



# Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Therrien Investments Ltd. v. The Owners, Strata Plan VIS 7041*,  
2021 BCCRT 788

B E T W E E N :

THERRIEN INVESTMENTS LTD.

**APPLICANT**

A N D :

The Owners, Strata Plan VIS 7041

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Lynn Scrivener

## INTRODUCTION

1. This dispute is about user fees for garbage removal. The applicant, Therrien Investments Ltd. (Therrien), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan VIS 7041 (strata). In 2020, the strata adopted a rule that created a user fee to allocate garbage removal costs using a formula other than unit

entitlement. Therrien says that this rule results in it paying more than its share of the garbage removal costs, which it says is both unfair and contrary to the *Strata Property Act* (SPA). Therrien asks for orders repealing the rule about garbage removal costs and requiring these costs to be allocated based on unit entitlement retroactive to July 1, 2020. The strata says the rule is valid and not contrary to the SPA.

2. Therrien is represented by a director. A member of the strata council represents the strata.

## **JURISDICTION AND PROCEDURE**

3. 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.
4. 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.
5. 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.
6. 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.

## **ISSUES**

7. The issues in this dispute are:
  - a. Whether the strata's garbage disposal rule is enforceable,
  - b. Whether the garbage disposal rule is significantly unfair to Therrien, and
  - c. What are the appropriate remedies.

## **EVIDENCE AND ANALYSIS**

8. The strata is comprised of a single commercial strata lot (strata lot 1) and 41 residential strata lots (strata lots 2 through 41). Therrien purchased strata lot 1 in 2019, and says that its unit entitlement is 19.9017%. I note that the Form V Schedule of Unit Entitlement filed at the Land Title Office on January 18, 2011 shows its unit entitlement as 19.91%. However, I find that nothing in this dispute turns on this discrepancy.
9. The strata does not have sections. Its bylaw 39, as filed at the Land Title Office on July 2, 2015, addresses types of strata lots only for the purpose of allocating the cost of natural gas services.
10. Despite there being no sections, the strata has entered into separate waste disposal contracts for the commercial and residential strata lots. The contracts involve a basic service charge for a set number of pickups, and there are added charges for additional pickups. Some of the invoices in evidence from the waste disposal contractor show charges "for use" by the commercial tenants, although it is not clear whether these charges were for additional pickups.
11. The bins associated with each contract are located on the same level of the strata's parking area. Therrien says that the parking area is open to the public during certain hours and access is not monitored. While photos in evidence show that there are signs indicating which bins are for residential and commercial use, there are no locks

or barriers restricting access to the bins. The parties disagree about whether residential waste ends up in the commercial bins.

12. Section 91 of the SPA provides that a strata corporation is responsible for its common expenses. The parties agree that garbage disposal is a common expense that falls within the definition of “common expenses” set out in section 1(1) of the SPA, and that it is paid from the strata’s operating fund. The parties disagree about how the cost of garbage disposal should be allocated.
13. Therrien says that, when it purchased strata lot 1, the strata was using a formula other than unit entitlement to allocate some expenses. Therrien says it advised the strata in April of 2020 that it would not support any further budgets where expenses were not allocated based on unit entitlement.
14. In response to Therrien’s concerns, the strata proposed a rule that would see garbage disposal expenses allocated by “user fee”. The proposed rule based the commercial strata lot’s user fee on the cost of the commercial waste disposal contract. It based the residential user fees on the cost of the residential waste disposal contract divided by each residential strata lot’s unit entitlement.
15. The proposed rule was distributed to owners in advance of the September 23, 2020 annual general meeting (AGM). The notice package also included an operating budget that allocated expenses based on the proposed rule. The proposed rule was ratified, and the operating budget approved, at the AGM.
16. Therrien disagreed with the rule and requested a hearing with the strata council. The hearing occurred on November 30, 2020. In a December 1, 2020 letter, the strata’s property manager advised Therrien that the strata council had decided not to repeal the waste disposal rule. I note that this letter also stated that the strata council might reconsider this decision after obtaining legal advice.

***Is the garbage disposal rule enforceable?***

17. According to Therrien, the impact of the garbage disposal rule is that it pays more than 60% of the strata’s total garbage disposal expenses despite holding less than

20% of the unit entitlement. Therrien says that, as a common expense, garbage disposal is not exclusive to residential or commercial strata lots and must be allocated based on unit entitlement. Its position is that the garbage disposal rule is contrary to the SPA, and is therefore unenforceable.

