



# Civil Resolution Tribunal

Date Issued: July 29, 2019

File: ST-2018-002540

Type: Strata

Civil Resolution Tribunal

Indexed as: *Allen-Hughes v. Vargas et al*, 2019 BCCRT 921

**B E T W E E N :**

Noel H. J. Allen-Hughes

**APPLICANT**

**A N D :**

Michael Vargas, Elizabeth Obiri-Darko, and The Owners, Strata Plan  
LMS 2866

**RESPONDENTS**

---

## REASONS FOR DECISION

---

Tribunal Member:

J. Garth Cambrey, Vice Chair

## INTRODUCTION

1. The applicant, Noel H. J. Allen Hughes (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 2866 (strata). The owner is a past strata council member and is self-represented.

2. The respondents, Michael Vargas and Elizabeth Obiri-Darko (collectively the council members), each co-own separate strata lots in the strata and are members of the strata council. The council members and strata are represented by a lawyer, Lisa Mackie.
3. As described below, the owner originally claimed against 3 additional council members but withdrew his claims against those members, with which the respondents agreed. The respondents also agreed to the owner's amended claims.
4. The owner claims the council members have failed to exercise their required standard of care by denying or intentionally misrepresenting disclosure of important and relevant information to strata owners. I infer the owner claims the strata has also not released copies of important and relevant information to strata owners.
5. The owner seeks orders that the council members resign from the strata council, not seek re-election for 5 years, and that the strata release complete and unredacted copies of all building envelope inspection reports, depreciation reports, contractor assessments, reviews and studies to all strata owners.
6. The respondents request that I dismiss the owner's claims. They also request the owner reimburse them for legal fees and disbursements.
7. For the reasons that follow, I refuse to resolve the owner's claims against the council members. I dismiss the owner's remaining claims and the respondents' claim for legal fees.

## **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. Under section 10 of the Act, the tribunal must refuse to resolve a claim that it considers is not within the tribunal's jurisdiction. A dispute that involves one or more issues that are within the tribunal's jurisdiction and one or more that are outside its jurisdiction may be amended to remove those issues that are outside its jurisdiction.
12. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
13. 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, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

## **PRELIMINARY ISSUES**

14. After being assigned this dispute by the tribunal chair, the owner attempted to personally contact me by telephone and email. I provided copies of the recorded voice message and 3 emails I received from the owner to all parties and requested further submissions on whether they objected to me deciding this dispute. The owner did not provide a response about my continued involvement as decision-maker and submitted that he knew me personally prior to my appointment to the tribunal. At the request of the respondents' representative, I confirmed I had listened to the voice

message and read the emails. I also provided details of my past employment to all parties disputing that the owner knew me personally. The owner was again requested to provide any objection he had with me continuing to decide this dispute and failed to respond despite being advised that I may proceed to decide the dispute. The respondents stated they do not object to me deciding this dispute. Based on these submissions, I have decided to adjudicate this dispute.

15. When I requested further submissions on my continued involvement, I also provided the owner an opportunity to withdraw some or all of his claims. As I have mentioned, the owner elected to withdraw his claims against 3 council members and reduce the number of requested remedies against the remaining respondents. The respondents agreed to both the withdrawal of respondents and requested outcomes. I have therefore exercised my discretion under section 61 of the Act to remove the withdrawn respondents' names from the style of cause. I also find that the owner's withdrawn requested remedies are not before me to decide.
16. The strata says that the owner did not request a hearing with the strata council before commencing this dispute, or request the tribunal to waive the hearing requirement as set out under section 189.1 of the SPA. The strata says the owner's dispute should be dismissed for this reason because the tribunal should not be considered a "first resort" to resolving disputes.
17. The owner does not dispute the strata's allegations but says, as a past multi-term member of the strata council, every meeting he chaired or participated in was effectively a hearing under section 34.1 of the SPA. He also says that given the contrary attitudes between the strata council and himself, a hearing would be futile.
18. While I do not agree the past meetings attended or chaired by the owner amount to hearings as contemplated by sections 34.1 or 189.1(1) of the SPA, I find some merit in the owner's assertion that a hearing would not have resolved this dispute. The strata council voted to remove the owner from his position as president after the owner wrote to the council expressing his concerns. It is clear the owner and remaining strata council members did not share the same views and I find on a

balance of probabilities, a hearing with the council would not have resolved the owner's dispute. For that reason, I exercise my discretion and waive the owner's requirement to request a hearing under section 189.1(2) of the SPA. I find I would have reached the same conclusion had the owner made a request of the tribunal to waive the hearing at the time he started this dispute.

