



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Gaudin v. The Owners, Strata Plan LMS 2140*, 2020 BCCRT 607

B E T W E E N :

BARRY GAUDIN

APPLICANT

A N D :

The Owners, Strata Plan LMS 2140

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about unspent special levy funds.
2. The applicant, Barry Gaudin (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 2140 (strata). The owner is self-represented, and the strata is represented by a strata council member.

3. The owner says the strata failed to refund \$80,347.16 of surplus money raised by a special levy as required under the *Strata Property Act* (SPA). The owner seeks an order that the strata reimburse him his proportionate share, which he estimates to be \$1,913.03. The owner also claims interest and dispute-related expenses.
4. The strata says the ownership passed a $\frac{3}{4}$ vote to transfer the surplus special levy money to the strata's contingency reserve fund (CRF) to be used for future repair of common property and common assets and, as such, there is no surplus money to refund. Subsequently, the strata agreed to have its ownership reconsider the $\frac{3}{4}$ vote, but then agreed to refund the surplus special levy money as the owner requested.
5. For the reasons that follow, I dismiss the owner's claim.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.
7. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
8. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

9. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

10. The issues in this dispute are:
 - a. Was the owner entitled to a refund of an unspent special levy, or surplus, under the SPA?
 - b. If so, what refund amount is appropriate for the owner?

BACKGROUND, EVIDENCE AND ANALYSIS

11. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
12. In a civil proceeding such as this, the applicant owner must prove his claims on a balance of probabilities.
13. The strata was created in September 1995 under the *Condominium Act* and continues to exist under the SPA. It consists of 42 strata lots in 7-storey building located in White Rock B.C.
14. The relevant facts are not at issue.
15. In May 2016, the strata ownership passed a $\frac{3}{4}$ vote to impose a special levy for building envelope repairs for just under \$1.8 million. Another $\frac{3}{4}$ vote was passed in January 2017 imposing a second special levy of about \$240,000 to complete the building envelope repairs.
16. The repair was completed sometime in 2018. At its September 27, 2018 strata council meeting, the strata reported there was \$88,868.95 remaining in the building

repair (special levy) fund. In February 2019, the ownership passed a $\frac{3}{4}$ vote to transfer an \$80,374.16 special levy surplus to the CRF.

17. The submissions show that the owner objected to the transfer of the surplus special levy to the CRF, but the details of those objections are unclear. It is clear that the parties were unable to resolve their differences and the owner applied for dispute resolution through the tribunal. The Dispute Notice for this dispute was issued on December 4, 2019.
18. Although there is some evidence the strata was considering refunding the special levy surplus at the time it filed its Dispute Response, according to the strata, it decided to refund the special levy surplus in January 2020, during the facilitation stage of the tribunal decision process. The strata instructed its property manager to calculate the surplus refunds based on the \$80,374.16 that was transferred to the CRF, "adding the interest accrued". Cheques for individual strata owners were prepared and hand-delivered by the strata council on about January 27, 2020.
19. It is undisputed that owner refused to accept a special levy refund cheque prepared for him (refund cheque) and requested a hearing with the strata council on January 31, 2020. Details of the hearing request and hearing discussion are not before me. However, the strata says it advised the owner that it had already decided to refund the special levy surplus. The strata also says the owner again refused to accept his refund cheque at the hearing.
20. At my request, tribunal staff asked the parties for further submissions on the details of the refunded amount and whether the owner had accepted his refund cheque. The strata's bank statement confirms that strata cheque #176 issued to the owner in the amount of \$1,733.21 cleared the bank on March 3, 2020. The cheque was dated January 21, 2020, which fits with the strata's description of events. For this reason, I find cheque #176 was the owner's refund cheque. I also note the owner does not dispute cashing the cheque or that it does not represent his portion of the special levy refund, except as I explain below.

21. Finally, I note the strata provided a general ledger listing with its final further submission. I did not seek the owner's submissions on this document because I find it relates to the amount of the final special levy surplus, which, as I discuss below, is not before me. I accept the special levy surplus is \$80,347.16 as originally agreed between the parties. Therefore, I do not accept the general ledger as evidence.

Was the owner entitled to a refund of surplus special levy money under the SPA?

22. For the reasons that follow, I find the owner was entitled to a refund of his proportionate share of the surplus special levy. The owner says the strata must refund any surplus special levy to the owner who paid the special levy. This is not entirely correct as I discuss below.

23. The strata does not expressly address the special levy refund issue, but in a letter to its owners stated it "received legal advice that it was reasonable with a resolution to determine an alternate use of the funds such as transferring to CRF". In its submissions, the strata states the "resolution in [February] 2019 was not thought out properly" so it decided to refund the special levy surplus. The owner objected to the strata's reason suggesting it was because of his email to the strata council and possibly because of a legal opinion received by the strata council. Neither the owner's email nor a legal opinion was provided in evidence.

