IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Oldaker v. The Owners, Strata Plan VR 1008,* 2010 BCSC 776

Date: 20100602
Docket: L052371
Registry: Vancouver

Between:

Oldaker

Petitioner

And

The Owners, Strata Plan VR 1008

Respondent

And

Denise M. Hamilton, Nevena Vojic and Nikica Vojic

Respondents

Before: The Honourable Mr. Justice P.G. Voith

Reasons for Judgment

Counsel for the Petitioner:	D.E. Burns
Counsel for the Respondent The Owners, Strata Plan VR 1008:	G.S. Hamilton
Counsel for the Respondents Denise Hamilton, Nevena Vojic and Nikica Vojic:	R.P. Hamilton
Place and Date of Hearing:	Vancouver, B.C. February 2, March 30 and April 1, 2010
Place and Date of Judgment:	Vancouver, B.C. June 2, 2010

[1] Several individuals who are owners of strata lots within a building seek an order that they be insulated or exempted from having to pay their respective shares of both the legal fees incurred by and the costs awarded against the respondent, The Owners, Strata Plan VR 1008. The central issue raised is whether there exists a basis within the *Strata Property Act*, S.B.C. 1998, c. 43 (the "Act") for such an order and, if so, whether the circumstances of this case support the order.

Background

[2] The respondent, The Owners, Strata Plan VR 1008 (the "Strata Corporation"), is civically located at 1819 Pendrell Street, in the City of Vancouver, in the Province of British Columbia and is commonly known as Pendrell Place.

[3] The petitioner, the individual respondents, and Keith F. Andrews are all owners in Pendrell Place:

(a) Mr. Oldaker has owned strata lot 22 (Unit 504) since approximately February, 1989.
(b) Denise M. Hamilton has owned strata lot 10 (Unit 205) since approximately December, 1989.
(c) Nevena and Nikica Vojic, have owned strata lot 9 (Unit 204) since approximately January, 1994.
(d) Keith F. Andrews ("Andrews"), has owned strata lot 16 (Unit 402) since approximately January, 2004.

[4] Pendrell Place was constructed approximately 27 years ago and is comprised of a 6-storey apartment style building with 22 strata lots and common property. It was constructed with building defects and deficiencies including defective wall assemblies, balconies and roofs.

[5] In or around the early 1990s, Pendrell Place began experiencing serious water ingress problems. Many owners, including the petitioner, were affected by the leaking.

[6] The water ingress problems and failed attempts to repair Pendrell Place led to significant animosity and friction amongst owners. The owners divided into two competing factions or groups. One group was comprised of a minority of the owners and included Mr. Oldaker and the individual respondents.

[7] The animosity between these camps has led to no less than nine different actions or proceedings. These various proceedings and the general nature of the claims that are advanced in each are described in the materials before me. In all but one such proceeding Mr. Oldaker, alone or with other members of the minority, has sued the Strata Corporation and other related parties including strata council members. I am presently the case management judge for the various actions that remain outstanding.

[8] In October 2005, Mr. Oldaker commenced this Petition (the "Petition"). Mr. Oldaker sought various forms of relief including, *inter alia*, declarations that the respondent was in breach of its statutory duty under s. 72 of the Act and that it had treated him in a significantly unfair manner, contrary to s. 164 of the Act.

[9] Each of Denise Hamilton, Nevena Vojic and Nikica Vojic filed Responses to the Petition in which they made clear that they did not oppose the relief being sought by Mr. Oldaker and in which they asserted that they should "be excused from contributing to any costs awarded to the petitioner". By virtue of a Consent Order made January 9, 2006, each was added as a respondent to the proceeding.

[10] The particular circumstances and considerations relevant to the Petition were heard by Madam Justice Gill over an 11-day period in January and February 2006. Counsel for the individual respondents appeared at the first day of the hearing, was excused and played no further role in the matter in the ensuing days. Gill J. issued Reasons for Judgment which can be found at 2007 BCSC 669 (the "First Oldaker Reasons"). Gill J. declined to award much of the relief claimed in the Petition including the request for a declaration that there had been a breach of s. 164 of the Act. Gill J. did conclude that the respondent had breached s. 72 of the Act.

[11] Some two years later, Mr. Oldaker reappeared before Gill J. to reopen the hearing before her and to adduce further evidence of what had transpired in the interim. The individual respondents filed a Response and an Outline in which they confirmed they did not oppose the relief being sought by Mr. Oldaker, and in which they sought an order that any award of costs made against the respondent have no application to them. They did not actively participate in the hearing. The Order which ensued from this second proceeding did not make reference to the individual respondents and was not signed or endorsed on their behalf.

