Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Mitchinson v. The Owners, Strata Plan VR 1120*, 2020 BCCRT 1420

B E T W E E N :

ROBERT MITCHINSON

APPLICANT

A N D :

The Owners, Strata Plan VR 1120

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about disclosure of strata corporation documents, and enforceability of strata bylaws.

2. The applicant, Robert Mitchinson, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan VR 1120 (strata).

3. Mr. Mitchinson says the owners of strata lot 60 (SL60) were forced out of their strata lot because they had a baby, which was a breach of the BC *Human Rights Code* (Code). Mr. Mitchinson says that matter is currently before the BC Human Rights Tribunal (HRT), and the strata council is keeping the strata's ownership "in the dark" about the HRT proceeding. Mr. Mitchinson also says the strata's bylaw 3(13) about move-in fees is unenforceable. He requests the following remedies in this dispute:

   - An order that the strata provide copies of legal opinions about the HRT claim.
   - An order that the strata stop enforcing bylaw 3(13) about move-in fees and acknowledge that it is unenforceable.

4. The strata says Mr. Mitchinson's claims should be dismissed. It says Mr. Mitchinson failed to request a council hearing before filing this dispute, contrary to *Strata Property Act* (SPA) section 189.1(2). It also says Mr. Mitchinson does not have standing (entitlement) to bring the dispute, as the claims are not about his own relationship with the strata. It says he is not affected by the move-in fees because he has not moved, he is not affected by the occupancy bylaw that is the subject of the HRT complaint, and he has not been fined for any bylaw breach. The strata says Mr. Mitchinson is an advocate for a party to the HRT claim and wants the legal opinions to share with the HRT complainants, which is not in the best interests of the strata ownership. The strata also says its move-in fee bylaw is enforceable. The strata requests reimbursement of $10,000 in dispute-related property management and legal fees.

5. Mr. Mitchinson is self-represented in this dispute. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

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

7. 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.

8. 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.

9. 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.

10. I issued a preliminary decision on September 30, 2020, denying the strata's request to pause this dispute until the HRT proceeding was complete. I confirm that decision, for the reasons set out in the written decision provided to the parties.

Requests for Additional Orders

11. In his reply submissions to the CRT, Mr. Mitchinson requested some orders that were not included in the Dispute Notice. These include a request for an order that this decision be provided to strata owners and tenants, and order for the strata to provide owners' email addresses, and a request that various strata council members be added as parties. I find it would be procedurally unfair to consider these requests, as the strata had no opportunity to respond. I therefore decline to do so.

ISSUES

12. Mr. Mitchinson's dispute application included other claims about disclosure of documents, including correspondence about move-in fees and a list of owners. These

issues were resolved during the CRT's facilitation process, so I have not addressed them in this decision.

13. The issues in this dispute are:

    a. Should the CRT refuse to resolve this dispute because Mr. Mitchinson did not request a council hearing?

    b. Does Mr. Mitchinson have standing to bring forward the claims in this dispute?

    c. Must the strata disclose its legal opinions about the HRT matter?

    d. Is bylaw 3(13) about move-in fees enforceable?

    e. Is the strata entitled to reimbursement of dispute-related property management or legal fees?

BACKGROUND FACTS

14. I have read all the submissions and evidence provided but refer only to that which I find relevant to provide context for my decision. In a civil proceeding like this one, Mr. Mitchinson, as applicant, must prove his claims on a balance of probabilities.

15. The strata was created in 1987, and consists of 78 residential strata lots. The strata filed consolidated bylaws at the Land Title Office (LTO) in November 2017. Since then, it has filed 2 amendments that I find are not relevant to this dispute. Therefore, the bylaws applicable to this dispute are those filed at the LTO in November 2017.

REASONS AND ANALYSIS

Strata Council Hearing

16. In its Dispute Response Form, the strata said the CRT should refuse to resolve this dispute because Mr. Mitchinson did not request a strata council hearing before filing his CRT dispute application.

17. SPA section 189.1(2)(a) says that before an owner may request that the CRT resolve a dispute about a strata property matter, the owner must have requested a hearing before the strata council. Section 189.1(2)(b) says the CRT may waive this hearing requirement at the request of a party.

