Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

LOREEN KNELSEN

APPLICANT

A N D :

The Owners, Strata Plan KAS 3625

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. This is a dispute about voting entitlement. Loreen Knelsen co-owns a strata lot in the strata corporation, The Owners, Strata Plan KAS 3625 (strata). The strata is a resort in Summerland.

2. The strata is the result of an amalgamation of 2 other strata corporations, The Owners, Strata Plan KAS 2894 (2894) and The Owners, Strata Plan KAS 3069 (3069). The amalgamation occurred on February 18, 2009. Before amalgamation, 2894 had filed a Schedule of Voting Rights (SVR) with the Land Title Office (LTO) that allocated 15.6 votes to its strata lot 1 (SL1). The same strata lot is also strata lot 1 in the amalgamated strata. The strata owns SL1 and strata lot 80 (SL80).

3. It is undisputed that the strata has no SVR. Despite this, since 2013 the strata has used its SL1 and SL80 votes and allocated SL1 15.6 votes. Ms. Knelsen says that this is contrary to section 53 of the *Strata Property Act* (SPA), which says that unless a strata corporation has an SVR, each strata lot has 1 vote. Ms. Knelsen asks for 2 orders related to SL1's "extra" votes. First, she asks for an order that the strata establish a "fair" SVR. Second, she asks for an order that I "declare invalid" any resolution that SL1 voted on since 2013.

4. Ms. Knelsen also alleges that the strata acted improperly by voting with SL1 and SL80's votes, relying on *Azura Management (Kelowna) Corp. v. Owners of The Strata Plan KAS2428*, 2009 BCSC 506. Even though the strata has voted on several resolutions since 2013, Ms. Knelsen only asks for an order that the bylaw amendments passed at the September 28, 2013 special general meeting (2013 SGM) "be struck". She also alleges that it was significantly unfair for the strata to use its votes to pass bylaw amendments that were contrary to her interests.

5. The strata says that Ms. Knelsen's first claim is *res judicata*, which means "already decided". The strata says that the Civil Resolution Tribunal (CRT) already dealt with voting rights in a dispute with another owner, Michael Drance, in *Drance v. The Owners, KAS 3625*, 2021 BCCRT 727 (Drance decision). The strata also says that all of Ms. Knelsen's claims are out of time under the *Limitation Act*.

6. As for the merits of Ms. Knelsen's first claim, the strata argues that 2894's SVR survived the amalgamation and continues to give SL1 15.6 votes. The strata says that, in any event, SL1's 15.6 votes were not determinative in any vote, so nothing has turned on the fact that it has 15.6 votes instead of 1.

7. With respect to the second claim, the strata says that the owners present at the 2013 SGM unanimously approved a resolution permitting the strata council to vote on behalf of SL1 and SL80. The strata notes that Ms. Knelsen did not attend the 2013 SGM and that the bylaw amendments passed unanimously. The strata also argues that Ms. Knelsen has no standing to contest the results of the nonresidential vote, since she owns a residential strata lot. Finally, the strata denies that the vote was significantly unfair.

8. Ms. Knelsen is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

9. These are the CRT's formal written reasons. 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.

10. 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.

11. 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.

12. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the tribunal 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

13. The issues in this dispute are:

    a. Are any of Ms. Knelsen's claims out of time under the *Limitation Act*?

    b. Is Ms. Knelsen's claim about the SVR *res judicata* or an abuse of process?

    c. Was the strata entitled to vote at the 2013 SGM?

    d. Did the strata treat Ms. Knelsen significantly unfairly by voting at the 2013 SGM?

    e. How many votes does SL1 have?

    f. What remedy, if any, is appropriate?

BACKGROUND

14. In a civil claim such as this, Ms. Knelsen as the applicant must prove her case on a balance of probabilities. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

15. The strata consists of 119 strata lots in 2 buildings, of which 115 are residential. SL1 and SL80 are both nonresidential strata lots. SL1 is the hotel's lobby. The strata leases SL80 to a company that operates a spa. The other 2 nonresidential lots are a restaurant. Ms. Knelsen's strata lot is a residential strata lot.

16. Under the strata's bylaws, the strata has 2 sections. The 2 restaurant strata lots are in one section. The remaining strata lots are in the other, which is known as the "Resort Section". While the strata has voted on behalf of SL1 and SL80 in Resort Section general meetings, the Resort Section is not a party to this dispute. So, I find that the validity of any Resort Section votes is not before me to decide.

EVIDENCE AND ANALYSIS

Are any of Ms. Knelsen's claims out of time under the Limitation Act?

