Simon Fraser University Foundation v. Strata Plan BCS 1345

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J.

Heard: January 4, 2021.

Judgment: March 3, 2021.

Docket: S189251

Registry: Vancouver

[2021] B.C.J. No. 404 | *2021 BCSC 360*

Between Simon Fraser University Foundation, Petitioner, and The Owners, Strata Plan BCS 1345, Respondent

(66 paras.)

Counsel

Counsel for the Petitioner: P. Williams.

Counsel for the Respondent: J.T. Weisman, O. Li, Articled Student.

Reasons for Judgment

R.A. SKOLROOD J.

Introduction

1 Strata Plan BCS 1345 (the "Strata") is a leasehold strata plan comprising 113 strata lots located on University Crescent in Burnaby, BC. Simon Fraser University ("SFU") is the registered owner of all 113 strata lots and has entered into lease agreements with respect to occupancy of the lots.

2 Unit 700 comprises two strata lots on the top floor penthouse of building 3 of the Strata. Unit 700 was leased by SFU to the petitioner Simon Fraser University Foundation for use as the residence of the president of SFU. For convenience, I will refer to SFU and the Simon Fraser University Foundation together as SFU.

3 In the summer of 2017, SFU installed an air conditioning system (the "System") in Unit 700. It did so without obtaining prior approval from the Strata council (the "Council"). The Strata takes the position that the System was installed in breach of the Strata Bylaws (the "Bylaws").

4 SFU now seeks a declaration that it is not in breach of the Bylaws and various related orders.

The Bylaws and the *Act*

5 SFU's application largely turns on the interpretation and application of Strata Bylaws 5 and 6:

> **5. Obtain approval before altering a strata lot**

(1) An owner must obtain the written approval of the Strata Corporation before making an alteration to a strata lot that involves any of the following:

(a) the structure of a building,

(b) the exterior of a building,

(c) stairs, balconies or other things attached to the exterior of a building,

(d) doors or windows on the exterior of a building, or that front on the common property,

(e) fences, railings or similar structures that enclose a patio, balcony or yard,

(f) common property located within the boundaries of a strata lot,

(g) those parts of the strata lot which the Strata Corporation must insure under section 149 of the Act,

(h) the painting of the exterior, or the attachment of sunscreens or greenhouses.

(i) The Strata Corporation must not unreasonably withhold its approval under subsection (1), but may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.

6. Obtain approval before altering common property

(1) An owner must obtain the written approval of the Strata Corporation before making an alteration to common property, including limited common property, or common assets.

(2) The Strata Corporation may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.

6 Bylaw 35(2) is also relevant:

35. Exterior Appearance

...

(2) No awning, shade screen, smoke stack, satellite dish, radio or television antennae shall be hung from or attached to the exterior of the strata lot, without prior written consent of the strata council.

7 SFU seeks relief under the *Strata Property Act*, *S.B.C. 1998, c. 43* [*SPA*]. The following provisions of the *SPA* are material:

Request for council hearing

34.1 (1) By application in writing stating the reason for the request, an owner or tenant may request a hearing at a council meeting.

(2) If a hearing is requested under subsection (1), the council must hold a council meeting to hear the applicant within 4 weeks after the request.

(3) If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week after the hearing.

[...]

Preventing or remedying unfair acts

164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2)For the purposes of subsection (1), the court may

(a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

(b) vary a transaction or resolution, and

(c) regulate the conduct of the strata corporation's future affairs.

Other court remedies

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

(a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;

(b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;

(c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

Background

8 Rancho Management Services (B.C.) Ltd. ("Rancho) is the management company retained to manage the Strata. Mr. Gus Ramirez, an employee of Rancho, is the Strata property manager.

9 On or about June 26, 2017, a resident notified Mr. Ramirez that renovation work was being undertaken in Unit 700. Mr. Ramirez made inquires and was advised by Mr. William Nelson that the System was being installed. Mr. Nelson is the manager of project services at SFU and was the project coordinator for the installation of the System.

