Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

Nizarali Mitha, Giulio Megaro on behalf of Estate of Sammi Megaro, Ramin Aminian, Eleonora Scott-Iverson, and Kamal Erfani

APPLICANTS

A N D :

The Owners, Strata Plan VR 2192

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell, Vice Chair

INTRODUCTION

1. The applicants, Nizarali Mitha, Giulio Megaro on behalf of Estate of Sammi Megaro, Ramin Aminian, Eleonora Scott-Iverson, and Kamal Erfani (owners) each own or

represent a corporate owner of a strata lot in the respondent strata corporation, The Owners, Strata Plan VR 2192 (strata).

2. The owners say the strata has breached the *Strata Property Act* (SPA) in several aspects of governance and spending.

3. The owners are represented by Mr. Mitha. The strata is represented by MF (also known as MR), a strata council member.

4. The owners seek the following remedies:

    a. Revocation of MF's voting rights.

    b. Removal of the current strata council and property management company.

    c. Control of the strata's common property maintenance program.

    d. Access to strata records including general ledgers, financial statements, bank statements, and meeting minutes.

    e. "Reimbursement and reversal" of 2 HVAC systems.

5. The strata denies all of the owners' claims.

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 strata requested an oral hearing of this dispute, on the basis that the owners' submissions are ambiguous and there are significant conflicts in the evidence. The tribunal has discretion to decide the format of the hearing, including in writing, by

telephone, videoconferencing, or a combination of these. I have considered the strata's request, but I find an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided. Most disputes involve conflicting evidence, and since the evidence in this dispute consists solely of documents I find that an oral hearing would not assist me in making findings of fact. I agree that the owners' submissions were lengthy, and included information not directly related to any of their requested remedies. As a result, a tribunal case manager attempted to work with the owners to narrow the claims and submissions. This was not particularly successful, and I find that an oral hearing would not offer further assistance. Rather, I find I am able to decide the dispute based on the documentary evidence and written submissions before me.

8. I also note that my reasons and findings in this decision are related to the requested remedies set out in the Dispute Notice, and confirmed by the owners in a "flow chart" provided during the tribunal facilitation process. The owners provided extensive submissions on matters such as the sale of a strata lot owned by the strata (unit 219), a roofing project, parking, allocation of hydroelectric expenses, a grease trap, municipal stop work orders, financial statements, and strata insurance. I understand these submissions to relate to the remedies listed on the Dispute Notice, and the owners' general position that the strata has failed to follow the SPA. However, this decision is limited to the remedies requested on the Dispute Notice. I find it would be procedurally unfair to allow the owners to add new claims and remedy requests after the strata has already provided its evidence. It is open to the owners to file another dispute, subject to the provisions of the *Limitation Act.*

9. 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.

10. 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.

ISSUES

11. The issues in this dispute are:

    a. Should I order that MR's voting rights are revoked?

    b. Should I order that the strata council be removed from office?

    c. Should I order that the strata's property management firm be replaced?

    d. Should I order that the owners control future common property maintenance in the strata?

    e. Are the owners entitled to documents under SPA section 36?

    f. Are the owners entitled to reimbursement of any HVAC-related costs?

EVIDENCE, FINDINGS AND ANALYSIS

12. 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.

13. The strata was created in 1988 under the *Condominium Act*, a predecessor to the SPA. It consists of 26 strata lots on 2 storeys. All of the strata lots are noted on the strata plan as commercial, rather than residential.

14. On January 1, 2002 the Standard Bylaws in the SPA became the statutory bylaws for every strata corporation, regardless of the date the corporation was created, except to the extent that a strata corporation had already dealt with the same subject matter by filing an amended bylaw in the Land Title Office. The strata filed amended bylaws at The Land Title Office March 1991, with further amendments filed in October 1993. I find these bylaws continued to apply after 2002, except to the extent that they are silent on an issue dealt with in the Standard Bylaws, or conflict with the Standard Bylaws. The strata filed further bylaw amendments in October 2007 and June 2014, which continue to apply.