[12] Madam Justice Gill, in Reasons for Judgment which can be found at 2008 BCSC 346, (the "Second Oldaker Reasons") and on the basis of the evidence before her was now satisfied that the respondent's conduct could "be categorized as a breach of either s. 72 or s. 164 of the *Strata Property Act*" (para. 26).

[13] In the First Oldaker Reasons, Gill J. had observed:

> [78] The matter of costs is, however, not as straightforward as might be the case in circumstances where a petitioner has met with limited success. Accordingly, if the parties cannot agree, further submissions may be made.

[14] Gill J., in Reasons for Judgment found at 2009 BCSC 697 (the "Cost Reasons"), dealt with the questions of costs. She declined to award Mr. Oldaker either double costs under Rule 37B or special costs based on the conduct of the respondent. Instead, she awarded Mr. Oldaker his costs at Scale B. Madam Justice Gill did not, in the Cost Reasons, address the issue raised by the individual respondents in the Responses and Outlines they had filed and in which they asserted that they should be exempted from her cost award. The cost award made by Gill J. has, I was advised, been appealed.

Analysis

a) The General Legislative Scheme

[15] The provisions of the Act with respect to the allocation of common expenses are mandatory. The Act requires that common expenses be allocated to each owner according to unit entitlement.

[16] Common expenses of the Strata Corporation are paid either through the operating fund, the contingency reserve fund or by means of a special levy. Owners must contribute to the operating fund and contingency reserve fund by means of strata fees to be calculated based on unit entitlement.

[17] Sections 99 and 100 of the Act provide:

> **Calculating strata fees**
>
> 99(1) Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.
>
> (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:
>
> $$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$
>
> **Change to basis for calculation of contribution**
>
> 100(1) At an annual or special general meeting held after the first annual general meeting, the strata corporation may, by a resolution passed by a unanimous vote, agree to use one or more different formulas, other than the formulas set out in section 99 and the regulations, for the calculation of a strata lot's share of the contribution to the operating fund and contingency reserve fund.
>
> (2) An agreement under subsection (1) may be revoked or changed by a resolution passed by a unanimous vote at an annual or special general meeting.
>
> (3) A resolution passed under subsection (1) or (2) has no effect until it is filed in the land title office, with a Certificate of Strata Corporation in the prescribed form stating that the resolution has been passed by a unanimous vote.

[18] "Operating fund" is defined by section 1 of the Act to mean "a fund for common expenses that usually occur either once a year or more often than once a year..."

[19] "Contingency reserve fund" is defined by section 1 of the Act to mean "a fund for common expenses that usually occur less often than once a year or that do not usually occur..."

[20] A special levy can be used to raise money for common expenses provided that the detailed requirements of s. 108 of the Act are satisfied.

b) The Act as it relates to Legal Fees and Costs

[21] Legal expenses to defend a lawsuit against a strata corporation have traditionally been viewed as non-operating fund expenses to be paid from either the contingency reserve fund or by means of a special levy. Both an owner's liability for judgments against the Strata Corporation and for the legal expenses of the Strata Corporation are expressly addressed by the Act.

[22] The following provisions of the Act are relevant:

> **Owner's liability for judgment against strata corporation**
>
> 166(1) A judgment against the strata corporation is a judgment against all the owners.
>
> (2) A strata lot's share of a judgment against the strata corporation is calculated in accordance with section 99(2) or 100(1) as if the amount of the judgment were a contribution to the operating fund and contingency reserve fund, and an owner's liability is limited to that proportionate share of the judgment.
>
> (3) Other than as set out in this section, an owner has no personal liability, in his or her capacity as an owner, for loss or damage arising from any of the following:
>
> (a) the management and maintenance of the common property and common assets by the strata corporation;
>
> (b) the actions or omissions of the council or strata corporation;
>
> (c) any contracts made or debts or liabilities incurred by or on behalf of the strata corporation.

> **Defending suits**
>
> 167(1) The strata corporation must inform owners as soon as feasible if it is sued.
>
> (2) The expense of defending a suit brought against the strata corporation is shared by the owners in the same manner as a judgment is shared under section 166, except that an owner who is suing the strata corporation is not required to contribute.
>
> ...
>
> **Limit on owner's responsibility for costs**
>
> 169(1) If the strata corporation joins or sues an owner in the owner's capacity as owner or as owner developer, or if an owner sues the strata corporation, that owner
>
> (a) is not liable to contribute to legal costs that a court or arbitrator requires the strata corporation to pay,
>
> (b) 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), and
>
> (c) does not, despite being an owner, have a right to attend those portions of any annual or special general meeting or council meeting at which the suit is dealt with or discussed.
>
> (2) If the strata corporation pays an amount to an owner in full or partial satisfaction of the owner's claim against the strata corporation, whether or not under a judgment, the owner is not liable to share in the cost of the payment with other owners.

