Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Johnson v. The Owners, Strata Plan K 46*, 2019 BCCRT 601

B E T W E E N :

Douglas Johnson

APPLICANTS

A N D :

The Owners, Strata Plan K 46

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. The applicant, Douglas Johnson (owner), owns strata lot 14 (SL14) in the respondent strata corporation, The Owners, Strata Plan K 46 (strata).

2. In 2012 the strata changed how it calculated strata fees which resulted in the owner's strata fees increasing significantly, and which the owner says was

significantly unfair to him. In 2017 the ownership voted unanimously to calculate strata fees equally across all strata lots (resolution #3). The owner wants the strata to reimburse him $21,924.06 for what he says are strata fee overcharges between July 31, 2012 and 2017. He also wants the strata to re-file resolution #3 with the Land Title Office (LTO) because the LTO rejected it when the strata first filed it.

3. The strata says the owner is out of time to bring his complaint, and that the strata's change in 2012 in how it calculated strata fees brought the strata into compliance with the *Strata Property Act* (SPA). The strata says it did not overcharge the owner, it simply charged him strata fees according to the strata's unit entitlement.

4. The owner is self-represented and the strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 121 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.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a "he said, they said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanor in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Bearing in mind the tribunal's

mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

7. 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.

8. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

9. Under section 123 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.

ISSUES

10. The issues in this dispute are:

    a. Is the owner out of time to claim reimbursement of strata fees?

    b. If not, is the strata required to reimburse the owner $21,924.06 for overcharges for strata fees and special levies?

    c. Is the strata required to refile Resolution #3 with the LTO?

BACKGROUND AND EVIDENCE

11. The strata is a phased plan created in July 1975 with phase 1. Phase 2 was filed in 1976. The strata's unit entitlement (UE) was filed at the Land Title Office (LTO) when the strata was created as part of the strata plan.

12. On August 11, 1976 the strata held its first annual general meeting (AGM). At that time the former *Strata Titles Act* (STA) was in force. At that meeting the ownership unanimously passed a motion for SL14 to be classified as a "single unit" regarding its unit contribution towards the strata's total annual expenses, provided it remained a single-family dwelling. This meant SL14 would contribute to common expenses in the same proportion as all other single units in the strata. The ownership also unanimously passed a motion that, there being 34 strata lots, each owner would pay 1/34 of the strata's annual common expenses.

13. At the strata's AGM on July 12, 1980, the ownership voted by special resolution with 88% approval to repeal the previous bylaws and replace them with new bylaws, which the strata filed with the LTO. Bylaw 49 (1) said that the strata consisted of 34 "single unit" strata lots, and each of the strata lot owners would contribute 1/34 towards the total common expenses. It specifically deemed SL14 to be a "single unit" as long as it remained a single-family dwelling. Bylaw 49 (5) said an operating budget would be approved at each AGM for the next fiscal year, and thereafter all owners would pay their respective 1/34th single-unit proportion of the approved budget.

14. In March 1996 the strata filed consolidated bylaws with the LTO. Bylaw 48 stated that the owners' contributions to the strata's common expenses would be levied in accordance with bylaw 50. Bylaw 50 (1) stated that each strata lot owner would pay 1/32 towards the strata's common expenses.

15. In July 2009 the strata filed bylaws with the LTO which replaced all previous bylaws. Bylaw 1 (b) states:

> (b) This strata plan consists of a total of thirty four (34) strata lots. To simplify accounting procedures and in consideration of the fact lots 8 and 9 do not contribute to the operating budget while owned by the corporation, each lot owner's strata fees shall be calculated as 1/32 of the total contributions budgeted for the strata corporation…

16. In the spring of 2012 a new property management company took over management of the strata, and they advised the strata that bylaw 1 (b) was unenforceable because it contravened the SPA. They told the strata that the 2-year transition period between the former *Condominium Act* and the SPA had expired, and they recommended the strata bring itself into compliance with the SPA as soon as possible.

17. On July 10, 2012, the strata mailed out notice of its July 31, 2012 AGM, which included a "Proposed Schedule of Unit Entitlements and Strata Fees" for June 1, 2012 to May 31, 2013 which calculated strata fees based on UE, not on the proportional system the strata had been using since 1976. On July 31, 2012 the strata held its AGM. The ownership approved the budget which included strata fees calculated based on UE. This change resulted in the owner's strata fees essentially doubling, while all other owners were only minorly affected by this change.

18. On August 21, 2012, the strata manager sent a letter to the ownership explaining the reason the strata had changed to calculating strata fees based on UE in its 2012-2013 budget which passed at the July AGM.

19. At the strata's July 31, 2013 AGM the ownership approved a bylaw amendment by a ¾ vote resolution to continue to calculate strata fees based on UE. On September 11, 2013 the strata filed this bylaw amendment with the LTO.

