Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Red Racer Holdings Ltd. v. The Owners, Strata Plan LMS 3816*, 2021 BCCRT 1018

B E T W E E N :

RED RACER HOLDINGS LTD. and Section 1 of The Owners, Strata Plan LMS 3816

APPLICANTS

A N D :

The Owners, Strata Plan LMS 3816 and Section 2 of the Owners, Strata Plan LMS 3816

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This dispute is about the use of a strata corporation's common property and assets, and the allocation of common expenses among a strata corporation and its sections.

2. The respondents are a strata corporation, The Owners, Strata Plan LMS 3816 (strata) and 1 of its 2 sections, Section 2 of The Owners, Strata Plan LMS 3816 (residential section). The applicants are Section 1 of The Owners, Strata Plan LMS 3816 (commercial section), and Red Racer Holdings Ltd. (Red Racer). Red Racer owns strata lot 22, the sole strata lot in the commercial section, in which it operates a street-level restaurant and taphouse (restaurant). The remaining 21 strata lots make up the residential section.

3. The applicants are represented by a lawyer, Devin Lucas. The applicants made 1 set of submissions under Red Racer's name.

4. Red Racer says the strata has unfairly restricted Red Racer's access to a "loading bay" in a common leased parking area and refused to provide a key to the loading bay door and elevator. Red Racer also says the strata has unfairly allocated common expenses among the strata and the sections. It seeks the following orders, which I have condensed and paraphrased:

    a. The strata provide Red Racer with unobstructed access to and use of the loading bay,

    b. Owners and visitors of the strata be prohibited from stopping in the loading bay for more than 30 minutes on weekdays between 8:00 a.m. and 10:00 p.m.,

    c. The strata provide the necessary keys to "lock off" the elevator and access the loading bay door.

    d. Certain common expenses be reallocated under bylaw 40.1(b) or otherwise.

    e. The residential section assume 100% of the parking costs in exchange for Red Racer relinquishing its 2 parking passes, or alternatively, Red Racer be granted access to 25% of the parking stalls.

5. The respondents are represented by a council member, Kevin Hisko, who is also a lawyer. They made 1 set of submissions under the strata's name.

6. The strata says it has not been unfair to Red Racer and generally denies the claims. In its submissions, the strata acknowledges that a bylaw affecting visitor parking or the loading zone is unenforceable, and says another bylaw governing common expense allocation contravenes the *Strata Property Act* (SPA).

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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

8. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties in this dispute call into question each other's credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and a prompt resolution of disputes, I decided to hear this dispute through written submissions.

9. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

10. Under CRTA section 123, 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 strata provided minutes from its 2017 annual general meeting (AGM) as late evidence after the stated deadline. The applicants had the opportunity to respond to the late evidence, which I find relevant. The late evidence also supports the applicants' position, so I find there is no prejudice to them in admitting it. Bearing in mind the CRT's mandate that includes flexibility, I admit the late evidence and discuss it where relevant below.

ISSUES

12. The issues in this dispute are:

    a. Is Red Racer entitled to unobstructed access to and use of the loading bay portion of the parking area?

    b. Is Red Racer entitled to an elevator service key to access the loading bay door?

    c. Has the strata allocated common expenses, including parking lease rent, contrary to its bylaws, or in a significantly unfair way?

EVIDENCE AND ANALYSIS

13. The strata is a heritage building converted into 21 residential strata lots on 3 floors, and 1 ground-level commercial strata lot, strata lot 22.

14. In March 2006, the owner developer filed the strata's bylaws at the Land Title Office (LTO). The bylaws created the residential section and the commercial section. As with any sectioned strata, each section must elect an executive, and each section is a corporation with the same powers and duties as the strata for matters that relate solely to the section: see part 11 of the SPA. The bylaws were amended in May 2014

and June 2017. I discuss the bylaws and the validity of the amendments where relevant below.

15. Red Racer purchased strata lot 22 in or around April 2015. In 2019 and 2020, Red Racer and the strata attempted to resolve the outstanding issues involving the loading bay and elevator access, and common expenses, without success. Those issues form the basis of the applicants' claims in this dispute.

