Civil Resolution Tribunal

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Type: Societies and Cooperatives

Civil Resolution Tribunal

Indexed as: *Martyn v. The Willows Housing Cooperative Association,* 2024 BCCRT 434

B E T W E E N :

KATHRYN MARTYN

APPLICANT

A N D :

THE WILLOWS HOUSING CO-OPERATIVE ASSOCIATION

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about maintenance fees in a housing cooperative.

2. The applicant, Kathryn Martyn, is a member and resident of the respondent cooperative association, The Willows Housing Cooperative Association (co-op).

3. Ms. Martyn says the co-op's monthly fees are unreasonable, and have been calculated incorrectly. Specifically, she says it is unfair that all occupants pay the same monthly fees, because the result is that occupants of smaller units are paying a disproportionate share of the co-op's expenses. Ms. Martyn says this fee structure constitutes oppressive and bad faith conduct by the co-op. She also says the co-op allowed impermissible proxy voting and did not have quorum at the general meetings where the fee increases were approved.

4. In her submissions, Ms. Martyn clarified and narrowed the orders originally requested in her dispute application. She now requests that the Civil Resolution Tribunal (CRT) make the following orders:

    - The co-op must charge monthly fees based on square footage/unit entitlement, rather than a flat fee per unit.
    - The co-op must use its contingency fund to compensate those occupants who have overpaid monthly fees (small unit occupants), starting from August 2014.

5. Ms. Martyn originally requested an order that the co-op board meet and decide whether to impose a special levy on occupants of larger units, to replenish the contingency reserve fund. In her later submission she said she no longer requests that order, so I have not considered it.

6. The co-op says it has charged maintenance fees based on valid lease agreements, and that all maintenance fees were approved by majority vote of the co-op members. The co-op asks me to dismiss Ms. Martyn's claims.

7. Ms. Martyn is self-represented in this dispute. The co-op is represented by a board member.

8. For the reasons set out below, I allow Ms. Martyn's claims in part.

JURISDICTION AND PROCEDURE

9. The CRT has jurisdiction (authority) over certain cooperative association claims under section 125 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.

10. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. I find this dispute does not turn on issues of credibility. I am satisfied I can fairly decide this dispute based on the evidence and submissions provided, without an oral hearing.

11. The CRT may accept as evidence information that it considers relevant, necessary, and appropriate, even if the information would not be admissible in court.

12. A CRT Vice Chair made a preliminary decision in this dispute on October 16, 2023. In that decision, the Vice Chair explained that the co-op owns all 40 strata lots in a strata corporation (strata). The co-op members, including Ms. Martyn, lease the strata lots from the co-op and occupy them. Ms. Martyn initially named the strata as the sole respondent in this dispute. She had also framed the dispute as being about strata fees under the *Strata Property Act* (SPA).

13. In the preliminary decision, the Vice Chair found that Ms. Martyn had no standing to bring a dispute against the strata about strata fees, as she was not a strata lot owner, and did not pay strata fees under the SPA. The Vice Chair found that the dispute about monthly fees fell within the CRT's cooperative association jurisdiction.

14. After the preliminary decision, at Ms. Martyn's request, CRT staff amended the Dispute Notice to name the co-op as a party, and to clarify that the dispute was about co-op fees. As directed in the Vice Chair's preliminary decision, the strata is no longer a party to this dispute.

15. I permitted Ms. Martyn to provide late evidence in this dispute. Since the co-op had an opportunity to respond to it, I find there is no procedural unfairness in admitting the late evidence.

ISSUES

16. The issues in this dispute are:

    a. Has the co-op charged fees incorrectly, or in an unfairly prejudicial manner?

    b. If so, what remedies are appropriate?

EVIDENCE AND ANALYSIS

17. In a civil claim like this one, Ms. Martyn, as the applicant, must prove her claims on a balance of probabilities (meaning "more likely than not"). I have read all the parties' evidence and submissions, but below I only refer to what is necessary to explain my decision.

18. As explained in the October 16, 2023 preliminary decision, the issue in this dispute is co-op maintenance fees. The co-op owns all 40 strata lots in the strata. This dispute is not about strata fees paid under the SPA, as Ms. Martyn is not a strata lot owner, and pays no strata fees.

