COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Valley's Edge Park Ltd. v Holden,* 2026 BCCA 447

Date: 20261113
Docket: CA50847

Between:

Valley's Edge Park Ltd.

Appellant/
Respondent on Cross Appeal
(Petitioner)

And

Moira Holden and Denis Holden

Respondents/
Appellants on Cross Appeal
(Respondents)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Donegan
The Honourable Mr. Justice Riley

On appeal from: Orders of the Supreme Court of British Columbia, dated June 24, 2025 and April 30, 2026 (*Valley's Edge Park Ltd. v Holden*, 2025 BCSC 1177 and 2026 BCSC 780, Golden Docket S6907).

Counsel for the Appellant/ Respondent on Cross Appeal:	M.A.S. Blakley
Counsel for the Respondents/ Appellants on Cross Appeal:	G.B. Davison, K.C.
Place and Date of Hearing:	Vancouver, British Columbia October 19, 2026
Place and Date of Judgment:	Vancouver, British Columbia November 13, 2026

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

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Concurred in by:
The Honourable Justice Donegan
The Honourable Mr. Justice Riley

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Summary:

In this appeal, the appellant challenged a judge's decision to deny an injunction that would require a strata lot owner in a recreational resort to dismantle a deck built without permission under the registered building scheme. The judge decided an injunction was not necessary; rather, $5,000 in damages would suffice. Among other things, the appellant said the judge erred by failing to appreciate injunctions are the presumptive remedy in these cases. The appellant also argued the judge should have made the lot owner pay all the appellant's legal fees and expenses arising from the injunction proceeding, as per the building scheme.

The respondents opposed the appeal and brought an appeal of their own, taking the position they should not have been made to pay any costs for the injunction proceeding.

HELD: both appeals are dismissed. The judge did not err in law, err in principle, or commit a palpable and overriding error of fact in awarding damages in lieu of an injunction. This is a highly discretionary decision, informed by the individualized circumstances of the case. There is also no principled basis on which to set aside the judge's interpretation of the relevant provision of the building scheme specific to legal fees and expenses. Finally, the cross appeal, brought by the respondents, has no merit.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

[1] This case involves both an appeal and cross appeal.

[2] The appeal is from a Supreme Court order awarding the appellant, Valley's Edge Park Ltd. ("Valley's Edge"), equitable damages in lieu of a permanent mandatory injunction for the respondents' non-compliance with a statutory building scheme and denying full indemnity for the appellant's legal fees and expenses. The appellant received costs for the petition on a party and party basis.

[3] The cross appeal is focused solely on costs. The respondents submit the appellant was not substantially successful in the petition proceeding and the parties should have been ordered to bear their own costs.

[4] I would dismiss both appeals.

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Factual Background

[5] The appellant administers a recreational strata resort in Edgewater. The respondents own a strata lot in the resort, which they purchased in 2021. A cabin sits on the lot and functions as the respondents' principal residence. This was their second purchase at the resort. They have owned one or more lots since 2008.

[6] The lots are subject to a building scheme that was created by the appellant in 2006 (the "Scheme"), and is registered under the *Land Title Act*, RSBC 1996, c 250 [*LTA*].

[7] In accordance with s 220(3) of the *LTA*, the Scheme's restrictions run with and bind each strata lot, applying to: (a) the owner; (b) each purchaser, lessee, and sublessee; and (c) each successor in title, future purchaser, lessee, and sublessee.

[8] The Scheme prohibits lot owners from constructing improvements on their lot unless they first obtain approval from the appellant. The provisions of the Scheme most relevant to issues on appeal read this way:

> 2.2 No Improvement shall be undertaken, constructed, erected or placed on any Strata Lot unless or until plans of specification showing compliance in all respects with these restrictions showing elevations, siting, size, set backs, exterior colour scheme, landscaping and all materials to be used have been submitted to and approved in writing by the Administrator.
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> 2.3 The Administrator shall have the sole right and power to approve or to reject such plans and specifications in its discretion. All decisions of the Administrator shall be final and binding.
>
> 2.4 It is the intention of this Building Scheme and Design Guidelines that all Improvements are to be controlled as to their design for the benefit of the Strata Lots and the development known as the Valley's Edge Park as a whole.
>
> 2.5 The Administrator shall receive and consider plans and specifications in a timely manner, and either approve or reject the plans and specifications, or make further recommendations for alterations of the plans and specifications.
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> 2.6 No Improvement shall be constructed or placed on a Strata Lot in a manner that impedes the views or sight lines of adjacent Strata Lots. In addition to the foregoing, Improvements must be constructed or placed in accordance with set back requirements of the Regional District of East Kootenay.
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> …

> 5.13 No owner will allow any breach of any covenants contained herein to continue for more than thirty (30) days after notice and writing delivered to the owner of the Strata Lot by the Administrator requesting the owner to remedy such breach, and if the owner allows such breach to continue the Administrator may cause such work as may be necessary to cure the breach to be performed and the cost thereof including the administration of legal costs shall be a debt owing by the owner, payable upon delivery to the owner of such Strata Lot of an invoice for such work or services.
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> [Emphasis added.]

