Civil Resolution Tribunal

Date Issued: May 23, 2019

File: ST-2018-005200

Type: Strata

Civil Resolution Tribunal

Indexed as: *Exelsior Holdings Ltd. v. The Owners, Strata Plan VR 2139*, 2019 BCCRT 623

B E T W E E N :

Exelsior Holdings Ltd.

**APPLICANT**

A N D :

The Owners, Strata Plan VR 2139

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member: Eric Regehr

## INTRODUCTION

1. The applicant, Exelsior Holdings Ltd., owns several strata lots in the respondent strata corporation, The Owners, Strata Plan VR 2139 (strata). The applicant is a holding company for an accounting firm, Martin & Henry (firm), which operates in the strata. This dispute is about the applicant's purchase of strata lot 6, also known

as unit 204, which is a residential strata lot on the strata plan. The applicant seeks to use unit 204 for offices. The strata has refused to approve the change in use.

2. The applicant says that the strata has improperly required a unanimous vote of the owners to approve the change in use, which should only require a simple majority vote. The applicant says that the strata has acted significantly unfairly in refusing to approve the change in use. The applicant also takes issue with the strata's spending on legal fees associated with this dispute.

3. The strata says that the change in use requires a unanimous resolution and defends its decision as being in the best interests of the strata.

4. The applicant is represented by a director or employee. The strata is represented by a member of strata council.

## 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. 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.

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. Under section 123 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, and order any other terms or conditions the tribunal considers appropriate.

## ISSUES

9. The issues in this dispute are:

    a. Does the applicant's request to change unit 204's use from residential to commercial require a unanimous vote, ¾ vote or simple majority vote?

    b. What is the appropriate process for the strata to approve the change?

    c. Did the strata act significantly unfairly by refusing to approve the applicant's request to change unit 204's use from residential to commercial?

## BACKGROUND AND EVIDENCE

10. In a civil claim such as this, the applicant must prove its case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.

11. The strata consists of 8 strata lots in 2 separate 3 story buildings in Vancouver. Each building has a strata lot on the ground floor, 2 strata lots on the second floor, and 1 strata lot on the third floor. Even though there are 2 separate buildings, the 4 second floor strata lots share an elevator, 2 staircases and a walkway, all of which are common property.

12. On the strata plan, strata lot 1 is designated as commercial and the remaining strata lots are designated as residential. Strata lot 1 has 2 votes while the residential strata lots have 1 each, for a total of 9 votes in the strata.

13. The strata has filed 4 bylaw amendments with the Land Title Office, none of which are relevant to this dispute. Therefore, for the purposes of this dispute, the Standard Bylaws under the *Strata Property Act* (SPA) apply.

14. The firm owns strata lot 1, also known as unit 101, through another holding company. Unit 101 is the ground floor strata lot in the building facing the street. The applicant also owns strata lots 3 and 4, also known as units 201 and 202, which are the 2 strata lots directly above unit 101. Unit 204 is on the second story of the building along the laneway.

15. The applicant renovated unit 202 in 2011, which included adding an internal staircase between 101 and 202. The applicant renovated unit 201 in 2014, which included adding an internal connection to unit 202. The applicant did each renovation with a City of Vancouver building permit and with the strata council's permission. While the evidence is not entirely clear, I infer that units 201 and 202 were used as residences before the applicant purchased them. There is no evidence that the owners voted on either renovation or change in use.

16. On April 16, 2018, the strata received legal advice about the applicant's proposal to purchase unit 204 and convert it to commercial use as part of its offices. The lawyer advised that the City of Vancouver would decide whether the applicant would need to revise the applicable Development Permit. Among other things, the strata's lawyer said that the applicant would also require the strata's approval. The strata's lawyer advised that the strata would need to pass a unanimous resolution to permit the change in use from residential to commercial.

17. On April 23, 2018, the strata held a special general meeting to consider the applicant's request to convert unit 204 to a commercial use. All of the owners were present. There were 7 votes in favour and 2 opposed so the strata took the position that the resolution failed.

