Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

RASHIDA MERCHANT, KEVIN CHAN, TUNG CHI TRAN, XI RUN ZHU and HOA NGUYEN

APPLICANTS

A N D :

The Owners, Strata Plan LMS 992

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This dispute is about the calculation of strata fees.

2. The applicants, Rashida Merchant, Kevin Chan, Tung Chi Tran, Xi Run Zhu and Hoa Nguyen, own or co-own 5 of the 8 townhouse strata lots in the respondent strata

corporation, The Owners, Strata Plan LMS 992 (strata). The strata also includes a tower, which the parties say includes residential and commercial strata lots.

3. The strata changed the way it calculated strata fees in the 2019/2020 operating budget. Strata fees for the townhouse strata lots increased more than strata fees for other strata lots. The applicants seek an order that the strata "break down" each budget expense category among tower, townhouse and commercial strata lots. They also say the strata should have sections for tower, townhouse and commercial strata lots.

4. The strata says it calculated strata fees based on unit entitlement as required by the *Strata Property Act* (SPA), with exceptions for certain expenses that it says resulted in lower fees for the townhouse occupants than if it had simply used unit entitlement under the SPA. I infer that it asks me to dismiss the dispute.

5. The applicants are represented by a non-lawyer family member of Rashida Merchant. The strata is represented by a strata council member.

6. For the reasons that follow, I dismiss the applicants' claims.

JURISDICTION AND PROCEDURE

7. 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.

8. 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.

9. 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.

10. 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.

11. The applicants raised other issues in their submissions, including issues about access to financial records, the strata's manager being dishonest about following the bylaws, and a $1.8 million special levy for work they say the strata only received one quote for. The applicants did not provide evidence that they made a request for documents under section 36 of the SPA, and they did not provide particulars about the other issues. The applicants also did not request remedies related to these issues, so I have considered them only as context to the claim about strata fee calculation.

ISSUES

12. The issues in this dispute are:

    a. How does the SPA require the strata to calculate contributions to its budget?

    b. Was the strata's decision to calculate contributions for its 2019/20 budget significantly unfair to the applicants?

    c. What remedies, if any, are appropriate?

EVIDENCE AND ANALYSIS

13. As this is a civil dispute, the applicants must prove their claims on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.

14. The strata was created in 1993 and includes 63 strata lots, 8 of which are shown on the strata plan as townhouses.

15. In this decision I adopt the parties' language in referring to the strata lots as being either townhouse, commercial (3 strata lots on the first floor of the tower) or tower (51 apartment-style residential strata lots). However, I note the strata plan does not indicate any non-residential strata lots. It is also undisputed that the strata has not created sections under Part 11 of the SPA.

16. The strata says its fiscal year end is November 30. It says its 2019 AGM was delayed because it ended its contract with its previous strata manager in November 2019. It says the new strata manager was not able to analyze the strata's financial data and prepare a budget until July 2020. None of this is disputed. The strata acknowledges that section 40(2) of the SPA requires AGMs to be held no more than 2 months after a strata corporation's fiscal year end.

17. The strata's 2019/20 budget proposed an increase in total strata fees from $247,014 to $281,014, or 13.76%. Each strata lot's strata fees increased. The average increase for tower strata lots was around 6%, the average increase for commercial strata lots was around 26%, and the average increase for townhouse strata lots was around 53%. For the first time, the majority of expense contributions were shared by all strata lots according to unit entitlement. Only electricity, gas, garbage and elevator expenses were separated among the townhouse, commercial and tower strata lots. The townhouses did not pay for gas or elevator expenses.

18. The AGM notice did not explain how the strata arrived at this allocation of expenses. The notice attached what is labelled as bylaw 52, which purports to set out a method of calculating the strata's annual budget with categories of expenses divided among tower, townhouse and commercial strata lots. However, bylaw 52 was not followed, as it provides for different allocation of several other expense categories beyond electricity, gas, garbage and elevator.

19. According to the August 4, 2020 AGM minutes, the motion to approve the 2019/20 annual budget was carried. There is no record of the number of votes in favour or

opposed, but the applicants do not allege the budget motion did not receive majority approval, as required under the SPA.

20. I pause to note there is no record of a bylaw 52 having been filed in the Land Title Office (LTO). Under section 128(2) of the SPA, bylaw amendments have no effect until they are filed in the LTO. Bylaw 51 was filed on December 12, 2002, and subsequently amended on February 21, 2003. Bylaw 52 is slightly different from bylaw 51 but the difference is not material in this dispute. In the rest of this dispute I will refer to bylaw 51, as amended February 21, 2003.

21. Bylaw 51 says the strata's annual operating budget will be calculated according to a 2-column table with headings for "category" (of expense or contribution) and "method of calculation". The calculation methods include "square footage", "unit" (not explained), "calculated" (not explained), "100% residential", or a given percentage for each of tower, townhouse and commercial.