17. Under section 13 of the CRTA, the *Limitation Act* applies to the CRT. The *Limitation Act* creates a 2-year limitation period for most claims, including Ms. Knelsen's claims. The strata argues that Ms. Knelsen's claims are both out of time. I note that it raised the same issue at an earlier stage of this CRT proceeding. In a preliminary decision, another CRT member concluded that Ms. Knelsen's claims are not out of time. That decision, which the CRT member noted was made based on limited evidence, is not binding on me.

18. Under section 8 of the *Limitation Act*, the limitation period starts running when the party "discovers" their claim. A party discovers a claim when they know or reasonably should know that another person has caused them a loss and that a legal proceeding would be an appropriate way to remedy the loss. Ms. Knelsen applied to the CRT on July 6, 2021. So, any claims she discovered before July 6, 2019, are out of time, and must be dismissed even if they would have otherwise been successful.

19. The strata says that Ms. Knelsen discovered the claim about the SVP when she purchased her strata lot in 2009, because she reasonably should have found out during the purchase process that there was no SVP. Section 59 of the SPA sets out the documents that the strata must provide a purchaser of a strata lot, which does not include an SVP. I do not agree with the strata that a reasonably diligent purchaser must also search the LTO on their own initiative to determine whether the strata has an SVP. I find this places too high a burden on purchasers.

20. The strata also relies on the Disclosure Statement that the developer gave purchasers, which outlines the voting structure based on 2894's SVR. However, Ms. Knelsen says that she did not receive the Disclosure Statement because she bought her strata lot from a prior owner, not directly from the developer. The strata does not dispute this so I accept that it is true. The Disclosure Statement also does not say anything about an SVR. I find that the Disclosure Statement does not help the strata.

21. With that, I agree with Ms. Knelsen that she discovered that the strata had not filed an SVP in January 2020, when the strata manager confirmed that the strata had no SVP. Therefore, I find that her claims about the SVP are not out of time.

22. I reach a different conclusion about the claim about the strata's use of SL1 and SL80's votes at the 2013 SGM. This claim has nothing to do with the SVP, or lack thereof. Rather, this claim is only about whether the strata was allowed to vote. The minutes indicate that the owners present unanimously approved a resolution permitting the strata council president to use SL1 and SL80's votes. It is undisputed that Ms. Knelsen did not attend the 2013 SGM, so I find that she knew or reasonably should have known that the strata used SL1 and SL80's votes when she received the minutes.

23. I acknowledge that Ms. Knelsen was not aware of *Azura* until much later and therefore did not know that the strata's use of the votes may have been improper. In other words, while she knew the relevant facts in 2013, she did not know the applicable law. While there are no court cases from BC on this point (see *Aubichon v. Grafton*, 2022 BCCA 77), Ontario has a nearly identical *Limitation Act*. Ontario courts have consistently concluded that a claim is considered discovered even if the person does not understand the legal significance of the facts they know. See, for example, *Holley v. The Northern Trust Company, Canada*, 2014 ONSC 889, at paragraph 156. Ontario decisions are not binding on me, but I agree with this proposition.

24. I therefore find that Ms. Knelsen discovered this claim when she received the 2013 SGM minutes. The exact date is not in evidence, but I find that it was likely before the end of 2013, and in any event, far before July 6, 2019. I dismiss Ms. Knelsen's claim about whether the strata was entitled to use SL1 and SL80's votes at the 2013 SGM as out of time.

Is Ms. Knelsen's claim about the SVR res judicata or an abuse of process?

25. The strata argues that the CRT considered the strata's voting rights in the Drance decision. According to the written decision, Mr. Drance argued that the strata's voting

entitlement was “illegal” and asked the CRT to impose a fair voting entitlement schedule.

26. The CRT member refused to resolve Mr. Drance’s claim about voting entitlement. She found that the parts of his claim that dealt with allegedly criminal behaviour were outside the CRT’s jurisdiction, and that in any event the remedy he requested was unenforceable. Ms. Knelsen was not a party to that dispute.

27. The doctrine of *res judicata* exists to prevent the relitigation of disputes. For that reason, *res judicata* only applies when the previous decision is a final decision. See *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180, at paragraphs 28 and 31. When the CRT refuses to resolve a claim or dispute, it is not a final decision on the merits. So, I find that *res judicata* does not apply because the CRT did not make a final decision about voting entitlement.

28. While the doctrine of abuse of process is more flexible than *res judicata*, it exists to prevent the same problems. See *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at paragraphs 37 to 44. The key purpose is to uphold the integrity of the justice system by ensuring that final decisions are indeed final. Again, I find that because the Drance decision about the strata’s voting scheme was not final, Ms. Knelsen’s claim is not an abuse of process.

