Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Herman v. The Owners, Strata Plan VR 2266*, 2020 BCCRT 1409

B E T W E E N :

MICHAEL HERMAN

APPLICANT

A N D :

The Owners, Strata Plan VR 2266

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This strata dispute is about entitlement to a parking stall, parking stall rules and a parking special levy.

2. The applicant, Michael Herman, owns residential strata lot 88 (SL 88) in the respondent strata corporation, The Owners, Strata Plan VR 2266 (strata). He says

the owner developer (developer) sub-assigned a parking stall licence to Mr. Herman when he purchased SL 88. Mr. Herman says the strata has deprived him of his exclusive parking rights by passing parking rules and declining to exempt him from the parking rules.

3. Mr. Herman seeks a declaration that the parking rule is unenforceable and that his guests have the same parking rights as other owners' guests. Mr. Herman seeks an order that the strata amend the parking rule to exclude him, provide exclusive use of a parking stall for vehicle storage at all times, and not to interfere with, or attempt to interrupt or terminate, his assigned parking rights. Finally, Mr. Herman claims $993.75 in parking costs.

4. Mr. Herman says the strata has been collecting parking income, attributing it to the owners, then notionally collecting it through a special levy passed in 2014. He says the special levy is invalid and contrary to the *Strata Property Act* (SPA). Mr. Herman asks the strata pay the owners the money it collected under the parking levy in the past year, or at least pay Mr. Herman his share. He also asks that the strata be ordered not to collect any more money under the levy.

5. The strata denies that Mr. Herman has exclusive use of parking stall 88. It says the developer's master licence agreement was not executed and, if it was, the developer breached its fiduciary duty to the owners, or contravened the then applicable *Condominium Act* (CA). The strata says, if Mr. Herman does have exclusive parking rights under the agreement, they are limited by the strata's parking rules. It says the parking rule is valid.

6. The strata agrees that the 2014 special levy is irregular and says it is taking steps to either nullify or correct the levy. It says Mr. Herman's claim is moot and that the CRT should not interfere with the strata's governance.

7. Both parties ask for reimbursement of their legal fees. Mr. Herman claims $14,382.68. The strata claims $10,694 in legal fees and $212.28 in expenses.

8. Mr. Herman is represented by a lawyer, Shawn Smith. The strata is also represented by a lawyer, Anil Aggarwal.

JURISDICTION AND PROCEDURE

9. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

10. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

11. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

12. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

13. In its submissions, the strata pre-emptively objected to any reply submissions from Mr. Herman that addressed matters that should have been raised in his initial submissions. I find Mr. Herman submitted new arguments in response to the strata's initial submissions about the validity of the assignment agreements, the CRT's jurisdiction over Form B remedies, the application of a second disclosure statement, and whether the strata council met its legislated standard of care. I disagree with the strata that Mr. Herman should have anticipated the strata's arguments on these issues, mostly because the strata did not identify these, or any, arguments in its

Dispute Response. Rather, the strata categorically denied all Mr. Herman's claims without providing any reasons for the denial.

14. On balance, I find it would be procedurally unfair to deny Mr. Herman the ability to respond to the strata's arguments. I do not find it necessary to provide the strata with the opportunity to provide any final response to Mr. Herman's reply submissions about the agreements' validity, as the strata provided very thorough initial submissions which pre-emptively addressed the issues raised in Mr. Herman's reply submissions.

ISSUES

15. The issues in this dispute are:

    a. Is Mr. Herman entitled to the exclusive use of a parking stall under a sub-assignment?

    b. If so, do the strata's parking rules violate Mr. Herman's parking rights and, if so, what is the appropriate remedy?

    c. Was the strata's April 2019 decision not to exempt Mr. Herman from the parking rule significantly unfair and, if so, what is the appropriate remedy?

    d. Is the strata's 2014 parking levy invalid and, if so, what is the appropriate remedy?

    e. Is either party entitled to reimbursement of its legal fees and, if so, how much?

BACKGROUND AND EVIDENCE

16. In a civil claim such as this one the applicant, Mr. Herman, must prove his claims on a balance of probabilities. I have reviewed all the evidence and submissions provided by both parties, but only refer to that necessary to explain my decision. I have also considered the cases referred to by each party but only refer to decisions I find applicable and useful in this dispute.

