



Civil Resolution Tribunal

Date Issued: October 10, 2018

File: ST-2017-002114

Type: Strata

Civil Resolution Tribunal

Indexed as: *Christ v. The Owners, Strata Plan NW 3229* 2018 BCCRT 611

B E T W E E N :

Michael Andrew Christ and Angela Elizabeth Christ

APPLICANTS

A N D :

The Owners, Strata Plan NW 3229

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Michael F. Welsh, Q.C.

INTRODUCTION

1. The applicant owners Michael Christ and Angela Christ, (owners) seek an order compelling the respondent strata corporation (strata) to accept what they claim is their share of a special levy, as the strata refuses to take the money offered. It claims that the owners are short-changing it on what is owed, to the detriment of other strata lot owners in the strata. I must decide if the strata is required to accept the amount proffered in full payment of the owners' obligations. The applicant owners, who are siblings, act for themselves and Mr. Christ presents their case. The respondent strata is represented by a strata representative, but its submissions were drafted by its lawyers.

JURISDICTION AND PROCEDURE

2. 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.
3. 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 as I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
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.

5. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.
6. 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. 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). Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan, NWS 3229, whereas, based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan NW 3229. 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.

ISSUES

7. The issues in this dispute are:
 - a. Is the amount the owners tender in full payment of their proportionate share of a loan for a special levy the actual sum they owe?
 - b. Did the strata mislead the owners on the terms of the loan to finance the special levy or was the owners' participation in that loan based on a misunderstanding of its terms?
 - c. Was the strata negligent in the performance of its duties in the obtaining of the loan?

BACKGROUND AND EVIDENCE

8. The strata comprises 35 residential strata lots and common property located in New Westminster and is commonly known as "Coventry Court".

9. The owners have been joint tenants in strata lot 35 (unit 404) since January 19, 2010. Between August 27, 2010 and June 23, 2017, they were also joint tenants in strata lot 25 (unit 306.)
10. Michael Christ, who is (as he puts it) a 65-year-old “soon-retiring” lawyer with a real estate practice, states he was the developer of the subject strata development which was built in 1990, and that he served on its strata council for over 20 years.
11. In 2012, the strata required a major building envelope remediation, commonly called “rain screening.” The estimated cost of was \$1,750,000. A special levy was required to raise the needed funds.
12. At a special general meeting (SGM) in September 2012 the strata lot owners present unanimously agreed to explore various financing options with lending institutions. Any viable options were to be brought before the strata lot owners at a subsequent SGM for discussion and approval. Financing was needed due to the significant amounts the strata lot owners had to pay based on their unit entitlements (ranging from \$39,000 to \$100,000.)
13. At the next SGM in March 2013, two $\frac{3}{4}$ vote resolutions were presented. The first was to raise a special levy (the Special Levy) of \$1,750,000 (Resolution 1) and the second was to authorize the strata to enter into a loan (the Loan) of up to \$1,200,000 (Resolution 2.) A copy of the proposed Loan term sheet (the Term Sheet) from the financing entity, Lift Capital Corporation, was enclosed along with the Notice of the SGM, so that any strata lot owners considering participating in the Loan were apprised of its terms.
14. Both $\frac{3}{4}$ vote resolutions were approved.
15. As the strata puts it, the purpose of the Loan was to provide a “lifeline to owners who could not secure financing independently.” While the Loan was made in name of the strata, those individual strata lot owners who wished could commit to the terms of the Loan by signing a written form (the Commitment.) Some did so and some did not, finding other ways to raise their share of the Special Levy.

16. On April 19, 2013, the applicant owners signed the Commitment, a short form document that states they “agreed to participate in the loan program arranged by the strata.” They signed one for each of their 2 strata lots.
17. In June 2016, after making 38 monthly payments, the owners sought to pay the strata the remaining principal of the Special Levy with accrued interest to date of payment. The strata refused to accept this payment unless a sum equivalent to an additional 22 month's interest (until the end of a 5-year term of the Loan) was paid.
18. The strata has refused to accept the payments on the basis that not all interest due and owing is included. The strata does state that there may be an issue as to Lift Capital Corporation’s calculation of interest and payments and it is having its auditors investigate. No details have been provided by either party about this and it does not form part of the matters for determination by me.

POSITION OF THE PARTIES

19. The owners seek the following orders:
 - (a) A determination that the owners are liable for interest on the Special Levy only up until the date that payment was tendered, namely May 25, 2016 in the amounts of \$62,981.60 for Strata Lot 25 and 113,810.23 for Strata Lot 35;
 - (b) An order that the strata accept their payment and record that their portion of the Special Levy has been paid in full;
 - (c) An order that the strata provide a Form B to them showing that no money is owed to it by them in relation to the Special Levy;
 - (d) Payment of 2.7% simple interest (the rate charged on their RBC Line of Credit) on their Special Levy payment during the time that the strata kept the bank draft from them, but did not cash it, totalling \$768.90.

(e) Payment of their filing fee and other costs of this dispute as allowed by the Act.