20. At the strata's July 28, 2017 AGM, the ownership unanimously passed a resolution to revert the strata fee calculation back to 1/32 equal contribution by each strata lot owner (resolution #3). The strata says it filed resolution #3 with the LTO in 2017 in a package with several other resolutions and that the LTO rejected the filing because another resolution in the package (about amending the strata plan) contained deficiencies. The strata says it mistakenly assumed that resolution #3 had been successfully filed, but later learned that the LTO had rejected the entire package. The strata says once it discovered its error it "took immediate actions" to re-file resolution #3. However, the LTO index in evidence does not show that resolution #3 was filed, and the strata has provided no proof that it was successfully filed.

ANALYSIS

21. In a civil claim like this one, the applicant must prove their claim on a balance of probabilities. This means the tribunal must find it is more likely than not that the applicant's position is correct.

22. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.

Is the owner out of time to bring this dispute?

23. The strata says the owner is out of time to claim disbursement of strata fees. It says he discovered this claim on or shortly after July 10, 2012, when the strata mailed out its notice package for the July 31, 2012 AGM. The notice package included the proposed budget, which included a calculation of strata fees based on UE, not on the equal proportion calculation that had been in place since 1976.

24. The owner says he first discovered this claim on August 21, 2012, which is the day the strata sent notice to the ownership of the change in calculating strata fees. In the alternative, the owner says he did not discover his claim until the strata's AGM on July 31, 2013 when the ownership passed a bylaw confirming the change to the strata fee calculations which had been passed at the previous year's AGM. In the further alternative the owner says he did not discover his claim until the strata's AGM on July 28, 2017, because at that meeting a council member announced that its decision to change its calculation of strata fees in 2012 was made in error.

25. The owner first filed his Dispute Notice on August 16, 2018, but he had difficulties naming the proper respondent, and the tribunal did not issue the Dispute Notice until September 10, 2018. On his original Dispute Notice the owner stated that he first discovered this claim at the AGM on July 31, 2012. The owner filed an amended Dispute Notice on September 28, 2018 which stated he first learned about the claim at the AGM on July 31, 2013. The owner filed another amended Dispute Notice on November 15, 2018 which stated he first learned about the claim at the AGM on July 28, 2017.

26. The *Limitation Act* applies to this dispute. The current *Limitation Act* came into force on June 1, 2013, and it requires a debt claim to be started within 2 years of the date it was discovered. For claims discovered before June 1, 2013, the former *Limitation Act* applies, and under that statute a debt claim had to be started within 6 years of the date it was discovered. A person discovers a claim on the day they first learned of the matters in the claim or reasonably ought to have known about the claim.

27. I find the strata's position that the owner first learned about the claim on July 10, 2012 to be incorrect. While the owner may have learned about the proposed change on that date, the change did not become effective until the ownership voted on it at the AGM on July 31, 2012. Therefore, I find the earliest date the owner could have learned about his claim was July 31, 2012. The owner's original Dispute Notice lists that date as the day he discovered his claim. In that case, the Dispute Notice would have to have been issued by July 31, 2018, and therefore the claim would be out of time under the former *Limitation Act*.

28. However, the owner subsequently amended his Dispute Notice, and it is not clear from the evidence before me that the owner attended the July 31, 2012 AGM. Therefore, I cannot say for certain that the owner discovered his claim on July 31, 2012.

29. In his submissions the owner claims he discovered his claim on August 21, 2012 but says in the alternative he discovered his claim on either July 31, 2013, or on July 28, 2017. However, the date the owner discovered his claim is not a legal position for which he can make alternative arguments. Rather, the date the owner discovered his claim is a fact, and by providing alternative dates the owner has provided inconsistent facts which diminish his credibility. The earliest date the owner says he discovered his claim was August 21, 2012, and the evidence before me supports this. Therefore, I find the owner discovered his claim on August 21, 2012, and for the following reasons, I find his dispute is out of time.

30. Under the former *Limitation* Act the owner would have been required to start his claim by August 21, 2018. While he filed his Dispute Notice on August 16, 2012, the

tribunal did not issue it until September 10, 2018. According to section 14 (1) of the Act that was in force at that time, the limitation period stopped running on the day the tribunal issued the Dispute Notice, not on the day the owner filed it is application.

31. Under section 5 of the former *Limitation Act,* if a person confirms a cause of action before the expiration of the limitation period it restarts the limitation period. The owner says the strata acknowledged his claim at the July 28, 2017 AGM which restarted the limitation period. He says at that meeting a strata council member announced that the strata had been mistaken in implementing the change in calculating strata fees in 2012. However, aside from the owner's assertion, there is no evidence to establish that the strata council member made that statement. Even if they did, I find such a statement does not specifically acknowledge the owner's cause of action. Therefore, I find the limitation period did not restart on July 28, 2017, and it expired on August 21, 2018, which was before the tribunal issued the Dispute Notice. I find the owner's claim for reimbursement of strata fees is out of time.

32. However, if I am wrong in this determination, for the following reasons I dismiss this claim on its merits.

Is the strata required to reimburse the owner $21,924.06 for overcharges for strata fees and special levies?

