



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Lee v. The Owners, Strata Plan LMS 2333*, 2021 BCCRT 1297

B E T W E E N :

MEI LI LEE

APPLICANT

A N D :

The Owners, Strata Plan LMS 2333

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about access to strata corporation records. The applicant, Mei Li Lee, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 2333 (strata). Ms. Lee requested several different strata records, as listed in a March 11, 2021 letter to the strata. Ms. Lee says the strata did not provide all of those records, and she seeks an order for the strata to provide her with copies of them.

2. The strata says Ms. Lee's request was overly broad, vague, and unreasonably burdensome, and some of the requested records contain legal advice that is protected by solicitor-client privilege and litigation privilege. The strata also says the requested records relate to an issue that is the subject of a British Columbia Supreme Court (BCSC) proceeding which Ms. Lee is not a party to, about parking and storage lockers in the strata (BCSC proceeding). The strata says Ms. Lee's request is essentially a request for document production in the BCSC proceeding. It says the BCSC, and not the CRT, should determine which of the records Ms. Lee is entitled to, in particular any privileged documents. However, the strata says it is willing to provide Ms. Lee with the requested documents in its possession or control, subject to privilege and the payment of copy charges.
3. Ms. Lee 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.
8. As noted, the strata says that Ms. Lee's record requests are akin to document production in the BCSC proceeding, and so her claim should be decided by the BCSC. In *Kayne v. Strata Plan LMS2374*, 2007 BCSC 1610 at paragraph 11, the court found the petitioner had misconceived the nature of records requests under the *Strata Property Act* (SPA) by approaching the matter as if it was a demand for production of documents in litigation. Given that Ms. Lee is not a party to the BCSC proceeding and she is requesting documents as an owner under SPA sections 35 and 36 as explained below, I find her claim falls within the CRT's strata property jurisdiction under CRTA section 121. I find the BCSC is not a more appropriate forum.

ISSUES

9. The issues in this dispute are:
 - a. Which records must the strata provide to Ms. Lee?
 - b. Are certain strata legal opinions and other records privileged, and if so, is Ms. Lee entitled to copies of them, with or without restrictions?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, Ms. Lee must prove her claims on a balance of probabilities. I have read and weighed the parties' evidence and submissions, but I refer only to that which I find necessary to explain my decision.

11. The strata was formed in 1996. It consists of 96 strata lots in a 5-storey commercial building with underground parking. Ms. Lee purchased strata lot 83 in 2007.
12. According to a petition and response in evidence, the BCSC proceeding is an action by several strata lot owners against the strata and the owner of strata lot 72. The petitioners say that several parking spaces and a storage locker are designated as limited common property (LCP) for the exclusive use of the strata lot 72 owner. However, the petitioners say that many of those spaces and the locker were licenced to the petitioners or previous owners by the owner developer, which was a previous owner of strata lot 72. The petitioners seek more permanent access to the parking spaces and locker licenced to them or otherwise assigned to the strata lots they own.
13. As noted, Ms. Lee is not a party to the BCSC proceeding, although she provided an affidavit that was filed with the strata lot 72 owner's response to the petition. The affidavit is not in evidence in this dispute. The strata did not file a response to the petition. The strata does not directly dispute the response's statement that the owner of strata lot 83 is "an unaffected strata lot owner". Ms. Lee says she is only interested in the requested records as a strata lot owner, and not because she intends to raise a dispute with the strata or become a party to the BCSC proceeding.

Which of the requested records must the strata provide to Ms. Lee?

14. Under SPA section 35(1), the strata must prepare certain records. Section 35(2) requires the strata to retain copies of the section 35(1) records, as well as several other types of records.
15. SPA section 35(3) says records referred to in section 35 must be retained by the strata for the periods set out in the regulations. In *The Owners, Strata Plan NWS 1018 v. Hamilton*, 2019 BCSC 863 at paragraph 27, which was an appeal of a CRT decision, the court determined that the CRT's decision to order production of documents not covered by SPA section 35 was inconsistent with existing case law, and was unreasonable. That decision is binding on me, so I find I lack jurisdiction to order access to records that are not covered by SPA section 35. Given section 35(3),

I find section 35 only covers strata records that fall within the retention periods set out in the regulations, and I may only order the strata to provide those records.

