COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dollan v. The Owners, Strata Plan BCS 1589,*
2012 BCCA 44

Date: 20120130
Docket: CA039074

Between:

459381 B.C. Ltd., Philip Dollan and Barbara Jean Woodford

Respondents
(Plaintiffs)

And

The Owners, Strata Plan BCS 1589

Appellant
(Defendant)

Corrected Judgment: The case name of the judgment was corrected at page 1 where a change was made on March 7, 2012;

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, May 2, 2011,
(*Dollan v. Strata Plan BSC 1589*, 2011 BCSC 570, Vancouver No. S090359)

Counsel for the Appellant: G.S. Hamilton

Counsel for the Respondent: G.J. Niemela

Place and Date of Hearing: Vancouver, British Columbia
October 28, 2011

Place and Date of Judgment: Vancouver, British Columbia
January 30, 2012

Written Reasons by:
The Honourable Madam Justice Garson

Concurring Reasons by:
The Honourable Mr. Justice Hall (page 15, paragraph 41)

Dissenting Reasons by:
The Honourable Madam Justice D. Smith (page 17, paragraph 48)

Reasons for Judgment of the Honourable Madam Justice Garson:

[1] Section 164 of the *Strata Property Act*, S.B.C. 1998, c. 43, permits an owner of a unit in a strata title property to apply to the Supreme Court in the event that the conduct of a strata corporation is significantly unfair to the owner. The respondents applied for such an order arising from the Strata Corporation's refusal to permit them to replace an opaque window with a view window as had been provided for in the original contract between the respondents and the developer of the building. The chambers judge agreed that the Strata Corporation's decision was significantly unfair to the respondents. The reasons for judgment that are under appeal by the Strata Corporation are reported at 2011 BCSC 570.

Background Facts

[2] The respondents, 459381 B.C. Ltd., Philip Dollan and Barbara Jean Woodford are the owners of a unit in a complex of 158 strata lots in the False Creek area of Vancouver. Their type of unit is referred to as an 01 unit. For convenience I shall refer to the respondents as Dollan and Woodford.

[3] This appeal concerns windows in the 01 units. The window is a spandrel opaque window. From the outside the window has a blackened appearance, and from the inside the window has a solid white appearance. The window is 17 ¼ inches wide and 98 inches tall.

[4] The marketing materials relied upon by Dollan and Woodford when they contracted to purchase their unit in May 2003 presented the window in question with what is called "vision glass." Sometime prior to Dollan and Woodford taking possession of their unit, the design was changed (without their knowledge) to the spandrel window that is at issue.

[5] The window is located in the den of their unit. Without the spandrel, the window would afford a pleasant view of False Creek. But it would also permit the occupants of 01 units to see into several 02 units. Presumably for concerns about

privacy for occupants of the 02 units, the developer used spandrel windows in the 01 units but not in the 02 units.

[6] Subject to the outcome of the proceeding, the developer has agreed to replace the window with vision glass.

[7] In or about March of 2008, Dollan and Woodford notified the Strata Council of their desire to replace the spandrel window with vision glass. The Strata Council considered, and it is not disputed in this proceeding, that the replacement of the window was a significant change within the meaning of s. 71 of the *Strata Property Act*, thus requiring a resolution supported by ¾ of strata owners to approve the change. At a special general meeting held on June 26, 2008, the owners of Strata Plan BCS 1589 defeated the resolution to change the spandrel windows to vision glass. At the meeting, 73 owners registered as being in attendance, 45 by proxy. When the votes were counted, 19 were in favour of granting the permission sought and 54 voted against.

[8] On January 16, 2009, Dollan and Woodford filed a petition requesting relief under s. 164 of the *Strata Property Act* on the grounds that the action or decision of the Strata Corporation in rejecting their request to replace the window was significantly unfair to them. The petition was heard before Madam Justice Loo on February 11, 2011. She granted the order sought in the petition, to permit Dollan and Woodford to replace the window with vision glass.

Statutory provisions

[9] The statutory provision under consideration is s. 164 of the *Strata Property Act*. It provides as follows:

> (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
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> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
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> (2) For the purposes of subsection (1), the court may
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> (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
>
> (b) vary a transaction or resolution, and
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> (c) regulate the conduct of the strata corporation's future affairs.

