 43 ("***Act*** "), the Petitioner applies for orders and declarations that the Respondent, The Owners Strata Plan KAS 2428, ("Corporation") has acted and conducted itself in a manner that is significantly unfair to the Petitioner; that two members of the Strata Council ("Council") of the Corporation, Curtis Darmohray and David Osmond have acted and conducted themselves in a manner that is significantly unfair to the Petitioner; that the Corporation has conducted itself in a manner that is in contravention of various provisions of the ***Act***; that the business conducted at the Annual General Meeting of the Corporation held September 27, 2008 ("2008 AGM") should be rescinded and a new annual general meeting be held once all financial statements have been prepared and audits up to and including the year ended August 31, 2007 are completed and approved by the Council; that a budget was not properly passed at the 2008 AGM so that the budget for the prior fiscal year remains valid until a new budget is passed at a newly convened annual general meeting; that a bylaw pursuant to s. 53(2) of the ***Act*** must be interpreted to mean that the Corporation is entitled to register a lien where an owner is in arrears of strata fees or special levies; that s. 128(1)(c) of the ***Act*** is to be interpreted to mean (a) that the strata lots for "tourist cabins" are residential, (b) that strata lots 488, 491, 494 and 495 are non-residential, and (c) that each of the residential and non-residential groups of strata lots must vote 3/4 in favour of a bylaw amendment in order for a resolution to take effect; and that J. Garth Cambrey be appointed as the administrator of the Corporation for such length of time and on such terms as the Court shall determine.

[2] The Petitioner also applies for injunctions restraining and enjoining the casting of votes of the common asset strata lots of the Corporation in relation to resolutions relating to the passage of the annual budget or elections of Council members other than as abstentions; the Corporation from holding any further general meetings until the declarations sought in the Petition are made; and the Corporation from completing the transfer of Strata Lot 162 until the financial statements of the Corporation "are in order" including the statement of adjustments on the transfer of 23 green space common asset strata lots. The Petitioner also applies for a mandatory injunction that the Corporation disclose to the Petitioner those legal opinions it has received from Adrienne Murray who is the solicitor for the Corporation.

BACKGROUND

[3] The Corporation comprises 500 bare lot strata lots located in Kelowna in a development called LaCasa Lakeside Village Resort ("LaCasa"). The Petitioner, Azura Management (Kelowna) Corp. ("Azura") is the registered owner of 15 strata lots. LaCasa Management Corp. ("LCMC") is affiliated with Azura. LCMC manages 108 strata lots for Owners as well as the investment of Azura within the complex. The Developer, 697133 B.C. Ltd. ("Developer") owns 40 strata lots. The Respondents, Curtis Darmohray and David Osmond, at all material times have been and presently remain members of the Council. Mr. Darmohray was the President of the Council for the fiscal year 2007-2008. Mr. Osmond was the President and Vice-

President of the Council respectively in the fiscal years 2006-2007 and 2007-2008. The property manager for LaCasa is Gateway Property Management ("Gateway").

[4] The initial developer of LaCasa was C.H. Golf Ltd. In the Spring of 2004, C.H. Golf Ltd. entered into an agreement with Azura to sell 465 strata lots to Azura, together with the shares of LaCasa Utilities Ltd.. At that point, Azura assumed management of the Corporation. In July, 2004, the Developer entered into an agreement with Azura to purchase 213 strata lots, with an option to purchase a further 238 strata lots. In September, 2005, the Developer exercised its option and completed the purchase of all strata lots. At that time, representatives of Azura resigned from the Council and representatives of the Developer, including John Murphy, were elected to Council.

[5] It is alleged by Azura that the December 17, 2007 Annual General Meeting of the Corporation ("2007 AGM") was held without a proper quorum in contravention of s. 48 of the ***Act*** as only the eligible votes of owners of 134 strata lots were represented in person or by proxy whereas the quorum requirement was 167, being one-third of 500.

[6] At the Annual General Meeting of the Corporation on September 27, 2008 ("2008 AGM"), it is alleged by Azura that the only strata owners who were found not to be entitled to vote were those who not only were in arrears of strata fees but also where the Corporation had liens filed against their strata lots so that those who were in arrears of strata fees but where no liens had been filed against their strata lots were allowed to vote along with those who were current in the payment of their

strata fees. In particular, it is alleged that the Developer was in arrears of strata fees but was allowed to vote at the 2008 AGM. Azura also submits that the votes of 24 common asset strata lots were improperly voted in favour of Council member elections, of budget approval and of all resolutions addressed at the 2008 AGM.

[7] Azura submits that the notice for the 2008 Annual General Meeting was distributed with "inadequate financial statements" in contravention of s. 45(4), 103(2) and 103(3)(a) and 103(3)(b) of the ***Act*** and of Regulation 6.7 of the ***Strata Property Regulations*** (B.C. Reg. 43-200) ("***Regulations***"). It is also alleged that all ballots for votes and election of Council members were destroyed despite the fact that, at all previous general meetings, the Council reported the results of resolutions and did not destroy ballots until a proper resolution to do so was passed. Azura also alleges that:

(a) Members of Council campaigned for re-election using Corporation funds in that campaign to encourage and solicit proxies and "attack" other owners who wished to be on Council. Messrs. Darmohray and Osmond and the Corporation refused to circulate biographies of Council candidates except those that were on a slate of nominees favoured by them, and, when reprimanded by Azura representatives, asked Gateway to circulate the biographies of those not on the "favoured" slate;

(b) John Murphy sat on Council in contravention of s. 32 of the ***Act*** and bylaw 12(5) of the Corporation;

(c) The Corporation has resolved to purchase Strata Lot 162 from the Developer, but the Council has not provided statements of adjustments with respect to this lot or the 23 green space strata lots that were previously transferred from the Developer to the Corporation;

(d) Mr. Darmohray was not eligible to serve as a member of Council;

(e) The Corporation borrowed $144,000 and pledged Strata Lot 492 as security for the borrowings without a ¾ resolution as is required by s. 79 of the ***Act***;

(f) When voting results were declared (with the exception of the budget result which was not declared), the Council disallowed certain ballots and then recounted until the result Council desired was achieved;

CLAIM AGAINST CURTIS DARMOHRAY AND DAVID OSMOND

[8] Section 164 of the ***Act*** states that the Court may make an interim or final order to prevent or remedy a significantly unfair action or threatened action by "… the strata corporation, including the council". It is the submission of Messrs. Darmohray and Osmond that this section does not give the Court the jurisdiction to grant the relief against them that is sought by Azura. I agree.

[9] In ***Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.*** [2007] B.C.J. (Q.L.) 636 (B.C.S.C.), the Court dealt with whether a claim could be maintained against members of a strata council and the finding was: "These claims

are not sustainable as they are all based on allegations of wrongdoing against the Corporation." (at para. 149). The claims were then struck against the council members with Sinclair-Prowse J. stating that a claim might be maintainable against a council member if:

> … the Current Strata Council Members personally benefited to the detriment of the Strata Corporation as a result of a breach of their duties and obligations owed to the Strata Corporation, these claims may be sustainable. (at para. 151)

[10] I can find no evidence which would indicate any personal wrongdoing by either Mr. Darmohray or Mr. Osmond. While paragraph 2 of the Petition states that Messrs. Darmohray and Osmond "… have acted and conducted themselves in a manner that is significantly unfair to the Petitioner", I can make no such finding. Even if I could make such a finding, I would not find that such actions were detrimental to the Corporation or significantly unfair to the Petitioner. I am satisfied that any actions taken by Messrs. Darmohray and Osmond were steps taken by the Council and not by them personally. The claims against them are all based on allegations of wrongdoing against the Corporation and/or the Council.

[11] The Petition against Curtis Darmohray and David Osmond is dismissed with costs on a Scale "B" basis. As the interests of Messrs. Darmohray and Osmond were represented by counsel also representing the Corporation, the costs available to Messrs. Darmohray and Osmond will be limited to any steps in the litigation which were unique to defending them. They will be entitled to one set of costs.

LEGAL TEST

[12] The question which arises as a result of the complaints of Azura is whether the Corporation and/or the Council have acted and conducted themselves in a manner that is so significantly unfair to Azura that an administrator of the Corporation should be appointed pursuant to the collective remedies available under the following sections of the ***Act*** :

> 164(1) On application of an owner or tenant, the Supreme Court may make in interim or final order it considers necessary to prevent or remedy a significantly unfair (a) action or threatened action …
>
> 165 … the Supreme Court may do one or more of the following:
>
> > (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
> >
> > (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
> >
> > (c) make any other orders it considers necessary to give effect to an under paragraph (a) or (b).
>
> 174(2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interest of the strata corporation.

[13] Prior to an order being made pursuant to s. 164 of the ***Act***, I must find that an action or a threatened action is "significantly unfair". Prior to ordering that an administrator be appointed, I must find that it is in the best interests of the Corporation to do so.

(a) What Is Significantly Unfair?

[14] In ***Reid v. The Owners, Strata Plan LMS2503***, [2001] B.C.J. (Q.L.) 2377 (B.C.S.C.), Sinclair Prowse J. stated:

> In this hearing, Counsel for both parties submitted that the meaning of "significantly unfair" would, at the very least, encompass oppressive conduct and unfairly prejudicial conduct or resolutions. I agree.
>
> In the case of ***Blue-Red Holdings Ltd v. Strata Plan VR 857***, [1994] B.C.J. No. 2293 (B.C.S.C.), the court reviewed all of the definitions that had been given to these terms. Specifically, 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.
>
> (at paras. 11-2)

[15] On the question of what is significantly unfair, Cullen, J. in ***McGowan v. Strata Plan NW1018***, [2002] B.C.J. (Q.L.) 959 (B.C.S.C.), stated:

> In the present case the Strata Corporation's actions said to be significantly unfair and those said to warrant the appointment of an administrator are not unconnected. It is the petitioner's submission that the impugned conduct must be looked at as a whole to determine whether there is a substantial breakdown in the management and governance of the Strata Corporation and also to determine whether the individual actions viewed in context are significantly unfair to one or more of the Strata Corporation owners.
>
> Counsel for the respondent, while contesting the merit of many of the petitioner's complaints, does not disagree with the precept that the impugned conduct must be viewed in context. It is his submission, however, that rather than establishing a pattern of behaviour representative of a breakdown of the Strata Corporation's ability to manage and of arbitrary or oppressive conduct towards individual owners, a contextual perspective establishes only isolated instances of easily rectifiable procedural irregularity within a larger framework of successful fiscal and administrative governance.