[9] The Scheme includes a schedule with "Design and Development Guidelines" that apply to improvements. Section 4 of the guidelines stipulates that:

> The Administrator requires detailed information about the proposed Improvements and other developments within the Strata Lot including detailed plans and a site drawing. Each Strata Lot owner who proposes to construct Improvements upon a Strata Lot shall submit to the Administrator a completed Architectural Review Form and such plans of the proposed Improvements as the Administrator may require. The Strata Lot owner is encouraged to meet with the Administrator to discuss plans prior to detailed design. All decisions of the Administrator regarding the acceptance or non-acceptance of the proposed Improvements, the compliance of the proposed Improvements with these guidelines or any interpretation of these guidelines, shall be final and binding upon all Strata Lot owners.
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> [Emphasis added.]

[10] In 2022, the respondents built a deck adjacent to their cabin. Due to a breakdown in the personal relationship between the respondents and Glen Ortt, the president and agent of the appellant, the respondents notified the president of the resort's elected strata council in July 2022 of their plan to build the deck rather than engage directly with Mr. Ortt.

[11] The president of the strata council told the respondents the council did not have authority to approve construction of the deck and that approval lay solely with the appellant. The respondents nonetheless chose to proceed with their planned construction.

[12] The president of the strata council passed the respondents' material to Mr. Ortt but not until September 2022. By this time, the respondents had built their deck.

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[13] There was evidence before the lower Court that the respondents had previously sought and received approval for improvements to their first lot, including a deck and deck extensions. As such, they understood and were familiar with the approval process. Their decision to proceed with the deck in 2022 was made knowing they had not received approval from the appellant before construction.

[14] In November 2022, Mr. Ortt sent a letter to the respondents telling them the deck did not comply with the Scheme and had been built without approval. The respondents were given 30 days to remove the deck or to submit "complete building plans" to the appellant. They were told that if they did neither of these things, the appellant would take legal steps to enforce the Scheme.

[15] The respondents replied by sending a hand-drawn diagram of deck dimensions to Mr. Ortt and telling him to bring that material to the attention of the court when he started legal proceedings.

[16] In December 2022, Mr. Ortt asked the respondents if their reply to his November letter was intended to be an application for approval. If it was, he considered the application incomplete and he denied approval for the deck.

[17] The respondents refused to remove the deck.

[18] The parties' intransigence resulted in the appellant petitioning for a permanent mandatory injunction in the Supreme Court, asking that the respondents be ordered to dismantle the deck. The appellant argued that allowing the deck to remain in place would render the Scheme meaningless and send a message to other lot owners that the Scheme would not be enforced.

[19] The respondents opposed an injunction on the basis that the deck does not interfere with any other owner's quiet enjoyment of the resort and removing it would be time consuming, costly, and of no practical benefit.

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Proceeding Below

[20] The petition proceeding involved three stages: (1) an application for an injunction; (2) an assessment of equitable damages in lieu; and (3) a decision on costs.

Injunction application

[21] Reasons for judgment on the injunction application were released in March 2024 and are published as *Valley's Edge Park Ltd. v Holden*, 2024 BCSC 377.

[22] The judge commenced his analysis by noting the respondents did not dispute they built their deck without the appellant's approval: at para 22. Thus, they were in breach of the Scheme.

[23] The judge instructed himself on the legal principles applicable to non-compliance with a statutory building scheme, including that "[a]lthough mandatory injunctions are the normal remedy for breach of building schemes, equitable damages can also be ordered in lieu": at para 24, citing *Arbutus Park Estates Ltd. v Fuller*, 1976 CanLII 1118, 74 DLR (3d) 257 at pp 260, 265 (BCSC), emphasis added [*Arbutus Park Estates*]. In *Arbutus Park Estates*, a judge awarded damages in lieu of an injunction for a garage that was 75% built when the occupants were advised it did not comply with the applicable building scheme. They nonetheless completed the project, in abject defiance of a demand to stop construction.

[24] The judge found that Mr. Ortt's reason for not approving the deck in December 2022 appeared "thin." Mr. Ortt denied approval because he thought the deck "looked like an afterthought or tag-on appendage", rather than because the deck would impede the views or sight lines of adjacent lot owners or otherwise have significant impact on them: at para 28.

[25] The judge found as a fact that the application for an injunction was filed as a matter of principle rather than because the deck interfered with the enjoyment and use of the resort. He found the motivation for the application was to "[develop] a precedent that the [Scheme] cannot be ignored or breached": at para 31.

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[26] The judge made several additional findings of fact:

- The material sent to the strata council president in July 2022 bore "the hallmarks of an application for approval": at para 40.
- Mr. Ortt's letter to the respondents in December 2022 told them their application for approval was incomplete and then rejected it, without disclosing what was missing: at para 41. The letter revealed "no effort to identify changes that might have been met with approval": at para 44.
- There was no explanation for the delay between receipt of the respondents' material by the strata council president in July 2022 and Mr. Ortt's first response to the respondents in November 2022: at para 42.
- The deck has little if any visual impact on other strata lot owners and nothing appears out of character with the cabin, the upper deck surrounding the cabin, or the resort in general: at para 43.
- The Scheme does not particularize aspects of construction that are restricted or permitted. As such, building the deck did not involve breaches of specific building restrictions other than failing to obtain approval before construction: at paras 46-47.
- The respondents' breach of the Scheme will not significantly impact the interests of other lot owners: at para 50. There is no evidence the deck interferes in any way with the use and enjoyment of other lots: at para 53.
- The appellant's decision to deny approval in December 2022 was arbitrary and did not account for the possibility of modifications that could address Mr. Ortt's concerns: at para 51.

