

CANADA / JUDGMENT

356 Cathedral Ventures Ltd. v. Owners of Strata Plan BCS3598

2020 BCSC 1583

COURT

Supreme Court of British Columbia

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2020 BCSC 1583 356 Cathedral Ventures Ltd. v. Owners of Strata Plan BCS3598

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

356 Cathedral Ventures Ltd. v. Owners of Strata Plan BCS3598,

2020 BCSC 1583

Date: 20201027

Docket: S1912373

Registry: Vancouver

Between:

No. 356 Cathedral Ventures Ltd.

Petitioner

And

The Owners, Strata Plan BCS3598

Respondent

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Petitioner:

N. Vaartnou

Counsel for the Respondent:

W. McMillan

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 12-13, 2020

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Vancouver, B.C.

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Introduction

- [1] This petition arises out of a dispute about the respondent strata corporation's adoption of a parking policy with respect to the parking spaces in Panorama Place ("Panorama"), a mixed-use development located in Surrey.
- [2] The petitioner claims that the strata corporation has not allocated sufficient parking spaces to the petitioner's strata lot and that, as a result, customers of the brewery and restaurant operating on the petitioner's strata lot have been unable to find parking, and the brewery's business has suffered. The petitioner asks this Court to order a special general meeting of the strata corporation to deal with the allocation of parking and to issue a declaration that actions taken by the strata corporation with respect to parking were significantly unfair.
- [3] The petition also included two peripheral matters. The petitioner seeks an order that the strata corporation hold a special general meeting to appoint section executives and an order that the strata remove a large freestanding sign that is in close proximity to the petitioner's lot. Those matters are dealt with separately at the end of this decision.

Jurisdiction

- [4] Counsel for the parties consented to the court hearing this petition instead of the Civil Resolution Tribunal ("CRT") which would, otherwise, have jurisdiction pursuant to s. 121 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 [CRTA].
- [5] Section 121 of the CRTA, as it applies in this case, provides in subsections (a), (e), and (f) that the CRT has jurisdiction concerning the interpretation or application of the Strata Property Act, S.B.C. 1998, c. 43 [SPA]; and an action, threatened action, or decision, by a strata corporation, including the council, in relation to an owner or tenant.
- [6] The CRTA provides that the court must stay or dismiss certain proceedings falling within the CRT's jurisdiction "unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim": s. 16.1(1)(c).
- [7] Section 16.3(1) sets out the applicable considerations for determining when it is not in the interests of justice and fairness for the CRT to adjudicate a claim that would ordinarily fall under its jurisdiction, such as a SPA claim.
- [8] In this case, the parties rely on ss. 16.3(1)(a), (c), and (d). In summary, those subsections address whether an issue raised by the claim or dispute is of such importance that it would benefit from a court decision to establish a precedent, whether the claim or dispute is sufficiently complex to benefit from court adjudication, and whether all of the parties agree that the claim or dispute should not be adjudicated by the CRT.

- [9] The parties submit, and I agree, that it is not in the interests of justice and fairness for the CRT to hear the matter.
- [10] In particular, I concluded that the issues are complex and may have precedential value in light of the uncertainty with respect to the test to be applied, and counsel preferred to fully argue the matter before the court.

The Background

The Parties

- [11] Panorama Place is a mixed commercial and office use business centre located in Surrey, BC on Highway No. 10 (56th Avenue) between 152nd Street and 153A Street (the "Property"). Panorama consists of a series of buildings located at 5570-152nd Street, 5577-153A Street, and 15230-56th Avenue.
- [12] The Property was owned and developed by Panorama Park Investments Ltd. ("PPI").
- [13] The petitioner, No. 356 Cathedral Ventures Ltd. ("356"), is the registered owner of a commercial strata lot within Panorama, legally described as:

Strata Lot 1 Section 2 Township 2 New Westminster District Strata Plan BCS3598 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form V.

PID: 028-049-497 ("Lot 1")

- [14] 356 is part of the Mark James Group, a group of corporations that operate various craft breweries and restaurants in Greater Vancouver.
- [15] The other corporations that are part of the Mark James Group and connected to this proceeding are:
- a) 471469 B.C. Ltd. ("469"). 469 and 356 have entered into an agreement under which 469 operates as the landlord for Lot 1;
 - b) Mark James Management Ltd. ("MJM Ltd."), entered into the contract to buy Lot 1 from PPI on June 27, 2008. MJM Ltd. assigned the contract to 356, and it was completed on or around November 10, 2009; and
 - c) Bigridge Brewing Corporation ("Big Ridge"), who is the tenant of Lot 1. On October 28, 2009, Big Ridge entered into a lease with 469 for the use of Lot 1. Big Ridge has been operating since 1999 and is one of Surrey's oldest and largest craft brewpubs. Since November 2009, Big Ridge has operated a 340-seat restaurant and brewery at Lot 1.
- [16] Parts of Panorama are governed by the respondent strata corporation, The Owners, Strata Plan BCS3598 (the "Strata"). Pursuant to s. 3 of the SPA, the Strata is responsible for managing the Strata's common assets.

[17] On September 30, 2009, after construction of the stratified portion of Panorama was complete, the strata plan was deposited in the New Westminster Land Title Office thereby establishing the Strata under s. 2 of the SPA. Once the Strata council was elected at the Strata's first annual general meeting, PPI ceased to be involved in the management of the Strata.

The Relief Sought

[18] Panorama has a limited number of parking spaces. The parties agree that the number of parking spaces is insufficient to meet the demands of all of the Strata owners and their tenants, employees, and customers.

[19] 356 seeks the following orders and declarations:

- A declaration that in approving a parking policy, the Strata has undertaken significantly unfair actions in respect of the parking allocation at Panorama.
- An order requiring the Strata to hold a special general meeting to address the parking allocation.
- An order that the Strata hold a special general meeting to appoint executives of the office section and commercial section of the Strata.
- A declaration that a freestanding sign (the "Sign") on the northwest corner of the Property is in violation of the Strata's bylaws and an order that the Strata remove the Sign.

[20] If the court finds that the current parking policy is significantly unfair, and orders the Strata to hold a special general meeting, 356 requests the court to provide directions for how parking at Panorama should operate until the Strata holds the meeting and the owners agree to a new parking allocation. Specifically, 356 submits that the court should order the Strata to implement the 2017 parking policy, discussed below, as an interim measure.

The Background Facts

[21] The Strata was developed in phases as construction was completed at Panorama. The Strata consists of 50 strata lots in seven buildings, known as Buildings A through F, and H. The ownership of the Strata approximately breaks down as follows:

- a) 15 commercial tenants, being mostly eating establishments and retail stores; and
- b) 35 office tenants, including accounting and law firms, physiotherapists and other medical professionals, and a variety of other professional service providers.

[22] Some businesses own more than one Strata lot, and some Strata lots have more than one tenant.

[23] Two other parcels of land, Lots A and B, are part of Panorama but are not part of the Strata. These lots are located on the southeast and southwest portions of the Property. PPI constructed buildings on these lots, known as Buildings I and G respectively. The Strata plan is subject to an easement with Lot A for the use of Strata parking and driveways. It is not a reciprocal easement because Lot A does not have to permit owners and tenants of the other buildings in Panorama to use its parking spaces.

The Development of Panorama and 356's Purchase of Lot 1

[24] The petitioner claims that PPI made various representations regarding the allocation of parking during various stages of the development of Panorama. They rely on those representations in their legal argument. The historical background of Panorama's development is important to understanding those alleged representations.

[25] About January 22, 2007, PPI applied to Surrey (the "City") for a rezoning and development permit for the development of Panorama (the "January Application"). The project was to consist of nine buildings, built in two phases, with 426 parking spaces. The City published a Planning & Development Report ("P&D Report") regarding PPI's application and approved the January Application. Construction started at the Property.