Issues on Appeal

[10] The appellant frames the issues on appeal in the following way:

1) Did the chambers judge err in law by failing to apply the correct legal test for finding significant unfairness under s. 164 of the *Strata Property Act*?

2) Did the chambers judge err in law by finding significant unfairness?

[11] The appellant submits that the focus of the analysis under s. 164 should be on the fairness of the process leading to the impugned "action" and not the result of the action. The appellant says that, provided the strata council considered the consequences of its decision and made the decision 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. The appellant says that the focus on conduct is consistent with a deferential approach. According to the appellant, a court ought not to interfere with decisions of democratically elected councils, acting within their jurisdiction unless the decision is clearly oppressive, unreasonable or contrary to the legislation. The appellant says also that the chambers judge erred in finding that the Strata Corporation's decision was significantly unfair.

[12] The respondent says that the focus of s. 164 ought not to be restricted to an analysis of the process leading to the action, but should include a consideration of

the consequences of the action. The respondent says that s. 164 does not require an overly deferential approach to the review of the decision of the Strata Corporation by a Supreme Court judge. The respondent says that the chambers judge's decision was a discretionary one and this Court ought not to interfere absent a demonstrable error.

Standard of Review

[13] Before turning to the central issue on this appeal, I will consider the respondent's assertion that the decision under review is a discretionary decision. A discretionary decision is one that connotes a decision making process that is somewhat flexible, generally requires weighing of multiple considerations and wherein which there may be multiple acceptable results.

[14] As defined by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 52:

> [52] The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:
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> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

[15] In this case, the characterization of an action as significantly unfair is not a matter of discretion but is an inquiry requiring consideration of the facts before the court and what legally constitutes unfair action. I would therefore disagree with the respondents' contention that the decision of the chambers judge in this case was a discretionary one and, for that reason, deference is required.

[16] This appeal requires appellate review of a question of law, that is the interpretation of s. 164, and of a question of mixed fact and law, the application of the law to the facts in this case. The standard of review for questions of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8. For a true mixed question of law and fact, the standard of review is the less stringent standard of palpable and overriding error: *Housen* at paras. 36 – 37; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 at para. 45; and *Paladin Security Systems Ltd. v. JBLK Enterprises Inc.*, 2010 BCCA 532 at para. 10.

[17] With these standards of review in mind, I turn first to the question of the proper interpretation of s. 164.

Analysis

[18] This appeal raises two issues about the proper interpretation of s. 164. First, the appropriate degree of deference owed to a decision of a strata council, or in this case, the Strata Corporation, and second, the meaning of the phrase "significantly unfair".

[19] Several trial level judgments have been cited to us as authority for the proposition that on an application under s. 164 (or its counter-part in other provincial jurisdictions), courts should grant considerable deference to decisions reached democratically by either the council or the corporation. The appellant urges on this Court an approach that is focussed on the fairness of the process rather than the outcome.

[20] In *934859 Alberta Ltd. v. Condominium Corp. No. 0312180*, 2007 ABQB 640, 434 A.R. 41, a judge considered whether deference should be granted to a condominium board. The section under consideration, s. 67 of the *Condominium Property Act*, R.S.A. 2000, c. C-22, permitted an interested party to apply to court for a remedy where a board of a condominium corporation engaged in improper conduct. At para. 54, Chrumka J. held that a court should defer to elected condominium strata boards "as a matter of general application" in the absence of

improper conduct. He cited a number of authorities from various provinces for the proposition that:

> … a Court should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction and substitute its opinion about the propriety of the board of directors opinion unless the board's decision is clearly oppressive, unreasonable and contrary to legislation ...

[21] The appellant contends that the focus of the analysis is on the conduct of the Strata Corporation. In *Peace v. Strata Plan VIS 2165*, 2009 BCSC 1791, 3 B.C.L.R. (5th) 188 at para. 55, Sewell J. focused on the process undertaken by the Strata Corporation and not the result:

> [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.

[22] In *Gentis v. Owners, Strata Plan VR368,* 2003 BCSC 120, prior to filing a s. 164 petition regarding the Strata Council's resolution that they could not continue to rent part of the common property to use as a deck, the petitioners sought to obtain such a lease through a special resolution of the Strata Corporation. Masuhara J. considered if the outcome of the Strata Corporation's vote was dispositive of the question of whether the Strata Council's action was significantly unfair. At para. 34, he held that the vote was not dispositive but the fact that the special resolution was soundly defeated was "additional evidence in support of the position that the Council's decision represented the interests of the majority of the Strata owners" and, in turn, is relevant in determining whether or not the action was significantly unfair.

