Civil Resolution Tribunal

Date Issued: October 10, 2018

File: ST-2017-002237

Type: Strata

Civil Resolution Tribunal

Indexed as: *Mykle-Hotzon v. The Owners, Strata Plan LMS 1372 et al*,

2018 BCCRT 609

B E T W E E N :

Barbara Mykle-Hotzon

APPLICANT

A N D :

The Owners, Strata Plan LMS 1372 and Sean Campbell

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a preliminary decision of the Civil Resolution Tribunal (tribunal). The respondent strata corporation, The Owners, Strata Plan LMS 1371 (strata), asks the tribunal to refuse to resolve this dispute on the basis that it is too complex or otherwise impractical for the tribunal to case manage or resolve, and that it may be outside the tribunal's jurisdiction. These are my reasons.

2. Only the evidence and submissions relevant to this decision are referenced below. This is not a final decision on the substance or merits of this dispute.

3. The applicant, Barbara Mykle-Hotzon, owns a strata lot in the strata. The main dispute primarily involves settlement of the strata's building where the owner's strata lot is located. The applicant seeks orders that the strata hire independent geotechnical and structural engineers to review existing engineer's reports, reimbursement of the owner's claimed legal and engineer fees of $30,200, and compensation of $25,000 for harassment.

4. The respondent Sean Campbell is an owner in the strata past strata council member.

5. The applicant and Sean Campbell are self-represented. The strata is represented by a lawyer, Lisa Mackie.

6. In exercising my discretion under section 11(1)(c) and (f) of the *Civil Resolution Tribunal Act* (Act), I have decided that the tribunal will refuse to resolve the applicants' claim for harassment but that resolution of the applicant's remaining claims against the strata may continue with the tribunal. My reasons follow.

JURISDICTION AND PROCEDURE

7. 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, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

8. 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.

9. Under section 10 of the Act, the tribunal must refuse to resolve a claim that it considers is not within the tribunal's jurisdiction. A dispute that involves one or more issues that are within the tribunal's jurisdiction and one or more that are outside its jurisdiction may be amended to remove those issues that are outside its jurisdiction.

10. In addition, section 11 of the Act provides that the tribunal has discretion to refuse to resolve a claim within its jurisdiction. In particular, the tribunal may refuse to resolve a claim if issues in the claim or dispute are too complex for the tribunal's process or otherwise impractical for the tribunal to case manage or resolve. The tribunal may exercise its authority under section 11 of the Act at any time before the tribunal makes a final decision resolving the dispute.

11. 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).

12. 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.

ISSUE

13. The issue I must decide is whether the tribunal should refuse to resolve the applicant's claims on the basis that they are outside the tribunal's jurisdiction, too complex for the dispute resolution process or otherwise impractical for the tribunal to case manage or resolve.

BACKGROUND AND EVIDENCE

14. The strata is a 56-unit residential strata corporation located in Langley, British Columbia, existing under the *Strata Property Act* (SPA).

15. In the fall of 2015, the strata received reports from geotechnical engineers and structural engineers on the condition of the foundation of the building where the owner's strata lot is located. In July 2016, the strata received a legal opinion based on its lawyer's review of the engineer's reports, which expressed the damage was "cosmetic" and only related to the owner's strata lot and one other. The lawyer further stated that the strata was not responsible for the strata lot repairs unless the strata was negligent, of which, in his view, there was no apparent evidence.

16. The required strata lot repairs noted by the lawyer involved "drywall cracks, floor leveling and the installation of steel plates as recommended by the engineers" which the lawyer said were the responsibility of the strata lot owners and not the strata.

17. At some point, the owner received a copy of the legal opinion and, believing the opinion was inaccurate, she retained her own legal counsel and engineer.

18. In May 2017, the strata wrote to the owner following a council hearing, advising it had rejected her claims for reimbursement of her legal and engineering fees, which totalled approximately $10,200 at the time. She has since incurred additional costs for legal and engineering fees. In the most recent amended

Dispute Notice dated October 3, 2018, the owner says she has incurred $30,200 in legal and engineering fees for which she seeks reimbursement.

19. From the parties' submissions, the dispute has remained somewhat fluid. For example, it is clear the strata obtained further reports and legal advice resulting in it proposing some structural repairs. The details of the extent and nature of the repairs have not been provided, nor is it clear if any repairs were actually completed before September 22, 2017, when the City of Langley posted a "do not occupy" order on the owner's strata lot.

20. The owner has not occupied her strata lot since that date.

21. During facilitation, and prior to this matter being referred to me by the tribunal facilitator, the owner further amended her dispute by removing some claims and requested remedies.