[23] The first basis that the individual respondents rely on in arguing that they should not be responsible for either the legal fees associated with the defence of the Petition or for the costs arising from that unsuccessful defence turns on the interpretation of s. 167(2) and s. 169(1) and (2). The individual respondents argue that by virtue of their formal status as respondents in the present proceedings they fall within the intended ambit of these provisions. The position they advance reflects a middle ground not squarely addressed by the Act.

[24] If, for example, the individual respondents had merely voted against the resolutions directed to defending the Petition, they accept they would be responsible for their unit share of the legal fees and costs arising from the Petition. This would reflect a common scenario where a minority of owners, who oppose the defence of an action, are proven in the result to have been correct. In such circumstances there

is no question but that both minority and majority owners share in both the legal fees and costs that emanate from the action in accordance with the owner's proportionate share of those amounts.

[25] Conversely, if the individual respondents had been named as petitioners in the Petition and were thereby each "an owner" who "sues the strata corporation" their immunity from having to contribute to the Strata Corporation's legal fees and costs would be clear. These are the very circumstances which arise in action number VA L011861, Vancouver Registry, a related proceeding which has similar roots, and in which each of the individual respondents, together with Mr. Oldaker, have sued the Strata Corporation. There is no suggestion in that action that the individual respondents/plaintiffs should contribute to the costs of the defence of that action or that they face any jeopardy in having to contribute to a costs award if they are successful.

[26] The position and status of the individual respondents under each of s. 167(2) and 169(1) and (2) turns on the interpretation of those provisions. The leading statement which establishes a general framework for statutory interpretation is found in Driedger*, The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, and was adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

i) The Words of the Act

[27] Both s. 167(2) and 169(1) address the consequences of an owner "suing" or being "sued" by the Strata Corporation. Section 1 of the Act expressly defines "sue" to mean "the act of bringing any kind of court proceeding". The natural and ordinary meaning of "bring", as found in the *Concise Oxford English Dictionary*, 11th ed., (Oxford University Press: 2004) is "to cause to move or to come into existence" or "cause to be in a particular state or condition". The word "bring" thus implies some

active or positive conduct. This is consistent with the use of the word “sue” in s. 167 and 169 of the Act.

[28] The *Rules of Court* define “proceeding” to mean “an action, suit, cause, matter, stated case under Rule 33A, appeal or originating application”. Though each of these distinct forms of a “proceeding” has unique attributes, they share the premise and object that some form of relief is being sought. By virtue of the associated words rule, *noscitur a sociis*, this extends to the word “matter”.

[29] Here the individual respondents did not sue the Strata Corporation. They did not bring any court proceeding against the Strata Corporation. They did not cause or bring into existence the Petition. They did not seek any relief against the Strata Corporation. Indeed, Form 124 of the *Rules of Court*, which establishes the structure and content of a Response, does not contemplate or allow for any prayer for relief. Instead, it allows a respondent to either “not oppose, “oppose” or “consent” to the relief being sought. That is exactly what the individual respondents did. They simply made clear that they either took no position or consented to the relief being sought by Mr. Oldaker.

[30] While they did, in their Response and Outline, seek to be excused from any cost consequences flowing from the Petition, this cannot be said to be relief which flowed from the Petition. Instead, it appears to have been a measured attempt to fall within the ambit of s. 167 and 169. In saying this I mean no criticism. It was open to the individual respondents to endeavour to act so as to bring their conduct within these provisions and to thereby avoid the ordinary consequences arising from the application of the Act. For the reasons I have given, and for the reasons which follow, I do not consider that they have done so.

ii) The Scheme of the Act

[31] Courts routinely look to provisions which are considered related, either because they are grouped together or because they deal with similar subject matter,

to inform the interpretation of a particular provision. In *Sullivan on the Construction of Statutes,* 5th ed. (Toronto: LexisNexis Canada, 2008) at p. 360, the author states:

> ***Related provisions***. In adopting a contextual approach, the courts focus on any provision or series of provisions that in their opinion is capable of shedding light on the interpretive problem at hand. Looking to other provisions is useful because courts make certain assumptions about the way legislation is drafted. As Lord Reid wrote in *Inland Revenue Commissioners v. Hinchy*:
>
> > ... one assumes that, in drafting one clause of a bill, the draftsman had in mind the language and substance of other clauses and attributes to Parliament a comprehension of the whole Act.
>
> More specifically, it is assumed that language is used consistently, that tautology is avoided, that the provisions of an Act all fit together to form a coherent and workable scheme.

