



Civil Resolution Tribunal

Date Issued: October 8, 2021

File: ST-2021-001729

Type: Strata

Civil Resolution Tribunal

Indexed as: *Waters v. The Owners, Strata Plan LMS 355*, 2021 BCCRT 1078

B E T W E E N :

KENNETH WATERS

APPLICANT

A N D :

The Owners, Strata Plan LMS 355

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about the timing of elevator repairs. The applicant, Kenneth Waters, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 355. The owners approved the modernization and refurbishment of the strata's 2 elevators. Project work began on approximately March 1, 2021, although the parties do not say whether it has been completed.

2. Mr. Waters says that as scheduled, the elevator project presents COVID-19 pandemic-related risks. He requests an order for the strata council to delay the elevator project until the pandemic is over. The strata opposes Mr. Waters' claim. The strata says that further delaying the project is neither feasible nor necessary.
3. Mr. Waters is self-represented in this dispute. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

4. 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.
5. 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.
6. 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.
7. 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.

ISSUE

8. Does completing the elevator project during the COVID-19 pandemic violate the *Strata Property Act* (SPA), strata bylaws or rules, or other applicable pandemic requirements, and if so, should I order the strata to delay the project?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, as the applicant Mr. Waters must prove his claim on a balance of probabilities (meaning “more likely than not”). I have read and weighed the parties’ evidence and submissions, but I refer only to that which I find necessary to explain my decision.
10. The strata was formed in 1992 and presently exists as a strata corporation under the SPA. The strata’s premises consist of 58 residential strata lots located on floors 7 through 26 and the roof of a mixed-use building, plus underground parking and storage and a ground floor lobby area, all connected by 2 elevators and a stairwell. The strata repealed and replaced its bylaws in 2003, and filed several bylaw amendments after that, none of which are relevant to this dispute.
11. Mr. Waters’ claim is for an order directing the strata council to delay an elevator modernization and refurbishment project until the COVID-19 pandemic “is over.” The evidence and submissions do not explain how to determine a pandemic end date, and Mr. Waters does not specify a particular delay length or project resumption date. I infer that Mr. Waters seeks an indefinite delay until unspecified COVID-19 risks drop below an unspecified threshold. Mr. Waters also submits that the strata could resume the elevator project before the “end” of the pandemic if the elevators stopped working. He does not explain how such an early resumption would address the COVID-19-related concerns he raises in this dispute, which I discuss below.
12. Mr. Waters also expresses dissatisfaction with the manner in which the strata council chose the elevator project contractor, and other unrelated strata council decisions and activities. He requests that the strata council revisit its choice of elevators, and asks the strata council to refrain from misleading owners. In particular, he says that

since the COVID-19 pandemic began in early 2020, circumstances are now different than they were when the strata ownership unanimously approved special levies and contingency reserve fund expenditures for the elevator project by votes at the strata's August 2019 annual general meeting (AGM). Mr. Waters says those approvals should no longer be considered valid.

13. However, Mr. Waters does not claim a remedy in this CRT dispute for the strata's choice of contractor or elevators, allegedly misleading statements, or elevator project funding approval. Further, Mr. Waters says that he only seeks a delay, and not cancellation, of the elevator project. I find this suggests that he considers the project's funding approval and contractor choice to be valid, despite also saying that the refurbishment was unnecessary. I find the only issue before me in this dispute is Mr. Waters' explicit CRT claim that the strata should delay the elevator project until the pandemic is over.
14. The undisputed evidence is that the strata received a 2016 elevator evaluation and proposed capital budget plan from the elevator manufacturer that maintained its elevators, ThyssenKrupp Elevator (Canada) Ltd. (TK). The evaluation said that the strata's elevators showed signs of significant wear, and that most of the major components were in fair/poor condition and included "vintage technology." Modernization, meaning major component updating and replacement, was recommended within 2 years.
15. The evidence also shows, and Mr. Waters does not deny, that 1 of the elevators failed in 2018. The elevator was out of service for an extended period because a replacement part was no longer available and had to be manufactured.
16. A 2018 depreciation report by Spratt Emanuel Engineering Ltd. (SE) said that the elevators were reported to be reliable, although it is unclear who reported that they were reliable. However, SE recommended that the strata begin planning for elevator modernization in 2018, based on the age of the elevators and the unavailability of, and lead times for obtaining, replacement parts. SE recommended that the strata obtain an elevator condition report from the maintenance contractor (TK) or a third-

party consultant to identify the components to be replaced. Mr. Waters says that a third-party condition report was not obtained. However, I find that TK, the chosen project contractor and author of the 2016 evaluation, likely identified the required modernization work before beginning the project.