[26] In about June 2008, Big Ridge was actively looking for a new location. Mark James, the principal of the Mark James Group and a director of 356, met with PPI representatives regarding the potential purchase of Lot 1 and the relocation of Big Ridge's brewery and restaurant from its then location, across Highway 10, to Panorama.

[27] According to his affidavit, one of Mr. James' main concerns was customer parking. Due to the location of Panorama on Highway 10, most customers would drive to the Big Ridge brewery and restaurant. Mr. James says that the PPI representatives, Richard Coulter and Alex Polacco, assured him that there would be sufficient parking for the exclusive use of Big Ridge's customers (the "PPI representations").

[28] According to Mr. James, based on the PPI representations and the January Application, on June 27, 2008, MJM Ltd. entered into a contract to buy Lot 1 (the "Contract"). Section 3 of the Contract provided that Lot 1 would receive an unspecified number of limited common property spaces at Panorama:

[PPI] intends to file a strata plan (the "Strata Plan") in accordance with the Strata Property Act in the New Westminster Land Title Office which will create a separate strata lot title for the [Lot 1], and for each of the units on the three floors of Office Building H and each of the other Retail-Commercial Building Units shown on the attached site plan for the Project and designate parking [spaces] in the immediate proximity of the [Lot 1] as Limited Common Property for the exclusive use of strata units in the Commercial Separate Section of the Project as well as Strata Corporation Bylaws to facilitate the orderly and efficient operation and administration of the Project in general, and the Commercial Separate Section and the Office Separate Section of the Strata Corporation in particular, according to industry standards for first-class retail-commercial-office

centres of this type.

[Emphasis added.]

- [29] The Contract's reference to the Commercial Separate and Office Separate Sections is a reference to the intent that the Strata would operate as a sectioned Strata under the SPA. This issue will be discussed later in these reasons when addressing the other relief sought in this petition.
- [30] As construction of Panorama continued, MJM Ltd. and PPI entered into a series of Contract addendums. The October 29, 2009 addendum provided temporary parking for Lot 1 in the area south of the building on Lot 1 until such time that PPI could provide 25 permanent spaces east of the building on Lot 1:
3. The Vendor hereby covenants and agrees that the Vendor shall, at the Vendor's cost, provide to the Purchaser use for parking of the paved area located to the south of the building described as Building "B" (the "Interim Parking Area") until such time as the Vendor can provide 25 permanent parking [spaces] for use by the Purchaser in the area located immediately east of [Lot 1], and further agrees that the Vendor shall paint and delineate the parking [spaces] within the Interim Parking Area, and will maximize the number of parking [spaces] within the Interim Parking Area, provided that, in any event, not less than 32 parking [spaces] will be delineated within the Interim Parking Area.

[Emphasis added.]

- [31] Over the 18 months after the Contract was signed, Mr. James says that the Mark James Group reviewed the various applications published by the City in respect of Panorama in determining whether to complete the Contract.
- [32] In November 2008, PPI applied to the City for a development permit, revising the January Application, to provide for the construction of a ninth building at Panorama, known as Building H (the "November Application"). Surrey published a P&D Report regarding PPI's proposal. The November Application stated that Panorama would have 433 parking spaces, 155 of which would be dedicated to restaurant parking. It did not specify the number of parking spaces for each restaurant.
- [33] About February 10, 2009, PPI applied to Surrey to subdivide a one-acre portion from the Property (the "Subdivision Application"). On about February 24, 2009, Surrey approved the Subdivision Application. PPI intended to build Buildings G and I on the subdivided portion of the Property.
- [34] About October 5, 2009, PPI applied to Surrey, in part, to rezone the Property to accommodate the Big Ridge brewpub and liquor store. Surrey published a P&D Report regarding PPI's proposal (the "October Application"; together with the January Application and the November Application, the "Application Materials"). The October Application stated that Lot 1 required 66 parking spaces.

- [35] About October 19, 2009, Surrey enacted Zoning Bylaw No. 17022 in which the Property was rezoned to a Comprehensive Development Zone ("Bylaw 17022"). PPI submitted a proposed zoning map to Surrey which was incorporated in Bylaw 17022. It provided for 404 parking spaces at Panorama, including 122 spaces dedicated for eating establishments.
- [36] The City's generally applicable Zoning By-law No. 12000 addresses Surrey's zoning requirements, including off-street parking requirements (the "Zoning Bylaw"). Part 5 of the Zoning Bylaw states that eating establishments with a gross floor area between 150 m² and 950 m² require 10 parking spaces per 100 m².
- [37] Lot 1, also known as Building A, is the largest single-tenant building at Panorama. Lot 1 is a single-storey building with a total floor area of approximately 745 m². Accordingly, the Zoning Bylaw requires Lot 1 to have 74 parking spaces.
- [38] Mr. James says that, when the Mark James Group decided to complete the Contract with PPI, it relied on the PPI representations, Bylaw 17022, and the Application Materials as assurances that Panorama would have sufficient parking for Big Ridge customers. In addition, the Contract, as amended, expressly provided that 356 would be entitled to 25 permanent parking spaces. As a result, 356 believed that, once the development was operational, there would be sufficient parking spaces for Big Ridge's needs.

Formation of the Strata and the Strata Bylaws

- [39] The Strata was formed in September 2009. The Strata's bylaws do not address the allocation of parking spaces.
- [40] As Panorama was constructed, PPI filed several amendments to the Strata plan which designated parking spaces as limited common property to various strata lots. In particular, on the following dates, the Strata plan was amended as follows:
- a) On November 4, 2009, to designate limited common property parking spaces for Lot 2;
 - b) On June 18, 2010, to designate 12 limited common property parking spaces for Lot 1 as well as limited common property parking spaces for strata lots 3 and 6 to 18;
 - c) On September 21, 2010 (this date was not clear on the record), to designate limited common property parking spaces for Lot 19; and
 - d) On March 14, 2012, to designate limited common property parking spaces for Lots 20 to 46.
- [41] The parties agree that limited common property, as defined in s. 1 of the SPA, is "common property designated for the exclusive use of the owners of one or more strata lots". A landowner/developer may designate certain land as limited common property: SPA, s. 73. Justice Groberman, when a member of this Court, explained in *Moure et al v. The Owners, Strata Plan NW 2099*, 2003 BCSC 1364 at para. 22 that "limited common property must be seen as a special category of property over which the unit owner has a substantial degree of control and something approaching a beneficial interest."

- [42] In total, the Strata has approximately 168 parking spaces designated as limited common property for various Strata lots. As set out above, 12 of those are for the exclusive use of Lot 1.
- [43] The remaining parking spaces at Panorama are either common property of the Strata or are located on Lots A or B which are not part of the Strata and are, therefore, beyond the Strata's control.

Subsequent Development at the Property

- [44] After the Strata was formed, PPI engaged in further development at Panorama.
- [45] In February 2012, PPI applied to Surrey for a development permit to construct a single-storey commercial building and a three-storey, multi-tenant, office building at Panorama (the "February Application"). These buildings, Buildings G and I, are part of Panorama Place but not part of the Strata.
- [46] Surrey published a P&D Report regarding PPI's development application. The February Application stated that PPI intended to install another 168 parking spaces for Buildings G and I, to bring the total number of on-site parking spaces at Panorama to 460. The February Application appended a building plan of Panorama, prepared by PPI, which allocated 74 parking spaces to Lot 1 and 117 spaces for eating establishments generally.
- [47] Surrey approved PPI's development permit. However, the permit expired because construction of Building G did not start within two years of the approval.
- [48] About May 30, 2016, PPI applied to Surrey for a further development permit for a two-storey multi-tenant commercial and office building on Lot B (the "May Application"). The City published a P&D Report regarding the May Application, which was ultimately approved.
- [49] The construction of Building G on Lot B substantially reduced Panorama's available surface parking spaces. Lot B previously provided about 55 surface parking spaces for owners, tenants, employees, and visitors to Panorama. Because of the proximity of those parking spaces to the Big Ridge restaurant, its customers frequently used them.
- [50] As built, Building G has 68 parking spaces, 26 of which are underground.
- [51] Building I was constructed on Lot A. It has 110 parking spaces, 37 of which are underground within Building I. Underground parking for buildings G and I is gated and only accessible with an underground parking pass. Those spaces are not available or accessible to the general public, including Big Ridge's customers.
- [52] As I have said, the parties agree that there is insufficient parking at Panorama to meet the needs of all users. As it relates to 356, at various times during the development of Panorama, PPI proposed that Lot 1, or Panorama eating establishments collectively, should have the following number of parking spaces:

- a) In November 2008, 155 for eating establishments generally.
- b) In October 2009, 66 for Lot 1.
- c) In October 2009, passed as part of Bylaw 17022, 122 for eating establishments generally.
- d) In February 2012, 74 for Lot 1 and 117 for eating establishments generally.

