



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Nicoletti v. Bateman, Strata Plan LMS 2960*, 2020 BCCRT 1389

B E T W E E N :

KARIN NICOLETTI

APPLICANT

A N D :

JANE BATEMAN and The Owners, Strata Plan LMS 2960

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about governance and maintenance in a strata corporation.

2. The applicant, Karin Nicoletti, owns a residential strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 2960 (strata). The other respondent, Jane Bateman, co-owns a different residential strata lot and is a strata council member.
3. In her dispute application, Ms. Nicoletti sets out numerous concerns with the strata's operation, dating back to 2011. These concerns include the following:
 - a. Leaks and window repairs were improperly addressed.
 - b. She was "kicked out" as janitor.
 - c. A lighting timer was improperly set for 5 years.
 - d. Utility costs for hot water and the boiler, elevator and garage gate have been improperly allocated between residential and commercial strata lots.
 - e. Taking turns sitting on the strata council must be mandatory.
 - f. Various areas in the strata, such as the locker room, bicycle elevator room, sprinkler room, and boiler room require too many separate keys.
 - g. The common property stairs are dirty.
 - h. Owners are not serious about recycling.
4. Ms. Nicoletti does not request orders or remedies for each of the above-mentioned items. Rather, she requests 5 remedies in this dispute:
 - a. Compensation of \$1,600 for her time spent sending the strata about 100 letters in the past 10 years.
 - b. An order that the strata council reimburse the strata's "BC Hydro fund" \$400 for failing to program the outdoor lighting timer.
 - c. An order that Jane Bateman cannot sit on the strata council in future.
 - d. An order that every owner take a mandatory turn sitting on the strata council.

- e. An order that the commercial strata lot owners contribute to strata expenses such as hot water based on their actual use.
 - f. An order that the commercial strata lot owners have “free maintenance” for 1 year.
5. The strata denies Ms. Nicoletti’s claims. It says it has made decisions based on fiscal responsibility and maintaining the strata building in good condition in both the short and long terms. The strata says it has consistently addressed Ms. Nicoletti’s letters and concerns in council meetings. The strata says it has fixed the lighting timer, that all claims against Jane Bateman are unfounded and should be dismissed, and that the legislation does not require all owners to take a turn on council. The strata also says it has carefully calculated commercial and residential strata fees and the percentages of shared expenses, and believe they are fair. It says the commercial strata lot owners have not expressed concerns about the allocation of expenses.
6. Jane Bateman says Ms. Nicoletti routinely opposes building maintenance. Jane Bateman says that because Jane Bateman is employed as a building technologist, the strata council often asks for Jane Bateman’s opinion, which has led to targeting from Ms. Nicoletti. Jane Bateman says there have been no decisions made without a council vote. About the allocation of expenses between residential and commercial strata lots, Jane Bateman says all owners pay strata fees based on unit entitlement, so allocating them differently would be illegal and would penalize the residential owners.
7. Ms. Nicoletti and Jane Bateman are self-represented in this dispute. The strata is represented by a strata council member.
8. For the reasons set out below, I dismiss Ms. Nicoletti’s claims, and this dispute.

JURISDICTION AND PROCEDURE

9. 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 principles of the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

10. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconference, 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.
11. 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.
12. 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.

ISSUES

13. As explained above, Ms. Nicoletti did not request remedies for all of the concerns set out in the Dispute Notice. My decision only addresses those issues for which Ms. Nicoletti has requested a remedy. I make no findings about the other issues.
14. I find the issues in this dispute are:
 - a. Can Ms. Nicoletti make claims against Jane Bateman about Jane Bateman's role as strata council member?
 - b. Must every owner take a mandatory turn sitting on the strata council?
 - c. Did the strata meet its duties in relation to the outdoor lighting timer? If not, what remedy is appropriate?

- d. Has the strata allocated expenses between residential and commercial strata lots inappropriately? If so, what remedies are appropriate?
- e. Is Ms. Nicoletti entitled to compensation for her time spent corresponding with the strata?

EVIDENCE AND ANALYSIS

- 15. I have read all the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding like this one, Ms. Nicoletti, as applicant, must prove her claims on a balance of probabilities.
- 16. The strata was created in 1997, under the former *Condominium Act*. It continues to exist under the *Strata Property Act* (SPA). The strata consists of 10 residential strata lots and 8 commercial strata lots, in a 2-storey building with a basement. Land title documents and the strata plan show that Ms. Nicoletti and Jane Bateman each own residential strata lots on the second floor. All of the commercial strata lots are on the ground floor.
- 17. There are no separate sections in this strata, such as for commercial and residential strata lots. There are also no “types” of strata lots identified in the bylaws.

Does Ms. Nicoletti have standing to make her claims against Jane Bateman?

- 18. Ms. Nicoletti’s claims against Jane Bateman are based on Jane Bateman’s actions and participation as a strata council member. For the following reasons, I find Ms. Nicoletti has no standing to make these claims, and I therefore dismiss them.
- 19. The duty of care that strata council members must meet in performing their role is set out in section 31 of the SPA. Section 31 says strata council members 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.

