



Civil Resolution Tribunal

Date Issued: August 30, 2018

File: ST-2017-003824

Type: Strata

Civil Resolution Tribunal

Indexed as: *MacArthur v. The Owners, Strata Plan K 588*, 2018 BCCRT 491

B E T W E E N :

James MacArthur

APPLICANT

A N D :

The Owners, Strata Plan K 588

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION AND JURISDICTION

1. This is a final decision of the Civil Resolution Tribunal (tribunal) made without the participation of the respondent, due to the respondent's non-compliance with the tribunal's directions as required, as discussed below.

2. The applicant, James MacArthur (owner) is the owner of 2 strata lots in the respondent strata corporation, The Owners, Strata Plan K 588 (strata). He is also a member of the strata council in this 4–unit strata.
3. This dispute is about repairs relating to the owner’s strata lots that remain incomplete.
4. The owner asks that the tribunal order the strata to:
 - a. Pay the owner \$9,906.03 relating to out-of-pocket expenses, incurred by the owner but which are the strata’s responsibility;
 - b. Pay the owner \$3,006.50 for to coordinate the purchase of materials and contractors;
 - c. Pay the owner \$451.60 for mileage charges at the rate of \$0.50 per kilometer for 903.2 kilometers;
 - d. Complete French drain and yard drainage at an estimated cost of \$4,000.00;
 - e. Re-build 2 of the 3 the backyard canopies (at the owner’s 2 strata lots) that were dismantled to permit foundation rehabilitation estimated at \$3,000; and
 - f. Complete landscaping at a cost of \$3,550.40.
5. The owner is self-represented. The strata is represented by a strata council member.
6. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.6 of the 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.
7. Section 36 of the *Civil Resolution Tribunal Act* (Act) applies if a party to a dispute fails to comply with the Act or its regulations. It also applies if a party fails to

comply with tribunal rules in relation to the case management phase of the dispute, including specified time limits, or an order of the tribunal made during the case management phase. After giving notice to the non-compliant party, the case manager (facilitator) may refer the dispute to the tribunal for resolution and the tribunal may:

- a. Hear the dispute in accordance with any applicable rules;
 - b. Make an order dismissing a claim in the dispute made by the non-compliant party; or
 - c. Refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.
8. Under tribunal rule 109, if a party does not comply with the Tribunal Decision Plan, the tribunal may:
- a. Decide the dispute, relying only on the information and evidence provided;
 - b. Dismiss claims brought by the non-complying party; and
 - c. Require the non-complying party to pay to another party any fees or other reasonable expenses that arose as a result of the party's non-compliance.
9. 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).
10. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan, KAS 588, whereas, based on section 2 of the *Strata Property Act* (SPA), the correct legal name of the strata is The Owners, Strata Plan K 588.

Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under

section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

11. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
12. For the reasons that follow, I have decided the applicant's claims should be heard and I have granted the orders requested by the owner with some variation.

ISSUES

13. The issues in this dispute are:
 - a. Should I proceed to hear the applicant's claims, without the respondent's further participation given the respondent's non-compliance?
 - b. If I hear the applicant's claims, what are the appropriate remedies?

BACKGROUND AND EVIDENCE

14. This dispute follows an earlier tribunal default decision issued in December 2016 involving the same parties, indexed as *James MacArthur v. The Owners, Strata Plan K 588*, 2016 BCCRT 2. In that dispute, the tribunal member found the strata had failed to repair and maintain its common property foundation and ordered a special levy of \$100,000 assessed to permit the strata to retain an engineer and contractor to proceed with the foundation repair (foundation work).
15. Except as noted below, I accept the facts set out in the owner's submissions given the strata is non-compliant and did not file contrary submissions.
16. The owner resides in strata lot 1 (SL1) and rents out strata lot 2. The other 2 owners rent out their strata lots with one owner living in Lillooet and the other in Merritt, BC. All 3 owners are council members under the strata's bylaws.