[53] Nonetheless, under the Strata plan, Lot 1 has only 12 designated limited common property parking spaces.

2010: The Strata's Early Attempts to Address Parking Difficulties

[54] Currently, there are approximately 472 parking spaces at Panorama. The Strata began making efforts to address parking difficulties at Panorama as early as 2010.

[55] The 472 parking spaces at Panorama consist of:

- a) the Strata has 126 common property parking spaces;
- b) various lots hold 168 limited common property parking spaces;
- c) Lot A (Building I) has 73 above ground parking spaces;
- d) Lot B (Building G) has 42 above ground parking spaces; and
- e) together, Lots A and B have 63 underground parking spaces, which are not accessible for others at Panorama to use.

[56] Brent Wolverton, a director of 356, and an agent for the Mark James Group, filed an affidavit in this petition. He is directly involved as a representative of 356 in its dealings with the Strata and has been, at various times, a member of the Strata council.

[57] Mr. Wolverton says that, in the early days of the Strata, there was no formal parking policy. The Strata did not allocate the common property parking spaces to individual Strata lots. It allowed visitors and employees at Panorama to access all of the parking spaces, other than the limited common property parking spaces, for a maximum of two hours at a time.

[58] In about 2010, the Strata's then management company began allocating monthly parking passes to Strata lot owners on request and without reference to the availability of parking spaces or the need to maintain visitor and customer parking. It soon became clear that the management company had issued more monthly parking passes than the total number of available parking spaces. 356 and other Strata lot owners requested that a new parking policy be developed.

[59] In about May 2011, Gulf Pacific Property Management Ltd. ("Gulf Pacific") was hired by the Strata as its management company. One of Gulf Pacific's tasks was to resolve parking allocation issues.

[60] Since February 2016, Wayne Lee, Gulf Pacific's Vice President of Property Services, has been assigned as the Strata manager for Panorama. He filed an affidavit in response to this petition. In it he says that, prior to 2017, parking spaces immediately adjacent to any buildings at Panorama were marked "1 hour only" parking, which was indicated either by a sign visible from the parking spaces or by paint on the asphalt within a parking space itself. Additionally, there were signs throughout the development indicating that the maximum parking time was three hours except for those with a permit.

2016: Further Attempts to Address Parking

[61] In 2016, construction began on Building G on Lot B. This had the effect of removing 55 parking spaces that had previously been used by visitors attending at Panorama and, due to its proximity to the Big Ridge restaurant, by a number of Big Ridge's customers.

[62] As the 55 parking spaces on Lot B were lost, it became apparent that parking at Panorama was a concern, particularly during mid-day hours, when most of the professional and retail businesses were open, their staff were at work, and lunch-goers arrived by car to patronize Panorama's restaurants. There was not enough parking to accommodate the needs of staff and customers.

[63] Starting at about that time, on a request for a parking permit, Mr. Lee gathered information about the tenant requesting it and tracked the number of permits already issued to that tenant. Mr. Lee also recommended in mid-2016 that rules be adopted concerning the issuance of parking permits.

[64] What followed were attempts, over about two years, by Mr. Lee and the Strata council to address the parking issues. They were outlined in Mr. Lee's affidavit and included:

- a) conducting a survey of owners and tenants to determine parking needs. The survey indicated that if everyone's stated parking needs were met, there would be no available visitor parking at Panorama and a shortage of parking spaces for tenants and staff. In short, demand for parking exceeded the available spaces;
- b) during the construction of Building G, parking was secured at a nearby ice rink for the use of Panorama's owners, tenants, and staff to free up spaces for customers. Panorama provided a free shuttle to and from the off-site parking. As Mr. Lee explained in his February 23, 2017 notice to owners and tenants, the off-site parking and free shuttle service were arranged for daily parkers who did not need access to their vehicles during the work day. The program was terminated in July 2017 due to lack of use;
- c) implementing parking restrictions during peak hours;
- d) installing new signage detailing the parking restrictions;
- e) securing an on-site parking "ambassador" from WestPark to enforce parking restrictions; and

- f) replacing rear-view mirror hang tags with virtual parking passes, which allowed better control over who was using the passes and better enforcement of parking restrictions.

[65] Mr. Lee provided regular updates to all Strata owners and tenants about ongoing parking issues and the attempts to address them.

2017: The First Formal Parking Policy

[66] In 2017, Gulf Pacific prepared a formal parking policy on behalf of the Strata. It notionally allocated parking spaces to strata owners on a ratio of two spaces per 1,000 square feet of office or commercial space. According to 356, and despite the stated ratio, the parking was allocated as follows:

- a) Commercial strata lots were allocated 57 spaces, despite having a total of approximately 31,596 square feet of commercial space. Pursuant to the stated policy, they should have received 64 spaces. The discrepancy was because Big Ridge's liquor store was allocated one parking space. Based on its square footage, it should have been allocated nine.
- b) Office strata lots were allocated 202 spaces. Based on having a total of approximately 100,310 square feet of space, they received two more parking spaces than they should have been allocated under the policy.
- c) Lot 1 was allocated four parking spaces in addition to its 12 limited common property parking spaces. This allocation, based on the ratio in the policy, was commensurate with the 8,000 square feet size of Lot 1.
- d) Visitors and customers to Panorama were allocated 181 parking spaces, after the underground parking spaces were accounted for.

[67] The allocated parking was for use by the Panorama tenants and employees. The visitor and customer parking was not specifically allocated.

[68] The first parking policy did not resolve the parking difficulties and complaints about the available parking continued.

2018: The Current Parking Policy

[69] On about March 8, 2018, the Strata approved a new parking policy (the "Parking Policy"). It is the 2018 Parking Policy that gave rise to this petition. The Parking Policy was sent out to owners and tenants on May 14, 2018, as Parking Update #12.

[70] Under the Parking Policy, all common area parking spaces were reserved for owners and tenants of Panorama. Virtual parking passes for tenants and staff were issued to each strata lot owner or tenant instead of specific parking spaces.