[27] Based on these findings, the judge declined to grant an injunction and found equitable damages were an appropriate remedy for breach of the Scheme:

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> [56] On all of the evidence, I find that this is not an appropriate case to order removal of the new deck. I have considered the option of ordering the respondents to pay damages in a sufficient amount that will operate as a disincentive to all others who may wish to flaunt the [Scheme]. [T]he petitioner's claim for a mandatory injunction has not been made out and I am satisfied that enforcement of the [Scheme] by way of a damages order can still protect the community interests of all owners in the Resort against creeping or incremental violations of the [Scheme].
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> [Emphasis added.]

[28] The appellant did not plead damages in lieu of an injunction. However, the judge decided this would be an appropriate case to permit the appellant to amend its pleadings for that purpose: at para 57.

Damages award

[29] After the release of judgment on the injunction application, the petition was amended to seek damages.

[30] Damages were then assessed and in June 2025, the judge released his decision on *quantum*: *Valley's Edge Park Ltd. v Holden*, 2025 BCSC 1177.

[31] At the start of the damages hearing, the appellant asked the judge to reconsider granting an injunction. He declined, noting the appellant had filed an appeal from the original denial of injunctive relief and the appeal was outstanding: at para 17.

[32] The judge then turned to quantifying damages. The appellant sought $20,000 as a "meaningful deterrent against breaches of the [Scheme] and to underscore the importance of the integrity of that scheme": at para 6. The respondents said the deck cost $1,800 to build, as they did the labour themselves, and the amount sought by the appellant was both "exorbitant and arbitrary": at para 9. They asked the judge to award only nominal damages.

[33] After instructing himself on the relevant legal principles (at paras 13-16), the judge decided justice would "manifestly not have been done if the [appellant was] merely given a nominal sum, or no sum, in substitution for the mandatory injunction":

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at para 22, citing *Wrotham Park Estate Co. v Parkside Homes Ltd.*, [1974] 1 WLR 798 (Ch D) at 815 (England and Wales).

[34] Ultimately, he ordered the respondents to pay the appellant $5,000. He described the damages award as an "objective assessment of the amount … [the appellant] would likely have accepted to grant relief from the [Scheme] and what the respondents could have reasonably been required to incur to construct an improvement which complied with the restrictions in the [Scheme]": at para 30.

Petition costs

[35] The parties submitted written submissions specific to costs. Judgment on costs was released in April 2026: *Valley's Edge Park Ltd. v Holden*, 2026 BCSC 780.

[36] The appellant sought full indemnity for its legal fees and expenses in the petition proceeding based on s 5.13 of the Scheme. The respondents argued against full indemnity, taking the position s 5.13 does not clearly and unequivocally provide for same. They also submitted that success in the petition proceeding had been divided and the parties should bear their own costs.

[37] The judge interpreted s 5.13 and gave it a narrow scope:

> [21] In this case, the respondents are correct in that the clause referring to costs is not "clearly and unequivocally expressed" in the [Scheme]. The clear and unequivocal meaning of clause 5.13 is only that the administrator can recover costs of performing "work" to correct a breach. In the context of this case, "work" refers to physical work to remove an improvement which was placed on the strata lot without the approval of the administrator. The petition did not succeed in obtaining the remedy of an injunction.
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> [22] Moreover, the phrase "such work as may be necessary to cure the breach to be performed and the cost thereof including the administration of legal costs shall be a debt owing by the owner" does not clearly and unequivocally encompass a claim for full indemnity for legal costs for a procedure which did not involve the performance of work to cure the breach.
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> [23] Further, no amount is payable until the petitioner has delivered to the owner of a strata lot [an] invoice for the work or services. In this proceeding no invoice has been issued and neither the amount claimed nor nature of the services provided are before the court.

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> [24] In my view, delivery of the invoice would have been necessary to trigger the respondent's obligation to pay costs and would have alerted the respondents to the nature and measure of those costs. As will be discussed further in these reasons, knowing the amount of the claim can be an important aspect to the exercise of the court's discretion to refuse a "contractual remedy" for costs.
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> …
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> [32] I am satisfied that the terms of the [Scheme] refer to the administration of legal costs when the administrator has performed work to cure the breach. This clause is not sufficiently clear or unequivocal that, absent the physical removal of the deck which was not authorized by the administrator, the administrator can claim indemnity costs for a petition it was unsuccessful in prosecuting.

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[38] Based on this interpretation, the judge denied full indemnity: at para 33. He went on to hold that if he was wrong about his interpretation of s 5.13, he would have exercised his discretion to deny full indemnity in any event:

> [47] In my view, the legal proceedings were prolonged due to the pleadings filed initially by the petitioner. Its failure to make an alternative claim for equitable damages … resulted in the petition proceeding with a second hearing.
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> [48] It must be noted that the principal complaint here was not the appearance of the deck nor any specific issue concerning the deck which might have resulted in a refusal of approval by the administrator. Moreover, there is no indication of what costs are claimed, and the court is deprived of evidence that would be helpful in determining whether the extraordinary circumstances have been met by the respondent to resist the claim for full indemnity costs.
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> [49] In the result, if I am wrong in the earlier decision, I would still not grant the petitioner its full indemnity costs …

[39] The judge found the appellant substantially successful in the petition proceeding and ordered party and party costs against the respondents: at para 49.

Issues on Appeal

[40] As noted, there is both an appeal and cross appeal.

[41] The appeal challenges the decision to award damages in lieu of an injunction and the denial of full indemnity for the appellant's legal fees and expenses.

