

Headline: **The Case of the Too Tall Tree**

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Can a strata corporation restrict the height of trees and other plants growing on an owner's patio and if it attempts to do so, is the strata corporation acting in a manner that is significantly unfair to the owner?

These questions were recently considered by the Court in the case of *Chan v. The Owners, Strata Plan VR 151*.

Ms. Chan owned a ground floor strata lot in a four storey building. The outdoor patio of Ms. Chan's strata lot was designated as part of her strata lot. The strata plan provided that the boundary of the patio portion of the strata lot extended to the height of the interior ceiling of her strata lot.

A cedar tree had been planted on Ms. Chan's patio prior to Ms. Chan purchasing her strata lot. Ultimately, the tree grew to a height of 12 meters and was almost as high as the building. The tree blocked the view and light for a number of strata lots above Ms. Chan's strata lot.

In 2006, a number of owners complained that the tree violated the strata corporation's bylaws which provided that "owners must not permit trees and plants on their strata lot which endanger property or impede the enjoyment of another strata lot". The owners demanded that the tree be cut down.

The strata corporation obtained an opinion from an arborist who concluded that the tree did not endanger the building foundation. The arborist recommended that the tree be reduced in height by six feet and pruned by three feet on all sides. Ms. Chan had the tree pruned more than the arborist recommended. Ms. Chan was then advised that the strata council was satisfied that she was not in violation of the bylaw.

Subsequently, the owners passed a new bylaw that specifically required owners of ground floor units to prune trees and other plants so that they do not extend beyond the boundaries of their strata lot. After receiving further complaints about Ms. Chan's tree, the strata corporation obtained legal advice which stated that the airspace above the patio beyond the level of the interior ceiling was common property and that the tree was intruding on common property.

When the strata council instructed the strata manager to obtain further legal advice on the appropriate steps to take to have the tree trimmed to the property line, Ms. Chan applied to the Court for an declaration that the strata corporation has taken or threatened to take action which is significantly unfair to her, and for a determination on whether the strata corporation can rely on the new bylaw to require Ms. Chan to cut back the tree. It was generally agreed that if the tree was cut back to the height of Ms. Chan's interior ceiling (her property line), the tree would very likely die.

Was the tree grandfathered?

Ms. Chan argued that the tree was in place when she purchased her strata lot and that she had been assured by the seller and the realtor that the tree was "grandfathered" and could not be cut without the owners' consent.

The Judge considered that if there was grandfathering protection, it would have to flow from a decision of the strata council or a decision of the owners at a General Meeting. The Judge noted that no record of any such decisions was provided.

The Judge clearly stated that neither the seller nor the realtor had authority to make a representation that would be binding on the strata council or the strata corporation.

Was the strata corporation prevented from taking action because of delay?

Ms. Chan argued that the tree was in place before she bought her strata lot and that because the strata corporation did nothing with respect to the tree for many years, it was now barred from taking any action. The Judge recognized that if a party has acquiesced and not asserted its rights for a long period of time, the party may ultimately be denied their rights. However, the Judge held that such a doctrine could not be applied to prevent a strata corporation from fulfilling its statutory duty to administer common property.

Even if the strata corporation had specifically permitted Ms. Chan's tree to extend into common property, the Judge found that it could only do so based on section 76 of the *Strata Property Act* which limits the strata corporation to providing such permission on a temporary and revocable basis. The Judge noted that it would be beyond the legal ability of the strata corporation to grant permanent protection for the tree which is what Ms. Chan claimed existed.

Was the new bylaw enforceable against Ms. Chan?

The Judge found that the airspace above Ms. Chan's patio beyond the height of her interior ceiling was common property. The Judge noted, however, that had the strata plan not specifically defined the upper boundary of the patio area to be the height of interior ceilings, Ms. Chan may have a claim at common law to ownership of the airspace directly above the patio. In this case, however, the Judge was satisfied that Ms. Chan's ownership extended only to the height of her interior ceiling and anything above that was common property.

The Judge identified that there were conflicting views among owners about how common property is to be used. Clearly, some of the owners wanted to prevent an owner's plants from intruding into common property. These owners wanted Ms. Chan to cut down her cedar tree. Others, such as Ms. Chan, wanted the tree to remain.

The Judge noted that the strata corporation was required to make a decision to resolve the conflict one way or another. They did so by passing the new bylaw. The Judge found that the new bylaw was validly enacted by the necessary $\frac{3}{4}$ vote of the owners.

The Judge concluded that the new bylaw may be applied to Ms. Chan's tree.

Had the Strata Council acted in a manner that was significantly unfair?

The Judge confirmed that "significantly unfair" has been considered to mean conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing or that has been done in bad faith or is unjust and inequitable".

The Judge also accepted that a claim relating to significant unfairness should be focused on the conduct of the strata corporation and not on the consequences of the conduct. The Judge adopted the following statement from the decision in *Peace v. The Owners, Strata Plan VIS 2165*:

There is no doubt that in making a decision the strata corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the [*Strata Property Act*] itself.

The Judge concluded that none of the actions of the strata council complained of by Ms. Chan amounted to an action or threatened action or decision that was significantly unfair.

Although the Judge found that no action taken to date could be considered to be significantly unfair to Ms. Chan, the Judge did note that in taking steps to enforce the bylaw, the strata corporation must be mindful not to act in a manner that is significantly unfair to Ms. Chan. As an example of possible significant unfairness, the Judge noted that, it may be significantly unfair to impose the costs of cutting or removing the tree and placing it on Ms. Chan alone, since the tree was permitted to grow far beyond the boundary of Ms. Chan's strata lot before the new bylaw was passed.

Conclusion

The owners in *Chan* were faced with a dilemma regarding the use of common property which they resolved by passing a bylaw. The Judge accepted this process as being a reasonable way of resolving the conflict.

The decision confirms that, as long as the strata corporation's bylaw was made in good faith and on reasonable grounds, simply because the bylaw adversely affects some owners, it will be unlikely that a Court will find the bylaw to be significantly unfair.

All buyers of strata lots should also note the Judge's comments that a vendor and realtor do not have authority to bind the strata corporation or the strata council. Additionally, the decision clarified that under section 76 of the *Strata Property Act*, a strata council is unable to create a permanent privilege or right regarding the use of common property. The most a strata council can do is provide for a temporary and revocable privilege to an owner or tenant to use common property.

The Chan case involved one tree. More than 500 pages of affidavit material and more than 600 pages of authorities were filed, which caused the Judge to wonder "how many other trees that represents".