Civil Resolution Tribunal

Date Issued: February 8, 2021

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Civil Resolution Tribunal

Indexed as: *Easton v. The Owners, Strata Plan VIS 6371*, 2021 BCCRT 147

B E T W E E N :

STEWART EASTON, CATHERINE POOLE, IRIS HENSLOWE, MERRILEE STUART, DEVRON GABER, BRAD COOK, ZHE PENG, NORTON LUCYK, LIANA CHOUINARD, CHERYL RIGLIN, NANSY MARSIGLIA, PETER JENNINGS, LILY DANIELSEN, TOM DAGG, LILO BINAKAJ, IVAN SWEDBERG, LAWRENCE FALCONER, and LOUISE LANGLEY

APPLICANTS

A N D :

The Owners, Strata Plan VIS 6371

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This dispute is about allocation of common hydroelectric (hydro) expenses between owners of different strata lot types.

2. The 18 applicants, Stewart Easton, Catherine Poole, Iris Henslowe, Merrilee Stuart, Devron Gaber, Brad Cook, Zhe Peng, Norton Lucyk, Liana Chouinard, Cheryl Riglin, nansy Marsiglia, Peter Jennings, Lily Danielsen, Tom Dagg, Lilo Binakaj, Ivan Swedberg, Lawrence Falconer and Louise Langley, all own or co-own townhome strata lots in the respondent strata corporation, The Owners, Strata Plan VIS 6371 (strata). The strata consists of townhome type strata lots and apartment type strata lots, as designated in the strata's bylaws.

3. The applicants say the strata's current method of allocating common property hydro costs to each strata lot owner according to unit entitlement is significantly unfair to the townhome owners. They say they should not have to pay for hydro used in the internal common property areas of the apartment buildings, as those areas are inaccessible to the townhome owners. The applicants ask that the strata be ordered to redistribute the common hydro expenses more fairly by either rewiring the electricity and installing separate hydro meters, passing a unanimous resolution to allocate the hydro expenses other than by unit entitlement, or reimposing sections in the strata.

4. The strata agrees that the applicants should not have to pay for electricity from which they do not receive any benefit. The strata agrees with the applicants' requested resolution to separate the apartment type common property hydro from the common property hydro for all owners.

5. The applicants are represented by Mr. Easton. 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 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. Is the current allocation of common property hydro expenses significantly unfair to the applicants and, if so, what is the appropriate remedy?

BACKGROUND AND EVIDENCE

11. In a civil claim such as this one the applicants must prove their claim on a balance of probabilities. I have reviewed all the evidence and submissions provided by both parties, but only refer to that necessary to explain my decision. The facts are largely undisputed.

12. The strata was created in August 2007. The strata has 42 townhouse-style residential strata lots and 51 apartment-style residential strata lots. The apartment strata lots are divided between buildings A and B.

13. The strata complex has 5 common property hydro meters, 1 on each apartment building and 3 more throughout the strata complex. The strata receives a separate hydro invoice for each meter, on a monthly basis.

14. Each apartment building's electrical panel supplies electricity to the building's internal common property areas including hallways, underground parking lot, and the elevator. Those internal common property areas are not accessible to the townhome owners and so the electricity for those areas benefits only the apartment owners.

15. The parties agree that, in approximately 2011, the strata discovered that the apartment buildings also supplied electricity to the buildings' external lights, pathway lighting, and other lights around the strata complex, which benefit all strata lot owners.

16. In 2007 the strata filed its first set of amended bylaws and created separate sections for the apartment style strata lots and the townhome style strata lots. On July 23, 2012 the strata filed a new set of amended bylaws at the Land Title Office. The new bylaws removed the sections but created apartment types and townhome types with bylaw 31.

17. Bylaw 31 says that an operating expense which relates to and benefits only one of the 2 types of strata lots will be charged to only the owners of that strata lot type. Each owner's share is calculated according to that owner's unit entitlement and the total unit entitlement of all strata lots in the type.

18. Based on the strata's operating budgets between 2007 and 2016 I find the strata historically allocated the common hydro expenses from the apartment buildings' 2 hydro meters to the apartment section or type strata lots and allocated the remaining common property hydro expenses to all strata lot owners.

