Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Lin v. The Owners, Strata Plan LMS 4071,* 2020 BCCRT 690

B E T W E E N :

WEI LIN, CHI WOR SAMUEL WONG, TRICIA DONG, ALESCORP INVESTMENTS LTD., DON WITTMAN, COLLEEN MULLEN, JACQUELINE M. MCMULLEN, EMERIK M. SLIVECKO, JESSICA TAN, THEODORA HOFF

APPLICANTS

A N D :

The Owners, Strata Plan LMS 4071

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. The applicants Wei Lin, Chi Wor Samuel Wong, Tricia Dong, Alescorp Investments Ltd., Don Wittman, Colleen Mullen, Jacqueline M. McMullen, Emerik M. Slivecko, Jessica Tan and Theodora Hoff, own strata lots in the respondent strata

corporation, The Owners, Strata Plan LMS 4071 (strata). The applicants say that the strata's bylaw 3.7, which requires owners to maintain their own heat pumps, is contrary to the *Strata Property Act* (SPA). They ask for orders to repeal bylaw 3.7, to require the strata to provide ongoing care and maintenance of heat pumps, and that the strata impose a special levy to pay for the ongoing care and maintenance of the heat pumps. The strata says there is no basis to repeal the bylaw and, as the owners are responsible to repair the heat pumps, there is no need for a special levy.

2. The applicants are self-represented. The strata is represented by a member of the strata council.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

4. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

5. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

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

7. As a preliminary matter, the applicants made a number of submissions about individual members of the strata council. The applicants suggest that the council members are biased and that a particular member of the strata council, MP, has a conflict of interest, acted inappropriately by paying for a legal opinion out of his own funds, and acted dishonestly in his dealings about the heat pumps. As the individual strata council members are not parties to this dispute, and these claims are not within the CRT's jurisdiction over strata property disputes as set out under section 122(1) of the CRTA, I will not address these submissions further.

ISSUES

8. The issues in this dispute are:

    a. whether the heat pumps are common property (CP) and therefore the strata's responsibility to repair and maintain,

    b. whether bylaw 3.7 should be repealed,

    c. whether the strata should be ordered to impose a special levy to pay for the ongoing care and maintenance of the heat pumps,

    d. whether the strata made an unauthorized expenditure for legal fees, and

    e. whether the applicants should be ordered to pay the strata's legal costs.

EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, an applicant bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their respective positions. While I have considered all of this information, I will refer only to what is relevant to the issues before me and necessary to provide context to this dispute.

10. The strata consists of 17 townhouse-style strata lots and 174 strata lots in a tower. The townhouses are heated by a steam system that services the building. The

strata lots in the tower portion have heat pumps for air filtration, heating and cooling. According to the parties' submissions, each strata lot has 1 or more heat pump units contained in a cabinet. Each heat pump is connected to pipes inside the walls of the tower that function in a closed-loop system. Water flows through pipes to common heating and cooling infrastructure, and back to the strata lots. The heat pumps in the strata lots cannot heat or cool without being connected to the pipe system.

11. The strata plan identifies various areas as common property (CP) or limited common property (LCP). However, the strata plan does not indicate the exact location of the heat pumps or their cabinet enclosures, nor does it identify them as CP or LCP.

12. The strata repealed its previous bylaws and filed new bylaws at the Land Title Office in 2016. Bylaws 4.1 and 4.2 state that an owner must repair and maintain their strata lot and any limited common property (LCP) of which they have use, except for repair and maintenance that is the responsibility of the strata corporation. Bylaw 4.5 says that it is the strata's responsibility to repair and maintain common assets, common property (CP), and some items of LCP.

13. The heat pumps are addressed in bylaw 3.7, which says that an owner must maintain, repair, and keep the heat pumps in their strata lot in good condition. It also requires that an owner retain a qualified technician to inspect, maintain, and repair the heat pumps at least once per year. At various times, the strata arranged for voluntary inspections of owners' heat pumps by its mechanical contractor. Strata lot owners could sign up for an inspection if they wished, and would be responsible for both the cost of the inspection any necessary repair work.

14. Some heat pumps began to malfunction or stop working completely. An attempt to repair a heat pump resulted in a leak that damaged a number of strata lots. The strata became concerned about the impact of further damage on its insurance costs, and formed a committee formed to investigate the issue. The committee obtained information about the heat pump system and surveyed owners about any

problems with the heat pumps. It explored options for replacing the heat pumps all at once or in stages.