[23] The appellants, particularly relying on *Peace*, say that the chambers judge erred by failing to afford the appropriate deference to the democratic and fair

process which lead to the decision to refuse permission to replace the windows. As noted earlier, the appellants say that the process, rather than the outcome, should be the focus of the court's scrutiny.

[24] Section 164 is remedial. It addresses that, despite using a fair process and holding a democratic vote, the outcome of majoritarian decision-making processes may yield results that are significantly unfair to the interests of minority owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose. I agree with what Masuhara J. said in *Gentis* that the outcome of the vote is one factor to be considered in determining if the impugned action is unfair. I do not agree with the suggestion in *Pearce* that provided the process is fair and democratic, a court should defer to the decision of the strata council or corporation.

[25] I now turn to the question of the meaning of the phrase "significantly unfair".

[26] As noted by the respondents, the language in s. 164 bears some resemblance to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57, which concerns oppression remedies. The jurisprudence considering the oppression remedy has informed the interpretation of s. 164. In *Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578, Sinclair Prowse J. ascribed a meaning to the phrase "significantly unfair" consistent with the test for oppressive conduct in a shareholder's oppression application. She held at paras. 11 – 14:

> [11] 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.
>
> [12] In the case of *Blue-Red Holdings Ltd v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (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.

> [13] Therefore the issue in this case is whether the Resolution has been burdensome, harsh, wrongful, lacking in probity or fair dealing, has been done in bad faith, and/or has been unjust and inequitable.
>
> [14] For reasons which follow, I have concluded that the Resolution is not burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, and/or unjust and inequitable. In other words, the evidence did not establish that the Resolution was "significantly unfair" to Mr. Reid.

[27] On appeal, her decision was affirmed by this Court. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, 12 B.C.L.R. (4th) 67, Ryan J.A. held that the section required, before a court would interfere, something more than mere prejudice or trifling unfairness. At para. 27, referring to the discussion of the court below regarding the meaning of the phrase "significantly unfair", Ryan J.A. held for the majority that:

> [27] A number of subsequent decisions from the B.C. Supreme Court have cited Sinclair Prowse J.'s definition of "significantly unfair" with approval. Most recently, Masuhara J. in *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120, referred to Sinclair Prowse J's decision as authority for the definition of significantly unfair. The judge, however, added the following comment:
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>> [28] I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.
>>
>> [29] I am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) at 1349.
>
> I agree with Masuhara J. that the common usage of the word "significant" indicates that 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"...

[28] Judges have consistently applied the language used by the Supreme Court in *Reid* (see: *Gentis* at para. 27; *Chan v. Owners, Strata Plan VR-151*, 2010 BCSC 1725 at para. 18; and *934859 Alberta Inc. v. Condominium Corporation No. 0312180*, 2007 ABQB 640 at para. 87). In the appellate decision in *Reid*, Ryan J.A. noted that the term "unfair" may not connote conduct as severe as is envisaged by the term "oppressive and unfairly prejudicial", but she held it was unnecessary for her to decide the point. Similarly, here, neither party suggested that the phrase should be given a meaning that is different than the meaning ascribed to it by Sinclair Prowse J. in *Reid*. The difference between the positions of the parties is in the scope of the inquiry.

[29] Borrowing again from the oppression jurisprudence, the appellant relies on *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; and *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173. In *Golden Pheasant*, in reliance on BCE, Greyell J. set out a two-part objective test to determine whether conduct was oppressive, at paras. 47 – 50:

> [47] *BCE* later articulated a two-part objective test to determine whether the impugned conduct is oppressive or unfairly prejudicial to a shareholder's respective interests, as opposed to the interests of other shareholders. At para. 56 the court said:
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> > 56 One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard".
>
> [48] The reasonable expectations of the parties as to what is just and equitable are determined by the nature of the business relationship between the parties. In *BCE*, at paras. 58-59 and 95, the court set out a two-part test to assess a claim for oppression:
>
> > 58 First, oppression is an equitable remedy. It seeks to ensure fairness - what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression

> should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.
>
> 59 Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.
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> ...
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> 95 ... [I]n assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest?