10 In an email exchange between Mr. Ramirez and Mr. Nelson on June 26, 2017, Mr. Ramirez suggested stopping the work until the Council had a chance to consider the request to install the System and to provide an official response. Mr. Nelson responded asking how long that might take, as there was a crew on site ready to proceed.

11 Mr. Ramirez indicated that a response would hopefully be provided within a week, to which Mr. Nelson responded:

> I guess I got to risk it as we will [b]e done the equipment install tomorrow. After that it's just the hook up and refinishing.

12 Mr. Ramirez followed that exchange with a letter to SFU dated June 27, 2017 in which he advised that the Council had received a complaint alleging a contravention of a Strata Bylaw, specifically the installation of air-conditioning units without prior approval from the Council. Mr. Ramirez cited Bylaws 5 and 6.

13 SFU requested a hearing before the Council in accordance with s. 34.1 of the *SPA*, which took place on July 5, 2017. At that hearing, SFU made a presentation to the Council seeking approval to install the System.

14 The Council denied SFU's request. The minutes of the July 5, 2017 Council meeting record the following reasons for the denial:

i) penetration of the window area and window frame would jeopardize the integrity of the building envelope now and in the future;

ii) noise from the air-conditioning compressors would impinge on other suites now and in the future and thus would unreasonably interfere with the rights of other persons to use and enjoy the common property, common assets, or their own strata lots; and

iii) approval of this request would set a precedent that could readily lead to the proliferation of air conditioning units throughout the development, multiplying the potential problems with building integrity and noise.

15 On July 11, 2017, Mr. Ramirez wrote to SFU advising of the denial. Mr. Ramirez set out the three reasons identified in the Council minutes, as well as a fourth reason: "[n]o specific need(s) sufficient to support this request were provided".

16 Ms. Woolf, an owner and member of the Council, deposed the following regarding the July 5, 2017 meeting in her affidavit sworn on behalf of the Strata:

> During that meeting, the Petitioner was specifically asked what alternatives it had considered to the AC Units. The Petitioner stated that Unit 700's windows could not simply be left open because of potential problems with insects. The Petitioner was asked whether screens for the windows had been considered, but did not indicate that this had been considered. Following the Petitioner's submissions at that meeting, my understanding of the Petitioner's approach was that the Petitioner had taken no meaningful steps to investigate alternatives to the installation of the AC Units.

17 Accordingly, it appears that the possible use of screens is what led the Council to decide that insufficient information was provided to support the request.

18 Mr. Ramirez sent two additional letters to SFU, each dated July 11, 2017, advising that SFU was being fined $200 for breaching each of Bylaws 5 and 6.

19 On July 18, 2017, counsel for SFU wrote to Mr. Ramirez acknowledging that SFU installed the System without the prior written authorization of the Council and that the failure to obtain prior approval was "inadvertent". Counsel indicated that SFU would pay the two fines of $200.

20 SFU appealed the Council's decision by way of a request to re-appear before Council. Its representatives attended a Council meeting on September 13, 2017 and made a detailed presentation describing the rationale for installing the system and the installation process. The presentation specifically addressed the reasons previously given by the Council for denying the request to approve the installation of the System.

21 The Council again denied SFU's request. The minutes of the meeting record the decision as follows:

> Guests attended tonight's meeting to request that Strata Council reconsider their decision not to allow for the installation of an air conditioning unit. The guests had legal representation and their lawyer provided various arguments pertaining to the concerns that were raised at the previous meeting. After the presentation, the guests were thanked for attending and were excised from the meeting.
>
> After discussion, it was **MOVED**, **SECONDED** and **CARRIED** to deny the Owner's appeal to request permission for the air conditioning units as Council does not feel sufficient information was provided to address the concerns.