- [71] Appended to the Parking Policy was a revised allocation of parking passes for the various Strata owners. The revised allocation of parking passes represented a change from the first formal parking policy of 2017, and departed from the ratio of two parking spaces per 1,000 square feet previously applied.
- [72] According to Mr. Lee's affidavit, the Strata adopted an informal policy of issuing a maximum of three virtual parking passes per 1,000 square feet, though it was not a firm rule. Any limited common property spaces of an owner or tenant were subtracted from the number of virtual parking passes that would be issued to that owner or tenant. Big Ridge Brewing has 12 limited common property spaces, and it was allocated 12 passes under the Parking Policy, so it was not issued any parking passes.
- [73] In fact, the informal rule of three parking passes per 1,000 square feet could be no more than a guide. Together, the office and commercial sections of the Strata have approximately 132,000 square feet of operating space.
- [74] Even after factoring in the additional 115 surface level spaces at Buildings G and I, which the Strata does not control, there are only 409 spaces available at Panorama.
- [75] Altogether, the Strata has approximately 132,000 square feet of operating space. If the Strata were to issue three passes per 1,000 square feet to tenants and owners, then it would issue 396 tenant passes. This informal rule would result in far more passes being issued than there are parking spaces available for tenant, owners, and staff. The current Parking Policy allocated 292 spaces to tenant and owner parking, out of a total of 409 parking spaces (excluding the underground spaces at Buildings I and G). The other 117 are allocated to visitor parking. Since then, 22 spaces between buildings D and E were allocated to visitor and customer parking, such that there are now only 270 spaces available to owners and tenants. Even if the Strata were to adhere firmly to this guideline and issue 396 passes--which it did not--there would be a shortage of tenant and owner parking on any day when all tenant and owner passes are in use. The number of spaces available to visitors would remain unaffected.
- [76] In particular, the Parking Policy:
- a) eliminated 356's entitlement to four common property parking spaces, such that 356 was left with its 12 limited common property parking spaces;
 - b) reduced the number of parking passes allocated to the commercial lot owners from 57 to 53 passes (including limited common property parking spaces);
 - c) increased the number of parking passes allocated to the office tenants from 202 passes to 287; and
 - d) reduced the unallocated visitor parking from 181 spaces to approximately 117 spaces.

[77] Visitors were restricted to designated, time-limited parking. The various designations of parking spaces were as follows:

Designation:

Who can park:

Reserved:

Registered vehicles of owners, staff, or permitted visitors

Tenant Name:

Registered vehicles for those tenants/owners with designated stalls as per their lease/ownership agreements

Visitor 30 min. Max:

Visitors only--no parking of registered vehicles

Visitor 1 hour Max:

Visitors only--no parking of registered vehicles

Visitor 2 hour Max:

Visitors only--no parking of registered vehicles.

[78] The material sections of the Parking Policy provide:

- a) the policy is enforceable between 9:00 a.m. to 3:00 p.m., Monday to Friday, except statutory holidays;
- b) on-site parking is only permitted for owners, tenants, and visitors of Panorama BCS 3598, Panorama Building I, and Panorama Building G;
- c) visitor parking is only permitted in visitor designated spaces for the posted maximum time limits;
- d) the Strata council and Gulf Pacific could permit visitor parking in spaces, for times exceeding the designated time limit, where the request was registered 24 hours in advance;
- e) no owner, tenant, or staff parking was permitted in visitor-designated spaces; and
- f) vehicles in violation of the Parking Policy could be towed without notice, at the vehicle owner's expense.

[79] 356 argues that the office lot owners saw a 30% increase in their parking space allocation at the direct expense of the spaces available to the commercial lot owners and visitor/customer parking, which were decreased. In making that submission, the petitioners appeared to be referring to the reduction in unallocated visitor parking from 181 spaces to 117 spaces.

[80] As the Strata states at para. 37 of its response to the petition, "[t]he issue of parking is a zero sum game." Approximately 75% of the available parking at Panorama has been designated as "Reserved" parking for tenants and staff, and 25% as "Visitor" parking.

[81] On a number of occasions, prior to and since the adoption of the first and current parking policies, 356 asked the Strata to address parking allocation. Parking issues have been addressed at numerous Strata annual and special general meetings, including on: November 24, 2016, May 4, 2017, March 8, 2018, and March 14, 2019. Parking continues to be an issue. For example, the minutes of the March 14, 2019 meeting state:

a) Visitor/Staff Parking Allocations

It was noted that the south lot is currently closed for the sewer construction project so no changes to the parking allocations would be considered until all parking facilities are restored.

The owners noted that the current parking ratio of 25% Visitor & 75% Staff will need to be changed to better balance demand. Council noted that no changes will be proposed until the full parking lot is accessible and open.

Owners are reminded that the adhesion to the parking policy will make parking available to visitors and customers. Please remind your staff of the parking policy. Recently a map was distributed to assist in communicating this information.

[82] The Strata has also addressed parking allocation at a number of council meetings including those on: March 30 and May 25, 2017; February 1, May 1 and November 15, 2018; and February 13 and July 4, 2019.

The Current Parking Situation at Panorama

[83] A parking map is attached as Exhibit EE to Mr. Lee's affidavit. It is not current because, since it was prepared, and in the last few months, approximately 22 parking spaces between buildings D and E were changed from reserved parking, for staff and tenants, to visitor parking, limited to three hours.

[84] Each parking space is labelled with paint, indicating the applicable parking restriction. Spaces marked as "Visitor Parking" may be used by any visitor of Panorama, irrespective of the business they are visiting. Parking that is labelled "Reserved for General Staff/Tenants" is available to any person working at Panorama who has a virtual pass. The spaces labelled as "Tenant Restricted" are limited common property and only available for the use of the tenant of the corresponding strata lot. The 12 limited common property parking spaces belonging to 356 are labelled as "Tenant Restricted".

[85] In fact, there are more parking spaces that are limited common property than those that are labelled Tenant Restricted. That is because the owners of many of the Strata lots with associated limited common property parking spaces, and who would otherwise be entitled to restrict access to those spaces, have not done so. They have opted to make them available

for others to use. In addition, the Strata has no control over the use of parking spaces located on Lots A or B, but, by agreement with the owners of those lots, their spaces have been made available for Strata use.

- [86] As Mr. Lee explains in his affidavit, the Parking Policy was an attempt to find a solution that was acceptable to all Strata lot owners and tenants irrespective of the strict rights of the owners of Lot A and Lot B and the owners of Strata lots for which parking spaces are designated as limited common property. In this way, the Strata made available, for the common benefit of all businesses at Panorama, a larger number of parking spaces than the Strata actually controls.
- [87] The office Strata lot owners represent the majority of lots (and votes) within the Strata. There are approximately five commercial Strata lots and 13 commercial tenants in the Strata. As a result, Lot 1 and the other commercial strata lot owners do not have sufficient votes to authorize re-allocation of parking spaces without consent from at least some of the office strata lot owners.
- [88] On June 13, 2019, 356 sent a letter to the Strata requesting that there be no further allocation of parking spaces to office Strata lots. 356 also requested the Strata call a meeting to address the proper allocation of common property parking spaces, as between the office and the commercial Strata lots. It says that the Strata has not taken any meaningful steps to correct the parking allocation or otherwise address 356's parking concerns.
- [89] Presently, 356 has only 12 limited common property parking spaces which are exclusively reserved for Big Ridge's customers. If those spaces are full, Big Ridge's customers must try to find parking in the overcrowded visitor parking spaces at Panorama, competing with the customers and visitors of all other businesses at Panorama.
- [90] Mr. James has provided evidence that the reduced parking at Panorama has negatively impacted customer traffic at the Big Ridge restaurant. Based on a spreadsheet he attached to his affidavit, he says that annual sales revenue has decreased year over year since 2016, the year the Building G was built and 55 parking spaces were lost.

The Legal Test under Section 164 of the Strata Property Act, S.B.C. 1998, c. 43

- [91] The first issue to be resolved is whether the current Parking Policy is significantly unfair to 356 and justifies judicial intervention pursuant to s. 164(1)(a) of the SPA.

