



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Paterson et al v. The Owners, Strata Plan VIS 6371*,
2019 BCCRT 760

BETWEEN:

CHERYL PATERSON and ROY GREEN

APPLICANT

AND:

The Owners, Strata Plan VIS 6371

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. The applicants, Cheryl Paterson and Roy Green, own strata lots 84 and 64, respectively, in the respondent strata corporation, The Owners, Strata Plan VIS 6371 (strata).

2. The applicants allege that the strata has not complied with the *Strata Property Act* (SPA) and the *Strata Property Regulation* (Regulations) in the way it has allocated electricity expenses. The applicants seek various orders that they say will fix the strata's mistakes and ensure the strata will allocate expenses properly going forward.
3. The applicants are represented by Ms. Paterson. The strata is represented by the strata council president.

JURISDICTION AND PROCEDURE

4. 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*. 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.
5. 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.
6. 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.
7. Under section 123 of the *Act*, in resolving this dispute the tribunal may make one or more of the following orders:
 - a. Order a party to do or stop doing something;

- b. Order a party to pay money;
- c. Order any other terms or conditions the tribunal considers appropriate.

ISSUE

- 8. The issue in this dispute is whether the strata allocated electricity expenses contrary to the SPA and Regulations. If so, what is the appropriate remedy?

BACKGROUND AND EVIDENCE

- 9. In a civil dispute such as this, the applicants bear the burden of proof. This means the applicants have to provide evidence to prove their claims on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
- 10. The strata is a 93-unit residential complex with 51 apartments in 2 buildings and 42 townhouses. The strata's bylaws refer to "Apartment type strata lots" and "Townhouse type strata lots" as discussed further below.
- 11. In a March 26, 2018 decision of this tribunal, *Paterson v. The Owners, Strata Plan VIS 6371*, 2018 BCCRT 94, a tribunal vice chair considered Ms. Paterson's argument that the strata had failed to properly allocate electricity expenses. In that decision, the vice chair found that hydro was a common operating expense that was not exclusive to only 1 strata lot type, but rather related to both the apartment and townhouse strata lot types, and that, therefore, the hydro expenses must be allocated to all strata lots based on unit entitlement.
- 12. There are 5 hydro meters which service the strata and each meter is individually invoiced. Three of the meters service common property exterior lighting. The fourth meter, located in building A, services both common property exterior lighting and common property interior lighting near the apartment type strata lots in building A. The fifth meter, located in building B, services both common property exterior

lighting and common property interior lighting near the apartment type strata lots in building B.

13. Bylaw 31 filed with the Land Title Office in 2012 and re-filed on March 30, 2015, states that the strata is comprised of 2 “types of strata lots”, namely the “Apartment / Condominium Type” and the “Townhouse Type”, for the purpose of determining each strata lot’s allocation of operating expenses. An operating expense that relates to and benefits only 1 of the 2 types of strata lots will be charged to only the owners of that type of strata lot, according to the formula set out in the bylaw:

$$\frac{\textit{unit entitlement of strata lot}}{\textit{total unit entitlement of all strata lots of the type to which the contribution relates}} \times \textit{contribution to operating fund}$$

14. As the fourth and fifth meters were considered by the strata to substantially benefit solely the apartment type strata lots, it sought to have those hydro expenses allocated to only the apartment type strata lots.
15. The strata received a legal opinion stating that one option to allocate the expenses could be through a “user fee” system further to a new sub-section of the Regulations, brought into force in March 2018.
16. Section 6.9(1) states that a strata corporation may impose user fees for the use of common property or common assets if the amount of the fee is reasonable and the fee is set out in a bylaw or rule.
17. New section 6.9(2) states that the user fee may be a fixed amount or any amount determined on a reasonable basis, including, but not limited to, (a) the user’s rate of consumption, (b) the recovery of operating or maintenance costs by the strata, (c) the number of users, or (d) the duration of use.
18. The strata had an electrician, RES, prepare a report on the estimated electricity usage for the exterior lights (which benefit all strata lot types) compared to the interior lights (which benefit only either building A or building B apartment type

strata lots) for the fourth and fifth meters. RES estimated that the electricity usage of the fourth meter was 2.17% for exterior lighting and 97.83% for interior lighting, and that the electricity usage of the fifth meter was 2.61% for exterior lighting and 97.39% for interior lighting.