18. Mr. Mitchinson does not say he requested a hearing, and there is no evidence of such a request. However, I find it implicit in his submissions that he now requests that the CRT waive the hearing requirement.

19. Based on my review of the evidence and submissions in this dispute, I find it appropriate to exercise my discretion under SPA section 189.1(2)(b) to waive the council hearing requirement.

20. A CRT vice chair considered the purpose of the section 189.1 hearing requirement in a previous CRT decision, *Ducharme v. The Owners, Strata Plan BCS 753*, 2019 BCCRT 219. The vice chair said the purpose of section 189.1 was to attempt to have the parties resolve their dispute at the hearing, before making a formal application to the CRT (paragraph 76). While this decision is not binding on me, I agree with this reasoning and adopt it.

21. In *Buschau v. The Owners, Strata Plan LMS 1816 et al*, 2018 BCCRT 413, I waived the section 189.1 hearing requirement because the evidence in that dispute showed that while the applicant owner had not requested a formal hearing before the strata council, she was a member of the council, and had discussed her claims at a strata council meeting before filing her dispute. The discussion was documented in meeting minutes. I therefore found that the strata was aware of the applicant's claims and had sufficient opportunity to respond to them before the dispute was filed, so it was unlikely that a formal hearing before the strata council would resolve the dispute.

22. The evidence before me shows that Mr. Mitchinson raised his concerns about the move-in fees at least by January 26, 2019. The material that essentially forms his submission on the issue in this dispute is set out in that email, and in another very detailed email dated March 7, 2019. Similarly, Mr. Mitchinson set out detailed reasons in his written requests for the strata's legal opinions relating to the HRT proceeding

in letters to the strata dated February 28, 2020 and March 21, 2020. The strata acknowledged receipt of all this correspondence.

23. I find this extremely detailed correspondence establishes that the strata was fully aware of Mr. Mitchinson's concerns and the potential claims in this dispute before he filed his CRT dispute application on April 6, 2020. The evidence before me, including meeting minutes and a March 17, 2020 letter from the strata's lawyer, shows that the strata had considered the issues raised by Mr. Mitchinson, and had formally refused his suggestions and requests. Under these circumstances, I find that a council hearing was unlikely to resolve the issues in dispute.

24. For these reasons, I waive the SPA section 189.1 hearing requirement.

Standing

25. The strata says Mr. Mitchinson does not have standing to make the claims in this dispute, as he has suffered no loss under the move-in fee bylaw, was not fined under the occupancy bylaw that is the subject of the HRT proceeding, and is not a party to the HRT proceeding.

26. The strata cites paragraph 29 of *Wong v. AA Property Management Ltd*., 2013 BCSC 1551, as authority for the premise that an applicant must have suffered something unreasonable or significantly unfair to have standing to seek a change to bylaws. First, I note that Mr. Mitchinson is not seeking for an order that the CRT change the move-in fee bylaw, but rather an order that the strata stop enforcing it. Second, I find that *Wong* does not set out a legal requirement that a dispute applicant personally suffer something unreasonable or unfair in order to contest the enforceability of a strata bylaw. This is because *Wong* was not a case about the enforceability or validity of strata bylaws. Rather, the claimant, Mr. Wong, sued the strata corporation, the strata's property manager, and several members or former members of the strata council for alleged mismanagement of the strata corporation. Paragraph 29 of *Wong* is a specific discussion of Mr. Wong's standing to make a claim under SPA section 164, which allows the BC Supreme Court (BCSC) of make an order to prevent or remedy a significantly unfair action by a strata corporation. Section 164 is not

engaged in the dispute before me, nor is the related provision of the CRTA, section 123(2).

27. Also, I note that paragraph 19 of *Wong* says that in order to determine if an applicant has standing or the capacity to sue "we must look at the applicable legislation." *Wong* was written in 2013, before the CRT existed. Since then, section 189.1 has been added to the SPA, in order to clarify who may file a CRT dispute. It is the applicable legislation in this case. SPA section 189.1(1) says a strata corporation, owner, or tenant may make a request that the CRT resolve a dispute "concerning any strata property matter over which the civil resolution tribunal has jurisdiction."

28. Land title documents confirm that Mr. Mitchinson is a strata lot owner, so he meets that part of the standing requirement.

