Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

The Owners, Strata Plan KAS 1979

APPLICANT

A N D :

DIANE OFFEREINS and PHIL OFFEREINS

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This is a summary decision of the Civil Resolution Tribunal (CRT). This dispute is about a strata corporation that is run as a condominium hotel. The respondents, Diane Offereins and Phil Offereins, own a strata lot in the applicant strata corporation, The Owners, Strata Plan KAS 1979 (strata).

2. All the residential strata lots in the strata are subject to a restrictive covenant registered in the Land Title Office. The covenant generally requires strata lot owners to make their strata lots available for short-term rental to the public. The strata says the Offereins breached bylaws that require them to 1) comply with the terms of a restrictive covenant and 2) enter into a licensing agreement in order to participate in a rental booking system. The strata says the Offereins also breached bylaws by changing the door lock on their strata lot. The strata seeks orders for the Offereins to sign a licensing agreement, replace the door lock, and pay bylaw fines of $5,300.

3. The Offereins disagree with the strata's claims. They say that the strata's claims assume that the restrictive convent is valid. The Offereins say the restrictive covenant is invalid because it is impermissibly uncertain. They submit that the strata's claims must therefore fail. The Offereins also say that the covenant is not registered in the strata's favour, and the strata is the wrong party to enforce the covenant. The Offereins also say the strata failed to meet its obligation to provide an in-person hearing before issuing any fines, and that the bylaws at issue are unenforceable for other reasons. They also argue the strata has acted in a signficantly unfair manner.

4. A strata council member represents the strata in this dispute. The Offereins represent themselves.

5. As discussed below, I refuse to resolve the strata's claims and this dispute under section 11(1)(a) of the *Civil Resolution Tribunal Act* (CRTA). I reach this conclusion because I find the validity of the restrictive covenant is a central issue in this dispute. I find that the Civil Resolution Tribunal (CRT) is unable to provide any finality on this issue. This is because the CRT lacks the jurisdiction to modify or cancel the covenant. In making my decision, I reviewed all the evidence and submissions, including case law. I only refer to what is necessary to explain my decision. My reasons follow.

JURISDICTION AND PROCEDURE

6. These are the CRT's formal written reasons. 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.

7. 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.

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.

ISSUE

10. Should the CRT refuse to resolve this dispute?

BACKGROUND, EVIDENCE AND ANALYSIS

11. The strata is a mixed-use development composed of 70 residential strata lots and 11 commercial strata lots. The development is a four-storey building in a ski resort area. The strata has both residential and commercial sections.

12. The strata is run as a condominium hotel. The strata lots are individually owned, and the owners contribute to a rental pool to pay for shared expenses and the management of the building.

13. Each residential strata lot is subject to a registered restrictive covenant, numbered as CA4878350 ("2015 covenant"). The parties to the covenant are the strata lot owners and Her Majesty the Queen in Right of the Province of British Columbia (Province).

14. Consistent with this, a schedule attached to the 2015 covenant shows it is registered against strata lots 11 through 80 in the strata.

15. In general, the 2015 covenant requires the owners to make their strata lots available for rent through a rental booking system. The strata lots are then rented to the public as tourist accommodations. By its terms, the covenant allows the owners to reserve some days for personal use. Given the short-term nature of the rentals, I find the tourist occupancy is a license to occupy rather than a tenancy.

16. In this dispute, the strata alleges that the Offereins have not complied with the terms of the 2015 covenant. The strata is not directly claiming for a breach of the 2015 covenant. Instead, it says the Offereins breached bylaws that say the owners must comply with the terms of the 2015 covenant. This is clearly shown in the strata's August 27, 2019 letter that outlines the strata's decision to fine the Offereins.

17. Section 35(1)(e) of *Property Law Act* says that a person interested in land may apply to the BC Supreme Court for an order to modify or cancel a restrictive or other covenant burdening the land or the owner. Unlike the BC Supreme Court, CRT has no jurisdiction or statutory authority to modify or cancel a restrictive covenant.

18. Section 11(1)(a)(i) of the CRTA says that the CRT may refuse to resolve a claim or a dispute within its jurisdiction if it would be more appropriate for another legally binding process or dispute resolution process.

19. The Offereins say the 2015 covenant is impermissibly uncertain and therefore invalid. They cite numerous authorities, which I have all reviewed, to support their position. They include the recent decision of *Kent v. Panorama Mountain Village Inc.*, 2020 BCSC 812. They say this provides a "complete answer" to the strata's claims. They submit this is because the bylaws at issue are premised on the validity of the 2015 covenant.

20. As the CRT cannot modify or cancel the 2015 covenant, I asked the parties to comment on whether the BC Supreme Court would be a more appropriate forum to resolve this dispute, and if the CRT should refuse to resolve this claim or dispute.