18. Under section 91 of the SPA, a strata corporation is responsible for its common expenses, which are defined in section 1(1) as expenses relating to common property (CP) and common assets, or required to meet any other purpose or obligation of the strata corporation. As set out in sections 92 and 99 of the SPA, the fees paid by strata lot owners fund a strata corporation's operating fund and contingency reserve fund. Sections 99 and 100 say that, unless there has been a unanimous vote to choose a different method of allocating expenses, the strata fees are calculated based on unit entitlement. The British Columbia Court of Appeal has held that, unless a strata corporation's bylaws identify types and unless the expense in question benefits only one type of strata lot, expenses must be shared based on unit entitlement (see *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597).
19. Here, there is no dispute that the strata has not passed a unanimous vote to choose a different method of allocating expenses. The parties agree that garbage disposal expenses are common expenses that are paid out of the operating fund. However, the strata says that section 6.9 of the *Strata Property Regulation* (Regulation) allows it to impose user fees for the use of CP or common assets. The strata's position is that the fact that garbage removal is a common expense does not preclude it from also being the subject of a user fee, as section 6.9 "contemplates a user fee being imposed as a means to recover an operating expense arising from a common asset". The strata submits that the garbage disposal rule complies with section 6.9, is valid, and there is no basis for its repeal.
20. Section 110 of the SPA allows a strata corporation to impose user fees for the use of CP or common assets, but says that it must not do so other than as set out in the Regulation. As noted by the strata, section 6.9(1) of the Regulation permits user fees if the fee is reasonable and set out in a bylaw or a ratified rule. In addition, section

6.9(2) specifically contemplates that user fees may be used to recover operating or maintenance costs based on, among other things, the user's rate of consumption.

21. The first consideration is whether garbage disposal services fall within the scope of CP or common assets. According to the contracts with the waste disposal contractor, the waste bins belong to the contractor rather than to the strata. Neither party suggests that garbage disposal amounts to or involves CP, and I agree that it does not fall within the definition under section 1(1) of the SPA. However, the strata submits that the contract with the waste disposal company and the benefit from that contract is personal property such that the benefit of garbage collection by the third party is a common asset.
22. The SPA defines a common asset as personal property held by or on behalf of a strata corporation or certain types of land held in the name of or on behalf of a strata corporation. While the SPA does not define this term, *Black's Law Dictionary*, 7<sup>th</sup> edition at page 1233 defines personal property as any moveable or intangible thing that is subject to ownership and not classified as real property. *Black's* further defines intangible property as property that lacks a physical existence, such as bank accounts, stock options, and business goodwill.
23. In my view, the contractual right to a service does not amount to personal property held by the strata corporation. Although garbage disposal expenses are required to meet an obligation of the strata corporation as a common expense, I am not satisfied that they are a common asset. Therefore, in these circumstances, I find that garbage disposal fees cannot be the subject of user fees under section 6.9(1) of the Regulation.
24. Even if my conclusion about the garbage disposal service not being a common asset is incorrect, I find that the user fees in the garbage disposal rule do not meet the requirements of section 6.9(2) of the Regulation. I find that the fact that the strata entered into separate contracts for residential and commercial waste disposal is not determinative. There are no locks or barriers to prevent visitors or residential occupants from placing non-commercial waste in the commercial bins, or vice versa.

Therefore, the costs associated with each contract are not necessarily representative of the separate rates of consumption of, or the actual operating costs attributable to, the commercial or residential strata lots.

25. The test for whether a user fee is reasonable is an objective one, taking into consideration market conditions and a strata corporation's actual costs (see *The Owners, Strata Plan LMS 3883 v. De Vuyst*, 2011 BCSC 1252). It is not clear whether the costs associated with each contract with the waste disposal provider are the strata's actual costs for garbage disposal for the commercial and residential strata lots. I find that the evidence before me does not support the conclusion that the user fees meet the requirements of 6.9(2) of the Regulation.
26. Although ratified by the owners, I find that the garbage disposal rule does not comply with the Regulation. Section 121(1) says that a bylaw is not enforceable to the extent that it contravenes the SPA, and section 125(2) says that a rule is not enforceable to the same extent that a bylaw is not enforceable under section 121(1). Based on these sections, I find that the garbage disposal rule is not enforceable.