> [49] The reasonable expectations of the shareholders is a question of fact which can be proved by direct evidence or by drawing reasonable inferences from circumstantial evidence: *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2006), 263 D.L.R. (4th) 450 at paras. 65-67, 79 O.R. (3d) 81 (C.A.); *Samra* at para 34; *BCE* at para. 59.
>
> [50] Reasonable expectations are not determined by the shareholder's own subjective desires but are premised by the word “reasonable” which requires the court to objectively consider the nature of the company at issue and the arrangements made with other shareholders. Reasonable expectations should be considered as part of the “compact of the shareholders”: [Citations omitted.]

[30] In the case of a strata unit owner seeking redress under s. 164, I would adapt the test, suggested by Greyell J. slightly to the context of s. 164 and articulate it in this manner:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

[31] At para. 24 of her reasons for judgment, the chambers judge adopted the interpretation of s. 164 as described in *Reid*: as “burdensome, harsh, wrongful, lacking in probity or fair dealing or has been done in bad faith”, “unjust or inequitable” or “unreasonable”.

[32] The chambers judge also referred to *Peace*. As noted above, in *Peace*, Sewell J. said in discussing the Supreme Court's power to intervene in a decision of a strata council pursuant to s. 164, held at para. 55 that, "... 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..."

[33] The chambers judge also made reference to the test referred to in *Sterloff v. Strata Corp. of Strata Plan No. VR 2613* (1994), 38 R.P.R. (2d) 102 (B.C.S.C.), at para. 30 of her reasons for judgment where she said that the Strata Corporation acknowledges that it "must endeavour to accomplish the greatest good for the greatest number". *Sterloff* was an application under s. 40 of the then governing *Condominium Act*, R.S.B.C. 1979, c. 61, which provided that:

> Where a strata corporation fails to fulfil an obligation under this Act or bylaws, the owner ... may apply to the court for a mandatory injunction requiring the strata corporation to perform the obligation.

[34] In my view *Sterloff* is not applicable to this case. Conduct may be significantly unfair to one owner even if it benefits a majority of other owners.

[35] The respondents acknowledge that *Sterloff* is inapplicable to the facts of this case.

[36] If the chambers judge had asked the two-part test set out above, she would have had to conclude that, looked at objectively, Dollan and Woodford had a reasonable expectation that the spandrel windows would be vision glass. That is what they agreed to purchase. The second question – whether the evidence establishes that the reasonable expectations of the owners were violated by action that was significantly unfair – was implicitly answered in the positive by the judge. She held at paras. 33 – 39:

> [33] I conclude that the petitioners have been treated significantly unfairly pursuant to s. 164. The decision of the Strata Council and the Strata Corporation in refusing or not allowing the change from a spandrel window to a vision glass window is significantly unfair to the petitioners. The decision is not one that accomplishes the greatest good for the greatest number.

[34] The Strata Corporation in carrying out its statutory mandate must fairly balance the competing tensions between those who want their view and those who want their privacy. Nothing in the *Act* guarantees either a view or privacy, but the *Act's* Schedule of Standard Bylaws provides as follows in s. 3(1)(c):

> **Use of property**
>
> **3** (1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that
>
> ...
>
> (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot[.]

[35] Although the Strata Corporation argues that it was the developer that decided to change the window from vision glass to spandrel, the petitioners and others who purchased 01 units from the developer still got less than they bargained for: they have a window that blocks their view from the inside to the outside; and the owners of the 02 units got more than they bargained for: they have the benefit of a privacy screen that blocks the view inside from the outside. But the privacy screen is not in or a part of the 02 unit, but in or a part of the 01 unit.

[36] The original purchasers of the 01 units and the 02 units both knew or ought to have known from looking at the strata plans that the distance between their windows was close and that the windows were to be vision glass windows. However, whether or not the current owners of the 02 units were the original purchasers, the 02 unit owners have both a privacy screen at the expense of the 01 unit owners <u>and</u> a view. The 01 unit owners, and more particularly the petitioners, have no view from the spandrel window and a privacy screen they do not want. To allow the 02 units the benefit of a privacy screen that is in reality a window in an 01 unit, deprives the 01 unit owners' use and enjoyment of the window as a window.

[37] I question but do not decide whether the proposed change was a significant change in the use or appearance of common property within s. 71 of the *Act*. The spandrel window is a window. It may act as a privacy screen but it remains a window.