[42] In its factum, the appellant alleges multiple errors by the judge—11 in total.

[43] The cross appeal focuses on costs. The respondents allege the judge was plainly wrong to award party and party costs. In their notice of cross appeal, the respondents sought special costs against the appellant. However, that order was not pursued in their factum or at the hearing of the appeal. I consider it to have been abandoned.

[44] No one challenges the *quantum* of the $5,000 damages award.

Standard of Review

[45] Each of the decisions at issue here attracts a deferential standard of review.

[46] The decision to deny an injunction and to award damages in lieu was discretionary. As explained in *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2022 BCCA 26, this Court may only interfere with the denial of injunctive relief where:

> [28] … the judge erred in principle, gave no or insufficient weight to relevant considerations, considered irrelevant factors, or made a decision that is so clearly wrong as to amount to an injustice: *Barrie v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2021 BCCA 322 at para. 87.

[47] The denial of full indemnity and the order for party and party costs also attracts deference. The test for appellate interference with a costs award was succinctly stated this way in *Peace River Partnership v Cardero Coal Ltd.*, 2023 BCCA 351 [*Peace River*]:

> [128] Costs awards are discretionary, and thus also subject to considerable deference. Appellate interference will only be justified where a judge makes a misdirection of law, an error in principle, a palpable and overriding error of fact, or, otherwise, the award is so clearly wrong as to amount to an injustice: *Gichuru v. Purewal*, 2021 BCCA 91 at paras. 13–14; *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 23.

Discussion

[48] I will address the appeal and cross appeal in turn.

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Injunction application

[49] The judge correctly instructed himself that at law, he had the discretion to deny a permanent mandatory injunction and to award equitable damages in lieu. See, for example, *Arbutus Park Estates*; *417489 BC Ltd. v Scana Holdings Ltd.,* 1998 CanLII 6770, [1998] BCJ No 140 (BCSC) at paras 4, 8-10 [*Scana Holdings*].

[50] The appellant does not dispute that a court can award damages in lieu. However, it says this discretion should be exercised sparingly and the judge made multiple errors in doing so.

[51] I do not consider it necessary to review and comment in-depth upon each of the errors alleged by the appellant. I do not consider those errors, either individually or in their cumulative effect, to support appellate interference with the judge's discretion in a case where he found, as a fact, that the breach of the Scheme will not significantly impact the interests of other lot owners and the deck does not interfere with their use and enjoyment of their lots or the resort.

[52] The appellant argues that once non-compliance with a statutory building scheme has been established, an injunction is the presumptive remedy and respondents to a petition must prove damages would constitute an adequate alternative to an injunction before a judge may properly consider the presumption to have been rebutted. The appellant says the judge erred in principle by failing to appreciate that framework.

[53] I find this argument unpersuasive.

[54] It is clear from the judge's reasons on the injunction application that he understood an injunction is the "normal" or "usual" remedy for breach of a building scheme: at paras 24-26. He was alive to this principle.

[55] In support of its submission, the appellant points to para 47 of the reasons, in which the judge stated that mandatory injunctions "may be appropriate where the breaches of building schemes involve specific works or specific construction

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requirements that are prohibited unless requisite approvals have been granted" (emphasis added).

[56] As I read para 47 and its placement in the reasons, it does not reflect misdirection on the law. Rather, the judge was simply noting that in cases involving breaches of a building scheme that are grounded in non-compliance with construction specifications, a court may be less likely to award damages in lieu of the usual remedy. In *Scana Holdings*, for example, the judge declined to award damages in lieu because the non-compliant conduct involved a use of land that was prohibited by the scheme, as opposed to a mere failure to obtain approval for a permitted use: at para 12. Clearly, the nature of the non-compliance, the extent to which it departs from the scheme or from the scheme's objects, or the impact of the non-compliance on others who may be affected, will logically inform a judge's exercise of discretion.

[57] Contrary to the appellant's suggestion, the judge also appreciated the reason why injunctive relief is the usual remedy in these cases: building schemes "reflect a broad concern for community interests" in residential property development, including the interests of the developer and all owners: at para 23. He was alive to the appellant's concern about breach of the Scheme, namely, that it was "against the interests of all owners in the [r]esort if owners are allowed to ignore the [Scheme] and seek forgiveness after the fact instead of seeking permission before undertaking new and unapproved improvements": at paras 19, 27, 43, 50.

[58] In deciding this case, the judge also relied upon *Foy v 0933164 B.C. Ltd.*, 2022 BCSC 2046, which recognized that statutory building schemes serve as a form of "local law": at para 30, citing *Gubbels v Anderson*, 1994 CanLII 16636 at paras 19, 23, 91 BCLR (2d) 379 (BCSC). He additionally cited to *Scana Holdings*, which highlighted the community focus of building schemes: at para 7.

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[59] Reasons for judgment are read as a whole, and here, it cannot reasonably be said that in the petition proceeding the judge ignored or gave no weight to the protective role and collective benefit of a building scheme in deciding whether to grant or deny injunctive relief.

