



Civil Resolution Tribunal

Date Issued: December 12, 2019

File: ST-2019-003292

Type: Strata

Civil Resolution Tribunal

Indexed as: *Kirsch v. The Owners, Strata Plan VR 320*, 2019 BCCRT 1403

BETWEEN:

ED KIRSCH

APPLICANT

AND:

The Owners, Strata Plan VR 320

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This dispute is about the conduct of a strata council over common property repairs and expenses, and its actions relating to building management.

2. The applicant, Ed Kirsch (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan VR 320 (strata). He is a former strata council member having served on the strata council in 2014 and 2015.
3. The owner says that the strata unreasonably replaced the building's fire pump and emergency generator. He alleges the pump and generator could have been repaired. He also says the strata failed to act on the strata's depreciation report, is not enforcing the building manager's job description, and is overpaying the building manager. Finally, he says the strata failed to allow him to address his concerns at an annual general meeting (AGM) it held February 5, 2019. He alleges the strata council did not act in the best interests of the strata by doing these things.
4. The owner requests orders that fire pump and generator costs of \$60,000 be "repaid" and that the strata get opinions on repairing the equipment. He also requests orders that the strata report actual building management costs to its ownership, and that it amend the building manager's job description and pay.
5. The strata denies the owner's claims and asks that they be dismissed.
6. The owner is self-represented. The strata is represented by a strata council member.
7. For the reasons that follow, I refuse to resolve the owner's claims to the extent the owner alleges the strata council has not acted in the best interest of the owners. I dismiss the owner's remaining claims.

JURISDICTION AND PROCEDURE

8. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

9. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
10. The tribunal may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
11. Under section 10 of the CRTA, the tribunal must refuse to resolve a claim that it considers to be outside the tribunal's jurisdiction. A dispute that involves some issues that are outside the tribunal's jurisdiction may be amended to remove those issues.
12. 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, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

13. The issues in this dispute are:
 - a. Does the tribunal have jurisdiction over claims brought by an owner about whether the strata council is acting in the best interests of the strata?
 - b. What are the strata's obligations with respect to a depreciation report?
 - c. Did the strata unreasonably replace the fire pump and back up generator?
 - d. What is the strata's authority about the building manager's contract, job description and pay?
 - e. Did the strata inappropriately restrict the owner from voicing his concerns at the February 2019 AGM?

BACKGROUND, EVIDENCE AND ANALYSIS

14. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
15. In a civil proceeding such as this, the owner must prove each of his claims on a balance of probabilities.
16. The strata was created in March 2016 under the *Strata Titles Act* and continues to exist under the *Strata Property Act* (SPA). It consists of 113 residential strata lots in a 19-storey high-rise building located in Vancouver, B.C.
17. The strata provided a consolidated bylaw document based on amendments it had filed at the Land Title Office (LTO). The owner did not object to the consolidated bylaws provided by the strata or say they were incomplete or inaccurate. I have compared the strata's consolidated bylaw document to the bylaw amendments registered at the LTO and find it includes the filed LTO amendments. However, I note that *Strata Property Regulation* (regulation) 17.11 states in broad terms that on January 1, 2002:
 - a. the Standard Bylaws under the SPA are deemed to be the bylaws of the strata, except to the extent conflicting bylaws are filed at the LTO,
 - b. bylaws under the *Condominium Act* or a former Act which were deemed to be bylaws of the strata, cease to have effect,
 - c. filed bylaws that conflict with the Standard Bylaws continue, unless the filed bylaws conflict with the SPA or regulation.
18. The consolidated bylaws do not include the Standard Bylaws even though they should for clarity. For example, Standard Bylaw 1 requires an owner to pay strata fees on or before the first day of the month. There is no reference to payment of strata fees by an owner in the consolidated bylaws and because of regulation 17.11, so I find Standard Bylaw 1 applies.

