Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Podgorenko et al v. The Owners, Strata Plan 962,* 2019 BCCRT 772

B E T W E E N :

Laura Podgorenko, Elizabeth Erickson, and Mike Daffron

APPLICANTS

A N D :

The Owners, Strata Plan 962

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. This dispute is about a rental restriction bylaw.

2. Applicant Laura Podgorenko owns a strata lot in the respondent strata corporation, The Owners, Strata Plan 962 (strata). Applicants Elizabeth Erikson and Mike

Daffron co-own another strata lot in the strata. I will refer to the applicants collectively as "the owners".

3. The owners want the ability to use their strata lots for short-term rentals.

4. Strata bylaw 39(1) sets a 6-month minimum for the amount of time certain strata lots, including the owners', may be rented. Bylaw 39(1) also says that this rental restriction does not apply to strata lots in the "rental pool", which are "deemed to be a rental of a non-residential strata lot."

5. The owners seek an order that bylaw 39(1) is invalid and unenforceable, because it is vague, has no valid legal mechanism for enforcement, and was not approved in compliance with section 128(1) of the *Strata Property Act* (SPA). Alternatively, they seek an order that bylaw 39(1) not be enforced against them because it is significantly unfair.

6. The strata says the bylaw is valid, enforceable, and not significantly unfair to the owners. It says a similar rental bylaw has been in place since 1995, and that owners who choose not to join the rental pool should not be permitted to compete against it.

7. The owners are represented by a lawyer, Mary Brunton. The strata is represented by a lawyer, Cora Wilson.

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 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.

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

12. 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.

13. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan, VIS 962. Based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan 962. 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 of the Act to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

Preliminary Issue – Conflict of Interest

14. The owners have provided evidence and submissions to support their argument that a number of strata council members are in a conflict of interest position, and are not acting for the benefit of all owners, due to their alleged affiliation with a hotel business that operates in the strata's building.

15. Section 31 of the SPA says that in exercising the powers and performing the duties of the strata corporation, each council member must act honestly and in good faith with a view to the best interests of the strata corporation. Section 32 of the SPA sets out conflict of interest provisions.

16. The remedies for breaches of sections and 32 are set out in SPA section 33: see *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183. Section 122(1)(a) of the *Civil Resolution Tribunal Act* specifically says the tribunal does not have jurisdiction over claims arising under section 33 of the SPA. Thus, the tribunal has no power to make orders for bad faith or conflict of interest by strata council members. I therefore make no such findings or orders in this decision.

ISSUES

17. The issues in this dispute are:

    a. Is bylaw 39(1) valid and enforceable?

    b. Is bylaw 39(1) significantly unfair to the owners?

    c. What remedies, if any, are appropriate?

BACKGROUND AND EVIDENCE

18. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding such as this, the applicant owners must prove their claims on a balance of probabilities.

19. The strata was created in 1981, under the former *Condominium Act,* a predecessor to the SPA. The strata consists of 57 strata lots in a 12-storey building. It has no separate sections. As discussed in my reasons below, I find that all 57 strata lots are residential.

20. The parties agree that there is no documentation from the time of the strata's creation indicating that it was intended as a "condominium hotel", and there are no subsequent documents registered with the Land Title Office setting out a similar designation. Item 17 of the June 1981 prospectus says that as a condition of sale, some purchasers of strata lots would be required to enter into the "Rental Pool Agreement", which was attached to the prospectus.

21. The documents provided in evidence include a copy of an unsigned, undated joint venture agreement (JVA) between a development partnership and an "individual developer". The JVA said the parties agreed to create a 57-unit condominium complex, with 46 units sized from 1200 to 1300 square feet (defined as "Type A units") and 11 units sized between 1750 to 1850 square feet (defined as "Type B units").

22. The JVA mostly addresses construction and financing. It says that that each individual developer would his have choice of one Type A unit.

23. Paragraph 17 of the JVA explains the "rental pool". It says that each individual developer of a Type A unit would enter into a co-ownership agreement for the operation of a rental pool. Paragraph 17(a) of the JVA said the "46 rental pool units" would be designated as such in the strata corporation's bylaws, subject to any decision by the majority of owners to change their status. The joint venture agreement also contained other provisions about the rental pool, including the following:

    a. Individual strata lot owners could withdraw from the rental pool upon approval by a simple majority of the rental pool owners.

    b. Rental pool units would be assessed with the costs of operating the rental pool, such as housekeeping, laundry, management, promotion, and insurance, in additional to strata corporation operating costs.

    c. Rental of units arranged by the rental pool manager under the co-ownership agreement would be rotated to ensure fair revenue sharing.

    d. No Type B unit would be included in the rental pool without majority approval by Type A unit owners.