16. *Strata Property Regulation* (SPR) 4.1 sets out how long section 35 strata records must be retained. Legal opinions and common property (CP) resolutions must be retained permanently. Meeting minutes and vote results, books of account, Information Certificates (Forms B), and annual budgets and financial statements, must be retained for 6 years. Correspondence must be kept for 2 years, and contracts for 6 years after their termination or expiry.
17. SPA section 36 says the strata must make requested section 35 records available to a strata lot owner on request. The owner may inspect the documents or receive copies. In this dispute, Ms. Lee requests copies.
18. Ms. Lee requested several strata records in emails dated October 29, 2020, November 27, 2020, and January 22, 2021. The requested records undisputedly numbered in the thousands of pages, and some were outside of the SPA section 35(3) retention periods. I find the following outstanding requests were summarized in the March 11, 2021 letter:
 - a. 595 strata emails dated January 1, 2004 onward, promised but not delivered by the strata's then-property management company, Pacific Dawn Asset & Property Management (Pacific Dawn),
 - b. Additional non-email strata correspondence from January 1, 2004 onward,
 - c. If the strata has not kept all correspondence from January 1, 2004 onwards, all strata correspondence and all strata council member correspondence from January 1, 2018 to March 11, 2021,
 - d. All legal opinions obtained by the strata about the allocation and LCP designation of parking stalls and storage lockers,
 - e. All Form B records for strata lots "affected by" parking stall and storage locker allocation from January 1, 2014 to the present date. According to the letter, Ms. Lee had already received digital copies of some of those records and her

representative reviewed the strata's physical files, but some unspecified Form B documents were allegedly missing,

- f. All supporting documentation for each Form B provided, in particular that supporting parking stall and locker allocation, for January 1, 2014 to the present,
 - g. A letter dated July 31, 2020 to "aggrieved owners",
 - h. All correspondence between Pacific Dawn and the strata council about "the parking stall and locker issue" from January 1, 2014 to the present,
 - i. A proposal from POI Parking Inc. to the strata council, mentioned in a letter dated March 16, 2018, and
 - j. A copy of the strata's general ledger, showing the legal fees and survey fees paid for the period January 1, 2014 to the present.
19. The strata says the March 11, 2021 letter was delivered to an incorrect email address, so it was not aware of the letter until it received Ms. Lee's CRT Dispute Notice. This was after the letter's March 25, 2021 deadline for a response. SPA section 36(3) requires the strata to comply with such a records request within 2 weeks of receiving it. The strata says that assembling the records took some time given the broad scope of the request, and because the strata's change of property management companies on May 1, 2021 was not seamless. It is undisputed that the strata had already provided Ms. Lee with many strata records before March 11, 2021.
20. I find that all of the outstanding records requested on March 11, 2021 are types of records that the strata is required to retain under sections 35(1) and 35(2). In a September 28, 2021 letter emailed by its lawyers, the strata provided Ms. Lee with an index of all the strata documents in the strata's control or possession, including documents already received or requested by Ms. Lee, and including documents that the strata says it was not required to retain or provide under SPA sections 35 and 36. The index lists 176 different documents and categories of documents. The strata said

it would provide Ms. Lee copies of any or all of those documents, subject to copying charges and certain privileged communications. I discuss privilege below.

21. I note that the strata may refuse to supply copies of records requested under section 36 until the fee charged for the copies is paid. The SPA, SPR, and strata bylaws do not distinguish between fees for paper and electronic copies. SPR 4.2 says the maximum fee the strata may charge for copies is 25 cents per page. Ms. Lee's claim does not address fees for the requested strata record copies, so I make no findings about that.
22. Ms. Lee says the strata's index is inaccurate or incomplete in some respects. In particular, Ms. Lee says the index does not squarely address whether some of the requested documents, in particular some strata correspondence, has been retained by the strata or is available to Ms. Lee. However, I find Ms. Lee does not claim any relief based on an alleged strata failure to retain SPA section 35 records.
23. Index item 156 lists "Various email correspondence between Strata Council (with redactions)". Ms. Lee says the strata is not entitled to redact this correspondence. However, at paragraph 22 of *Kayne*, the court found that with respect to SPA section 35(2)(k) correspondence, "it would be stretching the language of the [SPA] far beyond what was intended to suggest that it includes all correspondence between individual members of council that may or may not relate to the business of the council." Although not binding on me, I find persuasive and adopt the reasoning of the CRT Vice Chair in *Pritchard v. The Owners, Strata Plan VIS3743*, 2017 BCCRT 69, who determined that emails between strata council members were not records within the meaning of SPA section 35, relying on *Kayne*. Further, as in *Pritchard*, I find there is insufficient evidence of the strata routinely providing correspondence between council members to other owners, so I find it is not significantly unfair for the strata to withhold such correspondence from Ms. Lee. I find that Ms. Lee is not entitled to any correspondence between strata council members.
24. Ms. Lee says it is unclear whether the strata's record index includes the approximately 595 emails from 2018 onward that Pacific Dawn said it withheld from

her, and certain other strata correspondence. She also says it is unclear whether the index includes Form B attachments.

