Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Adrian v. The Owners, Strata Plan KAS2849*, 2018 BCCRT 357

B E T W E E N :

Richard Adrian

APPLICANT

A N D :

The Owners, Strata Plan KAS2849

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Jordanna Cytrynbaum

INTRODUCTION

1. The applicant is the owner of residential strata lot 78 (strata lot) in the respondent strata corporation (strata).

2. The applicant is self-represented. The strata is represented by a council member.

3. The dispute arises out of the strata's decision to purchase a geo-thermal heating system (system) used to heat and cool strata property. In general terms, the applicant alleges that the strata committed various breaches by failing to disclose certain information related to the system. The applicant also claims that the strata's property manager is responsible for some of these alleged breaches.

4. The respondent says that it did not do anything wrong, and takes the position that the claims have no merit.

5. For the reasons that follow, I agree with the respondent and order that the dispute be dismissed.

JURISDICTION AND PROCEDURE

6. 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. It must also recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

7. 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.

8. 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.

9. 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.

ISSUES

10. The issues in this dispute are as follows:

a) Are the applicant's claims, or any of the claims, out of time?

b) Did the strata fail to disclose certain material information to the applicant on a Form B Information Certificate (Form B) required by the Strata Property Act (SPA) prior to him purchasing the strata lot?

c) Did the strata's property manager prepare a false Form B?

d) Did the strata fail to disclose material information about the system prior to the strata's March 2012 special general meeting (SGM)?

e) Did the strata fail to have a proper preventative maintenance program in place?

f) What, if any, remedies should the tribunal award the applicant?

g) Should the strata be responsible for reimbursing the applicant's tribunal fees?

EVIDENCE AND ANALYSIS

Introduction

11. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities.

12. The parties filed lengthy submissions containing both their arguments and evidence. I will not refer to all of the evidence or deal with each point raised. I will

refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.

Evidence

13. The issues in dispute date back to 2011 and arise out of the strata's decision to purchase the system. The facts leading up to this dispute can be summarized as follows.

14. During the time the strata' developer marketed strata lots in the strata for sale, the developer delivered a disclosure statement which disclosed that the system was not owned by the strata, but was instead the subject of a lease. The disclosure statement also noted that the developer intended to become the owner and service provider of the system under the terms of the lease, but that the system designer also claimed ownership to the system and the lease.

15. Sometime after the strata's first annual general meeting, the strata's council realized that the strata was not being invoiced for the system's lease payments. The strata prudently decided to collect utility payments each month from the owners, and invested those funds held in reserve.

16. The applicant purchased the strata lot in or about September 2011.

17. Earlier that year, the strata became aware of a lawsuit between the developer and the system designer to determine ownership rights to the system. The issue came to the strata's attention in or about March 2011, when it received a demand letter from counsel for the system designer (demand). The strata learned that the reason it had not been invoiced for utility payments was because of the dispute between the strata's developer and system designer. The strata also learned that the litigation had concluded, and the system designer had become the owner of the system and the system lease.

18. Pursuant to the demand, the system designer claimed for payment of outstanding rent, which as a result of rent escalations exceeded the amount held by the strata in reserve.

19. The demand also claimed an entitlement to recover its assets - which I find included the system components itself, and unpaid utility payments. I further find that it would not have been practical for the system designer to remove the system, and that it was in the strata's interest (and by extension, in the interest of all of the owners) to avoid litigation and find a fair resolution.

20. Thereafter, the strata council referred the demand to its legal counsel. The evidence submitted by the parties does not disclose when this occurred, or when the strata council received the advice of its counsel. However, based on the record before me, I am satisfied that the strata council proactively dealt with the demand by seeking advice and entering into negotiations with the system designer to avoid litigation and find a resolution. As a result, the council decided to present the following two options to the owners for consideration:

    a) The first was to negotiate a new start date for the lease so that the funds in reserve would be sufficient to cover the outstanding lease arrears. This would have left the strata with ongoing obligations for a 50 year lease term that included a rent escalation clause of 5% per year for the first 15 years. The strata council determined that this would translate into payments in excess of $12 million over the course of the lease.

    b) The second option was to buy out the lease and take ownership of the system at a cost of approximately $3 million, which would require financing.