[32] In this case, several related provisions militate against the interpretation being advanced by the individual respondents. Section 169(1)(b) and (c) serve to protect a strata corporation's right to solicitor-client and litigation privilege. They deny an owner who sues the strata corporation information, including legal opinions, relevant to the suit as well as access to any meeting where the suit is addressed or discussed. To some extent, giving meaning to "an owner who sues" by referring to other provisions which use the same words is circular. Nevertheless, it is relevant and significant that statutory provisions which purport to limit or restrict rights are generally construed narrowly: Sullivan at pp. 476-478. Here, the application of a strict and narrow construction to s. 169(1)(b) and (c), which purport to limit the rights of owners who "sue" strata corporations, would lead to an interpretation that does not support the individual respondents.

[33] While I do not suggest that the conduct of the individual respondents informs the interpretation of s. 169(1)(b) and(c), I do note, based on the record before me, that various of the individual respondents appear to have participated in different Special and Annual General Meetings that preceded and followed the first hearing before Madam Justice Gill and at which the Petition was discussed. They were neither asked to conform with s. 169(1)(b) and (c) by the Strata Corporation, nor did they appear to consider that these provisions pertained to them.

[34] Section 166(1), which confirms that a judgment against the strata corporation is "a judgment against all the owners", also does not rest easily with the interpretation advanced by the individual respondents. Section 169(1) imposes joint and several liability on owners for the wrongs of the strata corporation: *The Owners, Strata Plan VIS 4534 v. Seedtree Water Utility Co. Ltd.*, 2006 BCSC 73. Strata members do not share the limited liability of shareholders in a limited company: *Hamilton v. Ball*, 2006 BCCA 243, 226 B.C.A.C. 239. Though Mr. Oldaker appears in this case to have released his claim for costs against the individual respondents, an expanded interpretation of "if an owner sues the strata corporation" has the prospect of impacting on the rights of judgment creditors.

[35] Finally, s. 170, 171 and 173 are relevant. These provisions establish the obligations and interactions of the strata corporation and owners when such owners are sued by the strata corporation. They provide:

> **Suits against owners**
>
> 170 The strata corporation may sue an owner.
>
> **Strata corporation may sue as representative of all owners**
>
> 171(1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
>
> (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
>
> (b) the common property or common assets;
>
> (c) the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under this Act, the bylaws or the rules.
>
> (2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.
>
> (3) For the purposes of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter.
>
> (4) The authorization referred to in subsection (2) is not required for a proceeding under the *Small Claims Act* against an owner or other person to collect money owing to the strata corporation, including money owing as a fine, if the strata corporation has passed a bylaw dispensing with the need for authorization and the terms and conditions of that bylaw are met.

(5) All owners, except any being sued, must contribute to the expense of suing under this section.

(6) A strata lot's share of the total contribution to the expense of suing is calculated in accordance with section 99 (2) or 100 (1) except that

(a) an owner who is being sued is not required to contribute, and

(b) the unit entitlement of a strata lot owned by an owner who is being sued is not used in the calculations.

...

Other court remedies

173 On application by the strata corporation, the Supreme Court may do one or more of the following:

(a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;

(b) order an owner, tenant or other person 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 order under paragraph (a) or (b).

[36] These various provisions further confirm that the "suing" of an owner is limited to the owner against whom relief is sought and as against whom some *lis* exists. Section 171(1)(a)-(d) establishes the nature of the issues in respect of which an owner can be "sued". Section 173(a)-(c) establish that any potential order made would be to either compel or prohibit conduct. In either instance, some relief as against a particular party is being sought. Sections 171(5) and (6) establish that "all owners, except any being sued" must contribute to the "expense of suing".

c) <u>The Object of the Act</u>

[37] Present day statutory interpretation recognizes that insofar as the language of a provision allows, interpretations which are consonant with and which promote a clear legislative purpose should be adopted. This is not to say that a statute's intended purpose can overwhelm the language of a provision. Instead, one seeks to ensure consistency between language and purpose and to achieve a result which is harmonious.