17. The facts are largely undisputed. The strata was created on October 7, 1988 under the CA, the predecessor to the *Strata Property Act* (SPA). The strata then consisted of 99 residential and 4 commercial strata lots. The complex has 2 underground parking levels; Level 1 is designated as common property (CP) on the strata plan, while Level 2 is a separate strata lot (SL 100). Each parking level contains 160 parking stalls.

18. The developer's June 7, 1988 disclosure statement sets out the developer's intention to cause the strata to enter into a Parking Stall Exclusive Use Agreement (Parking Agreement) with the developer, while the developer was still the sole owner of all strata lots. The developer intended to sub-assign its parking licence for one CP parking stall to each residential strata lot purchaser.

19. Attached to the disclosure statement is an unsigned copy of the Parking Agreement between the developer and the strata. In the agreement, the strata grants the developer a 99 year contractual licence to the exclusive use and enjoyment of the common property parking stalls, for $10. The strata agrees that the developer may sub-assign its parking stall rights to the owner of each strata lot, at the developer's discretion. The strata agrees that any sub-assignment is absolute and that the strata will not "interfere with or attempt to interrupt or terminate" the parking stall rights.

20. Mr. Herman co-purchased SL 88 from the developer on November 30, 1988. The October 17, 1988 contract of purchase and sale stated that the strata lot included "the exclusive use of one underground parking stall to be designated prior to the Completion Date".

21. On November 30, 1988 the developer sub-assigned to Mr. Herman the exclusive use of parking stall 88, as described in the October 7, 1988 Parking Stall Exclusive Use Agreement. By signing the Sub-Assignment agreement Mr. Herman agreed to use parking stall 88 "in accordance with the rules and regulations of the strata in effect from time to time."

22. Many of the residential strata lots are operated as short-term rentals, which means many of the residential strata lot owners are "non-resident" owners, including Mr.

Herman. Mr. Herman has used a CP parking stall since November 1988, although it is unclear if this is parking stall 88. He says he parked a vehicle there from May 2015 to April 2019, whether he was in residence or not.

23. On February 25, 2019 the strata council passed a new parking rule (Parking Rule), which prohibited storage, unregistered or uninsured vehicles in parking stalls. It also prohibited a non-resident owner from occupying any parking stall for more than 2 weeks at a time. The Parking Rule allowed an owner to use a maximum of 3 parking stalls per stay, for up to 2 weeks, although extensions could be requested from the strata.

24. In March 2019 Mr. Herman asked for an exception to the rule. He wanted to park his vehicle in the CP parking lot until June 2019, even though he was not then staying at the strata. The council declined Mr. Herman's request on April 10, 2019, to be consistent with the Parking Rule.

25. At the July 8, 2019 annual general meeting (AGM) the strata proposed a parking bylaw, which was voted down. The owners, however, ratified a rule package which included an amended parking rule (Amended Rule). Like the earlier Parking Rule, the Amended Rule prohibits unregistered or uninsured vehicles, or storage (including vehicles) in the CP parking stalls. The Amended Rule requires all vehicles to display a valid parking pass at all times. Parking stalls may not be rented or assigned to anyone who is not an owner, tenant, or guest. Like the earlier rule, the Amended Rule allows for owners to use up to 3 parking stalls per stay for themselves, family, and guests.

26. On August 14, 2019 Mr. Herman asked the strata to recognize his parking rights under the Sub-Assignment and the Parking Agreement and give him exclusive use of parking stall 88. He attended a strata council hearing on January 27, 2020.

27. In its February 3, 2020 letter to Mr. Herman, the strata agreed to investigate Mr. Herman's claim for exclusive use of parking stall 88. It agreed to give Mr. Herman the exclusive use of parking stall 88, and only parking stall 88, unless its investigation showed the Parking Agreement, or Sub-Assignment was invalid or had been

terminated. The strata agreed not to enforce the Amended Rule against Mr. Herman during its investigation. Mr. Herman was excluded from using up to 3 CP parking stalls per stay for himself and guests.