22. The applicants say the 2019/20 budget is unfair and serves to keep costs down for the majority (tower owners) at the expense of the minority (townhouse and commercial owners). They argue that the strata has used something close to bylaw 51's calculation method since 1995 and that this method complies with the SPA.

23. The strata says the 2019/20 budget calculation method was chosen to align "as closely as possible with" the SPA, to be as fair as possible for all owners, and to simplify the repair and maintenance budget given the age of the building.

How does the SPA require the strata to calculate contributions to its budget?

24. Generally speaking, the strata is responsible for repairing and maintaining common property under section 72 of the SPA. The strata is also responsible for common expenses under section 91 of the SPA.

25. To meet its expenses, the strata must establish, and the owners must contribute by strata fees, an operating fund for annually recurring common expenses, and a

contingency reserve fund (CRF) for less frequent expenses, under section 92 of the SPA.

26. Section 99 of the SPA says, subject to section 100, owners must contribute their strata lots' share of contributions budgeted for the operating fund and CRF based on unit entitlement and the Regulation.

27. Section 100 provides for an exception to section 99 if a different formula is agreed to by resolution passed by a unanimous vote and registered with the LTO.

28. Another exception is found in section 195 of the SPA and regulations 11.2 and 11.3, if a strata has sections. As noted above, the strata has not created sections, so this exception does not apply.

29. Section 6.4 of the Regulation contains another possible exception. It addresses contributions to the operating fund where the contribution relates to and benefits only limited common property, in section 6.4(1), or only one "type" of strata lot, in section 6.4(2). Section 6.4 says the contributions are shared only by owners entitled to use that limited common property or owners of that type of strata lot, respectively. Section 6.4(3) says in either circumstance, contributions to the CRF or a special levy are still calculated according to unit entitlement.

30. Neither party referred to section 6.4 of the Regulation or squarely addressed the issue of whether the strata has created "types" for the purposes of section 6.4(2). In order to rely on the types exemption, the strata must have a bylaw identifying types of strata lots. I find that bylaw 51 does not identify types of strata lots. Bylaw 51 does not contain the word "types". It is simply a table. It sets out a method of calculating contributions to commercial, tower and townhouse strata lots but also, confusingly, residential strata lots. It makes no reference to the strata plan and does not attempt to identify which strata lots belong to which type. I find it is not a clear expression of an intent to establish types.

31. Even if bylaw 51 could be interpreted as identifying types of strata lots for the purpose of section 6.4 of the Regulation, I would find it unenforceable. This is because I find,

in order to rely on a types bylaw, the strata must have enacted its types bylaw before January 1, 2002, as required by section 17.13 of the Regulation. This is consistent with the reasoning in *Coupal v. Strata Plan LMS 2503*, 2004 BCCA 552 (at paragraph 55), endorsing *Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085. Bylaw 51 was first approved at a special general meeting (SGM) on March 25, 2002 and registered at the LTO December 12, 2002. So, I find it does not comply with the transitional provisions in section 17.13 of the Regulation and is unenforceable.

32. Turning back to section 100 of the SPA, the applicants argue there was a unanimous vote approving the bylaws on January 29, 2002, which I infer they suggest satisfied the requirements for unanimous resolution under section 100.

33. The bylaws filed with the LTO as a result of the January 29, 2002 AGM stop at bylaw 50. Bylaw 51, as noted above, was first approved at an SGM on March 25, 2002 and registered at the LTO December 12, 2002. The SGM minutes show that the vote on the resolution was not unanimous as there were only 23 ballots cast and 3 were cast against the resolution.

34. The applicants argue that bylaw 46 saves bylaw 51, as it states that all bylaws are passed by a ¾ vote. Bylaw 46 discusses the differences between bylaws and rules, what each can address and where they are filed. I find bylaw 46 simply restates the SPA's treatment of bylaws and rules. Even if bylaw 46 could be read as purporting to negate section 99, section 121(1)(a) of the SPA says that a bylaw is not enforceable to the extent it contravenes the SPA or the regulations.

35. The applicants provided AGM minutes from certain years dating back to 1995. It is true that the budget was passed unanimously by those in attendance at many AGMs, but I find these AGM budget decisions do not meet the requirements of section 100 of the SPA. They were not unanimous votes in favour of a resolution by all the eligible voters (not just those in attendance), and they were not filed with the LTO.

36. In summary, I find the strata has not passed a resolution under section 100, does not have sections, and does not have a valid bylaw creating types for the purpose of section 6.4 of the Regulation. As a result, the owners were required to contribute their

share of the contributions budgeted for the operating fund and CRF in proportion to unit entitlement of all strata lots according to section 99 of the SPA.

Was the strata's decision to calculate contributions for its 2019/20 budget as it did significantly unfair to the applicants?

