



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Robert v. The Owners, Strata Plan NES2402*, 2021 BCCRT 536

B E T W E E N :

FRANCOIS ROBERT and JOANNE HENault

APPLICANTS

A N D :

The Owners, Strata Plan NES2402

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. This dispute is about the calculation of monthly strata fees.
2. The applicants, Francois Robert and Joanne Henault, own a strata lot in the respondent strata corporation, The Owners, Strata Plan NES2402 (strata).

3. The applicants say the strata has incorrectly calculated strata fees for all 144 strata lots, including the applicants. The applicants seek an order that the strata retroactively calculate the strata fees correctly under section 99 of the *Strata Property Act* (SPA) and reimburse the applicants and other owners that have overpaid their strata fees.
4. The strata agrees that it historically calculated strata fees incorrectly and in contravention of the SPA. It says it calculated strata fees correctly for the fiscal year ending January 31, 2021 (2020-2021 fiscal year) and will continue to do so in the future. The strata says there is no legally viable process to raise the funds to reimburse all the owners who historically overpaid strata fees. It also says the applicants' claims are limited to a 2-year period under the *Limitation Act*.
5. Mr. Robert represents the applicants. The strata is represented by a strata council member.
6. As explained below I find the applicants' claim is limited to the strata fees for the fiscal year ending January 31, 2020 (2019-2020 fiscal year) under the *Limitation Act*. I find the strata must recalculate the strata fees for that fiscal year to determine how much each strata lot overpaid or underpaid strata fees for that year and adjust each strata lot's account accordingly.

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. Under section 61 of the CRTA, the CRT may make any order or give any direction in relation to a CRT proceeding it thinks necessary to achieve the objects of the CRT in accordance with its mandate. The CRT may make such an order on its own initiative, on request by a party, or on recommendation by a case manager.

ISSUES

12. The issues in this dispute are
 - a. Are the applicants' claims limited to the 2-year limitation period under the *Limitation Act*?
 - b. Must the strata remedy the incorrectly calculated strata fees and, if so, how?

EVIDENCE AND ANALYSIS

13. In a civil claim such as this one the applicants must prove their claim on a balance of probabilities. I have reviewed all submissions and weighed all evidence provided by both parties, but only refer to that necessary to explain my decision. The facts are largely undisputed
14. The strata was created in 2002 and consists of 144 residential strata lots in 3 buildings. Strata lots 1 to 48 are in the Poplar building, strata lots 49 to 96 are in the Willow building and strata lots 97 to 144 are in the Birch building. In 2016 the applicants purchased strata lot 136 (SL 136) which is apartment 302 in the Birch building.

15. Under sections 92 and 99 of the SPA, strata lot owners must pay monthly 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 are calculated based on each strata lot's unit entitlement. The fees are calculated as each strata lot's percentage of the total unit entitlement for all lots in the strata, multiplied by the strata's annual budget, including contingency reserve fund contributions. It is undisputed that there has been no unanimous vote to calculate strata fees other than by unit entitlement here.
16. The SPA and the *Strata Property Regulation* (Regulation) allow a strata to allocate operating expenses differently to, and thus calculate strata fees differently between separate sections or types of strata lots in certain circumstances. I find these exceptions to SPA section 99 do not apply here. Based on the strata's meeting minutes, I find it approved bylaw establishing different types of strata lots on December 13, 2020. However, the new bylaw did not come into effect until it was filed in the LTO (SPA section 128(2)) So, I find the new bylaw creating different types of strata lots does not apply to the strata's fee calculations before the 2020-2021 fiscal year, which are at issue here.
17. I find the SPA required the strata to allocate common expenses equally amongst the 144 strata lots prior to filing the types bylaw, despite the separate buildings. Further, the SPA required the strata to calculate strata fees based on each strata lot's unit entitlement as a percentage of the total of all strata lots unit entitlements in all 3 buildings. It is undisputed that the strata has not historically done so.
18. The strata acknowledges that it has historically created separate budgets for each of the 3 buildings. This is consistent with the 2012, 2016, 2017 and 2019 strata budgets submitted in evidence by the parties. Specifically, the strata historically charged lower strata fees to the Poplar building owners, because that building did not use propane, while the Birch and Willow buildings did. The strata acknowledges that it historically calculated each owner's monthly strata fee based on that owner's unit entitlement, the building's unit entitlement and the building's budget. I find the strata's historical

practice to calculate fees in that manner is not authorized under the SPA and Regulation.