20. In *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 at paragraph 267, the BC Supreme Court found that the duties of strata council members under SPA section 31 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 about duties owed by strata council members under section 31.
21. I find Ms. Nicoletti's claims against Jane Bateman arise out of SPA section 31. Based on the reasoning in *Sze Hang*, which is a binding precedent, I find that Ms. Nicoletti has no standing to make claims against Jane Bateman about Jane Bateman's actions and duties as a strata council member. For that reason, I dismiss all of Ms. Nicoletti's claims against Jane Bateman.
22. This dismissal includes Ms. Nicoletti's request for an order that Jane Bateman be barred from sitting on the strata council. However, I would not grant that order even if Ms. Nicoletti had standing to make her claims against Jane Bateman. As I will discuss in the next section of this decision, the SPA and the strata's bylaws have provisions about how strata council members are elected by the ownership, and how they may be removed. I find there is insufficient evidence before me to justify overriding the strata's democratic governance.

Must every owner take a mandatory turn sitting on the strata council?

23. Ms. Nicoletti requests an order that every owner, except Jane Bateman, take a turn sitting on the strata council. This request appears to be based on the fact that Jane Bateman has been on the council for many years, and Ms. Nicoletti disagrees with decisions about maintenance and finances the council has made during that time.
24. SPA section 25 says that at each annual general meeting (AGM), eligible voters present in person or by proxy must elect a council. SPA section 28 sets out who is eligible to be on council. It says, in part, that owners, individuals representing corporations that own strata lots, and certain tenants may sit on the council.
25. The strata's bylaws are the Standard Bylaws under the SPA, with various amendments that were filed at the Land Title Office in 2000, 2002, and 2006. The

strata has not filed any amendments about strata council composition or elections, so the Standard Bylaws apply, based on *Strata Property Regulation* (Regulation) section 17.11(3). The relevant Standard Bylaws are as follows:

9(1) – the strata council must have 3 to 7 members.

10(1) – a council member’s term ends at the end of the AGM when a new council is elected

10(2) – a council member whose term is ending is eligible for reelection.

11(1) – a strata corporation may remove one or more council members by passing a resolution by a majority vote at an AGM or special general meeting.

26. None of these SPA provisions or bylaws permit a strata corporation to ban any individual from sitting on the council, or require any individual to sit on the council. In a strata property dispute like this one, the CRT has authority to make orders that a party do or not do something. Under CRTA section 123(2), the CRT has authority to make an order directed at the strata, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. I find section 123(2) allows the CRT to make orders about strata council, in limited circumstances. However, as stated by the BC Supreme Court in *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493, the court should only interfere with or override a strata’s democratic governance when absolutely necessary. I apply the same reasoning to the CRT’s interference with strata governance.

27. Based on the evidence before me, I find it would be inappropriate to override the strata’s democratic governance by making orders about who must sit on the strata council, or about who may not sit on the council. I therefore dismiss Ms. Nicoletti’s claims about strata council membership.

Did the strata meet its duties in relation to the outdoor lighting timer?

28. Ms. Nicoletti says that for the past 5 years, the strata council ignored her requests to adjust the outdoor building lights every season, so they would not run when it was

light out. She says a former owner used to perform this task on a volunteer basis, but for the past 5 years it was not done.

29. The strata does not deny that the lights were left on, but says this issue has now been fixed by connecting the lights to a timer that automatically adjusts seasonally.
30. Ms. Nicoletti does not specifically dispute that the lighting problem is now resolved by the timer. She did not provide evidence about the specific expense of running the lights without seasonal adjustment.
31. I find that the seasonal adjustment of outdoor lighting falls within the strata's duty to maintain and repair common property, as set out in SPA section 72. In meeting its duties under SPA section 72, a strata must act reasonably in the circumstances: *Wright v. The Owners, Strata Plan #205*, 1996 CanLII 2460 (BCSC). I find that in the context of operating a strata corporation with 18 strata lots, a lack of immediate attention to the seasonal adjustment of outdoor lighting is a minor issue, and is reasonable in the circumstances. In making this finding, I rely on the reasoning in *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74. In *Leclerc*, the BC Supreme Court considered a case of water ingress into a strata lot. The court said that although the strata could perhaps have hastened its investigations of the problem, there was no evidence of deliberate foot-dragging. The court said a strata council is not required to be perfect, only to act reasonably with fair regard for the interests of all concerned (paragraph 61).
32. I find that by installing the lighting timer, the strata has met its duty to act reasonably, despite any delay. I therefore dismiss this claim. I note that I would not order the \$400 refund to the "Hydro fund" requested by Ms. Nicoletti in any event, as this retroactive adjustment to the strata's operating budget would serve no practical purpose.

Has the strata allocated expenses between residential and commercial strata lots inappropriately?

33. Ms. Nicoletti says the commercial owners have been overcharged for certain expenses. She says the services or items in question are used more by residential

owners, or primarily benefit residential owners. These expenses include property management fees, WorkSafe BC expenses, alarm system, fire equipment maintenance, hydro costs for garage lighting, landscaping, and contingency reserve fund (CRF) contributions.

