Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

Neil Pritchard

APPLICANT

A N D :

The Owners, Strata Plan VIS3743

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicant Neil Pritchard (owner) owns strata lot 109, also known as unit 405B, in the strata corporation The Owners, Strata Plan VIS3743 (strata). The owner is self-represented and the strata is represented by a council member.

2. The owner wants various declarations and orders about the strata's disclosure of certain documentation to the owner, namely a) January 2015 to April 22, 2016 emails between council members relating to a "sundock" the owner co-owns (Council Emails), and b) an April 2016 legal opinion the strata obtained on the sundock dispute (April Opinion). The owner says the Council Emails and the April Opinion are records that the strata must disclose upon request, under sections 35 and 36 of the *Strata Property Act* (SPA).

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness. The tribunal also recognizes any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

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

5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I heard this dispute through written submissions because I find there are no significant credibility issues or other reasons that might require an oral hearing.

6. Under section 48.1 of the Act, in resolving this dispute the tribunal may make one or more of the following orders:

   a) order a party to do something;

   b) order a party to refrain from doing something;

c) order a party to pay money.

7. Section 48.1(2) of the Act is substantially similar to section 164 of the SPA and addresses remedies for significant unfairness in strata property disputes. Section 48.1(2) provides that the tribunal has discretion to make an order directed at the strata, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.

8. To the extent the owner makes allegations of slander against the strata or particular strata council members, the tribunal does not have jurisdiction over defamation or slander, as set out in the Act. I will not comment further on those allegations, other than to give context to the allegations of bad faith under the SPA over which the tribunal does have jurisdiction.

ISSUES

9. There are the issues in this dispute:

   a. Has the strata failed to provide records to the owner, including the Council Emails and the April Opinion, as required under section 35 of the *Strata Property Act* (SPA)? If yes,

      i. Should I order the strata to give the owner access to the Council Emails?

      ii. Should I declare that the Council Emails are within the meaning of records in section 35 of the SPA?

      iii. Should I declare that the strata did not comply with sections 35 and 36 of the SPA when they did not provide the strata's April Opinion within 2 weeks of the owner's request?

iv. Should I provide guidelines as to the future use of emails in the course of strata business and whether all emails between council members should be subject to disclosure?

v. Should I provide guidelines as to when a legal opinion must be provided to owners upon request?

b. Has the strata failed to act in good faith, because the strata has given similar documentation to other owners in the past? If so, should I make a declaration accordingly?

c. Should the owner be reimbursed $225 he paid in tribunal fees?

POSITION OF THE PARTIES

10. The owner says the Council Emails and the April Opinion should have been produced as records under the SPA. The owner says the strata provided such documentation upon request to other owners in the past. The owner says the strata cannot refuse the owner now, given that precedent. The owner submits that by treating him differently than those other owners, the strata has acted in bad faith and discriminated against him. The owner also says the strata acted in bad faith because it published that the owner may have had access to strata council emails sent to or from his wife, a council member, with whom the owner shared an email address.

11. The strata notes its difficult position in 2016, with 2 council members being spouses of the co-owners of the sundock, one of whom was the owner's wife. Based on legal advice, those 2 council members were excluded from verbal and email discussions between council members related to the sundock, in order to mitigate for the risk of a perceived or actual conflict of interest. The strata says it properly relied upon legal advice in refusing production of the Council Emails, because emails between council members are not records that must be produced under the SPA. As for the April Opinion, the strata also relied upon their legal

advice that it was privileged because it involved the owner's dispute about the sundock, although the strata ultimately produced it as part of the November 2, 2016 special general meeting (SGM) package. The strata denies it acted in bad faith.

BACKGROUND AND EVIDENCE

12. While I have read all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.

13. Section 31 of the SPA states that in exercising the powers and performing the duties of the strata, each council member must act honestly and in good faith with a view to the best interests of the strata, and, exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

14. Section 35 of the SPA lists a number of records that the strata must prepare and retain. Section 35(2)(h) requires the strata to retain copies of any legal opinion obtained by the strata. While section 35(2)(k) requires the strata to retain "correspondence sent or received by the strata corporation and council", communications between council members are not listed.

15. Section 36 of the SPA states that on receiving a request, the strata must make the records and documents referred to in section 35 available for inspection and provide copies to an owner, within 2 weeks.