21. The strata says the 2015 covenant is clear and enforceable and the CRT should decide this dispute.

22. The Offereins say the CRT has jurisdiction to find that the restrictive covenant is merely unenforceable, without deciding on the whether it should be cancelled under the *Property Law Act.* They say the CRT has previously decided or accepted jurisdiction over disputes that require the CRT to consider the enforceability of land instruments. However, the Offereins also say that the CRT should refuse to resolve this dispute if the CRT must consider the application of the *Property Law Act* in order to evaluate the Offereins' defences.

23. I find that it is appropriate to refuse to resolve this dispute under CRTA section 11(1)(a)(i). I reach this decision for several reasons.

24. I find that the validity and enforceability of the 2015 covenant is a central issue in this dispute. The strata's claims include a claim for what is, in substance, a breach of the 2015 covenant. The other alleged bylaw breaches are also in relation to the rental booking system referred to in the 2015 covenant.

25. I find that, if I were to decide on the validity of the covenant, I would be unable to provide any finality to the parties. The Offereins acknowledge in their submissions that they may need to apply to the BC Supreme Court for the removal of the 2015 covenant. In these circumstances, I find there is a significant risk of inconsistent findings between the CRT and the BC Supreme Court.

26. In reaching my decision I considered the CRT decision of *Residential Section of The Owners, Strata Plan VR 1858 v. High Plains Sales Agency Ltd.*, 2018 BCCRT 168 (*High Plains*). In that decision, the Vice Chair considered whether the CRT should resolve a dispute about whether an owner was required under the bylaws to place its

strata lot in a rental pool operated by a section of the strata corporation. The Vice Chair ultimately decided that the CRT should continue to resolve the dispute.

27. I find this dispute is distinguishable from *High Plains* for several reasons. In *High Plains* at paragraph 47, the Vice Chair found the main issue was whether the section's bylaw was enforceable. The section's bylaw referred to compliance with "municipal bylaws, regulations or other applicable restrictions". I do not find the validity of the restrictive covenant was as central an issue in *High Plains* as it is in this dispute.

28. I have also refused to resolve this dispute under CRTA section 11(1)(a)(i). This provision did not exist at the time the Vice Chair wrote his decision. The Vice Chair instead considered whether the issues were too complex or otherwise impractical for the CRT. The Vice Chair also considered whether the BC Supreme Court would order the CRT not to resolve the dispute under section 12.3(2). Section 12.3(2) has been repealed, though section 16.3(1) is similar. Section 16.3(1) outlines what a court may consider when deciding whether it would be in the interests of justice and fairness for the CRT to adjudicate a claim. In this context, "court" refers to either the Supreme Court or the Provincial Court.

29. In my view, CRTA section 11(1)(a)(i) provides the CRT a broader discretion than the CRTA provisions before the Vice Chair in *High Plains.* As noted above, CRTA section 11(1)(a)(i) says the CRT may refuse to resolve a dispute if the claim would be more appropriate for another legally binding process or dispute resolution process.

30. I find the BC Supreme Court is the more appropriate venue, but I do not reach my decision out of any concern that the issues in this dispute are too complex or impractical for the CRT. Instead, I am mindful of the BC Court of Appeal's comments in *Paterson v. Burgess*, 2017 BCCA 298. At paragraph 29, the court said, "Particularly where a judge is considering cancelling a covenant rather than modifying it, consideration must be given to all of the consequences of cancelling the covenant, not just those that arise in one particular situation".

31. The CRT cannot cancel the 2015 covenant. However, I have considered the broader implications of proceeding with this dispute. If I found the 2015 covenant was

unenforceable, the strata and the other owners in the strata would be placed in an uncertain position. The 2015 covenant would still be registered against the strata lots. The Offereins, or any other strata lot owner in the strata, would be free to litigate essentially the same issue before the BC Supreme Court. Until then, the continued viability of the entire rental booking system would potentially be threatened. This is because the strata runs itself as a condominium hotel, which requires broad participation by its owners. This participation is enforced, in part, by the 2015 covenant.

32. I also have some concerns over the fact that the 2015 covenant is registered in favour of the Province, but the Province is not a party to this dispute. In *High Plains* the holder of the restrictive covenant, the Resort Municipality of Whistler, provided submissions. The Province has not had the opportunity to provide evidence or submissions in this dispute. This is another difference between *High Plains* and this dispute.

33. Finally, I do not find it would be an efficient use of CRT resources for this dispute to proceed if the issues will need to be relitigated in the BC Supreme Court.

34. For those reasons, I find the BC Supreme Court is the more appropriate venue for this dispute.

CONCLUSION

35. In summary, I find the BC Supreme Court is the more appropriate venue for this dispute. I refuse to resolve this dispute under section 11(1)(a)(i) of the CRTA.

36. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As I have refused to resolve this dispute, I find it appropriate to refund the strata's CRT fees, and for each party to bear their own expenses.

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

David Jiang, Tribunal Member