[60] In *Hill v Herd*, 2025 BCCA 173 [*Hill*], a nuisance case, this Court set out the analytical approach to deciding whether to award damages in lieu of an injunction:

> [56] … First, the decision to award damages in lieu of a permanent injunction as a remedy in a nuisance claim is discretionary and the exercise of that discretion should not be lightly interfered with. Second, once a nuisance is established an injunction is the presumptive remedy. Third, the broad discretion of a trial judge to award damages in lieu of an injunction should be exercised judicially and in light of the factors identified in *Shelfer*, but is not to be fettered. Fourth, the discretion should not be exercised by engaging in a balancing of convenience and language suggesting such a balancing of interests is to be avoided. Fifth, the evidence that may be considered in engaging in the balance of convenience analysis on an interlocutory injunction application (such as, for example, the nature and extent of the harm that may be suffered by the respondent if an injunction is granted or that which will be suffered by the applicant if one is refused) may be considered in exercising the discretion to refuse a permanent injunction. Finally, the effect of the nuisance on third parties and the effect of a permanent injunction on the community may be considered in the exercise of the discretion.

[61] *Shelfer v City of London Electric Lighting Co.*, [1895] 1 Ch 287 (CA) [*Shelfer*] referred to in *Hill*, holds that damages may be appropriate where: (1) the injury to the petitioner's legal rights is small; (2) that injury is capable of being estimated in money; (3) it is one that can be adequately compensated by a small payment; and (4) an injunction would be oppressive to the respondent: *Hill* at para 34.

[62] Assuming without deciding the *Hill* framework applies to injunctions sought for breaches of a statutory building scheme (as opposed to claim in nuisance), I do not see that the judge erred. The appellant asserts in its factum that contrary to *Hill*, the judge failed to appreciate that "injunctions to prohibit breaches of a building scheme ought to be as a matter of course" (emphasis added), but as discussed, this argument ignores paras 24-26 of the judge's reasons.

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[63] The appellant points to para 56 of the judge's reasons, in which he stated that the "petitioner's claim for a mandatory injunction has not been made out" and says this shows the judge misunderstood an injunction is the usual remedy for breach of a building scheme. The appellant contends the judge wrongly cast an onus on the appellant to justify an injunction when the fact of a breach was not in dispute.

[64] I read para 56 differently, in the context of the entire judgment. In my view, the judge was simply saying here that in the circumstances of this case, a damages award was the appropriate remedy, and he did not accept the appellant's position that an order requiring the respondents to dismantle the deck was an absolute necessity to protect the community interests underlying the Scheme.

[65] *Hill* directs that once a nuisance has been established, an injunction is presumptive. However, it also holds there is a "broad discretion" to award damages in lieu of an injunction, the *Shelfer* factors cannot "fetter" that discretion, and in deciding the issue, a judge may consider the nature and extent of the harm the parties may suffer if an injunction is granted or refused, as well as the impact of an injunction (or no injunction) on third parties and the affected community: at para 56.

[66] The judge in this case engaged in precisely that analysis. In deciding whether an injunction was needed, or damages would suffice, he considered the perspectives of the parties, the impact of his decision on them, and the impact of an injunction or no injunction on both the effectiveness of the Scheme and other lot owners. As explained in *Hill*, this was a question the judge was in a "privileged position to address": at para 70. It is not the role of this Court to second-guess the judge's assessment based on our own view and weighing of the relevant evidence.

[67] I also consider the appellant's remaining challenges to the denial of an injunction to be without merit. They can be addressed summarily.

[68] The appellant contends the judge improperly conducted a balance of convenience analysis in denying an injunction. I do not read the reasons for judgment on the injunction application that way. The phrase "balance of

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convenience" appears nowhere. Instead, the assessment conducted by the judge is consistent with para 56 of *Hill.* In that assessment, he was entitled to consider the same kind of factors one might typically see in a balance of convenience analysis. In my view, he did not overstep.

[69] The appellant says a proper application of the *Shelfer* factors plainly favours an injunction. Respectfully, this ground of appeal asks the Court to re-weigh the evidence and to conduct its own assessment of relevant factors in the context of the record. That is not our role, and, in any event, *Hill* makes it clear that although the *Shelfer* factors appropriately inform the exercise of discretion, they are not dispositive: at para 56.

[70] The appellant's factum submits an injunction was necessary because the respondents "acted in a high-handed manner and stole a march on the plaintiff." Despite knowing of the requirement for approval by the appellant, the respondents built their deck without approval, and from the appellant's perspective, they never submitted a proper application for approval even though the necessity of doing so was brought to their attention. The appellant says the respondents acted in flagrant disregard of the Scheme and denying an injunction failed to account for that conduct. Consequently, it must be that in denying an injunction, the judge gave the respondents' knowing non-compliance with the Scheme little if no consideration.

[71] The appellant's description of the respondents' conduct as high-handed is not without merit. It is readily apparent from the record and from the judge's findings of fact that the respondents constructed their deck knowing it had not been approved in accordance with the Scheme and their terse response to Mr. Ortt's November 2022 letter was unhelpful. However, the judge was plainly alive to the respondents' conduct and accounted for it in his analysis. See, for example, paras 22, 44, 52 of his reasons. He accepted that the respondents had a "duty and responsibility" to comply with the Scheme: at para 44. He found they failed in that duty. He did not

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ignore their conduct; however, it formed but one part of the overall factual matrix for the judge to consider and he was entitled to find it was not determinative.

[72] The appellant submits the judge failed to consider (or misapprehended): the final and binding nature of the approval process and the broad scope of the appellant's discretion as administrator; the unique nature of building schemes and the interests they serve to protect; the importance of deterring breaches through injunctive relief; and the absence of evidence supporting undue hardship if the respondents were ordered to dismantle their deck. In my view, the judge did not fail to consider these things. See paras 7 (which cites s 2.3 of the Scheme), 19, 23, 27, 43, 49, 56. Again, no one factor is determinative.