17. The strata contracted with an engineer and general contractor in April 2017 as ordered by the tribunal, but was required to alter the scope of work because the cost estimates provided to the tribunal were higher than expected. The contracted work was completed in May 2017 at a cost that exceeded the \$100,000 special levy ordered by the tribunal, as described below. As a result of the change in scope, work required to re-install concrete sidewalks, patios, canopies, fencing, and landscaping was not completed.
18. At a special general meeting (SGM) held May 29, 2017 (2017 SGM), the strata approved a \$30,000 special levy (phase 2 special levy) to pay the following estimated expenses:
 - a. Outstanding amounts due to the engineer estimated at \$10,000,
 - b. Reinstallation of the concrete walkways and patios estimated at \$10,000,
 - c. construction of 2 French drains rainwater drainage estimated at \$4,500,
 - d. Replacement of fences estimated at \$4,500, and
 - e. Replacement of stairs in units 2 and 3 estimated at \$1,000.
19. This remaining work plus other work (remaining work) is the focus of this dispute.
20. The owner's portion of the phase 2 special levy was \$15,000 for his 2 strata lots. He paid \$10,000 into the strata's bank account on May 31, 2017 leaving \$5,000 of his portion of the special levy outstanding. The 2 remaining owners paid their portion of the special levy with the president paying hers over a short period of time.
21. The strata neglected to include Goods and Services Tax (GST) in its estimates for the final payout of the engineer. The GST totaled \$3,500. Further, the cost for the concrete patios and sidewalks, including preparation, was significantly underestimated.
22. Additionally, the owner submits other work such as the installation of gutters on the building and numerous expenses incurred by the owner were completed using the

phase 2 special levy funds, even though this work was not part of the levy. From the evidence submitted, it appears the strata maintains only 1 bank account and does not keep separate accounts for operating and contingency reserve funds as required under the SPA, nor does it separately account for special levies.

23. Therefore, while the evidence shows \$2,100 was spent to install building gutters, it is not clear if the money used was special levy money, which would be contrary to section 108(4) of the SPA.
24. The strata council met on July 8, 2017 but did not discuss the project or funding issues due to a threat of a physical altercation between the owner and another strata council member. This is confirmed in email “minutes” kept by the strata council president.
25. In a written statement provided in evidence, the strata council president describes an increasing level of dissent between owners in early July 2017. This appears to revolve around the owner’s claims for out-of-pocket expenses relating to the approved phase 2 special levy and suspicions that the owner did not have the strata’s best interests in mind.
26. The strata council attempted another council meeting on July 31, 2017 but only the owner and council president attended and the only business discussed was the financial aspect of the phase 2 special levy, remaining work and the owner’s claimed expenses.
27. The strata council has not met or attempted to meet since July 31, 2017, nor has it held its 2017 Annual General Meeting (AGM).
28. On August 28, 2017, the owner and council president met a building official from the District of Lillooet on site to discuss drainage issues. In a letter dated the same date, the official provided a review of the discussion. The letter states that 2 French drains are required and provides details on their location and construction. It also states that an extension of sloped concrete patios and walkways, properly graded, is required to assist with accessibility and to drain water away from the building toward the French drains.

29. The owner submits that he was required to pay certain contractors and expenses relating to the phase 2 special levy work in order to “keep the project moving forward.” This is because the signing authority for the strata’s bank account required both the owner and the president, who lives in Merritt, to sign all cheques.
30. The owner also submits that he was expected to perform a general contractor role by picking up materials and supplies as well as overseeing contractors on site since he was the only resident owner and strata council member. Included in the additional expenses are amounts for building materials as well as reimbursement of time charged by the owner for acting as a general contractor, reimbursement of labour charges to physically perform some of the claimed work, and mileage charges relating to the pickup of materials.
31. The owner submits that the completed fencing excludes the fencing relating to strata lots 3 and 4. He also submits that the back yard canopies installed at strata lots 1, 2 and 3 were attached to the exterior of the building and were not approved with any conditions that strata lot owners repair or maintain the structures. He says the strata’s bylaws require the strata repair and maintain the backyard canopies.
32. The remaining phase 2 special levy work includes:
 - a. Completion of the yard drainage including the French drains required by the District of Lillooet,
 - b. Approximately 52 feet of fencing in the back yards of strata lots 3 and 4,
 - c. Replacement of the 3 canopies in the back yards of strata lots 1, 2 and 3, and
 - d. Reinstallation of lawn areas including the irrigation system.