22 Mr. Ramirez advised SFU of Council's decision in a letter dated September 26, 2017. He stated in the letter:

> After taking into consideration the context of your September 13, 2017 letter, the Strata Council has again decided not to grant you permission to have air conditioning installed in your strata lot.

23 Little happened after that until January 24, 2018 when Mr. Ramirez wrote SFU and requested "confirmation that the air conditioning unit has been removed".

24 Counsel for SFU responded on February 13, 2018 noting that there had never been a demand for removal of the System. Mr. Ramirez replied on March 1, 2018 demanding removal within 30 days. There was a further back and forth and then on March 19, 2018, counsel for SFU wrote Mr. Ramirez stating that the Council had not resolved to require the removal of the System and, as such, there was no basis for demanding removal.

25 The Council met on May 2, 2018. The minutes of that meeting reflect the following discussion and decision:

> The Strata Council was presented with a letter from an Owner's legal counsel pertaining to the installation of the air conditioning matter. The letter was confusing as the Strata Council has previously written to the owner requesting the removal of the air conditioning unit which was installed without the authorization of the Strata council. As such, Strata Council again instructed Rancho to issue a letter to the Owner requesting that they remove the air conditioning unit which was installed without the authorization of the Strata Council.

26 Mr. Ramirez wrote to SFU's counsel on May 16, 2018 reiterating the demand for removal of the System within 30 days.

27 SFU's counsel responded with a detailed letter dated May 31, 2018 informing the Council that it would not remove the System. SFU took the position that it did not need the Council's prior authorization to install the System as there was no Bylaw prohibiting air conditioning units. Counsel further noted that in any event, the Council fined SFU for failing to get permission and SFU had already paid the fines to avoid confrontation.

28 The Council met on June 11, 2018 and resolved to fine SFU $200 every seven days for a recurring Bylaw infraction "starting on the date that the Strata Corporation requested removal of the air conditioning unit". Mr. Ramirez informed SFU's counsel of that decision in a letter dated June 22, 2018.

29 On March 25, 2019, the Strata held its annual general meeting at which it considered a resolution to permit the installation of air conditioning units on balconies on certain stipulated terms. However, the resolution did not achieve the requisite three-quarters majority needed to pass.

Installation of the System

30 It is not necessary to describe the System or its installation in great detail; however, it is useful to provide a general description. The following is taken from SFU's detailed presentation to the Council on September 13, 2017:

> The air conditioning system was installed by professionals. The installation was performed by Latham's Mechanical and designed by a mechanical engineer. Two independent and separate split system heat pumps were installed to cool the bedrooms, office, and den of Unit 700. Each split system heat pump consists of a condenser unit which is located outside the building on the balcony and a handling unit which is mounted in the strata lot on an exterior wall. There are various lines that run between the handler and condenser. Inside the unit, they are located primarily within the wall. In one of the installations, the lines run from the inside to the outside through a flashed spandrel window near the ground of the strata lot. The original glass was swapped with a flashed spandrel panel allowing the lines to run into the strata lot without affecting the integrity of the window or building envelope. In the other installation, the lines run from the condenser to the handling unit through the window flashing, which was replaced with new flashing in the corner of the balcony, where it meets the windows. Again, this location was chosen to make it minimally intrusive while ensuring the integrity of the building envelope. In addition, in both locations, the balcony roof offers further protection to the building envelope. In short, the lines running between the handling unit and condenser in both installations have no impact to the building envelope or its integrity.
>
> The installation of these units also required electrical wiring. In both installations, the heat pump was wired to a new circuit running from the strata lot's main panel to the condenser. The wiring runs through a box mounted on the sliding glass door flashing. Again, the building envelope, window glass and window frame were not damaged nor their integrity affected. All the flashing and penetration work through the flashings were undertaken by North View Glass. All the penetrations and flashings can be completely replaced if required as the integrity of the stucco wall envelope was not touched. Finally, the condenser units were anchored to the patio concrete pavers only to ensure that the patio membrane was not compromised.