19. The strata then proposed a bylaw in which the electricity costs determined by the fourth and fifth meters would be allocated using a “Hydro User Fee”, based on RES’s calculations. On February 20, 2019, bylaw 43 was approved through a $\frac{3}{4}$ vote at an Annual General Meeting. Bylaw 43 provides that for the fourth meter located in building A, 2.2% of the expenses would be charged to all owners based on unit entitlement and 97.8% would be charged only to the strata lots in building A, based on unit entitlement. Similarly, for the fifth meter located in building B, 2.7% of the expenses would be charged to all owners based on unit entitlement and 97.3% would be charged only to the strata lots in building B, based on unit entitlement.
20. I find the issue before me in this dispute is different from the tribunal’s prior decision in *Paterson* because at the time of that decision bylaw 43 did not exist, and because section 6.9(2) was not considered. Therefore, I find I am able to resolve this dispute.

POSITION OF THE PARTIES

21. The applicant argues that all electricity costs are common expenses which are not permitted to be allocated as set out in bylaw 43. The applicants seek the following orders:
 - a. That the Hydro User Fee is contrary to sections 6.4 and 6.9 of the Regulations, the SPA and the strata’s bylaws.
 - b. That the strata must allocate hydro expenses as a common expense that must be shared by all strata lots according to unit entitlement.
 - c. That the strata recalculate the budget, including strata fees, for the 2019 fiscal year, by allocating hydro expenses based on unit entitlement according to SPA section 99(2).

- d. That the strata determine how much each type of strata lot over or under paid strata / user fees for the 2019 fiscal year.
 - e. That the strata apply any strata lot over or under payment to the strata lot's account, provide owners with a description of the adjustment, and how the owner may address non-zero balances.
22. The strata submits that the Hydro User Fee complies with the SPA, the Regulations (specifically section 6.9(2)) and the bylaws, and therefore, none of the requested orders are appropriate.

ANALYSIS

23. Section 1 of the SPA defines common expenses as those related to the strata's common property and common assets or as required to meet any other purpose or obligation of the strata.
24. I find the hydro expenses are a common expense that the strata must pay, which is undisputed, given section 91 of the SPA and bylaw 43.
25. Section 99 of the SPA says that, subject to section 100, owners must contribute strata fees based on unit entitlement or as set out in the Regulations. The strata has not changed its basis for strata fee calculation under section 100, which requires a unanimous vote.
26. The relevant Regulations are sections 6.4(2) and 6.9. Both section 6.4(2) and bylaw 31 indicate that a contribution to the operating fund that "relates to and benefits **only one type** of strata lot", is shared only by owners of strata lots of that type. Under the 2-type bylaw, the electricity expenses in the fourth and fifth meters would relate to and benefit both the apartment and townhouse type strata lots.
27. Generally, expenses which benefit more than 1 type, even to different degrees, must be paid by all strata lots (see: *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597). In *Ernest*, the BCCA dismissed an argument that

where an expense benefits 1 type of strata lot disproportionately, the strata must allocate the expense according to the benefit derived by each type. This is exactly what the strata aims to do with bylaw 43: because building A and building B apartment type strata lots benefit from 97.8% and 97.3% of the electricity costs from those hydro meters, the strata found it was disproportionate for the townhouse type strata lots to share equally in the expenses. *Ernest* is a binding precedent, which the tribunal must follow. The court held that section 6.4(2) of the Regulations does not provide for any greater apportioning of expenses among types of strata lots. As worded, section 6.4(2) burdens the owners of 1 strata lot type with an item of expense from which they derive “the only benefit”. For clarity, expenses that benefit different types of strata lots disproportionately must be paid by all strata lots.