(at paras. 19-20)

[16] In ***Gentis v. Strata Plan VR368*** [2003] B.C.J. (Q.L.) 140 (B.C.S.C.),

Masuhara J. stated:

> Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.
>
> I am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": ***The Canadian Oxford Dictionary*** (Toronto: Oxford University Press, 1998) at 1349.
>
> (at paras. 28-9)

[17] In ***Aviawest Resort Club et al v. Chevalier Tower Property Inc. et al***

(2005), 254 D.L.R. (4th) 67 (B.C.C.A.), Smith, J.A. on behalf of the Court stated:

> Oppression has been the subject of a number of judicial comments, mainly in the context of litigation between shareholders in a corporation. In my view, the analogy between the strata corporation owner and shareholders of a corporation is appropriate (see s. 224 of the ***Company Act***). (at p. 74)
>
> … a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the ***Condominium Act***, which was to put the legislation in "plain language" and make it easier to use (British Columbia, *Official Report of Debates of the Legislative Assembly*, Vol. 12 (1998) at 10379). I also note that the term "unfair" is defined in the ***Canadian Oxford Dictionary*** as "not just, reasonable or objective." It may be that this definition of "unfair" connotes conduct that is not as severe as the conduct envisaged by the definitions of oppressive or unfairly prejudicial. However, counsel argued this appeal on the basis that "significantly unfair" has essentially the same meaning as

> "oppressive and unfairly prejudicial". For the purposes of this appeal the distinction between the definitions makes no difference. On either definition, the resolution passed by the strata council cannot be said to be significantly unfair to Mr. Reid. (at p. 74)

(b) Appointment of an Administrator

[18] In ***Lum et al. v. The Owners, Strata Plan VR519***, [2001] B.C.J. (Q.L.) 641 (B.C.S.C.), Harvey J. made the following statement regarding factors to be considered about whether the appointment of an administrator is in the best interests of a strata corporation:

> In my view after reviewing the authority available, bearing upon this question, 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.
>
> In addition, there is always to be considered the problem presented by the costs of involvement of an administrator.
>
> I also take into consideration the comments of Huddart, J. in ***Cook***, *supra*, that the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.

(paras. 11-2)

MATTERS RAISED BY AZURA

[19] The matters of concern to Azura are as follows:

(a) Failure to Set Aside Funds that Should Be Held in Trust

[20] $185,000.00 was received in Construction Deposits. The Construction Deposits arise as a result of Bylaw 48 of the Corporation which provides:

> Construction Deposit – any Owner wishing to construct a dwelling on their strata lot will be required to pay a deposit of $10,000 to the Strata Corporation with $7,500 allocated for building issues and $2,500 allocated to landscaping issues. As per the Architectural Control Guidelines, the Strata Corporation will be authorized to deduct costs relating to approval of Plans, Inspections by the Approving Office, Correspondence issued by the Property Manager relative to Bylaw infractions, fines for bylaw infractions, costs relating to use of Hydro from common property meters, costs for garbage, site clean up and any other items relating to the construction activity at the strata lot. The unused portion of the construction deposit will be returned to the Owner within 60 days of the Owner providing copy of an occupancy permit, landscape inspection and final letter of approval from the Approving Officer.

[21] The August 2008 Balance Sheet of the Corporation indicates a “Security Deposit Account” of $55,426.21 as an asset and $185,000.00 as a liability under the heading “Deposits Payable – Security/Lease – Deposits”. The January, 2009 Balance Sheet shows a “Security Deposit Account” of $5,819.54 and $105,000.00 as a liability under the heading “Deposits Payable – Security Lease Deposits”.

[22] It is the submission of Azura that $185,000.00 and now $105,000.00 should have been deposited into a separate trust account and that the failure to do so is a

breach of trust. It is the submission on behalf of the Corporation that the sums of $185,000.00 and $105,000.00 were and are secured by other assets of the Corporation and that it is not necessary to have the funds in a segregated trust account.

[23] There is nothing in the ***Act*** which would require amounts such as Construction Deposits to be deposited into a separate account to be held in trust and available for either the Corporation or the Owner, depending on the actual costs incurred relating to construction on a strata lot by an Owner. However, in the event of an insolvency of the Corporation, it may well be that there would not be sufficient funds available to return to an owner what was owing or to cover the costs accruing to the Corporation because Construction Deposits would be shared by all unsecured creditors of the Corporation on a *pro rata* basis. As well, the accounts receivable of the Corporation may not all be collectable resulting in the other assets of the Corporation not being sufficient to satisfy the amounts being held for Construction Deposits. Some of the present accounts receivable of the Corporation related to monies owing from the Developer and, as it is being recommended that the purchase price for Strata Lot 162 will be set off against the monies owing from the Developer, it may well be that there are insufficient accounts receivable of the Corporation to fund the full amount of $105,000.00.

[24] In order to protect the Corporation and the Owners, the recommended course of action would have been to deposit the funds into a separate interest-bearing trust account even though there may be no legal requirement to do so. Although I do not

criticize the Council or the Corporation for any failure to set aside the full amount of the Construction Deposits into the "Security Deposit Account", I do order that all Construction Deposits be held in that manner in the future.

(b) Strata Lot 492 (Laundry Facility)

[25] Strata Lot 492 is the common asset laundry facility lot. The Corporation borrowed $144,000 to purchase Strata Lot 495 (Sewer Treatment Plant) and pledged Strata Lot 492 as security for the borrowing. Azura submits that Strata Lot 492 was pledged as security without the requisite resolution required by s. 79 of the ***Act*** :

> To sell, lease, mortgage, grant an easement over, grant a restrictive covenant affecting or otherwise dispose of land that is a common asset, the strata corporation must proceed as follows:
>
> (a) a resolution approving the disposition must be passed by a ¾ vote at an annual or special general meeting;

[26] The Respondents submit that the requisite authority was obtained at the March 6, 2006 Special General Meeting ("March 2006 SGM"). Prior to the March 2006, SGM, the Information Package forwarded to Owners set out the following:

> **¾ Vote Resolution E – Financing for Bond Replacement – Sewer and Water Treatment Plants**
> LaCasa's Sewer Treatment Plant and Water Treatment Plant are regulated by the Ministry of Water, Lands and Air Protection who have set a bond requirement of the operator. The current owner is LaCasa Utilities Ltd. who has posted cash bonds for the operation of the Sewer and Water Treatment Plants. The Corporation has secured financing for the equivalent amount of pledged bond and the intention is to replace the funds posted by LaCasa Utilities Ltd. Once completed, the Corporation will be granted title to Strata Lot 495 as well as the Sewer and Water Treatment Plans.

[27] The Minutes of the March 2006 SGM record that the following Resolution under the heading "Financing for Bond Replacement – Sewer and Water Treatment Plant" passed with 281 in favour, 1 opposed and 4 abstentions:

> As a ¾ Vote Resolution, at the Special General Meeting of the owners, Strata Plan KAS2428 held on March 6, 2006 that the strata corporation hereby authorizes the strata council to proceed with the Financing and Legal arrangement that has been arranged for the replacement of security to the Ministry of Air, Water and Land for the Sewer Treatment Plant. Once replaced, title to Strata Lot 495, and the Sewer and Water Treatment Plants will transfer to the Corporation.

[28] Note No. 7 in the audited 2006 Financial Statements of the Corporation is to the effect that the mortgaging of Strata Lot 492 was "authorized" and that the security was to be provided in order to replace the existing security with the Ministry of Air, Water and Land relating to the Sewer Treatment Plant.

[29] While it is not absolutely clear from the materials that were forwarded to Owners or from the Resolution passed at the March 2006 SGM that it was Strata Lot 492 that would be pledged as security for the borrowing, I conclude that the references were to the pledging of Strata Lot 492. I find that a Special Resolution was passed by the Owners to allow the pledging of Strata Lot 492 as replacement security for the borrowing. First, the Resolution passed by a 99.65% vote with only one vote opposed. If it was not clear at the March 2006 SGM that it was Strata Lot 492 that was being pledged, I would have thought that the Minutes of that Meeting would have reflected questions and answers relating to this question. Second, the pledging that was to take place would allow the Corporation to replace the security that had previously been provided by LaCasa Utilities Ltd. with security that would

be provided by the Corporation. It would not have been possible for Strata Lot 495 to be provided as the security for "itself". To the contrary, it would be necessary to provide replacement security for the "cash bonds" that had been put up by LaCasa Utilities Ltd. Third, the minutes reflect LaCasa Utilities Ltd. was a "third party company owned by Ewen Stewart". Mr. Stewart is the principal of Azura. I think it unlikely that Mr. Stewart would have stood by if the vote to pledge Strata Lot 492 as security for the borrowing which would allow for a replacement of the cash bonds that his company had posted was other than in accordance with the requirements under the ***Act***. Although I confirm that s. 79 of the ***Act*** requires a ¾ vote before an asset of a strata corporation can be mortgaged, I find this complaint of Azura to be without merit as I find that the resolution to pledge Strata Lot 492 obtained such a vote.

(c) No Minutes of Council Meetings

[30] Section 35(1)(a) of the ***Act*** requires a corporation to prepare minutes of all annual and special general meetings and of all council meetings. Azura submits that that there were no minutes of the Council meeting that approved the agenda and materials for the 2008 AGM. Azura submits that the members of Council "were collectively using email and telephone calls in order to establish unanimous consensus on how the 2008 AGM would proceed" but no minutes were kept. Azura is of the opinion that, whether or not there was a formal meeting, minutes should be available in order to provide Owners with advance notice of what will be on the agenda prior to the agenda and meeting materials being forwarded.

[31] There is nothing in the ***Act*** which would require meetings to be held in person. Accordingly, meetings by telephone or by email are permissible and, in view of the recreational rather than the residential nature of these strata lots, a meeting by those means should be encouraged.

[32] There is nothing in evidence which would allow me to conclude that minutes were prepared after the meeting of Council that decided on the agenda and the materials for the 2008 AGM. This is an oversight. In this regard, I agree with the statements made in ***Kayne v. The Owners Strata Plan LMS2374***, [2007] B.C.J. (Q.L.) 2381 (B.C.S.C.):

> The purpose of the Act is to ensure that members of the strata corporation are informed of the decisions taken and the money spent on their behalf. It mandates no particular form in which these documents are to be kept and no particular level of detail. For example, although it requires minutes, it does not, beyond stating that the minutes include the results of any votes, set out any degree of detail that must be contained in those minutes. Minutes must contain records of decisions taken by council, but may or may not report in detail the discussions leading to those decisions.
>
> (at para. 8)
>
> Similarly the petitioner complains of that there are no minutes of a meeting held on November 8th, 2005. The evidence is that this was not a meeting of the council as such but an informal gathering of some council members at which no minutes were kept. The ***Act*** requires minutes of meetings of the strata council at which decisions are taken. In any organization, there will be occasions when people who are members of a council or an executive will meet informally to discuss matters of relevance to the organization. Those are not meetings of the council and it would be unrealistic to expect minutes to be kept of such meetings. Of course no decision that may be taken at any such meeting has any validity unless and until it is taken or ratified by a properly constituted and minuted meeting of the council.
>
> (at para. 23)

[33] There is nothing in the ***Act*** which states when minutes must be available. However, s. 36(3) of the ***Act*** requires a corporation to comply with a request for copies within one week of the request. Because that is the case, I am satisfied that it would not be unreasonable for minutes from a meeting of Council to be available within seven days. Pursuant to s. 45(1) of the ***Act***, a corporation must give at least two weeks written notice of an annual or special general meeting. Accordingly, it is not unreasonable that the minutes from the Council meeting which decided an agenda would be available prior to the two weeks written notice of an annual or special general meeting.

[34] While this criticism by Azura is justified, the failure to produce Minutes merely meant that the Owners would have to await the Notice and accompanying materials relating to the 2008 AGM before knowing what would be on the agenda for the 2008 AGM. I cannot conclude that the failure to produce minutes was significantly unfair to Azura or to any other Owner. I conclude that this failure only establishes an isolated instance of easily rectifiable procedural irregularity. In the future, the Council should produce minutes forthwith after all annual general meetings, special general meetings, and Council meetings are held.

(d) Description of the Agenda Items.

[35] Section 45(3) of the ***Act*** provides that the notice of an annual or special general meeting that must include: "… a description of the matters that will be voted on at the meeting, including the proposed wording of any resolution requiring a ¾ vote or unanimous vote."