33. When the strata was created in 1975, the former *Strata Titles Act* (STA) was in force.

34. Section 3 (1) (f) (ii) of the STA stated that strata fees must be calculated based on UE. Section 20 (1) (d) of the STA stated that the strata was required to calculate each owner's contribution to the administrative fund (now called the operating fund) and the contingency reserve fund based on UE. Section 44 (2) of the STA said the contribution to common expenses of each strata lot owner in a phased development was to be calculated in the proportion that the UE of an owner's strata lot bore to the total UE of the 2 or more phases of the strata plan.

35. The STA did not include a mechanism for the strata to calculate strata fees based on anything other than UE, whether by unanimous resolution or by bylaw. Therefore, the unanimous resolution the ownership passed at its 1976 AGM was in contravention of the STA, as was the bylaw it passed in 1980 setting out the calculation of strata fees equally across all strata lots.

36. In 1980 the STA was replaced by the *Condominium Act*, and in on July 1, 2000 the *Condominium Act* was replaced by the SPA. Therefore, at the time of the strata's July 31, 2012 AGM, the SPA was in force.

37. Section 99 of the SPA says owners must contribute to the strata's operating fund and contingency reserve fund by paying strata fees calculated according to the UE of a strata lot, divided by the total UE of all strata lots, multiplied by the total contribution. Section 100 (1) of the SPA allows the strata to use a different formula only if the ownership approves an alternate formula by a unanimous vote at a general meeting. Section 100 (3) says a resolution described in section 100 (1) has no effect until it is filed with the LTO. I note that nothing in this section allows a strata to apply a different formula for calculating strata fees by implementing a bylaw to that effect.

38. The strata has not filed a resolution contemplated by section 100 of the SPA with the LTO. While the ownership did pass a unanimous resolution in 1976 to calculate strata fees equally across all strata lots, the SPA was not in force at that time, and the STA did not include a similar provision to section 100 of the SPA. Even if it had, the evidence before me shows that the strata did not file the unanimous resolution with the LTO at the time or at all. Therefore, I find the strata was in contravention of the STA when it started calculating strata fees equally across all strata lots in 1976. When the SPA came into force, the strata continued to be in contravention of the legislation by the manner in which it calculated strata fees.

39. When the strata's proposed budget for the 2012-2013 fiscal year included an attachment showing that strata fees would be calculated based on UE, I find the

strata was attempting to bring itself into compliance with section 99 of the SPA, and that it did so when the ownership passed the budget.

40. The owner says the strata's decision to change the formula for calculating strata fees to UE was significantly unfair as it doubled his strata fees after 37 years. He says the strata's decision was based on incorrect advice from its property manager and says the strata did not obtain legal advice until after making that decision. The owner says the strata did not act in good faith by making such a decision without seeking legal advice.

41. The tribunal has jurisdiction to determine claims of significant unfairness because the language in section 164 of the SPA is similar to the language of section 123(2) of the Act, which gives the tribunal authority to issue orders about significant unfairness. (see *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.)

42. The courts and the tribunal have considered the meaning of "significant unfairness" in many contexts and have equated it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

43. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the Court of Appeal established the following test for establishing significant unfairness:

    1. What is or was the expectation of the affected owner?

    2. Was the owner's expectation objectively reasonable?

    3. If so, was that expectation violated by an action that was significantly unfair?

44. In this case, I find the owner expected to continue paying his strata fees proportionally based on the number of strata lots, and I find that expectation was objectively reasonable based on the strata's over 35-year history of calculating

strata fees in that manner. However, in the circumstances I find the owner's reasonable expectation was not violated by a significantly unfair action.

45. In *Liverant v. The Owners, Strata Plan VIS-5996*, 2010 BCSC 286, the court said that direct compliance with a specific provision of the governing legislation cannot be significantly unfair. I have already found that the strata's decision to start calculating strata fees based on UE was meant to bring the strata into compliance with the SPA. The evidence before me shows the new calculation method was included in the AGM notice package the strata sent to the ownership on July 10, 2012, 3 weeks before the AGM. Therefore, I find it was not significantly unfair for the strata to calculate strata fees based on UE.

46. I find there is no basis on which the strata is required to reimburse the owner any amount of strata fees, and I dismiss this claim.

Is the strata required to file resolution #3 with the LTO?

47. The LTO index in evidence indicates that the strata has not filed resolution #3 with the LTO. The strata says that after learning that the LTO rejected its attempted filing of resolution #3 it took immediate action to refile it, however the strata provided no evidence that resolution #3 has been re-filed. There is no evidence to indicate that the resolution has subsequently been amended or overturned. Therefore, within 30 days of the date of this decision, I order the strata to file resolution #3 with the LTO and to provide proof of filing to the owner.

TRIBUNAL FEES AND EXPENSES

48. Under section 49 of the Act, and the tribunal rules, since the owner was generally unsuccessful I find he is not entitled to reimbursement of his tribunal fees or dispute-related expenses.

DECISION AND ORDERS

49. I order that:

a. Within 30 days of the date of this decision the strata must file resolution #3 with the LTO and provide proof of filing to the owner.

50. 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.

Sarah Orr, Tribunal Member