25. I find that the index includes “Correspondence related to parking” from January 2007 to February 2021, as well as “various email correspondence” from January 1, 2018 to October 1, 2020, and Forms B for various strata lots. I find Ms. Lee has not shown that the requested records are not present in the indexed documents, and if they are not, that the strata possesses or controls those records and intends to withhold them. On balance, I find the strata has listed all of the types of requested records in its possession and control, and is willing to provide any of the non-privileged records to Ms. Lee. I find it would be futile to order the strata to provide requested section 35(2) records it does not possess or control.
26. I find Ms. Lee is entitled to strata records kept during the applicable SPA section 35(3) retention periods, from the time of her initial document request on October 29, 2020. So, subject to my findings on legal privilege below, to the extent any of the following documents are in the strata’s possession or control, I order the strata to provide unredacted copies of them to Ms. Lee upon her written request and payment of any applicable copy fees:
- a. All strata correspondence from October 29, 2018 to the date of this decision, except for correspondence between strata council members,
 - b. All Form B records, including any attachments, from October 29, 2014 to the date of this decision, for strata lots with CP parking stalls or storage lockers assigned to or associated with them, and
 - c. The strata’s general ledger for the period October 29, 2014 to the date of this decision.
27. I note that the strata has offered to provide additional documents to Ms. Lee, but following *Hamilton*, my order is limited to documents covered by SPA section 35.

Are certain strata legal opinions and other records privileged, and is Ms. Lee entitled to copies of them?

28. SPA section 35(2)(h) requires the strata to keep legal opinions obtained by the strata corporation. As noted, section 36 requires the strata to provide such documents to strata lot owners. At paragraph 7 of *Kayne*, the court confirmed that the requirements of sections 35 and 36 are mandatory. Ms. Lee requested all legal opinions obtained by the strata pertaining to the LCP designation and allocation of parking stalls and storage lockers. The strata has already provided some, but not all, of these legal opinions to Ms. Lee.
29. Section 169(1)(b) says that an owner suing the strata does not have a right to information or documents relating to the suit, including legal opinions kept under section 35(2)(h). Ms. Lee is not a party to the BCSC proceeding or any other strata litigation identified by the parties. Ms. Lee's parking is not at issue in the BCSC proceeding, and I find neither she nor the strata have indicated that they dispute or intend to dispute parking spaces or lockers. So, contrary to the strata's submissions, I find the evidence does not show that Ms. Lee or the strata are potentially parties to intended future strata litigation. I find section 169(1)(b) is not applicable here.
30. The strata says it obtained legal opinions dated April 12, 2016, September 18, 2019, and September 16, 2020 (withheld opinions). It says these opinions and other unspecified strata communications are protected by solicitor-client privilege and litigation privilege, and should not be disclosed to Ms. Lee. Although Ms. Lee does not dispute that those records were protected by privilege, she says that the strata has waived that privilege by its actions, so the records should be provided to her. Further, Ms. Lee says that even if the records remain privileged, they should still be released to her on the condition that she not share them with anyone else.
31. Privilege restricts the disclosure of documents. Solicitor-client privilege covers communications between a lawyer and a client that are made in confidence to obtain legal advice. Litigation privilege applies to documents prepared for the dominant purpose of obtaining legal advice or to conduct or aid in the conduct of litigation (see *Canning v. Mann*, 2019 BCSC 841). As Ms. Lee does not dispute that the withheld

opinions were protected by privilege, I found it unnecessary to request copies of those records, which are not in evidence. I find the withheld opinions are likely protected by solicitor-client privilege and litigation privilege.