Loading bay and parking

16. The strata leases a paved strip of land immediately adjacent to the strata building from the City of Vancouver (lease). The leased land is part of the laneway behind the strata building. In 2013, the leased area was extended to the southeast behind adjacent properties that are not part of the strata. Although the lease describes the land as 6 parking stalls, the strata says the leased land accommodates approximately 15 parked vehicles. Red Racer says the land accommodates 12 vehicles, but I find nothing turns on this. The area Red Racer refers to as a loading bay is part of this leased strip of land.

17. Red Racer says up until around May 2016, Red Racer and other strata occupants treated the area adjacent to the loading bay door as a loading bay. After May 2016, Red Racer says the strata turned the loading bay into a parking stall by allowing residents to park there for extended periods of time. The strata disputes this and says the area has always been used as a parking space, although it can be reserved, such as when residents are moving in or out. Neither party provided any evidence about the historical use of the space.

18. Red Racer says the strata changed the loading bay's use by passing a revised bylaw 50.1 in 2017. The strata's original bylaw 50.1 prohibited residents from parking in the "visitor parking stall" for more than 30 minutes. Bylaw 50.2 said any vehicle parked in violation of bylaw 50.1 would be subject to removal by a towing company authorized by the strata council. The term "visitor parking stall" is not defined in the bylaws or identified on the strata plan or the lease. I infer from the parties' submissions that the former visitor parking stall is what Red Racer refers to as the loading bay.

19. Bylaw amendments filed with the LTO in 2017 repealed bylaw 50.1 and replaced it with the current bylaw 50.1 that says no parking is permitted in the "loading bay" for more than 2 days. Like "visitor parking stall", the term "loading bay" is not defined.

20. The 2017 amendments also added bylaws 50.3-50.6, which generally allow residents to park in the laneway if displaying a valid parking pass, for up to 14 days at a time.

21. The strata says that during the argument submission stage of this dispute, it realized that the amendment to Bylaw 50.1 may not have been properly passed in accordance with SPA section 128(1)(c). That section says that in a strata with residential and non-residential strata lots, bylaw amendments must be approved by a resolution passed by a ¾ vote of the residential strata lots and a resolution passed by a ¾ vote of the non-residential strata lots, or as otherwise provided in the non-residential strata lots' bylaws.

22. The strata asks the CRT to determine the validity of the amended bylaw 50.1. The 2017 AGM minutes record that there was a vote to repeal and replace certain bylaws, including bylaw 50.1, with 19 in favour and 1 opposed. The parties agree that Red Racer voted against replacing bylaw 50.1. Red Racer says the bylaw is therefore of no legal effect.

23. A CRT vice chair considered this issue in *Safarian v. The Owners, Strata Plan LMS 1455*, 2020 BCCRT 83. In that dispute, the bylaw in question was approved unanimously at an AGM. The vice chair found that this did not meet the requirement of 2 separate votes of SPA section 128(1)(c), relying on *Omnicare Pharmacy Ltd. v. The Owners, Strata Plan LMS 2854*, 2017 BCSC 256, and found the bylaw amendments unenforceable. The vice chair ordered the strata to refrain from enforcing the amended bylaws.

24. I agree with and adopt the reasoning in *Safarian* and *Omnicare*. I find the 2017 AGM vote on the bylaw changes, including repeal and replacement of bylaw 50.1, did not comply with SPA section 128(1)(c). I find the new version of bylaw 50.1 is unenforceable and the version of bylaw 50.1 found in the 2006 bylaws remains in effect. I order the strata to refrain from enforcing the 2017 version of bylaw 50.1.

25. Turning back to Red Racer's claims and requested orders, I find it is not necessary to order the strata to prohibit parking in the loading bay for more than 30 minutes on weekdays between 8:00 a.m. and 10:00 p.m. This is because the 2006 version of bylaw 50.1, which is still in effect, prohibits parking beyond 30 minutes at all times in the visitor parking stall. The strata council is required under SPA section 26 to enforce the 30-minute parking limit in the visitor parking stall.

26. I decline to grant an order that the strata provide Red Racer with "unobstructed access" to the loading bay. There is no evidence that Red Racer ever had unobstructed access to the loading bay, or that such expectation would be reasonable. Red Racer clarifies in submissions that it does not seek exclusive use of the loading bay and repeats its request for a 30-minute parking limit. This is addressed by reinstating the original bylaw 50.1.