Revocation of MF's Voting Rights

15. The owners request an order that MF's voting rights be revoked. They made extensive submissions about MF's alleged conduct on a variety of strata matters, and say he has used his votes in a manner that is significantly unfair to other owners. They submit they want to "take back control" of the strata corporation from MF, who is also the strata council president.

16. The strata admits that MF owns 7 strata lots in the strata, either directly or through companies in which he is a shareholder. The owners agree that MF owns 7 strata lots. The parties disagree about whether MF owns unit 109 or unit 119, but I find that is not relevant to my decision.

17. Under CRTA section 123(2), the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. This is parallel to the BC Supreme Court's authority under SPA section 164. However, I find that this remedy is not available here. First, MF was not named as a party to the dispute, so I have no authority to make orders against him. Second, the strata says MF has never held 50% or more of the votes, even when holding proxies. The owners have not proved otherwise, so I find an order under CRTA section 123(2) is not available.

18. A strata lot owner's voting rights are as set out in SPA section 53 and 54. These provisions apply to MF, and I have no authority to order otherwise except under CRTA section 123(2), which I have found does not apply.

19. The strata's 1991 bylaws contained bylaw 8.2, which said the owner of a strata lot (except the owner developer) was only entitled to cast 1 vote for each strata lot owned, regardless of the relative size of the strata lot. It is likely that this bylaw was contrary to the *Condominium Act,* which applied when it was created. Also, bylaw 8.2 likely ceased to have effect on January 1, 2002, because it conflicts with section 53(1) of the SPA, which says each strata lot has one vote at an annual or special

general meeting, unless different voting rights are set out in a Schedule of Voting Rights in the prescribed form in accordance with section 247, 248 or 264.

20. Even if bylaw 8.2 was previously enforceable, the strata filed bylaw amendments on October 10, 2007 revoking bylaw 8.2. The October 2007 amendment said bylaw 8.2 was repealed, and after that the strata corporation would rely on the Schedule of Voting Rights registered in the Land Title Office.

21. For all of these reasons, MF is entitled to the votes associated with his strata lots as set out in the Schedule of Voting Rights (included in the strata plan). SPA section 53(1) is mandatory, and overrides any previous bylaw, and I have no authority to find otherwise.

22. For these reasons, I dismiss the owners' claim to revoke MF's voting rights.

Removal of Strata Council

23. The owners seek an order removing the strata council members from office. They allege numerous instances where the council failed to follow the SPA, and accuse certain council members of incompetence or impropriety.

24. I dismiss this claim, for the following reasons.

25. First, the owners have not named any strata council members as parties to this dispute.

26. Second, I find that the owners' claim against the strata council members arises under SPA section 31. Section 31 sets out the standard that strata council members must meet in performing their duties. It says they have a duty 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.

27. In *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc*., 2016 BCSC 32, the BC Supreme Court said that the duties of strata council members under SPA section 31 are owed to the strata corporation, and not to individual strata lot owners

(see paragraph 267). This means that a strata lot owner cannot successfully sue a strata council member for a breach of section 31. (See *Kornylo v. The Owners, Strata Plan VR 2628*, 2019 BCCRT 1215.)

28. Also, in *Jiwan Dhillon & Co. Inc. v. Gosal*, 2010 BCCA 324, the BC Supreme Court held in paragraphs 22 to 23 that it did not have authority to remove an entitlement set out in the SPA, such as the right to stand for election to the strata council. These paragraphs in *Jiwan Dhillon* deal specifically with SPA section 165, which applies only to the Supreme Court and not to the tribunal. However, I find the court's reasoning applies equally to the parallel powers of the tribunal, as set out in CRTA section 123. It would be unreasonable to conclude that the tribunal has a power not available to the Supreme Court, and there is nothing in the CRTA indicating otherwise.

29. For these reasons, I dismiss the owners' claim to remove the strata council members from office.

Replacement of Property Manager

30. The parties agree that in mid-2017, the strata hired Tribe as its property management firm. The strata says the decision to hire Tribe was made at a strata council meeting in July 2017.

31. The owners submit that Tribe's services were unacceptable, as it failed to follow SPA requirements such as scheduling an AGM and providing complete minutes. They also say the decision to hire Tribe was undemocratic.