ANALYSIS AND REASONS

Is Mr. Herman entitled to exclusive use of a parking stall under the Sub-Assignment?

28. Mr. Herman says the strata acknowledged his exclusive parking rights in its February 24, 2020 Form B Information Certificate. The certificate states that CP parking stall 88 is allocated to SL 88 and that it may have been allocated by owner developer assignment. No details of the assignment were noted and no documents relating to the assignment were attached to the Form B.

29. I disagree with the strata that the Form B is invalid because the property manager issued the certificate without the strata's consent. As agent for the strata, the property manager had the power to bind the strata, as the principal (see *Sherwin v. Chaudhary,* 2013 BCPC 81).

30. Under section 59(5) of the SPA, the information contained in a Form B is binding on the strata in its dealings with a person who reasonably relies on it. However, I find Mr. Herman cannot reasonably have relied on the Form B as he knew the strata was investigating the validity of the claimed parking rights. It would be unreasonable for Mr. Herman to rely on that Form B. Further, it contains no details or documents describing the alleged assignment. I find the certificate is not determinative of Mr. Herman's parking rights.

31. Mr. Herman says he is entitled to exclusive use of parking stall 88 under the Sub-Assignment and the Parking Agreement. He says the strata cannot attack the Parking Agreement's validity because the developer is not party to this dispute and a decision about the agreement's validity could affect the developer and potentially other owners. As noted, Mr. Herman bears the burden of proving that he has the exclusive parking rights he claims. This includes proving the developer had the exclusive

parking rights to assign to Mr. Herman through the Parking Agreement. I will address each of the strata's arguments in turn.

32. The strata says Mr. Herman has failed to prove that the strata and the developer executed the Parking Agreement. Neither party was able to produce an executed Parking Agreement. Absent a copy of the executed agreement, I may rely on other documents that refer to the Parking Agreement and other evidence to determine whether it was likely that the agreement was executed (see *The Owners, Strata Plan BCS3642 v. Unimet Levo Development Limited Partnership,* 2015 BCSC 1921).

33. The strata says it was unable to locate a signed copy of the Parking Agreement. In a May 31, 2019 email to the strata the developer was "sure it was turned to the strata corporation along with the original documents". From this statement I infer the developer previously signed the Parking Agreement.

34. Mr. Herman did not have a copy of the Parking Agreement. Although, by signing the Sub-Assignment, Mr. Herman agreed that he had read, and was bound by, the terms of the Parking Agreement, the Sub-Assignment did not state that the Parking Agreement was attached. I find it reasonable that Mr. Herman might not have a copy of the signed Parking Agreement and draw no adverse inference against him.

35. I agree with Mr. Herman that the June 7, 1988 disclosure statement indicates that the developer intended to enter into an agreement for exclusive common property parking rights with the strata. I note that the developer signed an undertaking that the contents of the disclosure statement were true, which gives the statement significant weight, although the statement sets out the developer's intentions and not its actions.

36. I also agree with Mr. Herman that it would be unlikely that the developer would sub-assign rights it did not have. I find the developer's execution of the Sub-Assignment indicates it must have executed the Parking Agreement which gave the developer the parking rights. Further, the Sub-Assignment says the Parking Agreement was executed on October 7, 1988. I find it unlikely that the developer would enter a date of execution, if the execution did not happen.

37. I accept Mr. Herman's argument that the strata has, by its past actions, recognized that some owners had exclusive parking use agreements. Based on the October 1988 special general meeting (SGM) minutes I find the strata decided a proposed pay parking scheme in the CP parking lot would not "derogate existing parking lease agreements" of some owners. The strata's former property manager (BB) advised that the original strata lot owners entered into "sub-lease agreements" for the CP parking stalls at the time the units were first sold, as documented in the January 21, 1999 strata council meeting minutes. Although the strata argues that BB's statements were made based on recollection, the minutes indicate that BB's statements were confirmed by 2 separate documents the strata had in its possession at that time, although the minutes do not identify what the documents were. Overall, I find the strata has, in the past, acknowledged that at least some owners obtained exclusive parking stall rights through sub-assignment agreements. I find the strata previously acted as though the Parking Agreement was executed.

