



# Civil Resolution Tribunal

Date Issued: December 14, 2018

File: ST-2017-003363

Type: Strata

Civil Resolution Tribunal

Indexed as: *Meridian International Trading Co. Ltd. v. The Owners, Strata Plan LMS 3025*, 2018 BCCRT 854

B E T W E E N :

Meridian International Trading Co. Ltd.

**APPLICANT**

A N D :

The Owners, Strata Plan LMS 3025

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

John Chesko

## **INTRODUCTION**

1. This dispute is about a strata corporation's liability for the alleged loss of prospective tenants.
2. The applicant, Meridian International Trading Co. Ltd., is the owner of a commercial strata lot, SL 5, in the strata corporation.
3. The respondent is The Owners, Strata Plan LMS 3025 (strata).
4. The owner is represented by a lawyer, Grant Haddock. The strata is represented by the strata's lawyer, Christopher Bakker. I find the representatives are appropriate.
5. The owner submits the strata acted in bad faith and was negligent by improperly rejecting proposals concerning prospective commercial tenants for the owner's strata lot. The owner claims damages from the strata for lost rent or loss of business opportunity.
6. The strata submits it acted in good faith and properly considered the prospective tenant issues. The strata also submits the prospective tenants chose not to lease the owner's strata lot for reasons unrelated to the strata. The strata submits the dispute should be dismissed.
7. For reasons set out below, I find the owner has not proven the strata is liable in law for the claimed loss of the prospective tenants.

## **JURISDICTION AND PROCEDURE**

8. 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.

9. 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.
10. 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.
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, order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

12. The issues in this dispute are:
  - a. Is the strata liable for the loss of the prospective tenants?
  - b. Is the owner entitled to reimbursement of tribunal fees and expenses?

## **BACKGROUND, EVIDENCE AND POSITIONS OF THE PARTIES**

13. While I have reviewed the submissions and materials submitted, I will refer to the facts needed to make my decision.
14. The evidence is that the owner purchased the strata lot in September 2015. During the time material to this dispute, the owner was seeking a tenant to lease the owner's strata lot.
15. The owner says that it had certain prospective tenants who would have leased the owner's strata lot, but walked away because of the strata. The owner says it lost the prospective tenants because the strata improperly considered proposals related to

the prospective tenants. The owner submits the strata acted in bad faith contrary to the *Strata Property Act* (SPA) and was negligent. I note the owner's strata lot is subject to multiple requirements including municipal and restrictive covenant use restrictions. The restrictive covenant includes requirements for municipal permits as well as restrictions on alterations such as exterior venting. The covenant also restricts commercial strata lot activities which could reasonably interfere with the use and enjoyment of residential strata lots and prohibits certain types of businesses.

#### ***PROSPECTIVE TENANT M***

16. The owner says the strata improperly rejected a request by the prospective tenant, M, in October and November 2015. The owner says the strata improperly refused to approve electrical work requested by the prospective tenant. The owner also says the strata improperly applied strata bylaws concerning opening hours.
17. The owner submits M would have removed conditions precedent and entered into a binding lease if the strata had properly approved the tenant's proposals. The owner submits the prospective tenant M would have entered a 10 year lease with the owner on favourable terms starting January 1, 2016.

#### ***PROSPECTIVE TENANT G***

18. The owner submits the strata also improperly rejected proposals for another prospective tenant, G, at the end of 2015 and into 2016. The owner says the strata improperly rejected the use and hours of operation of the prospective tenant. The owner says the tenant G would have begun paying rent for the space from October 1, 2016 if the strata had properly considered the tenant requests.

#### ***PROSPECTIVE TENANT B***

19. A third prospective tenant, B, was also interested in the space in July 2016. The evidence was that the strata considered and approved the prospective tenant, but the tenant did not lease the space. I note this prospective tenant was in a different

line of business (financial industry) than the previous prospective tenants and had different operating requirements.

20. The evidence shows there was much back and forth between the owner and the strata about the reasons for the strata's denial of the prospective tenants M and G. The strata initially took the position the strata bylaws and rules did not permit certain business uses such as food service, but later conceded the bylaw and rules were not properly instituted.
21. The evidence is that the owner's commercial space was leased by a retail business commencing March 1, 2017.
22. The owner says the lease terms it was able to secure with this tenant are inferior to the lease terms it would have had with the 2 prospective tenants M and G, which it submits were lost because of the strata's improper actions.
23. The owner submits the strata breached its obligations under the SPA and was negligent. The owner submits the strata misapplied the strata bylaws and rules in its consideration of the pre-leasing approvals for the prospective tenants M and G. The owner says the strata has not been transparent and has improperly tried to justify the rejections after the fact.
24. The owner says it would have leased the space on more favourable terms to the prospective tenant M on January 1, 2016 or to the prospective tenant G on October 1, 2016.
25. The owner calculates damages as the shortfall in the amount of rent it would have received if it had rented to the prospective tenants in January 2016 or October 2016. Taking into account variables such as tenant inducements, the owner calculates it suffered a loss of \$202,200.00 when prospective tenant M did not commence a lease on January 1, 2016. In the alternative, the owner says it lost \$96,409.56 when prospective tenant G did not enter a lease starting October 1, 2016. The owner calculated the amounts claimed as loss based on the difference in the rent it expects to receive from the tenant it ended up leasing the strata lot to

from March 1, 2017 and the higher rent it submits it would have received if the strata had not caused the earlier prospective tenants to not lease the strata lot.