18. On May 29, 2018, the applicant's lawyer wrote to the strata, asserting that there was no basis in the SPA to require a unanimous resolution. The applicant requested a strata council hearing, which was held on June 21, 2018. At that hearing, the strata council voted against either approving the conversion or putting the matter to a majority vote at the next AGM, scheduled on July 12, 2018.

19. On June 27, 2018, the applicant delivered a written request under section 46(2) of the SPA requesting that a majority vote resolution on converting unit 204 to a commercial use be added to the agenda of the next AGM. On July 6, 2018, strata council refused the request, maintaining that the proposed resolution required a unanimous vote.

20. On July 5, 2018, the applicant's purchase of unit 204 completed.

21. The strata has several reasons it does not want to approve the conversion. First, they say that converting another strata lot into the applicant's commercial lot would cross a threshold where more than 50% of the votes would be controlled by one commercial interest. It also points out that there is an internal staircase that connects units 101, 201 and 202, but unit 204 is in the second building so will have a greater impact on the residents who will have to share common property with the applicant's staff.

22. The applicant says that it will not use unit 204 for receiving clients. The strata is concerned that once unit 204 is established as a commercial strata lot, subsequent owners may use it to receive members of the public.

23. The strata's land is zoned as C-2 Commercial. According to the City of Vancouver's zoning bylaw, C-2 zoning permits general office uses in conjunction with residential uses.

24. As a preliminary matter, the applicant initially made claims about the strata's expenditure of funds on legal fees associated with the applicant's change in use application. The applicant argued in its Dispute Notice that the expenditure was not authorized by section 97 of the SPA.

25. Since the applicant filed its Dispute Notice, the strata has received legal advice about its obligation not to allocate any legal fees to the applicant for defending this dispute under section 167 of the SPA. That legal advice is in evidence.

26. During the tribunal decision process, neither party made submissions about the issue of legal fees. I infer that the applicant has considered these claims resolved, given the legal advice provided to the strata, and I dismiss them accordingly.

27. That said, the strata must comply with section 189.4, which says, among other things, that section 167 applies to tribunal disputes. Therefore, the strata must not charge dispute-related expenses to the applicant. Nothing in this decision prevents the applicant from making a future claim against the strata if the strata does not comply with section 189.4 in relation to expenses incurred in defending this dispute.

## POSITION OF THE PARTIES

28. The applicant argues that:

    a. The conversion of unit 204 to a commercial use requires only a majority vote under section 50(1) of the SPA.

    b. The strata has previously approved the conversion of units 201 and 202 to a commercial use.

    c. The strata improperly refused the applicant's request under section 46(2) of the SPA to put a resolution on the agenda of the AGM.

    d. The strata's actions are significantly unfair.

29. The applicant requests that I order:

    a. The conversion of unit 204 to a commercial use requires only a majority vote.

    b. The resolution of April 23, 2018, passed by a majority vote and the strata has therefore already approved the conversion of unit 204 to a commercial use.

    c. In the alternative, the strata hold a special general meeting (SGM) that includes a vote on the conversion of unit 204 to a commercial use, which requires only a majority to pass.

30. The strata argues that:

a. The applicant's proposed change in use requires a resolution passed by a unanimous or, alternatively, ¾ vote.

b. It would be inappropriate to retroactively apply the vote of April 23, 2018, to a new voting threshold.

31. The strata requests that I dismiss the applicant's claims.

## ANALYSIS

### *Does the applicant's request to change unit 204's use from residential to commercial require a unanimous vote, ¾ vote or simple majority vote?*

32. Section 50(1) of the SPA says that strata matters are decided by a simple majority vote unless the SPA or the *Strata Property Regulation* (Regulations) require or permit otherwise. There is no requirement in the SPA that a change in the use of a strata lot requires a unanimous vote.