29. CRTA section 121(1) sets out the strata property matters over which the CRT has jurisdiction. These include the interpretation or application of the SPA, or a strata bylaw. I find that both of Mr. Mitchinson's claims fall within this category, and are therefore within the CRT's strata property jurisdiction. His claim about the enforceability is about the interpretation of a strata bylaw, and about whether it is enforceable under SPA section 121(1)(a), which is a question involving the application of the SPA. Similarly, Mr. Mitchinson's claim about access to legal opinions is a claim about the interpretation and application of SPA sections 35, 36, and 169(1).

30. For these reasons, I find Mr. Mitchinson has standing to make the claims in this dispute.

Disclosure of Legal Opinion

31. In letters to the strata dated February 28, 2020 and March 21, 2020, Mr. Mitchinson requested copies of any legal opinions received by the strata council in response to the HRT application by the owners of SL60. In his letters, Mr. Mitchinson cited SPA sections 35(2)(h) and 36(1)(a).

32. Section 35(2)(h) says a strata corporation must retain copies of any legal opinions it obtains. Section 36(1)(a) says that upon request, the strata must make any document listed in section 35 available to an owner.

33. SPA section 169(1)(b) says an owner does not have a right to any information or documents relating to a suit between the strata and the owner, including any legal opinions about that suit.

34. The strata's lawyer sent Mr. Mitchinson a March 17, 2020 letter refusing the disclosure request. The lawyer said the HRT proceeding was currently before HRT, and Mr. Mitchinson was not a party. He said he did not believe any judge would order disclosure, despite SPA sections 35 and 36, and he said he assumed Mr. Mitchinson would immediately provide any legal opinions to the SL60 owners, which would be a breach of solicitor-client privilege.

35. As previously stated, Mr. Mitchinson now asks the CRT to order disclosure of all legal opinions related to the HRT complaint filed by the SL60 owners. The strata refuses to provide the legal opinions, because it says Mr. Mitchinson only seeks disclosure of the legal opinions so he can give them to the SL60 owners, which would not be in the best interests of the strata ownership. The strata also says the legal opinions are protected by solicitor-client privilege and privacy legislation.

36. I begin by considering how BC's privacy legislation applies to this claim.

Privacy Legislation

37. The strata says Mr. Mitchinson's claim about disclosure of legal opinions is covered by the *Personal Information Protection Act* (PIPA), and is therefore within the sole jurisdiction of the Information and Privacy Commissioner (IPC).

38. For the following reasons, I do not agree, and find that the CRT has jurisdiction to resolve this claim. PIPA governs how private organizations, including strata corporations, collect, use, disclose and protect personal information. "Personal information" is defined as "information about an identifiable individual."

39. I find that legal opinions are not personal information, as set out in PIPA, as they are not information about an identifiable individual. While a legal opinion could include personal information, it does not necessarily include it. Also, I find there is no authority either in the SPA or the PIPA for the strata to refuse to disclose or redact documents listed in SPA section 35. This is because section 18(1)(o) of PIPA authorizes the disclosure of personal information if it is authorized by another statute. This conclusion is consistent with the Office of the Information and Privacy Commissioner's publication, "PIPA and Strata Corporations: Frequently Asked Questions", *British Columbia Strata Property Practice Manual*, and the reasoning in prior CRT decisions such as *Betuzzi v. The Owners, Strata Plan K350*, 2017 BCCRT 6 and *Ottens et al v. The Owners, Strata Plan LMS 2785 et al*, 2019 BCCRT 730. While the reasoning in these prior CRT decision is not binding on me, I find it persuasive and rely on it.

40. I therefore find that PIPA is not determinative of the claim about disclosure of legal opinions, and that claim is not within the sole jurisdiction of the IPC. Rather, as explained above, it is a dispute about the interpretation and application of SPA sections 35, 36, and 169(1)(b). Section 121(1)(a) of the CRTA gives the CRT jurisdiction over the interpretation and application of the SPA. I therefore find the CRT has jurisdiction to resolve this claim.

41. The strata also submitted that disclosure of legal opinions may be barred under the *Freedom of Information and Protection of Privacy Act* (FOIPPA). FOIPPA governs how public bodies must collect and disclose records and information. "Public body" is a defined term, and includes government ministries and agencies, but does not include a strata corporation. I therefore find FOIPPA does not apply to this claim.