22. I find it helpful to summarize the remaining owner's claims and requested remedies in the main dispute as set out in the October 3, 2018 Dispute Notice. Simply put, they are:

    a. That subsistence of undersurface soil beneath building comprising the owner's strata lot caused damage to the foundation and structure of the building and the owner's strata lot. The only remedy the owner requests is reimbursement of $30,200 she has incurred for legal and engineering fees,

    b. The owner's inability to occupy her strata lot, as a result of ongoing subsistence of undersurface soil beneath the building comprising the owner's strata lot, given the City of Langley has ordered the owner not to occupy her strata lot. The requested remedies involve the strata retaining independent geotechnical and structural engineers to review existing engineering reports and assessments relating the building's foundation, a request for documents, and that the strata pay the owner's moving, temporary accommodation, and storage expenses.

c. Harassment allegations due to the perceived unwillingness of the strata council to collaborate with her. She seeks $25,000 as compensation.

POSITION OF THE PARTIES

23. The strata says the owner's claims have evolved from a single claim for reimbursement of legal and engineering fees to a complex dispute involving several claims. It says the dispute is too complex or otherwise impractical for the tribunal to resolve, and that some claims may be outside the tribunal's jurisdiction. In the alternative, the strata says the tribunal should refuse to resolve this dispute under section 11(1)(f) of the Act, suggesting it is likely the Supreme Court would grant an order that the tribunal refuse to resolve the dispute in the interests of justice and fairness.

24. The strata says that there will be a significant amount of material, including written submissions in excess of 25 pages and approximately 250 documents from the strata alone. It says this would interfere with the tribunal's ability to provide speedy, accessible, inexpensive, informal, and flexible resolution of the claims contrary to its mandate and its recent initiative to limit submissions to approximately 10 pages for strata property claims.

25. The strata also says an in-person hearing will be required as the large volume of material is not conducive to being heard by electronic means, and because of the expected involvement of a number of witnesses and expert witnesses, and the need to cross-examine these witnesses and the owner. It believes several witnesses will be required because the owner's claim is not that the strata failed to follow the advice of its engineers but rather that the advice of the strata's engineers was inaccurate. The strata says the tribunal is not set up for in-person hearings to accommodate witness testimony or assist in making decisions on credibility.

26. Finally, the strata says it will be necessary to add third parties, such as the engineering firms that provided opinions to the strata, to disprove the owner's claims, which it says is outside the tribunal's jurisdiction for strata property claims.

27. The strata argues that the dispute should be heard by the British Columbia Supreme Court as the court is better suited to hear complex disputes involving large volumes of material and several witnesses as the strata says is required here. The strata says that allowing the tribunal to hear some, but not all claims, could lead to inconsistent findings between the tribunal and the Supreme Court.

28. The strata asks that the tribunal refuse to resolve the dispute.

29. The owner says that her claims are not too complex or impractical for the tribunal to resolve and are within the tribunal's jurisdiction.

30. She says the same essential facts relate to all of her claims, and that they are indisputable and straightforward.

31. She relies on previous decisions of the tribunal that have addressed its jurisdiction, including its interpretation section 31 of the SPA as that relates to her allegation of harassment.

32. The owner asks the tribunal to hear the dispute.

ANALYSIS AND DECISION

33. At the outset I note the strata's submissions appear to include claims and remedies that the owner has now withdrawn. While I acknowledge the claims and remedies have expanded form the original Dispute Notice, I do not agree that they have done so to the extent suggested by the strata. For example, the strata says the owners requested remedies amount to more than $80,000, whereas it is clear the total is $55,200 as I have described earlier.

Jurisdiction

34. I will first address the strata's contention that some claims are outside the tribunal's jurisdiction.

35. As described below, I find the addition of third party respondents is within the tribunal's jurisdiction, even though I find the addition of such parties is not warranted in this case.

36. However, I do find the owner's harassment claim to be outside the tribunal's jurisdiction for the following reasons.

37. In her submission, the applicant says her compensation claim for harassment falls under section 31 of the SPA, which has been considered by the tribunal in some of its earlier decisions cited by the applicant. While I agree the tribunal has jurisdiction to determine if a particular strata council member may have breached their standard of care under section 31 of the SPA, I do not agree the tribunal has jurisdiction to address a requested remedy for such a finding. I rely on *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183, in which the court found, at paragraph 59, that remedies for breaches of sections 31 and 32 of the SPA are found in section 33 of the SPA. Section 3.6(2)(a) of the Act expressly states matters under section 33 of the SPA are outside the jurisdiction of the tribunal and must be dealt with by the BC Supreme Court.