[38] A central thesis underlying the interaction of owners within a strata corporation is that they engage in a form of communal living. The majority of owners dictates and determines the direction of the corporation. The following statements establish and expand on these propositions:

> a) Owning a strata lot and sharing ownership of the common property in a condominium development is a new system of owning property and has required the development of new mechanisms and procedures. Living in a strata development, as the Nova Scotia Court of Appeal stated, combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times: *Shaw Cablesystems v. Concord Pacific Group et al.*, 2007 BCSC 1711, 288 D.L.R. (4th) 252, at para. 10.
>
> b) The general rule under the *SPA* is that within a strata corporation "you are all in it together": *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085, 17 B.C.L.R. (4th) 63, at para. 35.
>
> c) It is not for this court to interfere with the democratic process of the strata council. Those who choose communal living of strata life are bound by the reality of all being in it together for better or for worse: *Oakley v. Strata Plan V1S1098*, 2003 BCSC 1700, 14 R.P.R. (4th) 242, at para. 16.
>
> d) It is obvious that public policy requires a methodology for resolving issues among owners in a strata corporation. That methodology is set out in the *Strata Property Act*. Without reference to or use of that statute, there would exist a form of anarchy in a strata building and it would therefore be unlikely that the essential repairs and maintenance would ever get done. That the majority make the rules is an accepted way in which our democracy functions. In the case of the *Strata Property Act* that majority must be 75% of all the eligible votes: *Strata Plan VR386 (The Owners) v. Luttrell*, 2009 BCSC 1680, at para. 37.

[39] These cases establish that for better or worse the majority of owners make the rules. For better or worse the minority of owners are to abide by those rules. The majority, as prescribed by the Act, and hopefully with the benefit of sound legal advice, determines what litigation to advance and what litigation to defend.

[40] Not remarkably the views of disparate groups within a strata corporation are often strongly held. The force of these convictions can lead to internal friction, to competing camps within the strata corporation and to paralysis of the corporation. The ongoing efficacy of the strata corporation requires that the views of the majority be respected. The interpretation of s. 167(2) and 169(1) and (2) advanced by the

individual respondents is not likely to foster or engender such respect. Rather, it is likely to undermine or subvert decision making by the majority. It has the further prospect of giving rise to mischief, to exacerbating friction within a strata corporation and to causing harm to the strata corporation.

[41] On the interpretation being advocated by the individual respondents, a minority owner would be able to strategically insulate themself from the various potential financial consequences of an action. Let us assume the strata corporation is sued. A minority owner unsuccessfully opposes the decision to defend the action. The minority owner becomes a respondent, files a Response supporting the plaintiff's claim, but does not participate in the hearing or trial and takes no further steps in the matter. If the plaintiff is successful, the minority owner argues that he or she, by virtue of their status as a respondent and the position they took in the action, is exempt from their unit share of a) any judgment, b) the legal fees of defending the action, and c) any cost award made by the court. Conversely, if the action is not successful the minority owner would still be spared their unit share of the legal fees incurred in defending the matter and would very likely avoid any cost award of consequence or substance arising from their status as a respondent. They would not have sought any relief directly against the strata corporation and their status as respondent would not have extended the length of the hearing or otherwise increased the costs associated with the action.

[42] In either instance the minority owner is the beneficiary of the increased financial burden imposed on the majority. I do not consider that such a result would be consistent with the communal concepts of strata living or with the tenets and consequences of majority rule that I have described.

[43] I recognize that in given instances the views of the majority can give rise to a "tyranny of the majority" with the attendant harm caused by such conduct. Nevertheless, such aberrant and wrongful conduct is best addressed through those provisions in the Act that are designed to deal with arbitrary or oppressive behaviour rather than through an expanded interpretation of other provisions within the Act.

[44] In summary, none of the language, the context or the object of the Act support the interpretation of s. 167(2) and 169(1) and (2) advanced by the individual respondents.

Unfair Conduct

[45] The second argument advanced by the individual respondents flows from the application of s. 164(1) and (2) of the Act which provide:

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

[46] The Strata Corporation acknowledges that s. 164 gives rise to a possible exception to the statutory requirements of s. 166, 167 and 169 of the Act. In *Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335, 54 B.C.L.R. (4th) 380, Mr. Justice Taylor said:

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

[47] In *Ranftl v. The Owners, Strata Plan VR 672 and Wennerstrom*, 2007 BCSC 482, 71 B.C.L.R. (4th) 318, a case the individual respondents rely on heavily and to which I will return, Mr. Justice McEwan said:

> [31] I think the utmost respect ought to be accorded to the democratic aspects of governance described by Bauman J. in *Strata Plan LMS 1537 v. Alvaraz* (2003), 17 B.C.L.R. (4th) 63 at para. 35, 2003 BCSC 1085, in the terms "[w]ithin a strata corporation 'you are all in it together'". The exception to the operation of this principle is where it is possible to show significant injustice. In *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259* (2004), 34 B.C.L.R. (4th) 229, 2004 BCCA 597, Lowry J.A. observed, at paras. 23-24:
>
> > It must be accepted that some actions of a strata corporation will be unfair to one or more strata lot owners in that the will of the majority may often serve the interest of the majority of owners to the detriment of a minority. Thus, to obtain relief, an owner must establish significant unfairness.
> >
> > What amounts to significant unfairness was address by this Court in *Reid v. Strata Plan LMS 2503* (2003), 12 B.C.L.R. (4th) 67, 2003 BCCA 126. There, at paras. 26-27, it was accepted that while it might relate to conduct that was less severe, at least for the purposes of that case, "significantly unfair" was equated with that which is oppressive and unfairly prejudicial.

