



Civil Resolution Tribunal

Date Issued: August 18, 2017

File: ST-2017-002675

Type: Strata

Civil Resolution Tribunal

Indexed as: *Booth et al v. The Owners, Strata Plan NW2575*, 2017 BCCRT 61

B E T W E E N :

George Booth and Verna Booth

APPLICANTS

A N D :

The Owners, Strata Plan NW2575

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shannon Salter, Chair

INTRODUCTION

- 1) This is a preliminary decision about whether the Civil Resolution Tribunal (tribunal) should exercise its discretion to permit the respondent strata corporation, The Owners, Strata Plan NW2575 (strata), to have a lawyer represent it in the tribunal process. The applicant strata owners (owners) oppose this request. Only the evidence and submissions relevant to this issue is referenced below.

JURISDICTION AND PROCEDURE

- 2) These are the tribunal's formal written reasons. 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.
- 3) Under section 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager (also known as a tribunal facilitator).
- 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.

ISSUES

- 5) The issue in this preliminary decision is whether the tribunal should exercise its discretion to permit the strata to use a representative in this dispute.

ANALYSIS

- 6) The owners' application for dispute resolution involves the authorization and maintenance of a sunroom. The strata has insurance defence coverage, which includes legal representation as an insurance benefit. The strata requests to use a lawyer provided under this insurance contract to represent it in the tribunal dispute.

- 7) The owners oppose this request. The owners are unrepresented because they say they cannot afford a lawyer, and they are concerned that it will be unfair if one side has a lawyer and the other does not.
- 8) In the tribunal process, a “representative” is someone who speaks on behalf of a party and is authorized to bind that party. While section 20 of the Act creates a general rule that parties must represent themselves, a party is entitled to use a “helper” throughout the tribunal process. There is nothing in the Act or the tribunal’s rules restricting a party’s ability to get legal advice, or help completing documents, preparing submissions, and organizing evidence, among other assistance.
- 9) However, with respect to representation, section 20 of the Act requires parties to a tribunal dispute to represent themselves, unless the party is a child or has impaired mental capacity. Section 20(2)(b) provides that the tribunal’s rules may also permit a party to be represented. However, the tribunal’s rules do not currently create categorical exceptions to section 20 of the Act.
- 10) Among other things, section 20(5) of the Act requires that a corporation, including a strata corporation, must be represented by an individual permitted under the rules. Tribunal rule 40 provides that a strata corporation must act through an authorized member of the strata council.
- 11) Section 20(2)(c) creates a residual discretion for the tribunal to permit a party to be represented, if it is in “the interests of justice and fairness.” Section 20(3) provides that in deciding whether to exercise its discretion to permit representation, the tribunal may consider whether the parties have agreed to the representation and whether the other party is represented. These factors are not exhaustive.
- 12) Tribunal rule 36 echoes the Act, and provides a non-exhaustive list of factors to consider in deciding whether to exercise discretion to permit representation. These factors include whether any other party in the dispute is represented and if so, whether that representative is a lawyer or other person supervised by a lawyer,

whether every party in the dispute has agreed to representation, whether the person proposed as the representative is appropriate, and whether in the interests of justice and fairness, the party should be permitted to be represented. Tribunal rule 35 states that parties can, at any time, ask for permission to have a representative. There is no question that the lawyer proposed as a representative by the strata would qualify as an “appropriate person.”

- 13) In light of these factors, I have considered whether, in the interests of justice and fairness, the tribunal should exercise its residual discretion to allow the strata’s representation request, as an exception to the general rule in section 20 of the Act. For the reasons which follow, I find that the tribunal should not allow this request.
- 14) In reaching this conclusion, I have put significant weight on the following:
 - (a) The owners do not agree to the representation. This is a factor set out in both the Act and the tribunal’s rules. The owners’ view is that allowing the strata to be represented by a lawyer would “tip the scales of justice against [them]. There is no fairness in that.”
 - (b) The owners are not represented. This is also a factor in both the Act and the tribunal’s rules. In this regard, I have also considered the owners’ undisputed submission that they cannot afford legal representation.
 - (c) There is nothing exceptionally unusual or complex about the subject-matter of the dispute. It is a common dispute type within the tribunal’s strata jurisdiction, conferred under the Act.
- 15) At my request, the parties provided detailed and helpful submissions on this issue, and I have addressed the strata’s main arguments below.