19. The strata also acknowledges that the Schedule of Unit Entitlement it historically used to calculate strata fees is different than the one registered in the LTO. I find the strata's unregistered schedule lists incorrect unit entitlements for 61 out of the 144 strata lots, including SL 136. The 2012, 2016, 2017 and 2019 budgets show the strata used the unfiled and incorrect schedule in calculating strata fees.
20. It is undisputed that the strata calculated strata fees for the February 1, 2020 to January 31, 2021 fiscal year in accordance with section 99 of the SPA and the registered schedule of unit entitlement. This is supported by the information package and minutes for the March 28, 2020 annual general meeting (AGM).
21. I turn now to the applicants' claim for the strata to fix its past errors in miscalculating strata fees.

Limitation Act

22. The strata says the applicants' claim for overpayment of strata fees is subject to the 2-year general limitation period in the *Limitation Act* (LA).
23. Section 13 of the CRTA confirms that the LA applies to CRT claims. Section 6 of the LA sets out a basic limitation period of 2 years, after the claim is "discovered". Section 8 of the LA explains that a claim is discovered on the first day the person knew, or reasonably ought to know, that the loss occurred, that it was caused or contributed to by an act or omission of the person against whom the claim may be made, and that a court or tribunal proceeding would be an appropriate means to remedy the loss.
24. In a November 5, 2020 preliminary decision, a CRT vice-chair found the applicants' claims were not statute-barred by the LA but were limited to the 2-year period before they filed their dispute application on July 7, 2020. As the vice-chair stated, I am not bound by his preliminary decision.

25. Mr. Robert says he discovered the strata was incorrectly calculating strata fees in late February or early March 2019. It is undisputed Mr. Robert was a strata council member at that time and was reviewing section 99 of the SPA to determine how to correctly and fairly allocate an increase in strata fees amongst all strata lots. Mr. Robert says he only determined the strata incorrectly calculated strata fees when he read SPA section 99. Signed witness statements by 2 other strata council members confirm Mr. Robert told the strata council in March 2019 of his findings. However, this is not necessarily determinative of when Mr. Robert reasonably could have discovered the incorrect strata fee calculation and resulting overcharges.
26. I agree with Mr. Robert that the strata's yearly AGM notice said the strata fees were calculated in accordance with section 99 of the SPA. However, I do not find that Mr. Robert, and the other strata lot owners, were entitled to assume that statement was correct. The intent of providing the proposed budget and strata fee calculations prior to the AGM is to give the owners the opportunity to review and discuss the budget, including proposed strata fees, prior to voting at the AGM. Further, the yearly AGM notices submitted in evidence for 2016, 2017, and 2019 also included the actual calculations for each strata lot's fees, which clearly show each strata lot's fee was calculated as a percentage of the unit entitlement and budget for their building, rather than for the strata as a whole. While Mr. Robert may not have read SPA section 99 prior to March 2019, it was easily available to him to read, as a public document. On balance, I find the applicants should reasonably have known that the strata fees were incorrect each year they received the AGM notice setting out the yearly strata fee calculation.
27. I also find that Mr. Robert could reasonably have discovered that the strata was using an incorrect Schedule of Unit Entitlement to calculate strata fees before March 2019. This is because the strata fee calculation spreadsheets sent with each AGM notice list the unit entitlement assigned to each strata lot. I find Mr. Robert could reasonably have compared the strata's list to the registered schedule filed in the LTO. Even if the applicants did not receive a copy of the filed schedule with their purchase documents, they could have obtained it from the LTO.

28. I agree with the applicants that the facts *1009727 B.C. Ltd. v. The Owners, Strata Plan BCS 1454*, 2019 BCCRT 1071, are very different than in this dispute. In *1009727*, a CRT member found the applicants should reasonably know that its strata fees were calculated incorrectly when it purchased its strata lot. The CRT member relied on the applicant's lack of due diligence in seeking out information and the obvious difference in size between strata lots, which was not reflected in any difference in strata fees between the strata lots. I disagree with the applicants that their strata fee errors were less obvious than in *1009727*, given my finding above that the calculations were clearly laid out in the AGM notice each year.
29. As the applicants' remedies are directed at correcting the strata's budget, I find that each AGM where the strata passed an annual budget with incorrectly calculated strata fees gave rise to a new claim against the strata. So, I find that the budget passed for the fiscal year from February 1, 2019 to January 31, 2020 (2019-20) is within the limitation period, because it was approved at the March 25, 2019 AGM. Although neither party provided the strata's 2018 AGM notice or 2018-19 budget, I find the budget was likely approved at an AGM held sometime in March 2018. So, I find the 2018-19 fiscal year budget is outside the limitation period and the applicant's claim for that fiscal year's strata fees, and any prior years, are barred by the LA.