Is Red Racer entitled to a key to access the elevator and loading bay door?

27. It is undisputed that the strata building has 1 elevator, which is shown on the strata plan as common property.

28. The elevator can be accessed from a common property ground floor lobby, which in turn can be accessed from common property stairs at the building's rear, or a residential limited common property corridor leading to a front entrance. The elevator connects to the 3 levels of residential strata lots and to the basement, which includes common property, residential limited common property and parts of strata lot 22. It is undisputed that Red Racer uses the basement to store kegs of beer, among other things.

29. It is also undisputed that the loading bay door leads directly onto the elevator but cannot be opened unless the elevator is "locked off" with a key. Red Racer argues that it requires a service key to lock off the elevator so that it can accept deliveries safely and effectively through the loading bay door. Red Racer says the strata's refusal to provide the service key is significantly unfair.

30. 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 or decision.

31. 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" means conduct that is burdensome, harsh, wrongful, lacking fair dealing or done in bad faith, while "prejudicial" means conduct that is unjust and inequitable: see *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed in 2003 BCCA 126. In considering an owner's reasonable expectations the courts have applied the following test from *Dollan*:

    a. What was the owner's expectation?

    b. Was the expectation objectively reasonable?

    c. Did the strata violate that expectation with a significantly unfair action or decision?

32. In *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, the BC Court of Appeal confirmed that an owner's reasonable expectations continue to be relevant where an owner alleges prejudicial conduct, which I find is the case here.

33. Red Racer says its expectation was that it would be able to use the loading bay door to accept deliveries and therefore to use its commercial strata lot for commercial purposes. Red Racer says this expectation was reasonable based on the disclosure statement, the strata's bylaws, and the practice of the strata corporation up until May 2016. Red Racer says the strata violated that expectation by refusing to provide an elevator service key, contrary to bylaws 2.4(a) and 8.8.

34. The strata says under SPA section 3 it is responsible for managing and maintaining the strata's common property and assets, including the elevator. It says it denied Red Racer's requests for an elevator key because access to the elevator is important to all residents.

35. The strata says it provides any resident with the elevator service key, allowing them to lock off the elevator, provided they have given 2 days' notice so the strata can advise residents when the elevator will be locked off. The strata says this happens approximately 4 times per year, usually for residential moves. Red Racer says this reservation system does not work for a restaurant accepting deliveries on a short notice basis.

36. The strata also says Red Racer is free to use the elevator to load and unload heavy items, without a key and without the need to lock-off the elevator. It says this is what Red Racer has been doing since it began operations.

37. The 2006 disclosure statement mentions the 10-by-75-foot paved laneway strip that the strata rents from the City of Vancouver, which it says is divided into a loading zone, a "parallel parking stall" and pedestrian exit and entrance ways. It says the strata manages the parking stall and loading zone. The disclosure statement does not say whether the loading zone is for people or goods, and gives no indication that the loading zone or the loading bay door is for priority use by the commercial strata lot owner. To the contrary, the disclosure statement says at section 3.3(a) that use of the elevator is limited to residential uses only, provided that the commercial strata lot owner or tenant may use the elevator for moving exceptionally heavy items to or from the basement level. I find the disclosure statement does not support Red Racer's stated expectation of loading bay access.

38. Turning to the bylaws, bylaw 2.4(a) provides that the strata will neither act nor pass any bylaw or rule that would have the effect of prohibiting, preventing or impairing Red Racer from "fully utilizing" strata lot 22 or commercial limited common property for commercial purposes in accordance with applicable government regulations.

39. Bylaw 8.8 provides:

> The use by the owner of the commercial strata lot of the single oversized elevator, ground level elevator lobby and adjacent exit stairs is restricted to the movement of large items that are too heavy to be transported to and from the basement by stairwell.