16. Section 169 of the SPA states that in a lawsuit between a strata and an owner, the owner does not have a right to information or documents relating to the suit, including legal opinions kept under section 35(2)(h) of the SPA. When litigation has been contemplated but not yet commenced, courts have concluded that a claim for privilege may still apply. According to the Continuing Legal Education Society's *BC Strata Property Practice Manual*:

> The prudent approach for a strata council in this circumstance is to withhold the information and leave it to the owner to determine whether to petition the court ...

17. I turn now to the relevant chronology.

18. On April 22, 2016, the owner requested the strata to provide the Council Emails and the April Opinion, which the owner said fell within the meaning of "records" under section 35 of the SPA. While I have defined the Council Emails above as referencing the "sundock" as that was the owner's description of the issue in this dispute, I note the owner's letter here requested all legal opinions and emails between certain council members, with respect to "the Sun Dock, Sun Float, raft or any derivative name for the floating private raft vessel" at issue. Nothing turns on these broader definitions. The owner also asked for the costs the strata incurred for obtaining the April Opinion.

19. On April 27, 2016, the strata's property manager contacted the strata's lawyer with the owner's request. The property manager wrote "we have no issue with providing" the April Opinion but was unsure about the Council Emails. The property manager noted that a few years prior "one of the owners" had requested documents and "the case ended up ruling that he was not entitled to the emails". It is unclear what "the case ended up ruling" was in reference to here. In any event, the property manager wrote that council asked for the lawyer's advice about providing the Council Emails.

20. Later on April 27, 2016, the lawyer wrote back and asked whether the owner was the owner of the sundock, regarding the April Opinion. As for the Council Emails, the lawyer stated the owner was not entitled to see them as they were emails between council members or between council and the property manager, as per the wording of section 35(1)(k) of the SPA and the decision in *Kayne v. Strata Plan LMS2374*, 2007 BCSC 1610. In short, the lawyer's opinion was that the Council Emails do not constitute correspondence sent to or received by the strata and thus do not have to be produced as a record under section 35 of the SPA.

21. In a further email exchange on April 27, 2016, the property manager responded to the lawyer and said "Yes actually he is one of the owners of the sun dock" and questioned whether the strata did not have to provide him with the April Opinion. The lawyer responded that the strata is entitled to, but is not required to, claim solicitor-client privilege over legal opinions with respect to a matter involving an owner, based on both section 169 of the SPA and under the common law. The property manager replied noting that the owner probably already had a copy of the April Opinion given his wife was a council member, to which the lawyer replied that the owner's wife should have recused herself because she had a conflict of interest, as discussed in section 32 of the SPA.

22. On May 11, 2016, the strata's property manager responded to the owner's initial request by explaining that the strata denied the Council Emails were producible, based on the decision in Kayne and the legal advice obtained. The property manager said at that time the strata claimed solicitor-client privilege over the April Opinion, noting the issue was being reviewed further by the strata council.

23. On May 18, 2016, the owner's wife, a council member, sent an email to the strata from the shared email address with the owner. The owner's wife referred to unit 209A having received copies of legal opinions as well as emails between council members, in 2014 and 2015. The owner's wife argued in that email, and the owner argues in this dispute, that the strata's decision to share that documentation with another owner in another matter set a precedent, with the inference that the strata could not fairly rely upon the Kayne decision. The owner's wife reiterated the owner's request for the costs associated with the April Opinion.

24. Council minutes from November and December 2014 indicate the unit 209A owner requested and was provided with "all legal opinions and reports" related to the building's remediation. There is no indication in the evidence before me that those opinions related to a dispute between the unit 209A owner and the strata. Similar requests for remediation-related correspondence were made by the owner of unit 109B in April 2015, which the strata apparently provided.

25. On May 30, 2016, the strata's property manager responded to the owner's wife and advised that council would seek legal advice in response to her concerns.

26. On June 9, 2016, in response to the owner's wife's May 18, 2016 correspondence the strata's lawyer wrote the strata property manager. The lawyer again noted the strata is entitled to maintain solicitor-client privilege over legal advice when there is a matter in issue between the parties, despite section 35(1) of the SPA. The lawyer was not involved in the disclosure of legal opinions to other owners and could not say whether the strata was entitled to claim solicitor-client privilege over those opinions or if the strata knew it had that right. The lawyer wrote that in any event, "each situation must be assessed on the facts".