[38] The Strata Corporation does not dispute that the spandrel window was designed during the course of construction to accommodate window coverings. There is nothing to suggest that the windows in the 02 units could not be covered with window coverings or blinds or that the windows do not already have existing coverings or blinds. One of the 01 unit owners wanting to change the spandrel window suggested at the special general meeting that "[o]wners may close blinds if their Strata Lot requires privacy".

[39] Allowing the petitioners to change the spandrel window to vision glass would allow the 01 unit and the 02 unit occupants to a view outside the window, and to privacy by closing blinds or coverings when the occupants want privacy. This would in my view accomplish the greatest good for the greatest number.

[37] On the facts of this case, the result of the Strata Corporation decision was to place the burden of the desired privacy on the wrong party. If the owners of 02 units wish privacy at times, they could install and close blinds in their own windows. It is burdensome (and that is my interpretation of the chambers judge's decision) to expect the owners of 01 units to entirely lose their view in order to afford occasional privacy to certain 02 units. The chambers judge found that this transferring of the burden was significantly unfair and I see no error in her conclusion. I understand her to have held that the decision or action is burdensome as that term was used in *Reid* and was therefore significantly unfair to the respondents. Although the judge may have erred in her reference to the deference to be afforded the Strata Council, and in her comment that the decision would accomplish the greatest good for the greatest number, those errors benefitted the appellant and do not therefore assist them on this appeal.

[38] I agree with the appellant that courts should be most reluctant to interfere in the affairs of a strata corporation where the process adopted to arrive at a decision is one that is fair and democratic. But where an owner invokes s. 164 to remedy alleged unfairness, a court is mandated to consider if the action rises to the threshold of "significant unfairness", in which case the court is required to intervene.

[39] In conclusion, I find no palpable and overriding error in the judge's conclusion that the refusal to permit the 01 units to remove the spandrel was unfairly burdensome to them.

Disposition

[40] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

Reasons for Judgment of the Honourable Mr. Justice Hall:

[41] I have had the advantage of reading in draft the reasons of Garson J.A. and D. Smith J.A. I am doubtful that the trial judge was adopting an appropriate analysis in this case when she made reference to a decision that would ensure the greatest happiness of the greatest number of owners of strata units. In fact, it is not entirely clear to me just what was the precise reasoning that persuaded her to a conclusion in favour of the respondents.

[42] In many cases, such considerations would mandate an order for a new hearing. However, I am reluctant to suggest such a course of action in the present case having regard to the further financial burdens this would inflict on the parties to this litigation. I believe if at all possible this Court should endeavour to decide this case on the record without the necessity of further proceedings.

[43] I start from the proposition very cogently set forth in the reasons of my colleague D. Smith J.A. that courts should be very hesitant in interfering with the decisions of a Strata Council. That is the form of government utilized by strata lot owners to govern their affairs and, assuming a fair process (of which there is no issue here), courts should, in my view, adopt an attitude of considerable deference to such decisions. If it was a question of process and procedure only, I would certainly not be inclined to interfere with the decision made by the Strata Council in this case.

[44] I do not, however, consider that in the unusual circumstances of the present case, that we can properly limit our consideration solely to the practice and procedure adopted by the Council. If such were to be the only consideration in a case raising such an issue as the present one, a court would have no ability to look beyond a majority supported decision to take account of the position of one or more parties in a minority. I might consider it an appropriate approach to a matter like the present controversy to adopt something of a presumption of regularity about a decision of a strata council supported by a majority of owners but to afford some

limited ability in a court to address a decision that imposes a too heavy burden on a minority. That is rather how I see the present case.

[45] As outlined in her reasons by my colleague Garson J.A., I consider that the decision of the appellant Council cast too heavy a burden on the respondents in this disputed issue. In terms of previous authorities, it could be characterized as "unduly burdensome" and therefore fairly capable of being within the purview of the language of the statute "significantly unfair". Perhaps, without express articulation, that was the unexpressed major premise underpinning the conclusion of the judge at first instance.

[46] I see the continuing burden of an impaired view as being a disproportionate imposition on the interests of the respondents. Therefore, this is what I view as a rare instance where a court can legitimately second guess the views of a strata council. The substantive issue here rises to a level of significance sufficient to engage the statutory basis to override the decision of the Council. Thus, perhaps based on a somewhat different mode of analysis than that articulated by Loo J. or by Garson J.A., I concur in the disposition of this appeal as proposed in her reasons by Garson J.A.