17. As noted, the strata ownership approved funding for the elevator modernization and refurbishment in 2019. Well before the elevator project began, an April 2020 elevator etiquette notice from the strata asked residents to limit the number of people in elevator, be wary of touching buttons, use the stairs when possible, and not to get on the elevators if a 2 metre distance could not be maintained.
18. The project was initially planned to begin in May 2020, but was delayed. Mr. Waters suggests it was delayed because of COVID-19 pandemic-related restrictions, so there should be no difficulty in delaying the project again for similar reasons. However, a March 15, 2021 email from TK, after the project began, says that the pandemic did not impact its projects except for the initial lead times to obtain equipment, and that it did not expect any COVID-19-related delays.
19. In 2020, Mr. Waters wrote to the strata council requesting cancellation of “upgrade projects”, among other requests. The strata did not cancel the elevator project. I find that strata council meeting minutes and memos to owners in evidence show the strata council kept owners reasonably informed about elevator project scheduling. An excerpt from the strata’s 2020 AGM minutes says that the planned renewal would take 3 months per elevator. The project was later scheduled to begin on March 1, 2021. February 17, 2021 strata council meeting minutes confirmed this March 1, 2021 start date, and noted that because only 1 elevator would be in service during the project, a plan for strata lot moves and deliveries would be in place.
20. After it was confirmed that only 1 elevator would be operating during the 6-month renewal project, Mr. Waters circulated a petition to other strata lots on February 25, 2021, asking others to oppose the partial elevator shutdown and what he considered to be unnecessary refurbishment. Petition signatures associated with 10 strata lots are in evidence, although apart from Mr. Waters’ signature, I find it is unproven

whether any of the signatures are from strata lot owners, as opposed to tenants or other occupants.

21. Petitions are not binding on strata councils. Under SPA section 43, persons holding at least 20% of the strata's votes may, by written demand, require that the strata hold a special general meeting to consider a resolution or other matter. However, the petition did not demand a special general meeting, did not identify a specific resolution or other matter for consideration at a meeting, and was not signed by at least 20% of the voting ownership.
22. Mr. Waters says that the strata should delay the elevator project because it creates conditions that are contrary to Provincial Health Officer (PHO) directives about physical distancing, which are therefore "illegal." Based on his submissions, I find Mr. Waters' concerns are primarily about elevator project workers not wearing masks, and the ability of people on the strata's premises to maintain adequate physical distancing.
23. However, Mr. Waters does not identify, and the evidence does not contain evidence of, any specific PHO directives about mask wearing or physical distancing, including any that were necessarily contravened because of the elevator project. Further, on the materials before me I do not see a basis in the SPA, bylaws, or otherwise, on which I should interfere with the strata's maintenance discretion and order it to stop the project, as further explained below.
24. The evidence contains notices from the strata's management company about whether the strata required masks to be worn in common areas at different times in 2020 and 2021, and asking strata residents to respect physical distancing measures and not to share the elevator another person without that person's permission. However, the evidence before me does not show that the strata adopted any specific bylaws or rules about physical distancing and mask wearing, or that specific SPA provisions required particular physical distancing or mask wearing practices that were not possible during the elevator project. I find Mr. Waters has failed to prove that any provincial health directives, bylaws, rules, or SPA provisions would be broken

because only 1 of the strata's elevators was operating during the modernization project.