27. On October 3, 2016, the owner wrote the strata in follow-up to his April 22 and May 18, 2016 correspondence. The owner noted that he had not received any further correspondence following the strata's May 30, 2016 letter. The owner wrote that he understood that at the September 21, 2016 council meeting, several motions were made pertaining to the sundock, which the owner described as "personal and private property", and that the council was planning on bringing forward a motion at an upcoming special general meeting (SGM) "in relation to this personal property". The owner asked for a "continuance" of the SGM until the owner was able to review the Council Emails and the April Opinion that he had requested, pending the outcome of his tribunal application. The owner asked for the September 26, 2016 council meeting minutes and "the verbatim discussion or the audio recording" with respect to the reasons why each council member decided that the sundock was "a significant change of common property".

28. On October 4, 2016, the strata's lawyer emailed the property manager, and among other things again noted that emails between council members are not records within the meaning of section 35 of the SPA.

29. October 25 and November 1, 2016 council meeting minutes summarize the owner's hearing before council on the issues giving rise to this dispute. The November 1, 2016 minutes state that one council member thought the owner

"already had the access to the information that he was requesting at this hearing as [the owner] and his wife share an email address". The strata circulated its written response at the owner's hearing, in which it was noted that the owner had perhaps received substantially more information than any other owner as it appears he shared an email address with his wife. The council member wrote:

> As she was on Strata Council for much of the time, she was in receipt of all e-mails, which may have been accessible by [the owner], I am only making that observations, and note that such e-mails may not have been read by [the owner], but that he might have had access to them.
>
> However, you will note from [the lawyer's June Opinion], even if the other owner had received information previously, that does not create a precedent for all legal opinions.

30. The strata council voted to refer the owner's request to all owners for a vote at a special general meeting (SGM), which was ultimately held on November 2, 2016. The April Opinion was included in the SGM package. I do not have the outcome of that SGM before me, but it is unnecessary for the purposes of this decision.

31. On November 23, 2016, the strata's property manager wrote the owner's wife who had expressed concern about the timing of the strata providing the June 9, 2016 "legal opinion" to the owner at the October 31, 2016 hearing. The property manager noted that that legal advice had no bearing on the sun dock "so this issue was not addressed". The property manager wrote that council "would like to apologize if this matter was overlooked".

32. Also on November 23, 2016, the property manager sent a separate letter to the owner's wife. The property manager said council could not comment on whether legal opinions in the past were provided illegally or not to two particular owners, but if council had erred in the past it would make every effort not to do so in the future. The property manager also noted that the strata's cost for legal advice in

relation to the sun dock was approximately $1,300.00 plus taxes, as quoted by the strata's lawyer.

33. On January 13, 2017, in response to the owner's renewed request for the Council Emails and for notes taken by the secretary at the November 2, 2016 SGM, the property manager reiterated that Council Emails between council members do not constitute correspondence sent to or received by the strata and thus do not have to be produced as a record under the SPA, as per the Kayne decision.

SUBMISSIONS & ANALYSIS

34. The owner submits the strata has never provided the Council Emails despite repeated requests. The owner says the April Opinion was only provided to them after 6 months of delay, contrary to section 36 of the SPA and contrary to the strata's earlier promises that it would release it "in the near future".

35. I will address the Council Emails first. I agree that the strata properly relied upon the Kayne case, as per its lawyer's advice. I also agree with the conclusions in Kayne, in which the court stated (my bold emphasis added):

> Again, the purpose of the [SPA] is to provide information as to how money has been spent. It requires the corporation to keep books of account showing money received and spent. It does not require those documents to be prepared and kept in any particular form and does not require the production of every bill or receipt that may be reflected in those summary documents. …
>
> The petitioner also makes a demand for certain e-mail correspondence that took place between strata council members. …
>
> It is important to note that the strata corporation is a different legal entity from the members of the corporation and the council is set up as a body that acts in the name of the corporation. The Act refers to correspondence to the council or by the council, which I take to mean correspondence by an officer that is

authorized by council to be sent on behalf of council or by an officer who has been delegated by council the power to deal with a matter.

In my view, it would be stretching the language of the Act far beyond what was intended to suggest that it includes all correspondence between individual members of council that may or may not relate to the business of the council.