[73] The appellant also submits the judge considered irrelevant factors in denying an injunction, including: the skeletal reasons given in December 2022 for not approving the deck; the lack of detailed criteria in the Scheme for constructing improvements; whether the respondents would have been granted approval had they complied with the approval process; and the impact of the deck on other lot owners. I consider all these factors to have been open for consideration by the judge. The weight assigned to them was for the judge to determine.

[74] Assuming without deciding that the *Hill* framework applies, the judge had broad discretion in assessing whether damages were appropriate in lieu of an injunction, including the conduct of both sides, the nature and content of the Scheme, and as per *Hill*, the impact of an injunction (or no injunction) on the affected community. This is an assessment that occurs case-by-case and in the round.

[75] Finally, the appellant challenges some of the judge's findings of fact. In particular, the appellant says: (1) the judge wrongly found there was no explanation for the delay between the respondents' notice to the president of the strata council in July 2022 and Mr. Ortt's first communication to the respondents in November 2022; and (2) he misapprehended the Scheme as not referring to a specific form for seeking approval.

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[76] I have reviewed the record and although it contains evidence that Mr. Ortt did not learn of the deck and non-compliance until September 2022, there is no explanation for why he did not communicate directly with the respondents about the issue until November 2022. In my view, that is the delay of most significance to the judge for purposes of his analysis.

[77] Specific to the second finding, I accept the judge misspoke in his first set of reasons when he said the Scheme makes "no mention" of a specific form for seeking approval. Schedule 1 to the Scheme stipulates the use of an "Architectural Review Form." However, no such form is attached to the Scheme nor did the parties adduce evidence of a specific form that is mandated (or regularly used) for seeking approval or its accessibility to lot owners. The record indicates the respondents had previously obtained approval from Valley's Edge for improvements to their first purchased lot, without a specified form. Overall, I am satisfied the misspeak was of no consequence.

[78] Having considered the numerous errors alleged by the appellant, I am not persuaded this Court should interfere with the judge's exercise of discretion to award damages in lieu. I see no principled appellate basis for doing so.

Costs on a full indemnity basis

[79] The judge's denial of full indemnity for legal fees and expenses is the focus of the appellant's second challenge to the orders below.

[80] The appellant raises multiple concerns with the judge's interpretation of s 5.13 and the alternative exercise of discretion to deny full indemnity, in any event.

[81] Among other things, the appellant says the effect of the judge's interpretation is to compensate the administrator of the Scheme for costs if it chooses to physically dismantle a non-compliant improvement without judicial authorization but decline compensation when the administrator seeks an injunction for that same purpose. From the appellant's perspective, this interpretation results in an absurdity. Instead, it says s 5.13 was intended to compensate the appellant for <u>all</u> fees and expenses

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arising from any enforcement steps undertaken in response to a breach that continues after notice, including applying for injunctive relief, whatever the outcome.

[82] The respondents say the judge did not misinterpret s 5.13, although their factum does not develop a substantive argument in support of their position.

[83] For ease of reference, I will repeat s 5.13:

> No owner will allow any breach of any covenants contained herein to continue for more than thirty (30) days after notice and writing delivered to the owner of the Strata Lot by the Administrator requesting the owner to remedy such breach, and if the owner allows such breach to continue the Administrator may cause such work as may be necessary to cure the breach to be performed and the cost thereof including the administration of legal costs shall be a debt owing by the owner, payable upon delivery to the owner of such Strata Lot of an invoice for such work or services.
>
> [Emphasis added.]

[84] Building schemes and restrictive covenants that flow from them are treated as contracts for the purpose of interpretation. Contractual interpretation is generally a matter of mixed fact and law and attracts a deferential standard of review on appeal: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 50 [*Sattva*]; *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras 21, 24 [*Ledcor*]. However, the law recognizes an exception specific to standard form contracts that have precedential value and for which there is no meaningful factual matrix specific to the parties. In the latter cases, a correctness standard will apply: *Ledcor* at paras 24, 46.

[85] Both parties take the position that the judge's interpretation of s 5.13 must be assessed applying a correctness standard, akin to a standard form contract, because the Scheme runs against each strata lot, the interpretation will affect all lot owners, and these parties did not negotiate its terms. As such, there is no meaningful factual matrix unique to them. The appellant says that if this Court interprets s 5.13 differently than the judge, it therefore means the judge committed an extricable error of law or principle which, in turn, displaces the deference that ordinarily attaches to a costs award.

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[86] It is not clear to me a correctness standard properly governs the judge's interpretation.

[87] This Court has previously ruled that the interpretation of a building scheme, which finds form as a restrictive covenant against land, is a matter of mixed fact and law. In *Hofer v Guitonni*, 2011 BCCA 393 [*Hofer*], for example, this Court held that:

> [14] … interpreting a restrictive covenant, whether found in a building scheme or not, involves no special approach. It is a contractual document, and the general principles of contract interpretation apply. The precise words used must be looked at in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as guides to interpretation.
>
> [Emphasis added.]