[36] The September 7, 2008 Notice ("Notice") that was forwarded to Owners described the "Purpose" of the meeting as follows: "To review the operation of the Strata Corporation over the past year, to adopt the 2008/2009 budget, to approve any ¾ Vote and Majority Vote Resolutions, and to elect a Strata Council for the coming year." There was no description of the matters that would be voted upon. This omission is a violation of s. 45(3) of the ***Act***. In addition to putting those who attended the 2008 AGM at a disadvantage in that they would not be fully aware of the matters that would come to a vote, the 164 Owners who had provided proxies because they could not attend the meeting would not be in a position to fully instruct the proxy holders.

[37] However, the Notice was not the only thing forwarded to Owners. In a September 23, 2008 email transmission to the Owners which came as a response to the letter of LCMC urging Owners to vote against various resolutions, the Owners were provided with explanations of the various Special Resolutions that would be before the 2008 AGM. The fact that this material was forwarded by email transmission is sufficient notice to the Owners.

[38] Section 61 of the ***Act*** provides that, if an owner has not provided a corporation with an address outside the strata plan, then notices must be provided by leaving the notice with the owner, by leaving it with an adult occupant at the owner's strata lot, by putting it under the door of the owner's strata lot, by mailing it to the person at the address of the strata lot, by putting it through the mail slot used by the person for receiving mail, or by faxing it to a fax number provided by the

owner. Pursuant to s. 61(3) of the ***Act***, a notice is conclusively deemed to have been given four days after it is left with an adult, put under the door, mailed, put through a mail slot, or faxed.

[39] While Azura is correct in submitting that s. 61(1)(b) of the ***Act*** does not authorize a notice to be sent by email transmission, it should be noted that s. 61(1)(b) of the ***Act*** only applies where an owner has not provided an address outside the strata plan for receiving notices. The provision of an email address is an acceptable way for an owner to provide the Corporation with an address outside the strata plan. If an owner has provided an email address, I am satisfied that the forwarding of a notice by email transmission to that "address" is sufficient "mailing" to satisfy the notice requirements set out in s. 61(1)(a)(ii) of the ***Act***. Even if an email address has not been provided, I am satisfied that forwarding communication to the known email address of an owner is satisfactory to meet the requirements of s. 61(1)(b) of the ***Act***. I am satisfied that the wording of s. 61(1)(b)(i) is broad enough to include the forwarding of an email transmission to qualify as a "leaving" of a notice with an owner.

[40] Having reached that conclusion, the legislation could be expanded to allow email transmissions to qualify where it is necessary for a corporation to provide notice. First, the considerable expense of providing notice in writing could be avoided if an owner is content to receive notices by email transmission. Second, notification by email transmission provides an instant notification, thus avoiding the delay associated with other forms of delivery.

[41] Despite the insufficient description in the original Notice, I am satisfied that all Owners were fully aware of matters that would be voted upon at the 2008 AGM, as well as the proposed wording of any resolutions which required a ¾ vote by virtue of the September 23, 2008 email transmission. I am satisfied that all Owners eventually received what should have been set out in the Notice prior to the 2008 AGM so that it cannot be said that the failure to provide the detail amounted to a significantly unfair action. Again, the lack of description in the Notice was a rectifiable procedural irregularity which should not be repeated by the Corporation. However, in the future, any notices should contain a full description of all agenda items plus the specific wording of all resolutions requiring a ¾ or an unanimous vote so that all Owners will have all of that information at one time and in order that all of the information will be available to Owners prior to Owners who are not in a position to attend the meeting providing their proxies.

(e) Objection to the Content of the Notice Sent Prior to the 2008 AGM

[42] The Council sent a letter to all Owners prior to the 2008 AGM setting out a "slate" of five existing members of Council, as well as five Owners who had been nominated to stand for election. The Notice contained the following sentence: "The Council would strongly encourage you to support the slate of candidates listed below." The Notice package was forwarded to Owners on September 9, 2008.

[43] Azura presented its own slate of candidates on September 12, 2008. While the Council forwarded the Azura "slate of candidates" to Owners, the advice to the Owners also contained the following:

> We understand that LaCasa Management Corp. ("LCMC") and/or their various Realtors, Agents and employees of Azura Management (Kelowna) Corp. have sent out various communications to the owners at LaCasa concerning the AGM.
>
> We believe the information contained in these communications is highly misleading and inaccurate. Further we believe it only serves to act as a "smokescreen" to their underlying motive – that being to take control of your Resort for the purpose of augmenting their business operations.
>
> In response, your Strata Council will be sending out a pre-AGM package early next week explaining the underlying rationales behind our budget and the resolutions proposed therein. Accordingly, we would ask all owners to refrain from making any "rash" decisions on the basis of their recent communications.
>
> We have enclosed LCMC's/Azura's slate of candidates.
>
> Don't be fooled by this smokescreen. This is a critical time. Take control of your resort and support your Council and the proposed resolutions.

[44] In his "President's Report September 2008", Mr. Darmohray urged the Owners as follows:

> … all owners need to elect a strong "CONFLICT FREE" strata council for the coming year. **Accordingly, I would strongly encourage you to SUPPORT THE SLATE OF CANDIDATES included in our AGM package.** Further, I would kindly ask **ALL owners TO SIGN AND RETURN THE ENCLOSED PROXY in favour of your current Council Members.** This Proxy will ensure that your vote will support owner-oriented strata-based initiatives on a going forward basis. **For these and other reasons, we would ask ALL owners to PROVIDE US WITH THIS FORM OF PROXY PRIOR TO OUR ANNUAL GENERAL MEETING on September 27, 2008.**

[45] The "Report" also contained the following advice:

> We hope that the above explanations have helped to shed some light on the many allegations levied against us by LCMC [the Petitioner]. We are your fellow Owners, and we love this Resort! We encourage you all to attend our AGM either in person OR BY PROXY. We ask

that you categorically support our agenda, our proposed resolutions, and our slate of candidates.

We kindly ask that you sign and fax our proposed form of Proxy in favour of your current Council members (and without limitations) to Gateway Property Management at fax: (250 762-0427 or by E-mail at jmueller@gatewaypm.com.

Don't be fooled by any "smokescreen". Please support your Council at this critical time!

[46] In a September 22, 2008 letter to all Owners, the Council advised in part:

We are writing this pre-AGM communication in response to questions we have received concerning our AGM package, and also to address statements contained in the recent communications sent out on behalf of **LaCasa Management Corp. ("LCMC")** and/or Azura Management (Kelowna) Corp, which we consider to be misleading.

- Many Owners will recall that Azura was responsible for the following actions:
- Blockading the beach access to all Owners as a result of its dispute with the Developer;
- Closing the Store and La Cantina complex;
- Cancelling the Lease for our "Owner's Centre" located in the La Cantina Building; and
- Charging the Owners $400,000.00 in return for a beach access easement (which formed part of the settlement with the Developer).

These are but a few of the many actions Owners have had to deal with during the past 2 years – all of which have been detrimental to our Resort. Council has tried to move forward and put this ugly past behind us. We have tried to do this in a positive manner, taking into account the varied interests of all of Owners including LCMC. Azura and LCMC now state that "it [is] imperative that LCMC members and [themselves] be represented on the 2008-2009 Strata Council". Interestingly, their current slate of candidates doesn't appear to include any independent LCMC "member-owners", rather it is comprised entirely of LCMC and/or Azura employees'.

LCMC has also made a point of singling out the legal fees paid to Adrienne Murray (our lawyer) during this past year. What LCMC fails

> to mention is that a large portion of these fees were incurred as a result of our dealings with the Developer and also in relation to LCMC's own efforts to contract with the Strata for "Resort Services".
>
> Finally, LCMC makes the point that Strata is proposing a 46% increase in our Strata fees, and that this shouldn't occur until our books are in order. In this regard, the proposed budget is similar to ALL past operating budgets with the exception that we are making larger contributions to our Contingency Reserve Fund and staff wages. This contribution will ensure that we can move forward with various capital projects required for our Resort — such as the second pool, expanded aqua parks, landscaping projects and other important initiatives that will benefit all Owners and their renters alike. If the proposed Budget is not passed, these projects will be placed in serious jeopardy and Owners will be subjected to numerous cash calls via "special levies" in order for any one project to proceed
>
> Council recognizes that Owners want certainty with respect to their Strata fees, and that they don't want to be subjected to periodic "cash calls" through-out the year. Our proposed budget and Strata fees are meant to achieve this, and will allow our Resort to complete series of capital projects on a continued annual basis that will greatly improve the amenities offered by our Resort, and which in turn will add real value to our Owners.

[47] In a September 22, 2008 letter to the Owners, the Council enclosed proxy forms naming Mr. Darmohray, Mr. Osmond or Denis Tardif to act as proxy for Owners not in position to attend the meeting. In that letter, the Owners were advised as follows:

> The 2008 season was a tremendous success at the LaCasa Lakeside Cottage Resort! We would like to thank all owners for their continuing input and support. Strata Council strongly encourages everyone to attend our Annual General Meeting, and to continue to provide their ideas to council, ensuring LaCasa continues to grow into a better place.
>
> Owners need to elect a strong, *conflict free* Strata Council for the coming year. The LaCasa Strata council kindly asks all owners to sign and return the enclosed Proxy favour of your current Council Members. This Proxy will ensure that your vote will support owner-oriented, strata-based initiatives on an on-going basis. For these and other

> reasons, we ask all owners to provide the council with this form of proxy prior our annual general meeting scheduled on September 27, 2008.

[48] The notices required under the ***Act*** should not be used for the purpose of soliciting support for any particular group of potential members of a council. Rather, notices should be restricted to factual matters and should remain neutral as to whether some owners are or are not suitable members of the council of a corporation. What was set out in the communications to the Owners was entirely inappropriate and unacceptable. Much of the correspondence from the Council was "wrongful", "harsh", and "done in bad faith". The funds of the Corporation should not have been used to further the interests of one side in the proxy battle between the competing factions. Such unacceptable notices and materials are not to be repeated in the future.

(f) Survey

[49] Azura complains that a survey was forwarded to Owners requesting their advice on topics such as who should have the authority to enforce the Bylaws, how to deal with violators of the Bylaws, should the Corporation give any consideration to the purchase of any commercial buildings on the property and how should the Corporation deal with Bylaw infractions that arise with rental guests. Azura submits that some of the options set out in the survey conflict with s. 27 of the ***Act*** which provides that a corporation may direct or restrict a council in the exercise of its powers and performance of duties, but cannot interfere with the discretion of a council to determine whether a person has contravened a Bylaw or rule, whether a

person should be fined, or whether a person should be denied access to a recreational facility.

[50] Azura submits that the contents of the Survey are evidence that the Council on behalf of the Corporation does not understand or acknowledge its responsibilities. In particular, fining is not an appropriate means to correct, remedy or cure Bylaw contraventions and that injunctive relief is appropriate: ***Kok v. Strata Plan LMS 463*** (1999), 23 R.P.R. (3d) 296; and ***Strata Plan VR 2000 v. Grabarcyzk***, 2006 BCSC 1960, affirmed, 2007 BCCA 295.

[51] Even though the Survey contained inaccuracies and suggests that there should be other means of dealing with what is only within the purview of the Council, I can see no complaint available to Azura that such a Survey was forwarded. I am satisfied that it would only be if the Corporation acted other than in accordance with the ***Act***, the ***Regulations*** under the ***Act***, or the Bylaws, that Azura would have a complaint. I am satisfied that the Survey was a genuine attempt by the Council to engage the Owners in a dialogue as to how problems that the Corporation was facing might be met.