15. The strata and the committee obtained legal advice, which provided them with conflicting opinions about whether the heat pumps were CP and therefore the strata's responsibility to repair and maintain.

16. The strata presented 2 resolutions to the owners at its 2019 annual general meeting (AGM). The first motion involved replacing the heat pumps and installing a preventative maintenance kit, and the second motion involved only installing the preventative maintenance kit. Both motions proposed that the work be funded by a special levy, and included the repeal of bylaw 3.7. At the October 16, 2019 AGM, the owners defeated both motions (with 15 owners in favour and 68 opposed). Accordingly, bylaw 3.7 remained in force.

17. After the AGM, the newly constituted strata council explored options for dealing with the heat pumps. However, the strata council did not resolve the matter before the applicants filed this dispute.

18. The applicants describe the inconvenience, stress and discomfort associated with their malfunctioning heat pumps. They say it is particularly uncomfortable in the summer as the tower was designed so that many of the windows do not open and there is little natural airflow. Some of the applicants are concerned about the health impact of having to stay at home without air conditioning during the ongoing pandemic.

19. The applicants say that there have been differences in opinion between owners of townhouse and tower strata lots about how to mange facilities and develop the bylaws. They say that these differences are important as there has been a higher proportion of townhouse owners on the strata council as compared to tower owners. The applicants say that bylaw 3.7 is "unconstitutional" and contradicts the SPA as it requires owners to assume responsibility for CP. Their position is that the strata is responsible for the repair and maintenance of the heat pumps, and that the cost of

repair and maintenance should be paid from the “general” (or operating) fund, the contingency reserve fund, or through a special levy.

20. The strata says that individual strata lot owners have been responsible for the heat pumps since the building was constructed, and that they were never intended to be CP. The strata’s position is that, as the heat pumps are not CP, it is not responsible to repair or maintain them.

Are the heat pumps CP?

21. Section 72 of the SPA makes a strata corporation responsible for the repair and maintenance of CP and common assets. It also allows a strata corporation to make an owner responsible for LCP that the owner has a right to use. The strata’s bylaws reflect the strata’s responsibility for CP, and there is no indication that it has designated the heat pumps as LCP.

22. There appears to be no dispute that the pipes and heating and cooling infrastructure are CP. The issue is whether the heat pump units that service the individual strata lots are also CP.

23. Section 1 of the SPA defines CP as:

    a. that part of the land and buildings shown on a strata plan that is not part of a strata lot,

    b. pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located:

        i. within a floor, wall or ceiling that forms a boundary (A) between a strata lot and another strata lot, (B) between a strata lot and the CP, or (C) between a strata lot or CP and another parcel of land, or

ii. wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the CP.

24. As noted above, the strata plan does not show the exact location of the heat pumps or their surrounding cabinets in each strata lot. The mechanical drawings in evidence show some of the common heating and cooling infrastructure, but do not show the heat pump locations for the strata lots. The strata says, and the applicants do not dispute, that the heat pumps are located within the boundaries of the individual strata lots. As there is no evidence to the contrary, I accept that the heat pumps are inside each strata lot, and that sections 1(a) and 1(b)(i) of the SPA do not apply.

25. The next consideration is under section 1(b)(ii), and whether the heat pumps are capable of being and intended to be used in connection with the enjoyment of another strata lot or the CP. Several decisions from the courts and the CRT have considered whether items inside strata lots meet this definition.

26. In *Taychuk v. Owners, Strata Plan LMS 744*, 2002 BCSC 1638, the court did not determine the exact source of the problem that caused discoloured water to flow from the taps in a strata lot's bathroom. However, at paragraph 28, the court stated that "the pipes are connected to the pipes that service all the units, and so they are intended to be used in connection with the enjoyment of another strata lot" and were the strata's responsibility to repair and maintain.

27. The notion that a component that forms part of an overall system is CP even if it is located wholly within a strata lot was reinforced in *Fudge v. Owners, Strata Plan NW 2636*, 2012 BCPC 409. This decision considered a water backup from a washing machine inside a strata lot, where the washing machine's discharge hose was connected to a common pipe installed in the wall. The court found that the discharge pipe from the washing machine was integrated with the pipe system in the walls, and was therefore was capable of being used in connection with the

enjoyment of the CP. The judge determined that the drainage system was an "integrated whole" that fell within the definition of CP in the SPA.