32. Privilege may be waived voluntarily by the person who holds it, or where fairness and consistency require it. For example, waiver of privilege over part of a communication can be waiver over the entire communication (see *S. & K. Processors Ltd. v Campbell Avenues Herring Producers Ltd.*, [1983] 4 WWR 762, 1983 CanLII 407 (BCSC) at paragraph 6). There is no evidence that the strata has explicitly waived privilege over the withheld opinions, but Ms. Lees says the council's actions waived privilege.
33. Ms. Lee says that certain strata council members had access to the withheld opinions when they were on the council, and they are now applicants in the BCSC proceeding against the strata. I do not find this to be a waiver of privilege. Strata corporations must act through their councils, and the evidence does not show that the strata permitted any owner to access the withheld opinions except in their capacity as a strata council member.
34. The strata provided Ms. Lee with other legal opinions about possible visitor parking relocation and the rental of outdoor parking spaces, dated January 28, 2007 and March 16, 2018. The strata says those opinions were not directly related to the BCSC proceeding, so it was required to provide them upon request under SPA section 36. Ms. Lee says that because those opinions relate to the parking spaces that are disputed in the BCSC proceeding, the strata has effectively waived privilege over its other legal opinions that relate to that proceeding. I do not find Ms. Lee's argument persuasive. I find the disclosed opinions in evidence relate to parking options being considered by the strata, but not specifically the dispute in the BCSC proceeding. I do not find that waiving privilege over those disclosed opinions waives privilege over the withheld opinions. Similarly, I do not find that other required disclosures of strata information or records to BCSC proceeding parties, for example the outcome of an ownership vote, are sufficient to show a waiver of privilege over the withheld opinions.

35. Ms. Lee says that before a parking-related ownership vote, the strata entered into a litigation funding agreement where certain owners agreed to pay for most of the strata's legal fees in certain types of future proceedings. Those owners later became the petitioners in the BCSC proceeding against the strata. Ms. Lee says this means the strata or its counsel have effectively agreed to represent the BCSC proceeding petitioners, so the strata cannot assert privilege to withhold documents from those petitioners or other owners. Only an unsigned blank litigation funding agreement is in evidence, and I find it only covers BCSC applications by the strata against any dissenting voters in a parking-related ownership vote. I find the BCSC proceeding is not such an application by the strata, but is instead an application by a group of presumably non-dissenting owners against the strata and another owner. I find the alleged litigation funding agreements are not sufficient to show that the strata has waived privilege over legal opinions or other communications in the BCSC proceeding.
36. Having considered Ms. Lee's arguments and the submitted evidence, I find that they do not prove that the strata has waived privilege over the withheld opinions or other privileged correspondence.

Should Ms. Lee's use of privileged records be restricted?

37. In *Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428*, 2009 BCSC 506, the court considered whether a strata lot owner was entitled to legal opinions about proceedings where the owner was not named as a party. The court found that providing unrestricted access to privileged legal opinions was not appropriate because they might be provided to owners involved in the proceedings. The court determined that the proper approach was to share the opinions with the owner, but restrict the owner from sharing them with others. As in my decision *Welsh v. The Owners, Strata Plan 962*, 2021 BCCRT 634, I find I am bound by the court's decision in *Azura*, which I find applies to the withheld opinions and other privileged correspondence in this dispute. Given my finding that there is likely no existing or intended dispute between the parties about matters addressed in the privileged

records requested, I find it unnecessary to order any redactions to copies provided to Ms. Lee.

38. For the above reasons, I find that the strata may not withhold the requested records because of legal privilege. I find that Ms. Lee is entitled to the 3 withheld opinions under SPA sections 35(2)(h) and 36, and I order the strata to provide unredacted copies of them to Ms. Lee upon payment of any applicable copy fees. In keeping with *Azura*, I order Ms. Lee not to share or disclose to any other person or organization any part of those legal opinions, or any part of other privileged records received from the strata or its agents as a result of orders made in this decision.

CRT FEES AND EXPENSES

39. 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. Ms. Lee was largely successful in this dispute, so I order the strata to reimburse her for \$225 in CRT fees. Neither party claims CRT dispute-related expenses.
40. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Lee.

ORDERS

41. Within 30 days of the date of this decision, I order the strata to provide unredacted copies of the following records to Ms. Lee upon her written request and payment of any applicable copy fees under the SPA, to the extent the records are in the strata's possession or control:
- a. Strata correspondence from October 29, 2018 to the date of this decision, except for correspondence between strata council members,

- b. Form B records, including any attachments, from October 29, 2014 to the date of this decision, for strata lots with CP parking stalls or storage lockers assigned to or associated with them,
 - c. The strata's general ledger for the period October 29, 2014 to the date of this decision, and
 - d. The legal opinions dated April 12, 2016, September 18, 2019, and September 16, 2020.
42. I order Ms. Lee not to share or disclose to any other person or organization any part of the legal opinions noted above, or any part of other privileged records received from the strata or its agents as a result of records orders in this CRT dispute.
43. Within 30 days of the date of this decision, I order the strata to pay Ms. Lee \$225 in CRT fees. Ms. Lee is also entitled to post-judgment interest under the *Court Order Interest Act*, as applicable. I dismiss the remainder of Ms. Lee's claim.
44. 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.

Chad McCarthy, Tribunal Member