19. The obligation to pay co-op maintenance fees is set out in the written lease. The co-op says every member has an identical lease. Ms. Martyn did not dispute this, so I accept it is true.

20. Ms. Martyn provided an unsigned copy of the lease. Term 24 of the lease says that if the parties have a dispute about the interpretation or fulfillment of the lease, or any other matter arising out of the lease, the dispute will be determined by an arbitrator under the *Commercial Arbitration Act.* This CRT is a different process, not contemplated in the lease. However, since neither party objected to the CRT's jurisdiction to resolve this dispute, I find I can decide it under CRTA section 125.

21. It defines the co-op as the "landlord", and the unit occupant as the "tenant". Page 1, section 3 of the lease says the parties agree to lease the strata lot to the tenant "on the terms and conditions set out in this agreement."

22. Term 3 of the lease governs maintenance fees. Term 3 states:

> The Tenant shall pay to the Landlord, on the first day of each and every month during the term of the Lease, without deduction or setoff, a monthly maintenance fee in an amount to be calculated and set by the Landlord pursuant to the Schedule attached, which amount will be in accordance with amounts ordinarily payable on similar strata lots. Any monies paid by the Tenant on account of the monthly maintenance fees are not refundable.

23. Term 5(j) of the lease also says the tenant agrees to pay the maintenance fees. Term 10 says the landlord will provide necessary management, operation and administration of the premises from the maintenance fees.

24. The Maintenance Fee Schedule (Schedule) is attached at the end of the lease, and I find it forms a binding term of the lease. The Schedule repeats that the tenant agrees to pay a monthly maintenance fee, "in an amount to be set by the Landlord on the 1st day of January of each year during the term of this Lease." The Schedule also includes the following relevant provisions:

    - The maintenance fee will include costs incurred by the landlord for maintenance of common areas, facilities, storage, and parking. The fee will include by is not limited to heating costs, hydro, water, sewage, lawn care, landscaping, snow removal, garbage, fire and liability insurance, strata lot maintenance and repair, etc.

    - The maintenance fee will not include property taxes and related assessments imposed by taxing authorities. The tenant is solely responsible for property taxes attributed to the strata lot.

25. Ms. Martyn argues that since 2014, the co-op has unfairly imposed "flat rate" maintenance fee increases on all units. She says that even though some units are larger than others, all occupants have been required to pay the same annual flat rate increases in their maintenance fees. Ms. Martyn says the lease, and fairness, require the co-op to increase maintenance fees based on unit entitlement, meaning proportional increases based on the square footage of each unit.

26. The co-op admits that units vary in size, and that it has imposed flat rate maintenance fee increases since at least 2014. The co-op says that neither the lease nor the CAA require it to base maintenance fee increases on unit entitlement or square footage.

27. “Unit entitlement” is not a term that appears in the CAA. It does appear in the SPA. The SPA defines unit entitlement as the number indicated in the Schedule of Unit Entitlement established under SPA section 246, that is used in calculations to determine the strata lot's share of the strata corporation’s common property, common assets, common expenses, and liabilities.

28. SPA section 246 says that a Schedule of Unit Entitlement must be deposited at the Land Title Office when a strata corporation is created. For a residential strata corporation that is not a bare land strata corporation, unit entitlement can be based on habitable area in square meters, the same whole number for each strata lot, or another method approved by the Superintendent of Real Estate.

29. The documents in evidence show that the strata in which the co-op is located has a registered Schedule of Unit Entitlement, with varying unit entitlements calculated based on the habitable square meters of each strata lot. This evidence confirms Ms. Martyn’s assertion that some co-op units are larger than others.

30. Ms. Martyn argues that the wording of the lease requires the co-op to assess maintenance fees based on unit entitlement. She also argues that because the occupants of smaller units effectively subsidize the contributions of the larger unit occupants, this is unfairly prejudicial to the smaller unit occupants.

31. The lease does not specifically say that maintenance fees must or should be based on unit entitlement. Rather, as summarized above, the lease says that maintenance fees must be set “in accordance with amounts ordinarily payable on similar strata lots.”

32. The lease does not define “similar strata lots.” I find this phrase is ambiguous. From the wording of the lease, it is unclear whether it means similar strata lots within the same building, or similar strata lots elsewhere. However, I find it would be

unreasonable to conclude that the phrase means the co-op must set its maintenance fees in relation to maintenance fees in other co-ops. The fees must cover various shared expenses, and it would be unreasonable to tie the fees used to pay those expenses to fees in another building, with potentially different expenses.