40. Red Racer says without an elevator service key, bylaw 8.8 is meaningless. I disagree. Nothing in bylaw 8.8 says or implies that Red Racer is supposed to have the ability to lock off the elevator. I find Bylaw 8.8's explicit mention of the lobby and adjacent exit stairs means that Red Racer is expected to transport heavy items between the laneway and the elevator via the exit stairs, not the loading bay door. If the intention was for Red Racer to be able to use the loading bay door on a regular basis to move large items, the bylaw would have mentioned the loading bay door rather than the exit stairs. The logic of making a restaurant transport kegs up stairs and onto an elevator when they could be transported directly onto the elevator may be questionable, but the meaning of the bylaw is clear. I agree with the strata that bylaw 8 is meant to ensure the commercial strata lot owner does not overuse the single elevator and to protect residents' access to it.

41. I accept Red Racer's submission that, as a restaurant, it must accept frequent deliveries of kegs of beer and consumables with a limited shelf life. I do not accept Red Racer's submission that the strata's refusal to provide the elevator service key impairs Red Racer's ability to use the strata lot for a commercial purpose. Red Racer does not explain how it operated a restaurant since 2015 without the ability to lock off the elevator and open the loading bay door.

42. Red Racer says it must transport kegs on a wheelchair lift and incurred $11,000 in repairs to the lift as a result. While Red Racer submitted a service record showing the lift repair costs from 2015 to 2020, it did not provide anything to link the repairs to transporting kegs or heavy items. Red Racer also did not provide evidence about the type, weight and frequency of deliveries or demonstrate how its current use of the elevator impairs its commercial purpose. I find Red Racer has not shown that the strata's refusal to provide an elevator service key was significantly unfair or contrary to bylaw 2.4(a). I dismiss this claim.

Has the strata allocated expenses in contravention of its bylaws, or significantly unfairly?

43. Red Racer says it is significantly unfair for the strata to calculate strata fees solely on the basis of unit entitlement rather than in accordance with its bylaws. It seeks an

order for a “different calculation” of certain common expenses, including HVAC system costs, electricity, janitorial, window cleaning, elevator, plumbing, and the laneway rental.

44. The strata says the above expenses are common expenses that do not benefit the residential section exclusively, so they must be allocated based on unit entitlement under the SPA. It says expenses that are 100% attributable to the residential section, including costs for natural gas, internet and cable services and repair and maintenance to the residential boiler units are covered by the residential section budget.

45. SPA section 99 requires strata lot owners to contribute to all expenses relating to the strata’s common property and common assets based on unit entitlement.

46. Section 195 of the SPA states that any strata corporation expenses that relate “solely” to the strata lots in a section are shared between the strata lots in that section based on unit entitlement. In *The Owners, Strata Plan VR 2213 (Re)*, 2021 BCSC 905, the court said that although section 195 does not say so explicitly, it refers to expenses for limited common property, reasoning that section 11.2 of the *Strata Property Regulation* makes the connection explicit. A section is empowered to establish its own operating fund and contingency reserve fund for the section’s common expenses, including expenses relating to limited common property designated for the exclusive use of the strata lots in the section, and common property appurtenant to or adjoining a section if the bylaws permit it: *Yang v. The Owners, Strata Plan LMS 4084*, 2010 BCSC 453.

47. The relevant strata bylaws are generally consistent with the SPA. However, bylaw 40.1(b) says:

> Common expenses which are used or enjoyed on a disproportionate basis by the Residential/ Artist Studio Section and the Commercial Section shall be equitably apportioned on a percentage basis by the strata council or the strata corporation in accordance with the benefit received.

48. Red Racer says the strata has failed to allocate common expenses equitably based on the benefit received in accordance with bylaw 40.1(b).

49. The strata says bylaw 40 (presumably meaning bylaw 40.1(b) in particular) seeks to circumvent the SPA's principle of contribution to common expenses by unit entitlement. The strata says bylaw 40 is unenforceable under SPA section 121, which says a bylaw is not enforceable to the extent that it contravenes the SPA.

50. For the reasons that follow, I agree and I find bylaw 40.1(b) is unenforceable. Courts and the CRT have consistently held that the SPA requires all owners to contribute to common expenses in proportion to unit entitlement, even where there is a disproportionate benefit to owners in one section: see *Borland-Spry v. The Owners, Strata Plan EPS4534*, 2021 BCCRT 339, and *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597. The overall scheme of the SPA is that common expenses are borne in proportion to unit entitlement under SPA section 99. There are limited exceptions in the *Strata Property Regulation*, but they apply only where the expense exclusively (as opposed to disproportionately) benefits 1 type of strata lot (section 6.4(2)) or 1 section (section 11.2). Importantly, section 100 says in order to change the formulas set out in section 99 and the *Strata Property Regulation*, a resolution passed by unanimous vote is required. A bylaw is not enough. It is undisputed that the strata has not passed such a resolution.