24. The documents in evidence also include an unsigned copy of a 1981 "Rental Pooling Agreement" (RPA). The RPA was between the type A strata lot owners and the Inner Harbour Management Corporation. The RPA says that each of the parties was desirous of leasing his strata lot for occupancy, so was included in the "rental

pool". Paragraph E of the preamble to the RPA says the purpose of the RPA was to create a pooling agreement with respect to rents and expenses, in order to minimize the substantial risk of loss by one owner. In its terms, the RPA says that all gross rental revenues would be pooled into one account, and expenses would be paid from the account prior to distribution of any revenue.

25. A new RPA was created in December 1992. It appears to replace the 1981 RPA, although there is no evidence about that before me.

26. Since 1995, the strata had a rental restriction bylaw that stated as follows:

> BYLAW – RENTAL RESTRICTIONS
>
> 1. No strata lot owner shall rent or lease their unit for a period of less than three (3) months without the written permission of the Property Manager, such permission not to be unreasonably withheld. All rentals of a shorter term than three (3) months must be administered by the VICTORIA REGENT HOTEL.

27. On February 23, 2015, the strata repealed and replaced all its previous bylaws, including the rental restriction bylaw, by filing an amended set of bylaws with the Land Title Office (LTO). These amendments included bylaw 39(1), which states as follows:

> **Time Restriction on Rentals**
>
> 39 (1) Pursuant to section 141(2)(b)(ii) of the Strata Property Act, the minimum period of time that a residential strata lot may be rented or leased for is six (6) months. This restriction does not apply to the rental of a strata lot in the rental pool which shall be deemed to be a rental of a nonresidential strata lot.

28. The strata filed further bylaw amendments with the LTO in November 2016, but these are not relevant to this dispute. Bylaw 39(1) has not been amended since it was filed in February 2015.

29. The hotel business operating in the strata building is operated by an incorporated company, Victoria Regent Hotel Ltd. (VRH). One of the registered officers of VRH is EW, who is also the strata's property manager. In a written statement provided in evidence, EW said that as of December 2018, 31 out of 57 strata lots in the strata were part of the rental pool. EW said the rental pool operates like a hotel, and rents participating strata lots to the public, with rental pool owners sharing income and expenses such as advertising, strata lot cleaning and renovations, insurance, and furnishings. EW confirmed that the VRH is a separate legal entity from the strata corporation, and the strata is not responsible for the rental pool obligations.

30. There is a contract between the strata and VRH. It says, in part, that in exchange for payment, the strata will rent certain common property areas to VRH, for uses such as lobby, laundry, staff lunch room, housekeeping storage, and offices.

31. At a special general meeting (SGM) held in November 2016, owners voted on a ¾ vote resolution to amend bylaw 39(1). The proposed amendment would have reduced the minimum rental period for non-rental pool strata lots to 1 month, rather than 6 months. The resolution was defeated.

FINDINGS AND ANALYSIS

Is bylaw 39(1) valid and enforceable?

32. The parties each provided extensive and detailed written submissions, which I have read but will not summarize here.

33. SPA section 121(1) says that a bylaw is not enforceable to the extent that it contravenes the SPA, the *Strata Property Regulation*, the *Human Rights Code,* or any other enactment or law. I find that bylaw 39(1) convenes the SPA, and is therefore unenforceable. My reasons follow.

34. Bylaw 39(1) says the rental restriction does not apply to strata lots in the rental pool, "which shall be deemed to be a rental of a nonresidential strata lot."

35. I find that this deeming provision is invalid, as it is not permitted by the SPA. SPA section 1(1) says a "residential strata lot" means "a strata lot designed or intended to be used primarily as a residence".

36. I find that all of the major documents from the time the strata corporation was created show that the all 57 strata lots were designed and intended to be used solely as residences. The owner-developer's statutory declaration on the strata plan states that all the strata lots are residential. Similarly, the June 1981 prospectus describes the project as a "residential condominium", with "57 residential strata lots." The June 1981 Rental Disclosure Statement also describes the strata plan as a 57 unit residential apartment building.

37. These clear residential designations were made at exactly the same time as the paragraphs in the prospectus setting out the creation of the rental pool. The "rental pooling agreement" was attached to the prospectus. Thus, it cannot be argued that the use of some strata lots as hotel-type temporary accommodations is a change in use from the original strata plan, justifying a change in designation from residential to nonresidential. Rather, the documents show that the rental pool was set up at the same time the strata plan was created in June 1981. Thus, the strata's submission that the use of some strata lots for hotel-type occupancies has changed them from residential to nonresidential cannot succeed, since they were used for that purpose from the time they were built.