28. In *Thiel v. The Owners, Strata Plan VIS 6763*, 2019 BCCRT 1065, the CRT considered whether a fan coil unit (FCU) that was part of a building-wide heating system was CP. The tribunal member found that despite being connected to CP pipes, each FCU was independent and did not impact other strata lots or the CP heating system. Although it was located within the boundary of the strata lot, the FCU was not CP as it operated independently of other strata lots and CP, and for the sole benefit of the owner. In those circumstances, the owner was found to be responsible for the repair and maintenance of the FCU.

29. The strata also noted that in *Okrainetz v. Condominium Plan No. 82R42988*, 1992 CanLII 7881 (SK QB), a judge considered the status of a furnace and air conditioning unit located on a CP balcony that was for the exclusive use of owner. The court found that the furnace and air conditioner were never intended to be CP and that the owners were responsible for their repair and maintenance. I note that the legislation in this jurisdiction that contains a much narrower definition of CP than the definition in the SPA.

30. The decisions of the British Columbia Supreme Court and British Columbia Provincial Court are binding upon me, while the decisions from the CRT and courts of other jurisdictions are not. The case law and the SPA must be considered in the context of the particular facts of this case.

31. The evidence contains a March 22, 2019 engineering report from Flow Consulting, and I find that this report provides guidance as to the function of the heating and cooling system and the heat pumps themselves. The report states that not all heat pumps need to be in cooling or heating mode at the same time, and that the system can accommodate simultaneous heating and cooling in different strata lots. This suggests that neighbouring strata lots would not use or enjoy the other's heat pump.

32. However, a Flow Consulting engineer's February 3, 2020 email message states that the entire system would need to be "rebalanced" after individual heat pumps were

turned off in order to perform repairs. In addition, although the engineer stated that a single heat pump could be removed entirely without affecting the operation of the others, he also stated that a minimum of 25% of the heat pumps must remain on at any given time so the main condenser water pumps (which service the entire system) will operate properly.

33. Based on the evidence before me I find that, although the heat pumps provide heating and cooling only to the individual strata lots, their operation (or non-operation) is not entirely autonomous, and has a degree of impact on the system as a whole. This is a different situation from *Thiel*, where the evidence established independent operation of the FCU from the common hot water system.

34. While another heating and cooling system involving heat pumps may function in a different manner, I find that the evidence supports the conclusion that the system in this case operates as an integrated whole, as described in *Fudge.* Therefore, as they are capable of being used in connection with the enjoyment of another strata lot or the CP, the heat pumps fall within the definition of CP in the SPA. Accordingly, under section 72 of the SPA and bylaw 4.5, the strata bears the repair and maintenance responsibility for the heat pumps.

Bylaw 3.7

35. The applicants ask for an order to repeal bylaw 3.7 as it is “unconstitutional” and contrary to the SPA.

36. Section 72(1) of the SPA requires a strata corporation to repair and maintain CP. Although section 72(2)(b) says that the strata may, by bylaw, make an owner responsible for the repair and maintenance of CP if it is identified in the *Strata Property Regulation* (Regulation), there currently is no section in the Regulation that permits this. Given my finding that the heat pumps are CP, the strata is responsible for their repair and maintenance.

37. Section 121 of the SPA says that a bylaw is not enforceable to that extent that it contravenes the SPA. As it conflicts with section 72, I find that bylaw 3.7 is not

enforceable and the strata may not rely on it. However, I dismiss the applicants' claim for the bylaw to be repealed. The strata may follow the bylaw amendment procedures in section 128 of the SPA in this regard.

Special Levy

38. The applicants ask for an order that the strata fund the ongoing care and maintenance of the heat pumps through a special levy.

39. Although my decision that the heat pumps are CP means that the strata is responsible for the costs of their repair and maintenance, I find that it would be inappropriate for me to grant the order the applicants request. To do so would be to interfere with the democratic rights of the strata lot owners to vote on decisions about the strata's finances and budget. Although I decline to make the order sought, the strata will need to determine how to finance the repairs and maintenance.

Expenditure for Legal Fees

40. The applicants say the strata used "unauthorized funds" on legal services related to this dispute. According to the applicants, the strata spent more than the amount allocated for legal fees in the budget in the 2019 and 2020 fiscal years, and it should have had an AGM or special general meeting to request additional funding for legal expenses.