38. Based on this cumulation of evidence, I find it more likely than not that the Parking Agreement was executed on October 7, 1988, as identified in the Sub-Assignment agreement. I am satisfied that the developer obtained the exclusive use of the CP parking stalls from the strata, under a 99-year licence with the strata.

39. The strata says the Parking Agreement is not valid because it disposes of common property without complying with section 20 of the CA.

40. Section 20 of the CA allows a strata to dispose of common property by way of special resolution. Section 20(2) requires the strata to execute the appropriate instrument, where there has been such a resolution. I note that there are no strata meeting minutes documenting or other documentation of a special resolution by the strata owners relating to the Parking Agreement.

41. It is undisputed that, as of October 7, 1988, the developer was the sole owner of all the strata lots in the complex. As the sole owner, the developer was in the unique position of acting for, and on behalf of, the strata, before there were any other strata members or council (see Part V of the CA). In such a situation, the developer's

execution of an agreement between the developer and the strata may be sufficient to show a special resolution of the strata (see *Phelps Holdings Ltd. v. The Owners, Strata Plan, VIS 3430,* 2010 BCCA 196). I find that to be the case here. As was the case in *Phelps,* I find that, although the process may have been completed with something less than the ideal level of formality, that lack of formality does not justify interfering with a unanimous decision of the strata over 30 years ago.

42. The strata also says the developer breached its fiduciary duty to future and prospective owners by entering into the Parking Agreement on behalf of the strata.

43. An owner-developer has a fiduciary duty not to use its control of the strata to better its own position at the expense of present purchasers and future owners (see *The Owners, Strata Plan 1261 v. 360204 BC Ltd.,* 1995 Can LII 659 (BC SC). However, an owner-developer is not necessarily in breach of its fiduciary duty by engaging in transactions for its own benefit, so long as it follows the development plans described in the disclosure statement and prospective purchasers have notice of the owner-developer's intentions (see *Marshall Mountain Telecom Ltd. v. The Owners, Strata Plan EPS 4044,* 2019 BCSC 1180).

44. There is no doubt that the Parking Agreement benefitted the developer because it provided control over the 160 CP parking stalls in Level 1, for 99 years. However, I find the Parking Agreement also benefitted the individual residential strata lot owners, because the developer's purpose in obtaining exclusive control of the CP parking stalls was to sub-assign one stall to each residential strata lot purchaser. That purpose would have been apparent to any purchaser who obtained the June 7, 1988 disclosure statement. On balance, I find the strata did not breach its fiduciary duty to the future strata lot owners, as the Parking Agreement benefits both the developer and the individual owners.

45. The strata provided an October 30, 2002 disclosure statement from another owner developer, which says the CP parking stalls are not assigned to any particular strata lot. I find this disclosure statement unhelpful in this dispute, as it relates to only 8

residential strata lots in the complex, none of which are SL 88. I find this disclosure statement does not apply to Mr. Herman's alleged parking rights.

46. In summary, I find the Parking Agreement was executed by the developer and is valid. I find Mr. Herman is entitled to the exclusive use of parking stall 88 in the CP parking lot under the terms of his Sub-Assignment.

Do the parking rules violate Mr. Herman's assigned parking rights?

47. Mr. Herman says that the Amended Rule cannot be enforced, because it was defeated as a bylaw. I disagree.

48. Bylaws must be approved by a ¾ vote of commercial owners and a ¾ vote of residential owners at an AGM or SGM (SPA, section 128(1)(c)). However, rules only require a majority vote of owners at an AGM or SGM to be ratified (SPA, section 125(6)). The July 8, 2019 AGM minutes show that, although the proposed parking bylaw was not approved, the Amended Rule was ratified by a majority vote. I find the Amended Rule valid and enforceable.

49. Mr. Herman says the strata has acted significantly unfairly toward him in passing parking rules which do not recognize his assigned parking rights. As the Parking Rule was replaced with the Amended Rule at the July 2019 AGM, I will consider only the remaining Amended Rule.

