Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Commercial Section of The Owners, Strata Plan BCS 1266 v. The Owners, Strata Plan BCS 1266*, 2019 BCCRT 1100

B E T W E E N :

Commercial Section of The Owners, Strata Plan BCS 1266

APPLICANT

A N D :

The Owners, Strata Plan BCS 1266

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This is a dispute about various strata governance issues, including the allocation of expenses between sections.

2. The applicant is the Commercial Section of The Owners, Strata Plan BCS 1266. It says the respondent strata corporation The Owners, Strata Plan BCS 1266 (strata) has allocated operating expenses to the commercial section or to the strata as a whole that should have been allocated only to the residential section. It seeks $10,081.36 from the strata. The applicant also requests all the strata's monthly maintenance and service invoices from 2013 to 2018.

3. In addition, the applicant requests orders that it be treated as separate from the strata and have separate accounts with the strata's suppliers and service providers. The applicant requests an order that the strata file certain documents at the Land Title Office. It also alleges that the strata council amended the strata's bylaws without a 3/4 majority vote from the applicant.

4. The strata says that expenses have been allocated properly and that the applicant may review invoices at the offices of its property manager. It says the commercial section and residential section are already separate, and the strata is not required to file the documents at the Land Title Office. It says that the proposed amendments to the bylaws were not ratified because it did not have the applicant's 3/4 majority vote.

5. The applicant is represented by an executive member. The strata is represented by a council member.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

7. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

8. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

9. Under section 123 of the CRTA 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, or order any other terms or conditions the tribunal considers appropriate.

10. Tribunal documents incorrectly show the applicant's name as Strata Corporation Commercial Section of Strata Plan BCS1266. Under section 193(4) of the *Strata Property Act* (SPA), when a bylaw creating a section is filed in the appropriate Land Title Office, the section is created bearing the name "Section [*number of section]* of [*name of strata corporation*]." Here, the bylaws creating the applicant section did not specify a section number, but rather created the "Commercial Section". 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 to direct the use of the name Commercial Section of The Owners, Strata Plan BCS 1266. Accordingly, I have amended the applicant's name in this decision.

ISSUES

11. The issues in this dispute are:

    a. Should the tribunal order the strata to file documents provided by the land surveyor at the Land Title Office?

    b. Has the strata improperly allocated operating expenses between the sections? If so, what is the appropriate remedy?

c. Should the tribunal order the strata to provide invoices to support the expense allocation?

d. Has the strata improperly prevented the applicant from opening its own accounts with certain service providers?

e. Has the strata amended its bylaws without the required 3/4 majority vote from the applicant, contrary to the SPA?

EVIDENCE AND ANALYSIS

Background

12. The strata consists of 37 strata lots. Three strata lots on the ground floor are commercial, and the rest are residential. In 2012 a numbered company that owned all three commercial strata lots started a proceeding in Small Claims Court against the residential section of the strata and its property manager. The dispute was about allocation of expenses between the sections, among other things.

13. In 2014, the dispute was settled with the strata agreeing to pay the numbered company a sum of money. The strata also agreed to amend its bylaws to reduce the commercial section's relative contributions to the annual operating fund and the contingency reserve fund. The commercial section was previously contributing 12.5% of the strata's budget. On May 5, 2015, the strata passed a resolution by unanimous vote amending its bylaws. The commercial section's contribution was reduced to 9.5%, with the remaining 90.5% contributed by the residential section. The bylaw amendment also specified certain expenses that were shared and others that were expenses payable by the residential section only.

Should the tribunal order the strata to file documents provided by the land surveyor at the Land Title Office?

14. The parties agreed to their new respective shares of the contributions to the strata's annual budget after negotiating with the assistance of legal counsel on both sides. The agreement was based in part on professional survey drawings and calculations

that delineated shared common areas and commercial and residential exclusive use areas (survey documents).

15. The applicant says the strata's lawyer who filed the bylaw amendment pursuant to the settlement agreement failed to file the survey documents that the agreement was based on. The applicant says it is vitally important that the survey documents are filed with the Land Title Office because the strata is not calculating fees based on the applicant's 9.5% share.