[48] In the First Oldaker Reasons, Gill J. referred to the following passage from *Chow v. The Owners, Strata Plan LMS 1277*:

> [75] In *Reid*, Ryan J.A. approved of Masuhara J.'s extended definition of "significant unfairness" in *Gentis v. Strata Plan VR 368* (2003), 8 R.P.R. (4th) 130, 2003 BCSC 120 at paras. 27-29:
>
> > The scope of significant unfairness has been recently considered by this Court in *Strata Plan VR 1767 v. Seven Estate Ltd.* (2002), 49 R.P.R. (3d) 156 (B.C.S.C.), 2002 BCSC 381. In that case, Martinson J. stated (at para. 47):
> >
> > > The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: *Reid v. Strata Plan LMS 2503*, [2001] B.C.J. No. 2377.
> >
> > I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

> I am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) at 1349.

[49] The individual respondents argue that the Strata Corporation has breached its statutory duty to them under s. 164. In doing so they rely in part on the comments and Orders made by Gill J. in this proceeding and in part on the historical conduct of the Strata Corporation.

[50] I do not consider that any of the observations or Orders made by Gill J. assist the individual respondents. The fact that Gill J., in the Second Oldaker Reasons, held that the Strata Corporation breached its statutory duty under s. 164 to Mr. Oldaker is of no moment in the context of the present application. To conclude otherwise would be to conflate a finding of significantly unfair conduct to Mr. Oldaker with a finding of significantly unfair conduct to the individual respondents. Instead, the entered Order, which reflects the finding made, is quite specific and states:

> The Strata Corporation has breached its statutory duties under section 72 of the *Strata Property Act,* S.B.C. 1998, c. 43 as amended (the "*Strata Property Act*") to repair and maintain common property and assets and breached its statutory duty under section 164 of the *Strata Property Act* to refrain from treating the Petitioner in a significantly unfair manner, due to its failure to promptly repair the building envelope that bounds Suite 504, (for convenience referred to as the "Suite 504 Building Envelope") of the strata lot of the Petitioner, legally described as
>
> > PID: 006-331-556
> > Strata Lot 22, District Lot 185
> > Strata Plan VR 1008 together with an interest in the common Property in proportion to the unit entitlement of the strata lots of the Strata Lot as shown on Form 1
>
> and commonly known as Suite 504, 1819 Pendrell Street in the City of Vancouver, Province of British Columbia.

[51] In addition, the comments made by Gill J. do not support the conclusion which the individual respondents invite me to draw. In the Second Oldaker Reasons, Gill J. said:

> [25] Counsel for the petitioner ascribes the delay to the "hostile mindset of the majority". It may be that some owners feel some hostility to the petitioner. Some would say that it has been Mr. Oldaker or others who purport to assist

> him who have acted inappropriately. I do not, however, accept that the delay is the result of a "hostile mindset". But it is also difficult to accept the submission made on behalf of the respondent that the evidence supports a finding that in 2006 and 2007 the strata corporation continued to act reasonably to complete the repair of the east wall.

[52] In the Cost Reasons, Gill J. addressed the assertion that the Strata Corporation's conduct in relation to Mr. Oldaker warranted an award of special costs and said:

> [8] The petitioner argues that this is an appropriate case for the award of special costs against the strata corporation. It is argued that the conduct of the strata corporation in the years prior to and during litigation can be characterized as reprehensible and unconscionable. It is also argued that the court was misled by the strata council's assurance that repairs would be effected.
>
> [9] While I understand why the petitioner is unhappy, I cannot agree with the submission of his counsel that the conduct of the strata corporation in the years prior to and during litigation could be characterized as reprehensible and unconscionable. While I obviously agree that repairs ought to have been effected more promptly, it is not my view that there is a sufficient basis for an order for special costs.

[53] While these various comments were made in the context of the Strata Corporation's dealings with Mr. Oldaker, there is nothing in their tenor or content which supports any broader finding of unfairness relating to the individual respondents.