## **ISSUES**

19. The remaining issues in this dispute are:

- a. Do I have jurisdiction to order the council members to resign from the council and not seek re-election for 5 years?
- b. Should I order the strata to release the owner's requested documents to all strata owners?
- c. Is any party entitled to reimbursement of legal fees?

## **BACKGROUND, EVIDENCE AND ANALYSIS**

20. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

21. In a civil proceeding such as this, the applicant owner must prove each of his claims on a balance of probabilities. The respondents must prove their claim for reimbursement of legal fees.

22. The strata is a mixed-use strata corporation located in Vancouver, B.C. comprising 51 strata lots in a single 5-storey building. It was created in 1997 under the *Strata Property Act* (SPA).

23. There are no strata bylaws that are relevant to this dispute.

24. The owner served on the strata council from at least December 2013 through to about September 2018, when he was not re-elected to the council. He served as council president from about December 2014 to March 2018.
25. In essence, the owner's claims arise from repair and maintenance of the strata's building envelope and related governance issues. It is undisputed, and I find, the building envelope is common property and therefore the strata's responsibility to repair and maintain.
26. The background to this dispute involves a long history of building envelope investigations and reports. General meeting minutes dating back to the early 2000's were provided in evidence that indicate water ingress problems were evident at that time. I summarize the investigations and relevant information from 2012 onwards as follows:

2012:

- The strata obtained a building envelope condition assessment (2012 BECA), that recommended a number of "corrective actions" based on priorities established by the engineering firm who provided the report.
- The 2012 BECA listed several "high priority items", such as exterior walls, windows and doors, balconies and decks, roofs and the parking garage. The cost to repair these items was estimated to be about \$700,000, however, the strata's owners defeated a resolution to approve the high priority repair items at an annual general meeting (AGM) held November 15, 2012.

2015:

- Roof repairs were completed.

2016:

- INSPECTRIGHT Property Inspection Services investigated water problems in 1 strata lot and determined water was entering the strata lot's balcony

enclosure through voids in the exterior stucco. The report also identified a water leak from a bathtub drain in the strata lot above.

- A review of the 2012 BECA was completed by a different engineering firm (Rainshield) retained by the strata.
- At the October 2016 AGM, the strata approved a \$15,000.00 expense from its contingency reserve fund (CRF) to complete window and building envelope repairs for a single strata lot.

#### 2017:

- The strata surveyed its owners for water problems, gave the completed surveys to Rainshield, and asked Rainshield to provide opinions on the cost of a full repair and the cost of a phased repair.
- Rainshield estimated repair costs for the full repair and first phase to be about \$3.1 million and \$645,000 respectively. The strata council agreed not put the repairs to a vote of the owners.
- In October 2017, the council agreed to enquire about available options to repair the building and obtain another opinion on conflicting information contained in the 2012 BECA.

#### 2018:

- The strata agreed to obtain cost estimates for a depreciation report as well as investigate more about the possibility of winding up the strata.
- In March 2018, the other council members voted to remove the owner as council president, but he continued to serve as a strata council member. It is unclear when the owner stopped serving on the strata council but he was not re-elected to the council at the September 19, 2018 AGM.

- On March 29, 2018, at a special general meeting (SGM), the strata owners approved expenses for a depreciation report and second BECA, subject to the strata council selecting an appropriate engineering firm.
- In May 2018, the strata received a report on the balcony condition of 1 strata lot from Butler Building Envelope Services Ltd. It is unclear if any work on the balcony was completed.
- On August 1, 2018, the strata council selected LDR Engineering Group (LDR) to complete a second BECA (LDR BECA).
- It appears that LDR was also selected to complete a depreciation report, but it is unclear if that report is complete.

2019:

- Information meetings were held on January 16 and 23, 2019 with all strata owners and LDR to discuss the LDR BECA.
- At a January 30, 2019 SGM, the strata was to consider 3/4 resolutions to approve a special levy for the building envelope repair. The results of vote and minutes of the meeting, if it occurred, are not in evidence.