24. Regardless, section 108 of the SPA deals with special levies and requires a special levy to be passed by a $\frac{3}{4}$ vote of the strata owners. There is no disagreement between the parties that the special levies were not properly authorized.

25. Section 108(5) states:

If the money collected exceeds the amount required, or *for any other reason is not fully used for the purpose set out in the resolution*, the strata corporation *must* pay to each owner of a strata lot the portion of the unused amount of the special levy that is proportional to the contribution made to the special levy in respect of that strata lot. [My emphasis added]

26. I find the use of the word “must” in section 108(5) clearly makes the refund a mandatory obligation of the strata. I also note the phrase “to each owner of a strata lot” implies the refund would not go to the owner or person who paid it, as suggested by the owner, but rather to the strata lot’s owner at the time the refund is made.
27. Therefore, it is the strata lot owner at the time the refund is made that is entitled to receive the refund, which in this case is the owner.
28. Section 108(6) allows the strata to deposit the funds into its CRF only if every owner is entitled to receive less than \$100 under section 108(5), which is not the case here.
29. For these reasons, I find the owner is entitled to a refund of the special levy surplus.

What refund amount is appropriate?

30. As earlier noted, the parties agreed the surplus amount was \$80,347.16.
31. I have noted my request for further submissions on the status of the surplus refund and details on how it was calculated. In these submissions, it is evident the special levy surplus amount of \$88,868.95 noted in the September 27, 2019 strata council meeting minutes was not the final surplus. I accept the strata’s argument that further building envelope repair invoices were paid, thereby reducing the surplus amount to \$80,347.16. The owner challenged this amount in his further submissions, noting the strata advised of a higher amount in its September 2019 minutes. I find it more likely than not, the owner would have known, or ought to have known, there were extra building envelope expenses that reduced the special levy surplus before he made his application for dispute resolution. If he did not know, he had the opportunity to challenge the strata on surplus amount before he agreed to the amount noted in the Dispute Notice. Alternately, the owner could have disputed the total surplus amount or sought reimbursement on the higher or different amount. However, he did not. Rather, he chose only to dispute that he was entitled to receive his proportionate share of the total surplus amount of \$80,347.16.
32. For these reasons, I accept the calculated special levy surplus total is \$80,347.16.

33. The evidence shows the strata calculated each strata lot's proportionate share of the surplus in accordance with the Schedule of Unit Entitlement shown on the strata plan. A schedule of the calculations for all strata lots was provided, and I find the calculations to be in compliance with section 108(5) of the strata. For the owner's strata lot 40 (unit 702), I find the owner's calculated amount of his strata lot's proportionate share of the special levy surplus of \$1,694.76 was correct. To this amount was added \$32.06 of interest purportedly at 2.27% as noted on the schedule. However, the schedule shows a total refund amount of \$1,726.82, whereas the refund cheque was issued in the amount of \$1,733.31. I find the cheque was issued in the correct amount, which I agree is the special levy surplus refund of \$1,694.76 plus 2.27% interest. I infer I may have been provided with a draft of the special levy refund schedule that did not show the correct calculated refund including interest.
34. I was not provided with reasons for why the strata chose a 2.27% rate of interest, however, I find the rate is reasonable. In particular, I note the interest rate paid by the strata is slightly higher than the 1.95% post-judgement interest rate established by the *Court Order Interest Act* (COIA) for the period in question.
35. As I have noted, the owner cashed the refund cheque which cleared the strata's bank account on March 3, 2020.
36. For these reasons, I find the \$1,733.31 the strata paid to the owner is an appropriate amount for the owner's proportionate share of the special levy surplus. As a result, I dismiss the owner's claim for \$1,913.03, which he admits was an estimated amount.
37. The parties did not make submissions about the strata refunding the special levy surplus after the surplus funds had been transferred to the CRF. It is not clear if the strata actually transferred the surplus funds to the CRF as directed by the strata owners. However, if it did, I find for the purposes of this dispute, the strata was authorized to remove the surplus funds from the CRF without the need for a $\frac{3}{4}$ vote,

in order to correct its mistake and refund the special levy surplus as required under section 108(5) of the SPA.

TRIBUNAL FEES AND EXPENSES

38. 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 and the strata did not pay tribunal fees, I make no order for reimbursement of tribunal fees. Neither party claimed dispute-related expenses, so I order none.
39. Under section 48(3) of the CRTA, the COIA applies to the tribunal. However, given I did not order the strata to pay any amount to the owner, I make no order for pre-judgement interest under the COIA.
40. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDER

41. I order the owner's claims and this dispute dismissed.

J. Garth Cambrey, Vice Chair