32. The strata says this issue is moot, as Tribe resigned and withdrew its services effective August 31, 2018. In their submissions, the owners agree that Tribe resigned. I agree, and dismiss the claim to remove Tribe because it is moot.

33. In *Binnersley v. BCSPCA*, 2016 BCCA 259, the BC Court of Appeal restated the principles of mootness as outlined by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R 342, as follows:

> ... if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot...

34. At paragraph 23 of *Binnersley*, again citing *Borowski*, the court found that determining mootness involves a 2-step analysis. First, whether the live issue has disappeared and any issues are theoretical or academic. Second, if there is no live issue, should the court or tribunal exercise its discretion to hear the case anyway.

35. Following *Binnersley* and *Borowski,* which are binding precedents, I find that the issue of removing Tribe as property manager is moot, since it resigned. There is no live issue about Tribe's contract or services, and I find there is no compelling reason to decide the issue of removal since I could make no effective order about it. I note that in *Borowski,* the court said it may be appropriate to decide moot issues if the decision will have some practical effect on the rights of the parties. I find that is not the case here, so I dismiss the owners' claim to remove Tribe as property manager.

Control of Common Property Maintenance

36. The owners seek an order that they control future common property maintenance in the strata. They submit that the strata mismanaged various repair projects, including roof repairs. They also submit that MF outvotes all proposed maintenance projects.

37. The owners also say MF bids on the projects, as contractor, and then awards himself the projects by collecting information and quotes from other participating bids. I find that this aspect of the owners' claim is outside the tribunal's jurisdiction. SPA section 32 addresses conflicts of interest by strata council members, and all remedies for section 32 breaches are set out in SPA section 33. (See *Dockside Brewing Company Ltd. V. Owners, Strata Plan LMS 38371,* 2007 BCCA 183.) CRTA section 122(1) specifically says the tribunal has no jurisdiction in relation to a claim under section 33, and such claims may only be dealt with by the Supreme Court. I therefore make no findings about conflict of interest.

38. Regardless of why the owners want control of common property maintenance in the strata, I find I have no authority to make that order. Under SPA section 72, the strata corporation must repair and maintain common property. There is an exception for limited common property maintenance, which may be delegated to owners by bylaw, but I find that is not relevant here.

39. SPA section 72 says the strata corporation must repair and maintain common property, and SPA section 4 says the powers and duties of the strata corporation must be exercised by the strata council. These provisions are binding, so the owners have no entitlement to take over common property repairs unless they are elected to the council and carry sufficient votes.

40. As previously stated, under CRTA section 123(2), the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. Again, this is similar to the Supreme Court's power under SPA section 164.

41. The BC Court of Appeal has considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *The Owners, Strata Plan LMS 1721 v. Watson,* 2018 BCSC 164 at paragraph 28:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

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

42. Applying the test to the facts before me, I find the owners had a reasonable expectation that the strata would properly manage common property maintenance and repairs. However, even if I found that the strata had failed to meet this expectation in a manner that was significantly unfair, I would not order the remedy requested by the owners.

43. I find that even if the strata council previously mismanaged any maintenance or repairs, it would be inappropriate to assign the responsibility for future repairs to the owners. That would not be consistent with the SPA's provisions on common property maintenance, and would subvert the voting entitlements set out in SPA Division 5.

44. For these reasons, I dismiss the owners' claim that they be granted control over common property maintenance.

Access to Strata Documents

45. The owners say the strata has failed to provide documents they have requested.

46. SPA section 35 sets out a list of the records that a strata must prepare and retain. Section 36 says that on request, the strata must make the records listed in section 35 available for inspection and provide copies to an owner, tenant, or person authorized by an owner or tenant within 2 weeks.

47. Email correspondence provided in evidence shows that on April 10, 2017, Mr. Mitha sent a written request to the strata's property manager for various strata documents he wished to pick up. Mr. Mitha requested more documents by email on May 18, 2017. After correspondence with the property manager about the cost of assembling the documents, Mr. Mitha narrowed his request, and emailed a new list on May 26, 2017.