21. The strata council gave notice of the issues raised by the demand through the process of calling, and later conducting, the SGM. The agenda for the SGM in particular noted that the owners would be asked to consider two options to resolve the demand, including buying out the lease and system.

22. On the record before me, it appears that the applicant's complaints about the strata's decision to purchase the system first arose in October 2013. This is reflected in email correspondence from the applicant to the strata's property manager in which the applicant demanded correspondence dating back to 2011 between the strata and the system designer, and information about whether the strata had been a party to any legal proceedings. The strata's property manager responded to confirm the strata had not been a party to legal proceedings and that any correspondence had previously been disclosed.

23. Thereafter, the applicant began complaining about how the strata handled issues related to the system.

24. There is no evidence before me as to what precipitated the applicant's enquiries or concerns.

25. On the record, I find that the strata responded appropriately, but the applicant refused to accept the information provided by the strata council and property manager, and became relentless in his pursuit of the claims at issue in this dispute. This includes:

    a) regular written complaints and demands from the applicant to the strata council and its property manager from 2014 to 2017;

    b) letters from the applicant's counsel setting out demands and threatening legal action in August and September 2016;

    c) two complaints to the Real Estate Council of British Columbia (REC) in 2015 and 2016, who determined the issues did not fall within the jurisdiction of the council; and

    d) a further complaint to the Ombudsperson of British Columbia, who determined the REC had responded appropriately to the applicant.

Analysis

Summary of the Applicant's Claims

26. The applicant claims that the strata did not act in good faith and breached its duties under the SPA by:

    a) Failing to disclose

        i. the demand prior to the SGM;

        ii. the strata council's vote to obtain legal advice in response to the demand letter prior to the SGM;

        iii. the strata's liability for the system prior to the SGM; and

    b) Failing to have a proper preventative maintenance program in place.

27. The applicant assigns a zero dollar value to his claims against the strata and does not seek any particular remedy. Rather, the applicant invites this tribunal to make any order and impose any terms and conditions it considers appropriate. As a result, I find that the applicant has suffered no loss, and that he is instead seeking to have the tribunal sanction the strata's president and/or council.

28. The applicant also claims that the strata's property manager prepared a false Form B, and asks the tribunal to direct the strata's property management company (who is not a party to this dispute) to replace the property manager (who is also not a party to the dispute).

29. While I find it would also be open to me to refuse to resolve this dispute on the basis of section 11(b) of the Act which permits the tribunal to decline to determine a dispute that discloses no reasonable cause of action, given the protracted and acrimonious history to this dispute, it is in the parties' interest that the tribunal deal with the claims on their merits.

Are the applicant's claims, or any of the claims, out of time?

30. Section 13 of the Act states that the *Limitation Act* applies to the tribunal as if it were a court.

31. The *Limitation Act* applies to claims, which are defined as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".

32. It does not appear that the applicant's claims are to remedy an injury, loss or damage that occurred as a result of an act or omission, which is necessary in order for the *Limitation Act* to apply. As noted above, the applicant assigns a zero dollar value to the claims. In addition the applicant did not present any evidence of having suffered loss or damage.

33. Even if the *Limitation Act* applies, on the basis of the record before me, it is not clear:

    a) when the applicable limitation period(s) began to run; and

    b) whether the current *Limitation Act* which came into force in 2013 applies, or the former *Limitation Act* applies, which in turn may establish different limitation periods.

34. However, given that my conclusions below are sufficient to decide this dispute, I find that it is not necessary to determine the limitation issue.

35. I will now deal with each of the applicant's claims in turn below.

Did the strata fail to disclose certain material information about the system prior to the strata's March 2012 SGM?

36. Based on the SGM minutes, I find that information about the demand, the decision to obtain legal advice, and a summary of that advice was set out in a letter from the council president to the owners in the information package circulated prior to the SGM. The minutes also reflect that proper notice of the SGM had been provided.

37. In total, 76 eligible voters (owners) were in attendance at the SGM. The sign-in sheet for the SGM shows that the applicant attended the SGM. The SGM minutes reflect that the applicant moved to approve the agenda for the SGM, which motion was carried.

38. The SGM minutes also reflect that the owners unanimously resolved to purchase the lease and system for $3 million and to authorize the strata council to obtain financing to facilitate the purchase. Given that the applicant was one of the voters present, I find that the applicant voted in favour of the resolution after receiving proper notice of the issues arising from the demand and the strata's proposals for dealing with the system.

