



Civil Resolution Tribunal

Date Issued: May 14, 2020

File: ST-2019-007766

Type: Strata

Civil Resolution Tribunal

Indexed as: *Ewert-Johns v. The Owners, Strata Plan VAS 2854*, 2020 BCCRT 532

B E T W E E N :

MARCUS EWERT-JOHNS and CRYSTAL EWERT-JOHNS

APPLICANT

A N D :

The Owners, Strata Plan VAS 2854

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. The applicants, Marcus Ewert-Johns and Crystal Ewert-Johns (owners), bought a strata lot in the respondent bare land strata corporation, The Owners, Strata Plan VAS 2854 (strata). The owners planned on increasing the size of the house on the

bare land strata lot. An inspection report raised questions about the capacity of a shared septic dispersal field to accommodate renovations previously done to another strata lot, SL1, as well as the owners' planned expansion. The report also showed the septic field was not properly functioning.

2. The owners request an order that the strata undertake a feasibility study to determine the septic field capacity and whether it can support their current home. The owners estimate that the study will cost \$3,000. The owners also request an order that the strata expand the septic field to the required capacity to support SL1's renovation and then recover the estimated \$25,000 from SL1. The owners further request reimbursement of 75% of the engineer's inspection report, or \$375.00.
3. The owners also state that the strata council is not acting in good faith as required by section 31 of the *Strata Property Act* (SPA) because the strata council members are in a conflict of interest and therefore refusing to maintain the common property septic field. The owners request an administrator be appointed to manage the septic field repairs. Marcus Ewert-Johns represents the owners.
4. The strata says that the owners are really asking for it to increase the size of the septic field to accommodate the owners' planned expansion. It says that the owners did not properly inspect the property or get the proper assurances about the septic field before it purchased the strata lot. The strata acknowledges that the septic field needs repair and says it is fulfilling its duty to repair and maintain the septic field. However, the strata argues it does not have an obligation to expand the septic field.
5. The strata also says it does not have to carry out the requested feasibility study and that it should not have to pay towards the inspection the owners privately conducted. The strata further says that it is acting in good faith. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil*

Resolution Tribunal Act (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a "they said, it said" scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
8. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
9. Section 10(1) of the CRTA says the tribunal must refuse to resolve a claim that it is outside its jurisdiction. Section 10(2) says claims that involve issues not within the tribunal's jurisdiction may be amended to remove the issues that are outside the tribunal's jurisdiction.
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.
11. In their submissions, the owners asked that the tribunal appoint an administrator for the strata. Section 174 of the *Strata Property Act (SPA)* provides that an owner may apply to the Supreme Court of British Columbia for the appointment of an

administrator to exercise the powers and perform the duties of a strata corporation. Section 122 of the CRTA specifically states that the tribunal does not have jurisdiction in relation to a claim under section 174 of the SPA. Accordingly, I refuse to resolve the owners' request for the appointment of an administrator under section 10 of the CRTA.

ISSUES

12. The issues in this dispute are:

- a. What is the strata's obligation under their duty to repair and maintain common property and does it include paying for a feasibility study and expanding the septic field?
- b. Do the owners have standing to seek an order about whether the strata violated SPA section 31?

EVIDENCE AND ANALYSIS

13. In a civil dispute such as this, the applicant owners must prove their claim on a balance of probabilities. I have reviewed all of the evidence provided but refer only to evidence I find relevant to provide context to my decision.
14. The strata is a bare land strata corporation as defined under the SPA. It has 4 strata lots and two shared septic fields, known as Parcels A and B. The owners' strata lot and strata lot 1 (SL1) share Parcel A's septic field. The strata plan shows that the septic field is common property. The parties agree that the septic field is common property. I agree and find that the septic field is common property.
15. The strata was created under the *Condominium Act* (CA), the predecessor to the SPA and now exists under the SPA.
16. The bylaws of the strata when it was created were those contained in Part 5 of the CA (sections 115 to 132). The SPA came into force on July 1, 2000, replacing the CA. The SPA contained a Schedule of Standard Bylaws (Standard Bylaws). The

regulation also came into force on July 1, 2000. Under section 120 of the SPA and regulations 17.9 and 17.11, the strata's previous bylaws continued, with the deemed addition of Standard Bylaw 1 about payment of strata fees that is not relevant to this dispute.

17. *Strata Property* Regulation (regulation) 17.11 also addresses the transition of bylaws passed under the CA to the scheme of the SPA. In summary, regulation 17.11 states that on January 1, 2002:

- a. the remaining Standard Bylaws under the SPA (bylaws 2 through 30 inclusive) are deemed to be the strata's bylaws, except if there are conflicting bylaws filed in the LTO.
- b. Filed bylaws that conflict with the Standard Bylaws continue and prevail over the Standard Bylaws, unless the filed bylaws conflict with the SPA.
- c. Any bylaws under Part 5 of the CA cease to have any effect.