[47] I too would dismiss this appeal.

"The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[48] I have had the benefit of reviewing the draft reasons of Madam Justice Garson and Mr. Justice Hall. With respect, I am unable to agree with the disposition proposed by my colleagues. I would allow the appeal for the following reasons.

The test for "significant unfairness" in s. 164 of the Strata Property Act.

[49] Counsel for the parties agree with the legal test identified by the chambers judge for finding significant unfairness under s. 164 of the *Strata Property Act,* S.B.C. 1998, c. 43 [*Act*]. They also agree that the decision in *Reid v. Strata Plan LMS 2503,* 2001 BCSC 1578, aff'd at 2003 BCCA 126, referred to by the chambers judge at paras. 24 and 28, correctly states the meaning of significantly unfair in s. 164, which Madam Justice Ryan, for the Court, summarized as follows:

> [26] ... Under s. 42 of the *Condominium Act*, an owner could apply to the court to remedy behaviour of the strata corporation that was "oppressive" or acts or resolutions that were "unfairly prejudicial" to the owner. In [*Blue-Red Holdings Ltd. v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (B.C.S.C.)], the court found that oppressive conduct had been defined as conduct that is burdensome, harsh, wrongful, lacking in probity or fail dealing, or has been done in bad faith and that unfairly prejudicial conduct had been defined as conduct that is unjust or inequitable. In the case at bar counsel for both parties submitted that the meaning of "significantly unfair" would encompass, at the very least, oppressive and unfairly prejudicial conduct and the judge agreed with them. [Emphasis added.]

[50] The chambers judge also referred to the decisions in *Peace v. The Owners, Strata Plan VIS 2165,* 2009 BCSC 1791, 3 B.C.L.R. (5th) 188, and *Chan v. Owners, Strata Plan VR-151,* 2010 BCSC 1725, 98 R.P.R. (4th) 309 which emphasize that "some action or decision of the Strata Corporation must be the source of the unfairness complained of": *Peace* at para. 44; see also *Chan* at para. 19.

[51] In view of counsel's agreement on the interpretation of s. 164, the meaning of the words "significantly unfair" was not at issue in this appeal and it was therefore unnecessary for us to address the precise scope of the review authorized by the provision. I would however, endorse the observation of Ryan J.A in *Reid* where she stated:

> [27] ... I agree with Masuhara J. [in *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120 at paras. 28-29] that the common usage of the word "significant" indicates that 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.

[52] Counsel for the appellant also directed us to the two-part objective test from *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69, [2008] 3 S.C.R. 560, as a basis for reviewing the chambers judge's finding that the conduct of the strata corporation was significantly unfair. In *BCE* the issue was whether the conduct of the directors of the defendant company in approving the sale of the company was oppressive to stakeholders under s. 241 of the *Canadian Business Corporations Act,* R.S.C. 1985, c. C-44 [*CBCA*]. In that context (where directors owe a fiduciary duty to the corporation but not the stakeholders) the Court set out a test that involved a consideration of the stakeholders' reasonable expectations of how they were to be treated. The two-fold test includes an objective assessment of whether the stakeholders' expectations were reasonable, and if so, whether the directors' actions or conduct amounted to oppression, unfair prejudice or unfair disregard, as set out in s. 241 of the *CBCA*. As I understand Garson J.A.'s reasons, this is the test, in a slightly modified form, that she proposes to adopt (at para. 30) as the test for an application under s. 164 of the *Act.*

[53] This proposition does not appear to have been placed before the chambers judge as she does not refer to it in her reasons. Counsel for the appellant, however, relied on *BCE* before this Court in the course of advocating for the approach developed in *Southern Interior Construction Association v. Strata Plan KAS 2048*,

2007 BCSC 792, 74 B.C.L.R. (4th) 105, with a focus on the conduct of the strata corporation, rather than on the consequences of its decision. Counsel for the respondents did not address the *BCE* test but agreed that *Southern Interior Construction Association* set out the correct three-part test (at para. 22): first, to identify the decision under attack; second, to assess all the facts relevant to the fairness of that decision; and third, to assess whether the decision was, in all the circumstances, significantly unfair to the applicant.