19. The strata's allocation of the common hydro expenses was the subject of 2 prior CRT disputes. In *Paterson v. The Owners, Strata Plan VIS 6371,* 2018 BCCRT 94 (*Paterson* 2018) an apartment owner raised the issue of how the strata allocated certain common property expenses, including the hydro expenses. A tribunal vice chair considered sections 1 and 91 of the *Strata Property Act* (SPA), and section 6.4

of the *Strata Property Regulation* (Regulation) and found that the strata's hydro, plumbing, electrical, gutter and window cleaning expenses were common expenses to be shared by all owners by unit entitlement, rather than by strata lot type. The vice-chair ordered the strata to allocate an operating expense to 1 type of strata lot only if that expense was exclusive to that type. At paragraph 24 the vice chair said:

> 24. Hydro is a common operating expense that should be paid from the operating fund, as it occurs more often than once a year. A hydro expense is not exclusive to only 1 strata lot type. Rather, it relates to both the apartment and the townhouse strata lot types. This fact is supported in the evidence about how the various hydro meters supply electricity to areas common to both strata lot types. Therefore, hydro is an operating expense that must be assessed to all strata lots based on unit entitlement, as submitted by the owner. I order the strata to do so, in accordance with the SPA and the strata's bylaws.

20. As a result of the decision in *Paterson* 2018, the strata reallocated the "apartment common property hydro expenses" to all owners, according to unit entitlement.

21. On February 21, 2019, the strata filed new bylaw 43, which created a user fee for the common hydro expenses. The bylaw allocated 97.8% of building A's hydro costs and 97.3% of building B's hydro costs to the apartment type owners and the remaining common hydro expenses to all owners, according to unit entitlement. According to the strata's February 20, 2019 AGM minutes, the purpose of bylaw 43 was to ensure the owners who benefitted most from building A and B's common hydro would be responsible for paying the majority of those hydro expenses.

22. In *Paterson v. The Owners, Strata Plan VIS 6371*, 2019 BCCRT 760 (*Paterson* 2019), another tribunal vice-chair found bylaw 43 unenforceable because it contravened section 99 of the SPA and sections 6.4(2) of the Regulations which require common strata expenses to be allocated to all owners according to unit entitlement. The vice chair considered that the 2 building meters measured electricity used within the interior building common property and the exterior common property of the strata

complex itself so therefore the hydro was used by all strata lot owners and the expense should be shared amongst all strata lot owners.

23. At the February 26, 2020 annual general meeting (AGM) the strata proposed spending up to $12,000 from the contingency reserve fund (CRF) to relocate the exterior lighting circuits for the apartment buildings to a separate electric panel and meter base to allow for separate hydro meter readings (Resolution 9.1). The applicants say that it was the strata's intention to allocate the hydro expenses for external lighting to all strata lot owners and to allocate the hydro expenses for the apartment buildings' internal common property to the apartment type owners only.

24. The parties agree that Resolution 9.1 received 72% of votes at the February 26, 2020 AGM and so did not pass. Neither party submitted the AGM minutes.

REASONS AND ANALYSIS

25. Section 91 of the SPA says that the strata corporation is responsible for paying the common expenses of the strata. Common expenses that occur at least once per year are paid for out of the strata's operating fund, while common expenses that occur less often than once per year are paid out of the CRF. I find the strata's common property hydro expenses should be paid from the operating fund.

26. Under sections 92 and 99 of the SPA 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. It is undisputed that there has been no unanimous vote to calculate strata fees other than by unit entitlement here.

27. The general rule under the SPA is that, in a strata corporation, "you are all in it together" (see *Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085 at paragraph 35). 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 with some exceptions, such as where the strata has passed a unanimous

resolution otherwise or has created sections under Part 11 of the Regulations (see *Coupal v. Strata Plan LMS 2503,* 2004 BCCA 552 and *Polway v. Owners, Strata Plan K69,* 2012 BCSC 726). I find another exception occurs when the strata creates types, as is the case here.

28. Section 6.4 of the Regulation allows a strata to allocate an operating fund expense that "relates to and benefits" only one type of strata lot to the owners of that type of strata lot, provided the types are established in the strata's bylaws. Each owner's share is based on unit entitlement of that owner's strata lot, and the total unit entitlement of all strata lots of that type.

29. At paragraph 18 of *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259,* 2004 BCCA 597, the court said "relates to and benefits only one type of strata lot" means the expense benefits one type of strata lot "exclusively". As the hydro expenses for each apartment building currently include external lighting common property expenses I find those expenses currently benefit all strata lot owners, as they all have access to, and benefit from, external lighting throughout the complex. Because all owners benefit from the external lighting, they must pay the associated expenses. As stated at paragraph 18 of *Ernst*, section 6.4 of the Regulation does not provide for any apportionment of an expense amongst types of strata lots.

30. Prior CRT decisions are not binding on me, but they are persuasive. I agree with the vice-chairs' decisions in *Paterson* 2018 and *Paterson* 2019 and find that the strata's common hydro expenses must be allocated to all strata lot owners by unit entitlement, as this is consistent with the SPA and Regulation. This is because each of the strata's 5 common property hydro meters service at least some common property which provides light and benefit to all strata lot owners.