18. The March 30, 1992 bylaws filed at the Land Title Office (LTO), specifically bylaw 4, states that the strata shall control, manage and administer the common property and keep in a state of good and serviceable repair and properly maintain all facilities, apparatus and equipment used in connection with the common property. Bylaw 22 specifically states that the strata council shall also administer and operate the sewage disposal system located on the common property and that service and maintenance will be entirely at council's discretion.

19. I have already determined that the sewage disposal system itself is common property. I have considered whether it is a common asset and find that it is not because it is a series of pipes for the passage of sewage into the field itself. As already noted, the strata plan shows the field as common property.

20. I note that bylaw 4 is similar to standard bylaw 8 which says that the strata must repair and maintain common property. However, I find bylaw 22, which says that the service and maintenance of the sewage disposal system on the common property will be entirely at the council's discretion, does conflict with SPA section 72(1) which

says that the strata must repair and maintain common property and common assets. The SPA does not indicate that this is discretionary. Therefore, based on my review of the strata's bylaws, I find the strata's bylaws in effect at the time of this dispute to be the Standard Bylaws and the strata's obligation to repair and maintain common property must comply with the Standard Bylaws and the SPA.

21. Accordingly, pursuant to section 72 of the SPA and bylaw 8, I find the strata is responsible to repair and maintain common property, which includes the sewage system. The standard of care to which a strata council must adhere is one of reasonableness, such that "perfection is not required... only reasonable action and fair regard for the interests of all concerned". See *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at para 61.
22. I first note that the strata did not know there was anything wrong with the sewage system. None of the owners expressed any complaint and it appeared to be functioning normally. Problems only came to light once the owners arranged for an inspection because they wanted to expand their home. The owners bought the strata lot in late 2017 and completed the septic inspection in October 2018.
23. The November 8, 2018 engineer's report provided by the owners indicated that the existing field had 3 subsurface trenches and the upper lateral one appeared to be plugged with soil and roots and the lower lateral one was plugged with soil and full of liquid. The middle lateral trench appeared to be clean and functioning. The engineer stated that using "loading rates" from the current version of the Standard Practice Manual and making certain assumptions about the soil, the hydraulic capacity of the existing disposal field would be 1800 litres per day. The engineer then referred to examples of home configurations and their design sewage flow rates. He noted that a 1 bedroom home would be at 700, a 2 bedroom home at 1000, and a 3 bedroom home at 1300.
24. The engineer's report stated that the septic field did not appear to meet the size requirements under the current regulation for the number of homes it was designed to service. I note that the engineer did not describe which homes or how many

bedrooms they had. The fact that the owners themselves say another feasibility study is necessary because the first one did not have information about how many people lived in SL1 supports my conclusion that the engineer's report is of limited value as it did not address the specifics of the houses on the strata lots. The evidence before the tribunal also does not show how many people live in SL1.

25. Having said that, I note that the strata did not provide contrary evidence showing the capacity of the field. Therefore, although I find the engineer's report inconclusive as to whether the field needs to be expanded, I note that it does raise the question as to whether the field as it exists has the capacity to service the owners' and SL1's strata lots.
26. I also note that the owners have made lengthy submissions on the May 2017 expansion of SL1 and how a proper sewage inspection report was not obtained at that time. I have read all the evidence and find that there was no bad faith and SL1's owner and the strata thought that the inspection and approval obtained was valid. The approval came from the city and was based on an inspection that stated the septic system was adequate to service the proposed addition.
27. I agree that the evidence suggests that SL1's expansion of adding a suite would put an extra strain on the septic system but at the time there was no suggestion that the septic system could not handle it or that the strata acted unreasonably in allowing the expansion.
28. After the owners informed the strata of the result of their engineer's inspection, the strata considered options available to deal with the septic field, including de-stratifying and selling off the field. However, this suggestion was not approved because apparently there were issues with the city's requirement for road access.
29. In May 2019, the strata arranged for a camera inspection of the septic field's lines which confirmed that some were damaged and blocked. In September 2019 the strata learned that the cost of repair was about \$5,000 and an upgraded or new field would cost between \$30,000 and \$50,000. Discussions continued and in an email exchange in early September 2019 the strata told Ms. Ewert-Johns that the strata

was not looking at a new design or a rebuild. The strata said that it had been advised by 2 qualified contractors that the field was repairable. It also noted that any further work had to be approved by the strata council. The strata noted that there was no necessity to panic because the field was currently functioning. However, the strata did not address the capacity issue.