38. For this reason, I refuse to resolve the applicant's claim involving harassment because of her contention that it flows from a strata council member's breach of their duty of care under section 31 of the SPA. Accordingly, I refuse to refuse the applicant's claim against Sean Campbell in this regard.

Complexity of Claims

39. As earlier noted, the applicant's dispute has been amended to 3 claims, 1 of which is her harassment claim, which I have found is outside the tribunal's jurisdiction. The applicant's 2 remaining claims relate to the subsistence of

undersurface soil beneath building comprising the owner's strata lot allegedly causing damage to the foundation and structure of the building and the owner's strata lot. The strata says that 14 engineering reports or assessments have been provided by the strata and others may be produced by the applicant. I don't see that the number of engineering reports alone is determinative of the complexity of the substantive claims in this dispute. All of the reports would likely identify opinions on the singular issue of the cause of the damage to the building comprising the applicant's strata lot, including the owner's strata lot. I find the tribunal has the expertise to make a finding on the cause of the damage based on its review of the reports or determine if independent engineers should be required to provide opinions on the existing reports as requested by the applicant.

40. A determination on the strata's liability to reimburse the applicant for legal and engineering fees would likely involve consideration of negligence, based on the evidence provided. The tribunal routinely considers negligence claims and I do not find such a determination to be complex.

41. Further, while the tribunal has recently initiated a limit on submissions, I find the limit is generally intended to assist unrepresented parties to focus their submissions (and evidence) on only relevant information. For reasons of procedural fairness, I find the tribunal has discretion to waive the limit in certain circumstances and it is premature here to determine whether it is necessary to do so. The tribunal has heard many disputes involving lengthy submissions and large volumes of evidence and either party can apply to the tribunal to seek permission to exceed the identified limits. Here, the parties both have legal assistance, either by legal representation or a lawyer helper as permitted by the tribunal rules, and I expect that the submissions and evidence provided by the parties will be focussed and relevant.

In-person Hearings

42. The strata argues the British Columbia Supreme Court is the only court of jurisdiction to hear this dispute, because the tribunal's electronic hearing

processes are inadequate to assess credibility and that it is unable to conduct in-person hearings. While the tribunal's main hearing method is on the basis of written submissions, it is not true that the tribunal is unable to conduct in-person hearings, which could include videoconference. As the court noted at paragraph 35 in *Yas v. Pope*, 2018 BCSC 282, issues of credibility are routinely addressed on written records by a host of administrative boards, tribunals and commissions across multiple disciplines and areas of legal authority in British Columbia. The court rejected concerns about the tribunal's alleged inability to assess credibility, given sections 39(3) and 42 of the Act give the tribunal discretion to tailor its procedures to suit a given dispute, which includes asking questions of parties and witnesses.

43. I therefore find that the strata's concerns about the tribunal's ability to assess credibility by written submissions or conduct in-person hearings are unfounded. I make no finding about whether an in-person hearing is ultimately necessary in this dispute.

Third Parties

44. Even if the applicant claims the findings of the strata's lawyer and engineers were inaccurate, as the strata suggests, she has not sought remedies against those individuals or firms. It would be to her benefit to add these parties as respondents and she has chosen not to do so.

45. Therefore, as for the strata's argument that other parties must be added, I do not agree. Given the applicant's remedies only relate to the strata, I find that the addition of other parties does not appear to be warranted. As I found in *Fisher v. The Owners, Strata Plan VR 1420*, 2018 BCCRT 151, I agree with the applicant that applicant's claims in this dispute are only against the strata. Namely, claims that the strata is responsible to reimburse her for legal and engineering fees, plus moving, temporary accommodation, and storage expenses. Any claims the strata has against other parties are not relevant to this dispute.

46. I also reiterate my finding in *Fisher* that while section 189.1 of the SPA expressly limits applicants of a tribunal claim to strata corporations (and sections), owners, and tenants, there is no such restriction on respondents. Therefore, I find there is no legislated restriction to add third parties as respondents.

47. For these reasons, I find the owner's remaining claims are not too complex for the tribunal to resolve.

Impracticality

48. Given my earlier findings, I am not persuaded that it would be impractical for the tribunal to continue to resolve the remaining applicant disputes.

49. Specifically, I do not agree that allowing the tribunal to hear the applicant's remaining claims in this dispute, other than the harassment claim, would lead to inconsistent findings between the tribunal and court. If the strata is not successful in this dispute, it can seek leave to appeal the tribunal's decision. In that event, it would be open to the strata to seek permission of the Supreme Court to add other potential parties.