48. Further correspondence indicates that the property management firm sought authorization from the strata to proceed with the document request, including confirmation that the strata would pay the property manager's $50 per hour fee to locate and assemble the documents. The property manager said this fee was specified in its contract with the strata. He said in a June 5, 2017 that the strata had not authorized the compilation of the records requested by Mr. Mitha.

49. At that time, the property management firm had already given notice that it was terminating its contract with the strata on June 30, 2017. The property manager

wrote that the firm was compiling all of the strata's records and they would be available for the strata council to pick up by June 30.

50. The property manager and Mr. Mitha corresponded directly about the documents request, apparently because Mr. Mitha was a member of the strata council. On June 5, 2017 Mr. Mitha also emailed the strata council president requesting access to the documents. On June 29, 2017, the property manager wrote that the strata council president had instructed him not to release any files to any individual strata council member, including Mr. Mitha.

51. There was further correspondence about Mr. Mitha's document request. In a February 6, 2018 email to a council member, Mr. Mitha again requested access to a broad set of strata documents (he was no longer a council member by this time). The strata's new property manager wrote back on February 26, 2018 that he had been advised of the request. He said he could set up a time for Mr. Mitha to view the records at his office, but that "we have been advised that owners that do wish to inspect the records, will be charged for the time our office spends supervising."

52. I find that by failing to provide any of the documents requested by Mr. Mitha in April 2017 and February 2018, the strata breached SPA section 36. It was open to the strata to attempt to work with Mr. Mitha to narrow and clarify his requests, in order to save labour costs charged by the property manager. However, it was not entitled to refuse the request, or to ignore it. The correspondence confirms that the strata council was aware of Mr. Mitha's document requests, and did not provide documents listed in SPA section 35. I note that in February 2018, the property manager did not even respond to Mr. Mitha's written request until February 26, which was 20 days after he sent it. This is a clear breach of SPA section 36(3), which says the strata must comply with a section 36 document request within 2 weeks.

53. Also, I find the strata was not entitled to demand that Mr. Mitha pay for the property manager's time to locate the records or supervise his review of the records. The strata was also not entitled to make document production contingent on Mr. Mitha's

agreement to pay those costs. *Strata Property Regulation* (Regulation) 4.2(1) allows the strata to charge up to 25 cents per page for documents provided under SPA section 36. However, Regulation 4.2(2) specifically says the strata may not charge an owner a fee for the inspection of a record or document under SPA section 36.

54. The strata now says it agrees to provide documents, provided that the owners pay the copying fee. I find that since the strata breached section 36, as described above, it is appropriate to waive the copying fee. I find the strata's repeated breach of section 36 constitutes a significantly unfair action, as contemplated in CRTA section 123(2) and SPA section 164. Applying the test set out in *Dollan* and *Watson*, I find the owners had a reasonable expectation that the strata would disclose documents as required under the SPA, and the strata's failure to do so was significantly unfair.

55. As a remedy for that significant unfairness, as authorized in CRTA section 123(2), I find the strata is not entitled to charge the owners any copying fees for the documents I order disclosed in this decision.

56. They owners gave the tribunal case manager a list of requested documents. The strata was given a copy. I order the strata to provide the owners, within 2 weeks of this decision, with those documents from the owners' list that are included in SPA section 35.

57. Some of the requested documents, such as municipal bylaws, are not listed in section 35, and are therefore not required to be disclosed. In *The Owners, Strata Plan NWS 1018 v. Hamilton,* 2019 BCSC 863, the BC Court of Appeal said that in a claim for access to records under SPA sections and 35 and 36, the tribunal has no authority to order the production of documents not covered by section 35. Also, in *Kayne v. Strata Plan LMS 2375*, 2007 BCSC 1610, the court said a record or document that is not set out in section 35 of the SPA is generally not available to an owner or tenant.

58. In *Kayne*, the court said an owner is entitled to review books of account and financial statements but not underlying bills, invoices or receipts reflected in the

financial statements. I therefore order that the strata is not required to disclose any bills, invoices, or payment receipts as those documents are not set out in SPA section 35.

59. Where the owners' have not specified a time period for their requested documents, the strata must provide the available documents from April 1, 2017 onwards.

60. I also find the strata is not required to provide any document that was already provided as evidence in this dispute.