38. The strata also submits that a single strata lot can be both residential and nonresidential at the same time. I disagree. "Residential" and "nonresidential" are terms used in the SPA with specific and precise meaning. As explained, "residential strata lot" is a defined term. The definition of "residential" is "designed or intended to be used primarily as a residence". Given the use of the word "primarily", I find that a single strata lot cannot be intended to have 2 opposite uses that are both primary. Thus, a strata lot must either be residential or nonresidential, and cannot be both simultaneously.

39. The strata relies on the BC Supreme Court's decision in *Winchester Resorts Inc. v. Strata Plan KAS2188 (Owners)*, 2002 BCSC 1165 (CanLII) to support its submission. In *Winchester*, the Court held that the permitted uses for the strata lots in that case were governed by the Building Scheme, rather than the statutory declaration on the strata plan. However, a permitted commercial use is not the same as "nonresidential", for the purposes of the SPA. Also, there is no evidence of a building scheme applicable to this dispute.

40. Since residential status is not determined by use, a strata cannot change a strata lot from residential to nonresidential through a bylaw. This is consistent with sections 246 and 247 of the SPA, which provide that unit entitlement and voting rights are calculated differently for nonresidential strata lots than for residential strata lots.

41. Bylaw 39(1) attempts to "deem" certain residential strata lot as nonresidential strata lots, at least for the purpose of rentals. For the reasons set out above, I find that the SPA does not permit such deeming.

42. SPA section 121(1)(a) says, "A bylaw is not enforceable, to the extent that it...contravenes this Act." Based on this provision, I find that the second sentence of bylaw 39(1) is not enforceable, because its deeming provision contravenes the SPA. Specifically, I find that the following sentence in bylaw 39(1) is unenforceable:

> This restriction does not apply to the rental of a strata lot in the rental pool which shall be deemed to be a rental of a nonresidential strata lot.

43. I find the first part of the sentence, "This restriction does not apply to the rental of a strata lot in the rental pool" must also be unenforceable, as it is inextricably linked and solely justified by the impermissible deeming clause at the end of the sentence. The deeming clause must be interpreted as having some meaning, and without it, there is no basis to support applying the same bylaw differently to different strata lots. While the *Strata Property Regulation* allows strata operating expenses to be allocated differently to different types of strata lots, this bylaw does not relate to operating expenses.

44. For these reasons, I conclude that the second sentence of bylaw 39(1) is unenforceable, pursuant to SPA section 121(1)(a).

Section 128(1) – Bylaw amendment procedure

45. Although I have found bylaw 39(1) to be unenforceable, based on my finding that all the strata lots are residential, I disagree with the owners' argument that bylaw 39(1) was not enacted in accordance with SPA section 128(1). That section requires separate votes of residential and nonresidental strata lot owners in order to approve a bylaw amendment. Since all the strata lots are residential, section 128(1) does not apply to this dispute. However, I understand why the owners' raised this argument, given the wording of bylaw 39(1) and the strata's submission that a strata lot can be both residential and nonresidential.

Short-term Occupancies

46. I also find that nothing in bylaw 39(1), without or without the unenforceable second sentence, prohibits the use of any strata lot in the strata for short-term temporary occupancies such as Airbnb.

47. In *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064, the BC Supreme Court considered a case where a strata corporation had a bylaw prohibiting rentals of less than 30 days. The plaintiffs wanted to offer their strata lot as a short-term temporary vacation accommodation, through a management company.

48. The Court concluded that the guests did not have an interest in land and were not lessees. Relevant factors included the fact that the owners, via the management company, retained the right to access the strata lot, and reserved the right to cancel the accommodation booking. The temporary guests agreed not to share the strata lot with anyone who was not listed on the guest agreement.

49. The Court considered whether the plaintiffs were leasing or licensing their strata lot to the temporary occupants. The Court reviewed relevant case law, and concluded

that the temporary guests were not tenants, renters, or lessees because they did not have an interest in land.

50. At paragraph 45 of *Semmler,* the Court set out and affirmed 4 principles established by the case law:

    a. A person may occupy a strata lot under a tenancy agreement or a license agreement.

    b. A tenant is a person who rents all or part of a strata lot and who, through that arrangement, receives an interest in the property including exclusive possession of the premises.

    c. An occupant is a person other than an owner or tenant who occupies a strata lot.

    d. A licensee is an occupant but not a tenant.

    e. Provisions of the SPA relating to tenants and tenancies do not apply to licensees.

51. These principles from *Semmler* are binding on me, and on the parties in this dispute. There is no evidence before me indicating that the applicant owners have actually offered their strata lots for occupancy by others. Without specific facts to consider, I cannot determine whether such arrangements would be licenses or rentals. However, if any owners in the strata wished to offer temporary occupancies under a license arrangement, as contemplated in *Semmler,* I find that bylaw 39(1) does not preclude them from doing so because it relates solely to rentals.