50. The CRT has jurisdiction to determine claims of significant unfairness because the language in section 164 of the SPA is similar to the language of section 123(2) of the CRTA (formerly section 48.1(2)), which gives the CRT authority to issue such orders (see *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164).

51. The courts and the CRT have considered the meaning of "significantly unfair" and have found it means oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the BC Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

52. The BC Court of Appeal considered the language of SPA section 164 in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *Watson* at paragraph 28:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

53. The recent decision *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, indicates that the consideration of an owner's expectations is not always necessary when determining significant unfairness, but may make sense when a strata council is exercising its discretionary authority. As the strata is not required to pass rules under the SPA, I consider it exercised its discretion in proposing the Amended Parking Rule at the 2019 AGM. Applying the court's reasoning in *Kunzler,* I will consider the reasonableness of the Mr. Herman's expectations.

54. I agree with Mr. Herman that the Parking Agreement requires the strata not to "interfere with or attempt to interrupt or terminate the parking rights" sub-assigned by the developer to any purchaser. I find Mr. Herman had an objectively reasonable expectation that the strata would recognize his right to the exclusive use of parking stall 88. However, I do not find that the Amended Rule violates that expectation, as explained below.

55. First, I do not find the Amended Rule subverts Mr. Herman's exclusive use of parking stall 88. I disagree that the rule allows parking stall 88 to be used by other resident owners and their guests. I find there are more CP parking stalls than there are residential strata lots, which means parking stall 88 does not need to be used by another owner to allow for the resident owner use set out under the Amended Parking Rule.

56. Second, I find exclusive use does not mean unfettered use. Although I agree with Mr. Herman that exclusive use means that only he can use the parking stall at any time,

I find he is not entitled to use it however he wants to. This is particularly so, given that clause 3 of the Sub-Assignment requires Mr. Herman to use his parking stall "in accordance with the rules and regulations of the strata in effect from time to time. So, while Mr. Herman has exclusive use of parking stall 88, I find he must abide by the strata's rules while using the stall.

57. Third, I do not find that the Amended Parking Rule "interferes with, interrupts, or terminates" Mr. Herman's right to exclusive use of parking stall 88. While the rule does not allow Mr. Herman to store a vehicle in the stall, he is entitled to park there, so long as he maintains vehicle insurance, registration, and displays a valid parking pass.

58. Mr. Herman argues that the Amended Rule restricts his right to park in his parking stall when he is not in residence. I disagree. I do not read the Amended Rule to restrict non-resident parking or limiting how long a vehicle can be parked in the CP parking lot for. The original Parking Rule specifically restricted non-resident parking to 2 weeks, and resident parking as well, but that time limit and mention of non-resident parking is not included in the Amended Rule. So, I find the Amended Rule does not preclude Mr. Herman from using parking stall 88 to park his vehicle when he is not resident in the strata, for as long as he wishes, so long as the vehicle remains in working condition, registered, and insured, as required by the rule.

59. I note that the strata's owners' manual, dated June 16, 2020, states that owners can only use the parkade when they are staying at the strata, or visiting for the day. I find this reflects the Parking Rule, rather than the Amended Rule.

60. I acknowledge that it may have been strata council's intention to restrict non-resident parking through the Amended Rule, and that the strata could further amend the rule to that effect at any time. If I had found the Amended Rule restricts non-resident parking, I would have found that to be an interference with Mr. Herman's exclusive use of parking stall 88, contrary to the Parking Agreement. While I find requiring insurance and registration places limits on Mr. Herman's use of the parking stall, I find restricting his use to the times when he is only staying in the strata interferes with

Mr. Herman's right to exclusive use of his parking stall. In other words, the strata may govern what Mr. Herman can do with the parking stall, but not when he may use it. Restricting the availability of the parking stall effectively interferes with Mr. Herman's exclusive use. However, as I find the Amended Rule does not restrict Mr. Herman's ability to park in his stall when he is not in residence, I find it does not violate his reasonable expectation to the exclusive use of parking stall 88.

61. I do not find the Amended Rule unenforceable and so decline to order the strata to amend the rule or provide Mr. Herman with exclusive use of a parking stall for vehicle storage, as I find he is not entitled to unfettered use of the parking stall.