61. I also specifically find the strata is not required to provide "all permanent records" and all "digital records", as set out in the owners' list. These requests are too broad to comply with section 36.

62. If the strata does not have a document requested by the owners, it must indicate that in a letter or list attached to its disclosure package.

63. In the future, the owners may request that the strata provide additional documents under section 36. The strata must comply by supplying the requested documents within 2 weeks of the request, assuming the documents are listed in section 35. The strata is entitled to charge up to 25 cents per page for subsequently requested documents. I suggest that for clarity, the owners make their requests as precise as possible.

Second Floor HVAC System

64. The history of the HVAC systems in the strata is complex. The parties agree, and the evidence confirms, that until 2015 the first floor strata lots each had separate HVAC units, and the 11 second floor strata lots shared 2 large HVAC units, which were mounted on the roof and connected to common ducting.

65. The owners dispute the way the strata allocated the costs of maintaining, operating, and replacing the second floor HVAC units. The owners say this was done unfairly, and contrary to the SPA. As remedy, they seek "reimbursement and reversal" of the second floor HVAC systems. By that, I understand that the owners want reversal of

some past decisions about the second floor HVAC system, and reimbursement of some expenses.

66. The evidence before me, including a November 1, 2017 email from SL, the strata's former accountant, suggests that until around 2007, the second floor strata lot owners shared the costs of the second floor HVAC systems on the basis of their unit entitlement, and each first floor owner paid the cost of their separate HVAC systems individually. SL says this continued until October 2007, when the strata first hired a property manager. SL says that after October 2007, HVAC costs were grouped into one budget item with no cost breakdown between floors.

67. The owners have a slightly different version of events, and say the HVAC operating costs were always shared by all owners. I find that for the reasons set out below, and the application of the *Limitation Act,* it does not matter for the purposes of this dispute how HVAC costs were allocated before 2007. I note that in February 2013, MF provided a letter to all owners as part of the 2013 annual general meeting (AGM) notice. In that letter, MF said his company would not approve the strata's proposed 2013 operating budget and planned to proceed with a lawsuit because it had been paying heating and air-conditioning costs for the whole building, based on unit entitlement, as well as paying 100% of its own air conditioning costs. There is no indication in the evidence that this suit was ever filed.

Bylaw 2.20 - Types

68. At the June 18, 2014 AGM, the ownership passed a ¾ vote resolution in favour of new bylaw 2.20 designating the second floor strata lots as a separate "type" for the purpose of allocating HVAC operating expenses. Bylaw 2.20 also says the HVAC expenses in the operating fund that relate to and benefit only the second floor strata lots shall be shared by the owners of the second floor strata lots, in accordance with Regulation 6.4(2).

69. The owners say that the vote and resulting bylaw were significantly unfair because MF controls the outcome of any voting, and he benefits substantially from bylaw

2.20 since almost all of his strata lots are on the first floor. I do not agree that the vote or bylaw were significantly unfair, for the reasons that follow.

70. As previously stated, under *Dollan* and *Watson* the test for significant unfairness is whether the strata violated the owners' reasonable expectation. I find the owners' expectation that MF not vote, or that the strata not put forward the bylaw resolution, was not reasonable. As previously stated, MF is entitled to votes based on the Schedule of Voting Rights. Unlike in strata council meetings, where a member may be required to abstain from voting where they have a materially conflicting interest in the matter under consideration, there is no conflict of interest provision in the SPA that could have prevented MF from voting in his own interest at the AGM.

71. I accept that it is frustrating for the owners to be routinely outvoted, which is established in the evidence. However, I find that since this is permitted under the SPA's voting provisions, it does not rise to the level of significant unfairness, as contemplated in *Dollan.* In *Oldaker v. The Owners, Strata Plan VR 1008*, 2010 BCSC 776, the BC Supreme Court considered this type of inequity, and reasoned as follows:

> ...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.

72. I find this reasoning applicable to the bylaw 2.20 vote, and rely on it.

73. The owners say the proper voting process was not followed. However, I find they provided no evidence to establish improper voting, so I place no weight on that submission.

74. For these reasons, I conclude that bylaw 2.20 is not significantly unfair, and is enforceable. I find the owners are not entitled to any reimbursement on that basis.