Solicitor-Client Privilege

42. The strata says that its legal opinions about the HRT proceeding are protected by solicitor-client privilege. Solicitor-client privilege covers communications between a lawyer and client that are made in confidence, for the purpose of obtaining legal advice: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.

43. In *Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428*, 2009 BCSC 506, the BCSC considered a case in which a strata lot owner sought disclosure of legal opinions about proceedings to which the owner was not a party. The BCSC concluded that SPA section 169(1)(b) does not extinguish the common law of solicitor-client privilege. However, the BCSC did not permit the strata to maintain solicitor-client privilege over the dispute between the strata corporation and another owner. The BCSC concluded that the proper approach was restricted access.

44. Specifically, the BCSC found it would be inappropriate for any owner to have unrestricted access to legal opinions because they could simply provide them to the owner involved in the dispute. The BCSC found that SPA section 36 could not have been intended to allow that to occur, but this concern did not justify denying access entirely. Rather, the BCSC concluded that it was appropriate to place restrictions on the owner's access. Specifically, the BCSC said the owner and the owner's council could not share the legal opinions with any other person (paragraph 69).

45. Both parties cited a prior CRT decision, *0716712 BC Ltd. v. The Owners, Strata Plan LMS 3924*, 2019 BCCRT 388. In that case, the CRT member found that the correspondence in evidence suggested potential litigation between the strata corporation, and the strata's commercial section. The applicant's strata lot was in the commercial section, so the CRT member found it was appropriate to extend solicitor-client privilege to preclude disclosure to the owner in that circumstance. I find that is different from the facts before me in this case, as there is no suggestion that Mr. Mitchinson is or could be part of the HRT matter.

46. For that reason, I reject the strata's claim that it is protected from having to disclose its legal opinions about the HRT matter to Mr. Mitchinson due to solicitor-client privilege. Rather, I find that since Mr. Mitchinson is not a party to that proceeding, he is entitled to the legal opinions under SPA sections 35(2)(h) and 36.

47. *Strata Property Regulation* (Regulation) 4.1(2) says a strata corporation must permanently retain legal opinions it obtains. I therefore order the strata to immediately

provide Mr. Mitchinson with unredacted copies of all legal opinions it has obtained that relate to the HRT proceeding with SL60.

48. Consistent with *Azura,* I order that Mr. Mitchinson cannot share or discuss the legal opinions with any other person or organization.

Move-in Fee Bylaw

49. Strata bylaw 3(13) states as follows:

> A person moving into a strata lot must pay to the strata corporation a one-time move in fee of $200 by closing date of the sale of the unit, or no less that 2 weeks prior to the start of any new long term rental.

50. Mr. Mitchinson says this bylaw is unenforceable because it is inconsistent with the strata's authority to impose fees, as set out in SPA section 110 and Regulation 6.9.

51. SPA section 110 says a strata corporation must not impose user fees for the use of common property or common assets by owners, tenants, occupants, or their visitors, other than as set out in the Regulation. Regulation 6.9(1) states that a strata corporation may impose user fees for the use of common property or common assets if the amount of the fee is reasonable.

52. Mr. Mitchinson says the $200 amount imposed by bylaw 3(13) is unreasonable, because the strata lots are all townhouses with separate, street-level entrances, so there is no use or wear of an elevator or other common property related to moving. He says there is no staff attendant during moves, so that costs nothing, so the $200 is an unreasonable "cash grab" by the strata.

53. The strata says bylaw 3(13) was approved by a ¾ vote of the strata ownership in July 2017, so if Mr. Mitchinson wants to change it he must follow the procedure in SPA section 46(2) to put forward an amendment resolution. It also says its $200 fee is reasonably related to the costs of removing abandoned items from common property.

54. Mr. Mitchinson relies on *The Owners, Strata Plan LMS 3883 v. De Vuyst*, 2011 BCSC 1252. In that case, the BCSC set out a test for whether a user fee is reasonable. The BCSC said that whether a user fee is reasonable is an objective test, and must depend on the prevailing market conditions at the time and the actual costs incurred by the strata corporation in facilitating moves.