- [92] Section 164 provides:

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.
- [93] It is well-settled that s. 164 provides the court with broad discretion to remediate a strata council's action or decision that it finds to be significantly unfair. What amounts to a significantly unfair action or decision by a strata has been the subject of a number of cases in this Court and the Court of Appeal. I will review some of them.
- [94] Reid v. Strata Plan LMS 2503, 2003 BCCA 126 involved a residential strata dispute about the use of common areas. The strata council passed resolutions permitting the owners of units, adjacent to a common property patio, to put plants on the patio. An owner, whose unit overlooked the patio, but was not adjacent to it, sought a declaration that the resolutions were significantly unfair to him.
- [95] At the trial level in Reid, Justice Sinclair Prowse, when a member of this Court, interpreted "significantly unfair" in the SPA in the same way as the wording "oppressive" or "unfairly prejudicial" conduct had been interpreted under the repealed Condominium Act, R.S.B.C. 1996, c. 64 (see Reid v. Strata Plan LMS 2503 (Owners), 2001 BCSC 1578 at paras. 9-11). Oppressive conduct had been interpreted to mean conduct that is burdensome, harsh, lacking in probity or fair dealing, or dealing that was done in bad faith. Unfairly prejudicial conduct had been interpreted to mean conduct that was unjust and inequitable.
- [96] At the Court of Appeal, Justice Ryan agreed with Justice Sinclair Prowse's interpretation but added that the word "significantly" modified the word "unfair" in the SPA: Reid at para. 28.
- [97] In Dollan v. The Owners, Strata Plan BCS 1589, 2012 BCCA 44, the petitioner relied on marketing materials indicating that their unit, and other units similarly situated in the strata, would have "vision glass" in a window which would allow them a view of False Creek. However, the vision glass also gave the petitioners a view into certain other strata units. A design change during construction replaced the proposed vision glass with opaque glass, thereby impairing the view.
- [98] The affected owners applied to the strata corporation for permission to install vision glass. Their request was defeated at a strata Special General Meeting. The owners challenged the vote as being significantly unfair. Their challenge was upheld by the chambers judge and at the Court of Appeal.

- [99] On appeal, in interpreting "significantly unfair", Justice Garson referred to similar wording used in assessing allegedly oppressive conduct in shareholder actions. She said:
- [26] As noted by the respondents, ["significantly unfair"] 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
- [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:
- [28] 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 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* and *934859 Alberta Inc. v. Condominium Corporation No. 0312180*). 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*

[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?

[Citations omitted.]

[100] Justice Garson's articulation of the meaning of "significantly unfair" in the SPA, focussing as it does on a petitioner's reasonable expectations, has not been universally applied.

[101] In *Dollan* itself, Justice Hall, while concurring in the result, did not adopt the test articulated by Justice Garson. He determined that conduct that was unduly burdensome was covered by the term "significantly unfair" in s. 164 of the SPA. Justice Hall also noted that courts should adopt an attitude of considerable deference to strata council decisions (at para. 43) and that the facts in *Dollan* presented a "rare instance where a court can legitimately second guess the views of a strata council" (para. 46).

[102] Justice Smith, who dissented in *Dollan*, specifically declined to adopt a reasonable expectations focus. She opined that the plain and ordinary meaning of significantly unfair might be less complex than the test that had evolved.

[103] In *Radcliffe v. The Owners, Strata Plan KAS1436*, 2015 BCCA 448, Justice Savage wrote:

[39] The scope of s. 164 of the Act has been considered by this Court, most recently in *Dollan* ... In *Dollan*, in considering the meaning of "significantly unfair", Garson J.A. endorsed the description in *Reid*, that something more than "mere prejudice" or "trifling unfairness" was required to invoke the section.

[40] Garson J.A. applied a two-part test borrowed from corporate oppression jurisprudence that considered (1) does the evidence objectively support the reasonable expectations of the strata unit owner seeking redress, and (2) does the evidence establish that the reasonable expectations of the strata unit owner was violated by action that was significantly unfair.

[41] Without endorsing the two-part test, Hall J.A., found that conduct "unduly burdensome" fell within the purview of the statute as "significantly unfair". Smith J.A., was disinclined to adopt the two-part test, which she noted was developed in a very different factual and legal commercial context. She opined that the plain and ordinary meaning of the term "significantly unfair" might be less complex than the test which appears to have evolved.

[104] Justice Savage did not find it necessary resolve the issue of the applicability of the two-part test described by Justice Garson in *Dollan*. He wrote:

- [42] Although the members of the division differed in whether it would adopt the two-part test, I do not see anything in the language used in *Dollan*, the earlier decisions, or the language of the statute that would preclude a court from directing a strata corporation to reimburse an owner for expenses incurred or in doing something that would have the consequential effect of requiring the reimbursement of expenses, provided the actions complained of are shown to be significantly unfair.
- [105] In *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591*, 2018 BCCA 187, Justice Groberman, writing for the court, upheld the chambers judge's decision. Alterations that a petitioner made to its unit, which involved cutting a two-inch hole in an exterior wall and installing permanent pipes leading to a heat pump, were an alteration to the strata lot that involved common property and were made without permission in violation of the strata bylaw.
- [106] The remaining issue was whether the judge made a palpable and overriding error in not relieving the appellant from the bylaw requirements which the appellant had argued were significantly unfair to it. Citing Reid, Justice Groberman, at paras. 27-30, upheld the chambers judge's conclusion that requiring the appellant to remove the heat pump and repair the wall was not significantly unfair.
- [107] Although Justice Groberman mentioned *Dollan*, he did not apply the two-part reasonable expectation test articulated by Justice Garson.
- [108] Recently, Justice Punnett considered the test for what amounts to significant unfairness in *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576. He attempted to rationalize the different articulations of the test and proposed a principled approach as to when Justice Garson's test in *Dollan* might be applicable.
- [109] In *Kunzler*, the petitioners challenged a strata bylaw preventing them from constructing and operating a licensed cannabis production facility. Justice Punnett determined that the reasonable expectations test articulated in *Dollan* was not appropriate where the impugned action of a strata was the passage of bylaws, as that would subvert the bylaw amendment procedures set out in the SPA and the right of strata owners to make democratic decisions: see paras. 72-74. He said, at para. 72:
- [72] *Dollan* was not a case where a bylaw was passed but rather a case of a strata council exercising its discretionary authority. While a reasonable expectations test may make sense in the latter circumstance, it is problematic if sought to be applied to a fundamental decision of the owners such as the passage of bylaws.

[110] In those circumstances, Justice Punnett applied the definition of significant unfairness described by Justice Ryan in *Reid*. As an alternative, in the event his conclusion on the reasonable expectations test was incorrect, he applied it and, in so doing, determined that an owner's expectations must be objectively reasonable and not based on subjective expectations. Expectations must be realistic, objective, and contextual in the situation in which they arise: *Kunzler* at para. 76.

Application of the Test in this Case

[111] In this case, unlike *Kunzler*, 356 does not challenge a strata bylaw. Rather, it challenges a discretionary Parking Policy enacted by the Strata. As a result, 356 submits that the reasonable expectations test is appropriate for determining whether the Parking Policy is significantly unfair. It says that it entered into the Contract with reasonable expectations that it would have sufficient parking spaces at Panorama, informed by the PPI representations, Bylaw 17022, the Zoning Bylaw, and the Application Materials.

[112] In its submissions, 356 acknowledges that the Strata owners are "all in it together" as described by Justice Bauman in *Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085 at para. 35. It says that it is not asking for, or reasonably expecting, a parking entitlement equal to that set out in the PPI representations, the Application Materials, or in the Zoning Bylaw. It acknowledges that those allocations are unrealistic given the limited parking available at Panorama.

[113] 356 says that what it expected, and has not received, is an equitable allocation of parking at Panorama. It says it reasonably expected that the Strata would implement a parking policy which treated various strata lot owners equally and allocated a reasonable number of parking spaces for 356's exclusive benefit, to be used by its customers. It bases those reasonable expectations on:

- a) the October 29, 2009 Contract addendum which contemplated that 356 would receive 25 permanent parking spaces east of Lot 1;
- b) the PPI representations, the Application Materials, and the February 2012 Application in which PPI proposed various parking allocations for Panorama. These materials suggested that Lot 1 was to receive between 66 and 74 parking spaces and that eating establishments, in general, would receive between 117 and 155 parking spaces; and
- c) the Zoning Bylaw, which required Lot 1 to have access to 74 parking spaces.