31 It is also worth noting the rationale provided by SFU for installing the System. In its presentation to Council on September 13, 2017 and elsewhere in its materials, SFU makes the point that Unit 700 is a unique unit that is subject to excessive heat as a result of how the roof was constructed. It says that the System was necessary in order to permit the occupants to enjoy the unit for their basic needs.

SFU's Petition

32 SFU seeks the following relief:

a) A declaration that it is not in breach of the Bylaws;

b) An order pursuant to s. 164(1) of the *SPA* that the Strata has conducted itself significantly unfairly by:

(i) Retroactively and continuously fining SFU for the alleged contravention of two Bylaws for which SFU had already been fined;

(ii) Failing to provide a written decision within one week of a hearing held pursuant to s. 34.1 of the *SPA*;

(iii) Refusing to grant permission to SFU to install the System in Unit 700;

c) An order pursuant to ss. 164(2)(b) and (c) and s. 165(c) that

(i) SFU is permitted to install and continue to operate the System in Unit 700.

33 SFU also seeks relief in respect of the fines levied by the Strata; however, the Strata has now waived all fines other than the initial two fines of $200 for failing to obtain advance permission and so it is not necessary to address that relief. I will however deal with the issue of the fines when considering SFU's argument that the totality of the Strata's conduct was significantly unfair.

Discussion

Did SFU breach the Bylaws?

34 As set out above, the Bylaws in issue are Bylaws 5 and 6. Bylaw 5 is concerned with alteration of a strata lot and Bylaw 6 with alteration of common property. Both require advance written approval of the Strata.

35 SFU acknowledges that it did not obtain advance approval to install the System, however it takes the position that the installation of the System did not involve an alteration within the meaning of the Bylaws.

36 SFU cites *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591*, *2017 BCSC 1646*, aff'd *2018 BCCA 187*. There, the petitioner installed a heat pump in an area of the exterior of its strata lot. Before doing so, it sought approval from the strata council, which was denied on the basis that air conditioning units were prohibited under the strata bylaws. The petitioner nonetheless proceeded with the installation and then sought a declaration that it was not in breach of the bylaws or, alternatively, that it was significantly unfair for the strata to refuse permission. The bylaws in issue there are similar to the Bylaws here.

37 The chambers judge found that by attaching the heat pump to the exterior patio and cutting a hole in the wall to run lines constituted an alteration of common property. He found further that the strata's order to remove the heat pump was not significantly unfair. The chambers judge acknowledged that removal would place a hardship on the petitioner but the degree of unfairness was compromised because the unit was installed without approval first being obtained (at para. 44).

38 The Court of Appeal dismissed the appeal. Mr. Justice Groberman, for the Court, agreed with the petitioner/appellant that "immaterial changes to common property will not be 'alterations' for the purposes of Bylaw 6(1)". However, he went on to hold (at para. 23):

> ...on any sensible definition of "alteration", the cutting of a 2-inch hole in an exterior wall, and the installation of permanent pipes in the wall and out to a heat pump constitutes an "alteration" that is material.

39 Justice Groberman also agreed with the chambers judge's finding that the order to remove the heat pump was not significantly unfair. He cited the Court of Appeal's previous decision in *Reid v. Strata Plan LMS 2503*, *2003*

BCCA 126 at para. 27, where the Court held that 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" (at para. 28).

40 SFU relies upon Justice Groberman's finding that "immaterial" changes do not constitute an alteration. It submits that the installation of the System was unobtrusive and impermanent in comparison to the installation in *Allwest.*

41 SFU further submits that there is no Bylaw prohibiting the installation of an air conditioning system. It notes that Bylaw 35(2) identifies a number of items that may not be hung from or attached to the exterior of a strata lot and that the list does not include air conditioning units. SFU submits that had it been intended to exclude air conditioning units, the Bylaws would have explicitly said so.