19. I have not conducted an in-depth review of the strata's bylaws to determine which bylaws, if any, contained in the consolidated bylaws conflict with the SPA or the Standard Bylaws because I find that is not necessary for the purpose of this decision. I would encourage the strata to obtain professional advice as to its bylaws and their enforceability, and consider registering a complete new set of bylaws at the LTO to avoid confusion arising over its bylaws in future. I address relevant bylaws as necessary in my analysis below.
20. The facts in this dispute are largely undisputed.
21. In August 2013, the strata obtained a depreciation report from Morrison Hershfield Engineering (MH) under section 94 of the SPA. The report was updated by MH in 2016. Both depreciation reports listed the strata's fire pump and back up generator as common assets. For the fire pump, both reports listed its condition as "poor" with a priority of "1-immediate" with further study for functionality and code compliance. Both reports stated the fire pump was past its typical serviceable life and estimated the generator's remaining life was 0 years. For the backup generator, both reports listed its condition as "fair" with a priority of "4-discretionary". Both reports stated the generator was past its typical serviceable life and estimated the generator's remaining life was 5 years.
22. In 2014, the strata changed its management model. It had previously retained a live-in caretaker and full professional management services from a licensed property management firm. At the January 2014 AGM, the owners approved retaining an owner as the strata's building manager and reducing the property management services to financial only.
23. In September 2016, there was a fire in building. About this time the strata discovered the fire pump did not operate properly. At the February 2017 AGM, the strata's ownership passed a $\frac{3}{4}$ vote to spend up to \$75,000 to replace the fire pump. The vote approved a \$50,000 expenditure from the strata's operating surplus and the balance from the contingency reserve fund (CRF). The fire pump was replaced by September 2018 at a total cost of about \$60,000.

24. In about August 2018, the back up generator stopped working. At its November 2018 council meeting, the strata council voted to replace it. At its February 2019 AGM, the strata's ownership passed a $\frac{3}{4}$ vote to spend up to \$100,000 from the CRF to cover the estimated replacement cost. The generator was replaced by July 2019 at a total cost of about \$91,000. Additional costs of about \$31,000 for the rental of a temporary generator were incurred while the generator was being replaced, which the strata paid from its operating fund.
25. The evidence shows the owner has raised his concerns over the cost of the building management, fire pump replacement and back up generator replacement since these items were first raised by the strata. In addition to sending emails to the strata, the owner has raised his concerns, or attempted to, at the strata's AGMs. In about February 2019, the owner circulated a letter to most strata owners detailing his concerns over the strata council's actions about the management costs and equipment replacement costs, suggesting an audit was required (February 2019 letter). In the February 2019 letter, the owner encouraged strata owners to attend the February 2019 AGM or write to the strata council if they shared his concerns.
26. The owner requested a hearing with the strata council and was granted one on May 30, 2019. The strata wrote to the owner on June 6, 2019 providing a detailed response to his concerns, that reflects his claims in this dispute.

Does the tribunal have jurisdiction over claims brought by an owner about whether the strata council is acting in the best interests of the strata?

27. The owner has framed his claim in a way that alleges the strata council did not act in the best interests of the strata. His requested remedy that \$60,000 of the replacement costs for the fire pump and backup generator be repaid is unclear as he does not explain who should repay these expenses. To the extent the owner seeks repayment of the replacement costs from the individual strata council members, I find the owner's claim is not within the tribunal's jurisdiction. I refuse to resolve his claim under section 10 of the CRTA for the reasons that follow.

28. While the owner did not refer section 31 of the SPA in his claims, he did in an email to the strata council after the January 2019 AGM. I find that the owners' allegation that the strata council acted contrary to the best interests of the strata arises under section 31 of the SPA. Section 31 sets out the standard that strata council members must meet in performing their duties. It says that each council member must act honestly and in good faith, with a view to the best interests of the strata, and must exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances.
29. In *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 at paragraph 267, the BC Supreme Court said that the duties of strata council members under section 31 of the SPA are owed to the strata corporation, and not to individual strata lot owners. This means that a strata lot owner cannot be successful in a claim against a strata council member (or the entire strata council) for a breach of section 31.
30. Further, in *Wong v. AA Property Management Ltd*, 2013 BCSC 1551 at paragraph 36, the BC Supreme Court considered a claim brought by an owner against individual council members and others. The owner alleged that the council members had acted improperly in the management of the strata's affairs. The court concluded that the only time a strata lot owner can be successful in a claim against an individual strata council member is for a breach of the conflict of interest disclosure requirements under section 32 of the SPA. Remedies for breaches of section 32 are expressly excluded from the tribunal's jurisdiction under section 122(1)(a) of the CRTA.
31. Thus, I find the tribunal does not have jurisdiction over claims brought by an owner against an individual strata council member or, in this case, the entire strata council. I therefore refuse to resolve this aspect of the owner's claims under section 10(1) of the CRTA.

What are the strata's obligations with respect to a depreciation report?