[114] Together, 356 says that this evidence establishes PPI's intention that Lot 1 would have at least 25 parking spaces for its exclusive use and access, to upwards of 70 spaces. It submits that this allocation makes good sense because Big Ridge was to be an anchor tenant for Panorama, with seating for over 300 people. Additionally, it submits that this evidence establishes that the municipal requirements for eating establishments at Panorama, and Lot 1 in particular, contemplated a similar number of parking spaces. With reference to the

analysis set out in *Potter v. Vancouver East Cooperative Housing Association*, 2019 BCSC 871, 356 claims this evidence provides an objective, realistic, and contextual basis for what 356 expected for parking allocation.

- [115] I do not agree that a reasonable expectations analysis should be applied in this case for the following reasons.
- [116] The Court of Appeal has not clearly adopted and applied Justice Garson's articulation of that test. Thus, it is not settled that Justice Garson's test in *Dollan* represents the applicable approach to deciding what is substantially unfair.
- [117] Even if 356's "reasonable expectations" are to be considered, much of the material 356 relies on to establish its expectations predates the filing of the Strata Plan and is not incorporated into it. Further, the PPI representations, the Application Materials, and the terms of the Contract are inconsistent and changed over time as the development at Panorama progressed. For the most part, the Application Materials did not address a specific parking allocation for 356. They referred more generally to the total available parking at Panorama and the parking for eating establishments globally.
- [118] I note that the Zoning Bylaw and the Application Materials did not require that a specific number of parking spaces be available for 356. Surrey looked at the adequacy of the parking, in the aggregate, based on the proposed tenancy of the development. Surrey did not concern itself with which owner or tenant owned, or was allocated, what parking spaces. Although the Contract specifically addressed the parking that would be available to 356, that term was not reflected in a commensurate allocation of limited common property to it, and it did not form part of the Strata plan.
- [119] The Mark James Group and its member companies, including 356, are sophisticated entities. 356 was a sophisticated purchaser of a commercial Strata lot. It had the ability, as an anchor purchaser and tenant, to negotiate contractual terms that reflected its expectations about available parking, which it said was important to it. The Contract it reached with PPI provided for 25 parking spaces. That term was binding on PPI but not binding on the Strata as it was not incorporated into the Strata plan under which 356 only received 12 limited common property spaces.
- [120] The Strata was not the developer of Panorama. It did not enter into the Contract for Lot 1 with 356. It did not make the PPI representations and did not file the development Application Materials.
- [121] A strata corporation plays no role in its own development. It is not created until after a strata plan and bylaws are deposited at the land title office. It is not a party to any representations that may have been made by the landowner/developer.
- [122] Thus, a strata cannot make representations to future owners about what the strata corporation will look like. Regardless of what a future owner may be entitled to by reason of a contract or promise from a landowner/developer, or under a local bylaw, if a strata

corporation is created without including that contract or promise, or that bylaw, the strata cannot provide it. In this case, PPI decided the specific allocation of parking spaces by allocating limited common property parking spaces to a specific lot owner. 356 was allocated limited common property of 12 parking spaces.

- [123] Further, in a case involving the allocation of a finite resource among Strata owners, 356's expectations cannot be considered in isolation from the reasonable expectations of the other Strata owners and tenants.
- [124] Dollan was a residential strata case. It did not involve the allocation of a limited resource among mixed use Strata owners with competing demands. Here, even accepting that 356 had reasonable expectations about available parking, those expectations are not capable of being met without directly affecting the expectations of other Strata lot owners and tenants.
- [125] The Strata is faced with a conundrum. It is not possible for it to provide each owner or tenant with the parking spaces required for all its staff and customers. It has a finite number of parking spaces, which must be allocated among competing demands and expectations. The reasonable expectations of 356 may well conflict with the reasonable expectations of other Strata lot owners and tenants. In fact, 356 is the only lot owner to file a petition. The Strata can only provide more parking spaces to 356 by taking away spaces from the owners, tenants, and staff of the other businesses at Panorama.
- [126] Panorama has approximately 409 available parking spaces for all users. Two hundred and thirty-two spaces are designated for staff and tenant parking. One hundred and thirty-nine parking spaces are available for visitors to any business at Panorama. The remaining 38 parking spaces are designated as limited common property for the exclusive use of a particular strata lot.
- [127] 356 has 12 limited common property parking spaces, which it makes available only to its customers, as it does not permit its staff members to park in its limited common property parking spaces.
- [128] As Exhibit L to Mr. Lee's affidavit shows, and as I have said, through the efforts of Gulf Pacific, there are a number of parking spaces currently available at Panorama that are not part of the Strata itself. They include those belonging to Lot A/Building I, Lot B/Building G, and some parking spaces that are designated as the limited common property of lot owners who are not insisting on their exclusive rights to use the spaces. If all owners and tenants insisted on exercising their rights, there would only be 126 common property spaces that could be allocated by the Strata (since there are 73 spaces on Lot A, 42 spaces on Lot B, and 168 limited common property spaces). Currently, through the efforts of Gulf Pacific, there are 139 parking spaces available for visitor and customer use.

- [129] The Strata must use discretion in making decisions that affect various owners and tenants. In reference to the term "significantly unfair" in s. 164 of the SPA, Justice Masuhara explained at para. 28 of *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120 that at times:
- [28] the [Strata'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[s] 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.
- [130] The Strata and the court cannot impose a policy or an order affecting the property rights of the owners of the limited common property parking spaces, who are not currently insisting on their property rights. Nor can an order be imposed on the owners of Lots A and B requiring them to permit their parking spaces to be available to Strata owners and tenants. Gulf Pacific has negotiated an arrangement for the benefit of the Strata generally which has the effect of making more parking spaces available than the Strata otherwise controls.
- [131] Meeting 356's demands might cause the owners of other limited common property parking spaces and the owners of Lots A and B to withdraw from the current arrangement. The Strata cannot do anything to prevent that from happening, nor can it mitigate the effect on other lot owners and tenants.
- [132] The Strata is responsible for the management and maintenance of its common assets: SPA, s. 3. The landowner/developer may designate certain land as limited common property: SPA, s. 73. Once property is designated as limited common property, the Strata cannot allocate it or grant use of it to anyone other than the Strata lot owner to whom it has been designated.
- [133] The number of parking passes allocated to Strata lots is not the same as the number of parking spaces available for tenant and staff parking. The Strata has issued more parking passes than the number of available spaces for those with a parking pass. The Strata could issue an unlimited number of passes, but that would not change the number of actual spaces available for tenants and staff and, more importantly for the purposes of this dispute, visitors.
- [134] Deciding whether an action or decision of a strata council is significantly unfair can only be answered in the context in which it was made.
- [135] The context in this case includes that:
- a) there are only 126 parking spaces that are common property of the Strata;
 - b) the current parking arrangement includes additional parking spaces that are limited common property of other lot owners and parking spaces located on other parcels of land not owned or controlled by the Strata but made available to all owners;

- c) the parking arrangement is likely in breach of the easement rights in favour of Lot A or, alternatively, not enforceable against Lot A;
- d) the current arrangement is predicated on those with limited common property and the owners of Lot A and Lot B not enforcing their legal rights and entitlements;
- e) there are simply not enough parking spaces to meet the needs of all owners and tenants, even under the current arrangement; and
- f) the parking arrangement is tailored and time-restricted. Parking restrictions apply only during peak business hours when all or most business in Panorama are operating. The parking restrictions do not apply on weekends, holidays, or after 3 p.m.

[136] The parking spaces that are allocated by the Strata are reserved for tenants and staff so that persons who work at Panorama can park on-site. The remaining parking is for general visitor parking. Anyone with a staff or tenant parking pass may park in any space reserved for staff or tenants. Similarly, any visitor to Panorama can park in any space reserved for visitors. Of course, after 3 p.m., visitors can park in any space.

[137] This case is not about the allocation of parking passes; it is about how many parking spaces are available for customers. Therefore, despite 356's complaints about how many parking passes are allocated to office strata owners and tenants as compared to commercial strata owners and tenants, the real issue is visitor parking.