50. Further, nothing prevents the strata from filing a counterclaim in this dispute, or seeking permission to do so given the time that has passed, to the extent the tribunal has jurisdiction. For other claims that might fall outside the tribunal's strata property jurisdiction, I do not agree that the outcome of the applicant's remaining claims adversely impacts the strata's ability to pursue those other claims.

Would the Supreme Court order the tribunal not to resolve the dispute?

51. I acknowledge the strata's arguments are primarily based on the potential complexity of the claims, including the additional claims. However, in the alternative, the strata has also argued that I must consider exercising the tribunal's discretion under section 11(1)(f) of the Act. That section states that if the tribunal is satisfied that if an application under section 12.3 *[Supreme Court*

may order that tribunal not resolve strata property claims] were brought, the Supreme Court would grant an order that the tribunal not resolve the claim or dispute as sufficient reason for the tribunal not to resolve the claim or dispute.

52. I do not agree that the Supreme Court would find the principles of natural justice offended if the tribunal heard this dispute.

53. I specifically do not agree that the outcome of the applicant's remaining claims in this dispute adversely impact her ability to pursue her harassment claim in Supreme Court. In any event, that is not something the applicant has argued. As noted, the applicant wants the tribunal to hear her dispute.

54. Section 12.3(2) of the Act lists several factors the Supreme Court may consider when deciding if it is in the interests of justice and fairness that the tribunal not resolve a dispute. These are factors I find must consider under section 11(1)(f) in order to satisfy myself whether an application under section 12.3 would succeed.

55. Here, I find the relevant factors under section 12.3 to be the following:

- Whether the use of electronic tools in the tribunal process would be unfair to one or more of the parties in a way the tribunal cannot accommodate. (section 12.3(2)(a))

- Whether an issue raised is of such importance that the claim or dispute would benefit from being resolved by the Supreme Court to establish a precedent. (section 12.3(2)(b))

- Whether an issue raised is sufficiently complex to benefit from being resolved by the Supreme Court. (section 12.3(2)(c))

56. The Supreme Court has decided only one application under 12.3 of the Act. That being the *Yas* decision I referenced earlier. I find it to be of some assistance given the court considered the same factors relating to the interests of justice and fairness that I have set out above. I note the court did not express an opinion on whether the list of factors contained in the Act was exhaustive.

Electronic tools

57. I have already found that the claims in is this dispute are well suited to the tribunal's online processes. I disagree with the strata that the use of online tools would be unfair to either party.

Importance

58. The importance of the issues was not argued by the parties. Absent any arguments, I find the issues are important only to the parties, and possibly the owners of strata lots in the same building as the applicant. I do not find the outcome of this dispute would have any far-reaching effects or is of great importance to other strata corporations given the narrow and infrequent issues involved.

Complexity of the issues

59. As I have found, based on the evidence and submissions before me, I am not persuaded that that the subject matter in this dispute is of such complexity that the Supreme Court should resolve it.

Other factors the tribunal should consider

60. As noted earlier, in *Yas*, the court did not consider if the list of factors set out in section 12.3 of the Act is exhaustive. Given the parties have not asked me to consider any other factors when deciding this matter, I do not find it necessary for me to do so.

61. Therefore, I am not satisfied that if a claim were made under section 12.3 of the Act, the court would grant an order that the tribunal not resolve the claims or dispute. I therefore decline the strata's request that I refuse to resolve the claims under section 11(1)(f) of the Act.

The Tribunal's Mandate

62. I find the tribunals' mandate to provide speedy, accessible, inexpensive, informal, and flexible resolution of claims is relative. The ability of the tribunal to meet it mandate in this respect must be weighed against the alternatives, which in most cases is an application to the Supreme Court. As a result of my earlier findings on the volume of material, I find the tribunal is the appropriate venue for the applicant's remaining disputes.

63. For all of these reasons, I decline the strata's request that I refuse to resolve this dispute, except for the applicant's harassment claim.

ORDERS

64. The strata's request that the tribunal refuse to resolve this dispute dismissed, in part.

65. Specifically, I refuse to resolve the applicant's claim for compensation relating to harassment by strata council members, including Sean Campbell, under section 31 of the SPA for lack of jurisdiction. Continued resolution by the tribunal of the remaining applicant's claims against the strata should proceed.

66. Accordingly, I refer the remaining claims in this dispute back to facilitation.

J. Garth Cambrey, Vice Chair