



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Chao v. The Owners, Strata Plan LMS1509 et al*, 2017 BCCRT 99

B E T W E E N :

Michael Chao

APPLICANT

A N D :

The Owners, Strata Plan LMS1509, Jack Ng, Steve Cheng, Eric Kai-Hing Hau, and Simon Luo

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. The applicant Michael Chao (owner) owns strata lot 119 in a building in Vancouver. Strata lot 119 is part of the respondent strata corporation, The Owners, Strata Plan LMS1509 (strata).

2. The strata fell into disrepair as a result of water ingress. Groups of owners disagreed about how to address those repairs. The matter came to a head with a Petition to the BC Supreme Court¹ by some of the owners to appoint an administrator to fulfil the strata's duty to repair and maintain the common property.
3. The owner claims that four members of the strata council (the individual respondents Jack Ng, Steve Cheng, Hing Hau and Simon Luo) retained a lawyer to attend at the hearing of the Petition, at a cost of \$33,062. The owner says that this retainer was contrary to the will of the owners who at a special general meeting on April 26, 2016 defeated a $\frac{3}{4}$ special resolution to hire a specific, different lawyer to represent the strata.
4. The owner seeks orders:
 - a) declaring that the individual respondents acted without authority in retaining the lawyer;
 - b) requiring the individual respondents to personally reimburse the strata for the legal expenses incurred; and
 - c) requiring the respondents to reimburse him for tribunal fees in the amount of \$225.
5. The individual respondents were members of the 2015/2016 strata council, from which the applicant resigned. They say that they retained legal counsel, pursuant to their duties under the *Strata Property Act* (SPA), to attend the hearing of a Petition seeking to appoint an administrator for the strata with regard to repairs. They say they were acting in the best interests of the majority of owners in seeking legal representation for the strata on the Petition application, which had an urgent hearing date in June 2016. They deny any improper behaviour and ask that the application be dismissed.

¹ Supreme Court Action No. S161894

6. The respondent strata takes no position on whether it was appropriate for the strata council to retain legal counsel for the Petition. The respondent strata says that the strata's decision to pay legal counsel's bill, and allocation of the expense to the budget line item for legal expenses were practical and appropriate steps.
7. The applicant is self-represented. The respondent strata acts through its strata president Paul Martyniak. The individual respondents are self-represented.

JURISDICTION AND PROCEDURE

8. These are the formal written reasons of the Civil Resolution Tribunal (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, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
9. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
10. 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.
11. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
12. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make one or more of the following orders:
 - a. order a party to do or stop doing something;

- b. order a party to pay money;
- c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

- 13. The parties reached an agreement on certain issues prior to this adjudication, and those issues are not before me in this decision.
- 14. The issues in this dispute are:
 - (a) whether the strata council acted improperly in retaining legal counsel for the strata to attend at the hearing of a Petition brought by some of the owners to have an administrator appointed, in the context of significant and expensive repairs needed to address water ingress problems;
 - (b) if so, whether the strata acted appropriately in allocating those expenses to the operating fund under a budget line item for legal expenses and;
 - (c) whether the individual respondents are personally liable for a proportionate share of the legal expenses related to the Petition.

BACKGROUND AND EVIDENCE

- 15. Prior to the issues arising in this case, the strata had suffered water ingress problems and fallen into disrepair. There were differences of opinion among the owners as to how much to spend to fix the problem and how to approach it.
- 16. On April 26, 2016, a special general meeting (SGM) was held. The Minutes of the SGM state that a group of owners, but not a majority of the owners, had filed the Petition to appoint an administrator to deal with the question of repairs to the water ingress problems.
- 17. At the April 26, 2016 SGM, a $\frac{3}{4}$ resolution was presented to raise \$50,000 to retain lawyer Elaine McCormack to act for the strata at the Petition. The motion was defeated.

18. In a strata council meeting on May 2, 2016, a motion was passed to hire another lawyer, Patrick Williams, to replace Ms. McCormack when her role as strata counsel ended.
19. The individual respondents provided evidence of their honestly held belief that retaining Mr. Williams as legal counsel to assist in responding to the Petition was necessary to protect strata owners. They made the decision as part of their duty as strata council members.
20. The respondent Eric Hau provided evidence that the Petition hearing took place in June 2016. Mr. Williams acted for the strata at the hearing. His legal fees amounted to \$33,062.
21. Initially, the strata council decided to use the contingency reserve fund (CRF) to pay Mr. Williams' legal services account, given the urgency and the fact that the April 2016 special levy had not passed.
22. The individual respondents believed that if legal representation were not provided in a timely way, the costs to the strata owners may be much more significant.
23. The 2016 AGM was delayed by four months due to the legal issues that were outstanding. At an annual general meeting in September 2016, the owners approved, on a majority vote, a budget that included a line item for "Professional Services – Legal", in an amount of \$50,000.
24. The 2016/17 strata council agreed to allocate the expense of \$33,062, which had been paid already, to the legal services account under the budgeted line item for "Professional Services – Legal".
25. Ultimately the strata spent \$57,000 in legal expenses in fiscal year 2016/2017, meaning they were somewhat over budget on legal services, but under budget elsewhere.