30. The owners argued that the contractors were not properly qualified and insisted that the field needed more than repairs to get it up to compliance.
31. Because of the ongoing disagreement, the minutes from the September 14, 2019 council meeting show that 3 resolutions were tabled. The 2 resolutions that did not pass dealt with engaging a certified planner to assess the field and make recommendations to bring the field to the required capacity. The third resolution was to repair and restore the plugged and broken lateral lines and to install clean-out drains at the end of each lateral line. This resolution passed with 3 owners in favour and one opposed.
32. The owners then requested a hearing before the strata to request it fix the known capacity shortage of the septic field. At the September 21, 2019 meeting the owners summarized the same facts outlined above. They repeated that field capacity was too low and that a feasibility study was necessary. They stated that the strata was making its decision to pursue the lesser repair because the other owners were not willing to spend more money. They said this showed personal bias. They asked that the decision be revisited. On September 26, 2019, the strata delivered its decision that increasing the capacity and obtaining a feasibility study was beyond the strata's obligation to repair and maintain the common property for the benefit of all the owners.
33. In its submissions, the strata points out that since it learned of the problem it has taken reasonable efforts to investigate the extent of the damage and has conducted 2 videos of the septic lines from the treatment tanks leading to the field, a video of 3 lines in the field to determine the extent and location of the damage, hydro-jetting of 3 lines, and installation of end caps for future maintenance and manual digging to

show the extent of the crushed and broken lines. It notes that it has provided copies of videos, photographs, invoices for hydro-jetting and manual work as evidence. The owners do not dispute that the strata has conducted this work. The strata also says it has been working on the advice of a certified planner using his recommendations for repair work but the investigations and repair stopped in September 2019 when this dispute was filed.

34. The strata correctly points out that it must consider the interests of all owners when making decisions. This includes the applicant owners. When deciding whether to repair common property, the strata has discretion to approve “good, better or best” solutions to any given problem. The court (or tribunal) will not interfere with a strata’s decision to choose a “good,” less expensive, and less permanent solution, although “better” and “best” solutions may have been available. (*Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784 at paragraphs 28 and 29).
35. As noted, it is established law that the strata’s standard of care in performing its duties is one of reasonableness, perfection is not required. However, the evidence shows that the strata never addressed the engineer’s report about capacity, which based on the report certainly seems plausible and is unchallenged. Although the strata can choose a less expensive solution, part of its duty to maintain and repair the common property involves making sure it is functioning properly, especially given the engineer’s report that it is not. I find that the strata has not investigated the problem brought to light by the engineer’s report and therefore is not in a position to choose a less expensive solution.
36. Accordingly, I find it is reasonable for the strata to carry out a feasibility study. This does not mean that the strata has to expand the current septic field. After obtaining the feasibility study the strata will be in a position to make a decision on how to repair and maintain the common property septic field. Therefore, I dismiss the owners’ claim that the strata must expand the septic field, but I accept their claim that the strata must carry out a feasibility study.

37. I also find the strata does not have to reimburse the owners for 75% of the engineer's report. The strata did not authorize this report and there is no basis for making it pay for it, particularly given the owners were partly unsuccessful in their claim. I also note that it was obtained before the Dispute Notice was issued so cannot be considered an expense related to the Dispute.

Do the owners have standing to seek an order about whether the strata violated SPA section 31?

38. Under section 31 of the SPA, each council member must 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.

39. Based on the applicable precedents from the BC Supreme Court, I find the owner has no standing to make a claim under SPA section 31. In *Wong v. AA Property Management Ltd*, 2013 BCSC 1551, the BC Supreme Court considered a claim brought by an owner that the strata 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 sue an individual strata council member is for a breach of the conflict of interest disclosure requirement under SPA section 32 (see *Wong*, at paragraph 36). Remedies for breaches of SPA section 32 are specifically excluded from the tribunal's jurisdiction, as set out in CRTA section 122(1)(a).

40. Similar to *Wong*, 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 succeed in a claim against the strata or against individual strata council members for a breach of section 31.

41. These court decisions are binding precedents and the tribunal must apply them. Following *Wong* and *Sze Hang*, I dismiss the owners' claim for a remedy under SPA section 31.

TRIBUNAL FEES AND EXPENSES

42. 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. Because the owners were partially successful in their claim, they are not entitled to reimbursement of half of their tribunal fees, or \$112.50.
43. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owners.

ORDERS

44. I order that within 30 days of this decision the strata arrange for a feasibility study of the septic field's capacity.
45. I order within 14 days of this decision the strata must reimburse the owners \$112.50 tribunal fees.
46. I dismiss the owners' other claims.
47. The owners are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.
48. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia (BCSC), a validated copy of the order which is attached to this decision. Once filed, a tribunal order has the same force and effect as a BCSC order.

49. 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 owner can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.

Kathleen Mell, Tribunal Member