Civil Resolution Tribunal

Date Issued: September 27, 2019

File: ST-2018-008486

Type: Strata

Civil Resolution Tribunal

Indexed as: *Residential Section of The Owners, Strata Plan NW 2089 v. Commercial Section of The Owners, Strata Plan NW 2089 et al*, 2019 BCCRT 1140

B E T W E E N :

Residential Section of The Owners, Strata Plan NW 2089

APPLICANT

A N D :

Commercial Section of The Owners, Strata Plan NW 2089 and The Owners, Strata Plan NW 2089

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. This is a dispute about who must pay for the repair and maintenance of an elevator. The respondent strata corporation, The Owners, Strata Plan NW 2089 (strata), is divided into the applicant Residential Section of The Owners, Strata Plan NW 2089

(residential section), and the respondent Commercial Section of The Owners, Strata Plan NW 2089 (commercial section).

2. This dispute is about 1 of the building's 5 elevators (subject elevator). The residential section paid $188,842.50 to repair the subject elevator, which had been unusable for years. It believes that this was a strata expense. The residential section asks for an order that the commercial section reimburse it for the commercial section's share of the subject elevator's repair expenses or, alternatively, that the strata reimburse it by dividing the subject elevator's repair expenses amongst all owners based on unit entitlement. The net effect of either order would be the same, which is that the commercial owners would collectively reimburse the residential owners $47,358.62.

3. The commercial section says that the subject elevator is the residential section's responsibility under the *Strata Property Act* (SPA) and the bylaws. The strata takes no position on whether the residential section is responsible for the subject elevator.

4. The residential section is represented by a lawyer, Katherine Uppal. The commercial section is represented by a lawyer, Veronica Franco. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

5. 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.

6. 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.

7. 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.

8. Under section 193(4) of the SPA, when a bylaw creating a section is filed in the Land Title Office (LTO), the section is created bearing the name "Section [number of section] of [name of strata corporation]". In this dispute, the bylaws creating the sections do not set out section numbers, as required by the SPA, but rather create a "Residential Section", consisting of the residential strata lots, and a "Commercial Section" consisting of the commercial strata lots. I note this only to bring it to the attention of the parties and to explain why the section's names appear as they do in the style of cause in this decision. The strata might consider amending its bylaws to properly name the sections.

9. As another preliminary matter, the residential section and commercial section both raise the issue of significant unfairness. The tribunal has jurisdiction over significantly unfair decisions under section 123(2) of the CRTA, which does not explicitly include jurisdiction over sections. In *Section 2 of The Owners, Strata Plan BCS 4327 v. Fan*, 2019 BCCRT 1087, I found that the tribunal has jurisdiction over significantly unfair decisions by a section. Neither section raised an issue about the tribunal's jurisdiction over this issue. I find that I have jurisdiction to determine whether either section has acted significantly unfairly under section 123(2) of the CRTA.

ISSUES

10. The issues in this dispute are:

    a. Do the subject elevator's repair expenses relate solely to the residential section?

b. Is the residential section or the strata responsible for the subject elevator under the bylaws and the SPA?

c. If the residential section is responsible for the subject elevator under the bylaws and the SPA, is it significantly unfair for the commercial owners not to contribute to the subject elevator's repair expenses?

d. If the strata is responsible for the subject elevator under the bylaws and the SPA, is it significantly unfair for the commercial owners to contribute to the subject elevator's repair expenses?

BACKGROUND AND EVIDENCE

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

12. In December 2001, the strata filed a complete set of bylaws in the Land Title Office, which repealed and replaced all previous bylaws and the Standard Bylaws. There have been several amendments since then but none relevant to this dispute.

13. Bylaw 8(1)(a) says, in part, that the strata will "keep in a state of good and serviceable repair and properly maintain the fixtures and fittings, including the elevators, used in connection with the common property, common facilities or other assets" of the strata.

14. Bylaw 8(c) says, in part, that the powers and duties of the strata may be "assumed and exercised" by a section in respect of "those matters which relate exclusively to the respective sections, including (but not limited to) maintenance and repairs exclusively referable to the respective section".