33. Rather than relying on a provision in the SPA or Regulations, the strata relies on *Clarke v. The Owners, Strata Plan VIS 770*, 2011 BCSC 240. In *Clarke*, there were 6 strata lots in which the owners had enclosed their balconies in glass, effectively increasing the size of their strata lots. The change was contrary to the applicable zoning bylaw and the City of Victoria had demanded that the owners or the strata corporation remedy the contravention by removing the glass structures.

34. The Court concluded that the strata could not pursue rezoning without a unanimous vote. The Court stated that the SPA provides for different votes, ranging from a simple majority to unanimity, but did not refer to a section of the SPA that required a unanimous vote for the rezoning at issue.

35. The strata argues that *Clarke* effectively creates a new situation that requires unanimity: zoning changes. The strata further argues that a change to a Development Permit is analogous to a zoning change. The strata relies on the Court's statement that the rezoning requires unanimity because it "directly affects the property rights of each individual owner".

36. The applicant says that *Clarke* was wrongly decided because it is not for the Court or the tribunal to add new situations that require a unanimous resolution. I agree with the applicant that the SPA and Regulations contain an exhaustive list of the types of resolutions that require a unanimous vote. I do not agree with the strata that the Court sought to create a requirement that a change that "directly affects the property rights of each individual owner" must be approved by a unanimous resolution.

37. That said, I do not agree with the applicant that *Clarke* was necessarily wrongly decided. Rather, I infer that the Court relied on section 261 of the SPA, which requires a unanimous vote to amend a Schedule of Unit Entitlement to reflect a change in the habitable area of a strata lot. I make this inference because the Court's reasoning rested on the fact that the change would "impact directly on individual ownership". Amending the Schedule of Unit Entitlement to reflect an increased size of some strata lots would directly impact each owner because it would alter each owner's financial responsibilities and the strata corporation's repair and maintenance obligations.

38. I therefore find that the reasoning in *Clarke* does not apply to this dispute. I find that a unanimous resolution was not necessary to change the permitted use of unit 204.

39. In the alternative, the strata argues that a changing the use requires a ¾ under section 71 of the SPA because the applicant's employees will use common property. The strata says that this is a significant change in the use of common property. The strata cites *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333, which sets out a number of factors that determine when a change is significant.

40. There is no evidence that the applicant's staff will use common property in a different way or with a different frequency than a resident. Employees, like residents, come and go at varying times and frequencies. Therefore, I find that section 71 of the SPA does not apply to this dispute.

41. However, it does not follow that the applicant only requires a majority vote to convert unit 204's use from residential to commercial. There is nothing in the SPA that regulates a strata lot's use. Rather, section 119 of the SPA permits a strata corporation to pass bylaws regulating the use of strata lots, common property and common assets. Standard bylaw 3, which applies to the strata, regulates use.

42. The strata argues that the applicant's desire to use unit 204 for a commercial purpose would breach bylaws 3(1)(c) and 3(1)(e). Bylaw 3(1)(c) prohibits using a strata lot in a way that unreasonably interferes with the rights of other persons to use and enjoy common property, common assets or another strata lot. Bylaw 3(1)(e) prohibits using a strata lot in a way that is contrary to the purpose for which the strata lot is intended as shown on the strata plan.

43. If using unit 204 would breach a bylaw, then the strata would be obligated to enforce it. While strata corporations have some discretion to enforce bylaw, that discretion is limited. See *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32. Therefore, if using unit 204 for a commercial purpose would breach a bylaw, then the correct process to "convert" its use to a commercial use would be to pass a bylaw permitting the new use. I will therefore address whether the proposed use is a breach of a bylaw.

44. First, for the same reasons that I found that section 71 of the SPA does not apply to the proposed change in use, I find that changing the use of unit 204 would not violate bylaw 3(1)(c). I agree with the applicant's argument that the strata's concerns are speculative. In any event, if the applicant uses common property in a way that unreasonably interfere with other person's use and enjoyment of common property or their strata lot, the strata may, at that time, enforce bylaw 3(1)(c) to address any specific issues.