The strata disagrees with the general rule in section 20 of the Act

- 16) Several of the strata’s submissions involve its disagreement with section 20 of the Act. The tribunal, like any administrative decision-making body, must respect the

scope of authority conferred to it by the legislature. The clear intention of the legislature, expressed in section 20 of the Act, is that parties must represent themselves before the tribunal, outside of specific exceptions.

- 17) The tribunal's residual discretion under section 20, is just that; residual. The legislature has authorized the tribunal to make exceptions, on a case-by-case basis "in the interests of justice and fairness." Given the general rule in section 20 of the Act, the tribunal's residual discretion should be exercised in exceptional circumstances, not routinely. Exercising this discretionary authority on the basis that a party disagrees with the legislation would effectively gut section 20 of the Act, subverting the will of the legislature, and exceeding the tribunal's authority.
- 18) For this reason, I do not consider that the strata's disagreement with the substance of section 20 of the Act is a relevant factor in deciding its representation request.

The strata relies on the purpose of the rules to support its representation request

- 19) The strata's submissions focus substantially on tribunal rule 2, which sets out the purpose of the tribunal's rules. Tribunal rule 2 serves as an interpretive aid, and includes considerations such as: taking reasonable steps to recognize the needs of tribunal participants, recognizing relationships between parties, facilitating speedy, accessible, inexpensive, informal and flexible processes, encouraging early and collaborative dispute resolution, making reasonable accommodations for the diverse circumstances of persons using the tribunal, and recognizing the value of certainty and finality in the resolution of disputes, among others.
- 20) While tribunal rule 2 provides helpful guidance in applying the rules, the test for the tribunal in exercising its discretion under section 20(2)(c) is expressly set out in the Act, namely, whether it is in the interests of justice and fairness for the party to have a representative. Both the Act and tribunal rule 36 provide specific, though non-exhaustive, factors to consider in deciding whether to exercise the discretion in section 20(2)(c) of the Act.

- 21) While many of the factors in tribunal rule 2 support my decision not to exercise my discretion to permit representation in this case, including facilitating the inexpensive and informal resolution of disputes, to the extent there is a conflict, I have put greater weight on the factors enumerated in the Act and rule 36, as discussed earlier.

The insurer should not be a party, because there is no cause of action against it

- 22) It is unclear whether the insurer in this case provides coverage to pay damages in the dispute, in addition to legal defence coverage. If so, under tribunal rule 41, an insurer providing coverage to pay damages in a dispute can request to be added as a party. This rule does not involve representation, but rather the participation in the tribunal process of an insurer whose interests may be affected by a tribunal decision.
- 23) While the strata argues that there must be a cause of action against a person for them to be a party, this is not so in the tribunal process. Tribunal rule 108 states that the tribunal may at any time order that a party be added to the dispute. This may happen where the party's interests could be directly affected by the outcome of a decision. For example, in *Thompson v. The Owners, Strata Plan BCS 1455 et al*, 2017 BCCRT 27 the tribunal ordered that an owner be added as a respondent, since the dispute concerned that owner's parking stall. Depending on the outcome of the tribunal decision, the owner's entitlement to the parking stall could be affected. For this reason, I do not accept the strata's argument in this regard.

The insurer is located outside British Columbia and its direct participation is impractical

- 24) The tribunal is, primarily, an online decision-making body, which uses a variety of communication tools to enable parties to participate when and where it is convenient for them. Most of the tribunal's communication happens over email, although mail and telephone services are also available. There is no requirement to meet in person, and the tribunal works to accommodate the different needs of parties, including with respect to their location. For this reason, I do not consider

that the insurer's location is a factor in favour of permitting representation in this case.

