UNIT ENTITLEMENT & SIGNIFICANT UNFAIRNESS

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It is easy to allege that certain conduct or actions are significantly unfair; however, it is much more difficult to prove.

There has been significant litigation surrounding this issue in recent years, much of which has been spurned by the Leaky Condo Crisis. The question of “who pays” and “how much” becomes a front and center issue when owners are faced with a significant repair bill or perceived significant unfairness.

Many Strata Corporations, often unwittingly, invoke a scheme for the allocation of expenses in violation of the statutory schedule of unit entitlement formula. This inevitably leads to conflict and potential challenges at great expense to all owners.

The general rule is that the community governs and the owners are “all in it together”. The typical statutory formula for assessing common expenses for residential strata lots is the habitable area formula. For example, if strata lot #1 is twice as big as the neighbours strata lot #2, then strata lot #1 pays twice as much as strata lot #2. If the repair bill is $120,000, then SL#1 pays $80,000 and SL #2 pays $40,000. The actual repair costs might be split 3: 1 as opposed to 2:1 or $90,000 for SL #1 and $30,000 for SL #2. One owner overpays by $10,000 and the other underpays by $10,000. Is there any recourse?

The statutory formula is etched in stone as part of the Schedule of Unit Entitlement. Since the Schedule of Unit Entitlement is registered in the applicable land title office for each Strata Corporation, all owners are deemed to have notice of this formula. The argument that “we didn’t know” carries little weight in the eyes of a Court.

The answer to the issue of "who pays" for common expenses and “how much” is found within the framework of the legislative scheme of the *Strata Property Act* (the “Act”), the Regulations and the Bylaws. The only exceptions to the general rule that "we are all in it together" may be summarized as follows:

> (a) the strata corporation has by unanimous vote agreed to use a different formula for the allocation of contributions to the operating fund and contingency reserve fund ("CRF"), other than those set out in s. 99 and the regulations (Act, s. 100);
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> (b) the strata corporation has by a unanimous vote established a "fair division" of expenses for that particular levy (Act, s. 108(2));
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> (c) sections have been created (Act, s. 195);
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> (d) a bylaw is filed in the land title office before July 1, 2000, providing for the apportionment of contributions to a contingency reserve fund as a common expense according to type of strata lot, if that type of strata lot is a type identified in the bylaws of the strata corporation (Reg. 17.11(6)); or,
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> (e) a bylaw is enacted before January 1, 2002, that identifies the type of strata lot set out in the budget in effect on July 1 ,2000, as a "type of strata lot" in accordance with section 128(2) of the *Condominium Act* or a similar bylaw, then the strata corporation may continue to use the type of strata lot identified in the budget as a "type of strata lot" for the purposes of allocating operating expenses in the budget (Reg. 17.13(1) & (3), 6.4(2) and 11.2(2)).

This scheme was approved by the Court of Appeal in *Coupal v. Strata Plan LMS2503,* [2002] B.C.J. No. 2313 (B.C.S.C.), revd 332 W.A.C. 273 (B.C.C.A.).

A bylaw adopted under exception (e) above does not apply to an assessment for greater than annual expenses (e.g. a major repair bill).

Now, lets muddy the waters. The owners in the Strata Corporation adopted a “fair allocation” formula without a unanimous vote of owners and it has applied this formula to the allocation and assessment of operating and contingency

reserve fund expenditures over a period of many years. This substitute formula is operating as the norm, until one day an owner questions whether or not this substitute scheme complies with the Act.

Then the fur flies. The owners are divided and chaos reigns. One faction argues that the historical scheme must prevail. The other faction argues that the statutory Schedule of Unit Entitlement formula set out in the Act prevails. One group of owners has underpaid and the other group of owners has overpaid. Who wins?

The Act does not permit the Strata Corporation to unilaterally implement a substitute scheme that differs from the statutory Unit Entitlement Formula. Unanimous resolutions are virtually impossible thresholds to achieve, especially after the fact. One group smells blood and a potential wind fall, while the other group feels victimized.

The scope of legal advice that a strata lawyer can provide to the Strata Corporation in this situation is extremely limited. The options include:

1. create sections, if this option is available;

2. seek a unanimous resolution to approve historical practice and if it fails, then resort to the Schedule of Unit Entitlement Formula (someone will always be unhappy);

3. apply to court under s. 246 of the Act, but this remedy is only available to correct an inaccuracy on the plan; or

4. wait until an owner challenges the allocation, but this is not a viable option since it means the Strata Corporation is operating contrary to the law.

Legal advice typically directs the Strata Corporation to exhaust its political remedies (unanimous vote and/or sections, if applicable) and if this fails, then the Strata Corporation must comply with the law.

If Unit Entitlement prevails, what do we do about past contributions? Owners buy and sell. Strata lots are foreclosed upon. Someone screams foul and if the dissatisfaction is deeply rooted, the potential for a law suit by an owner looms.

Absent a political solution, most of the available options involve legal proceedings, which can be lengthy, divisive, uncertain and extremely expensive.

Strata councils are advised to seek legal advice before implementing a seemingly equitable assessment of expenses. The consequences far outweigh any benefits. If you question whether or not an expenditure has been properly assessed, you should seek advice from a qualified strata lawyer as soon as practically possible.

The best cure for a violation is prevention.