25. I acknowledge Mr. Waters' desire to observe certain pandemic health practices. However, even if Mr. Waters had proven that applicable requirements mandated physical distancing and mask wearing in strata common areas during the elevator project, I find that Mr. Waters has not proven that the strata's pursuit of the elevator project prevented people from observing such alleged requirements, for the following reasons.
26. Mr. Waters submitted photos and a short video showing a worker in a lobby not wearing a mask. No one was physically close to the worker. Mr. Waters does not say whether he asked the worker to wear a mask, whether the worker refused, or whether mask wearing was recommended by the strata or the PHO at that time. Mr. Waters also says he observed some workers on the parking levels not wearing masks. However, I find the evidence does not show that the strata knowingly allowed TK or its workers to disobey any health directives or strata requests about wearing masks or physical distancing, or failed to respond to any complaints about alleged violations. The strata says, and Mr. Waters does not directly deny, that most of the elevator work took place in the elevator shaft and on the roof. I find the evidence does not show that wearing masks or maintaining reasonable physical distancing was not possible for elevator workers, or that TK consistently failed to follow such practices with the strata's knowledge.
27. Mr. Waters also says that because of delays due to only 1 elevator being in operation, those on the strata's premises were more likely to share the elevator contrary to physical distancing recommendations, and to congregate in close proximity while waiting for the elevator. He also says that those with physical difficulties might have been unable to reasonably access their strata lots.
28. I find these concerns are speculative. I find the evidence does not prove that elevator sharing or lobby congregations occurred contrary to physical distancing recommendations. I find the evidence does show that the strata reminded residents

to follow any applicable COVID-19 protocols, not to share elevators without permission, and to be patient during the elevator project. Further, the evidence does not show that anyone was unable to access their strata lot because of unreasonable elevator delays, or that it was not possible to use the elevator without sharing the car with others. Mr. Waters did not directly dispute the strata's February 28, 2021 statement to owners that elevator traffic had been lighter during the pandemic, and the strata said this meant it was a good time to have only 1 elevator in service.

29. Mr. Waters submitted a video showing an elevator call button being pressed but not staying lit. The video is several seconds long, but the evidence does not show how long the button remained non-functional after the video was taken. I find correspondence between TK and the strata shows that this button behaviour was expected while the "door open" button in the elevator was pressed. Further, it is undisputed that the strata had taken steps to limit elevator unavailability to only a few minutes at a time when being used for moving.
30. Mr. Waters also says that a strata notice said that holding the elevator doors open could render the elevator non-functional until a service person reactivated it, which would effectively prevent access to the strata lots except by many flights of stairs. The strata says this notice was mistaken, and that it corrected the notice. A March 15, 2021 email from TK says that TK tested the elevator and found that holding the door open for an extended period did not affect its operation, and that after a certain time the door would nudge those holding it out of the way. Further, I find this type of door holding delay would likely exist regardless of whether the elevator project took place during a pandemic or not.
31. Mr. Waters alleges that the strata ignored owners' safety concerns with respect to the elevator project. Although the strata did not fulfill all of Mr. Waters' requests, I find that it did not ignore COVID-19 considerations in deciding to pursue the elevator project. After Mr. Waters distributed his petition, the strata explained to the owners its rationale for continuing with the elevator project, including that there were significant costs to stop and restart the project that would require further ownership approval. I find the evidence contains no significant elevator project-related complaints from

other strata lot owners after this explanation by the strata which, contrary to Mr. Waters' submissions, I find was consistent with other evidence and not misleading.

32. Having considered the evidence and submissions, I find that the strata's decision to continue with the elevator project as planned was not contrary to the SPA, a bylaw, a rule, or a pandemic-related requirement applicable to the strata. I find Mr. Waters' concerns about physical distancing and mask wearing are largely speculative, and that he has failed to prove that any applicable distancing or mask requirements were not followed, or could not be followed, because of the strata's decision to maintain the elevator project schedule.
33. I also find the evidence shows that the modernization and refurbishment of 1 of the elevators was completed in July 2021, although as noted it is unclear whether work on the other elevator has been completed. Although Mr. Waters disagrees with the strata's decision to continue, I note that the courts have said they should be cautious before interfering with the manner in which the strata decides to make repairs (for example, see *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784). Overall, I find Mr. Waters has not proven that continuing the elevator project has threatened resident safety, or that it should be delayed on that basis.
34. I dismiss Mr. Waters' claim.

CRT FEES AND EXPENSES

35. 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 find the strata was successful in this dispute, but it paid no CRT fees. The strata requested reimbursement for all legal and administrative expenses related to responding to the dispute. However, the strata provided no further submissions or evidence about whether it actually incurred such expenses or their amount. Further, under CRT rule 9.5(3)(b), the CRT does not reimburse lawyer fees except in

extraordinary circumstances, which I find are not present here. So, I find the strata's claim for CRT dispute-related expenses is unproven. I order no reimbursements.

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

ORDER

37. I dismiss Mr. Waters' claim, and this dispute.

Chad McCarthy, Tribunal Member