16. The strata's position is that the survey documents need not be filed with the Land Title Office. For the reasons that follow, I agree with the strata.

17. There is nothing in the parties' terms of settlement that requires the strata to file the survey documents. The parties agreed to pass a unanimous resolution changing the basis for calculation pursuant to section 100 of the SPA. That section says that the strata may, by unanimous vote, agree to use a different formula, other than the one set out in section 99 and the *Strata Property Regulation*, to calculate a strata lot's share of the contribution to the operating fund and contingency reserve fund. The resolution has no effect until it is filed in the Land Title Office. By filing the unanimous resolution with the appropriate certificate in the Land Title Office, the strata complied with the SPA and with the terms of the settlement agreement.

18. The SPA does not require survey documents or any other supporting documentation to be filed. The bylaw amendment makes it very clear that the commercial section is to contribute 9.5% to the annual operating fund and contingency reserve fund, so the survey documents would not clarify or add any information.

19. I also note that the survey documents state that the calculation the land surveyor was asked to perform was not intended to amend the Schedule of Unit Entitlement, and the survey plans were not intended to amend any sheets of the strata plan. This confirms that the surveyor's work was simply to assist the parties in determining a fair formula. Indeed, the parties opted not to use the exact calculations in the survey

(90.52% residential and 9.48% commercial) and instead rounded to 90.5% and 9.5%.

20. I find that the applicant has not justified its request to have the survey documents filed. The survey documents would not change the parties' agreement, as captured in the bylaw amendment, that the commercial section's relative contribution to the strata's annual budget is 9.5%.

21. As I have found that the strata was not obligated by either the settlement agreement or the SPA to file the survey documents, I find that it would not be appropriate for the tribunal to make the requested order. I dismiss this claim.

Has the strata improperly allocated operating expenses between the sections? If so, what is the appropriate remedy?

22. The applicant says the strata owes the commercial section $10,081.36 for the combined period from September 1, 2013 to November 2018 for mis-allocated expenses. It arrived at this figure by taking the budgeted annual fees provided by the property manager and subtracting the applicant's calculation of budgeted annual fees for each fiscal year and adding the annual sums.

23. The strata says the applicant used incorrect information and assumptions to make its calculations. It says that the settlement agreement 'covers' the period up to 2015. It also says that strata fees are based on the adopted budget, not actual expenses. It says surpluses or deficits are handled according to the SPA.

24. Neither party addressed the *Limitation Act* in their submissions, but on its face, the applicant's claim appears to be subject to a 2-year limitation period. I determined that it was not necessary to seek submissions from the parties about the application of the *Limitation Act* because I find the applicant's claim must be dismissed on its merits.

25. In general, the applicant alleges that that the strata has 'charged' it – in other words, allocated expenses in its annual budget as shared strata expenses for which the commercial section contributes 9.5% – for expenses that should be allocated only to the residential section. The applicant argues that the expenses must be separated between the commercial and residential sections.

26. Standard bylaw 8 makes the strata responsible for repair and maintenance of common assets and common property. The SPA dictates that the strata is responsible for the common expenses of the strata corporation, and that owners must contribute, through strata fees, to an operating fund and a contingency reserve fund for common expenses.

27. Section 195 of the SPA says that for a strata with sections, expenses of the strata that relate *solely* to the strata lots in a section are shared by the owners of strata lots in the section. Section expenses are then calculated on the basis of unit entitlement within the section. I find the use of the word "solely" in section 195 means the applicant must contribute to any expenses that relate at least in part to the commercial strata lots, to their limited common property, or to common property.