(g) 2008 Financial Statements

[52] Pursuant to s. 103 of the ***Act***, a strata corporation must prepare a budget for the coming fiscal year for approval by resolution to be passed by a majority vote at each annual general meeting. The proposed budget must be distributed with the notice of the annual general meeting, and must be accompanied by a financial statement.

[53] Pursuant to s. 103(3) of the ***Act***, the budget and financial statement: "… (a) must contain the information required by the regulations, (b) may be in the form set out in the regulations." Pursuant to regulation 6.7(1) of the ***Regulations*** under the ***Act***, the financial statement must contain "… the following information for the fiscal year to which the fiscal statement relates as of a day that is within the 2-month period before the date of the annual general meeting: (a) the opening balance in the operating fund and the current balance; (b) the opening balance in the contingency reserve fund and the current balance; (c) the details of the strata corporation's income from all sources, except special levies; (d) the details of expenditures out of the operating fund, including details of any unapproved expenditures under section 98 of the ***Act***; (e) the details of expenditures out of the contingency reserve fund, including details of any unapproved expenditures under section 98 of the ***Act***; (f) income and expenditures, if any, by special levy under section 108 of the ***Act***."

[54] Pursuant to ***Regulation*** 6.7(2) of the ***Act***, a corporation must prepare the financial statement updated to the end of the fiscal year within 8 weeks after the end of a fiscal year. ***Regulation*** 6.7(3) provides that, for the purpose of distribution with the notice of an annual general meeting, a corporation may provide the financial information required under ***Regulation*** 6.7(1)(c)-(e) in a summary form if the bylaws of the corporation permit the financial information to be disseminated in that manner. However, pursuant to ***Regulation*** 6.7(4), a corporation must place before the annual general meeting a financial statement that complies with ***Regulation*** 6.7(1).

[55] Azura submits that the financial statements did not meet the requirements of s. 45(4) of the ***Act*** because the financial statements were incomplete and contained "multiple journal entry errors". As well, the financial statements distributed with the Notice were subsequently noted as being "draft" by the Council but were not identified as such in the Notice. Azura submits that draft statements should be sent to the Council and not to the Owners and that Owners should only receive statements that have been approved by the Council. However, the Council advised the Owners as follows in a September 22, 2008 letter:

> **1. Financial Statements:**
>
> LCMC has correctly stated that the Financial Statements included in the AGM package were incomplete and contained multiple journal entry errors. What LCMC hasn't said is that this is no different from any past reporting year, and that these financial statements were 'DRAFT' statements only, and should have been marked as such. LCMC was made well aware of this, and still chose to use this information for the purposes of promoting their own agenda and to discredit our Property Manager, Gateway Property Management (who is responsible for maintaining our books and records). Included with this pre-AGM package is a letter from Gateway Property Management ("Gateway") which addresses the "DRAFT' financial statements provided to you. Further, Council has asked Gateway to rectify the various discrepancies identified by LCMC, and to provide an updated set of "draft" financials to Owners as soon as possible, with the goal of having them for the AGM.
>
> LCMC has also correctly informed Owners that the Contingency, Operating and Special Assessment Account Reconciliations are out of date. In response, Council has asked Gateway to update these reconciliations and to have them available for our AGM. These are simple bookkeeping tasks that can easily be corrected, and in no way suggests that these funds are missing or have been misappropriated. All other alleged cost allocation errors are also being addressed by Gateway, and Council has no reason to think that any improprieties have occurred. As a final check on our accounting processes, Owners should recall that our yearly financial statements are subjected to a complete audit by an independent accounting firm at which time all

> final correcting entries are made to the books, and discrepancies are brought to our attention.

[56] The Council and Gateway provided final versions of the financial statements to Owners who were present at the 2008 AGM. The Corporation submits that none of the "minor errors" resulted in any "significant alterations to the proposed budget" that was tabled and approved at the 2008 AGM. As well, the Corporation submits that the financial statements provided included all of the information required by ***Regulation*** 6.7(1).

[57] In any event, Corporation submits that it is the budget and not the accompanying financial statements or schedule of Strata Lot fees which had to be approved at the 2008 AGM and that there were no amendments proposed at the 2008 AGM as is permitted under s. 103(4) of the ***Act***, which states: "The proposed budget may be amended by a majority vote at the annual general meeting before the budget itself is put to a vote."

[58] It was responsible and appropriate for Azura to draw to the attention of the Council and Gateway the deficiencies that were present in the financial statements that were initially forwarded to the Owners. While it is regrettable that there were errors in what was presented so that it became necessary to provide corrections to those Owners who were present at the 2008 AGM, I am satisfied that the requirements under the ***Act*** were met.

[59] Azura is also correct in its submission that the draft statements should have been sent to the Council and not to the Owners. If financial statements are in draft

form, the Council can deal with the person preparing the statements to seek clarification and/or correction. While the fact that draft financial statements were forwarded to the Owners is regrettable, I am satisfied that the requirements under the ***Act*** were met so that I am satisfied that Azura has no complaint regarding what was actually before the Owners at the 2008 AGM. The budget which was approved at the 2008 AGM was not invalid by virtue of the fact the draft financial statements were initially forwarded in the Notice.

[60] It should also be noted that it was Gateway who produced the financial statements and not the Council or the Corporation. Gateway has acknowledged its errors and has provided explanations for the errors. I am satisfied that Gateway will take steps in the future to prevent such errors from reoccurring.

(h) Provision of Legal Opinions

[61] Section 35(2)(h) of the ***Act*** provides that a strata corporation must retain copies of: "(h) … any legal opinions obtained by the strata corporation …". Pursuant to s. 36(3) of the ***Act***, a strata corporation must make available for inspection and provide copies of the records and documents referred to in s. 35(2)(h) of the ***Act*** within two weeks of a request being received from an Owner. However, there is a limitation on the ability of an Owner to have access to information as s. 169(1)(b) of the ***Act*** provides that, if a strata corporation is suing an owner in the owner's capacity as owner or as owner developer or if an owner sues the strata corporation, that owner: "… does not, despite being an owner, have a

right to information or documents relating to the suit, including legal opinions kept under section 35(2)(h) … [of the ***Act***]".

[62] On October 29, 2008, counsel for the Corporation replied to Azura as follows regarding the request of Azura for copies of opinion letters that had been provided:

> Adrienne Murray Opinion Letters will be reviewed to determine whether or not they are privileged. I anticipate that any letters which were commissioned in respect of a need to respond to your initiatives or transactions will not be released without a Court Order.

[63] Six opinions had been provided by Ms. Murray between January 16, 2007 and November 16, 2007. In its Petition, Azura seeks a mandatory injunction requiring the Corporation to provide Azura with copies of all opinions obtained excluding any opinions received by the Corporation with respect to this Petition.

[64] As solicitor/client privilege was claimed over the opinions, an Order was made that the opinions would be produced in an affidavit sealed in the records of the Court and not available to Azura until a determination could be made whether the documents were subject to solicitor and client privilege, whether they were subject to s. 169(1)(b) of the ***Act***, or whether they should be produced to Azura and, if so, under what conditions if any. After my review of the six opinions provided by Ms. Murray, it appeared that some of the opinions related to ongoing litigation between the Corporation and Azura, some of the opinions related to litigation between the Corporation and the Developer, and some of the opinions related to disputes between the Corporation and Azura which had not resulted in litigation.

[65] An order was made that certain portions of the opinions would be redacted so that the information set out would not be available to Azura, and that an Affidavit attaching the six opinions with the redacted portions would be filed in the records of the Court on the basis that the Affidavit would not be available except by further Court Order. The Affidavit with the redacted opinions attached was provided to counsel for Azura and to Azura.

[66] Section 169(1)(b) only restricts the provision of opinions where there is actual litigation between a strata corporation and an owner. Where there is a dispute between a strata corporation and an owner which has not resulted in litigation, s. 169 (1) (b) does not apply. While s. 169(1)(b) of the ***Act*** is specific in only denying an owner the right to documents if an action has been commenced against or by that owner, I conclude that it could not have been in the intent of the Legislature to require a strata corporation to waive solicitor/client privilege or to require a solicitor to breach solicitor/client privilege by producing documents which relate to a dispute or a potential dispute where litigation has not been commenced and is only contemplated.

[67] The Legislature would have to have used very specific language in the ***Act*** before it would be clear that solicitor/client privilege could be waived or breached once a request was made under s. 36(2) of the ***Act***. That very specific language has not been incorporated by the Legislature into this ***Act***. If an owner could have unlimited access to legal opinions, then that owner would be in a position to know not only his or her side of the negotiations about a dispute but also the opinion

provided by counsel on behalf of a corporation. That could not have been the intent of the Legislature. Accordingly, it is inappropriate to grant a mandatory injunction where a strata corporation claims solicitor/client privilege. Rather, it is appropriate for the corporation to seek the opinion of the Court whether the documents produced in contemplation of litigation must be provided to the owner with whom the dispute has arisen.

[68] I am also satisfied that it would be inappropriate for an owner to have unrestricted access to legal opinions even if those legal opinions did not involve that particular owner. It would be too easy for one owner to request the legal opinion and then provide the opinion to the owner who is involved in the litigation. The access accorded to owners under s. 36 of the ***Act*** could not have been intended to allow that to occur.

[69] Some of the requested opinions relate to litigation with another Owner or the Developer. I am satisfied that a restriction should be imposed so that, while counsel for Azura and Azura can receive copies of the opinion letters which relate to another Owner or the Developer, counsel for Azura and Azura are prohibited from sharing the legal opinions with any other person, whether or not that person is a member of the Corporation.

[70] Azura also complains that the opinions were not provided in a timely manner submitting that, pursuant to s. 36(3) of the ***Act***, the opinions should have been provided within two weeks. That provision is clear. However, s. 36(3) of the ***Act*** sets up an unrealistic timetable for the provision of legal opinions in that it may not

be possible for a corporation to refer legal opinions to counsel to ascertain what should be redacted in whole or in part because of the operation of s. 169(1)(b) of the ***Act***, to have counsel provide an opinion in those regards, and to then forward the opinions requested within the two week time period. As well, it would be an unnecessary expense each time a corporation obtained a legal opinion to also request counsel to provide a separate opinion about what could or could not be revealed depending on whether the owner requesting a copy of the opinion was subject to the provisions of s. 169(1)(b) of the ***Act***, about what should be redacted before the owner requesting the opinion is provided with the opinion, and about what conditions, if any, should be imposed when the opinion is provided.

[71] In making the records of a strata corporation generally available, it is unfortunate that the Legislature has not made separate provisions under s. 35(2)(h) of the ***Act*** to deal with legal opinions obtained by a strata corporation in a manner different than the decisions of an arbitrator or a judge. Where the opinions that are sought are subject to s. 169(1)(b) of the ***Act***, it might well be advisable for a council to seek a court order prior to providing a requested legal opinion.

[72] While I am satisfied that the legal opinions requested have now been provided in a suitable form to Azura long after the 2 weeks contemplated under the ***Act***, I am of the view that the failure to provide the legal opinions requested within the time period set out under s. 36(3) of the ***Act*** does not form the grounds for any complaint by Azura. The legal opinions were not provided by the Council on wise advice received from the legal advisors to the Council and the Corporation.