***Do I have jurisdiction to order the council members to resign from the council and not seek re-election for 5 years?***

27. I find I do not have jurisdiction over the owner's request that the council members be ordered to resign from the strata council and not seek re-election for 5 years.
28. The owner specifically claims the council members have breached their standard of care under section 31 of the SPA. Section 31 requires a council member to act honestly and in good faith with a view to the best interests of the strata, and exercise the care diligence and skill of a reasonably prudent person in comparable circumstances. The British Columbia Court of Appeal has found that remedies for breaches of section 31 of the SPA are found in section 33 of the SPA. Section 33 is expressly outside of the tribunal's jurisdiction as set out in section 122(1)(a) of the



Act and must be dealt with by the Supreme Court. (See *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 at paragraph 59.)

29. For this reason, I find I do not have authority to make orders against the council members for breaches of section 31 of the SPA. Accordingly, under section 10 of the Act, I refuse to resolve the applicant's claims that the council members failed to exercise their required standard of care by denying or intentionally misrepresenting disclosure of important and relevant information to strata owners.

***Should I order the strata to release the owner's requested documents to all strata owners?***

30. Given the owner served on the strata council until about September 2018, I find he was more likely than not, able to obtain strata records and documents up to that date. That would include all building envelope-related records and documents except for the LDR BECA and LDR depreciation report.
31. I will first address the owner's request for documents before considering if the strata's records and documents must be released to all strata owners.
32. On October 5, 2018, the owner requested copies of the complete and unredacted copies of the LDR BECA and LDR depreciation report when they were received by the strata manager, citing section 36 of the SPA. No other documents were requested. The strata manager provided copies of the LDR proposals for both the BECA and depreciation report on October 9, 2018, but the owner re-iterated his request for the final reports when they were received.
33. The respondents say the SPA does not mandate that the strata "preemptively publish all of its records". They also say that sections 35 and 36 govern minimal recordkeeping practices as set out in *Kayne v. Strata Plan LMS 2374*, 2007 BCSC 1610. I infer from the respondents' submissions, that they say the strata must only provide records and documents required under section 35 to authorized people set out in section 36, within the timelines established under *Strata Property Regulation* 4.1. I agree. I also find the strata must only disclose records and documents it has in

its possession at the time the request was made. Neither the LDR BECA or LDR depreciation report were complete at the time the owner made his request.

34. It is undisputed that the LDR BECA dated November 9, 2018 was not available or finalized when the owner made his request in early October. However, I find the owner's request for this document is now moot as it was provided to him as evidence in this proceeding.
35. The strata did not address the owner's request for the LDR depreciation report. It is unclear if that report has been completed, but I find the owner has not proven he has requested this document since October 5, 2018, when it was not available. If the owner wishes to obtain a copy of the depreciation report, he may request one under section 36 of the SPA and the strata must provide it, if it is available, on receipt of the required fee.
36. As for the owner's request that all building envelope-related documents be provided to all strata owners, I agree with the strata that the owner's claims do not involve other strata owners. As mentioned, the strata must provide records and documents to those people authorized under section 36 of the SPA. I see no reason to order that the owner's requested records be distributed to all strata owners, given other strata owners are able to request records and documents of interest to them under section 36 of the SPA.
37. The owner's request for release of these documents to all strata owners is based on his argument that the strata council has somehow withheld documents from strata owners or intentionally not disclosed documents the strata has in its possession. Even though I refused to resolve this aspect of the owner's claim, it does not appear the owner's allegation is true. I would say the recent actions of the strata council proactively and reasonably brought the building envelope issues to the strata owner's attention by holding 2 information meetings in January 2019 with LDR in attendance, before conducting a formal vote at the January 30, 2019 SGM. I find that the strata owners had every opportunity to request further records or documents if

they were not satisfied with the information they received at the information meetings or chose not to attend the meetings.

38. For these reasons, I dismiss the owner's request that documents relating to the building envelope repair be distributed to all strata owners.