The tribunal should not interfere with the strata's ability to obtain the benefit of the insurance policy it purchased

- 25) The strata submits that it entered into an insurance contract with the insurer, and legal representation is one of the insurance benefits. It argues that section 20 of the Act "interferes" with its right to this benefit, and the tribunal should exercise its discretion to permit representation for this reason.
- 26) The Act and its predecessor, *Bill 44 – Civil Resolution Tribunal Act*, have been publicly promulgated for about 5 years. The wording of section 20 has remained, unchanged. Section 20 of the Act cannot be said to have caught the strata by surprise.
- 27) An implication from the strata's argument is that legislative provisions should conform to the terms of contracts between private entities, and not, conversely, that private entities should ensure the terms of their contracts are consistent with applicable legislation. I do not accept the strata's argument in this regard. I also find that it would be inappropriate for the tribunal to use the residual discretion in section 20(2)(c) to assist a party to contract out of a legislative provision with which it disagrees.

The Strata Property Act (SPA) requires the strata to maintain liability insurance, and so it should be permitted to realize the benefits of this insurance

- 28) Section 150 of the *SPA* requires a strata corporation to insure itself against liability for property damage and bodily injury. Section 151 permits a strata corporation to maintain errors and omissions insurance for council members. Neither section requires a strata corporation to purchase legal defence coverage so that it may be represented by a lawyer in a tribunal dispute. For this reason, I do not accept the strata's argument in this regard.

Requiring the strata to be represented by a strata council member, or requiring the insurer to participate as a party, would hinder the insurer's or the strata's access to legal advice and full defence representation

- 29) As discussed above, a party is entitled to use a “helper” throughout the tribunal process, and there is no restriction on a strata’s or insurer’s ability to get legal advice, assistance completing documents, preparing submissions, or organizing evidence, among other help.
- 30) To the extent the strata’s argument is that section 20 of the Act hinders access to full defence representation by a lawyer, this is true. However, this is also the clear wording of the Act, and without more, is not a factor supporting the tribunal’s exercise of discretion to permit representation in this case.

A single council member does not have independent authority to bind the strata member, given the voting requirements under the Act.

- 31) According to the strata, a strata council cannot delegate responsibility for the tribunal process to a single strata council member. It is unclear how, according to the strata, this authority could instead be delegated to a lawyer or other representative. In any event, at the facilitation stage, strata council representatives are frequently given time to consult with the strata council and obtain instructions with respect to a proposed settlement. Strata councils are also free to seek legal advice and assistance in preparing for the tribunal decision process, in which a tribunal member makes a binding decision.
- 32) I also note that in navigating the challenges of an individual strata council member representing a strata corporation, the strata in this dispute is no different than any other strata corporation in British Columbia. For this reason, the strata’s argument does not support the tribunal’s exercise of discretion to permit representation in this case.

It would be more efficient for the insurer and strata to be represented by legal counsel

- 33) In some cases, it may be more efficient for the strata's representative to jointly represent the strata and the insurer. However, there is nothing particularly unusual or complex about this dispute that would justify exercising the exceptional, residual discretion under the Act on the basis of efficiency, especially in the face of the owners' disagreement with the request and own lack of representation.

Strata disputes involve complex questions of statutory interpretation involving the SPA

- 34) The provisions of the Act specifically address the resolution of strata disputes in British Columbia. The SPA governs strata corporations in British Columbia. It follows that all disputes within the tribunal's strata property jurisdiction under the Act involve the application of the SPA or other legislation. Moreover, the type of strata dispute in this case is fairly common and typical of those within the tribunal's jurisdiction. I also note that a party is free to get legal advice or assistance in preparing evidence and submissions before the tribunal.

The unique circumstances of strata governance justify and require representation through legal counsel in this dispute

- 35) Again, the provisions of the Act specifically address the resolution of strata disputes in British Columbia. There does not appear to be anything unique about the strata's governance in this case that would justify exercising the tribunal's residual discretion to exempt the strata from the general rule in section 20 of the Act.
- 36) For all of these reasons, I decline to exercise my discretion to permit the strata to have a representative in this tribunal dispute. The strata's request to have a representative in this dispute is therefore refused.

DECISION AND ORDERS

- 37) I order that the strata's request to have a representative in this dispute is refused.
- 38) As this is a preliminary decision, I make no order with respect to the reimbursement of tribunal fees. While I note the tribunal's general rule is to not award reimbursement of legal fees, it is open to the parties to request the reimbursement of tribunal fees and reasonable dispute-related expenses in the tribunal decision process on the merits of the dispute, if this becomes necessary.

Shannon Salter, Chair