THE UNANIMOUS RESOLUTION REMEDY

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When the historical practice used to allocate expenses differs from the statutory formula, Strata Corporations should take timely steps to correct the misstep. It is important to exhaust available political remedies. The approval of historical formulas using the unanimous vote option is one such political remedy.

If the unanimous vote of owners to continue historical allocations fails, then the Strata Corporation must, by default, use the unit entitlement formula into the future. All owners should be informed of the consequences of a failed vote.

Some may argue that it is highly probable that such a resolution will fail – so why go this route? Recent judicial comments lead me to believe that it is a wise course of action to present the unanimous resolution, even if it is likely to be defeated.

In *Strata Plan NW2212 (Re),* [2010] B.C.J. No. 680 (B.C.S.C.), the strata corporation sought to amend the strata plan by bringing an application under s. 164 (significant unfairness) for an order to dispense with the unanimous vote required by s. 257(a) of the Strata Property Act ("SPA") to amend the strata plan. The strata corporation also sought orders to approve a special levy to accomplish the amendment of the strata plan and for the liberty to apply for further orders to effect the resolution they sought. A group of owners also brought its own application to require the strata corporation to comply with the strata plan.

The strata corporation was comprised of 40 townhouse style lots and common property. Each strata lot had a carport and a yard designated as limited common property for their exclusive use. However, the fences and hedges planted by the developer 25 years prior did not follow the designated boundaries for the yard area. The owners of one lot argued that they were denied the use of a portion of their private yard enjoyed by the adjacent strata lot owner.

The Owners wishing to continue the historical fence line brought an application to Court for an order to amend the strata plan to conform to the original fence lines. In addition, six visitor parking stalls were not designated on the strata plan. The parking encroached onto the limited common property of two lots. While one of the lot owners consented to the amendment of the strata plan to provide for three parking stalls, the owner of the second lot did not consent and sought enforcement of the strata plan, which would result in the loss of three parking stalls.

After the strata corporation became aware that the fence lines did not conform to the strata plan, it obtained estimates of the costs of relocating the fences to conform to the strata plan and put forward resolutions at general meetings that the estimated costs to relocate the fences be paid for my special levy. After the resolutions were defeated, the strata corporation presented a resolution that it bring a court application to amend the strata plan, which was approved by a ¾ vote. At no time did the strata corporation attempt to pass a unanimous resolution to amend the strata plan under s. 257 of the SPA because it believed that such a resolution would be defeated.

The Court in *Strata Plan NW2212 (Re)* dismissed the application by the strata corporation and allowed the application by the owners. The Court held that the strata corporation could not bring an application against itself under s. 164 of the SPA. The availability of an application pursuant to s. 164 is specifically limited to an owner or tenant. The Court further ruled that the only legal avenue available to the strata corporation was to pass a resolution by unanimous vote at a general meeting. In proceeding to the Court for relief from the unanimous voting requirement, the strata corporation sought to avoid the rigours of s. 257 (amend the strata plan) and did so by proceeding in a manner that was not open to it. Finally, the conduct complained of, being required to adhere to the obligations imposed by the SPA, was not significantly unfair. The owners were entitled to conformity with the strata plan and to the full benefit of their limited common property.

In reaching its conclusions, the Court reviewed a number of decisions which are instructive on this issue. The Court stated as follows:

> 35. This situation is similar to Liverant in the sense that the strata corporation there, who was not the petitioner, had not considered proposing a resolution under s. 100 to change the formula for funding contributions to the operating fund. The petitioner argued that there was no point in putting forward such a

resolution because he could never obtain the required unanimous approval. **The court considered that if significantly unfair and oppressive conduct is to be found, the strata corporation should be given the opportunity to remedy the problem through the statutory process before the court could be in a position to consider unfairness** [emphasis added]. The court said at para. 28:

> [28] The facts of this case are distinguishable from those in Shaw, [2008] B.C.J. No. 655. First of all, although the petitioner has made his objection known to the other owners and to the strata council, there is no evidence that any resolution under s. 100 has ever been put before an annual general meeting. The petitioner suggests that this would be a pointless exercise because he could never obtain the required unanimous agreement. That may be so, but the procedural requirements of the Act are not to be dismissed as empty formalities. If the strata corporation, made up of all of the owners, is going to be accused of significantly unfair, oppressive, or unfairly prejudicial conduct, all of the owners must be presented with the evidence and argument in support of that allegation and be given the opportunity to remedy it. It is only when they are given that opportunity and specifically refuse to act that the court is in a position to consider whether their conduct is significantly unfair.