(i) Ability of Mr. Darmohray to Serve on Council

[73] Mr. Darmohray is not an Owner. His wife is an Owner. Section 28(1) of the ***Act*** provides: "The only persons who may be council members are the following: (a) owners; (b) individuals representing corporate owners; (c) tenants who … have been assigned a landlord's right to stand for council." At the 2008 AGM, there was a motion to amend the Bylaws to allow non-owners to serve as members of the Council. That motion did not pass. Unless it can be shown that Mr. Darmohray is a tenant and that his wife has assigned her right to stand for Council or unless it can be shown that her strata lot is owned by her corporation, I agree with the submission of Azura that Mr. Darmohray is not eligible to serve as a member of Council. Mr. Darmohray should resign immediately from Council. If the Bylaws are amended in due course as was proposed at the 2008 AGM, Mr. Darmohray will again be in a position to serve on Council. However, the fact that Mr. Darmohray chaired the 2008 AGM when he was not eligible to serve on Council and the fact that Mr. Darmohray was a member of Council for some time is not sufficient grounds to overturn the results of the 2008 AGM. The results of the 2008 AGM will not be overturned on that ground.

(j) Amendments to the Bylaws (Residential v. Nonresidential)

[74] Section 1 of the ***Act*** defines "residential strata lot" as meaning a strata lot "… designed or intended to be used primarily as a residence" and "bare land strata plan" as meaning: (a) a strata plan on which the boundaries of the strata lots are defined on a horizontal plane by reference to survey markers and not by reference to the

floors, walls or ceilings of a building, or (b) any other strata plan defined by regulation to be a bare land strata plan".

[75] Section 128 of the ***Act*** provides that amendments to the bylaws of a strata corporation must be approved at an annual general meeting or a special general meeting as follows: (a) in the case of a strata plan composed entirely of residential strata lots, by a resolution passed by a 3/4 vote, (b) in the case of a strata plan composed entirely of nonresidential strata lots, by a resolution passed by a 3/4 vote, or (c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots.

[76] It is clear that this Corporation is composed partly of residential strata lots and partly of non-residential strata lots:

> (a) The May 11, 2007 "Consolidated and Seventh Amendment of the Disclosure Statement", filed by the Developer, stated that 495 strata lots were for residential purposes, and four were for non-residential purposes. The strata lots "presently being retained or utilized for non-residential purposes" were described as being Strata Lots 488, 491, 492 and 495;
>
> (b) The "Schedule of Voting Rights" filed in the Land Title Office indicates that the strata plan is composed of six nonresidential strata lots, and 489 residential strata lots. However, the same Schedule lists Strata Lots 488, 491, 492 and 495 as being "nonresidential";
>
> (c) In a June 19, 2008 Disclosure Statement, Azura made an offering regarding Strata Lots 496, 497, 498, 499, 500 and 501 which described Strata Lots 488, 491 and 495 as being used for "non-residential or multi-family purposes".

[77] I find that there are four nonresidential strata lots: 488 (a restaurant); 491 (a theatre); 495 (sewage treatment plant); and 492 (caretaker's cottage). Azura owns Strata Lots 488, 491 and 495. Strata Lot 492 is presently owned by the Developer.

[78] If the submission of Azura is correct, no amendments to the Bylaws can be passed unless there is a resolution passed by a ¾ vote of the residential strata lots as well as a similar resolution by the 4 nonresidential strata lots. If this is the case, no change to the Bylaws can be approved unless Azura votes in favour of the change as Azura owns three out of the four nonresidential strata lots.

[79] While I cannot assume that the legislation was meant to deal with the situation where 4 non-residential strata lots would have the same voting entitlement regarding bylaw amendment as 494 owners, I am satisfied that this is the effect of the legislation for this corporation.

[80] While Azura submits that this is the outcome, counsel for Azura points to the provisions of s. 164(1) and s. 191 of the ***Act*** as ways of avoiding providing Azura with such a veto power. Section 164(1)(b) provides that the Court may make an interim or a final order it considers necessary "to prevent a remedy of significantly unfair exercise of voting rights by a person who hold 50% or more of the votes, including proxies, at an annual or special general meeting. For the purposes of s. 164(1) of the ***Act***, the Court may direct or prohibit an act of the person who holds 50% or more of the votes, vary a transaction or resolution, and regulate the conduct of the Corporation's future affairs: s. 164(2) of the ***Act***. Under s. 191 of the ***Act***, a corporation may create "sections" for the purpose of representing the different

interests of owners of residential strata lots and owners of nonresidential strata lots. In order to create sections, s. 193 of the ***Act*** provides that a corporation must hold an annual or special general meeting to create sections, and any resolution must be passed by not only a ¾ vote by the eligible voters in each of the proposed sections but also by a ¾ vote of all eligible voters in the strata corporation.

[81] I am satisfied that the second possibility presented by Azura is no solution at all. I am satisfied that it is not in the interests of this Corporation that two "sections" be created. First, this would result in a duplication of administrative expenses. That duplication is not warranted or affordable. Second, it is highly unlikely that it would be possible to obtain the requisite votes in favour.

[82] I am satisfied that it is inappropriate for a change in Bylaws to require the approval of Azura before long overdue and badly needed changes to the Bylaws can be implemented. I am satisfied that it is appropriate to make an Order pursuant to s. 164(1)(b) of the ***Act***. Any future annual general meetings or special general meetings to consider amendments to the Bylaws will be conducted on the basis that both residential strata lots and non-residential strata lots otherwise eligible to vote will vote as a group and not as two groups separated into residential strata lots and non-residential strata lots.

[83] In this context, I am satisfied that the term "significantly unfair" used in s. 164(1)(b) of the ***Act*** encompasses potentially oppressive conduct. While there is nothing in evidence which would allow me to conclude that Azura would act other than in accordance with the best interests of the Corporation, I am satisfied that the

potential to do so is sufficient to require an order to be made pursuant to s. 164(1)(b) of the ***Act***.

(k) The Necessity For A Quorum

[84] Section 48 of the ***Act*** states that business must not be conducted at an annual or special general meeting unless a quorum is present. Pursuant to s. 48(2)(a) of the ***Act***, a quorum is defined as being "eligible voters holding 1/3 of the strata corporation's votes, present in person or by proxy …". Under s. 1 of the ***Act***, "eligible voters" means persons who may vote under ss. 53-58 of the ***Act***. Under s. 53(3) of the ***Act***, if a vote for a strata lot may not be exercised, that vote must not be considered for the purposes of determining a quorum.

[85] The minutes of the December 15, 2007 AGM ("2007 AGM") reflect 494 strata lots, 210 strata lots "ineligible" to vote, a "Quorum requirement" of 95 strata lots being 1/3 of the "remaining" 284 strata lots, 98 strata lots represented in person, 36 strata lots represented by proxy for a total representation of 134 strata lots. The minutes of the 2008 AGM indicate that there were 32 strata lots ineligible, the quorum requirement was 154 strata lots based on the remaining 462 strata lots, 143 and 4/6 strata lots were represented in person, 164 strata lots were represented by proxy for a total representation of 307 and 4/6 strata lots represented so that the quorum was said to have been present.

[86] I agree with the submission of Azura that the quorum was inaccurately calculated for both meetings. The former ***Act*** provided that it was one-third of those eligible to vote whereas s. 48(2) of the ***Act*** now provides that a quorum is "eligible

voters holding 1/3 of the Corporation's votes …". Under the old act, the quorum would have been 95 at the 2007 AGM and 154 at the 2008 AGM. Under the present provision, the quorum requirement would have been 167 at both meetings, being 1/3 of 500. I am satisfied that there was not a quorum at the 2007 AGM as there were only 134 strata lots presented in person or by proxy. However, there was a quorum present at the 2008 AGM as there were 307 strata lots represented in person or by proxy.

[87] Azura does not seek a declaration that there was not a quorum present at the 2007 AGM. Even if such declaration had been sought, it would not be made. The Minutes of the 2007 AGM reflect that there was a quorum present. As well, the Minutes from the 2007 AGM were approved unanimously at the 2008 AGM. I am satisfied that the failure to challenge the quorum at the 2007 AGM as well as the approval at the 2008 AGM of the Minutes from the 2007 AGM eliminates the possibility that a complaint could now be made that a quorum was not present at the 2007 AGM.

[88] Regarding whether there was a quorum at the 2008 AGM, the quorum would be 167, there were 32 strata lots said to be ineligible to vote, and Azura submits that 40 votes of the Developer should not have been ruled as being eligible to vote. Even subtracting the 40 votes of the Developer, the 267 votes that were eligible to vote represent 54% of the total 500 potential votes of the Corporation. I find that there is no merit to the argument raised by Azura that a quorum was not present at the 2008 AGM.

(l) Voting by Strata Lots that are in Arrears

[89] This is one of the primary complaints of Azura relating not only to whether various Resolutions passed at the 2008 AGM, but also to whether it was improper for Owners who were in arrears to vote at the 2008 AGM. I am satisfied that these matters are governed by ss. 112 and 116 of the ***Act***. Section 112 of the ***Act*** states:

> 112 (1) Before suing or beginning arbitration to collect money from an owner or tenant, the strata corporation must give the owner or tenant at least 2 weeks' written notice demanding payment and indicating that action may be taken if payment is not made within that 2 week period.
>
> (2) Before the strata corporation registers a lien against an owner's strata lot under section 116, the strata corporation must give the owner at least 2 weeks' written notice demanding payment and indicating that a lien may be registered if payment is not made within that 2 week period.

[90] Section 116(1) of the ***Act*** states:

> The strata corporation may register a lien against any strata lot, but only one strata lot, owned by an owner as owner/developer, by registering in the Land Title Office a Certificate of Lien in the prescribed form if the owner/developer fails to pay an amount payable to the strata corporation under section 14(4) or in (5), 17(b) or 20(3).

[91] Pursuant to s. 53(2) of the ***Act***, a strata corporation may, by bylaw, provide that the vote of a strata lot may not be exercised, except on matters requiring an unanimous vote, if the strata corporation is entitled to register a lien against that strata lot. Bylaw 27(8) of the Bylaws registered in the Land Title Office provides:

> The strata corporation may register a lien against an owner’s strata lot by registering in the Land Titles Office a certificate of Lien in the prescribed form if the owner fails to pay to the strata corporation any of the following with respect to that strata lot:

(a) strata fees;

(b) a special levy;

(c) a reimbursement of the cost of work referred to in section 85;

(d) the strata lot's share of a judgment against the strata corporation.

(9) The strata corporation may provide that the vote for a strata lot may not be exercised, except on matters requiring a unanimous vote, if the strata corporation is entitled to register a lien on the strata lot under bylaw 27(8).

[92] At the March, 2006 Special General Meeting, Bylaw 27(8) was proposed and passed by a vote of 285 Owners in favour, 1 Owner abstaining, and 1 Owner voting against the Resolution. The materials that were forwarded to the Owners prior to the meeting included this statement:

> The Strata Council appreciates the effort of many owners to ensure that their strata fee payments were paid each month during the transition of property management last fall, and Gateway is working diligently to contact a few outstanding arrears. The Council would like to add a clause (part 8) to existing Bylaw 27 which will allow the Corporation to register a lien against a Strata Lot for unpaid fees to the Strata Corporation. By adding this provision, the Council will be able to remove the eligibility to vote at an AGM/SGM for any owner with arrears to the Strata Corporation.
>
> The wording of that Bylaw parallels s. 116(1) of the ***Act***, which provides: "The Strata Corporation may register a lien against an Owner's strata lot by registering in the *Land Title Office* a Certificate of Lien in the prescribed form."

[93] No demand letters were forwarded to Owners who were in arrears prior to the 2008 AGM. In his Affidavit, Mr. Mueller of Gateway states that letters were not sent out in time for the 2008 AGM as the 2008 AGM package was sent out before the

Corporation realized that it had not sent out the letters to prevent owners who were not in good standing from voting.