33. I find it is more reasonable to conclude that "similar strata lots" means similar within the same co-op building. In reaching this conclusion, I note that when the co-op was first created, maintenance fees were set proportionately, based on the Schedule of Unit Entitlement. I find that practice supports the conclusion that "similar strata lots" means strata lots of similar size, as document in the Schedule of Unit Entitlement.

34. In making this finding, I also note that the co-op units vary in size from 70.42 square meters to 106.18 square meters, which is a 50% difference. I find this difference is significant, and likely means the strata lots are not similar.

35. As noted above, Ms. Martyn argues that it is unfair for the smaller unit occupants to effectively subsidize larger unit occupants, by paying a larger proportion of co-op expenses.

36. CRTA section 127(2) allows the CRT to make an order to prevent or remedy an unfairly prejudicial action by a co-op. (See *Harding v. Meadow Walk Housing Co-operative*, 2021 BCCRT 1103.) To succeed in a claim about unfairly prejudicial actions or decisions, an applicant must establish that the co-op failed to meet the applicant's reasonable expectations and that, on an objective basis, that failure involved prejudicial consequences. (See *Dalpadado v. North Bend Land Society*, 2018 BCSC 835, as cited in *Pang v. Little Mountain Residential Care & Housing Society*, 2021 BCCRT 947).

37. I agree with Ms. Martyn that it is unfairly prejudicial for smaller unit occupants to pay a larger proportion of the co-op's expenses. In making this finding, I place significant weight on the fact that this co-op is located within a strata corporation. The SPA requires that the strata lot owners (the co-op, in this case), must pay strata fees for each strata lot based on the Schedule of Unit Entitlement. The purpose of the strata fees, as set out in the SPA, is to cover common expenses, including repairs and

maintenance of common property and common facilities, and to make the required contributions to the strata's contingency reserve fund (CRF). Under the Schedule of Unit Entitlement and SPA section 99, these financial contributions must be based on the size of each strata lot, with larger strata lots contributing a proportionally larger share of the strata's expenses.

38. However, the minutes in evidence indicate that the co-op is not paying strata fees, contrary to SPA requirements. Rather, the minutes show that the co-op uses money paid in co-op maintenance fees to pay for strata expenses. For example, the August 30, 2022 minutes show that the meeting participants voted to transfer $6,200 from the co-op's bank account to pay for strata landscaping expenses. Landscaping on common property is a strata expense, and should be paid from strata fees (or special levies). If the strata had collected strata fees, as it should have done, these fees would be proportionally larger for larger strata lots, as required under SPA section 99 and the Schedule of Unit Entitlement. The strata did not do this, and the co-op simply took maintenance fee money to pay for the landscaping expenses, without any provision for the proportional payments based on unit size required under the SPA.

39. Put another way, strata common expenses should be paid proportionately based on unit entitlement, but currently they are not.

40. Similarly, the August 25, 2021 minutes show that the co-op transferred $65,800 in co-op funds (collected through maintenance fees) to the strata's CRF. This is not permitted under the SPA. Rather, SPA section 99 says that CRF contributions must be paid proportionately by strata lot owners, based on unit entitlement.

41. These minutes show that by blending strata and co-op expenses, the strata and the co-op have effectively ignored the fact that the SPA requires common expenses and CRF contributions to be paid proportionately based on unit entitlement. I find Ms. Martyn had a reasonable expectation that the co-op would operate independently from the strata, and would not make payments to the strata that were inconsistent with the SPA.

42. Given this, I agree with Ms. Martyn that the co-op's actions were unfairly prejudicial to her. The co-op required her to pay a proportionately larger share of the co-op's contributions to the strata, even though strata expenses are supposed to be paid proportionately based on unit size.

Proxy Voting and Quorum

43. Ms. Martyn also argues that the co-op's maintenance fee increases are invalid because they were not properly approved at annual general meetings (AGMs). In particular, she argues that the increases were approved using impermissible proxy voting, and without proper quorum. The co-op did not provide any arguments about proxy voting or quorum.

44. The meeting minutes in evidence show that the co-op permitted proxy voting, which is prohibited under co-op rule 25. So, these votes are likely invalid.