31. I turn now to consider whether the strata's decision to allocate hydro expenses across all strata lots, by unit entitlement, is significantly unfair to the applicants.

32. Section 123(2) of the CRTA gives the CRT the power 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. Significantly unfair conduct must be more than

mere prejudice or trifling unfairness (see *Dollan v. The Owners, Strata Plan BCS 1589,* 2012 BCCA 44). Significantly unfair means conduct that is oppressive or unfairly prejudicial. "Oppressive" is conduct that is burdensome, harsh, wrongful, lacking fair dealing or done in bad faith, while "prejudicial" means conduct that is just and equitable (see *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed in 2003 BCCA 126).

33. The test for significant unfairness established in *Dollan* was restated in *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 28:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

34. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, the court determined that the reasonable expectations portion of the *Dollan* test may apply where the strata council is exercising its discretion but is problematic when applied to a fundamental decision of the owners, such as the passage of a bylaw. The court reasoned that the reasonable expectations test would mean that each owner would have a veto over decisions of the owners as a whole, which would effectively undermine the strata's right to make democratic decisions.

35. In this dispute, I find the strata council was not exercising its discretion when allocating the common property hydro expenses. Rather, the strata council was acting on the direction of the CRT following the decisions in *Paterson* 2018 and *Paterson* 2019. Applying the court's analysis in *Kunzler,* I find the reasonable expectations test cannot apply in these circumstances because the strata did not have discretion in deciding how to allocate the common property hydro expenses. Rather, the strata was following the orders issued by the CRT.

36. I find the test the applicants must meet is whether their expectations were violated by a significantly unfair action of the strata.

37. I find the applicants' expectation is that the common property hydro expenses be allocated according to usage or benefit, rather than unit entitlement. I agree with the applicants that this was the intention of the owner developer and the initial strata in creating sections and allocating hydro expenses to each section in the 2007 bylaws. However, those bylaws, and the sections, were repealed in 2012. So, I give little weight to how the strata structured its common expenses under those now repealed bylaws.

38. In *Poloway v. Owners, Strata Plan K692,* 2012 BCSC 726 the court considered whether allocating a significant special levy to repair apartment buildings to all owners in a mixed apartment and townhouse strata was significantly unfair. There the court looked at several factors in determining significant unfairness including the general scheme of the SPA, the strata's historical approach to similar issues, the strata's other general conduct, the expense involved, and the degree of benefit between types of strata lots. Although the court in *Poloway* considered a special levy, rather than operating expenses, I find the approach fair and reasoned and adopt it here.

39. First, as noted above, the SPA creates a scheme that "all owners are in it together" (see *Alvarez*). Although bylaw 32 allows the strata to allocate expenses to one type of strata lot, the expense must "relate to and benefit" only that type of strata lot. I find that not to be the case here, as the strata's common property hydro expenses benefit all strata lot owners due to the exterior lighting on common property accessible to all owners. So, in allocating the common hydro expenses according to unit entitlement, I find the strata is complying with the SPA and its own bylaws. This weighs against a finding of significant unfairness.

40. The courts have implicitly accepted that compliance with a prescribed cost allocation scheme is a strata decision that is reviewable for significant unfairness, even if the strata is acting in accordance with the legislation (see *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, at paragraph 58). As noted in *King Day*, the courts also look to the relative benefit of the expense, past allocation practices, and any written agreements between the type owners to determine whether

the legislatively correct allocation is significantly unfair. So, I find the strata's compliance with the SPA is not, on its own, determinative.

41. Second, I find the strata's historic approach to allocation of hydro expenses has been mixed. I acknowledge that, between 2007 and 2016, the strata allocated the apartment building hydro expenses to the apartment sections, or types. However, given the strata did not know that the apartment electrical panels also provided electricity for the strata complex's outdoor and pathway lighting, I find it likely that the strata allocated the hydro in that manner on the mistaken assumption that only the apartment owners benefitted from that expense. I find this is not a strong argument that such mistaken allocation should continue.

42. While the strata continued to allocate the apartment building hydro expenses to the apartment type after 2011 I find that it caused some tension amongst owners, based on complaints made to the strata in 2015 and the 2 prior CRT disputes, both filed by apartment owners. I find there is no historical approach to allocating the apartment building hydro expenses based on agreement or facts.