26. As the applicant put it in his materials before this tribunal, Mr. Williams' fee of \$33,072 was borrowed from the CRF and later charged to the approved operating budget for the next fiscal year under a line item for legal expenses.
27. In an October 2016 year-to-date expenses chart, a \$50,000 line item in the budget for legal fees is listed. At that point, \$7, 534 of the \$50,000 had been spent. The chart also lists "petition legal fees (2016)" at an amount of \$33,062 that had been paid, at that point, to Mr. Williams.
28. On September 28, 2016, the BC Supreme Court appointed Tony Gioventu as an administrator of the strata, under s. 174 of SPA. At that time, the Court ordered that complete building and roofing repairs be implemented, using existing special levy funds and an additional special levy of \$26,173,000, if approved by the owners.
29. Mr. Gioventu provided an administrator report to the owners at their SGM on June 26, 2017. The report explained that the amount of the additional special levy funds proposed in the court order turned out to be a significant underestimate of true repair costs. Given the scope of work and market costs of construction, a consultant construction management specialist estimated the cost of construction, including a 10% contingency for damages, at about \$44 million dollars.
30. Mr. Gioventu proposed two options:
 - a) a special levy could be passed in the amount of \$26,173,000, but this would not provide sufficient funds to complete the needed building envelope repairs; or
 - b) the owners could vote to have Mr. Gioventu explore the option of winding up the strata corporation.
31. At a SGM on June 26, 2017, a $\frac{3}{4}$ special resolution to impose an additional special levy of \$26,173,000 for repairs was defeated. The owners passed a majority vote resolution to direct the strata to support Mr. Gioventu's application to expand his mandate to include possible windup of the strata corporation.

ANALYSIS

Did the respondents act improperly in using strata funds to retain a lawyer for a Petition brought against the strata by some of the owners?

32. In *Lum v. Strata Plan VR519* 2001 BCSC 493 the court held that there is a duty on the part of strata council to have the strata properly represented in legal proceedings concerning it. The fact that some owners oppose legal representation in such proceedings does not change the strata council's obligation to arrange for representation (see *Lum* at paragraph 24).
33. A strata council is entitled to retain a lawyer without the approval of the owners. However, a strata council lacks the ability to pay the lawyer without an emergency situation under SPA, or a budget line item for legal expenses. (*Dockside Brewing Co. v. Strata Plan LMS 3837*, 2005 BCSC 1209, affirmed 2007 S.C.C.A. No. 262 (Q.L.))
34. The appointment of an administrator to exercise duties of the strata council with respect to building envelope repairs is a serious application. Such an application requires a Petition to the courts and is outside this tribunal's jurisdiction, suggesting it reasonably warrants representation by legal counsel.
35. The question for the court is whether the appointment of an administrator is in the "best interests" of the strata. An application for appointment of an administrator engages questions of the democratic governance of a strata corporation. It also looks at the difficulty created when groups of owners disagree about repair, which sometimes means that the disagreement can create a situation where a building envelope "...remains in need of repair and the Strata Corporation is in breach of its statutory obligation to repair it." (*The Owners, Strata Plan LMS 2643 v. Kwan et al*, 2003 BCSC 293 at para. 35).
36. The fact that legal counsel represented the strata in the *Kwan* case supports the conclusion here that a strata may reasonably require legal representation on a Petition to appoint an administrator.

37. Based on the nature of an application to appoint an administrator, which clearly impacts the strata, and on the direction that there is a duty to obtain proper representation (*Lum*), I find that it was appropriate for the strata council to retain a lawyer to appear at those proceedings on behalf of the strata, even though a $\frac{3}{4}$ resolution did not pass in respect of a similar proposal earlier.

Did the strata deal appropriately with the allocation of the legal expenses?

38. The next question is with respect to how the legal expenses were treated. There was no special levy to raise the funds, nor was a $\frac{3}{4}$ resolution passed.
39. In *Nicolson v. Strata Plan VIS 1098*, 2003 BCSC 1108 the British Columbia Supreme Court dealt with the situation where strata lot owners in Wedgewood Estates were divided about how to remedy water ingress damage. One group of owners favoured spending far more money on the repairs than the other.
40. The group that favoured the lower budget solution applied to declare resolutions passed by a majority of the owners to spend certain money on the repairs to be invalid as an abuse of process. The Court found that there was no abuse of process. In a related decision, the Court said that work need not be of an urgent nature to be included in the budget.
41. Legal expenses relating to litigation involving a strata have been held to be legitimate operating fund expenses (*Gemmell v. Strata Plan LMS 2374* (29 January 2008), Vancouver S076096 (BCSC)).
42. A strata's operating fund applies to expenses that usually occur once a year or more often. Legal expenses to pay for general advice as to strata governance, required to meet the strata's obligation to enforce the bylaws, for example, are common expenses and may be paid out of the operating fund.
43. While extraordinary expenses ought generally to be paid from the CRF, legal expenses related to litigation may sometimes be legitimate expenditures from the operating fund. There may well also be circumstances where a $\frac{3}{4}$ resolution or a

special levy to pay funds out of the CRF are the only appropriate means of raising funds.