45. Also, the August 30, 2022 minutes show other problems with how the meetings and voting were conducted. Specifically, the minutes show that the co-op maintenance fee increase was approved at the strata AGM. There is no evidence before me indicating that there was a co-op AGM. As explained in the preliminary decision, these 2 organizations are separate bodies, with separate memberships, constituted under different legislation. The co-op requires a separate AGM. And the co-op members are not entitled to vote at the strata's AGM, as they are not strata lot owners.

46. The August 30, 2022 minutes also show that the vote for the maintenance fee increase included proxy votes. As noted above, co-op rule 25 prohibits proxy votes. So, this vote is likely invalid.

47. From the minutes, it appears that the maintenance fee increases would have passed even without the proxy votes, or even if the proxy votes had been counted as votes against the fee increases. However, this does not address the issue that the co-op maintenance fee increases were approved at the strata AGM, not the co-op AGM. The evidence before me suggests there was no co-op AGM in 2022, and the co-op provided no evidence on this point.

48. There is nothing in the CAA, co-op rules, or lease that specifically say the co-op fee increases must be approved at an AGM. However, in its submissions in this dispute, the co-op specifically relies on the fact that the fee increase was approved at an AGM. Since the fee increase vote was not conducted at the proper meeting, using the correct (non-proxy) voting method, I find the co-op cannot reasonably rely on this argument.

49. I also note that the CAA and co-op rules require the co-op to hold AGMs each year, with no proxy voting. I find it was reasonable for Ms. Martyn to expect the co-op to follow these requirements when approving maintenance fee increases. I also find the co-op's failure to follow CAA requirements had objectively prejudicial consequences for Ms. Martyn. So, I find the co-op's meeting procedures were also unfairly prejudicial.

Remedies

50. Ms. Martyn requests an order that the co-op must charge monthly maintenance fees based on square footage/unit entitlement, rather than a flat fee per unit. For the reasons explained above, I agree. I order that the co-op's maintenance fees must be proportional, based on unit size as reflected the Schedule of Unit Entitlement.

51. Ms. Martyn also requests and order that the co-op use its contingency fund to compensate those occupants who have overpaid monthly fees (small unit occupants), starting from August 2014.

52. I do not make that order for 2 reasons. First, it is unclear from the evidence whether the co-op has a contingency fund. Rather, it appears that that the strata has a CRF, but as previously stated, the strata is a separate body, and must keep its funds and accounting separate from the co-op.

53. Second, I find the *Limitation Act* applies to Ms. Martyn's claim. Under the *Limitation Act,* Ms. Martyn is only entitled to contest maintenance fee increases approved within the 2 years before she filed her CRT dispute application on October 18, 2023. So,

she can contest the maintenance fee increase approved in August 2022, but not those approved in August 2021 or earlier.

54. I find the the appropriate remedy for the co-op's unfairly prejudicial conduct is to order the co-op to hold a new AGM or special general meeting (SGM), with proper notice as required in the CAA and rules, to re-vote on the maintenance fees from August 30, 2022 onwards. Again, these maintenance fees must be proportionate, based on unit size.

55. Once new maintenance fees are approved, the co-op must refund Ms. Martyn and other smaller unit occupants for any overpayment.

56. Ms. Martyn asked that I appoint her to calculate any overpayments. However, this is not required under the CAA or rules, and so I do not order it.

57. Finally, given the problems explained in my reasons above, I suggest, but do not order, that the co-op obtain legal advice to ensure it complies with the CAA and SPA.

CRT FEES AND EXPENSES

58. Ms. Martyn paid no CRT fees. Neither party claims dispute-related expenses. So, I order no reimbursement.

ORDER

59. I order that:

    a. The co-op's maintenance fees must be proportional, based on unit size as reflected in the Schedule of Unit Entitlement.

    b. Within 90 days of this decision, the co-op must hold an AGM or SGM, with proper notice as required in the CAA and rules, to re-vote on the maintenance fees from August 30, 2022 onwards.

    c. Within 60 days of the date new maintenance fees are approved, the co-op must refund Ms. Martyn and other smaller unit occupants for any overpayments.

60. I dismiss Ms. Martyn’s remaining claims.

61. This is a validated decision and order. Under CRTA section 57, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Kate Campbell, Vice Chair