41. The strata says that, according to *Lum v. Strata Plan VR519*, 2001 BCSC 493, a strata council has a duty to ensure that the strata is properly represented in legal proceedings. The strata also says that it has a budget line item for legal expenses, and the expenditure was authorized.

42. The evidence before me shows that the strata does have a line item for legal expenses in its operating budget. However, the evidence does not contain any legal invoices or other documentation to establish what funds, if any, the strata spent in relation to this dispute. Accordingly, I find that the applicants have not proven their claim that the strata spent "unauthorized" funds, and I dismiss it.

Legal Costs

43. The strata asks for an order that the applicants pay its legal costs or, in the alternative, that the CRT dispense with its normal direction that the strata not charge the applicants for the costs of defending the claim. The strata submits that the applicants' argument meets the test for special costs as it contains allegations of dishonesty and bad faith for individual strata council members. As discussed above, the strata council members were not named as parties to this dispute.

44. The applicants deny that they made any allegations recklessly or with malice, and say that they made the submissions to "highlight potential conflict of interest and inconsistency of sworn testimony". The applicants' position is that they should not be responsible for the legal costs associated with this dispute.

45. Rule 9.4(3) says that, except in extraordinary circumstances, the CRT will not order a party to pay another party's legal fees in a strata property dispute. This is different from the concept of special costs, where a court will order a party to pay all or part of another party's legal costs. The CRT does not have the jurisdiction to order special costs as they arise under the British Columbia *Supreme Court Rules*, which do not apply to the CRT (see *The Owners, Strata Plan VR 766 v. Hayatshahi*, 2020 BCCRT 451 at paragraph 53). Rule 9.5 does allow the CRT to order the reimbursement of dispute-related expenses in some circumstances.

46. Orders for special costs are the exception rather than the norm. According to *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (BCCA), special costs should be ordered against a party whose conduct in the litigation was reprehensible, in the sense of deserving of reproof or blame.

47. The British Columbia Supreme Court considered special costs in the context of a strata dispute in *Hirji v. Owners Strata Corporation VR44*, 2016 BCSC 548. The Court reiterated previous decisions that awards for special costs should be made only in exceptional circumstances where reprehensible conduct requires an element of deterrence or punishment. The Court stated that this will likely occur in circumstances where there is evidence of improper motive, abuse of process,

misleading the court and persistent breaches of the rules of professional conduct and rules that prejudice the applicant.

48. The CRT has granted special costs when a party's threatening conduct was found to be aimed at suppressing evidence (see *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330).

49. I disagree with the strata's submission that the applicants' conduct meets the high threshold for an award of special costs. The applicants did express their view that the strata council was biased, but I am not satisfied that this expression amounted to reprehensible conduct. I also find that the applicants' motive was not improper or misleading. I find that this is not an appropriate circumstance for special costs. I also find that granting an exception to the requirement in section 169 of the SPA that the strata not charge the applicants for the costs of defending the claim would be akin to an award of special costs. Accordingly, I dismiss the strata's claim for reimbursement of its legal costs under Rule 9.5.

50. I have also considered whether the strata is entitled to reimbursement of its legal fees on the basis of extraordinary circumstances under Rule 9.4(3). This dispute involved the interpretation of the definition of CP, which I find is not an unusually complex issue, and did not involve an unusually large amount of evidence or submissions. I find that the circumstances of this dispute are not extraordinary and dismiss the strata's claim for reimbursement. Even if I had come to a different conclusion, I would not have ordered reimbursement as the strata did not provide evidence of its expenses.

TRIBUNAL FEES AND EXPENSES

51. Under section 49 of the CRTA, and the CRT rules, the CRT generally will order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I therefore order the strata to reimburse the applicants for tribunal fees of $225.

52. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants.

ORDERS

53. I order that:

    a. the strata stop enforcing or relying on bylaw 3.7, and

    b. within 30 days of the date of this order, that the strata reimburse the applicants' tribunal fees of $225.

54. The applicants are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

55. The remainder of the applicants' claims are dismissed.

56. The strata's claim for reimbursement of legal costs is dismissed.

57. Under section 57 of the CRTA, a party can enforce this final CRT decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). Once filed, a CRT order has the same force and effect as a BCSC order.

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

Lynn Scrivener, Tribunal Member