42 For its part, the Strata cites *The Owners, Strata Plan NW 1245 v. Linden*, *2016 BCSC 619*. There, the strata corporation successfully applied for an injunction to prohibit the respondents from installing an air conditioning unit, which would involve drilling holes in an outside wall, without first obtaining written permission to do so (at paras. 30 and 32).

43 The Strata also cites *Wentworth Condominium Corp. No. 198 v. McMahon*, *[2009] O.J. No. 983* (S.C.), which dealt with the addition of a hot tub to a back yard that was part of the common element area of the strata property (as defined in the Ontario *Condominium Act*), albeit over which the owner had exclusive use. The court found that this was not an "alteration" because it did not "change the structure of the property" (at para. 26).

44 The Strata submits that SFU is in breach of both Bylaw 5 and 6, although it was somewhat vague and imprecise in identifying what aspects of the installation of the System are an alteration to the strata unit (Bylaw 5) versus an alteration to the common property (Bylaw 6).

45 In my view, there is little question that the installation of the System constitutes an alteration of common property. As set out in the description of the installation at para. 30 above, the windows and flashings on the exterior wall of Unit 700 were replaced to permit the connecting lines to run from the exterior condenser units to the interior handling units. There is little to distinguish this method of installation from what occurred in *Allwest*, where holes were drilled to accommodate the connecting lines. Both involve an alteration to the structure of the building.

46 Further, as seen in photographs entered into evidence, the condenser units were affixed to the external patio of Unit 700. Although SFU says that the units were affixed to the patio pavers so as to not compromise the patio membrane, the fact that the units were affixed is consistent with a finding that there was an alteration to the patio.

47 In summary, I am satisfied that SFU breached Bylaw 6 by installing the system without first obtaining the written approval of the Strata. The fact that Bylaw 35 does not specifically prohibit air conditioning units is not an answer. That bylaw deals with the exterior appearance of the strata buildings and prohibits items from being hung or affixed thereto, whereas Bylaw 6 deals more generally with alterations.

Did the Strata act in a manner that was significantly unfair?

48 As discussed in para. 39 above, significant unfairness requires something beyond "mere prejudice or trifling unfairness": *Reid* at para. 27.

49 Courts have often borrowed from the jurisprudence developed in the context of the oppression remedy (s. 227 of the *Business Corporations Act*, *S.B.C. 2002, c. 57*) in interpreting "significantly unfair": *Dollan v. The Owners, Strata Plan BCS 1589*, *2012 BCCA 44*. In *Dollan*, Madam Justice Garson proposed a test for evaluating significant unfairness under s. 164 of the *SPA* based on the test for oppression that focussed on the reasonable expectations of the strata owner. I note, however, the two other members of the division also wrote reasons and did not endorse Garson J.'s test.

50 Mr. Justice Masuhara similarly relies on the language of oppression in his discussion of "significantly unfair" in *Gentis v. The Owners, Strata Plan VR 368*, *2003 BCSC 120*:

> [27] The scope of significant unfairness has been recently considered by this Court in ***Strata Plan VR 1767* v. *Seven Estate Ltd.*** *(2002), 49 R.P.R. (3d) 156* (B.C.S.C.), *2002 BCSC 381*. In that case, Martinson J. stated (at para. 47):
>
> > The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable: ***Reid v. Strata Plan LMS 2503***, *[2001] B.C.J. No. 2377*.
>
> [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.

51 SFU submits that the Strata acted unfairly by failing to provide it with a decision within one week of the September 13, 2017 meeting, in violation of s. 34.1 of the *SPA* (see para. 7 above). SFU was advised of the Council's decision to reject its request a second time, by way of a letter from Mr. Ramirez dated September 26, 2017.

52 SFU acknowledges that it has not found any case law addressing this issue, apart from a decision of the BC Civil Resolution Tribunal suggesting that if the Legislature had intended there to be consequences for a breach of s. 34.1, it would have done so explicitly: *Kerwin v. The Owners, Strata Plan LMS819*, 2020 BCCRT 131 at para. 42.