HVAC Decommissioning

75. The parties agree that sometime around 2013, the strata council recommended removing the 2 second floor HVAC units, and instead allowing strata lot owners to each install individual HVAC units to service their strata lots. According to documents produced by the council at that time, the existing HVAC system was costly to maintain and operate, and required extensive repairs.

76. The strata got quotes from contractors on the cost to remove the HVAC units, and held an information meeting.

77. At the March 5, 2015 AGM, the ownership approved a ¾ vote resolution to disconnect, decommission, and remove the 2 second floor HVAC units. The preamble to the resolution said the HVAC units were common property, so a ¾ vote was required under SPA sections 71 and 80(2). The AGM minutes indicate that the removal expense was a common expense to which all owners had to contribute.

78. I find the HVAC units were common assets as opposed to common property, but nothing in this decision turns on that distinction.

79. An invoice provided in evidence shows that on June 6, 2016, a contractor removed and disposed of 7 HVAC units, which I infer included the 2 second floor units.

80. The evidence indicates that some but not all second floor strata lot owners collaborated and installed 1 or 2 new shared rooftop HVAC units. There is no dispute that these owners had permission to do so. The strata did not contribute to this work.

81. At least 1 other second floor strata lot owner, SL, purchased and installed his own HVAC unit at his expense.

HVAC Replacement Fund

82. The evidence shows that for several years, starting around 2002, the second floor owners paid into a special fund for the purpose of replacing the older of the 2 second floor HVAC units. According to SL's November 1, 2017 email, the "north side" HVAC unit was replaced in 2002, resulting in a $52,000 special levy paid by all second floor owners. SL said this caused financial hardship, so to prevent that from recurring a replacement fund was created for the "south side" HVAC unit.

83. SL says this fund was unanimously approved at the 2003 AGM, and was designated for the sole purpose of replacing the second floor south side HVAC system. SL says all second floor owners contributed annually to this fund.

84. As neither party provided contrary evidence (including meeting minutes), I accept SL's evidence on this point. I also find it is confirmed by the June 16, 2008 AGM minutes, and subsequent financial statements. For example, the 2008 AGM agenda included a resolution that the second floor strata lot owners pay a special assessment (levy) of $12,930, with contributions based on unit entitlement, to replace one of the second floor HVAC units. The resolution says the second floor owners had already contributed to a special fund for this purpose, but required additional money to pay for the project. The preamble to the resolution states:

> WHEREAS, the Level II strata lot owners…have contributed to a special fund for the purpose of replacing the south rooftop common heating and ventilation unit…

85. This motion was tabled rather than approved. However, I find the wording of the resolution and the attached operating budget confirms SL's evidence that there was a second floor HVAC replacement fund, and that it had a positive balance in 2008. Similarly, the financial statement in the June 18, 2014 AGM notice said the HVAC replacement fund had a balance of $30,121.14.

86. I find that the HVAC fund was created contrary to the SPA and Regulation, as different types of strata lots may only contribute differentially to the operating fund.

SPA section 92(a) says the operating fund is for common expenses that usually occur either once a year or more often than once a year, or are necessary to obtain a depreciation report. HVAC replacement does not fall within this definition. Rather, HVAC replacement must come from the contingency reserve fund (CRF), as it is an expense that usually occurs less than once a year, or does not usually occur. All strata lot owners must pay into the CRF, based on unit entitlement. Further the HVAC fund appears to have been established to offset a special levy, which must also be paid by all strata lot owners.

87. I also find the earlier special levy in 2002 to replace the north side HVAC unit was contrary to the SPA. Under SPA section 108(2), the strata must calculate each strata lot's share of the special levy based on unit entitlement, unless otherwise approved by a unanimous vote at an AGM or SGM. There is no evidence of such a unanimous vote, therefore it was not permissible to have only the second floor owners contribute to the 2002 special levy. I make this finding for clarity, but order no specific remedies about the 2002 and 2003 decisions because I find that any claims about their validity are now barred under the *Limitation Act.*

88. Even though it was contrary to the SPA, the evidence establishes that the strata collected money from the second floor owners from about 2003 onwards and put it into an HVAC replacement fund. The most recent financial statement in evidence is from the May 18, 2017 AGM notice. This document says the HVAC replacement fund started the fiscal year with a balance of $30,840.06 and then earned $240.67 interest. The statement also shows that $8,885.00 was removed from this fund, as a "current expenditure". This amount is for the contractor's invoice to remove the HVAC units on June 6, 2016.