[54] The individual respondents also maintained in argument, and through the Affadavit of Ms. Hamilton, that the past conduct of the Strata Corporation violated s. 164 of the Act. To the extent such claims are made simply as a matter of argument, and without evidence, little is achieved. The history of this matter is extended and tortured with each side alleging multiple wrongs on the part of the other. In the First Oldaker Reasons, Gill J. referred to a report which detailed the progress or state of litigation for the five month period from September 2002 to January 13, 2003. That report states:

> On October 11, 2002 a new Court of Appeal action (CA30176) was commenced by Mr. Oldaker against the Strata Corporation claiming that Madam Justice Dorgan erred in extending the appointment of the Administrator to January 31, 2003 and in assessing Special Levies of

> $25,548.15 and $40,000.00 for a deficit recapture and roof and balcony repairs respectively. Additionally, Mr. Oldaker commenced a new Supreme Court Action on June 7, 2002 (L021782, Vancouver Registry) that was not served upon the Strata Corporation until October 17, 2003. This action names Mr. Oldaker as Plaintiff, Ascent Real Estate Management (the former Property Manager), the Strata Corporation, several past Council Members and a contracting firm as Defendants.
>
> Furthermore, on November 19, 2002 Mr. Oldaker filed a motion to stay the execution of the Order of Madam Justice Dorgan in assessing Special Levies. It was determined by Mr. Justice Burnyeat that the motion was likely inappropriately brought before the Supreme Court and it was referred to the Court of Appeal. No date has been set.
>
> At the time of my original appointment in October, 2001 six legal actions had been commenced. Since my appointment one action has been settled, two actions involving collection of outstanding fees and a forced sale of the same Strata Lot have been completed and, recently, the Petition of Mr. Oldaker filed December 28, 2000 under which I was originally appointed has been dismissed. However, since my appointment, one Small Claims action, two Supreme Court actions and two Court of Appeal actions have been filed involving the Strata Corporation.

[55] Since 2003, at least four further actions including these proceedings were commenced by Mr. Oldaker and/or the minority owners. At least one of these proceedings has made its way to the Court of Appeal.

[56] The Affidavit of Ms. Hamilton did, however, allege various specific wrongs on the part of the Strata Corporation. Central among these wrongs were the events relevant to several resolutions. One of those resolutions, for example, was passed on November 24, 2005. In it a special levy of $20,000 was raised “to enable the Corporation to be represented in the matter of the petition filed by the Owners of strata lot 22”. This reference is to the Petition. It is now argued that the resolution approving this special levy was improperly achieved, that various statements were made during the course of the meeting in question which were inaccurate and that subsequent to the meeting relevant information was withheld from the owners.

[57] I begin by noting that the individual respondents have not, on this application, sought any declaration that the conduct of the Strata Corporation has given rise to a breach of s. 164. Instead, they simply seek, as I said at the outset, an Order that they be exempted from paying their unit share of Mr. Oldaker’s costs and of the legal

fees of defending the Petition. Under such circumstances, I do not believe it would be appropriate nor am I prepared to make the necessary findings of fact that would be required to support the conclusion that the Strata Corporation had offended s. 164. I am fortified in this conclusion by the fact that the individual respondents are plaintiffs in a separate action (VA S012351, Vancouver Registry) in which the Strata Corporation and several named council members are named defendants. In that action various forms of misconduct are advanced as is the claim that the defendants acted in a "high handed and arrogant disregard for the plaintiffs' rights". With this backdrop, and with the existing history between the parties that I have alluded to, there is all the more reason to be cautious about making findings whose ramifications are very likely to extend beyond the present application.

[58] Still further, significant unfairness must be assessed with respect to all of the circumstances of a case and in light of the balancing of competing interests that must be undertaken by a strata council: *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120, 8 R.P.R. (4th) 130. The context and manner in which the individual respondents have raised the spectre of a s. 164 breach does not comport with the broad assessment that a court is required to undertake to arrive at such a conclusion.

[59] One further matter is relevant in addressing s. 164. The mere fact that the Strata Corporation was unsuccessful in defending the Petition, with the attendant financial and cost consequence of that loss, does not constitute "significantly unfair" conduct or a breach of s. 164 in relation to the individual respondents.

[60] In *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791, Mr. Justice Sewell said:

> [55] I have already referred to the wording of section 164 of the *SPA*. I repeat that the focus of that section is on the conduct of the Strata Corporation and not on the consequences of the conduct. There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so

> when the consequence complained of is one which is mandated by the *SPA* itself.
>
> [56] I do not think that the provisions of the *SPA* with respect to the allocation of costs can be departed from in the absence of conduct on the part of some of the owners that would make it inequitable for them to stand on their legal rights.