53 I would characterize a failure to provide a decision within the stipulated time to be an irregularity which, by itself, does not give rise to significant unfairness. However, I will consider this issue further when assessing whether the cumulative effect of the Strata's conduct was significantly unfair.

54 In this regard, SFU characterizes the Stata's entire course of conduct in dealing with its request to approve the installation of the System as lacking in probity, unreasonable, and, therefore, significantly unfair. SFU relies on the following conduct in support:

a) At its July 5, 2017 meeting, the Council resolved to reject SFU's request for three reasons (see para. 14 above), yet in his letter dated July 11, 2017, Mr. Ramirez added a fourth reason: "[n]o specific need(s) sufficient to support this request were provided". Neither the Council nor Mr. Ramirez addressed SFU's rationale for the System or identified what information was lacking.

b) SFU made a detailed presentation at the September 13, 2017 Council meeting that addressed the need to install the System and the installation process and responded to the initial reasons for refusal identified in Mr. Ramirez's July 11, 2017 letter. Despite this detailed presentation, the meeting minutes simply record that Council rejected the request because it "[did] not feel sufficient information was provided to address the concerns". SFU submits that this reflects the fact that Council had clearly made its decision to reject SFU's request prior to the September 13th meeting. Mr. Ramirez then conveyed the Council's decision to SFU in his September 26, 2017 letter, which again was sent outside of the time limit prescribed by s. 34.1. As noted, the Strata failed to identify what information was allegedly lacking.

c) At no time prior to March 31, 2018 did the Strata demand removal of the System. The minutes of Council's May 2, 2018 meeting suggesting Council was "confused" by the position taken by SFU's counsel given that a demand had previously been made for the removal of the System are inaccurate, because again no such demand was made.

d) Despite this, the Council resolved at its June 11, 2018 meeting to fine SFU $200 every seven days dating back to July 2017. While the Strata has now waived those fines, SFU's points to this as a further illustration of the Strata's unfair conduct. SFU submits as well that the only Bylaw contravention, if there was one, was its failure to obtain written permission in advance pursuant to Bylaws 5 and 6. SFU was fined $200 each for these contraventions and it has paid those fines. The Strata's characterization of SFU's contravention as a continuing one was unreasonable, particularly given the lack of a demand for removal.

e) Removal of the system would be expensive. This cost is unwarranted because the contravention was simply not obtaining advance approval, which should have been given.

f) SFU also says that the Strata has failed to act consistently, noting that at the Strata's March 25, 2019 AGM, the Council approved the installation of a self-contained air conditioning unit "that did not entail the placement on the unit balcony or require the installation of refrigeration pipes and electrical wires that would penetrate the building envelope". This is despite Ms. Woolf's statement in her affidavit in support of the Strata that the "Council has not authorized the installation of any air conditioning units in the Strata".

55 One of the grounds identified by SFU is the adequacy of the Council minutes, particularly the minutes of the September 13, 2017 meeting. As noted, the Council purported to reject SFU's request simply because, in its view, SFU had not provided sufficient information to address its concerns.

56 I agree that the minutes are lacking in detail and that neither the minutes nor Mr. Ramirez's letter advising SFU of the decision provided SFU with any real insight into why the Council rejected its request. However, there is no requirement that the minutes set out the Council's decision-making process in detail.

57 In *Kayne v. the Owners, Strata Plan LMS 2374*, *2007 BCSC 1610*, Mr. Justice Smith stated at para. 8:

> The purpose of the [*SPA*] is to ensure that members of the strata corporation are informed of the decisions taken and the money spent on their behalf. It mandates no particular form in which these documents are to be kept and no particular level of detail. For example, although it requires minutes, it does not, beyond stating that the minutes include the results of any votes, set out any degree of detail that must be contained in those minutes. Minutes must contain records of decisions taken by council, but may or may not report in detail the discussions leading to those decisions.