62. I further decline to order the strata not to interfere with, interrupt, or terminate Mr. Herman's assigned parking rights, as I have found the strata has not done so here, and that obligation is already set out in the Parking Agreement.

63. Mr. Herman asks for the strata to provide his guests with the same parking rights as other owners' guests. I take Mr. Herman to refer to the strata's February 3, 2020 decision to allow Mr. Herman temporary use of parking stall 88 but disallow Mr. Herman to use up to 3 parking spots for himself and his guests, free of charge, when he is in residence.

64. I agree with Mr. Herman that the strata has effectively decided to apply the Amended Rule differently to him than to the other owners, because he has exclusive use of parking stall 88. The result is that Mr. Herman's guests are required to pay for parking when other owners' guests may park for free. I find this is unjust, inequitable, and unfairly prejudicial against Mr. Herman. I find that, under the Amended Rule Mr. Herman is entitled to use up to 3 parking spots, including parking stall 88, for himself and his guests, when he is in residence.

Was the strata's April 10, 2019 decision significantly unfair?

65. Mr. Herman says the strata's decision not to grant him an exemption to the Parking Rule in April 2019 was significantly unfair because it did not recognize his excusive right to use parking stall 88.

66. As noted above, I find the Parking Rule specifically excludes non-resident owners to park in the CP stalls for more than 2 weeks. For the reasons stated above, I find restricting Mr. Herman's ability to park in his stall interferes with his exclusive use of that parking stall. I find the strata's decision not to allow Mr. Herman to use his parking stall when not in residence violated his reasonable expectation to exclusive use of that parking stall. I find the strata's decision was significantly unfair to Mr. Herman.

67. In *Radcliffe v. The Owners, Strata Plan KAS1436,* 2014 BCSC 221, Mr. Justice Weatherill described section 164 of the SPA as "an equitable oppression remedy" and held that "if a claim under s. 164 is properly made out, any appropriate remedy will follow" to "right the wrong". I find the appropriate remedy is for the strata to reimburse Mr. Herman's parking costs.

68. In his submissions Mr. Herman amended his claim for parking costs to $393.75. I am satisfied that he spent that on off-site parking, as set out in his April 2019 invoice from a management company. I find the strata must reimburse Mr. Herman $393.75 in parking costs.

Is the 2014 Parking Levy Valid?

69. Sometime before, or around, 2003 the strata initiated a pay parking plan where it charged non-owners to park in the CP parking lot. The strata collected the parking revenue on behalf of the owners, as well as rental revenue from commercial SL 103, which the strata owns. It then attributed the overall yearly parking revenue and rental revenue to each owner proportionally, according to each owner's individual strata lot entitlement. The strata issued a yearly income statement setting out each strata lot's proportional share of parking and rental revenue for the owners' tax purposes. At no time did the strata distribute the actual revenue to the owners. None of this is disputed.

70. At the July 9, 2014 AGM the owners unanimously passed a "Revenue Distribution Special Levy" to offset the parking and rental revenues attributed to the owners. The strata says the purpose of the parking scheme, and the special levy, was to tax the parking and rental revenue in the hands of the strata lot owners, rather than in the

strata's hands, so that the strata could maintain its non-profit status. The strata says it initiated the scheme, and the levy, on the advice of its then strata manager.

71. Regardless of the reasons behind the parking scheme, the special levy must comply with the SPA. Section 108(3) requires a special levy resolution to include the total amount of the levy, the method used to determine each strata lot's share of the levy, and the amount of each strata lot's share. The 2014 resolution says the levy will be equal to the parking and strata lot distribution to the owners, which I find is not a total amount of the levy. I further find the resolution fails to set out each strata lot's share of the levy.

72. Mr. Herman says the strata has failed to account for the special levy monies separately from the other strata money and has failed to separately invest the money collected under the special levy, as required under section 108(4) of the SPA. The strata does not dispute this. Based on the strata's 2019 AGM notice, and AGM minutes, I agree that the strata has failed to invest, or account for, the special levy monies apart from the general operating funds. On balance, I find the special levy resolution contravenes section 108(3) of the Act and the strata, in failing to account for the levied monies, has contravened section 108(4) of the Act.