36. Emails to the strata or from the strata are records within the meaning of section 35. However, I find that section 35 does not include emails between council members, whether or not those emails relate to council business. Just as the SPA does not require documents to be prepared and kept in any particular form or that every bill and receipt be produced, I find that emails between council members also do not have to be produced. I agree with the court in Kayne that it would be an unreasonable stretch to conclude otherwise. I find the Council Emails are not records within the meaning of section 35 of the SPA.

37. In the circumstances before me, I cannot conclude that the owner has been treated significantly unfairly by the strata, within the meaning of section 48.1(2) of the Act, which as noted is similar to section 164 of the SPA. As set out in my earlier decision *Moore v. The Owners, Strata Plan KAS 1878*, 2017 BCCRT 51, in which I reviewed the relevant case law, "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct. In particular, as noted in the decision of *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44 (CanLii) (my bold emphasis added):

> There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, **if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others**. …

38. There is insufficient evidence before me to suggest that other owners in the past were routinely provided with emails between council members, let alone where the subject matter involved such an owner. The legal opinions apparently provided to two other owners in years prior related to remediation of the building rather than to a particular dispute between the relevant owner and the strata. I cannot conclude that there is a pattern of treating other owners one way and discrimination against the owner. In other words, I cannot conclude that the strata has treated the owner significantly unfairly, in all of the circumstances.

39. I dismiss the owner's claims with respect to the Council Emails. I do not consider it necessary to provide the strata with any guidance about handling email correspondence in the future. The strata has received appropriate legal advice on the subject.

40. Next, I will address the April Opinion. While the strata initially considered providing the April Opinion, it sought legal advice and then decided it may be appropriate to withhold it on the basis of solicitor-client privilege. I agree with the strata's lawyer's advice, as set out above, and find the strata reasonably relied upon it. That the strata may have on two occasions in the past provided legal opinions about the building's remediation is not determinative in this case. Here, the material point is that the April Opinion related to a matter specifically involving the owner. Thus, while legal opinions like the April Opinion are records within the meaning of section 35 of the SPA, the strata was entitled under the common law to claim solicitor-client privilege over it in this case. In any event, the strata decided to disclose the April Opinion in advance of the November SGM, as was its right to do.

41. While there was a lag in the strata's response to the owner's wife following the strata's May 30, 2016 correspondence, I find that this was an inadvertent delay for which the strata apologized. Since I have found above that neither the Council Emails nor the April Opinion were producible "records" under section 35 of the SPA, nothing turns on the delay. I also have no evidence before me that the owner followed up before October 2016. A strata council comprised of lay people is

entitled to a certain degree of latitude and I find overall the strata acted reasonably in its responses to the owner and his wife.

42. I dismiss the owner's claims with respect to the April Opinion. I do not consider it necessary to provide the strata with any guidance about its handling of legal opinions in the future, given my conclusions above. The strata has received appropriate legal advice on the subject.

43. I turn then to the question of whether the strata acted in bad faith. Given my conclusions above, I find the strata did not act in bad faith in refusing to produce the Council Emails or in its handling of the disclosure of the April Opinion.

44. I will next address the related bad faith issue related to the email address shared between the owner and his wife. The owner raises the issue of two council members suggesting in October 2016 council meeting minutes that the owner read strata-related emails of his wife, who was a council member. The owner notes these minutes were posted publicly throughout the strata building, and suggests the allegation was defamatory and is evidence that some council members acted dishonestly and in bad faith and were biased against him.

45. I cannot agree with the owner's submissions. The November 2016 minutes simply reflects one council member's understanding, which is not unreasonable given the owner and his wife do share an email address and on May 18, 2016 the owner's wife did write to the council essentially on her husband's behalf. The strata did not say the owner in fact improperly accessed his wife's council emails, but instead raised the question of whether he might have had access to council documentation given the shared email address. I cannot conclude the strata acted unreasonably nor can I conclude the mention of the shared email address in the context indicated bad faith or bias. I see no evidence of dishonest conduct by the strata.

46. I dismiss the owner's claims that the strata acted in bad faith.

47. Given my conclusions above, I find the owner is not entitled to reimbursement of his tribunal fees as he was not successful in this dispute.

DECISION AND ORDERS

48. The applicant's dispute is dismissed.

Shelley Lopez, Tribunal Vice Chair