[94] The Notice contained the following advice: "VOTING: The vote for a Strata Lot may not be exercised, except on matters requiring an unanimous vote, if the Strata Corporation is entitled to register a lien against the Strata Lot (i.e.: outstanding fees and/or Special Levies)." The September 22, 2008 letter to Owners included the following under the heading "Votes by Owners with Delinquent Accounts":

> At our AGM, it is very likely that Owners with delinquent accounts will be allowed to vote. In this regard, the *Strata Property Act* states that votes can only be suspended if "lien letters" have been issued to the Owner a pre-determined time prior to the AGM. While it was certainly not our intent to allow delinquent Owners to cast their votes, we may have little choice under the *Strata Property Act*. We have referred this question to our Strata Lawyer who states:
>
> > In my opinion, a Strata Corporation is only ***entitled to register a lien*** against a strata Lot when section 112(2) has been fully complied with. Because no notice pursuant to section 112(2) was delivered ... 14 days in advance of the AGM, the Strata Corporation is not ***entitled to register a lien*** and therefore [owner name] may vote.
>
> We hope that the above explanations have helped to shed some light on the many allegations levied against us by LCMC [the Petitioner].

[95] At the 2008 AGM, an attempt was made to amend Bylaw 27 of the Bylaws by deleting Bylaw 27(8) and 27(9), and replacing them with the following: "An owner will not be entitled to vote at a general meeting except on matters requiring an unanimous vote if the Strata Corporation is entitled to register a lien against that strata lot under section 116 of the ***Strata Property Act***." It should be noted that this

proposed amendment contains only a reference to an annual general meeting and not to a special general meeting. This amendment was not passed at the 2008 AGM but, if a similar amendment is proposed in due course, consideration might be given to whether it is appropriate to deal with votes at not only annual general meetings but also special general meetings.

[96] The ability to file a lien for strata fee arrears and commence an action for an order for sale was described by Master Joyce, as he then was, as "brutal and piratical": ***Strata Plan LMS 93 v. Neronovich*** (1997), 39 B.C.L.R. (3d) 382 at para. 34. It is submitted on behalf of Azura that the "right" reason why lien letters are sent is to collect arrears and to ensure that the owners who are current do not become the bankers of those who are in default and to ensure that the cost of proceeding to actually filing a lien can be avoided. It is submitted on behalf of Azura that the budget of a strata corporation is a "zero sum cash-based budget" where expenses are calculated, strata fees are set, and expenditures are incurred in accordance with the budget. If an owner is in arrears, the budget will have a deficit on a cash basis. It is submitted on behalf of Azura that the lien process is commenced to secure payment of strata fees and special levies and not to stop an owner from voting and that, otherwise, the right to prohibit would have been a provision of the ***Act*** and not an optional bylaw of a strata corporation.

[97] While it may well be that the commencement of an action to sell a strata lot is "brutal and piratical", the initial step of forwarding a demand letter is not. Azura is correct in its submission that the demand letters contemplated under s. 112(2) of the

Act will hopefully have the effect of encouraging Owners to bring their strata fees current so that they may be eligible to vote at an annual or special general meeting, and so that the Corporation has the cash available to fund operations. However, Azura is not correct in its submission that the mere accumulation of arrears is enough to disentitle an Owner from voting. Section 112 of the ***Act*** makes it clear that, before a corporation is in a position to register a lien against the strata lot of an owner under s. 116 of the ***Act***, the corporation must have given the owner at least two weeks written notice demanding payment. Pursuant to the ***Act***, and pursuant to the Bylaws of the Corporation, unless the Corporation is in a position to register a lien, the Owner who is in arrears is still entitled to vote.

[98] Because no demands were forwarded prior to the 2008 AGM, Bylaw 27(9) of the Bylaws does not apply as the Corporation was not entitled "… to register a lien on the strata lot under bylaw 27(8)". The Notice correctly states the combined effect of s. 112 of the ***Act***, s. 116 of the ***Act***, and Bylaw 27(8) of the Bylaws: An Owner is entitled to vote at an annual general meeting or a special general meeting unless a notice demanding payment of arrears has been forwarded.

[99] Even though the Developer and other Owners had substantial arrears, all were entitled to vote at the 2008 AGM. The submission made by Azura that a quorum was not present, and that various resolutions requiring a ¾ vote were not passed because the votes of the Developer were counted does not succeed. At the same time, I can find no justification for a submission that demand letters were not

sent out on purpose so that the Developer would be in a position to vote, thus assuring that a ¾ vote would be available.

[100] For any future annual general or special general meetings, no Owner will be in a position to vote if the demand letters contemplated under s. 112 of the ***Act*** have been forwarded and 14 days has expired.

(m) Voting by the 24 Common Area Lots.

[101] At the 2007 AGM, the solicitor for the Corporation responded to a question about who could vote on behalf of Strata Lot 162 (the cottage) if it was purchased and replied that: "… her advice would be to abstain for the vote on that strata lot."

[102] In the Notice sent regarding the 2008 AGM, the Owners were advised that 23 "green lots" had been transferred by the Developer to the Corporation. The Owners were also advised that, because it had been suggested that the Council could cast the votes for what were now 24 common area lots of the Corporation, the Council would seek the necessary legal advice from its lawyer to ensure that it was acting within the authority entrusted to them by the Owners. It was said that the issue would be discussed with the Owners at the beginning of the 2008 AGM.

[103] Azura points out that there was no prior notice that such a resolution would be put to the meeting, that this is a violation of s. 45(3) of the ***Act*** which requires a "description of agenda", and that the 164 strata lot owners who voted by proxy would not have known that there would be such a vote and that the 24 strata lots owned by

the Corporation would be voted. In a September 18, 2008 letter to those Owners whose strata lots were managed by LCMC, LCMC stated:

> There are 23 green lots at LaCasa which are owned by strata. Mr. Darmohray has indicated to LCMC that council will use the 23 green space votes to support their current position on the budget, bylaws, resolutions and voting of new council members. LCMC feels this is unethical as it is not supportive of how all owners may choose to vote. While some owners support the direction of current council, others do not. This is a significant portion of votes which could greatly influence the outcome of certain resolutions, budgets and bylaws. Hypothetically, if we had 100 green space lots, any Strata Council could stay for as long as they would like despite their performance in the role. Is this something you would support, why can council not support a non biased vote based on owner wishes?

[104] Under the heading "Voting of Strata Owned Lots", the Minutes of the 2008 AGM state that: "Curtis Darmohray confirmed that we would be seeking a general resolution allowing Council to vote the strata corporation owned lots in support of our AGM agenda items but that Council would not use these votes for the election of Strata Council Candidates." The Minutes of the 2008 AGM reflect that it moved, seconded and carried that the Council could exercise all votes in relation to the lots owned by the Corporation for purposes of the proposed Special Resolutions and General Resolutions but not for the election of Candidates for Council. In the Minutes, it is noted that Mr. Stewart of Azura "took exception to this proposal". The vote on this resolution is recorded as being 166 in favour, 61 abstentions, and 80 opposed, being a 67.5% vote in favour. On the assumption that 24 common strata lots were voted in favour of this resolution and should not have been, the vote of 142 in favour with 80 opposed would still have produced a 64% vote in favour, with only a 50% plus one vote being required.

[105] There is no statutory prohibition against a council voting the common area lots. While there may not be a statutory prohibition, I have concluded that it is inappropriate for a council to do so as the casting of such votes might inappropriately change the outcome of a vote, whether or not the resolution requires a majority vote or a ¾ vote. Common area strata lots are owned by all of the owners of a corporation and not merely by the members of a council who purport to vote the common area strata lots votes on behalf of the entire corporation. Unless there is an otherwise unanimous vote, it is the natural result of the common area lot votes being cast that the vote will be other than in accordance with the proportionate views of all owners. In the circumstances, I am satisfied that it is inappropriate for such votes to be cast by a council on a resolution save and except a resolution that requires a 100% vote. At future meetings, the 24 common area strata lot votes are not to be cast.

[106] However, I agree with the submission of the Respondents that, if the 24 common area lots votes had not been cast, Resolutions #1, #2 and #6 would still have passed by a ¾ vote at the 2008 AGM, as the negative votes would then have been 23.3% on Resolution #1, 20.5% on Resolution #2, and 21.7% on Resolution #6.

[107] It is not clear whether the 24 common area lots were voted for Council elections. Even on the assumption that they were, I am satisfied that the overall results of the election would not have been significantly affected. Mr. Burkby, who won the “last” spot on the Council, received 29 more votes than Jeremy Ball so that,

even assuming that the 24 votes were cast, the election result would not have changed.

(n) Strata Lot 162 (Caretaker's Cottage)

[108] Strata Lot 162 is owned by the Developer. $125,000.00 was provided by the Corporation as a down-payment to purchase Strata Lot 162 from the Developer. The balance of the purchase price was to be secured by the Corporation obtaining a mortgage. When the Corporation found it could not borrow money without having a guarantor, the balance of the total purchase price of $350,000 was to be funded by a special levy.

[109] The ¾ vote for the special levy of $125,000 for the purchase of Strata Lot 162 was passed at the 2006 AGM with the motion to approve the Special Levy for the "down payment for a residence for the onsite personnel" passing 218 in favour, 36 opposed, 3 abstentions, being a 85.8% vote in favour. The Minutes of the 2006 AGM set out a suggestion made that it might be preferable to purchase Strata Lot 162 for cash in order to avoid a mortgage debt and an explanation that a motion to amend the Resolution to pass a larger special levy could not be made at that meeting.

[110] The Developer voted in favour of the Resolution but should not have in view of the obvious conflict. However, if the 40 votes of the Developer had not been cast in favour of the Resolution, the necessary ¾ vote would still have been present as the vote then would have been 178 in favour, 36 opposed, and 43 abstentions (83.2% in favour) with the quorum of 165 present or represented by proxy.

[111] The Minutes of the August 25, 2007 Special General Meeting ("August 2007 SGM") reflect the following resolution and discussion relating to the purchase of Strata Lot 162:

> **WHEREAS** The Owners, Strata Plan KAS 2428 (the "Strata Corporation") approved a ¾ Vote Resolution at an Annual General Meeting held December 2, 2006 for a special levy in the amount of $125,000 for the purchase of a residence for an onsite caretaker.
> **AND WHEREAS** the purchase of strata lot 162 has been negotiated with 697133 B.C. Ltd. [the Developer] for a total purchase price of **$350,000 inclusive of GST**.
> **AND WHEREAS** the amount of **$225,000** which represents the balance of the purchase price, legal fees, and property transfer tax amount is required in order to complete the purchase
> **BE IT RESOLVED AS A ¾ VOTE RESOLUTION** of the Strata Corporation at the Special General Meeting held on August 25, 2007, that pursuant to section 78 of the *Strata Property Act*, the Strata Corporation is hereby authorized to purchase strata lot 162.
> **BE IT FURTHER RESOLVED AS A ¾ VOTE** of the Strata Corporation that to complete the purchase of strata lot 162 a special levy in the amount of **$225,000** is hereby approved. The special levy is payable by all strata lots. Each strata lot's share of the special levy is calculated based on the unit entitlement of each strata lot divided by the total unit entitlement of all strata lots and is set out on the **attached schedule**. Each strata lot's share of this special levy is due and payable upon passage of the special levy, however, for the convenience of the owners, it may be paid in three equal monthly installments beginning on **December 1, 2007**.
> The Strata Council is hereby authorized and directed to do all that Is necessary and required in their opinion, without further need of resolution, to give effect to this Resolution, including the execution and delivery of all documents related thereto.
>
> D. Osmond opened with a brief statement to explain why the owners were in a position to vote on another Special Levy for the purchase of this cottage. The initial vote that took place at the AGM held in December of 2006, was approved and was for the amount of the down payment of a cottage, SL 162. This cottage was to be owned by the strata corporation, It would be an asset to the strata and occupied by the on site Resort Superintendents. The subsequent paperwork that followed for the mortgage on this strata lot had any signatories of the agreement personally liable and understandably, the council was not prepared to assume the financial responsibility for that purchase on

> their own. If this Special Levy is approved, it would allow the strata to purchase the cottage outright.
>
> It was **MOVED** (SL2) and **SECONDED** (SL219) to adopt the Resolution as presented and the floor was opened for discussion.
>
> SL 2 asked who would vote on behalf of the strata lot if it was owned collectively by the strata corporation. A. Murray replied that her advice would be to abstain for the vote on that strata lot. B. Kilani reminded the owners that the cottage would be generating income by having it rented out and that the purchase price was discounted. SL 272 asked if an increase in strata fees could cover these types of costs.
> A. Murray replied that it cannot as it is not a budgeted expense. John Murphy added that with respect to the personal liability issues that he offered to sign the documents, but the strata council declined.
>
> There being no further discussion the question was called and by show of hands the Motion **CARRIED**.
>
> One Hundred and Forty Two (142) in favour, One Hundred and Nine (109) abstentions, Thirty (30) opposed.