***Is any party entitled to reimbursement of legal fees?***

39. Tribunal rule 9.4 (3) (formerly rule 132) says that, except under the tribunal's motor vehicle injury jurisdiction, the tribunal will not order one party to pay another party's legal fees unless the tribunal determines there are extraordinary circumstances. This follows from the general rule under section 20(1) of the Act that parties are to represent themselves in tribunal proceedings.
40. I have elected to consider the owner's claim for legal fees, in the event I misunderstood his intention to withdraw the claim. Even if the owner's original claim for legal fees had not been withdrawn, I would decline to order the respondents pay the owner's legal fees given the owner has not been successful in this dispute. Further, the owner failed to provide any evidence in support of his claim for legal fees such as copies of his lawyer's invoices.
41. The respondents submit that the owner should be ordered to reimburse their legal fees and disbursements of \$13,469.33, incurred to defend this dispute.
42. I considered an order for legal fees in *Lam v. The Owners, Strata Plan EPS 2328*, 2018 BCCRT 73. I found that barring exceptional circumstances as required by the tribunal rules, ordering reimbursement of the strata's legal fees would be contrary to section 189.4(b) of the SPA, and contrary to the tribunal's general rule that parties are to be self-represented.

43. I note that under sections 167(2) and 189.4 of the SPA, an owner who brings a tribunal claim against a strata corporation is not required to contribute to any expenses the strata corporation incurs in defending the claim.
44. I find that “exceptional circumstances” under the tribunal’s rules are akin to the circumstances favouring the award of special costs by the courts. The leading case in British Columbia with respect to special costs is *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (BCCA). The Court of Appeal found that special costs should be ordered against a party when their conduct in the litigation was reprehensible, in the sense of deserving of reproof.
45. In *Hirji v. Owners Strata Corporation VR44*, 2016 BCSC 548, the court provided detailed reasons on special costs in the context of a strata dispute. The court noted prior decisions, and confirmed the “reprehensible” test from *Garcia*. At paragraph 5, the court found that an award of special costs should only be made in exceptional circumstances where an element of deterrence or punishment is necessary because of the reprehensible conduct. In reaching this conclusion, the court cited the prior decision in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, where the court found it must exercise restraint in awarding special costs, and not all forms of misconduct meet the threshold of “reprehensible”. In *Westsea*, the court said that reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court’s process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant.
46. More recently, the Court of Appeal has confirmed that special costs are punitive, not compensatory, and are awarded when a court seeks to disassociate itself from some misconduct in the course of litigation. (See *Sandhu v. Mangat*, 2019, BCCA 238 at paragraph 5 citing *Smithies Holdings Inc. v. RDV Holdings Ltd.*, 2017 BCCA 177 at paras. 56–57, 134)

47. Here, in their argument about the owner's claim for legal fees, the respondents admit "there is nothing extraordinary about this dispute" and submit that the applicant's claims are frivolous and/or unsupported by evidence. In their additional submissions, the respondents say it would be unfair for the owner to withdraw his claims "at the 11<sup>th</sup> hour" because they had gone to great lengths to defend themselves , including paying legal fees. They also say that, based on the owner's statement "that this proceeding no longer matters" made in his additional submissions, there is no basis for the owner's remaining claims. I find the owner's statement should be taken in the context that he had become frustrated with the tribunal process and was planning on selling his strata lot. The owner also stated that he was concerned for the owners that remain in the building.
48. I find the owner is not liable for the legal fees claimed by the strata noting the respondents have not provided any evidence of misconduct on the part of the of the owner. Adopting my reasons in *Lam* noted above, I find the applicant's conduct in bringing this application was not an 'exceptional circumstance'. While I have found against the owner on the issues, I accept he brought his application in good faith. I also accept the owner's submission that he was concerned about the strata and started this proceeding to resolve the issues reasonably.

## **TRIBUNAL FEES AND EXPENSES**

49. 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. Here, the strata was the successful party but did not pay tribunal fees or claim dispute-related expenses. I dismiss the owner's claim for tribunal fees. He did not claim any dispute-related expenses except legal fees, as addressed above.
50. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

## **DECISION AND ORDER**

51. I refuse to resolve the owner's claims relating to the council members' conduct.

52. I dismiss the owner's remaining claims.

53. I dismiss the respondents' claim for legal fees and disbursements.

---

J. Garth Cambrey, Vice Chair