26. In the alternative, the owner submits the tribunal could award damages for loss of business opportunity citing *Mickelson v Borden Ladner Gervais LLP*, 2018 BCSC 348. The owner submits the tribunal could award similar type of damages for the lost opportunity to lease its commercial space to the prospective tenants. The owner submits a reasonable amount of damages for the lost opportunity in these circumstances would be \$32,535.00.
27. The owner referred to correspondence between the parties as well as sworn statements in support of its claims.
28. The strata says it complied with the SPA, the bylaws and the law and was not negligent. The strata submits at all times it acted in good faith, honestly and in the best interests of the strata as a whole.
29. In response to the allegations that it improperly denied the request for electrical changes, the strata says it had valid concerns the electrical changes proposed could be hazardous. The strata also submitted evidence that there were valid concerns about use, heritage status of the building and specific municipal requirements such as set-back and permitted venting. The strata points to the restrictive covenant applicable to the owner's strata lot. The strata submitted evidence from third parties such as municipal authorities in support of its understanding.
30. The strata also submits that the owner has not shown that the prospective tenants would have rented the owner's space. In fact, the strata submits the evidence shows the prospective tenants M and G did not lease the owner's commercial strata lot for reasons unrelated to the strata. Among other evidence, the strata points to correspondence at the end of September 2015 with the owner's property agent indicating M had already decided not to go forward with the lease. The strata points to the correspondence that there were many unresolved issues. The strata also

notes it approved prospective tenants where there were no concerns about proposed use or other issues such as electrical safety.

31. The strata says the owner is trying to make the strata responsible for the result of the owner's conduct in the negotiation. The strata submits it worked in good faith and the owner failed to reasonably pursue opportunities. The strata notes the owner was aware when it purchased its strata lot that there were certain restrictions that could affect who the space could be leased to.
32. The strata says this application should be dismissed as the owner has not proven that the strata is liable on the facts and the law.

## **ANALYSIS**

33. In this dispute the owner alleges the strata did not comply with the SPA requirements and is liable for loss under the SPA and negligence.
34. To be successful in the claim against the strata, the owner must prove its case on the balance of probabilities. That means I must be convinced on all the circumstances that the owner's position is more likely than not to have occurred.
35. Under the SPA and the law, a strata is owned and controlled by all of the strata owners, who in turn elect a group of owners to serve on the strata council. The standard of care required for a strata is not perfection, but reasonableness. The law recognizes strata councils are made up of real people volunteering their time for the good of the strata community and gives them latitude.
36. To prove negligence the owner must demonstrate the strata owed the owner a duty of care, that the strata's behaviour breached the standard of care required, that the owner sustained damage, and that the damage was caused in law and in fact by the strata's breach of the standard of care. See *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27 (Canlii).

37. In determining what is the standard of care required of a strata, the courts have looked to the statutory requirements and standards set out in the SPA, but have held that the overarching test is reasonableness in the circumstances. See *Hirji v The Owners Strata Corporation Plan VR 44*, 2015 BCSC 2043, application for leave to appeal dismissed 2016 BCCA 392 (Canlii), application for leave to SCC dismissed 2017 Canlii 23876 (SCC).
38. For the purpose of this dispute, I would apply the standard of reasonableness as found to be the appropriate standard in *Hirji*. Whether the strata has met the required standard depends on the circumstances as a whole.
39. While not bound by other tribunal decisions, I have also considered the following tribunal decisions helpful in considering application of the strata's standard of reasonableness: *Di Lollo v The Owners, Strata Plan BCS 1470*, 2018 BCCRT 24, *NCAH BC Holdings Ltd. v. The Owners, Strata Plan EPS 1231* 2018 BCCRT 137, *Ford v The Owners, Strata Plan LMS 215*, 2018 BCCRT 290.

#### ***IS THE STRATA LIABLE FOR THE LOSS OF THE PROSPECTIVE TENANTS?***

40. I find the owner has not proven on a balance of probabilities the strata is liable for the loss claimed.

#### ***OWNER NOT PROVEN PROSPECTIVE TENANTS WOULD HAVE RENTED***

41. I find on all the circumstances that the prospective tenants M and G did not lease the owner's strata lot for reasons other than the action of the strata. In other words, I find the owner has not suffered a loss in law or in fact.
42. In support of my decision I note the correspondence from the owner's agent shows there was clearly not a firm and binding agreement to lease. As pointed out by the strata, the contemporaneous correspondence between the owner's property agent and the prospective tenants shows interest in the owner's strata lot lagging prior to the time that the strata made the decisions complained of by the owner. Indeed I find the evidence supports that the prospective tenants had already lost interest in



the strata lot due to other reasons such as cost and were not following up with the property agent to move forward. I find the property agent was doing their best to move things along, but the prospective tenants were not sufficiently interested. I especially note the correspondence from the prospective tenant M in September 2015 advising that the prospective tenant would not proceed with the lease. I also note the repeated failure to provide required deposits and the rejection of the offer to cover certain electrical costs.