36 The same can be said here because the strata corporation has not sought to pass a resolution to amend the strata plan under s. 257 because it considers that it would not pass. While the failure to pass a special resolution may not be determinative if the underlying conduct is significantly unfair (Chow at para. 95), s. 57 provides a specific legislative solution in the face of the requirement for unanimity which cannot be ignored. In this circumstance, the judicial attitude towards the exercise of discretion in Liverant is preferred so that the strata corporation must have tried to seek unanimity through the legislated process before it can seek redress from the court, if indeed it is even entitled to do so under s. 164.

37 While it does not deal with s. 257 specifically, Ang v. Spectra Management Services, 2002 BCSC 1544, contains a useful discussion of what use can be made of s. 164 to overcome a specific statutory voting requirement. In that case, the petitioner applied pursuant to s. 164(1) of the SPA to have two leases of common property in a 127 unit boutique hotel strata development declared void. The petitioner was associated with a group of owners who sought to take over the operation of the hotel, for which control of the leases in question was necessary. The court dismissed the petition on the basis that the petitioner did not have standing to pursue the claim. As the leases in question related to common property, and under s. 3 of the SPA the strata corporation is responsible for managing the common property, it was the strata corporation, and not an individual owner, that must bring the action on behalf of all owners. Having failed to muster sufficient support among the other owners to obtain the requisite 3/4 vote that would authorize the strata corporation to make the application under s. 171, the petitioner was not entitled seek relief in her personal capacity. Put simply, the petitioner could not rely on s. 164 merely because she was unable to meet the rigours of the governance procedure in s. 171. While the issues in Ang are different than in this case, the reasoning with respect to s. 164 is apposite. **Section 164 is not a catch-all provision that permits dissatisfied petitioners to obtain relief from the court every time they fail to secure the required number of votes at a council meeting to effect their wishes. Rather, s. 164 does no more than authorize proceedings by an owner to redress the actions of a strata corporation that are significantly unfair to that owner** (Ang at para. 21) [emphasis added].

38 Courts have been reluctant to use their discretion to override specific legislative requirements under the SPA based upon significant unfairness. Section 164 could not be used to override the specific requirements under s. 108 of the SPA for the allocation of special levies according to unit entitlement in Peace, notwithstanding that the allocation meant repair costs had to be paid on a 2:1 ratio. The consequence of the conduct conferring a benefit on some and not others is irrelevant when the conduct itself is pursuant to the SPA and exercised in good faith and on reasonable grounds. Just because conduct adversely affects some to the benefit of others is not a basis for a finding of significant unfairness under s. 164, particularly when the consequence is mandated by the requirements of the SPA itself. Direct compliance with governing legislation cannot be considered significantly unfair (Peace at para. 22).

I was one of the joint counsel for the Strata Corporation in the *Peace* case, and as such, I have some insight into this case.

Given the judicial reasoning set out above, it may be wise to present a unanimous resolution to the owners thus to allocate expenditures using a formula other than unit entitlement consistent with past practice. If this resolution fails, then the Strata Corporation will have no alternative but to assess common expenses based on the statutory formula (typically the habitable area formula).

The unanimous resolution should be presented to the owners even though there is almost a certainty that it will fail. In the event of a court challenge, the Strata Corporation can inform the court that it availed itself of all available remedies before it reverted back to the statutory formula. It is clear from the above case law that the Strata Corporation does not have the legal right to bring an application to court for an order approving the historical formula based on a foundation of significant unfairness.