15. The strata was initially built in 1983 and has a 19 floor tower on top of a 6 floor podium. The podium takes up half of a city block. The tower is above roughly the middle third of the podium.

16. The strata has 5 elevators. There is an elevator on the northeast side of the building and on the southwest side of the building (podium elevators). The podium elevators each only service up to the sixth floor because they are not under the tower. The other 3 elevators are in a lobby in the middle of the building. Two of these elevators service the tower (tower elevators). The third elevator, the subject elevator, only goes to the sixth floor. The elevators are all common property on the strata plan.

17. Over the years, the strata has undergone several significant changes, including subdivisions and conversions of strata lots. At the time of construction, all the residential strata lots were in the tower. There were commercial strata lots in both the podium and the tower. There was also a parkade on the second to fifth floors.

18. In 1989, all the commercial strata lots in the tower were converted to residential strata lots. As a result, since 1989, the commercial owners have had no reason to access the tower elevators. In addition, almost the entire sixth floor was consolidated into a single commercial strata lot. As part of this subdivision, a wall was added in the lobby to separate the tower elevators and the subject elevator. With the wall, the residential owners could access the tower elevators through the lobby but could not access the subject elevator. A separate entrance was added so that the commercial owners could directly access the subject elevator from the street. The commercial owners could not access the tower elevators.

19. In 2005, a developer purchased the sixth floor commercial strata lot and subdivided it into 29 residential strata lots. Following the 2005 subdivision, the only commercial strata lots were on the ground floor and second floor mezzanine.

20. During the 2005 subdivision, the developer closed off the commercial access to the subject elevator and took down the wall between the subject elevator and tower elevators. Since 2005, the only way to access the subject elevator is through the residential lobby. The commercial owners do not have access to the residential lobby and thus have no ability to access the tower elevators or the subject elevator.

21. As part of the 2005 subdivision, the residential section made sure that the developer cut off the commercial owners' access to the subject elevator. For example, on

September 27, 2005, the property manager wrote to the developer to ask for confirmation that the subject elevator would be restricted to residential owners. In other words, the residential owners actively ensured that its owners had exclusive use of the subject elevator.

22. Unfortunately for the residential owners, they did not enjoy the use of the subject elevator for long. In June 2007, an elevator contractor inspected the subject elevator and determined that it was unsafe. The subject elevator was decommissioned and was not used for over a decade. There is some suggestion in the evidence that the developer damaged the subject elevator by using it during construction of the sixth floor residential strata lots.

23. In a memo dated August 21, 2007 a strata council member and residential section executive committee member, RJ, outlined the outstanding issues between the residential section and the developer. RJ confirmed that "we" would take responsibility for maintaining all 4 residential elevators, being the tower elevators, the subject elevator, and one of the podium elevators. It is not entirely clear whether "we" refers to the residential section or the strata. However, RJ refers to "our" elevator company maintaining the 4 elevators. Residential section executive committee meeting minutes from 2006 indicate that the residential section instructed and paid the same elevator company. Furthermore, at the time, the strata had section executive committees but no strata council. Therefore, based on the totality of the evidence before me, I find that RJ's memo confirmed that the residential section intended to take responsibility for the subject elevator as part of the 2005 subdivision.

24. On May 31, 2016, the residential section received a report from an elevator consultant, Gunn Consultants, that set out an elevator modernization report that included bringing the subject elevator back into commission.

25. At the strata council meeting on June 21, 2016, the residential section executive informed the strata council that it had decided that the strata was responsible for the repair and maintenance of the tower elevators and the subject elevator. There was

no commercial section representative at this strata council meeting. The strata council instructed the property manager to advise the commercial section that the strata, not than the residential section, would fund the elevator modernization project.

26. The residential section did not explain, and has not explained in this dispute, why it believed in 2016 that the subject elevator was the strata's responsibility. At that time, the subject elevator was still decommissioned, so there could be no suggestion that a commercial owner or contractor had used it since 2007.

27. The strata held an SGM on October 18, 2016, to consider special levies to fund the several projects, including the elevator modernization project. The first resolution that the owners considered was to approve a quote of $846,090 for the elevator modernization project and an associated special levy (elevator resolution). The elevator resolution narrowly passed. However, just after the vote, another commercial owner arrived. This commercial owner, with its proxies, held 8.89 votes and appears to have tipped the balance in favour of the commercial owners. Most of the resolutions funding further projects were defeated.