### ***Significant Unfairness***

27. The parties also disagree about whether the garbage disposal rule is significantly unfair to Therrien. The courts have interpreted "significantly unfair" to mean conduct that is oppressive or unfairly prejudicial. "Oppressive" conduct has been interpreted as conduct that is burdensome, harsh, wrongful, lacking fair dealing or done in bad faith. "Prejudicial" conduct means conduct that is unjust and inequitable (*Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed 2003 BCCA 126).
28. Section 164 of the SPA sets out the authority of the British Columbia Supreme Court to remedy significantly unfair actions. The CRT has jurisdiction over significantly unfair actions under section 123(2) of the CRTA, which involves the same legal test as cases under SPA section 164. I find that the circumstances of this claim fall within sections 121(1)(a) and (f) of the CRTA, as they involve the application of the SPA and a decision of a strata corporation in relation to an owner.

29. The test for significant unfairness was summarized by a CRT Vice Chair in *A.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94, with reference to *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44: what is or was the expectation of the affected owner or tenant? Was that expectation on the part of the owner or tenant objectively reasonable? If so, was that expectation violated by an action that was significantly unfair?
30. The British Columbia Court of Appeal has confirmed that consideration of the reasonable expectations of a party is “simply one relevant factor to be taken into account” (see *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 at paragraph 89).
31. I note that the strata distributed to the owners a proposed rule about user fees for water usage. However, this proposed rule was not considered at the AGM, and the only rule ratified by the owners was the garbage disposal rule.
32. Therrien says that the strata has not created rules for user fees for common expenses that benefit only the residential strata lots, such as carpet cleaning, janitorial services, and the repair and maintenance of hot water tanks, elevators, and the enterphone system. Therrien’s position is that it is unfair that it contributes to these expenses despite receiving no benefit for them, but the strata’s rule requires that it contribute an amount in excess of its unit entitlement for garbage disposal. I find that Therrien’s expectation that all operating costs and expenses would be allocated fairly is objectively reasonable in light of the strata’s choice not to create separate residential and commercial sections.
33. The strata did not dispute Therrien’s claim that it contributes to expenses that benefit the residential strata lots, but rather stated that this fact does not invalidate the user fee for garbage removal. The strata is correct in its submission that the Regulation does not require a user fee to be imposed for the recovery of all operating or maintenance costs. However, this is not determinative of whether imposing user fees for only some operating or maintenance costs is significantly unfair.



34. Here, the strata took steps to implement user fees for common expenses that it suggests benefit the commercial strata lot disproportionately, but it has not taken similar steps to implement user fees for common expenses that benefit only the residential strata lots. I find that the strata's decision to make a rule only about the costs of garbage disposal is prejudicial to Therrien as the owner of the sole commercial strata lot.
35. In addition to being unenforceable, I also find that the garbage disposal fee was significantly unfair to Therrien.

### ***Remedies***

36. I order the strata to stop enforcing the garbage disposal rule and applying the associated user fees. As the strata's fiscal year runs from July 1 to June 30, my decision will impact both the 2020 – 2021 and 2021 – 2022 operating budgets.
37. The strata must re-calculate the strata fees for both fiscal years, allocate the garbage disposal expenses based on the Schedule of Unit Entitlement and section 99 of the SPA. It must apply any the resulting overpayments and underpayments to each strata lot's account. The strata must also advise the owners of the adjustments made to their strata lot accounts and how the owners may address any outstanding balances.

### **CRT FEES AND EXPENSES**

38. 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. As Therrien was successful, I order the strata to reimburse it \$225 in CRT fees.
39. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Therrien.

## ORDERS

40. Within 60 days, I order the strata to:

- a. re-calculate the strata fees in the 2020 – 2021 and 2021 – 2022 operating budgets by allocating the garbage disposal fees in accordance with the Schedule of Unit Entitlement and section 99 of the SPA,
- b. determine how much each strata lot overpaid or underpaid and apply those amounts to the strata lot accounts, and
- c. advise the strata lot owners of the adjustments made to their strata lot accounts and how the owners may address any outstanding balances.

41. Within 30 days, I order the strata to reimburse Therrien \$225 in CRT fees

42. 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.

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Lynn Scrivener, Tribunal Member