45. The strata also relies on bylaw 3(1)(e). The strata plan expressly says that strata lot 1 is for a commercial use and strata lots 2 through 8 are for residential use.

46. The applicant says that bylaw 3(1)(e) does not apply and relies on *Winchester Resorts Inc. v. Strata Plan KAS2188 (Owners)*, 2002 BCSC 1165. In *Winchester*

*Resorts*, an owner sought to build a fishing lodge for paying guests. The strata plan said that it was "entirely for residential use". However, the strata corporation was also subject to a building scheme, which prohibited a list of uses even though the applicable zoning might permit them. A building scheme is a charge on title that contains terms which limit what future owners can do with the property. Notably, the zoning regulations permitted fishing and hunting resorts and the building scheme did not expressly prohibit them.

47. The strata corporation sought to rely on an identical bylaw to bylaw 3(1)(e), relying on the strata plan's statement that all of the strata lots were for residential use. The owner relied on the building scheme and zoning regulations. The Court found in favour of the owner, noting that considerable effort went into prohibiting certain specific uses that the zoning would have otherwise allowed.

48. The strata argues that *Winchester Resorts* was specifically about a situation where there were documents with inconsistent information about permitted and prohibited uses. In this dispute, there is no building scheme or any other evidence about the permitted or intended uses of the strata lot other than in the strata plan.

49. The strata relies on *Kok v. Strata Plan LMS 463*, 1999 CanLII 6382 (BC SC). In *Kok*, the strata corporation's bylaws required commercial strata lot owners to apply to the strata council before changing the nature of its business. The Court found that the strata corporation was able to regulate what type of business a strata lot could operate. It is noteworthy that the Court in *Winchester Resorts* distinguished *Kok* because *Kok* did not involve a building scheme.

50. In my view, *Winchester Resorts* does not assist the applicant. The applicant specifically points to the Court's comment that bylaw 3 related to matters "of less importance than land use in a zoning sense". I find that the applicant overstates what the Court intended by this statement. Most uses of land are governed to some extent by applicable zoning laws. Therefore, accepting the applicant's arguments would effectively rob bylaw 3(1)(e) of any meaning. Given that bylaw 3(1)(e) is a Standard Bylaw, the legislature cannot have intended this result. I find that

*Winchester Resorts* is limited to situations where there are competing documents filed in the Land Title Office, which is not the case in this dispute.

51. The applicant also argues that *Winchester Resorts* stands for the proposition that a strata corporation must pass a specific bylaw restricting how a strata lot may be used, and that the strata has not done so. It is difficult to reconcile the applicant's position with bylaw 3(1)(e), which explicitly prohibits certain uses by referring to the strata plan.

52. I am supported in my conclusion on the applicable law by the *British Columbia Strata Property Practice Manual*, which synthesizes the law regarding use bylaws as follows. If a strata lot is charged by a building scheme, the bylaws may not restrict the uses permitted in the building scheme. If there is no building scheme, the bylaws may restrict the uses for the strata lot.

53. Applying the above, I find that using unit 204 for a commercial use would violate bylaw 3(1)(e) because the strata plan provides for a residential use. I find that the correct process to "convert" unit 204 to a commercial use is to pass a bylaw amendment permitting the applicant's proposed use.

54. This outcome provides the applicant and the strata with flexibility to negotiate the wording of a potential bylaw that would permit the applicant to use unit 204 as it wishes while preventing some of the potential harms that some owners fear. For example, the bylaw could provide that unit 204 may be used for a commercial use but prohibit clients from attending unit 204. It also provides the opportunity to bring the status quo in units 201 and 202 into compliance with the bylaws.

### *What is the appropriate process for the strata to approve the change?*

55. Bylaws may be amended under section 128 of the SPA. In general, bylaw amendments require resolutions passed by a ¾ vote. However, because the strata includes both residential and nonresidential strata lots, section 128(1)(c) applies. Section 128(1)(c) provides that to pass a resolution amending a bylaw, the

resolution must pass by a ¾ vote of residential strata lots and a ¾ vote of nonresidential strata lots.