55. In this case, the strata does not dispute Mr. Mitchinson's assertions that moving into the townhouse strata lots involves no wear and tear on elevators, lobbies, or similar common property. It also did not suggest there were any staffing costs such as moving attendants. Rather, the strata provided a copy of a copy of a June 5, 2019 invoice from TidyTrailers, for hauling garbage, "household junk", and "demo and reno debris". The invoice amount is $1,096.25. The strata also provided a photograph of domestic debris, such as furniture, boxes, bicycles, toys, and a barbecue. The items appear to be stacked in a parking area. The strata says the invoice represents the cost of removing furniture, appliances, and other items left behind by incoming and outgoing owners and tenants. The strata says the move-in fee money is used to pay these costs.

56. In a final reply submission, Mr. Mitchinson objected to this evidence. He said it is "fraudulent", as the strata had invited all residents in May 2019 to deposit their items for a "clean up day". I place no weight on Mr. Mitchinson's statement about the clean-up day, since the strata did not have an opportunity to respond to it. However, I find that 1 invoice and 1 photo do not establish that the $200 move-in fee is reasonable, based on prevailing market conditions and actual incurred costs. The strata provided no evidence to show that removing abandoned items is a routine or ongoing cost related to individuals moving into strata lots. Rather, I find it more likely that items would be abandoned during the move-out process, for which there is no fee. Also, the TidyTrailers invoice indicates that some of the cost was to haul demolition and renovation debris, and there is no evidence that this debris was related to move-ins. I find the June 2019 invoice and single photo do not prove that the items hauled by TidyTrailers, or shown in the photo, were abandoned by people moving into strata lots.

57. For these reasons, I find evidence before me does not establish that the strata's $200 move-in fee meets the requirement in *De Vuyst* that it is reasonably objective, based on the prevailing market conditions and actual costs incurred by the strata in facilitating moves.

58. The strata submitted that bylaw 3(13) should be permitted to stand because it was approved by a ¾ vote of the strata ownership at a special general meeting. However, SPA section 121(1)(a) says a bylaw is not enforceable to the extent that in contravenes the SPA or the Regulations. This provision applies regardless of whether the bylaw was approved by the ownership. I find that bylaw 3(13) is unenforceable under SPA section 121(1)(a) because it is not consistent with Regulation 6.9, for the reasons set out above. I therefore order the strata to immediately stop enforcing bylaw 3(13) by collecting the move-in fee.

Legal Fees

59. The strata claims reimbursement of $10,000 in legal fees and property management fees related to time spent on this dispute. I deny this claim for the following reasons.

60. The strata has not provided invoices or receipts to confirm the requested expense. Also, CRT rule 9.4(1) says a successful party will usually be entitled to reimbursement of dispute-related expenses. In this dispute, the strata was not the successful party.

61. Finally, CRT rule 9.4(3) says that except in extraordinary circumstances, the CRT will not order one party to pay another party's legal fees in a strata property dispute. Similarly, CRT rule 9.4(5) says that except in extraordinary circumstances, the CRT will not order compensation for time spent dealing with a CRT proceeding (which would include dispute-related property management fees). I find the circumstances of this dispute are not extraordinary. Although the parties have strongly held positions, I find this dispute involves typical claims about document disclosure and bylaw enforceability. The strata asserts that Mr. Mitchinson has acted unreasonably, but did not explain the basis for that assertion, other than the fact that he disagrees with decisions the strata council made.

62. For these reasons, I deny the strata's request for reimbursement of legal and property management fees.

CRT FEES AND EXPENSES

63. As Mr. Mitchinson was successful in this dispute, in accordance with the CRTA and the CRT's rules I find he is entitled to reimbursement of $225.00 in CRT fees. He did not claim dispute-related expenses, so none are ordered.

64. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to Mr. Mitchinson.

ORDERS

65. I order the following:

    a. Within 2 weeks of this decision, the strata must provide Mr. Mitchinson with unredacted copies of all legal opinions it has obtained that relate to the HRT proceeding with SL60.

    b. Mr. Mitchinson cannot share or discuss the legal opinions with any other person or organization.

    c. The strata must immediately stop enforcing bylaw 3(13) by collecting the move-in fee.

    d. Within 2 weeks of this decision, the strata must reimburse Mr. Mitchinson $225 for CRT fees.

66. Mr. Mitchinson is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

67. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Kate Campbell, Vice Chair