20. They argue that, by the terms of Resolution 1, they have the right to make this payment in advance of the end of the Loan's term. In particular, they rely on one term of Resolution 1:

(g) if an Owner who does not pay the Special Levy on or before the Due Date later makes a lump sum payment in respect of the Special Levy, that Owner must also pay to the Strata Corporation a corresponding lump sum payment of his or her share of the accrued interest payable at the Special Levy Interest Rate based on that Owner's portion of the Special Levy as of the lump sum payment date;

21. Although not specifically stated as issues they also argue that they did not understand the Loan terms, or the strata either misled them and other strata lot owners about the terms of the Loan when they voted on Resolutions 1 and 2, or that the strata failed in its duty of care to them and other strata lot owners by failing to retain a competent mortgage broker to locate more preferable financing terms. As the strata has made submissions in response, I have noted each of these arguments as an issue for resolution.

22. The strata submits that the argument of the owners that they can pay out under term (g) of Resolution 1 is a "red herring", as the operative document governing the obligations of the owners is the Loan and not Resolution 1.

23. In particular the strata submits that "[t]he levy in question was presented to (all strata lot) owners with a choice to be paid in full or to be paid via financing. In either model, the strata received all the funds at once to pay the contractor for a substantial repair on the building. The (owners) elected to finance the levy, and thus were bound by the terms of the loan they signed on to. The binding document for the (owners) is the loan; the 'levy' has been paid by the finance company."

24. It also points out that, if the owners are permitted to be released from the Loan with interest only to the date they tendered payment, the other strata lot owners will bear the burden of paying the interest on the owners' portion for the additional 22 months to the end of the Loan term, totalling approximately \$23,000.
25. The strata submits it accurately disclosed the terms of the Loan in Resolutions 1 and 2 and by providing the Term Sheet. It submits that, in setting the Special Levy and arranging the Loan, the strata council members fulfilled their duties under section 31 of the *Strata Property Act* (SPA,) that requires strata council members to act honestly and in good faith with a view to the best interests of the strata corporation, and to exercise the care, diligence and skill of a reasonably prudent person in similar circumstances.
26. The strata requests that I dismiss the owners' claims.

ANALYSIS

Is the amount the owners tender in full payment of their proportionate share of a loan for a special levy the actual sum they owe?

27. A determination of the obligations of the applicant owners requires an analysis of the wording of Resolutions 1 and 2 and the 2 Commitments.
28. Resolution 1, in addition to the term relied on by the owners and quoted earlier at paragraph 15, states:
 - (d) any Owner who fails to pay his or her strata lot's share of the Special Levy in full by the Due Date must pay interest on the outstanding amount at the rate of 10.00% per annum, compounded annually, in arrears, ("Special Levy Interest Rate") pursuant to section 108(4.2) of the Act (SPA) and will be deemed to participate in the Loan, if $\frac{3}{4}$ vote Resolution # 2 is approved, and be required to make the monthly installment payments pursuant to paragraph (e);
29. Section 108(4.2) of the SPA states:

(4.2) The interest payable on a late payment of a special levy in accordance with a bylaw or resolution referred to in subsection (4.1) is not a fine, and forms part of the special levy for the purposes of section 116.

30. Resolution 1 also states:

(e) and provided $\frac{3}{4}$ Resolution # 2 is approved the Strata Corporation will not file a lien or take other collection measures against an Owner in respect of unpaid Special Levy contributions so long as the Owner pays monthly installments, on or before the 15th of each month, of blended principal and interest payments toward his or her share of the Special Levy, where:

- i. principal is that Owner's portion of the Special Levy as set out in Schedule "A" increased by that Owner's portion of the Loan set up fees;
- ii. interest is the Special Levy Interest Rate; and
- iii. the payments reflect a term of 5 years with an amortization of 20 years, such that the final payment will be a lump sum payout of the remaining balance of that Owner's share of the Special Levy until that Owner's share is paid in full;

31. Resolution 2 approved the strata entering into the Loan agreement based on the Term Sheet conditions that were provided to the strata lot owners with the notice package prior to the April 2017 SGM.

32. I find from a plain reading of term (d) of Resolution 1 quoted earlier in paragraph 27 that even without signing the Commitments, by electing not to pay their proportionate share of the Special Levy, the owners are automatically deemed to participate in the Loan and required to make the monthly payments under Resolution 1 term (e), quoted in the paragraph 28.

33. The signed Commitments simply confirm this obligation that already arose under Resolution 1 when a strata lot owner did not pay its proportionate share in full by

the due date. The owners in this case did not pay and they also signed the 2 Commitments, so they are doubly bound to participate in the Loan.