51. Red Racer says as the owner of the sole strata lot in the commercial section, it is responsible for 23.55% of the strata's budgeted expenses, yet it receives a benefit that is far less than 23.55%. Red Racer says it should only be responsible for 4.5% of the common expenses, given that it is 1 of 22 strata lots in the strata. I find this argument unpersuasive because it fails to acknowledge that strata lot 22 is by far the largest strata lot, taking up 1 of 4 floors. A significant unfairness claim brought on the basis that an owner obtains little appreciable individual benefit from a common expense will likely fail: *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 at paragraph 65.

52. Having reviewed Red Racer's evidence about expenses, I am not persuaded that the allocation of common expenses has been significantly unfair.

53. Red Racer provided a spreadsheet of plumbing expenses and invoices but I cannot determine which expenses, if any, related to common property. Some of the descriptions say things like "clogged sink" and "camera urinal line", which would be strata lot expenses for which Red Racer is responsible. Invoices refer to clogged grease traps and kitchen waste stacks and leaking faucets, which are likely part of strata lot 22 and not a common expense. Some expenses appear to relate to sewer backups but there is no evidence, such a statement from a plumber or plumbing diagrams, to explain whether repairs were made to common property pipes.

54. Other service receipts were not explained and it was not readily apparent what equipment they were for and whether the equipment serviced strata lot 22 or all strata lots or common property.

55. For janitorial work, the strata says the janitor's duties include cleaning common property stairwells and garbage bin area, I infer in addition to residential limited common property. Red Racer did not dispute this or that it receives a benefit from the janitorial work, even if the benefit is less than the residential owners receive. Red Racer provided little or no specific evidence electricity, window cleaning and other expenses. I am unable to find that the allocation of these expenses has been unfair or contrary to the SPA.

56. Red Racer raises the allocation of rent under the parking lease as a separate claim, but given that the parking lease is a treated as a common expense, I will consider the issue here.

57. As noted, under the parking lease, the strata rents an area of laneway behind the strata building and an adjacent building. Based on the SPA's definition of common assets that includes land held by the strata that is not shown on the strata plan, I find the leased laneway parking area is a common asset. I find the rent payable under the lease is a common expense.

58. Red Racer says it pays 23.55% of the parking lease rent. I find this is consistent with SPA section 99.

59. Red Racer complains that it only has access to 2 parking spaces out of the available 12 (or 15, as the strata says). I infer that Red Racer means it has 2 parking passes, as the strata undisputedly provides 2 parking passes to Red Racer and 1 to each residential strata lot. Parking is only available on a first-come, first-served basis, which Red Racer says frequently means it cannot use its parking passes. Red Racer provided no evidence in support of this assertion.

60. I find nothing unfair about the way the strata manages this common asset. The strata's decision to provide Red Racer with 2 parking passes while all other strata lots receive only 1 appears more than fair to Red Racer. I see no reason Red Racer should not contribute to lease rent expense in proportion to unit entitlement, as required by the SPA.

61. Overall, I find Red Racer has not met its burden of proving that the strata has treated it significantly unfairly with respect to expense allocation. I acknowledge Red Racer's submission that is not always possible to obtain empirical evidence of the disproportionate use and benefit of common expenses. But as noted above, disproportionate use or benefit from common expenses is not enough to depart from the clear direction of the SPA and the court decisions cited above. I dismiss this claim.

CRT FEES AND EXPENSES

62. 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. The applicants were partially successful, so I order the strata to reimburse them $112.50 for half their $225 CRT fees. Neither party claimed any dispute-related expenses.

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

ORDERS

64. I order the strata to immediately refrain from enforcing the version of bylaw 50.1 amended in 2017.

65. I order the strata, within 30 days of this decision, to pay the applicants $112.50 for reimbursement of half the applicants' CRT fees.

66. The applicants are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

67. I dismiss the applicants' remaining claims.

68. 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.

Micah Carmody, Tribunal Member