28. Some of the expenses the applicant takes issue with were specifically addressed in the 2015 bylaw amendment, and others are not. I consider each expense the applicant raised below.

    a. Electricity – the bylaws refer to two accounts and say that account #643 is a shared expense, and "14% of the breakers" for account #573 is a shared expense. The applicant says the strata's property manager incorrectly "charged" it for the full amount of both accounts instead of 14% and 61.53% (it is not clear from where the 61.53% derives). Based on an April 3, 2019 email it appears the strata's property manager realized a mistake was made in posting the full amount for account #573 from June 2014 to August 2, 2016 as a shared expense. The strata says that to correct the mistake it has moved the total adjustment from a shared strata expense to a residential section expense. The applicant did not dispute that this has been done, so I find that the error has been corrected. As account #643 is a shared expense as stated in the bylaws, there is no further adjustment to be made. The applicant produced no evidence to show why it was only responsible for 61.53% of that account. If it wishes to change responsibility for that shared expense it needs to seek a bylaw amendment.

b. Garbage bin / recycling / waste removal – The bylaws state that residential section garbage collection is a separate expense payable by the residential section, but cardboard recycling is a shared expense. Based on an April 3, 2019 email, the property manager acknowledged some recycling or waste removal expenses were incorrectly posted to the strata rather than the residential section. It is not clear when this happened. The resulting adjustment was $4,044.21 reallocated from a shared strata expense to a residential section expense. The strata submits that garbage collection has not been treated as a shared expense since 2014. As I have been unable to find evidence that garbage collection was treated as shared expense after September 1, 2015, I find there is no further adjustment to be made.

c. Janitorial – The bylaws state that residential section janitorial expenses are payable by the residential section. The applicant says it was charged $1,328.04 for janitorial costs for 2015-16. It does not explain this figure. It says it has its own contract with the same company and pays the company directly. The annual budgets for 2015-16 and later do not indicate any shared expenses for janitorial costs. I find there is no adjustment to be made.

d. Miscellaneous and additional services – As set out above, the applicant must establish that the expense was either to be paid by the residential section under the bylaws or was an expense solely for the residential section and therefore payable by the residential section under section 195 of the SPA. The bylaws are silent on miscellaneous and additional services, and the applicant has not established that these services were exclusively for the residential section. The strata's evidence indicates that they may be for postage fees or similar costs. I find that they are a shared strata expense to which the commercial section must contribute its 9.5% share.

e. Lighting – The applicant says it paid for exterior and interior lighting but should only have been charged for exterior lighting. The bylaws state that lighting in the residential section limited common property areas will be paid exclusively by the residential section. Interior lighting in any other common

property areas would be a shared expense. There is no evidence that the applicant was required to contribute to lighting expenses the residential section limited common property.

f. Fire protection – The bylaws list fire protection inspection as a shared expense. The applicant submitted a contractor's quote showing that the contractor routinely inspects six different items, ranging from fire alarm control panels and sprinklers to emergency lighting and fire extinguishers. The applicant says only the fire alarm control panels and dry sprinklers pertain to the commercial section, so there should be a breakdown of costs for each item inspected. Even if I were to accept the applicant's implied submission that it has no emergency lighting or fire extinguishers (or obtains its own inspection for those items), there is no basis in the bylaws to break down the fire protection inspection expenses any further. Fire protection inspection is a shared expense to which the commercial section must pay its proportionate share. If the applicant wants some fire protection expenses to be assigned strictly to the residential section, it will need a bylaw amendment. To order further division requested by the applicant would be in conflict with the bylaws.

g. City of Vancouver utilities – The applicant wants to break down utility fees, similar to fire protection fees. The applicant points to a City of Vancouver utility bill for an annual cross connection free, a fireline, and street cleaning. An email from the City of Vancouver indicates that the street cleaning fees "are only for the residential units," while the other fees "are for the entire strata plan." However, I find that the invoice and email from the City of Vancouver are not determinative of responsibility for the fees. I find that street cleaning would benefit the commercial strata lots as well as the residential strata lots, even if the City determines its rates based on the number of residential lots. The 2015 bylaw amendment does not address these services or fees. Accordingly, I find the bylaws and section 195 of the SPA govern and the City of Vancouver utilities are a shared expense.