28. Following the October 2016 SGM, under section 51 of the SPA, owners holding at least 25% of the votes made a written demand requiring the strata to hold a second SGM to reconsider the elevator resolution.

29. At another SGM on November 24, 2016, lawyers for the residential section, commercial section and the strata were present. The owners discussed who should be responsible for the elevator modernization project but decided to defer making a decision until the strata received a legal opinion.

30. According to the strata council meeting minutes from December 19, 2016, the 3 lawyers determined that the residential section should pay the entire cost of the elevator modernization project. The strata council instructed the property manager to tell the strata's lawyer to draft a resolution to rescind the elevator resolution.

31. The strata held another SGM on January 31, 2017. The owners voted to rescind the elevator resolution. The residential section held an SGM the same day and considered a resolution to fund the elevator modernization project through a special levy imposed on the residential owners. According to the minutes, some residential owners still believed that the residential section should not have to pay the entire cost, but the resolution easily passed.

32. The residential section proceeded with the elevator modernization project. As discussed above, as part of the project, the residential section spent $188,842.50 to recommission the subject elevator. It is undisputed that if the strata had paid the subject elevator's repair expenses, the commercial owners' collective share would have been $47,358.62.

ANALYSIS

Do the subject elevator's repair expenses relate solely to the residential section?

33. Section 195 of the SPA says that "expenses of the strata corporation that relate solely to the strata lots in a section are shared by the owners of strata lots in the section".

34. The residential section says that the subject elevator does not relate "solely" to the residential section. The residential section concedes that none of the commercial owners have access to the subject elevator. However, the residential section says that both strata contractors and commercial section contractors can use it to service common property and mechanical equipment.

35. The parties agree that there is mechanical equipment that services the commercial strata lots on the podium rooftop, which can be accessed by the subject elevator, the stairs, or one of the podium elevators.

36. The residential section provided a copy of the strata's annual maintenance plan for 2019, which includes tasks that the residential section says must be done with access through an elevator. The residential section also provided an equipment list

from the strata's HVAC contractor, which shows that some mechanical equipment on the 7th floor rooftop relates to the commercial section.

37. The residential section also provided a list from the resident caretaker about contractors' elevator usage between January and April 2017, which it says shows that work attributable to the residential section, commercial section and strata all take place on the floors serviced by the subject elevator. However, the subject elevator was not in use during that time.

38. The commercial section says it has not used the subject elevator since 2005 and specifically disputes that its owners or contractors use the subject elevator. More importantly, the commercial section says that there is no reason for its owners or contractors to use the subject elevator. It says that most of the mechanical rooms are on the third, fourth and fifth floors, which contractors can access directly via the parkade. The commercial section says that while it is possible for a contractor to access the sixth floor mechanical room via the subject elevator, that route is impractical compared to the podium elevator because the contractor would have to get to the roof via a residential hallway.

39. The commercial section notes that the strata and sections have all successfully accessed the roof since the subject elevator was shut down in 2007, which proves that it is not necessary for any contractors to use it to access the roof. The commercial section also points out that the on-site caretaker directs how contractors should access any mechanical equipment.

40. I agree with the commercial section. The residential section has not proven that any commercial section owner or contractor has used the subject elevator. All it has proven is that the subject elevator is one possible route for a person to get to the podium rooftop. Even though the use of the word "solely" in section 195 of the SPA creates an extremely low threshold, I find that it is not enough for the residential section to prove that someone connected to the commercial section or strata could hypothetically use the subject elevator.

41. I find that the subject elevator's repair expenses relate solely to the strata lots in the residential section within the meaning of section 195 of the SPA.

Is the residential section or the strata responsible for the subject elevator's repair expenses under the SPA and the bylaws?

42. Even if the subject elevator's repair expenses relate solely to the residential strata lots, the residential section argues that the strata must repair and maintain the subject elevator under the bylaws.