73. The strata acknowledges there are "inconsistencies" with the 2014 special levy, and the parking scheme generally. It is undisputed the strata obtained an accounting opinion on July 3, 2019, which questioned the validity of the parking scheme structure. In March 2020 the strata's property managers advised all owners that it would not be allocating parking revenues to the owners in the 2019-2020 fiscal year as it had previously done. On June 26, 2020, the strata advised all owners that it was seeking legal advice about the 2014 special levy, to ensure the strata was complying with the SPA.

74. The strata says that it cannot remedy the 2014 special levy without an owners' vote at an AGM. It says that, since it has taken steps to address the 2014 special levy, and the parking scheme, the issue is moot. I disagree, as the special levy still existed as of final submissions in this dispute, and Mr. Herman is still asking for repayment

of his share of the special levy contribution. I find the issue is not moot as the special levy controversy continues to affect the rights of the parties (see *Binnersley v. BCSPCA,* 2016 BCCA 259).

75. The strata also says the CRT should not interfere with the strata's governance as it has taken steps to remedy the special levy and revenue distribution issues. I agree with the strata that the court, and the CRT, should not lightly interfere with, or override, the democratic process of the strata (see *Oakley et al v. Strata Plan VIS 1098*, 2003 BCSC 1700). However, in *Oakley*, and the other cases cited by the strata, the owners sought orders striking down validly passed resolutions of the owners, which I find is not the case here. Further, although the strata has taken steps to address the issue, the evidence indicates the issue is not yet resolved, with no clear plan for resolution. I find it appropriate for the CRT to remedy this invalid special levy.

76. Sections 164 and 165 of the SPA permit the BC Supreme Court to grant relief to an owner against a strata corporation in the context of an invalid special levy (see *Christensen v. Strata Plan KAS 468,* 2013 BCSC 1714). Section 165 allows the court to order a strata to stop contravening, or perform a duty required under, the SPA, its bylaws, or its rules. The CRT has similar authority as set out in section 123 of the CRTA and confirmed by the Supreme Court in *The Owners, Strata Plan BCS 1721 v. Watson,* 2018 BCSC 164.

77. As was the case in *Christensen,* I find Mr. Herman has not proved that the strata's actions surrounding the special levy were significantly unfair. I find there is no conduct on the part of the strata that would have led a reasonable person to expect that the strata would refund the special levy contributions, particularly given the contributions did not come directly from the owners in the first place. There is no evidence that any other owners have had their special levy allocations refunded, so I find all owners have been treated equally.

78. I am, however, satisfied that the strata breached section 108(3) and (4) of the SPA.The wording in section 165(b) of the SPA implies that a strata's breach of the SPA must be current in order for an order to be made. What is current must be viewed

liberally and in the context of particular circumstances (see *Mitchell v. The Owners, Strata Plan KAS 1202*, 2015 BCSC 2153). Although the special levy resolution was passed in 2014, I find the strata continued to apply the levy by continuing to "collect" contributions under the levy until 2019. I further find the strata continues to breach section 108(4) in how it handles the special levy contributions. I am satisfied that the strata's breach of section 108 of the SPA is current, in the circumstances.

79. I find the 2014 special levy invalid. I order the strata to refrain from attributing parking revenue to the owners, under the 2014 special levy.

80. I find Mr. Herman is not entitled to reimbursement of the parking revenue attributed to him over the past 2 years because he did not pay those funds to the strata. I find the special levy "contributions" were notional and no money changed hands. Further, as the parking revenue went into the strata's operating account, I find the special levy "contributions" have been used for the intended purposes of offsetting the strata's operating costs and reducing the owners' strata fees, including those of Mr. Herman. On balance, I find the owners, including Mr. Herman are not entitled to reimbursement of the parking revenue "contributions". I dismiss this claim.

Should either party pay legal fees?

81. Both parties claim that the other should pay their legal fees. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. In this dispute I find both parties have been partly successful, so I can consider both parties' claims for legal fees.