[88] *Gubbels v Anderson*, 1995 CanLII 1377, 8 BCLR (3d) 193 (BCCA) [*Gubbels*], is to the same effect:

> 15 … the restrictive covenant must be given the interpretation it requires as a contractual document ... Sometimes some skill is required in the process of interpretation, but the most rudimentary tool of interpretation is that a document should be interpreted in the context of its own factual matrix. It must be looked at as the conditions existed at the time it was created. While purpose is not the only guidance of what it meant, its purpose at that time may be one of the guides.
>
> 16 This document [in this case] … must be interpreted as of the time it was created. It is not merely a question of looking at the precise words used in the document without any sense of the background and purpose of the document. In this case, the factual matrix and the time when the document was created are tools that must be used in giving it its interpretation …
>
> [Emphasis added.]

See also *Goodwin v Riley*, 2006 BCCA 581 at para 8 [*Goodwin*].

[89] In my view, this Court's jurisprudential direction to consider the factual matrix surrounding the creation of the scheme and the conditions that existed at the time, logically attracts the deferential standard of review endorsed in *Sattva*.

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[90] In *Restrictive Covenant Instrument 213AT (Re)*, 2021 ABCA 138, the Alberta Court of Appeal explicitly applied a deferential standard to the interpretation of a building scheme and was not prepared to interfere with the lower court's interpretation in the absence of palpable and overriding error: at paras 12, 67.

[91] Functionally, this Court appears to have taken the same approach in *Hofer*, by looking to see if the judge at first instance committed an error in law or principle in the interpretive process before intervening, rather than simply construing the building scheme itself: at paras 20-22. See also *Paterson v Burgess*, 2017 BCCA 298 at paras 22-31 and *Anderson v Michaels*, 2018 BCCA 237 at paras 23-24, which offer additional examples of a deferential approach.

[92] At the same time, I accept that in other cases from this Court, the standard of review applied to the interpretation of a building scheme is either unclear (*Gubbels*) or appears to favour correctness (*Goodwin*).

[93] I do not consider it necessary to determine the proper standard of review in this case. That is because I am satisfied the appellant's challenge to the denial of full indemnity for its legal fees and expenses (which is the issue on appeal), fails whether a deferential or a correctness standard is applied.

[94] The parties jointly perceived correctness as the applicable standard and made only brief submissions specific to that issue. We have received no substantive argument on standard of review or an analysis of this Court's prior related jurisprudence specific to building schemes, whether registered or common law. No one has made a meaningful attempt to show why the interpretation of restrictive covenants that flow from a building scheme appropriately engages the *Ledcor* exception. In this context, I am reluctant to conduct the analysis. Instead, this is a question I consider better answered in an appeal where the standard of review is raised as a live issue and the parties make full submissions.

[95] I turn then to assessing this judge's interpretation of s 5.13. I will start with the application of a deferential standard.

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[96] Before construing s 5.13, the judge reviewed the parties' positions on the meaning and scope of the provision. The appellant, who was responsible for crafting and including this provision in the Scheme, argued that its purpose is to avoid burdening the administrator with any expenses that arise from enforcing the Scheme, including legal: at paras 7-9. The respondents argued that in the absence of clear and unequivocal language mandating the payment of legal fees and expenses for enforcement action, s 5.13 could not be interpreted this broadly: at paras 13-16.

[97] In his analysis, the judge reminded himself of the contextual background to the Scheme, including that it was registered under the *LTA*: at paras 20, 27. Consistent with his previous rulings in the case, he considered the nature and the purpose of the Scheme, noting it was for the "mutual benefit of all owners": at para 29.

[98] The judge instructed himself on the general rules of contractual interpretation in discerning the scope of s 5.13: at para 28. This included the rule that it is not the subjective intention of the crafting parties, in this case the appellant, that determines the interpretation. Rather, the document, including a building scheme, is to be interpreted objectively: at para 27.

[99] The judge considered the text of the impugned provision (at paras 21-23); the fact that the word "costs" is generally understood to mean something different from actual legal fees and expenses (at para 25, citing *Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd.*, 2010 BCCA 469 at para 42); the principle that a contractual entitlement to indemnification on a solicitor-client basis must be "clearly and unequivocally expressed" to be effective (at para 26, citing *Eisler Estate v GWR Resources Inc.*, 2020 BCSC 562 at para 31 [*Eisler*], affirmed 2021 BCCA 247); and the principle that "[w]here a contract is sufficiently clear, the courts will generally enforce express covenants for solicitor-client costs, absent misconduct or harshness": at para 31.

[100] Ultimately, the judge found s 5.13:

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> [32] … refer[s] to the administration of legal costs when the administrator has performed work to cure the breach. This clause is not sufficiently clear or unequivocal that, absent the physical removal of the deck which was not authorized by the administrator, the administrator can claim indemnity costs for a petition it was unsuccessful in prosecuting.
>
> [Emphasis added.]

[101] In my view, the judge did the interpretive analysis required of him by *Sattva* and the appellant has not persuaded me of palpable and overriding error.

[102] Section 5.13 contains no reference to seeking injunctive relief, initiating any other form of legal action or court-based proceeding to remedy a breach, or taking steps to legally enforce the Scheme, generally. Nor is there any reference to "legal fees and expenses" arising from one or more of those types of initiatives, or otherwise: at para 26, citing *Eisler*. Instead, s 5.13 refers to the "administration of legal costs" (an inherently ambiguous phrase), arising from "work" that the administrator "causes" to be "performed" to "cure" the breach. The judge found this language unclear. I agree. In the absence of wording that reflects and is consistent with the "work" including legal action to enforce the Scheme and obtain a remedy, I do not consider it palpably wrong for the judge to have adopted the narrow interpretation that he did.