32. Under section 94 of the SPA and regulation 6.2 the strata is obligated to obtain a depreciation report. In essence, a depreciation report is a replacement cost estimate of common expenses that usually occur less often than once per year or do not usually occur. The report is based on a physical inspection of common property building components and common assets for which the strata is responsible.
33. The SPA requires the strata to complete a depreciation report every 3 years, unless it opts out by passing a $\frac{3}{4}$ vote at a general meeting.
34. At present, the SPA and regulation do not require the strata to act on a depreciation report. That is, there is no requirement for the strata to fund the estimated replacement cost or take any other action associated with a depreciation report. Once obtained, a depreciation report is simply a tool to assist the strata in estimating the amount and timing of its future capital expenses.

Did the strata unreasonably replace the fire pump and backup generator?

35. There is no dispute that the fire pump and generator are common assets as defined under the SPA. The strata is obligated to repair and maintain common assets under section 72 of the SPA.
36. The owner says the strata should have repaired the fire pump and back up generator before replacing them. He notes his profession as a power engineer familiar with motors, pumps and generators. He argues that replacement of the fire pump and generator was premature and that the strata failed to act on its depreciation reports.
37. The strata says it considered the repair option and determined that, given the age of the equipment, the potential inability to obtain replacement parts, and that the depreciation reports identified the equipment was at the end of its serviceable life, it chose replacement over repairs. It also says the strata's ownership overwhelmingly approved replacement of the equipment.
38. For the reasons that follow, I find the strata did not unreasonably replace the fire pump and back up generator.

39. I will first address the owner's argument that the strata did not act on the depreciation reports. As earlier noted, under the current legislation, the strata is not required to take any action with respect to a depreciation report. It is only required to obtain one, unless it opts out of that requirement by passing a $\frac{3}{4}$ vote to that effect. I agree with the strata that this aspect of the owner's argument appears to contradict his argument that the strata should have repaired the fire pump and generator rather than replace them. Regardless, I dismiss this aspect of the owner's claim alleging the strata failed to act on its depreciation report because there is no obligation for the strata to do so.
40. As for the fire pump replacement, the evidence is that the strata determined the fire pump was not up to current standards as testing by the strata's contractor in the latter part of 2016 indicated there was insufficient flow to the upper levels of the building. The strata investigated replacement of the fire pump with its contractor and an engineering firm, and determined the pump should be replaced and upgraded. Details of the proposed work were discussed at the February 2017 AGM and recorded in the AGM minutes. The strata ownership approved an expense of \$75,000 to replace the fire pump as earlier noted. The result of the vote as shown in the minutes was 56 votes in favour and 8 opposed or 87.5% in favour.
41. The test for whether strata corporation has satisfied its statutory duties is one of "reasonableness" and not perfection.
42. The courts have recognized that strata councils are entitled to rely upon and be guided by advice from professionals. Even if the professionals they hire fail to carry out work effectively, strata corporations are not held responsible for this result so long as it acted reasonably in the circumstances. (*Wright v. The Owners, Strata Plan #205*, (1996), 20 B.C.L.R. (3d) 343 (S.C.), at paragraph 30; *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 56; *Kayne v. The Owners, Strata Plan LMS 2374*, 2013 BCSC 51 at paragraph 185).
43. Here, the strata council researched replacement of the fire pump and presented its findings to its ownership, who considered and approved the replacement at the

February 2017 AGM. The strata relied on its depreciation reports, prepared by MH, that show the fire pump was at the end of its serviceable life. It also relied on an engineer's opinion that the pump should be replaced. There is no evidence the advice given was incorrect and I find the strata acted reasonably when it recommended replacing the fire pump to the strata ownership at the February 2017 AGM.

44. While the owner clearly asserted repairs were a better option than replacement, he did not provide any evidence to support his assertions. For example, he did not provide a reasoned professional opinion to support his allegation that replacing the pump was unnecessary. Instead he provided his own opinion based on the strata's maintenance reports suggesting certain repairs should have been done before replacement was considered. I do not accept the owner's opinion as expert evidence. This is because under tribunal rule 8.3(7), expert evidence must assist the tribunal and not advocate for a party. I find the owner's opinion is not neutral.
45. While the owner may have a great deal of experience about pumps, I find his suggestions to be speculative in nature as he did not physically inspect the pump or participate in its testing. Even if the owner's suggested repairs would have prolonged the life of the fire pump, it does not mean that the strata's recommendation to replace and upgrade the pump was unreasonable.
46. As the court stated in *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784, the strata must consider the best interests of all owners when making decisions. When deciding whether to fix or replace common property, the strata has discretion to approve "good, better or best" solutions to any given problem. I find the strata properly exercised its discretion to approve a "best" solution to replace and upgrade the fire pump rather than repair it.
47. Further, the strata ownership agreed to replace the fire pump when it passed the $\frac{3}{4}$ vote at the February 2017 AGM. The strata was obligated to follow the instructions of its owners.