39. Sometime after the SGM, the applicant was appointed to the strata's council.

40. At the next special general meeting held on November 7, 2012, the meeting minutes note that the applicant was present and at that time was a member of the strata's council. The meeting minutes also note that the applicant voted in favour of a unanimous resolution to approve financing to purchase the system. Based on the record, I find that prior to this meeting, the strata council disclosed the proportionate share of cost ownership of each strata lot for the system.

41. As a strata council member, I find that the applicant had full access to information relating to the demand, the decision to purchase the system, financing for the system, and the corresponding cost to the owners.

42. By October 2013 when the applicant's complaints began, it appears that he was no longer a strata council member. However, as set out above, I find that the strata responded appropriately to his requests for information, and that at no material time was he deprived of the information at issue in this dispute.

43. Based on these findings, the applicant's claim that the strata failed to disclose material information about the system prior to the SGM is dismissed.

Did the strata fail to have a proper preventative maintenance program in place?

44. The applicant alleges that the strata failed to have a preventative maintenance program.

45. The origin of this claim appears to be a reference to something contained in the demand to this effect. However, no evidence was presented about this issue. I therefore find no basis for the claim. Accordingly, this claim is dismissed.

Did the strata fail to disclose certain material information to the applicant on the Form B prior to him purchasing the strata lot?

46. The strata corporation is required to deliver a Form B to an owner or prospective purchaser pursuant to section 59 of the SPA. The Form B sets out certain information about the strata unit, as prescribed by the SPA.

47. At issue in this dispute are sections (j) and (k) of the Form B the strata's property manager provided the applicant. These sections read as follows:

> "(j) Is the Strata Corporation party to any court proceeding or arbitration, and/or are there any judgments or orders against the Strata Corporation?
>
> (k) Have any notices or work orders been received by the strata Corporation that remain outstanding for the strata lot, the common property or the common assets?"

48. The strata's response to both of these items on the Form B was:

> "No – Not to the best of our knowledge"

49. The applicant claims that section (j) of the form B was false. He claims that based on the demand, the strata should have disclosed its knowledge of a claim.

50. The strata's response to this allegation is that the strata was not in fact a party to any legal proceeding, and the demand merely referred to legal proceedings between two other parties that did not involve the strata. I agree. On the record, there is no evidence that the strata was a party to any court proceeding or

arbitration. Nor is there any evidence that there were judgments or orders against the strata.

51. The applicant also claims that section (k) of the form was misleading, but does not explain why. There is no evidence that there were any outstanding notices or work orders relating to the strata lot or common property or common assets of the strata. The term "notices" is not defined by the SPA. For the purpose of this section, I find that "notices" refers to notices about defects or work that needs to be performed on a strata lot from a public or local authority, consistent with sections 84 and 85 of the SPA.

52. I therefore find that the Form B was not false. Accordingly, this claim is dismissed.

Did the strata's property manager prepare a false Form B?

53. The applicant asks the tribunal to direct the strata's property management company to replace the property manager. The basis for this request is the claimant's allegation that the strata's property manager prepared a false Form B.

54. As set out above, I find that the Form B was not false. Given these findings, there is no basis for the applicant's claims against the strata's property manager.

55. Further, and in any event, I would decline to make such an order. This is because the property management company and the property manager are not parties to this dispute, and the tribunal's jurisdiction is limited to making orders against parties to a dispute.

What, if any remedies should the tribunal award the applicant?

56. Given my conclusions above, I find the applicant has failed to establish any of his claims on a balance of probabilities. As such, it is unnecessary to consider the applicant's request for unspecified remedies that the tribunal considers appropriate.

Should the strata be responsible for reimbursing the applicant's tribunal fees?

57. Given the applicant was not successful, I find he is not entitled to reimbursement of tribunal fees or expenses.

DECISION

58. In the result, I order that the applicant's dispute is dismissed.

59. Under section 189.4 of the SPA, an owner who brings a tribunal claim against a strata corporation is not required to contribute to any monetary order issued against the strata corporation or to any expenses the strata corporation incurs in defending the claim. I order the strata to ensure that no expenses incurred by it in defending this claim are allocated to the applicant owner.

Jordanna Cytrynbaum, Tribunal Member