56. The complication in this dispute is: which strata lots are residential and which are nonresidential for voting purposes? Units 201 and 202 function as commercial strata lots but remain residential strata lots on the strata plan.

57. The BC Court of Appeal considered this issue in *East Barriere Resort Limited v. The Owners, Strata Plan KAS1819*, 2017 BCCA 183. That case involved a phased strata corporation in which the initial disclosure statements stated that the intended uses of the strata lots were a mix of commercial and residential strata lots. However, in practice, all of the strata lots were used as residential strata lots and for many years the owners voted as if it were a strata corporation with only residential strata lots under section 128(1)(a).

58. Several owners disputed the strata corporation's voting practices. The Court found that the initial intention of the developer was determinative of whether a strata lot was intended to be used as a residential or nonresidential strata lot, regardless of their actual use at a given time.

59. I find that the Court of Appeal's reasoning in *East Barriere Resorts*, which is binding on me, is directly applicable to this dispute. I find that for the purposes of section 128(1)(c), a bylaw must pass by a ¾ vote of strata lots 2 through 8 and a ¾ vote of strata lot 1.

60. In terms of a remedy, I have decided against making orders setting out a process for putting a bylaw amendment to the owners because I wish to preserve the parties' ability to cooperate on the terms of a bylaw amendment. I note that until this dispute arose, the owners in the strata enjoyed a positive and constructive relationship. I also note that because the applicant holds more than 20% of the strata's votes, it can unilaterally require the strata to hold a special general meeting to consider a resolution to amend the bylaws under section 43 of the SPA. The applicant does not require an order and I consider that the timing is best left to the applicant's discretion when it is ready to propose a bylaw amendment to the strata.

61. Because of my conclusion that a bylaw amendment is required to permit the applicant to use unit 204 for a commercial purpose, it follows that the strata did not properly address the issue in April 2018. I dismiss the applicant's claim that the April 2018 vote be considered an approval of the change in use.

62. I note that there is some suggestion in the materials that the City of Vancouver will require strata "approval" of the change in use. Given that a bylaw amendment will require the support of ¾ of the residential strata lots, I find that the issue of whether the strata may pass a resolution approving the change in use by a simple majority is moot.

### *Did the strata act significantly unfairly by refusing to approve the applicant's request to change unit 204's use from residential to commercial?*

63. I find that it is premature for me to decide whether it would be significantly unfair for the owners to refuse to amend the bylaws to permit the applicant to use unit 204 for a commercial purpose. If the applicant's proposed bylaw amendment does not receive sufficient votes to pass, the precise terms of the proposed bylaw amendment will be relevant to a consideration of whether refusing to pass the bylaw was significantly unfair.

64. In addition, section 123(2) of the Act, which uses the same language as section 164 of the SPA, requires an action, decision or exercise of voting rights before providing a remedy. Given the outcome of this dispute, there is no action, decision or exercise of voting rights to assess because the strata has not yet properly considered the issue.

65. Nothing in this decision prevents the applicant or any other owner from bringing a new tribunal dispute after the owners vote on a resolution about the applicant's proposed change in use.

## TRIBUNAL FEES AND EXPENSES

66. 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 dispute-related expenses. While the applicant was not entirely successful, I find that it is appropriate to order the strata to reimburse its tribunal fees because the strata's insistence that the applicant required unanimity prevented the owners from properly considering this issue. I order the strata to reimburse the applicant its $225 in tribunal fees. The applicant did not claim any dispute-related expenses.

67. I dismiss the strata's claim for reimbursement of its dispute-related expenses.

## DECISION AND ORDERS

68. I order that within 14 days of the date of this decision, the strata pay to the applicant $225 for tribunal fees.

69. The applicant is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

70. The remaining claims are dismissed.

71. 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 123.1 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.

72. 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 123.1 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.

Eric Regehr, Tribunal Member