ANALYSIS

Should I proceed to hear the applicant’s claim, without the respondent’s further participation, given the respondent’s non-compliance?

33. The respondent is the non-compliant party in this dispute and has failed to participate in the case management phase as required under section 32 of the Act

and tribunal rule 106, as it failed to respond to the facilitator's request for contact as required, about whether the strata would be providing a submission.

34. In particular, the tribunal issued its Dispute Notice on August 8, 2017. The respondent filed its Dispute Response on August 28, 2017. The respondent participated in facilitation discussions but failed to provide a response to the applicant's submissions despite the facilitator making multiple requests to do so. The facilitator made the following attempts at contact with no response:
 - a. *June 6, 2018*: email requesting response by June 17, 2018.
 - b. *June 2, 2018*: email advising the requested response was overdue and requesting confirmation that a response will not be provided.
 - c. *July 5, 2018*: telephone call leaving a voice mail message that a response was required and to contact the facilitator.
 - d. *July 13, 2018*: email noting the earlier attempts requesting a response by July 17, 2018. The facilitator stated this was a final warning to the respondent's representative that the dispute may be referred to a tribunal member for adjudication without further participation by the respondent.
35. The facilitator has referred the respondent's non-compliance with the Act and tribunal's rules to me for a decision as to whether I should hear the dispute in the absence of the respondent's participation.
36. As noted earlier, the respondent filed a Dispute Response but provided no explanation about why it later suddenly stopped communicating with the tribunal as required. I find the facilitator made a reasonable number of attempts to contact the respondent. Parties are advised by an assigned facilitator at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process. Given the respondent's representative participated in facilitation up to April 15, 2018 when the Tribunal Decision Plan was created, and did not advise the tribunal of any change in their contact information, I find it is more likely than not that the respondent's representative was aware of the facilitator's attempts to contact them and chose not to respond.

37. The tribunal's rules are silent on how it should address non-compliance issues. I find that in exercising its discretion, the tribunal must consider the following factors:
- a. Whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute;
 - b. The stage in the facilitation process at which the non-compliance occurs;
 - c. The nature and extent of the non-compliance;
 - d. The relative prejudice to the parties of the tribunal's order addressing the non-compliance; and
 - e. The effect of the non-compliance on the tribunal's resources and mandate.
38. I find this claim is of importance to the remaining 2 strata owners as well as the parties involved in this dispute, as any monetary order against the strata affects owners of all strata lots within the strata. Given the remaining 2 owners are strata council members acting on behalf of the strata in this dispute, and that no further work has been completed since the last council meetings in July 2017, I find all 3 owners are aware of the status of, and had the opportunity to provide information about this dispute.
39. The non-compliance here occurred at the end of the facilitation process after unsuccessful facilitation discussions between the parties had occurred. The strata has abandoned the process, because it has failed to participate in the Tribunal Decision Plan by providing response arguments to those of the applicant or by advising it will not provide arguments.
40. Given the facilitator's repeated attempts to contact the strata's representative and its complete failure to respond despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.
41. I see no prejudice to the owner in hearing the dispute without the strata's participation. The prejudice to the strata of proceeding to hear the dispute is outweighed by other factors of non-compliance. I find it would be unfair to the owner if I refuse to hear the dispute as the owner would be left without a remedy.