[54] As the actual meaning of the words "significantly unfair" in s. 164 of the *Act* was not at issue in this appeal, in my view it would be preferable to leave a discussion of their interpretation, and the correctness of applying the *BCE* test in these circumstances, to another day. I would simply observe that the plain and ordinary meaning of the term "significantly unfair" might be less complex than the test which appears to have evolved from the jurisprudence based on the now repealed *Condominium Act*, R.S.B.C. 1979, c. 61. That meaning in my view may be more closely aligned with the noted dictionary definitions referred to in *Gentis* and *Reid* above. It seems to me that adoption of the *BCE* test unduly complicates the inquiry and creates a risk of misdirecting its focus. It also imports a test that was developed in a very different factual and legal commercial context. In the circumstances of this appeal, particularly where the issue was not fully canvassed by counsel, I am disinclined to adopt the test from *BCE*, even in a modified way, to interpret the meaning of a strata corporation's obligation under s. 164 of the *Act* to not make decisions that are "significantly unfair" to an owner or tenant.

Did the chambers judge err in her application of the test for "significant unfairness" under s. 164 of the Act?

[55] The more significant issue, in my view, is whether the chambers judge erred by applying a different test than the one agreed to by counsel, and if so, whether the error was material to her determination. In that regard, the chambers judge stated:

> [33] I conclude that the petitioners have been treated significantly unfairly pursuant to s. 164. The decision of the Strata Council and the Strata Corporation in refusing or not allowing the change from a spandrel window to

> a vision glass window is significantly unfair to the petitioners. The decision is not one that accomplishes the greatest good for the greatest number. [Emphasis added.]

[56] This test (in the underlined part of the passage) appears to have originated in *Sterloff v. Strata Corp. of Strata Plan No. VR 2613* (1994), 38 R.P.R. (2d) 102 (B.C.S.C.). The issue in *Sterloff* involved the interpretation of a strata corporation's duty under s. 34(1)(d) of the *Condominium Act* (now s. 72 of the *Act*) to repair and maintain common property. The petitioner strata owner had sought a mandatory injunction pursuant to s. 40 of the *Condominium Act* seeking directions from the court that the strata corporation be required to take specific actions in order to meet its obligation under s. 34(1)(d) to address the petitioner's complaint of noise from the opening and closing of a garage door. In dismissing the petition as requesting relief that exceeded the scope of the court's jurisdiction under s. 40, Wilson J. observed:

> [35] Pursuant to its bylaws, the strata corporation must control, manage and administer the common property for the benefit of all the owners. It seems to me that in carrying out that mandate, the corporation, among other things, must endeavour to accomplish the greatest good for the greatest number.

[57] As Garson J.A. has noted (at para. 35), the respondents acknowledge this *dicta* from *Sterloff* was not the correct test for determining whether the conduct of the strata corporation was significantly unfair. I am unable to see, however, how this error of law favours the appellants' position (as found by Garson J.A. at para. 37). Even if it could be said that this test represents a lower threshold than that of "significantly unfair", in my view the error cannot be found to be immaterial because it misdirected the focus of the chambers judge's inquiry and caused her to improperly place a duty on the strata corporation to resolve the consequences of the developer's decision to change the window design.

[58] This is apparent from the chambers judge's subsequent discussion:

> [35] Although the Strata Corporation argues that it was the developer that decided to change the window from vision glass to spandrel, the petitioners and others who purchased 01 units from the developer still got less than they bargained for: they have a window that blocks their view from the inside to the outside; and the owners of the 02 units got more than they bargained for:

> they have the benefit of a privacy screen that blocks the view inside from the outside. But the privacy screen is not in or a part of the 02 unit, but in or a part of the 01 unit.
>
> [36] The original purchasers of the 01 units and the 02 units both knew or ought to have known from looking at the strata plans that the distance between their windows was close and that the windows were to be vision glass windows. However, whether or not the current owners of the 02 units were the original purchasers, the 02 unit owners have both a privacy screen at the expense of the 01 unit owners <u>and</u> a view. The 01 unit owners, and more particularly the petitioners, have no view from the spandrel window and a privacy screen they do not want. To allow the 02 units the benefit of a privacy screen that is in reality a window in an 01 unit, deprives the 01 unit owners' use and enjoyment of the window as a window.
>
> ...
>
> [39] Allowing the petitioners to change the spandrel window to vision glass would allow the 01 unit and the 02 unit occupants to a view outside the window, and to privacy by closing blinds or coverings when the occupants want privacy. This would in my view accomplish the greatest good for the greatest number.
>
> [Emphasis in original.]