48. Finally, as the strata notes, the work has been done for several months and the owner's requested remedy to order "repayment" of the cost of the work would be impractical.
49. For these reasons, I dismiss the owner's claim that the strata unreasonably replaced the fire pump.
50. I apply a similar analysis to owner's claim that the strata unreasonably replaced the back up generator.
51. The evidence is that when the strata became aware the generator was not working, it investigated possible repair options and determined that replacement was the best solution. The strata's rationale is explained in detail in the November 20, 2018 strata council meeting minutes. That meeting was dedicated entirely to discussing the back up generator.
52. The strata again relied on its depreciation report that the generator was at the end of its serviceable life. It did not obtain a separate independent opinion but did present its recommendations to replace the generator to its ownership at the February 25, 2019 AGM by way of a $\frac{3}{4}$ vote. The minutes of the February 2019 AGM show the $\frac{3}{4}$ vote passed with 57 votes in favour and 3 opposed or 95% in favour.
53. The owner's main objection was that repairs to the generator were not first attempted although he also questioned the overall expense of new generator and the need for a temporary generator.
54. As with the fire pump replacement, I find the strata acted reasonably when it recommended replacement of the back up generator. Consistent with *Weir*, I find the strata used its discretion to approve a "best" solution to replace the back up generator rather than repair it.
55. Again, the strata ownership approved the strata's recommendation with 95% of the votes in favour. The strata was obligated to follow the instructions of its ownership to replace the generator and has done so. It also makes no practical sense to consider "repayment" of the cost of the work in these circumstances.

56. For these reasons, I dismiss the owner's claim that the strata unreasonably replaced the back up generator.

What is the strata's authority about the building manager's contract, job description and pay?

57. There is no dispute that the strata changed how it manages its affairs in 2014 as described above. It entered into a written contract with one of its owners to provide building management services based on a written job description. The written contract has been amended and extended since 2014 and the remuneration has increased.

58. The owner says the strata did not provide accurate financial information to the owners in 2014 when the management model changed. He says the costs of the current model are more than the previous model, despite the strata's arguments to the contrary. He also says the strata is not enforcing the building manager's job description suggesting the manager is not working the requisite number of hours, and that the manager is being paid too much. The strata disagrees.

59. The decision to change management models was made in 2014, well in excess of 2 years before the June 11, 2019 Dispute Notice was issued for this dispute. This raises questions about whether the owner's claim is out of time under the *Limitation Act* (LA). However, given my conclusion below and the tribunal's mandate to issue speedy dispute resolution services, I elected not to seek further submissions from the parties to reasonably establish the owner's date of discovery under the LA.

60. A significant amount of evidence and arguments were provided on this issue, but I find I do need to address every detail given my finding on the strata's authority that follows.

61. Under section 3 of the SPA, the strata is responsible for managing and maintaining its common property and common assets for the benefit of all owners. Sections 4 and 26 of the SPA require the strata council to exercise the powers and duties of the strata, subject to the SPA, regulation, and the strata's bylaws.

62. In managing and maintaining the common property and common assets on behalf of a strata corporation, a strata council has the authority to enter into contracts, including a building manager contract as is the case here. The SPA and regulation do not contain any restriction on the strata's ability to enter into contracts except possibly with respect to paying a strata council member under section 34 of the SPA, that does not apply here. Similarly, the strata's bylaws do not contain any applicable provisions that might restrict the strata from entering into a contract with the building manager.
63. Therefore, I find the strata council has sole discretion to enter into a building manager contract under terms and conditions it feels are appropriate, subject only to a direction or restriction given to it by a majority vote of the strata's owners at a general meeting under section 27(1) of the SPA. There is no evidence the strata ownership has given an instruction relating to the building manager under section 27. There is also no evidence the manager's pay exceeds the amount approved in the budget.
64. The owner's main concern appears to be that the building manager's contract and job description do not set out a specific number of hours the manager must work. The strata admits this and says as long as the manager's work gets done it is satisfied. The strata also says the majority of owners are satisfied with the manager's performance and the current management model based on comments and support it has received from its owners. I find the AGM minutes support the strata's position. In particular, the February 2018 AGM minutes include a detailed discussion on the building manager's performance and general satisfaction from owners who participated in the discussion. I also find the strata's position is supported by the results of a 2015 owner survey it conducted on the overall satisfaction of the new management model. The results of the survey show 63 participants and that 53, or 84%, of the participants rated the model as satisfactory, good or excellent.
65. Just because the owner disagrees with the building manager's contract, job description or pay does not mean the strata's position on these things is wrong. Based on the overall evidence, I find the owner has failed to prove his allegations