[112] There is no indication that the Developer cast its votes but, on the assumption that it did not, the Resolution passed by a 82.6% vote. On the assumption that the Developer did cast votes, the Resolution would still have passed as the vote would have been 77.3% in favour.

[113] However, the Council subsequently developed a “strategy” to acquire Strata Lot 162 without the expenditure of all of the funds authorized by the special levies by offsetting against the $350,000.00 purchase price the unpaid strata fees of the Developer. This proposal was developed partially as a result of the concern of the Council that creditors of the Developer might attach funds that were paid to the Developer before those funds could be repaid by the Developer to the Corporation in satisfaction of unpaid strata fees. It was the intention of the Council to implement this “strategy” at the 2008 AGM and Resolution #6 was developed in that regard.

[114] In a September 12, 2008 letter to those Owners whose units were managed by LCMC, LCMC urged those Owners to vote against Resolution #6 on the following basis: "It is unclear what the outstanding strata fees amount to from the Developer. Under section 108 of the ***Strata Property Act***, a special levy can be used for the purpose for which it was collected or it must be returned to the Owner."

[115] In a September 22, 2008 letter to the Owners, the Council gave this explanation as to why an Owner should vote in favour of Resolution #6:

> Our Strata Corporation has collected 95% of the Special Levy funds required to complete the purchase of our Caretaker's Cottage. Once collected, Strata can proceed to pay these monies to the Developer and complete this purchase. The Developer currently owes our Strata Corporation $175,000 (as its contribution towards our pool and walkways funds) but lacks the available cash to make this payment. In addition, the Developer also owes Strata various other amounts related to its purchase of our aqua park unit, and for its outstanding Strata fees. As a solution to this dilemma, Council is proposing to simply offset the amounts owed for the cabin purchase against all amounts owed to the Strata Corporation. The effect of these offsets *EXACTLY THE SAME* as if we pay them and then they pay us, but it ensures that this money will be paid immediately and not be subordinated to any possible creditor claims. Appropriate journal entries will be made to credit the offsetting amounts to our pool and walkways funds, and thereafter these funds can be accessed immediately and allocated to these projects. In addition, all outstanding Strata fees will have been paid. We believe this is the best possible solution for proceeding under the circumstances.
>
> LCMC urges Owners to vote "No" to this resolution. It further states that a special levy can only be used for the purpose for which it was collected or it must be returned to its owner. The above solution doesn't impact on the special levy that was collected in the slightest. The exact same purchase price is being paid, but offsetting credits will be issued with surplus cash being allocated to the properly designated funds. Voting "No" to this resolution will only ensure that the caretaker cabin does not complete and that the required funds for our second pool are not paid this year, thereby delaying its construction for an indefinite period.

[116] The Minutes of the 2008 AGM reflect the following:

> **¾ Vote Resolution #6**
>
> It was **MOVED** (SL-436) and **SECONDED** (SL-199) that ¾ Vote Resolution #6 be approved as follows:
>
> **BE IT THEREFORE RESOLVED** as a ¾ Vote Resolution of the Owners, Strata Plan KAS 2428, LaCasa Lakeside Cottage Resort at the AGM held on September 27, 2008, that the owners approve of the Strata Council and the developer setting off the $175,000, together with any outstanding strata fees owed by the Developer to the Strata Corporation against the purchase price of the cottage, and the funds that were originally collected by way of special levy by the owners be redirected towards construction of the second pool and hot tub, with any excess to be used for other capital projects as determined by the Strata Council, in its sole discretion.
>
> Curtis Darmohray explained the significance of this resolution to the owners and the question was called.
>
> There being no further discussion on the Motion, by way of a count of voting ballots the Motion was **CARRIED**.
>
> Two hundred seventy two (272) in favour, two (2) abstentions, sixty one and four sixths (61–4/6) opposed.

[117] Assuming that only eligible votes were cast, the Resolution passed by an 81.5% margin. If the 24 common area lots had not been voted in favour of the Resolution, then the Resolution would still have passed as the vote would have been 248 in favour, 26 abstentions, and 61-4/6 opposed, being 80% in favour. If the 24 common lots and the 40 votes of the Developer had not been counted, then the Resolution would still have passed by the requisite ¾ majority, as the vote would have been 208 in favour, 66 abstentions, and 61-4/6 opposed, being 77.1% in favour. Accordingly, I am satisfied that the submission on behalf of Azura that Resolution #6 was not properly passed by the Corporation is without merit.

[118] Even if Resolution #6 had not passed at the 2008 AGM, I am satisfied that the Council would have been in a position to proceed with the Strata Lot 162 transaction as planned. The passage of Resolution #3 at the August 2007 SGM which allowed the Council to proceed on the basis of an all-cash purchase of $350,000.00 was sufficient to allow such a purchase to proceed on the basis that the purchase price would be "paid" partially by setting off the balance owing against the strata fees arrears of the Developer so less cash would change hands. This method of "payment" would protect the funds of the Corporation as no creditor of the Developer would be in a position to "intercept" the cash paid by the Corporation prior to when the Developer would then return the funds by paying the strata lot arrears.

[119] I order that this purchase proceed forthwith on the basis outlined in Resolution #6. I authorize the Corporation to apply the funds obtained from the two Special Levies to the accounts of the Corporation as if the arrears of the Developer had been paid directly to the Corporation by the Developer. To the extent that the funds raised by the $125,000.00 Special Levy at the 2006 AGM and the $225,000.00 raised by the Special Levy at the August 2007 SGM are no longer required to "purchase" Strata Lot 162, those funds should be returned to the Owners by virtue of s. 108(5) of the ***Act*** which provides: "If the amount collected exceeds that required, or for any other reason is not fully used for the purpose set out in the resolution, the strata corporation must return the money to the Owners in amounts proportional to their contributions."

[120] The additional complaint of Azura is that any Statement of Adjustments relating to the purchase of Strata Lot 162 have not been provided to those who have requested copies. While Mr. Mueller in his January 2009 Affidavit states that no statement of adjustments was prepared as there was no sale ”in the conventional sense”, it appears that a draft statement of adjustments has now been prepared and that the Corporation is ready to proceed with this transaction. While I am not satisfied that a Statement of Adjustments would be required for this transaction, now that such a Statement has been produced, it should be provided forthwith to all Owners. However, I am satisfied that there was nothing untoward by virtue of the fact that a Statement of Adjustments had not been previously prepared or that the Statement of Adjustments now available was not forwarded at an earlier date.

(o) If in Arrears, a Person Cannot Serve on Council

[121] Section 28(3) of the ***Act*** provides that a strata corporation may, by bylaw, provide that: “… no person may stand for council or continue to be on council with respect to a strata lot if the strata corporation is entitled to register a lien against that strata lot under section 116(1).” Bylaw 12(5) of the Corporation states: “No person may remain on the Strata Council if the Corporation can file a lien on their strata lot for unpaid strata fees.”

[122] Azura submits that John Murphy as a representative of the Developer was on Council from December, 2006 through September, 2008 although the Developer was in arrears of strata fees of $119,369 as of August 31, 2008 and, by permitting Mr. Murphy to remain on Council, the Corporation was in contravention of s. 26 of

the ***Act*** which requires the Council to exercise the powers and perform the duties of the Corporation, including the enforcement of bylaws and s. 28(3) of the ***Act***.

[123] If an Owner is in arrears and if a demand letter has been forwarded pursuant to s. 112 of the ***Act***, then that Owner or a representative of that Owner is not entitled to serve on Council. There is not sufficient information before me to allow me to conclude whether or not Mr. Murphy should have been a member of Council as it is not in evidence whether a demand letter was forwarded to the Developer prior to the term of Mr. Murphy on the Council. If a demand letter has been forwarded, Mr. Murphy should not have been a member of Council. However, the fact that Mr. Murphy served as a member of Council at a time when the Corporation was in a position to register a lien is not sufficient to invalidate any actions taken by the Council while Mr. Murphy was serving as a member.

(p) Unauthorized Spending – Special Levy V. Contingency Reserve Fund

[124] The relevant sections of the **Act** dealing with this dispute are:

> 92. To meet its expenses the strata corporation must establish, and the owners must contribute, by means of strata fees, to
>
> > (a) an operating fund for common expenses that usually occur either once a year or more often than once a year, and
> >
> > (b) a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur.
>
> 96. The strata corporation must not spend money from the contingency reserve fund unless the expenditure is

> (a) consistent with the purposes of the fund as set out in section 92(b), and
>
> (b) first approved by a resolution passed by a ¾ vote at an annual or special general meeting, or authorized under section 98.

> 98. (3) The expenditure may be made out of the operating fund or contingency reserve fund if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise.

[125] In these regards, Regulation 6.3 of the ***Regulations*** states:

> 6.3 (1) For the purposes of section 95 (4) of the ***Act***, the strata corporation may only lend money in the contingency reserve fund to the operating fund if both of the following conditions are met:
>
> (a) the loan is to be repaid by the end of that fiscal year of the strata corporation;
>
> (b) the loan is for the purpose of covering temporary shortages in the operating fund resulting from expenses becoming payable before the budgeted monthly contributions to the operating fund to cover these expenses have been collected.
>
> (2) The strata corporation must inform owners as soon as feasible of the amount and purpose of any loan made under this section.

[126] The concern raised by Azura is that a special resolution to increase the Contingency Reserve Fund ("C.R.F.") for certain expenditures was defeated at the 2008 AGM, but an increase in the strata fees was then passed in an amount sufficient to pay for the projects set out in the Resolution which was defeated.