44. In my view, legal expenses typically occur once a year or more frequently in circumstances where a strata is embroiled in consideration of water ingress repair on the scale encountered here. A strata facing this type of water ingress repair may anticipate some such expenses, particularly those in respect a potential appointment of administrator under section 174 of the SPA.
45. Where the owners have split in their opinions of how to address a substantial repair, a strata may anticipate more significant legal expenses for the years leading up to a repair being implemented. Such a situation may also make it difficult to obtain a $\frac{3}{4}$ resolution approval for legal expense funding of this kind.
46. I find that using the CRF funds was not appropriate, because the purpose did not meet the criteria in SPA s. 96 for a $\frac{3}{4}$ vote, nor did it fall under an emergency exception. Having an urgent hearing in June, where a $\frac{3}{4}$ resolution is attempted in April, is not sufficient to establish an emergency under s. 98(3) of the SPA.
47. While it is preferable not to use the CRF as a borrowing source and retroactively apply an invoice against a budget line item, the situation here appeared to involve a stalemate on how to proceed with repairs, which extended to a practical inability to pass a $\frac{3}{4}$ resolution, leaving the strata council in the unenviable position of considering how to fulfil their duty to obtain appropriate representation for the strata on the Petition.
48. I find that the application of the expenditure of \$33,072 against the operating fund as part of the majority approved budget line item for legal expenses of up to \$50,000, was appropriate and consistent with SPA s.97(b)(i) which provides that expenditures from the operating fund can be made if authorized in the budget.

Are the individual respondents personally liable for a proportionate share of the legal bill?

49. The applicant suggests that the individual respondents be held personally liable for a proportionate share of the \$33,062 legal bill. I do not agree.
50. The applicant referred to the case of *Dockside Brewing Co. Ltd. v Strata Plan LMS 3837 2007 BCCA183*, upheld on appeal from 2005 BCSC 1209.
51. In *Dockside*, a group of owners in a strata corporation approved expenditures for legal expenses to support litigation where no $\frac{3}{4}$ special resolution was obtained for those expenditures, which were non-recurring expenses paid allocated to the operating budget. Another group of owners objected to these actions, and alleged that the strata council was acting in a conflict of interest and contrary to the best interests of the strata corporation.
52. The owners who approved the legal expense expenditures failed to disclose conflicts of interest and did not act in good faith. This was because, in part, they used the funds to try to take over the hotel through legal challenges to existing leases of the common property (including the hotel lobby). They also failed to disclose the purpose for which the legal fees were being spent.
53. The case before me is different than *Dockside*. There is no evidence that any of the individual respondents misled anyone about the purpose of the legal expenditures. Rather, their purpose is accurately described in the strata council minutes dated May 2, 2016. The evidence does not establish that the strata council members were in a conflict of interest with regard to these legal expenditures.
54. Section 31 of the SPA provides that each strata council member must act honestly and in good faith with a view to the best interests of the strata corporation, and exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

55. In the strata's bylaws, section 22(1) provides that a council member is not personally liable for actions done honestly and in good faith.
56. The Applicant said that the individual respondents "ignored" the defeated $\frac{3}{4}$ vote resolution about retaining legal counsel. This is not accurate. For example, an email filed in evidence shows the individual respondent Mr. Cheng asking for a way to fund legal representation for the Petition legally. There is evidence that the individual respondents were aware of their duties. There is no evidence that they acted in bad faith.
57. On the evidence from the individual respondents as to their intent in hiring a lawyer for the Petition hearing they acted honestly and in good faith to ensure that the strata was appropriately represented. Their actions were not hidden, but reported in the strata council minutes. I therefore find that the individual respondents cannot be personally liable, as they were acting in the good faith exercise of their strata council duties under the SPA.
58. Even if I am incorrect about whether the strata council acted properly in retaining Mr. Williams, paying his bill and allocating the expense to the budget line item for legal expenses, the remedy requested by the Applicant does not follow. That is, the strata council members acted honestly and in good faith, and therefore cannot be personally liable even if they were wrong to retain and pay Mr. Williams.

DECISION AND ORDERS

59. I order that the applicant's dispute is dismissed.
60. As the applicant was unsuccessful in his primary claim, I find he is not entitled to the reimbursement of his tribunal fees. The successful respondents did not pay any tribunal fees and did not claim any expenses.
61. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order attached to this decision. The order can only be filed if, among other things, the time for an

appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

Julie K. Gibson, Tribunal Member