that the strata has acted outside its authority with respect to the building manager's contract, job description, and pay. I dismiss the owner's claim in this regard.

Did the strata inappropriately restrict the owner from voicing his concerns at the February 2019 AGM?

66. I begin with a brief review of the legislation. I find the regulation is silent on the matter of procedures for a general meeting.
67. Under the SPA, I find that sections 27(1), 43 and 46 are relevant. I have addressed section 27(1) above. Section 43 of the SPA sets out the process for the strata's owners holding at least 20% of the strata's votes to demand a special general meeting (SGM) for the strata to consider a resolution or other matter. Section 46(2) similarly permits owners holding 20% of the strata's votes to demand matters be raised at an AGM. The owner did not demand his concerns be addressed.
68. Without a written demand from the strata's owners, section 46(1) of the SPA says the strata determines the agenda of an AGM or SGM. I find this provision supports a conclusion that the owner has no express right to voice his concerns at a general meeting, especially if an item over which he has concern is not on the agenda.
69. The strata's bylaws set out the agenda for a general meeting but are otherwise silent on the process. Generally speaking, absent bylaws to the contrary, I find procedures about allowing owners to voice their concerns at a general meeting are at the discretion of the meeting's chair. In other words, it is up to the chair of the meeting to run the meeting as they see fit as long as they do so within the provisions of the SPA and bylaws. I find this to be true in this dispute.
70. The purpose of an AGM is for the strata to inform owners of its operation, approve the strata's budget, and elect a strata council. As is the case here, it may also propose resolutions for the owner's approval.
71. It can be expected that owners may have questions about matters that will be voted on. Therefore, an owner should be afforded the opportunity to voice any reasonable concerns relating to those items or other items that might come up for discussion.

72. In this dispute, the owner alleges that he was not given an opportunity to voice his concerns at the February 2019 AGM. I disagree.
73. I note the February 2019 AGM minutes provided in evidence reflect “an owner” raising discussion points. I infer that with respect to the issues before me, “an owner” is the owner in this dispute.
74. As I have mentioned, the owner voiced his concerns in advance of the February 2019 AGM by circulating his February 2019 letter. The minutes show the building manager and the strata council president each responded to the owner’s February 2019 letter at the beginning of the February 2019 AGM. The strata council president’s response was detailed and complete and directly addressed all of the owner’s concerns.
75. The February 2019 AGM minutes also show the ownership passed a majority vote under section 27(1) of the SPA, after the council president’s response, to hold other points of discussion on the owner’s February 2019 letter until the end of the meeting. This may be the reason why the owner felt he was restricted from voicing his concerns, but I find it was in keeping with the SPA. In addition, the minutes show no further discussion ensued even though the owner had been given that opportunity.
76. I find the owner had the opportunity to voice his concerns about the repair expenses contained in the financial statement and budget, the proposed transfer of the surplus fire pump funds to the CRF, and approval of the generator replacement. The February 2019 AGM minutes show this discussion and I find it mirrors the owner’s concerns in this dispute.
77. For these reasons, I find the strata did not restrict the owner from voicing his concerns at the February 2019 AGM.
78. I dismiss the owner’s claim in this regard.

TRIBUNAL FEES AND EXPENSES

79. 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. Given the owner was not successful, I decline to order reimbursement of tribunal fees or dispute-related expenses.
80. The strata must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the applicant owner.

DECISION AND ORDER

81. Under section 10(1) of the CRTA, I refuse to resolve the owner's claims about whether the strata council acted in the best interests of the strata as I find such claims are outside the tribunal's jurisdiction.
82. I dismiss the owner's remaining claims.

J. Garth Cambrey, Vice Chair