[138] Further, 356's complaint is not about its allocation of visitor parking because no owner or tenant is allocated visitor parking spaces. Those Strata lot owners with limited common property parking spaces may make them available for the exclusive use of their customers. 356 has done that by implementing its own policy--that its employees may not park at Panorama. As a result, its 12 limited common property spaces are available for the exclusive use of its customers.

[139] 356's complaint can only be about available visitor's parking for the lunch crowd, as parking restrictions under the Parking Policy do not apply after 3 p.m. The departure of tenants and staff at the end of the work day means that there is likely sufficient parking available for 356's evening customers.

[140] Similarly, 356's complaint can only be about parking on business days, as the parking restrictions do not apply on weekends or holidays.

[141] In my view, a determination of whether the Parking Policy is significantly unfair must also consider the Strata's reasonable available alternatives, as that is part of the context in which the Strata implemented the Parking Policy.

- [142] One alternative is for the Strata to have no parking policy. Those with limited common property parking spaces could insist upon their rights to exclusive use (including renting limited common property parking spaces to other owners at Panorama). The common property parking spaces would then be available to any tenant or visitor on a first come, first serve basis.
- [143] Demand for tenant and employee parking exceeds the total number of available parking spaces. Employees, owners, and tenants are likely to arrive earlier than most customers and visitors to Panorama. In the absence of a parking policy, there is likely to be a decrease in the number of parking spaces available to customers or visitors, including spaces available to Big Ridge's customers and visitors.
- [144] Another alternative is for the Strata to make more spaces available for visitor parking, but that would require taking spaces away from tenants and staff. Based on the location of Panorama, it is likely that most of those who work there, and most customers and visitors, drive there and require parking. Because of its location, Panorama does not have a number of nearby, alternative parking options. The best information about tenant and staff parking needs was the self-reporting survey conducted by Gulf Pacific. It showed an insufficient number of spaces for staff, let alone customers. Reducing the parking available to employees, tenants, and owners would impact other businesses at Panorama.
- [145] Gulf Pacific's attempts to negotiate with nearby building owners for access to their parking was unsuccessful. It did reach an agreement with an ice rink that was an 11 minute walk away but abandoned that arrangement due to lack of use.
- [146] I accept that there are other ways the Strata could allocate the parking spaces but, with a finite number of available spaces, the interests of one group of parking space users would always be given preference over another. 356's case, at its best, is that there may be other arrangements that would divide the parking pie differently. Given that the Strata is required to balance the interests of all users of the parking spaces, it is hard to see how dividing the parking pie differently would result in a better arrangement for all the Strata owners and tenants.
- [147] Taking into account the context and the alternatives, I conclude that the Parking Policy cannot be said to be significantly unfair. It is a negotiated result involving cooperation between the Strata lot owners, tenants, and the owners of adjacent not-Strata lots who have, without compensation, made their parking spaces available to all of the owners and tenants in Panorama.
- [148] The Strata, through the efforts of Gulf Pacific, has managed to expand the available parking pie. It is difficult to imagine how, in those circumstances, the Strata has acted significantly unfairly.

- [149] Given the inadequacy of parking spaces--which everyone accepts is the fact--it is not surprising that there are complaints about how the parking spaces are allocated. The fact that 356 is the only owner or tenant bringing this petition about the current Parking Policy suggests the Policy is, on the whole and in the context, fair.
- [150] 356 is not without remedy with respect to what it says were the PPI representations and the Application Materials on which it said it relied. It may pursue PPI for misleading misrepresentations on which it relied to its detriment and for breach of contract. I understand that an action has been commenced.
- [151] 356 relied on Justice Griffin's decision, while a member of this Court, in *B.P.Y.A. 1163 Holdings Ltd. v. The Owners, Strata Plan VR 2192*, 2008 BCSC 695 [B.P.Y.A.], which, it submits, considered the same issue.
- [152] In that case, the plaintiff owned five strata lots in a commercial strata development in the City of North Vancouver. It operated a neighbourhood pub and cold beer and wine store out of the strata lots. It commenced an action against the strata corporation alleging that the strata corporation's failure to allocate parking spaces, in accordance with its bylaws, was significantly unfair conduct pursuant to s. 164 of the SPA.
- [153] The strata's bylaws adopted the requirements of the city's bylaws for off-street parking spaces. There was no dispute that the plaintiff had not been allocated parking spaces in accordance with the city's requirements
- [154] At para. 34 of her reasons, Justice Griffin determined that, having decided to incorporate the city's parking requirements into the strata bylaws, the strata corporation was not free to ignore the parking requirements.
- [155] Justice Griffin's finding in that regard is not helpful in this case where the Strata's bylaws are silent with respect to parking allocation. However, she went on to consider the parking allocation for the plaintiff's other lots, which were not addressed by the bylaws. Justice Griffin relied on the interpretation of "significantly unfair" from Reid, set out above:
- [46] The meaning of "significantly unfair" was discussed in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126. This phrase encompasses conduct which is oppressive and unfairly prejudicial, with the word "significant" denoting something more than mere prejudice or trifling unfairness.
- [156] Justice Griffin went on to write:
- [47] As noted, the City bylaw requires that each commercial space provide one parking space per 500 square feet of space. Since all strata lot owners have been allocated one parking stall per strata lot for their exclusive use, it would appear that the Strata Council has adopted a policy and practice of complying with the City bylaw with respect to owners of strata lots that are less than 1,000 square feet, which is the vast majority of owners other than BPYA.

- [48] It appears that the Strata Corp. is discriminating against BPYA by applying the City bylaw to other owners, allocating to them one parking stall per 500 square feet of commercial space, and not applying the same parking allocation to BPYA in respect of its Strata Lots 21 and 26-29. Parking entitlement is of critical importance to a commercial business. The Strata Corp. has acted significantly unfairly in not allocating parking to all commercial owners on the same basis.
- [49] Strata Lots 21, 27, 28 and 29 are each less than 1,000 square feet in area. If the Strata Corp. was to apply its parking policy fairly, BPYA should be allocated one parking space for its exclusive use for each of these strata lots. Strata Lot 26, which BPYA purchased in 1991, is more than 1,000 square feet and just less than 1,500 square feet, such that it should entitle the owner to two parking spaces for its exclusive use if the City bylaw was applied fairly by the Strata Corp. to all owners.
- [157] Justice Griffin ordered the strata council to allocate additional parking spaces to the plaintiff for its exclusive use.
- [158] 356 submits that B.P.Y.A. supports the proposition that where strata bylaws are silent regarding the allocation of common property parking spaces, and the strata corporation adopts an allocation policy, the policy must allocate spaces to owners on a fair and equitable basis.
- [159] In my view, Justice Griffin's analysis was more nuanced. She found that it was significantly unfair for the strata council, which had adopted a policy of applying the city bylaw to allocate one parking space for each 500 square feet of commercial space, to not to apply the same policy to the plaintiff on the same basis. There does not appear to have been an issue that there was insufficient parking available to meet all of the strata owners and tenants needs.
- [160] In this case, the Strata Council has not adopted a policy which it universally applied to everyone but 356. It adopted an informal rule with respect to the allocation of reserved staff and tenant parking in an attempt to meet some of those needs, understanding that all of those needs could not be met. It did not allocate any visitor parking. The common parking spaces which remained, after the allocation of the reserved spaces, were made available to all customers and visitors to Panorama. Even if the Strata allocated fewer spaces to staff and tenant parking, the remaining common spaces would still be shared between all of the customers and visitors to Panorama.

Conclusion

[161] For all of the foregoing reasons, I conclude that the Parking Policy was not adopted and implemented oppressively, in that it is burdensome, harsh, lacking in probity or fact, or adopted in bad faith. I also conclude that the Parking Policy was not adopted in an unjust or inequitable way. The Parking Policy does not treat 356 significantly unfairly under s. 164 of the SPA, and the petition is dismissed.