[59] It would seem from this analysis that the chambers judge's finding that the decision of the strata corporation was significantly unfair was driven by the objective of providing "the greatest good for the greatest number." This, in my view, was materially wrong and affected the judge's ultimate determination of the petition by placing the judge in the position of weighing the merits of the competing interests of the 01 and 02 unit occupants rather than reviewing the fairness of the strata corporation's decision.

[60] With respect, this reasoning also led the chambers judge to erroneously focus on the fairness of a decision that did not involve the strata corporation. The developer's decision to change the design from a vision to a spandrel window was made well before the strata plan was deposited in the Land Title Office, at a time when the strata corporation was not even in existence. By examining the issue of whether that change by the developer was significantly unfair to the respondents, the chambers judge appears to have imposed an obligation on the strata corporation to rectify the respondents' contractual dispute with the developer.

[61] The respondents were aware of the change to the window design when they completed the contract of purchase and sale for their unit. If the new window design was unsatisfactory to them, their complaint, and any potential remedies, should have been pursued with the developer. They chose, however, to complete the purchase knowing of the modification, but then two years later attempted to correct the “deficiency” through the strata corporation.

[62] If there was unfairness to the respondents in the change of the window design it was caused by the decision of the developer and not the decision of the strata corporation. By the time the issue was brought before the strata council the building was completed and its exterior design in place with spandrel windows forming a long black stripe down the building between the 11th and 27th floors. It was the proposed change from this state of affairs which in my view the chambers judge was obliged to consider. The relevant period of time for a reviewing a strata corporation’s decision for significant unfairness must surely begin after the strata corporation came into existence with the registration of the strata plan.

[63] The chambers judge, however, focused her analysis on the change in design of the west-facing window as it was initially contracted for with the developer, rather than on the respondents’ proposed change from the design of the window as it was constructed when the respondents took possession of their unit. In doing so, the judge in my view conflated issues involving the contractual rights and obligations of a vendor and purchaser with the statutory rights and obligations of a strata corporation and owner under the *Act.*

[64] Under s. 71 of the *Act*, the respondents’ request to change the spandrel window to a vision window required a 3/4 vote of the owners. The change however created privacy concerns for other owners and would have changed the external appearance of the building between the 11th and 27th floors. In declining the respondents’ request, the strata corporation chose to maintain the status quo of the building design. It was under no obligation to remedy the developer’s defect; it was only obliged to weigh the completing interests of all affected owners, including

concerns about views, privacy, and the exterior appearance of the building, and to make a decision that was not significantly unfair to the respondents. That obligation was met, in my view, by putting the respondents' request before all the owners for a 3/4 vote and then giving effect to the outcome of that vote. While I agree with Hall J.A. that a review for significant unfairness under s. 164 of the *Act* is not limited to considerations of process and procedure, I am also of the view that courts must give considerable deference to the democratic decisions of a strata corporation, especially in circumstances where the decision is based on a 3/4 vote of the owners. The effect of the vote in this case was to maintain the existing design of the building. When this decision is reviewed in its proper context, without extraneous considerations, it cannot in my view be said to have been objectively unreasonable or significantly unfair to the respondents.

[65] Without endorsing the reasonable expectations test adopted by Garson J.A., even under that test the decision of the strata corporation cannot in my view be said to have been "significantly unfair". The respondents were aware of the final design of the window before they completed the purchase of their unit. Thereafter, the only reasonable expectation they could have had vis-à-vis the strata corporation was an objectively fair consideration of the request to change the spandrel window, as was the design when the building was constructed, to a vision window which change would have impacted a number of the other unit owners, by way of a 3/4 vote of all the owners. It was the decision of the strata corporation and not the earlier actions of the developer which the chambers judge was obliged to review for significant unfairness.

[66] In the result, I would allow the appeal, set aside the order of the chambers judge and dismiss the petition. The appellant is entitled to its costs of the appeal and of the proceedings below.

"The Honourable Madam Justice D. Smith"

M E M O R A N D U M

TO: All Publishers

FROM: Judgment Office

DATE: March 7, 2012

RE: ***Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44**

On the title page of the reasons for judgment released January 30, 3012, the case name is to be corrected to read "The Owners, Strata Plan BCS 1589" rather than "The Owners, Strata Plan BSC 1589".

Attached is the revised page.

Thank you.

Encl(s).