42. The tribunal's resources are valuable and its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party does not wish to participate. I find it would be wasteful for the tribunal to continue applying its resources on a dispute by making further attempts to seek participation from the strata.
43. In weighing all of the factors, I find the applicant's dispute should be heard. In deciding to hear the applicant's dispute I have put significant weight on the following factors:
- a. All persons affected by this dispute are involved either directly, or as a strata council member acting on behalf of the strata;
 - b. The extent of the non-compliance is significant;
 - c. The applicant is not prejudiced if an order is made; and
 - d. The tribunal's resources should be conserved.

What are the appropriate remedies?

44. Where a respondent filed a response but has since failed to comply with the tribunal's directions as required, as is the case here, I find I may draw an adverse inference against that respondent. In other words, if the respondent refuses to participate, it is reasonable that I assume that the applicant's position is correct on the issue. This concept is similar to where liability is assumed when a respondent has failed to provide any response to the dispute causing the respondent to be in default.
45. As a result, I order the owner's requested remedies, as varied and described below. Also as described below, I order the strata to assess a special levy to raise the necessary funds to pay the ordered expenses and work.

Out-of-pocket expenses incurred by the owner

46. I have reviewed the owner's self-described "out-of-pocket expenses" totalling \$9,906.03. I find they are reasonable but only allow those expenses claimed after

the May 2017 SGM that relate to phase 2 special levy work. I find the total allowable expenses to be \$9,351.74. Given the owner did not pay \$5,000 of his portion of phase 2 special levy, I deduct \$5,000 from the total expenses I have allowed and order the strata to pay the owner \$4,351.74.

Time relating to coordinating the purchase of materials, contractors and others

47. I have reviewed the owner's claimed time of 85.9 hours for coordinating the strata's work and his claimed amount of \$3,006.50. I agree the rate of \$35 per hour is reasonable, but only allow those expenses that were claimed after the May 2017 SGM that relate to the phase 2 special levy work. I find the total amount of time spent by the owner to coordinate the phase 2 special levy work to be 73.9 hours. At \$35 per hour, this equates to \$2,586.50 and I order the strata to pay the owner this amount.

Owner's travel charges

48. I have reviewed the owner's travel expenses totalling \$451.60 for picking up supplies and rental equipment, such as an auger for digging fence post holes. I agree the rate of \$0.50 per kilometer is reasonable, but only allow those expenses that were claimed after the May 2017 SGM that relate to the phase 2 special levy work. I find the total allowable travel expenses to be \$274.40 and I order the strata to pay the owner this amount.

Yard drainage and French drains

49. Given the August 28, 2017 letter from the District of Lillooet building official, I find the strata must complete the yard drainage and French drain installations and so order. The owner did not prove a quotation for the completion of this work so I accept the owner's estimate of \$4,000.00.

Backyard canopies

50. The owner requests an order for the re-installation or replacement of the backyard canopies for his 2 strata lots and estimates the installation work to be \$3,000.00.

No photographs were provided of the installed canopies prior to the building foundation work. I accept the owner's submission that the canopies were originally attached to the building and had to be dismantled to accommodate the foundation work. I also accept that there were no agreements for individual owners to repair and maintain the canopies. Given the Standard Bylaws under the SPA apply to the strata, I find the canopies are the strata's common property and should be reinstalled. I note the owner incorrectly refers to bylaw 8 and that the canopies are limited common property, whereas it is actually bylaw 6 that applies to alterations to common property.

51. In light of these facts, and that I have drawn an adverse inference against the respondent, I find that the back yard canopies for strata lots 1 and 2 must be reinstalled at the strata's expense and I so order. I accept the owner's estimate of \$3,000.00 as the cost to re-install the 2 canopies.