58 This observation was endorsed by Mr. Justice Punnett in *Yang v. Re/Max Commercial Realty Associates (482258 BC Ltd.)*, *2016 BCSC 2147* at para. 133.

59 Thus, the lack of details in the minutes explaining or justifying the Council's decision is not a ground for overturning that decision.

60 That said, the absence of any explanation or evidence addressing how and why the Council made its decision, is a factor to consider in the unfairness analysis. In *Gentis*, which was cited in *Reid,* Masuhara J. relied in part upon the various factors considered by the council in reaching its decision in finding that a decision of a strata council was not significantly unfair. After considering the meaning of the term "significantly unfair", he said at para. 30:

> Applying this analysis to the instant case, I have concluded that there has been no oppressive conduct. There is no evidence before me that the Council has acted in bad faith, or in a harsh, burdensome, or wrongful manner. Rather, the Council appears to have taken into consideration many factors and reached a decision in accord with its duties to act in the best interests of all tenants and owners. The Council took into account the impact of the continued use of the Deck on the suite below, the possibility that other tenants might demand similar treatment insofar as deck-space is concerned, potential changes in property value, and the potential impact on the nature and character of the strata community. Each of these factors is clearly a legitimate consideration.

61 The issue in this case is that it is difficult to discern from the September 13, 2017 minutes what factors were

considered by the Council. The Council provided reasons in Mr. Ramirez's July 11, 2017 letter conveying the initial denial. These reasons were then addressed in detail by SFU in its written submission and presentation at the September 13, 2017 meeting. However, there is little indication in the minutes of the extent to which the Council considered the additional information provided by SFU, other than deeming it "insufficient".

62 It is apparent from the record that SFU had good reason to be unhappy with the Strata's conduct. The decision-making process leading to the denial of SFU's request for approval to install the System was opaque; indeed, no clear explanation for the denial has ever been provided. The decision to fine SFU retroactively for a continuing breach was unreasonable, given that no demand to remove the System was made prior to March 2018. The Strata subsequently, and quite properly, agreed to waive the ongoing fines.

63 Despite these problems, I am not satisfied the Strata's conduct reaches the level of significantly unfair within the meaning of s. 164 of the *SPA*. I reach this conclusion for the following reasons:

a) The evidence does not establish that the Strata acted in bad faith or in a manner that was unduly harsh or burdensome towards SFU.

b) When Mr. Ramirez first alerted SFU that the installation required prior approval, Mr. Nelson indicated that SFU would "risk it" and proceed, rather than "down tool" pending consideration by the Council. In *Allwest*, the chambers judge held that installing the unit without receiving prior approval undermined the petitioner's claim that removing it would create a hardship (S.C. at para. 44). The Court of Appeal did not disagree (C.A. at para. 30).

c) SFU appeared before the Council on two occasions and made a detailed presentation in the second meeting. Although the Council's second decision did not identify its reasons for denying SFU's request, SFU cannot say that it was denied the opportunity to make its case for approval to Council.

d) The evidence indicates that the Council acted consistently with previous decisions to deny requests to install air conditioning units. The one exception appears to involve a self contained unit that did not require an installation or alteration within the meaning of the Bylaws.

e) While SFU alleges that removal of the System would be expensive and thus create a hardship, I was not taken to any evidence about what the anticipated cost of removal would be or the extent of the alleged hardship.

64 Where, as here, an owner of a strata unit feels hard done by as a result of a decision of the strata council, it is important to keep in mind the nature of strata living. As Masuhara J. observed in *Gentis*, at para. 28:

> 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.

See also *The Owners, Strata Plan NW 1815 v. Aradi*, *2016 BCSC 105* at para. 43.

Conclusion

65 SFU's petition is therefore dismissed. If the parties are unable to agree on costs, they may speak to the issue.

66 Counsel for the Strata submitted that if the petition was dismissed, the Court should order removal of the System. However, there was no application before me for such relief and I therefore decline to make that order.

R.A. SKOLROOD J.

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