Other Relief Sought in the Petition

The Sections

[162] The second issue raised by 356 in this petition is the failure of the Strata to operate as a sectioned strata as contemplated in its bylaws.

[163] In a mixed-use development like Panorama, 356 submits that sections serve an important purpose, and allow distinct sub-groups of strata lots to have independent governance and finances as well as more equal bargaining power within the Strata in respect of the Strata's common property.

[164] There is no dispute that, pursuant to the Strata's bylaws, the Strata was intended to be a sectioned strata. Division 8 of the bylaws provides:

Sections pursuant to Part 11 of Strata Property Act

31(1) The owners of the strata lots in the multi-storey office buildings in the Strata Plan (namely Buildings B and H) shall form a section within the strata corporation, pursuant to Part 11 of the [SPA], which shall be known as the "Office Section" of the strata corporation.

(2) The owners of the strata lots comprising the single storey commercial-retail buildings in the Strata Plan (namely, Buildings A, C, D, E, and F) shall form a section within the strata corporation, pursuant to Part 11 of the [SPA], which shall be known as the "Commercial Section" of the strata corporation.

Separate section executives

32(1) Subject to the [SPA], the regulations and the bylaws and subject to any restriction imposed or direction given by a majority vote at an annual or special general meeting of the owners belonging to the separate sections, the powers and duties of a separate section of the strata corporation (including the enforcement of separate section bylaws and rules) shall be exercised and performed by the executive of the separate section.

(2) The owner developer shall exercise the powers and duties of the executive until an executive is elected by the owners belonging to the separate section.

- (3) An executive shall be elected at the first annual general meeting of the owners called by the owner developer pursuant to Section 16(1) of the [SPA] by a majority vote of the owners belonging to the separate section.
- [165] Pursuant to s. 32(1) of the bylaws, PPI was to exercise the powers and duties of the executive for both the office and commercial sections until an executive was elected by the majority of Strata owners belonging to those sections at the first annual general meeting of the owners. That never occurred. Section executives were not appointed, and the sections have not been operating.
- [166] 356 says that the Strata improperly attempted to cancel the sections when, on February 13, 2019, the Strata council carried a special resolution seeking to introduce an amendment to the Bylaws to relax the requirement that it operate as a sectioned strata. The Strata council minutes noted that the Strata was not being administered in accordance with the bylaws (the "Sections Resolution").
- [167] 356 says that on March 14, 2019, the Strata owners held an annual general meeting. By a $\frac{3}{4}$ vote of the owners in attendance, a resolution was approved to amend the bylaws to eliminate the sections. The meeting minutes, which are attached to Mr. Wolverton's affidavit, state:

The manager noted that BCS 3598 [w]as defined in the Bylaws as a Sectioned Strata Corporation. This means that the Office, Retail/Commercial, and Shared Strata Sections are to operate as 3 separate strata corporations. This template is beneficial where there is a residential strata corporation attached to a commercial strata section. In the case of Panorama, the sections mostly differ in accounting and cost splits; as well, there are currently only 2 owners in the Retail/Commercial sections. The property manager acknowledged that cost recording was already standard as Office owners do not share in costs specifically to the Retail/Commercial and vice versa. The Sectioned Strata is not as effective for BCS 3598 and creates additional administrative work for management; hence, this proposal to operate BCS 3598 as a Type versus Sections Strata is being proposed. The change would be recorded in the Bylaws and as with any Bylaw, can be reverted back in the future if the demands change. The owners present were in favour of the Bylaw change. The property manager will proceed with preparing the Bylaw change wording, in consulting with a lawyer. Then once the strata council approved, will plan for a SGM to adopt the Bylaws language, it was then MOVED AND SECONDED To authorize the property manager to proceed a draft Bylaws to operate the Sectioned Strata as a Type Strata Corporation.

- [168] However, the Sections Resolution was passed without the approval from the section members. Section 193 of the SPA requires that a resolution cancelling a section be passed by both a $\frac{3}{4}$ vote of the Strata owners and of $\frac{3}{4}$ of all the eligible voters present for the existing sections.

- [169] 356 submits that, as the Strata did not obtain $\frac{3}{4}$ approval of the section members to pass the Sections Resolution, it was improperly passed and any attempt by the Strata to amend the Bylaws to cancel the sections is invalid.
- [170] The Strata's position is that the sections remain in existence and the Sections Resolution simply authorized the preparation of amended Bylaws, to be voted on at a subsequent annual or special general meeting in accordance with s. 193 of the SPA.
- [171] Further, the Strata says that given 356's position with respect to maintaining the sections, any further steps to cancel the sections would be pointless as the commercial section, of which 356 is a part, would not pass any such resolution by a $\frac{3}{4}$ vote.
- [172] As that is the Strata's position, the relief 356 seeks, a declaration of the invalidity of the Section Resolution, appears to be moot.
- [173] Nevertheless, the sections have not been functioning as required by the Bylaws. Since the appointment of section executives did not occur as contemplated by s. 32(3) of the bylaws at the first annual general meeting of the owners called by PPI, and since it is the Strata that has the authority to create or delete sections, I agree with 356 that the Strata retains the right to call a meeting pursuant to s. 32(3) of the Bylaws.
- [174] I order the Strata to call a special general meeting of the owners, pursuant to s. 32(3) of the Bylaws, for the purpose of appointing section executives.

The Sign

- [175] The final issue raised by 356 in this petition is in respect of a large, freestanding sign located on the northwest corner of the Property. According to 356, the Sign is approximately 15 feet high by 10 feet wide and is located approximately four metres from the southwest corner of Lot 1. The Sign is illuminated by florescent light bulbs and advertises various businesses in Panorama.
- [176] 356 says that the Sign sits on the limited common property of Strata Lot 2, which is owned by PPI.
- [177] 356 says that, given its proximity to Lot 1, and its size and brightness, the Sign is a significant issue for Big Ridge's business and is distracting to its customers. Big Ridge receives numerous customer complaints about the Sign and often has to close the blinds facing it to provide a comfortable customer atmosphere.
- [178] 356 says that the Sign was erected in violation of the Strata's Bylaws. Exhibit A to the Bylaws addresses the requirements for Strata signage and requires, among other things, that "[a]ll sign layouts to be approved by the separate section prior to commencement."
- [179] In its response to the petition, at para. 21 of Part 5: Legal Basis, the Strata says that the Sign is located on a small piece of land designated as limited common property for Strata Lot 2. It says it has no record of when the Sign was erected but, in a double negative, says, "[it] has

no reason to believe it was not erected prior to deposit of phase 1 of the strata plan". At para. 39 of the same Part, the Strata says that the City of Surrey sign bylaw does not prohibit signs on land that is zoned for comprehensive development from being illuminated by direct light sources.

[180] In its written argument, the Strata says, at para. 85, that the Sign is freestanding, not contained within a Strata lot and not on the exterior of a Strata lot and that the Strata's Bylaws concerning signs only pertain to signs on the exterior of a strata lot.

[181] It appears that 356 is relying on Exhibit A to the Bylaws which is entitled "Sign Criteria - Panorama Place". Exhibit A is referred to in Division 11, dealing with the Separate Section Duties & Rights of Owners.

[182] As the strata sections are not yet established, it is not at all clear on the record that Exhibit A, which provides that all sign layouts must be approved by the separate sections before an owner of a Strata lot in either the office or commercial section may install, operate, and display signs on the exterior of their Strata lot, is applicable.

[183] It is also not at all clear that the Sign in question is on the exterior of a Strata lot in either the office or commercial section.

[184] As a result, based on the evidentiary record before me, I cannot grant the relief sought by 356. This matter is left to be addressed either at the section level, once the section executives have been elected, or on a subsequent application to the court or to the CRTA.

Costs

[185] If the parties are unable to agree on an appropriate cost order in light of the result, they may seek to appear before me to speak to costs.

"MacNaughton J."

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