43. The residential section relies on *Yang v. The Owners, Strata Plan LMS 4084*, 2010 BCSC 453. In *Yang*, the strata corporation was divided into 3 sections. The Court noted that the SPA did not allow a section to hold common property, just LCP. The Court reasoned that common property remains the strata corporation's responsibility. However, the Court went on to say that a section may take on responsibility for common property if the strata corporation's bylaws allow it. In that case, the bylaws did not allocate that responsibility to the sections, so the strata corporation was responsible for them.

44. In a subsequent case involving the same strata corporation, *Yang v. Re/Max Commercial Realty Associates (482258 BC Ltd.)*, 2016 BCSC 2147, the Court clarified that neither a section nor a strata corporation can pass a bylaw allocating responsibility for expenses related to common property to a section unless they relate solely to that section. The Court came to the same conclusion in *Norenger v. The Owners, Strata Plan NW 3271 et al*, 2018 BCSC 1690.

45. Based on the above cases, a strata corporation remains responsible for the repair and maintenance of common property that relates solely to one section unless its bylaws allocate responsibility to that section. With that in mind, I turn to the strata's bylaws.

46. As discussed above, bylaw 8(1)(a) explicitly requires the strata to repair and maintain elevators. However, bylaw 8(c) says that a section may "assume and exercise" the powers and duties of the strata for matters that "relate exclusively" to the section. The residential section essentially argues that bylaw 8(c) is permissive

and that it did not, in fact, assume and exercise the strata's obligation to repair and maintain the subject elevator. Rather, it stepped in only because the strata had breached its obligation to repair and maintain the subject elevator. The residential section submits that it agreed to fund the elevator modernization project "with the caveat that they could later seek recourse from the other parties".

47. I find that the residential section's position in this dispute is inconsistent with the evidence. First, at the time of the 2005 subdivision, the residential section not only accepted but insisted that it have exclusive use of the subject elevator. Furthermore, it was the residential section's elevator contractor who inspected and shut down the subject elevator in 2007. Indeed, RJ explicitly confirmed that the residential section wanted to repair and maintain the subject elevator.

48. Even if I am wrong that the residential section accepted responsibility for the subject elevator in 2007, I find that it did so in 2016. The residential section started the process to repair the subject elevator in 2016 without input from the commercial owners. Most importantly, there is nothing in the residential section's January 2017 SGM minutes that support the residential section's assertion that its funding of the elevator modernization project came with a caveat, that it believed that the strata breached its repair and maintenance obligations, or that it intended to seek reimbursement from the strata or commercial section. In other words, there is no indication that the residential section funded the elevator modernization project under protest. I find that it is unlikely that the residential section, at the time, believed that it could seek reimbursement from the commercial section or strata given that the 3 parties' lawyers had agreed that the subject elevator was the residential section's responsibility less than 2 months prior. I find that the mere fact that some owners disagreed that the residential section should pay for the elevator modernization project does not mean that the residential section did not fully accept responsibility for the subject elevator by passing the resolution funding the repairs.

49. For these reasons, I find that the residential section assumed and exercised the strata's duty to repair and maintain the subject elevator before the elevator

modernization project began. Therefore, I find that under the SPA and the bylaws, the residential section must repair and maintain the subject elevator.

Since the residential section is responsible for the subject elevator under the bylaws and the SPA, is it significantly unfair for the commercial owners not to contribute to the subject elevator's repair expenses?

50. The residential section argues that it would be significantly unfair for the commercial owners not to contribute to the cost of the subject elevator's repair expenses for the subject elevator. The residential section relies on the fact that the commercial section used the elevator during a "significant period of its serviceable life". The residential section also says that the commercial section occasionally uses it now, which I have found is not supported by the evidence.

51. The leading case that sets out the test for significant unfairness under section 164 of the SPA is *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The British Columbia Supreme Court (BCSC) confirmed that the same test applies under section 123(2) of the CRTA in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763. The test is:

    a. What is or was the expectation of the affected owners?

    b. Was that expectation on the part of the owners objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

52. According to the residential section, it expected that the commercial section would contribute to the cost of the elevator modernization project. I find that this was not a reasonable expectation.