Landscaping

52. The owner provided an April 3, 2018 quotation from B.G. Sullivan Enterprises (Sullivan), a landscape contractor, for re-installation of the lawn and irrigation system at a cost of \$3,550.40. I find that the lawn and irrigation system must be re-installed on common property front yard area and order the strata to retain Sullivan to complete the work listed in its April 3, 2018 quotation.
53. I acknowledge that there is additional work, such as the back yard canopy of strata lot 3 and fencing to the rear of strata lots 3 and 4 that the strata may wish to complete but was not requested by the owner. Nothing in this decision restricts the strata from raising additional funds to complete any outstanding work remaining from the foundation work or the phase 2 special levy.

Funding of the remaining work

54. The total of the owner's expenses I have ordered plus the estimated cost of the remaining work I have ordered is \$17,763.04. Given the strata does not have sufficient funds to cover these expenses, I find I must order the strata to assess a special levy in order to ensure the necessary funds are raised. This will require the

owner to contribute his proportionate share of the strata's work, including reimbursement of his expenses, which I find are entirely to do with common property repairs.

55. To be clear, the owner is not exempt from paying his proportionate share of the special levy. Further, in light of the dissent among owners, and to ensure the accounting of the special levy is properly kept, including any interest earned on the special levy funds, I find that the owner is not permitted to set off his special levy payments by the amount of money the strata owes him.
56. As a result, I order that a special levy totalling \$17,763.04 be assessed against all 4 strata lots (\$4,440.76 per strata lot) as described below.

DECISION AND ORDERS

57. I order that, as of the date of this decision, a \$17,763.04 special levy of the strata is assessed against all 4 strata lots based on the unit entitlement of each strata lot, for the purposes of:
- a. Paying the owner \$7,212.64 broken down as follows:
 - i. \$4,351.74 for out-of-pocket expenses, ii. \$2,586.50 for co-ordinating the purchase of materials and contractors, iii. \$274.40 for travel expenses
 - b. Completion of the yard drainage and French drain installation estimated at \$4,000.00,
 - c. Re-installation of the backyard canopies for strata lots 1 and 2 to the same or similar design that existed before the foundation work to the building was completed in May 2017 estimated at \$3,000.00, and
 - d. Re-installation of the lawn and irrigation system to the common property front yard area as set out in the April 3, 2018 quotation the owner received from Sullivan estimated at \$3,550.40.

58. The \$4,440.76 contribution of each owner's strata lot is payable in 4 equal monthly installments of \$1,110.19 commencing October 1, 2018 and continuing on the first day of each month thereafter until fully paid.
59. The owner is not exempted from paying his portion of the special levy for the 2 strata lots he owns and is not permitted to set off his special levy payments by the amount of money the strata owes him.
60. The special levy funds collected by the strata must be paid out or used in the order of, and only for the purposes, set out above. Any special levy surplus money remaining after completion of the owner's payments and work must be refunded to the strata lot owners or deposited to the strata's contingency reserve fund according to sections 108(5) and (6) of the SPA.
61. Any strata decisions relating to the special levy or work that is not specifically set out in this decision must be made by the strata council acting reasonably.
62. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable expenses related to the dispute resolution process. I see no reason in this case to deviate from the general rule. I therefore order the strata to reimburse the owner \$225.00 for tribunal fees.
63. The owner has not claimed any dispute-related expenses.
64. 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. As earlier noted, I have found the owner must contribute to the special levy that forms the subject of this decision. However, I order the strata to ensure that no expenses incurred by it in defending this claim are allocated to the owner.
65. Under the *Court Order Interest Act* (COIA), the owner is entitled to pre-judgement interest. I calculate the interest on money due to the owner of \$8,364.13 for the

period from November 13, 2017, the last day the owner claimed out-of-pocket expenses, to the date of this decision, to be \$49.63.

66. The owner is also entitled to post-judgement interest under the COIA.
67. 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 which is 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.
68. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial Court of British Columbia a validated copy of the order which is 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 Provincial Court of British Columbia.

J. Garth Cambrey, Vice Chair