[103] I reach the same result applying a correctness standard to the judge's interpretation, specific to the claim for full indemnity. Again, that is the specific interpretive issue before this Court. In my view, whether a deferential or correctness standard is applied, the interpretive outcome on the entitlement to full indemnity would have been the same.

[104] The law in this province is clear. A contractual entitlement to indemnification for legal fees and expenses on a solicitor-client basis is only effective if it is "clearly and unequivocally expressed": *Eisler* at para 31. See also *Peace River* at paras 129-136 and *Catherwood Towing Ltd. v Lehigh Hanson Materials Limited*, 2024 BCCA 348 at para 44. The appellant takes no issue with that proposition.

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[105] The judge found that overall, s 5.13 lacks clarity. As noted, I agree with that assessment. Moreover, specific to legal fees and expenses, this provision is far less clear than the one in *Eisler*, which was held to allow for full indemnity. That provision stated: "[t]he Company shall pay all legal fees and expenses incurred by [the plaintiff] in contesting or disputing any termination or in seeking to obtain or enforce any right or benefit provided by this Agreement, provided that [the plaintiff] is successful in any such action": *Eisler* at paras 8, 34, emphasis added. I appreciate a contractual entitlement to full indemnity need not use this precise language before it will be effective; however, s 5.13 is a far cry from the *Eisler* articulation.

[106] In support of its position on full indemnity, the appellant relies on *Sunset Lakes Owners Association v Gingras et al*, 2025 ONSC 467 [*Sunset Lakes*] and *Chapadeau v Devlin*, 2019 ONSC 241 [*Chapadeau*]. Those decisions are, of course, not binding on this Court. In any event, the full text of the provision allowing for full indemnity in *Sunset Lakes* does not appear in the judgment. As such, that decision is of no real assistance. The wording of the relevant provision(s) in *Chapadeau* is fundamentally different than s 5.13 and explicitly guaranteed indemnification for "any liability and all costs, charges and expenses" arising from "any action, suit or proceeding": at para 7, emphasis added. *Chapadeau* is much more closely aligned with *Eisler* than the provision before us.

[107] Given *Eisler* and later authorities applying a "clear and unequivocally expressed" test to the interpretation of clauses that allegedly guarantee full indemnity, I am satisfied that even if the judge incorrectly limited the application of s 5.13 to the physical removal or dismantling of improvements following a successful injunction application or otherwise, he correctly held that this provision is too vague on the issue of legal fees and expenses to support a claim for full indemnity.

[108] With this result, it is not necessary to address the appellant's alleged errors in the judge's decision to exercise his discretion to deny full indemnity in any event.

[109] I would not accede to the appellant's second ground of appeal.

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Whether the appellant is entitled to any costs

[110] In their cross appeal, the respondents acknowledge a judge has wide discretion in deciding costs: *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2026 BCCA 267 at paras 22-26. However, they submit he was plainly wrong to award costs to the appellant in this case.

[111] Among other things, the respondents say the judge gave insufficient weight to his finding that the appellant's failure to include a claim for damages in its pleadings prolonged the litigation by necessitating a second hearing. At that second hearing, the appellant sought $20,000 in damages but received only $5,000. The appellant also failed to persuade the judge to reconsider the denial of an injunction. Specific to the issue of costs, the appellant lost on its full indemnity argument. With this context, overall, the respondents say the appellant should not have received any costs for the petition proceeding and instead, the parties should have been ordered to bear their own costs.

[112] I consider the respondents' challenge to the costs award devoid of merit.

[113] These orders attract a highly deferential standard of review, and appellate courts must be "cautious in intervening": *Cambie Surgeries* at para 22, citing *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at para 52; *Peace River* at para 128.

[114] Although the judge denied the request for an injunction, the petition itself was allowed and the respondents were ordered to pay damages for their breach of the Scheme. But for their conduct, there would have been no need for an application for injunctive relief. Respectfully, the respondents' cross appeal underplays their role in the dispute between the parties.

[115] The appellant did not seek damages in lieu, and as a result, a second hearing to address damages was necessary. However, I consider this factor attenuated in the costs analysis. The judge invited an amendment to the pleadings that would allow for the second hearing.

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[116] The judge noted in his decision on damages that administrators have an obligation to enforce the requirements of the Scheme: at para 28. This too attenuates the appellant's decision to focus on an injunction, rather than damages in lieu.

[117] The judge declined to award the nominal damages sum sought by the respondents: at para 22. Their position on *quantum* was rejected.

[118] Finally, it is apparent from the pleadings the respondents attempted to introduce irrelevant issues into the injunction application, including steps taken by the appellant in 2018 to amend the resort's bylaws and other matters they say put Mr. Ortt in a conflict of interest. The judge declined to address these issues because of the lack of relevance. By placing them on the table, the respondents contributed to the prolix nature of the petition proceeding.

[119] Familiar with the entire context of the case, the parties' approach to the litigation, and having presided over three separate stages, the judge found the appellant to have been substantially successful overall. In my view, this was a matter for the judge to weigh and determine, and I see no principled basis for this Court interfering with his discretion.

Disposition

[120] For the reasons provided, I would dismiss the appeal and cross appeal.

[121] I would award costs on the appeal to the respondents, to be assessed applying Scale A.

[122] I would award costs on the cross appeal to the appellant, again to be assessed applying Scale A.

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[123] I consider Scale A appropriate because in my view, both sides made the appeal proceeding more complex than it needed to be.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Mr. Justice Riley"

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