43. I disagree with the applicants that the owner developer made a mistake in wiring the apartment buildings to provide hydro which benefitted both the apartment type and townhome type strata lots, but did so disproportionately. I place no weight on the emailed statements the applicants provided as they do not identify how the authors have any experience to comment on industry practice in electrical wiring. Further, neither of the authors saw the apartment buildings' electrical panels or considered the history of the strata complex. I do not find that the apartment type owners are benefitting from the owner developer's alleged mistake.

44. Third, there is no allegation that the strata has otherwise acted unfairly to the applicants, or other townhome owners. There is no allegation, or evidence, of any other contentious common operating expense.

45. Fourth, I accept that the hydro expenses for both apartment buildings disproportionately benefit the apartment type owners. I find approximately 97.83% of building A's common property hydro consumption is for building A's internal common

property while approximately 97.39% of building B's common property is for building B's internal common property. I take my findings from the January 24, 2019 report of Robert Elvedahl, certified journeyman electrician, which I accept as expert evidence under the CRT rules. Based on these findings, I find the apartment owners benefit significantly more from the buildings' hydro expenses than do all owners together, who benefit only from the outdoor lighting powered by less than 5% of the apartment buildings' hydro expense. This factor weighs in favour of a finding of significant unfairness.

46. However, I find the expense associated with the disproportionate allocation of hydro expenses is not significant. The strata provided a 2019 spreadsheet showing each strata lot owner's proposed common property hydro user fee, under bylaw 43, which is unenforceable. The spreadsheet used the percentages found in Mr. Elvedahl's report and applied them to each strata lot, according to type and unit entitlement. Based on that spreadsheet, the annual hydro user fee would have been approximately $360 to $620 for apartment type owners, and $6 to $10 for townhome owners, depending on unit entitlement. I find this results in an annual cost of between $350 to $600 for townhome type owners for hydro expenses used only by apartment type owners.

47. I also consider the letter Ms. Paterson distributed to the owners prior to the February 26, 2020 AGM. Ms. Paterson, an apartment owner and former strata council member, pointed out that, in the same way the townhome owners did not benefit from the hydro used in the apartment building's internal common property, neither did the apartment owners benefit from expenses benefitting the townhome owners, such as garage door repair. I find the annual cost of the common property hydro expenses which the townhome owners do not benefit from must be balanced against other strata common expenses which benefit the townhome owners more than apartment owners, such as garage door repair, or yard landscaping. Considering the disproportionate common property hydro expenses, in combination with other strata common expenses which benefit townhome type owners more than apartment type owners, I find an annual cost of $350 to $600 for townhome owners is not a significant expense.

48. On balance, given all the considerations above, I find the strata's allocation of common property hydro expenses are not significantly unfair. I find the strata's conduct in allocating the common property hydro expenses according to unit entitlement is not oppressive or unfairly prejudicial to the townhome type owners.

49. I have also considered whether the failure of Resolution 9.1 is a significantly unfair action of the strata and find that it is not. As noted in *Kunzler*, caution must be taken when overriding a democratic process of the strata owners. I find the owners' failure to pass Resolution 9.1 at the 2020 AGM is a democratic process. There is no indication that the process was flawed or incorrect. Rather, the applicants argue that the owners, as a whole, were confused about whether an additional separate meter for outdoor lighting would allow the strata to allocate the remaining apartment building indoor common property hydro expenses to the apartment type strata lots only. This suggests to me that the owners, as a whole, required more information and advice before deciding whether to move forward with Resolution 9.1. It does not indicate a situation where a majority of owners "stand on their legal rights" and insist on unit entitlement allocation of common property expenses in an oppressive or unfairly prejudicial manner, as described at paragraph 69 of *King Day*.

50. As I find there is no significant unfairness here, I find the applicants are not entitled to any of the orders they sought. I dismiss the applicants' claims.

51. The applicants also ask for guidance on whether the common property hydro expenses could be allocated between strata lot types if Resolution 9.1 had been passed. I find this is effectively a request for legal advice, which is not within the role or mandate of the CRT.

52. The applicants refer to *Section 1 of The Owners, Strata Plan BCS 3495 et al v. The Owners, Strata Plan BCS 3495,* 2019 BCCRT 707, where another vice-chair provided comments to aide the parties with cost allocation amongst themselves. I find the vice-chair's comments in that decision were practical, rather than legal in nature. He pointed out factors the parties should consider before choosing between alternate resolutions. Here, the parties are seeking legal opinion on a potential future event.

While I acknowledge that recognizing the parties' ongoing relationship is part of the CRT's mandate, I find providing legal advice is not.

53. In accordance with the CRT and the CRT rules, I find the applicants are not entitled to reimbursement of their CRT fees, as they were unsuccessful in this dispute.

ORDER

54. I dismiss the applicants' claims and this dispute.

Sherelle Goodwin, Tribunal Member