37. The applicants argue that the strata's decision to change the allocation of contributions to the annual budget was unfair. Section 123(2) of the CRTA allows the CRT to make orders directed at the strata to prevent or remedy a significantly unfair action, decision, or exercise of voting rights.

38. Significantly unfair conduct is conduct that is oppressive in that it is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith, or conduct that is unfairly prejudicial in that it is unjust or inequitable. Where the significant unfairness in question involves allegedly oppressive conduct, a modified reasonable expectations test forms part of the inquiry (*King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851,* 2020 BCCA 342).

39. The reasonable expectations test was restated in *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164:

    a. What is or was the owners' expectation?

    b. Was that expectation objectively reasonable?

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

40. The applicants ask for an order that the strata "break down" each budget expense category among tower, townhouse and commercial strata lots. If their expectation is that the strata continue to follow bylaw 51 in allocating the budget contributions, that expectation may be objectively reasonable despite the bylaw being unenforceable. This is because it is undisputed that the strata has used something approximating bylaw 51's budget allocation method for 25 years.

41. Until recently, BC courts had held that direct compliance with a specific provision of the governing legislation cannot be significantly unfair (see *Liverant v. The Owners,*

Strata Plan VIS-5996, 2010 BCSC 286). However, in *King Day*, the court held that compliance with a prescribed cost allocation scheme is a decision that is reviewable for significant unfairness. So, I find the strata's attempt to bring itself closer to compliance with section 99 of the SPA is not, on its own, determinative.

42. In *King Day*, the court considered past allocation practices, the relative benefit of the expenses, and written agreements between the parties to determine whether compliance with section 99 of the SPA was significantly unfair. However, the facts in *King Day* were extraordinary. In *King Day*, the strata building comprised hotel, commercial and parkade strata lots. A company named Retirement Concepts owned the majority of the hotel lots, which comprised the majority of the strata lots. The parkade lots, owned by King Day, benefited little, if at all, from several of the operating costs, such as cleaning, gas, hot water, and repair and maintenance. Retirement Concepts had also proposed 2 special levies for $1.9 million that solely benefited the hotel but required King Day to contribute according to unit entitlement of 30%, rather than the previously-agreed 18%. As well, the court was concerned that Retirement Concepts had taken these steps when King Day rejected its attempts to purchase the parkade lots.

43. The present facts are distinguishable from those in *King Day.* There is no evidence that the majority of the tower strata lots are owned by a single entity seeking to exert its will on the townhouse owners. There is no evidence the strata is seeking to make the townhouse owners contribute unfairly to a significant one-time expense that will only benefit the tower strata lots. Moreover, the applicants have not provided evidence that the townhouse strata lots do not benefit at all from particular operating expenses they have been required to pay. None of the key factors that indicated significant unfairness in *King Day* are present here.

44. I acknowledge that a 53% increase in strata fees is substantial and came as a surprise to townhouse strata lot owners. However, the townhouse owners have benefited by paying substantially lower strata fees than they should have under the SPA since it came into force on July 1, 2000. As well, the 2019/2020 budget did not comply with

section 99 of the SPA, and this resulted in the townhouse owners paying lower strata fees than they should have.

45. I find the increase in strata fees did not arise from a significantly unfair decision of the strata. The strata hired a new strata manager and this led to an attempt to bring the strata closer into compliance with section 99 of the SPA. There was no bad faith or unduly harsh or burdensome conduct. To be clear, I find the strata has not complied with section 99 of the SPA because it apportioned some contributions by a method other than unit entitlement. Although the strata is required to comply with section 99, the applicants have not asked for an order to that effect. As the strata did not file a counterclaim, I find it would be inappropriate order a recalculation of strata fees in a way that would result in the applicants paying more.

46. In summary, although the strata's 2019/20 budget decision was contrary to the SPA, I find it was not significantly unfair to the applicants. I therefore dismiss the applicants' claims.

47. In submissions, the applicants say the creation of sections would address their concerns, and they ask for the CRT's help in creating sections. Sections are created under section 193 of the SPA, and require a resolution passed by a ¾ vote and a sectional ¾ vote. The general principle is that the democratic government of the strata community should not be overridden by a court or the CRT except where absolutely necessary: *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493. The courts have also held that the fact that a minority of owners fear being outvoted does not justify intervention in democratic strata governance: *Oldaker v. The Owners, Strata Plan VR 1008*, 2010 BCSC 776. With these principles in mind, I find it would not be appropriate given the evidence before me to order the strata to create sections.

CRT FEES AND EXPENSES

48. In accordance with the CRTA and the CRT's rules, as the applicants were unsuccessful, I find they are not entitled to reimbursement of CRT fees. Neither party claimed any dispute-related expenses.

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

ORDERS

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

Micah Carmody, Tribunal Member