28. The strata argues that section 6.9(2) allows a user fee to be adopted by a strata corporation on the basis of consumption. The strata relies on a BC Government announcement about the new section, which states:

A consumption-based rate may be charged to users to recover expenses as long as it is reasonable and in a strata bylaw or rule. For example:

- water use in a bare land strata corporations or
- electricity usage for strata residents charging their electric vehicles

These amendments are part of ongoing efforts to reduce regulatory barriers and are expected to promote the approval of and access to electric vehicle charging stations in strata properties.

29. Despite the introduction of section 6.9(2), I note section 6.4 of the Regulations and section 99 of the SPA remain in effect. Additionally, I find *Ernest* is still good law even though it pre-dated section 6.9(2).

30. I am not persuaded that section 6.9(2) was introduced to be utilized as the strata has contemplated in bylaw 43. As described in the strata’s own evidence, the

amendment was made in an attempt to promote access to electric vehicle charging stations. I find that the electricity expenses for the interior of buildings A and B are not “consumed” by the strata lots in those buildings, as would happen with an electric vehicle “consuming” electricity. Rather, the electricity costs are a common expense of the entire strata, pursuant to the SPA and *Ernest*, and should be allocated by unit entitlement following section 99 of the SPA.

31. Additionally, I find that, as written, bylaw 43 does not comply with section 6.4(2) of the Regulations. Bylaw 43 states that 97.8% of building A’s hydro expenses are to be allocated, by unit entitlement, to those apartment type strata lots only in building A. Similarly, 97.3% of building B’s hydro expenses are to be allocated, by unit entitlement, to those apartment type strata lots only in building B. This calculation allows hydro expenses to be charged disproportionately between strata lots within the same type (building A lots and building B lots, which are both apartment type strata lots), contrary to section 6.4(2).
32. Given all of the above, I find that bylaw 43 is contrary to the SPA and Regulations. Section 121 of the SPA states that a bylaw that contravenes the SPA or Regulations is not enforceable. Therefore, I find bylaw 43 is unenforceable.
33. As the strata’s 2019 budget includes an income line item for Hydro User Fees, which I have found is contrary to the SPA, I order the strata to recalculate the 2019 budget to comply with these reasons. This recalculation will result in the townhouse type strata lots owing the strata money and the strata owing the apartment type strata lots money.
34. The strata will have 30 days from the date of this decision to determine how much each strata lot has overpaid or underpaid for the 2019 fiscal year, to the date of the revised budget. The strata will have 60 days from the date of this decision to apply the amount each strata lot overpaid or underpaid to each strata lot’s account, as the case may be, and to provide each owner with a brief description of what adjustments the strata has made to their account, what the current account balance is, and how that owner may address any non-zero balance.

TRIBUNAL FEES, EXPENSES AND INTEREST

35. 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. As the applicants have been successful in their claim, I order the strata to reimburse the applicants \$225 in tribunal fees and \$11.08 in dispute-related expenses.
36. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the applicants.

DECISION AND ORDERS

37. I order that:

- a. Within 30 days of this decision, the strata recalculate the budget, including strata fees, for the 2019 fiscal year, by dividing the hydro electricity expenses based on unit entitlement according to section 99 of the SPA.
 - b. Within 30 days of this decision, the strata determine how much each apartment type strata lot overpaid in user fees / strata fees for the 2019 fiscal year, to the date of the revised budget, and how much each townhouse type strata lot underpaid in user fees / strata fees for the same time period.
 - c. Within 60 days of this decision, the strata apply the amount each strata lot overpaid or underpaid to each strata lot's account, and provide each owner with a brief description of what adjustments the strata made to their strata lot account, what the current balance is, and how the owner may address any non-zero balance.
 - d. Within 30 days of this decision, the strata pay the applicants a total of \$236.08 (\$225.00 in tribunal fees and \$11.08 in dispute-related expenses).
38. The applicants are also entitled to post-judgment interest under the *Court Order Interest Act*.

39. 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.
40. 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 strata 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.

Andrea Ritchie, Vice Chair