[127] The Resolution and the Recitals to the Resolution were as follows:

> **WHEREAS** the Strata Corporation wishes to undertake a number of significant projects that in accordance with the Strata Property Act are not considered to be Operating Expenses and;
>
> **WHEREAS** the Strata Council wishes to complete these projects without the need to collect these funds by way of special levies;
>
> **BE IT RESOLVED** as a 3/4 Vote Resolution of the Owners, Strata Plan KAS 2428, LaCasa Lakeside Cottage Resort at the AGM held on September 27, 2008, that the following projects as noted and more completely described on the Proposed Budget for 2008-2009 be funded through the withdrawal of funds from the Contingency Reserve Fund:
>
> | | |
> |---|---|
> | • Fences | $30,000.00 |
> | • Maintenance Compound | 20,000.00 |
> | • Pool Furniture | 5,000.00 |
> | • Lawn Maintenance Equipment | 12,000.00 |
> | • Purchase Pick-Up Truck | 24,000.00 |
> | • Purchase Utility Trailer | 3,000.00 |
> | • Purchase Golf Cart | 6,000.00 |
> | • Three Additional Aqua Parks | 27,500.00 |
> | • Purchase of two Kayaks | 2,000.00 |
> | • Security Gates and Card System | 75,000.00 |
> | • Additional funds to build second pool | 175,000.00 |
> | • Purchase of boat and motor | 4,000.00 |
> | • Takeover and reconfiguration of Strata Web Site | 8,000.00 |
> | **TOTAL** | **$391,500.00** |
>
> PROVIDED THAT if any of these funds are not required or fully used up for their required purchases, be it further resolved that any such funds may be used to fund either the construction of walkways, or to assist in funding the purchase of the Discovery Centre (as per Resolution #5), or may be otherwise applied towards the purchase price of any of the proposed crown loop areas (pending the Crown's approval of the Strata Corporation's current applications), or may be otherwise designated and used for various capital expense items as determined by the Strata Council, in its sole discretion.

[128] The Resolution was defeated with 215-2/6 in favour, no abstentions and 92-2/6 opposed, being a 70% vote when a ¾ vote was required. While a special resolution requires a ¾ vote in favour, a resolution setting the strata fees for the year

only requires a 50% plus 1 favourable vote. After the question was called on whether or not the budget should be approved, the budget was approved by a vote of 209 in favour and 97-4/6 opposed (68.2% in favour). As a result of the budget being approved, the strata fees were increased from $154.00 per month per lot to $249.00 per month per lot.

[129] The Minutes of the 2008 AGM reflect the following explanation from Mr. Darmohray regarding what was included within the budget:

> He further explained that the proposed 2009-2009 budget reflected the costs to operate the resort on a going forward basis and if approved would fund continued expansion of the strata's amenities without requiring special levies for proposed capital projects. The budget was developed by looking at past operating costs and also reflected a $500,000 contribution to the Contingency Reserve Fund for the purpose of funding much needed capital projects (i.e. second pool), together with increased wages for additional summer staff.

[130] In his Affidavit, Mr. Mueller of Gateway, states: "I do verily believe that it is common practice amongst strata corporations to increase their contingency reserve fund contributions without tying these to specific projects or costs. I do verily believe this common practice has developed specifically to reduce the need for special levies in the future."

[131] In answer to the concerns raised, the Respondents agree that any expenditure on the items listed in the Special Resolution that was defeated will require a ¾ vote of the Corporation before being spent out of the C.R.F. In this regard, Mr. Darmohray as the Past President states in his October 2008 Report:

> When all was said and done, we passed an important budget, but failed to pass the necessary resolutions in support of constructing our second pool, fencing our storage areas, acquiring landscape and maintenance equipment, expanding our aqua park, installing the remaining security gates, purchasing the Discovery Centre, and reconfiguring our Owner based web-site. As a result, we have sufficient funds in our operating and contingency reserve accounts, but no authority to spend it on some much needed projects.

[132] It is the submission of Azura that, while nothing in the ***Act*** has been contravened, there has been a contravention of the "intent" of the ***Act***. Azura submits that the intent of the ***Act*** is that contingency funds contributions are to create a fund for repair and replacement items and that a special levy fund is for buying and building things. I am satisfied that Azura is correct in its submission that the intent of the ***Act*** would be violated if expenditures that would ordinarily be taken out of the C.R.F. could be taken out of the operating fund thus effectively eliminating the requirement that there be a ¾ vote prior to funds being allocated to the C.R.F. However, the Council recognizes that this is the case, as evidenced by the October, 2008 President's Report.

[133] In the circumstances, I am satisfied that it is not necessary to enjoin the Corporation from using the funds that are in the operating budget to fund those items totalling $391,500.00 which were set out in the Resolution which was defeated at the 2008 AGM. I am satisfied that the Council will not attempt to do so. However, I do order that the Corporation proceed with the necessary steps to have a special general meeting to consider again whether the expenditures totalling $391,500.00 will be authorized by a special resolution, and, if authorized, whether the expenditures can be undertaken by transferring funds out of the operating fund into

the C.R.F. In this regard, s. 104(1) of the ***Act*** states that, if funds are not required to meet operating expenses accruing during a fiscal year, the surplus funds can be transferred into the contingency reserve fund, can be carried forward as part of the operating fund as a surplus, or can be used to reduce the total contribution to the next fiscal year's operating fund. Owners may wish to consider how to deal with any funds which are surplus to the anticipated operating expenses for the 2008-2009 fiscal year.

(q) Ballots

[134] It was the submission of Azura that the ballots at the 2008 AGM had been destroyed. It appears not to have been the case. Representatives of both the Petitioner and the Respondents now have access to the ballots and so are now in a position to review the ballots and report to the Court.

(r) Votes at the 2008 AGM were Mathematically Impossible.

[135] While I agree with the submissions made on behalf of Azura, I am satisfied that the outcome of the various votes would not have changed if the counting of votes had been undertaken in an appropriate manner. In this regard, Mr. Darmohray in his December 4, 2008 Affidavit states:

> The 2008 AGM Minutes do reflect a miscount in the calculation of the total number of votes for Resolution #6. However, votes at the 2008 AGM were calculated by "first" counting the opposed votes, then the abstentions and finally the confirmed votes in favour. Further, after specifically counting the opposed votes and the abstentions, we verbally confirmed that all other votes were to be counted in favour of the resolution. If a resolution clearly passed, we did not necessarily count all votes in favour. Similarly, if a resolution clearly failed, we also

> did not necessarily count those votes in favour. At no time did any registered unit holder object to this method of determining the votes at our 2008 AGM. In all instances, the results of the votes were announced and were made clear to our registered unit holders.

[136] The method of tallying votes employed by Mr. Darmohray was not appropriate. The following procedure should be implemented at all future annual and special general meetings on all resolutions after it has been determined that there is a quorum present: (a) the total number of votes represented in person or by proxy should be calculated; (b) all votes in favour should be counted first; (c) all votes against should be calculated second; (c) all abstentions should be counted third. Once those counts have been undertaken, the votes in favour as a percentage of the eligible votes should be counted to ascertain whether the requisite 50% plus one, 75% or unanimous votes have been obtained.

DECISION AND ORDERS MADE

[137] The business undertaken at the 2008 AGM will not be rescinded. Even taking into account the votes of the Developer, the voting of the 24 common area lots, and the chairing of the meeting by Mr. Darmohray, I am satisfied that there was a quorum present and that all votes carried by the requisite margin even after subtracting the 24 common area votes and the votes of the Developer.

[138] While critical of some of the actions taken by the Corporation and the Council, I cannot find that there has been a substantial breakdown in management, a breakdown of the ability to manage, oppressive conduct, or conduct which requires the Court to interfere in the democratic operation of this Corporation. Taken as a

whole, I find that there were isolated instances of easily rectifiable procedural irregularities amounting to matters which are not of great importance or consequence.

[139] I also find that many of the complaints of Azura are not justified and that much of the legal interpretation of the ***Act*** provided by Azura cannot be maintained. I find that the following complaints of Azura are without merit: the security for Strata Lot 492 (Laundry Facility) was not properly approved; the form of the financial statements which were distributed to the Owners prior to 2008 AGM was not appropriate; that there was not a quorum at the 2008 AGM; that the Developer should not have been entitled to vote at the 2008 AGM; that the "purchase" of Strata Lot 162 (Caretaker's Cottage) should not proceed; and that the ballots at the 2008 AGM had been destroyed. I am satisfied that the only complaints of substance were the content of the Notice and the voting of the 24 common area strata lots. While complaints regarding the failure to segregate Construction Deposits, that minutes were not forwarded immediately after the Council meeting, that the Notice did not have full descriptions of the items to be considered, and that votes were not counted in an appropriate manner are matters which raise questions of merit, I am satisfied that those matters merely raise isolated instances of easily rectifiable procedure irregularities amounting to matters of not great importance or consequence. I also take into account that many of the matters raised are being dealt with by the Court at first instance so that there was no guidance available for the Corporation regarding the matters raised by Azura.

[140] It is clear that the approach taken by Azura was to raise as many complaints as possible, whether or not those complaints affect the running of the Corporation or the Council and whether or not the matters have been previously raised.

[141] Taking into account the operations of the Corporation and the complaints as a whole, I am satisfied that it would be inappropriate to make the order sought by Azura on the basis that there have been a series of significantly unfair actions or threatened actions.

[142] Even if I am wrong in reaching this conclusion, I cannot be satisfied that it is in the best interests of the Corporation that an administrator be appointed. The cost and disruption of such an appointment is not justified. While critical of some of the actions or the inactions of Gateway and/or the Corporation, I cannot conclude that it has been shown on a balance of probabilities that there is an inability to manage, substantial misconduct or mismanagement, a struggle between Owners which impedes proper management, or a necessity to appoint an administrator as the only reasonable prospect of bringing order to this Corporation. I do not see that the grounds have been shown which would require the Court to override the democratic government of this Corporation. I am not satisfied that the Order requested by Azura is absolutely necessary.

[143] In addition to ordering that the Construction Deposits be maintained in a separate interest-bearing trust account, I also order that a special general meeting be called as soon as possible taking into account what is set out above and, in particular, the following:

(a) non-residential and residential strata lots will vote together pursuant to an order made under s. 164(1)(b) of the ***Act***;

(b) the minutes from the meeting of Council which decides the agenda and the materials to be distributed will be available within two weeks of the meeting and the minutes and the necessary notice required under the ***Act*** will be forwarded to all Owners giving Owners no less than two weeks notice of the date and location of the special general meeting;

(c) the notice will contain a full description of all agenda items plus the specific wording of all resolutions requiring a ¾ or an unanimous vote;

(d) the notice which will be forwarded to all Owners will be of a "neutral" nature and any materials to support or not to support proposed resolutions and votes for candidates for Council are to be funded by proponents or opponents and not by the Corporation or by Gateway;

(e) potential candidates for the Council will be provided with sufficient opportunity prior to the notice being forwarded to Owners to provide their biographies so that all biographies will be included in the notice;

(f) any Proxy form should list at least four Owners – two from the present list of Council members and two from those presently not on Council. In this way, those in favour of various resolutions and those opposed to various resolutions will have an opportunity to have their vote cast by Owners who represent their positions;

(g) the Quorum for all future Corporation meetings will be eligible voters holding at least one-third of the total number of strata lots in the Corporation;

(h) in all future elections for members of Council, the Corporation must comply with s. 28(1) of the ***Act*** and s. 28(3) of the ***Act***;

(i) all votes should be calculated in accordance with the procedures set out above;

(j) those ineligible to vote will only include Owners who are in arrears where demand letters have been forwarded, and where no less than 14 days has expired since the demand letters were forwarded; and

(k) regarding the financial statements for the Corporation, any draft statements should be forwarded to the Council first in order that they can be reviewed and finalized prior to being forwarded to the Owners. Only financial statements and budgets in final form should be forwarded to Owners with the Notice of an annual general meeting or a special general meeting.

[144] The Corporation and Azura will be in a position to make submissions as to the costs of these proceedings, with written submissions to be received no later than May 8, 2009.

"Burnyeat J."
The Honourable Mr. Justice Burnyeat