82. Under CRT rule 9.5(3), the CRT will not order reimbursement of legal fees except in disputes with extraordinary circumstances. Rule 9.5(4) says in determining whether, and to what degree, the CRT should order reimbursement of legal fees, the CRT may consider the complexity of the dispute, the representative's degree of involvement, whether a party or the representative's conduct has caused unnecessary delay or expense, and any other factors the tribunal considers appropriate.

83. It is undisputed that a 30-year old parking stall licence agreement, a unique parking revenue distribution scheme, and allegedly invalid 6-year old special levy, are complex issues. I find that both legal representatives provided extensive submissions and argument. However, I find that neither the complexity of the issues, or the involvement of legal counsel, resulted in an overly complex, delayed, or expensive dispute. I am not persuaded that these factors result in extraordinary circumstances.

84. I reviewed the CRT's decisions which consider methods of assessing special costs, such as *Kornylo v. The Owners, Strata Plan VR 2628*, 2019 BCCRT 1387, and *Parfitt et al v. The Owners, Strata Plan VR 416 et al,* 2019 BCCRT 330. Although those decisions are not binding on me, I agree with that the CRT's ability to order reimbursement of legal fees is different from, but similar to, special costs under the BC Supreme Court Civil Rules. In short, special costs may be awarded when a party engages in reprehensible conduct in the course of litigation, persists in unfounded allegations of fraud, or makes resolution of an issue far more difficult than it should have been.

85. I disagree with Mr. Herman that the strata acted reprehensibly in refusing to change the parking rules or rescind the special levy. I find the strata was entitled not to rely on Mr. Herman's allegations and assertions and to investigate the matter, which I find they did. Further, it is a party's conduction during the litigation that leads to an order for special costs, not pre-litigation conduct (see *Smithies Holdings Inc. v. RCV Holdings Ltd.,* 2017 BCCA 177).

86. I also disagree with the strata that Mr. Herman's claims were unnecessary or premature. As noted above, I find Mr. Herman's special levy claim was neither moot nor unnecessary. I note that the strata was still seeking legal advice on the allegedly invalid special levy one year after it was aware that the levy was potentially invalid. I do not find Mr. Herman's dispute was unnecessary, particularly as he has been partially successful.

87. Overall, I find that the circumstances of this dispute were not so extraordinary that legal fees should be awarded. I dismiss both parties' claims for legal expenses.

88. In summary I find Mr. Herman has the exclusive use of parking stall 88 under the Parking Agreement and Sub-Assignment. The Amended Parking Rule is enforceable, as it does not restrict Mr. Herman's non-resident parking rights. Mr. Herman is entitled to use up to 3 parking stalls for himself and guests, including parking stall 88, when he is staying at the strata. Mr. Herman is entitled to reimbursement of $393.75 in parking costs. I further find the 2014 special levy is invalid and the strata must not collect from, or attribute to, the owners any revenue distribution under the levy.

89. I dismiss the remainder of Mr. Herman's claims, and the strata's request for reimbursement of legal fees.

CRT FEES, EXPENSES AND INTEREST

90. As I find Mr. Herman was partly successful in this dispute, I find he is entitled to reimbursement of half his CRT fees, which equals $112.50. Mr. Herman does not claim reimbursement of any dispute-related expenses other than legal fees.

91. The strata claims reimbursement of $212.28 in Land Title search expenses. On balance, as I find the strata was largely unsuccessful in this dispute, I find it is not entitled to reimbursement of any expenses.

92. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Herman is entitled to pre-judgement interest on the $393.75 parking costs from April 10, 2019, the date of payment, to the date of this decision. This equals $10.23.

93. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Herman.

ORDERS

94. I order the strata to immediately:

    a. Grant Mr. Herman the use of up to 3 parking stalls, including parking stall 88, for himself and his guests during his stay, and

b. Refrain from attributing parking revenue to the owners under the 2014 special levy.

95. Within 14 days I order the strata to pay Mr. Herman a total of $516.48, broken down as follows:

    a. $393.75 as reimbursement of parking costs,

    b. $10.23 in interest under the COIA, and

    c. $112.50 in CRT fees.

96. Mr. Herman is also entitled to post-judgment interest under the COIA.

97. I dismiss Mr. Herman's remaining claims.

98. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Sherelle Goodwin, Tribunal Member