34. The strata says all expenses have been correctly calculated based on unit entitlement. Ms. Nicoletti does not dispute this, but says only “truly shared costs” should be allocated based on unit entitlement.
35. As previously stated, the strata corporation is responsible for maintaining and repairing common property, under SPA section 72. Similarly, SPA section 91 says the strata corporation is responsible for the common expenses of the strata. In general, common expenses that occur at least once a year are paid for out of the strata’s operating fund, and common expenses that occur less often than once a year are paid for out of the CRF.
36. Under SPA sections 92 and 99, strata lot owners must pay strata fees, which fund both the operating fund and the CRF. SPA sections 99 and 100 say that unless there has been a unanimous vote of the ownership to calculate strata fees in a different way, strata fees for each strata lot are calculated based on unit entitlement.
37. In *Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085, the BC Supreme Court cited SPA sections 91 and 99, and said that the general rule under the SPA is that within a strata corporation “you are all in it together” (paragraph 35).
38. Based on the reasoning in *Alvarez*, the courts have found that common expenses of a strata corporation must be allocated in proportion to unit entitlement under section 99 of the SPA, unless:
 - a. the strata corporation has by a unanimous vote agreed to use a different formula for the allocation of contributions to the operating fund and contingency reserve fund, other than those set out in s. 99 and the regulation (SPA, section 100),
 - b. the strata corporation has by a unanimous vote established a “fair division” of expenses for a special levy (SPA section 108(2)),

- c. “sections” have been created under Part 11 of the regulation, or
- d. the strata corporation has by a unanimous vote changed the unit entitlement of one or more strata lots (SPA section 261).

(See *Coupal v. Strata Plan LMS 2503*, 2004 BCCA 552 at paragraph 34, citing *Alvarez at paragraph 55*, and *Poloway v. Owners, Strata Plan K69*, 2012 BCSC 726 at paragraph 54.)

- 39. A CRT vice chair noted in *Trinden Enterprises Ltd. v. The Owners, Strata Plan NW 2406*, 2020 BCCRT 807 that Regulation 6.4 allows a difference basis of expense allocation where there are different “types” of strata lots, or expenses related to limited common property. However, I find neither of those exceptions applies in this case. The expenses Ms. Nicoletti disputes are not related to limited common property, and the strata’s bylaws do not create different types of strata lots.
- 40. In this case, the strata has not passed a unanimous vote to allocate expenses other than by unit entitlement. The unit entitlements are set out in the strata plan, and Ms. Nicoletti does not say the strata has miscalculated expenses. Rather, she says the unit entitlement is unfair, as commercial owners have overpaid for services they use proportionally less than residential owners.
- 41. The BC Court of Appeal considered the allocation of a strata corporation’s expenses between strata lots in *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597. The court considered the SPA and Regulation 6.4, and said that under those provisions, unless there are “types” identified in a strata’s bylaws, and unless the expense in question benefits only 1 type of strata lot, expenses must be shared based on unit entitlement. In the circumstances of this case, the applicable legislation and reasoning in *Ernest & Twins* means that even if some strata lots benefit disproportionately from certain services, such as landscaping, they must be paid by all strata lots based on unit entitlement.
- 42. In conclusion, since the strata has no separate sections or types, I find that all expenses, including operating expenses and CRF contributions, must be allocated based on unit entitlement. It is open to the strata to change this, by amending its

bylaws to create types or sections, or by passing a unanimous resolution to change the formula for calculating expenses. Since this has not occurred, I dismiss Ms. Nicoletti's claims about allocation of expenses.

Is Ms. Nicoletti entitled to compensation for her time spent corresponding with the strata?

43. Ms. Nicoletti requests \$1,600 as compensation for her time spent corresponding with the strata over the past 10 years.
44. Based on the evidence before me, I accept that Ms. Nicoletti has spent considerable time writing to the strata. However, I find there is nothing in the SPA, Regulation, or bylaws that entitles her to compensation for her time.
45. I infer that Ms. Nicoletti is seeking damages, as she says the strata has not responded listened to her or acknowledged her complaints. The strata denies this, and says its property manager has provided Ms. Nicoletti's many complaints to the council, which has addressed them in meetings and communicated with her where necessary.
46. I also note there is nothing in the SPA, Regulation, or bylaws that requires a strata to respond to all correspondence or complaints it receives. A strata has a duty to act reasonably, which I find does not necessarily include a duty to respond to repetitive complaints, or correspondence that is difficult to understand.
47. For these reasons, I dismiss Ms. Nicoletti's claim for \$1,600 as compensation for her time spent on correspondence.

CRT FEES AND EXPENSES

48. Under section 49 of the CRTA and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule.
49. The strata and Jane Bateman are the successful parties. They paid no CRT fees and claim no dispute-related expenses. I therefore do not award them to any party.

50. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Nicoletti.

ORDER

51. I dismiss Ms. Nicoletti's claims, and this dispute.

Kate Campbell, Vice Chair