[61] More recently, Mr. Justice Smith, in *Liverant v. The Owners, Strata Plan VIS-5996*, 2010 BCSC 286, confirmed that the focus under s. 164 is on the "conduct of the strata corporation, not on the consequences of that conduct." Smith J. went on to conclude, at para. 22, that "[d]irect compliance with a specific provision of the governing legislation cannot, by definition, be significantly unfair."

[62] Here the negative financial consequence which arise as a result of losing the Petition and which flow to the Strata Corporation, and under the Act to owners other than Mr. Oldaker, cannot, without more, give rise to relief under s. 164.

[63] In *Ranftl*, two owners, the Wennerstroms, were added as respondents in addition to the strata corporation, in a petition commenced by another owner. The case involved a "leaky condo" where an administrator was appointed to manage the building's remediation as there were competing groups of owners within the strata corporation. Early in the proceedings the Wennerstroms communicated to the respondent strata corporation's lawyers that they were aligned with the position of the petitioner. The petitioner was successful against the strata corporation and was awarded costs. McEwan J., at para. 34, relieved the Wennerstroms of their obligation to pay for their proportionate share of the strata corporation's legal fees under s. 164 of the Act. Importantly, in *Ranftl* the strata corporation consisted of only six strata lots and five owners. Indeed, the Wennerstroms and one other owner were the only resident owners. These facts were crucial to the decision of McEwan J. who said:

> [30] The small scale of this strata corporation renders the abstractions of "democracy" and majority rule, to which one might ordinarily resort, rather strained. The dysfunctions of this strata corporation can only be appreciated in inter-personal terms. There simply are not the numbers to make notions like "75% of the owners" meaningful. In practise, such small corporations

> must operate more or less by consensus, or the sort of unhappy situation that has come about here would be inevitable. On the scale of this strata corporation, democracy equals either paralysis or oppression.
>
> ...
>
> [33] ...On the scale of this strata corporation there is no “common good” which can be ascertained by a majority vote. There are, rather, competing interest that will be *de facto* oppressive to the extent that one prevails over the other.

[64] I consider that the result in *Ranftl* must necessarily be limited to the finite circumstances of that case. Certainly McEwan J. took pains to emphasize that it was the size or scale of the strata corporation before him that gave rise to the application of s. 164. There is no principled basis, however, to extend this result to any set of circumstances where there is an impasse between minority and majority owners. To extend the ambit of s. 164 to any such impasse would be to significantly upset the principle of majority rule that I have alluded to. It would also be inconsistent with the admonition in *Peace* that it is the “conduct of the strata corporation” which engages the operation of s. 164.

[65] In this case, the strata corporation, though not large at 22 units, is of sufficient size that the application of such concepts as “democracy” and “majority rule” do not, of necessity, devolve to abstractions. Instead, they have meaning and content. I do not consider that the individual respondents have established a breach of s. 164 of the Act by the Strata Corporation.

[66] One last matter remains. At a Case Management Conference early in the proceedings, counsel for the Strata Corporation agreed to Ms. Hamilton and to Mr. and Ms. Vojic being added as respondents. At a subsequent Case Management Conference a request was made to have Keith F. Andrews added as a respondent. Counsel for the Strata Corporation did not agree to this request as he indicated he needed instructions and because no Notice of Motion was filed. It is now submitted that Mr. Andrews should be added as a respondent *nunc pro tunc*.

[67] As a result of my conclusions in the main application before me, it is not clear what, if any, relevance adding Mr. Andrews as a respondent to these proceedings

will have. Nevertheless, I am prepared to make the Order being sought. The materials before me suggest that all parties acted as though Mr. Andrews was a respondent in these proceedings. Both the Response and the Outline filed by the individual respondents in the second hearing before Gill J. expressly refer to Mr. Andrews as a respondent. Gill J. issued a set of Judicial Directions on July 23, 2008 which expressly identify Mr. Andrews as a respondent and which was signed by Counsel for the various individual respondents, including Mr. Andrews, on their behalf. That set of Directions was also signed by counsel for the Strata Corporation. It thus appears as though all parties proceeded, without objection, on the basis that Mr. Andrews was a respondent. It is too late for the Strata Corporation to try to revisit these events.

[68] In summary, I am ordering:

a) Mr. Andrews be added as a respondent to these proceedings on a *nunc pro tunc* basis;

b) the application of the individual respondents is dismissed; and

c) the Strata Corporation is to receive the costs of this application.

"Voith J."