h. Gas – The applicant says both sections have separate gas meters and pay their own accounts with Fortis BC. There is no mention of gas consumption in the bylaw. The strata submits that the applicant has misinterpreted the budgets, which list gas recovery as revenue rather than an expense, because the residential strata lots with gas ovens or fireplaces pay an extra $10/month. I find that the applicant has not established any overpayment for gas expenses.

i. Roof repairs – The applicant says it was charged for investigative work pertaining to a roof leak. It says the investigation concluded that the source of the water leak was the residential section's HVAC equipment on the roof. The bylaws state that the residential section is responsible for its HVAC repair and maintenance. However, the roof is common property, and therefore I find the expense of investigating a roof leak is a shared expense.

j. Management fees – the applicant disputes that management fees should be a shared expense. The applicant terminated its agreement with the strata's property manager on May 15, 2012 because of perceived bias in favour of the residential section. It believes it should not have to contribute to the property management fees. The 2015 bylaw amendment is clear that strata management fees are a shared expense. The evidence also indicates that the property manager serves the strata and the residential section separately. Both the strata and the residential section budget for management fees. The services that the property manager provides for the strata benefit the entire strata and are not solely attributable to one section. As part of the strata, the applicant must contribute to the shared expense of management fees.

k. Pest control – The bylaws provide that the residential section will pay expenses for pest control services within the residential section. The invoices for pest control indicate "pest management in the parking and garbage/recycle room and inside apartments (as needed)". It is not clear from the invoices whether any pest control services were required inside apartments. The strata says pest control services are only provided in

common property and not inside any residential units. I find the applicant has not established that it has paid for any pest control services within the residential section contrary to the bylaws.

l. Legal fees – The 2015 bylaw amendment is silent on legal fees. There are several expenses relating to legal fees in 2017 and 2018. The applicant argues that it should not have to contribute to these fees because the lawyer who provided the services is the residential section's lawyer and acted for the residential section during their dispute that resolved in 2014. The bills include fees for legal opinions on patio membranes, advice on bylaw amendments, and attendance at council meeting at the request of a commercial strata lot owner. They are all billed to the strata, not the residential section, and I find that the legal services were provided at the request of and for the benefit of the strata, not the residential section. According to section 195 of the SPA and the bylaws the legal fees are therefore a shared expense.

29. The burden of proof is on the applicant to establish that expenses were incorrectly treated as shared expenses rather than expenses exclusively payable by the residential section under the bylaws or the SPA. I find the applicant has not established on the evidence any incorrect allocation of expenses that has not already been addressed by the strata. I dismiss this claim.

Should the tribunal order the strata to provide invoices to support the expense allocations?

30. The applicant seeks an order that the strata provide all monthly invoices pertaining to maintenance and services from 2013-2018. In its Dispute Response, the strata said the applicant may review all accounts and invoices at its property manager's office.

31. Sections 35 to 37 of the SPA address record keeping and access. The strata must keep copies of its budget and financial statement, and written contracts to which the strata is a party, among other things. It must allow an owner or authorized person to inspect those records and must provide copies if requested.

32. On review of the evidence, I am satisfied that after the applicant filed its Dispute Notice, it was able to review all of the strata's invoices and accounts.

33. In January 2019 correspondence, the property manager told a representative of the applicant that the property manager had supplied all the invoices requested within the time specified and asked the applicant owner to let it know if anything else was required.

34. On February 1, 2019, the commercial section executive met with the property manager at its offices. The purpose of the meeting was to clarify the calculation of budgets for 2014 to 2018. The minutes from that meeting indicate that the commercial section executive reviewed accounts and invoices. There is no indication in the minutes that the commercial section executive was not given access to any invoices or that any invoices were missing. It simply disagrees with how the expense were assigned. Accordingly, I find that the applicant has been able to review the invoices and I dismiss this claim.

Has the strata improperly prevented the applicant from opening its own accounts with certain service providers?

35. The applicant says that since it terminated its contract with the property manager, the commercial section has provided its own property management services. It opened accounts for garbage collection, janitorial services, fire protection and pest control. It has separate gas, water and electrical accounts. However, it has been unable to open separate accounts for 'Telus', insurance, alarm monitoring, water consumption and sewer charges. It says the strata council prevents it from opening its own accounts.