53. It is undisputed that the commercial section had the exclusive use of the elevator until 2005. The residential section argues that because the commercial section contributed to the wear and tear on the subject elevator, it should have to pay towards its ongoing maintenance. I disagree. There is no evidence that the commercial section caused any damage to the subject elevator. If it had, the residential section could have negotiated a payment as part of its assumption of

responsibility for the subject elevator during the 2005 subdivision process. Instead, the residential section voluntarily accepted responsibility for the subject elevator without conditions. Then, after over a decade, the residential section decided to bring the subject elevator back into use for the exclusive benefit of its owners. Given that the commercial owners will derive no benefit from the subject elevator, I find that there is no reasonable expectation that the commercial section should contribute to its repair.

54. Accordingly, I reject the residential section's argument that it is significantly unfair for it to bear the entire cost of repairing the subject elevator. The residential section must bear the full cost under the SPA and the bylaws. I dismiss the residential section's claims.

If the strata were responsible for the subject elevator under the bylaws and the SPA, would it be it significantly unfair for the commercial owners to contribute to the subject elevator's repair expenses based on unit entitlement?

55. While my findings above are sufficient to dispose of the issues in this dispute, I will address the commercial section's arguments about significant unfairness. Even if I had found that the strata was responsible for the subject elevator under the bylaws and the SPA, I would have found that requiring the commercial section to contribute to its repair and maintenance would be significantly unfair.

56. I find that the circumstances of this dispute are analogous to *Shaw v. The Owners, Strata Plan LMS 3972 et al*, 2008 BCSC 453. That case involved a strata corporation divided into a commercial section and residential section. Several residential owners brought a petition against the strata corporation because the commercial owners used a disproportionally high amount of certain common expenses, including water. The residential owners said that it was significantly unfair for these expenses to be divided based on unit entitlement, which had the residential owners paying 38% of common expenses.

57. The Court dismissed most of the residential owners' claims for a lack of evidence. However, the Court found that the strata corporation's allocation of water expenses based on unit entitlement was significantly unfair to the residential owners. The residential owners had installed separate water meters and were able to demonstrate that the commercial strata lots used 99% of the strata's water.

58. In this dispute, turning to the test from *Dollan*, the commercial section says that it reasonably expected the residential section to assume responsibility for the elevator. I agree, for the same reasons that I found that the residential section's expectation that the commercial section would contribute was unreasonable.

59. As for the third part of the test, would it be a significantly unfair breach of the commercial section's reasonable expectations if it had to contribute to the subject elevator's repair expenses? The courts have described actions that are significantly unfair as being burdensome, harsh, wrongful, lacking in probity or fair dealing, unjust or inequitable. See *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128.

60. I find that it would be significantly unfair to the commercial section to be forced to contribute. The residential section approved the elevator modernization project knowing that the commercial owners did not believe that they should contribute. Furthermore, the residential section approved the elevator modernization project after the commercial section, residential section and strata all received legal advice that the residential section was responsible for the subject elevator. Therefore, I find that the residential section's attempt to now seek reimbursement for the subject elevator's repair expenses lacks probity and fair dealing.

61. Therefore, even if I had found that the strata was responsible for the subject elevator under the SPA and bylaws, I would have dismissed the residential section's dispute on the basis of significant unfairness.

62. In an effort to assist the parties, I will add one further comment. As discussed above, the SPA provides the strata with no discretion to allocate common property expenses unless the expense relates solely to a section. Thus, responsibility for repairing and maintaining common property is governed solely by use.

63. The same restriction does not apply to LCP that has been designated for the exclusive use of a section. Section 11.2(1) of the *Strata Property Regulation* says that a section must pay any expenses related to its LCP, regardless of use. Given that the parties appear to agree on who is responsible for the strata's other 4 elevators, and this decision has determined the responsibility for the fifth, the parties might consider designating the elevators as LCP for their respective sections to prevent any future dispute.

TRIBUNAL FEES AND EXPENSES

64. 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 residential section was not successful so I dismiss its claim for tribunal fees and dispute-related expenses. Neither respondent claimed any dispute-related expenses.

DECISION AND ORDER

65. I dismiss the residential section's claims, and this dispute.

Eric Regehr, Tribunal Member