89. That invoice shows that the contractor actually removed 7 HVAC units on June 6. The owners say the strata improperly used strata funds to remove 5 of MF's HVAC units, in addition to the 2 authorized in the March 5, 2015 resolution. I agree that the invoice and the May 2017 financial statement support this conclusion. I find it was inappropriate to bill the cost of removing any HVAC units against the HVAC replacement fund other than the 2 HVAC units servicing the second-floor strata lots

that were previously removed in June 2016. The removal of additional HVAC units was not approved in the March 5, 2015 resolution, and is contrary to the purpose of that fund, since the strata did not replace the HVAC units.

90. Also, I find the strata has established no authorization to pay for removal of 5 first floor HVAC units out of the operating fund. If the first floor HVAC units were common assets, such that the strata had a duty to maintain them, then a ¾ vote was required before removing and disposing of them. If they were not common assets, the strata has not explained why the expense was paid out of the operating fund. I order that within 60 days, the strata must reverse this $8,885.00 charge, and restore the balance of the HVAC replacement fund.

91. Since the strata has not replaced the second floor HVAC units, and instead left that expense to the individual second floor owners. The owners say that the "southside" second floor owners should have been given money from the HVAC replacement fund, since they paid into that fund for the purpose of replacing the south side HVAC unit and should have the benefit of that fund.

92. The wording of the June 2008 resolution clearly establishes that the second floor strata lot owners "contributed to a special fund for the purpose of replacing the south rooftop common heating and ventilation unit." Those same owners paid a special levy to replace the north side HVAC unit in 2002, and the June 2008 resolution shows the south side owners had a reasonable expectation that they would get the benefit of a south side HVAC replacement fund with contributions from all second floor owners.

93. The proper balance of the HVAC replacement fund is over $30,000. I therefore order that within 60 days of this decision, the strata must divide the HVAC replacement fund among all second floor strata lot owners. The division must be proportionate, based on the unit entitlement of each strata lot. This division includes those second floor owners who chose to install shared HVAC units, those who purchased their own HVAC units, and any who chose to forego or postpone HVAC installation.

TRIBUNAL FEES AND EXPENSES

94. As the owners were substantially successful in this dispute, in accordance with the CRTA and the tribunal's rules I find they are entitled to reimbursement of $225.00 in tribunal fees. The strata must pay this amount to Mr. Mitha, who will distribute it among the owners. Neither party claimed dispute-related expenses, so none are ordered.

95. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to the owners.

DECISION AND ORDERS

96. I order that within 2 weeks of this decision:

    a. The strata must provide the owners with 1 set of copies of those documents from the owners' list that are included in SPA section 35.

    b. Where the owners have not specified a time period, the strata must provide the documents from April 1, 2017 onwards.

    c. The strata is not required to provide any bills, invoices, or payment receipts, or any document that was already provided as evidence in this dispute.

    d. The strata is not required to provide "all permanent records" and all "digital records", as set out in the owners' list.

    e. If the strata does not have a document requested by the owners, it must indicate that in a letter or list attached to its disclosure package.

97. I order that within 60 days of this decision:

    a. The strata must reverse the June 2016 $8,885.00 HVAC removal expense taken from the HVAC replacement fund.

b. The strata must then divide the HVAC replacement fund among all of the second-floor strata lot owners. The division must be proportionate, based on the unit entitlement of each strata lot.

98. I order that within 30 days of this decision, the strata pay Mr. Mitha $225.00 for tribunal fees.

99. I dismiss the owners' remaining claims.

100. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA 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 a BCSC order.

101. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently $35,000). Under section 58 of the CRTA, the owners can enforce this final decision by filing a validated copy of the attached order in the BCPC. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA 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 a BCPC order.

Kate Campbell, Vice Chair