Remedy

30. The strata says that it has remedied the situation by changing the way it calculates strata fees for the 2020-2021 fiscal year and creating a building types bylaw to address the unequal propane expense amongst the 3 buildings. While I agree that this resolves the situation going forward, this does not remedy the incorrectly calculated strata fees for the 2019-2020 fiscal year.
31. The applicants ask that the strata reimburse them, and all other owners who have overpaid strata fees in the past, as set out in a June 17, 2019 email. However, the email submitted as evidence contains no attachment, or any explanation of reimbursement or rebalancing of strata fees. So, I cannot make an order based on any June 17, 2019 accounting or calculations.

32. I disagree with the strata that there is no legally viable way to raise the funds to reimburse the overpaying owners. This is because the applicants specifically ask for an order that the strata retroactively calculate the strata fees based on SPA section 99 and the correct Schedule of Unit Entitlement, such that the overpaid fees will essentially balance out the underpaid fees. In a February 2020 email a strata council member roughly calculated that the owners in the Birch building collectively overpaid \$13,606.14, the Willow owners overpaid \$6,055.51 and the Poplar building owners underpaid \$19,661.65 in strata fees over the prior 2 years. I note that this estimate does not seem to account for the unit entitlement errors and therefore cannot be taken as an accurate recalculation. However, the estimate confirms that taking an approach of recalculating the strata fees will balance the reimbursements to the over contributors against the further payments required of the under contributors, subject to any strata lots that have been sold, as discussed below.
33. This approach has been taken by other CRT members when considering how to remedy incorrectly calculated strata fees that had already been collected and spent by the strata. See, for example *Gulf Manufacturing Ltd. v. The Owners, Strata Plan BCS 1348*, 2019 BCCRT 16, *Paterson v. The Owners, Strata Plan VS 6371*, 2019 BCCRT 760, and *Carroll et al. v. The Owners, Strata Plan VIS 2499*, 2019 BCCRT 125. In each of those 3 cases, the tribunal members found the strata had calculated strata fees either contrary to the SPA, or contrary to the approved budget, which I find is also a breach of the SPA. The tribunal members in each of those cases found the strata must comply with the SPA and required the strata to correct its prior non-compliance. Although prior CRT decisions are not binding, I accept the reasoning used in these cases and apply it here.
34. I find the strata must comply with section 99 of the SPA and recalculate each owner's strata fees for the 2019-2020 fiscal year.
35. I disagree with the strata that the applicants have not proven any financial loss. The strata agrees that it calculated the 2019-2020 strata fees incorrectly and acknowledged that the owners in the applicants' building overpaid strata fees in that year. Further, the correct Schedule of Unit Entitlement shows the applicants' strata

lot has less unit entitlement than the strata used in determining the applicants' strata fees. For these reasons, I am satisfied that the applicants overpaid strata fees in 2019-2020.

36. The strata says the applicants lack standing to bring this claim on behalf of all other overpaying owners which, I accept, is approximately 94 of the 144 strata lot owners. As stated by the tribunal member in *Gulf Manufacturing*, section 163 of the SPA recognizes the importance of an owner's standing to ensure that the strata is properly governed, including to ensure the strata's finances are in order. I find the applicants have framed their claim as a governance issue, rather than a debt. I find the applicants' claim is not made on behalf of other owners, merely because some other owners may benefit. The remedy sought is directed at the strata, not at any other owners. I find the applicants have standing to bring this claim.
37. The strata says trying to correct historical miscalculations is difficult and refers to *Heliker et al v. Strata Plan VR 1395*, 2005 BCPC 500, where the court found the claimants were not entitled to reimbursement of overpaid strata fees. In *Heliker* the court determined that it was impossible to calculate over and underpaid strata fees over the years, given that the ownership of some strata lots had changed. Under the former LA the general limitation period was 6 years, not 2, which I find would further complicate retroactive calculations. Further, given the strata's estimate of the strata fee errors, I find determining who has underpaid and overpaid is not overly complicated in this case. Further, the court's comments in *Heliker* were obiter (incidental to the issues decided) because it had already found it did not have the jurisdiction to consider the strata property claim. So, I find I would not be bound to apply the reasoning in *Heliker*, even if I had not distinguished it on the facts.
38. The strata also refers to *Large, McCall et al. v. The Owners, Strata Plan No. 601*, 2005 BCSC 1128, where the court refused to order the strata to reimburse the applicants for overpayment of past strata fees. At paragraph 65 the court interpreted section 164(2) of the SPA to authorize the courts to remedy significantly unfair acts by regulating the strata's future affairs, but not necessarily by remedying the strata's past acts. Later decisions of the same court specifically rejected this approach, finding