52. The strata says bylaw 39(1) is a mixed "use" and "rental" bylaw. I disagree. The heading immediately above bylaw 39(1), "Time Restriction on Rentals", specifically identifies 39(1) as a bylaw about rentals. Also, the bylaw's wording begins with the phrase, "Pursuant to section 141(2)(b)(ii) of the Strata Property Act." Section 141 is titled "Restriction of rentals by strata corporation", and is located in Part 8 of the

SPA, which relates to rentals. Section 141(2)(b) (ii) specifically says a strata bylaw may restrict the period of time for which residential strata lots may be rented.

53. Also, bylaw 39(1) uses the words "rented or leased" and "rentals". It does not use other words, such as "occupy" or "license". As stated in paragraph 50 of *Semmler,* "within the meaning of the *Strata Property Act,* the words 'rent' and 'rental' do not apply to licenses. Rather, the word rental must be read as describing an intention to create a tenancy."

54. For these reasons, I find that bylaw 39(1) relates only to rentals and leases. It is not a "use" bylaw, and does not limit any strata lot owner's ability to offer a strata lot for occupancy under a temporary license arrangement.

Significant Unfairness

55. Given my finding that bylaw 39(1) is partly unenforceable, and does not preclude short-term occupancies under license, I find it is unnecessary to make findings about the owners' alternative argument that the bylaw is significantly unfair to them.

Remedies

56. I conclude that the second sentence of bylaw 39(1) is unenforceable. Also, bylaw 39(1) does not prohibit short-term temporary occupancies under license arrangements.

57. The owners request an order that the strata consent to any short term rental application submitted to the City of Victoria. I decline to make this order, as the details, contents, and requirements of such an application are not before me. Also, I find that such an order would go beyond my jurisdiction to address strata property claims in section 121(1) of the Act. Since there is no indication that a rental application has been provided to the strata for its consent, I find that this is not a claim about an action, threatened action, or decision by the strata corporation, or any of the claim types listed in section 121(1).

58. In their submissions, the owners also request an order or declaration that any strata bylaw that attempts to distinguish between strata lots for the purpose of rental restrictions or hotel-type occupancies is of no force and effect. By this, I infer the owners seek a declaration preventing any future bylaws that distinguish between rental pool and non-rental pool strata lots.

59. While I appreciate the owners' desire for certainty and finality, I decline to make this order. First, the tribunal will generally not make "prospective orders" about things that have not yet occurred: *Bourque et al v. McKnight et al*, 2017 BCCRT 26; *James v. B.A. Blacktop Ltd. et al*, 2018 BCCRT 528.

60. Second, there are numerous decisions from the Supreme Court stating that a court should not interfere with the democratic governance of a strata unless absolutely necessary: *Oakley et al v. Strata Plan VIS 1098,* 2003 BCSC 1700; *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493; *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333. I find that this reasoning applies equally to the tribunal, which did not exist that the time these decisions were written.

61. I also note that the Supreme Court has held that the fact that a minority of owners fear being outvoted does not justify court intervention in democratic strata governance. In *Oldaker v. The Owners, Strata Plan VR 1008*, 2010 BCSC 776, the court reviewed a number of cases, including *Oakley*, and found at paragraphs 39 and 40:

> These cases establish that for better or worse the majority of owners make the rules. For better or worse the minority of owners are to abide by those rules. ...
>
> Not remarkably the views of disparate groups within a strata corporation are often strongly held. The force of these convictions can lead to internal friction, to competing camps within the strata corporation and to paralysis of the corporation. The ongoing efficacy of the strata corporation requires that the views of the majority be respected.

62. Based on this reasoning, it would be inappropriate for the tribunal to order a strata not to pass future bylaws. However, an owner may challenge any new bylaw, once enacted, by filing a new dispute.

FEES AND EXPENSES

63. 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. The owners were largely successful in this dispute and I see no reason to depart from this general rule. Since there is more than one applicant owner, I order the strata to pay $225 to Ms. Podgorenko, and I leave it to her to divide this in an equitable manner.

64. Both the owners and the strata request reimbursement for legal fees. Tribunal rule 132, which was in force at the time this dispute was filed, says the tribunal will not order one party to reimburse another party's legal fees except in extraordinary cases. I find this case is not extraordinary, and therefore dismiss both parties' claims for legal fees.

65. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owners.

DECISION AND ORDERS

66. The second sentence of bylaw 39(1) is unenforceable under section 121(1)(a) of the SPA.

67. Bylaw 39(1) does not prohibit short-term temporary occupancies under license arrangements.

68. I order that within 30 days of this decision, the strata pay Ms. Podgorenko $225 for tribunal fees.

69. 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.

70. 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.

Kate Campbell, Tribunal Member