34. This means they agreed to make monthly payments of blended principal and interest for a term of 5 years, based on an amortization of 20 years, “such that the final payment will be a lump sum payout of the remaining balance of that Owner’s portion of the Special Levy” and with all interest paid in advance of that principal being paid out.
35. Based on this wording it follows that the owners, in addition to the principal, must pay all the interest owing under their respective portions of the Loan until the end of the Loan term.
36. This obligation seems to conflict with the rights given by term (g), as interpreted by the owners, to pre-pay with a lump sum payment with interest to the payment tendering date only.
37. The interpretation difficulty faced here is in deciding what the phrase “as at the lump sum payment date” at the end of term (g) modifies. Does it refer to the interest accrued to the lump sum payment date, or does it refer to the remainder of the Special Levy amount owing at the lump sum payment date? When term (g) is viewed in isolation the answer is not apparent.
38. However, as was stated by the BC Court of Appeal in *Hanna Collision Repair (1984) Ltd. v. Insurance Corporation of British Columbia*, 2010 BCCA 490 at para. 42, “[t]o begin with, the trial judge must apply the proper principles of contract interpretation, including consideration of the clause in the context of the entirety of the contract.” In other words, clauses cannot be read in isolation. They must be interpreted as part of the whole agreement.
39. The Court of Appeal at para. 42 in *Hanna* also said “[i]n interpreting the contract, the trial judge also applies the legal principles to the language of the contract in the context of the relevant facts and inferences.” In other words, you must look at the circumstances of the agreement and reasons for it.

40. The principles for statutory interpretation are similar. The Canadian test, adopted many times by the Supreme Court of Canada, is that set out by Professor E.A. Driedger, Q.C., in his book, *The Construction of Statutes* (1974) ; namely that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
41. We are here dealing with $\frac{3}{4}$ vote resolutions under the SPA which are a type of rule, and so like legislation, but which have also created contractual-like relations between the strata lot owners who elected to participate in the Loan and the strata. The voluntary signing of the 2 Commitments by the owners reinforces this conclusion.
42. Relating these principles back to Resolution 1 and the Loan to which the owners are bound by Resolution 1 and by signing the Commitments, I find the following:
- (a) Resolution 1 read as a whole obligates the owners, who elected not to pay their proportionate share of the Special Levy by the due date, to participate in the Loan according to the terms of the Loan.
 - (b) Resolution 1 read as a whole obligates the owners, who elected to participate in the Loan, to pay all interest under the Loan on their proportionate share of the Special Levy amount borrowed, with the final payment to be on account of the remaining balance of the principal of that proportionate share, with interest paid in advance.
 - (c) It is not reasonable to conclude that it was intended that a strata lot owner who elected to participate in the Loan could avoid payment of a portion of that interest by an early pre-payment and thereby require the other strata lot owners to pay the remaining interest on that owner's portion of the Loan. In this case, shifting \$23,500 of interest onto other strata lot owners creates an inequitable situation that cannot have been contemplated by the strata or the strata lot owners.

(d) The phrase “as at the lump sum payment date” in term (g) must, as a result, modify the term “based on that Owner’s portion of the Special Levy”, meaning that the strata lot owner must pay out the remainder of its portion of the Special Levy as at the payment date together with all interest accruing to the end of the Loan term.

43. I therefore find that, for the owners to be released from their obligations under the Loan, they must pay out the whole of the principal amount of their proportionate share of the Loan for the Special Levy plus all interest that accrues to the end of the Loan term. I find there is no right of pre-payment with interest payable only to the payment tendering date.

Did the strata mislead the owners on the terms of the loan to finance the special levy or was the owners’ participation in that loan based on a misunderstanding of its terms?

44. I turn to the argument that the owners either did not understand or were misled about the terms of the Loan. The onus is on the owners to establish this on the balance of probabilities.

45. Mr. Christ is a long-time practising lawyer who handles matters of real estate, has had extensive experience on strata council and has been involved in strata development. He is more astute about these types of matters than most people. I do not accept his submission on behalf of the owners that they collectively misunderstood the wording of the two $\frac{3}{4}$ vote resolutions or the Term Sheet that was provided to all strata lot owners as part of the package of material that went with the notice for the April 2013 SGM. The sophistication of his submissions in this case indicate otherwise.

46. I also find that the Term Sheet and the wording of Resolutions 1 and 2 establish that the strata did not mislead on the Loan terms. The 2 resolutions reflect the terms that are in the Term Sheet. While there is arguably some ambiguity around the right of pre-payment, this is not the result of any misleading, just poor drafting.

Was the strata negligent in the performance of its duties in the obtaining of the loan?

47. The conclusions to the previous issue also answer the negligence claim. The Loan obtained was in the terms disclosed to strata lot owners.
48. While the owners may believe the Loan terms are not the best that may have been available to the strata if it had reached out to other lenders, this is not sufficient.
49. I adopt the strata's submissions on this point: "The test for whether a property manager, property management company or strata corporation has satisfied its statutory duties is one of "reasonableness" and not perfection. Further, the courts have recognized that strata councils are entitled to rely upon and be guided by advice from professionals. Even if the professionals they hire fail to carry out work effectively, [a strata is] not held responsible for this result so long as it acted reasonably in the circumstances (*Wright v. The Owners, Strata Plan #205*, (1996), 20 B.C.L.R. (3d) 343 (S.C.), at paragraph 30; *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 56)
50. I conclude that the owners have failed to establish their case and I order that their claims be dismissed.

DECISION AND ORDERS

51. I order that the claims of the owners are dismissed.
52. 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 respondent strata to ensure no expenses incurred by the respondent strata in defending this claim are allocated to the applicant owners.
53. 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.

Michael F. Welsh, Q.C,
Tribunal Member