43. I also find the prospective tenant G decided not to lease the space for reasons not related to the strata. On review of the correspondence as a whole, I accept the strata's submission that factors other than the strata council decisions led to the prospective tenants not leasing the owner's strata lot. I also note the evidence submitted by the strata about the restrictive covenant and from municipal authorities of difficulties with use and vent requirements for the strata lot further reinforces my decision. I accept the strata argument, and I find, that the circumstances and evidence of the negotiating history shows the prospective tenant G did not lease the owner's strata lot for reasons unrelated to the strata.
44. In further support of my conclusion, I note the other prospective tenant B also 'walked away' and did not lease the owner's strata lot even though it had received approvals from the strata.
45. I find the owner has not proven its case on a balance of probabilities. I find on all the evidence that the prospective tenants M and G decided not to rent the owner's strata lot for reasons other than the actions of the strata. I find the evidence of the owner does not meet the necessary requirement to prove that the strata's actions were sufficiently connected to the loss claimed. See *Hirji v The Owners Strata Corporation Plan VR 44*, 2015 BCSC 2043, application for leave to appeal dismissed 2016 BCCA 392 (Canlii), application for leave to SCC dismissed 2017 Canlii 23876 (SCC). In other words, I find there was no loss in fact or in law related to the strata.

### ***LOSS OF BUSINESS OPPORTUNITY***

46. I have also considered the owner's alternative argument that there was a chance the prospective tenants may have continued to pursue a lease and that damages for loss of the chance or opportunity are appropriate. The owner submits that \$32,535.00 is the appropriate amount for the lost opportunity. I note this is roughly 15-30% of the loss calculated by the owner above.
47. While I would conclude that the tribunal could award damages in the right circumstances for loss of business opportunity, I would however find the owner has not made out a case for damages for loss of opportunity in the circumstances. As set out above, I find on the facts that the prospective tenants decided not to rent the owner's strata lot for reasons unrelated to the strata. I would also find in all the circumstances that the owner has not established there was 'a real and substantial possibility' the prospective tenants M and G would have rented the owner's space and would likewise dismiss the claim for loss of business opportunity. See *Mickelson v Borden Ladner Gervais LLP*, 2018 BCSC 348 at paragraphs 196-197.

### ***IN THE ALTERNATIVE I WOULD ALSO HAVE FOUND STRATA NOT IN BREACH OF STANDARD OF CARE IN ALL THE CIRCUMSTANCES***

48. While I have found on the facts the prospective tenants would not have leased the owner's strata lot, in the alternative I also would find the owner did not prove on the whole of the evidence the strata conduct was below the statutory requirement of the SPA. In other words, I would find the strata, on the whole, acted honestly and in good faith and exercised reasonable care, diligence and skill in the circumstances. While it is clear the strata did make errors, on the whole I find the strata acted reasonably and in the best interest of the strata in the circumstances.
49. Applying the test of reasonableness, I would have found the strata met the required reasonableness standard of care in all the circumstances. I do not accept the owner's allegation that the strata was acting in bad faith in its dealings with the owner and the prospective tenant issue. I note the strata's refusal to accept the

proposal to change the electrical amperage was supported by the belief the proposed electrical changes would be harmful to the building. I have also taken into account the strata's responsibility to the strata as a whole and factors including the restrictive covenant. The courts have held that even where a strata does make an error, the standard of care required of a strata is not perfection, but reasonableness in all the circumstances. Even where a strata council has made a mistake in good faith, that does not automatically mean the strata has fallen outside the required standard. Where a strata reasonably continues to address a situation and work towards resolving strata issues, the law recognizes the strata has leeway as it works in good faith to resolve strata issues. I would find that is what the strata did in this case.

50. I also note the contemporaneous evidence shows the strata considered and approved other prospective tenants such as the prospective tenant B that was approved by the strata in July 2016. I further note the correspondence shows, and I find, the strata was attempting to work honestly and in good faith with the owner. I do not accept the owner's submission that the strata sought professional assistance as evidence of bad faith. Indeed, I would find it was further evidence that the strata was acting reasonably and applying care and skill of a reasonably prudent person.
51. I have also considered in the alternative whether the conduct of the strata was 'significantly unfair' to the owner as set out in section 164 of the SPA. See *Reid v The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578, *Dollan v The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, *Sherwood v. The Owners, Strata Plan VIS 1549*, 2018 BCSC 890. For reasons similar to the conclusions above, I would also have found the strata's conduct in this dispute has not been 'significantly unfair' in all the circumstances.

***IS THE OWNER ENTITLED TO REIMBURSEMENT OF TRIBUNAL FEES AND EXPENSES?***

52. As I have found for the strata, the owner is not entitled to reimbursement of tribunal fees or expenses.

53. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute related expenses against the owner, unless the tribunal orders otherwise.

## **ORDERS**

54. For the reasons set out above, I order the owner's claims and this dispute dismissed.

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John Chesko, Tribunal Member