that section 164 of the SPA permits orders governing a strata's future conduct as well as orders remedying past actions (see, for example, *Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335, at paragraph 105 and *Shaw v. The Owners Strata Plan LMS 3972 et al*, 2008 BCSC 453, at paragraph 51).

39. I have not considered the applicants' claim under section 164 of the SPA, or section 123(2) of the CRTA which grants the CRT the authority to remedy or prevent significantly unfair actions or decisions of the strata. Since the strata's historical strata fee calculations were clearly contrary to the SPA, I find I need not consider whether the impermissible calculations were also significantly unfair to the applicants. I find section 121(1) and 122(1) of the CRTA provide me with the authority to make an order that the strata "do something" to resolve this strata property dispute about strata fees and compliance with the SPA. I find this includes the authority to order the strata to recalculate the 2019-2020 strata fees in accordance with the SPA.
40. The strata says many of the owners who either underpaid or overpaid strata fees in the past have since sold their apartments and that at least 10 strata lots were sold in the last year. I agree that, for the strata lots that have been sold after January 31, 2019, the current owners are not responsible for, or cannot benefit from, the previous owners' strata fee overpayments or underpayments (see SPA section 101). So, any adjustments attributable to prior owners should necessarily be excluded from the strata's adjustments.
41. The strata has provided no evidence supporting the sale of strata lots, when the sales occurred, or which building those lots were in. So, on the evidence before me, there is no way to determine how removing the sold strata lots from any strata fee recalculation would affect the balance of underpayments to overpayments for the 2019-2020 strata fees. While I acknowledge that the sale of strata lots complicates the recalculation, I find the complication does not outweigh the strata's obligation to correct the strata fee calculation errors it made in 2019.
42. On balance, I find the best way to remedy the 2019-2020 strata fee calculation errors is to order the strata to recalculate the strata fees correctly, determine how much

each strata lot underpaid or overpaid strata fees, and apply those underpayments and overpayments to each strata lot's account. The recalculation will result in some owners owing the strata money and the strata owing other owners money. I find the underpayments and overpayments will balance out, subject to the adjustments attributable to the strata lots that have been sold. If after removing the sold strata lots from the recalculation, the strata owes more than it is owed, the strata will need to determine how to fund that net amount owing. Given the strata's rough calculation that \$19,655 was overpaid and underpaid in a 2-year period amongst 144 strata lots in 3 buildings, I find any net amount owing will necessarily be small. For this reason, and because there is no way to precisely calculate any net amount that may be owing by the strata, I decline to make an order directing the strata how to raise any funds required to satisfy that possible negative balance.

CRT FEES and EXPENSES

43. 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. I order the strata to reimburse the applicants \$225 in CRT fees. They did not claim any dispute-related expenses.
44. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants.

ORDERS

45. Within 30 days I order the strata to:
 - a. recalculate the February 1, 2019 through January 31, 2020 strata fees according to section 99 of the SPA and using the registered Schedule of Unit Entitlement, and
 - b. determine how much each strata lot overpaid or underpaid strata fees for the 2019-2020 fiscal year.

46. Within 60 days I order the strata to:
- a. apply the amount each strata lot overpaid or underpaid to each strata lot's account, excluding any strata lots that sold after January 31, 2019, and
 - b. provide each owner with a brief description of what adjustments the strata made to their strata lot account, what the current account balance is, and how the owner may address any non-zero balance.
47. Within 14 days I order the strata to reimburse the applicants \$225 in CRT fees.
48. The applicants are entitled to post-judgment interest under the *Court Order Interest Act*.
49. 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.

Sherelle Goodwin, Tribunal Member