36. The strata says that it already operates as a sectioned strata. It says the accounts that the applicant wants to open fall under strata operations.

37. The 2015 bylaw amendment provides that insurance premiums, fire protection, alarm monitoring (excluding a portion of payment for elevator services), and water and sewer repair and maintenance are shared expenses. For these items, the

applicant is asking for an order that would contradict the bylaws. It would not be appropriate for the tribunal to grant such an order.

38. As for 'Telus' and water consumption and sewer services, the approved budgets do not include any expenses for these items. I find the applicant has not established on the evidence that it is paying for services that are not shared services for the strata.

39. The organizing principle of the SPA is that "you are all in it together." See *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085. Under section 195 of the SPA, sections are responsible for expenses relating solely to each section, but the strata is responsible for common expenses of the strata. Given the numbers of years the applicant and the strata have been disputing expenses, I would encourage the strata, wherever reasonably practicable, to arrange for separate metering, billing, and accounts for the commercial and residential sections. That said, there was no evidence that the strata has been unfair in allocating expenses between the sections. It has adhered to the bylaws and the SPA.

Has the strata amended its bylaws without the required 3/4 majority vote from the applicant, contrary to the SPA?

40. The applicant says "all" bylaw amendments were improper because the commercial section "has not been invited or participated in voting" at meetings. The applicant correctly points out that bylaw amendments require a 3/4 vote of each section according to the SPA. It is not entirely clear which bylaw amendments or proposed bylaw amendments the applicant takes issue with. The applicant also says that because the strata council consists mainly of members from the residential section, the applicant's opinions or suggestions are not taken into consideration.

41. Bylaw 36 says that the strata council shall include at least one person from each of the executives of the commercial and residential sections. Having reviewed the council meeting minutes and AGM minutes, I am satisfied that the strata has diligently tried to ensure full participation from the commercial section executive. It ensured that the commercial executive had a representative on council even in

years when the commercial owner did not attend the AGM and volunteer for the role.

42. Section 128 of the SPA says that bylaw amendments must be approved at an annual or special general meeting. In a strata with different sections, bylaw amendments require a resolution passed by a 3/4 majority vote of the residential strata lots and a resolution passed by a 3/4 majority vote of the non-residential strata lots, or as otherwise provided in the bylaws for the non-residential strata lots.

43. The strata says new bylaws were proposed and voted on at the September 2017 AGM but because there was no representative from the commercial section, the bylaws were not ratified and not filed at the Land Title Office. The title search confirms that the last bylaw amendment was received in July 2015. A bylaw amendment has no effect until filed in the Land Title Office. I find that the September 2017 proposed bylaw amendment was not ratified, was not filed at the Land Title Office, and has no effect.

44. The 2015 bylaw amendment changed the basis for calculating the contribution to the operating fund and contingency reserve fund, and therefore required a unanimous vote. The applicant does not suggest that the commercial owners did not vote in favour of the amendment. There may not have been separate votes for each section, but I find it makes no difference whether separate votes were held given the requirement for unanimity – the result would be the same even if there were two separate votes.

45. Given that the applicant did not provide specifics, I decline to consider whether any other bylaw amendments were passed without the requisite 3/4 majority vote. I also not that the previous bylaw amendment was in 2011, so if the applicant wished to make a claim regarding that bylaw and previous ones, it would have to contend with the *Limitation Act.*

46. I conclude that the strata has not amended its bylaws without the requisite 3/4 majority vote. I dismiss the applicant's claim.

47. I encourage the applicant to ensure that a member of the commercial executive participates on the strata council and attends all AGMs so that the strata can make necessary bylaw updates that affect both sections.

TRIBUNAL FEES AND EXPENSES

48. Under section 49 of the CRTA, 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 applicant was not successful, so I decline to order reimbursement of its tribunal fees and expenses.

ORDER

49. I dismiss the applicant's claims and this dispute.

Micah Carmody, Tribunal Member