How many votes does SL1 have?

29. Section 269 of the SPA governs how 2 or more strata corporations may be amalgamated into a single strata corporation. Relevant to this dispute, section 269(2)(b)(iv) says that if a predecessor strata corporation has an SVR, the amalgamation application to the registrar must include a new SVR.

30. The predecessor strata corporations applied for amalgamation on February 16, 2009. Even though 2894 had an SVR, the amalgamation application did not include a new SVR. Despite this apparent noncompliance with section 269 of the SPA, the LTO accepted the application on February 18, 2009.

31. Ms. Knelsen relies on section 53 of the SPA, which says that each strata lot has 1 vote unless there is an SVR that says otherwise. The strata says that "an argument could be made" that 2894's SVR survived amalgamation. However, the strata does not explain what that argument is. I find that a plain reading of section 269 supports Ms. Knelsen's position. I find that requiring strata corporations with existing SVRs to include a new SVR in their amalgamation application necessarily means that SVRs do not survive amalgamation.

32. In the absence of an SVR, I agree with Ms. Knelsen that section 53 applies and every strata lot has 1 vote. I find that the strata has breached section 53 of the SPA by allocating SL1 more than 1 vote at general meetings.

What remedy, if any, is appropriate?

33. As mentioned above, Ms. Knelsen asks for 2 remedies, one about the validity of past votes and one about correcting the problem going forward.

34. The strata provided a copy of all AGM and SGM minutes from 2013 to 2019. The strata says that SL1's additional 14.6 votes did not impact the outcome of any vote. Having reviewed the minutes in evidence, I agree. Notably, all of the bylaw amendments passed unanimously.

35. For reasons that are not explained, neither party provided AGM or SGM minutes after the 2019 AGM. However, Ms. Knelsen does not dispute the strata's assertion that SL1's votes made no difference to any resolutions at the 2020 AGM. She also does not dispute the strata's assertion that it did not use SL1's votes at the 2021 AGM. Given that Ms. Knelsen bears the burden of proving her claims, I find that SL1's extra votes never changed the outcome of a vote at an AGM or SGM.

36. Ms. Knelsen argues that the reason SL1's votes never mattered was because the restaurant owner likely never bothered to attend general meetings because its votes were so heavily outnumbered by the strata's votes. In particular, Ms. Knelsen points out that under section 128 of the SPA, bylaw amendments require separate votes between residential and nonresidential strata lots. As a result, SL1's 15.6 votes meant

that the strata could unilaterally decide whether a bylaw amendment would pass or fail.

37. While I accept that this points to the potential for unfairness, I find Ms. Knelsen's argument speculative. In fact, I find that the only evidence from a restaurant owner contradicts her argument. On January 22, 2021, a former owner of the restaurant, CLM, wrote a letter to Mr. Drance. CLM said that they knew that their vote "did not count" when it came to bylaw amendments, but still said that they "attended most meetings". CLM did not refer to any bylaw amendments that they disagreed with. More importantly, as mentioned above, the minutes indicate that the bylaw amendments all passed unanimously, with no abstentions. I find that CLM likely would have voted against any bylaw amendments they disagreed with even if the vote did not ultimately affect the outcome.

38. In any event, I find that this potential unfairness is far outweighed by the considerable chaos that would ensue if every vote the strata took since 2013 was retroactively invalidated. In the absence of any concrete, proven impact of SL1's extra votes, I decline to make any order about the validity of any resolutions. I note that I have taken the same approach as the court in *Azura*. There, an owner asked the court to invalidate certain votes because of voting irregularities. The court declined to do so because it determined that none of the proven irregularities affected the outcomes of any votes.

39. Ms. Knelsen also wants an order that the strata establish a fair SVR. I find that there are 2 difficulties with Ms. Knelsen's proposed remedy.

40. The first is that the SPA only provides for 2 occasions when a strata corporation may establish an SVR. Sections 247 and 248 say that a strata corporation may establish an SVR when a person applies to deposit a new strata plan, which is essentially when a strata corporation is created. Section 264 says that a strata corporation may establish an SVR after amendments that change the number, size, or composition of strata lots. There is nothing in the SPA that suggests that owners of an existing strata

corporation can simply choose to establish a new SVR outside of these narrow contexts.

41. Section 50(1) says that at general meetings, all matters are decided by majority vote unless the SPA or *Strata Property Regulation* provide a different threshold. Because there is no process in the SPA for establishing a new SVR to correct an error at amalgamation, I find that the SPA would provide for a majority vote. The possibility that a simple majority of owners could decide how many votes each strata lot gets is obviously problematic, which supports my conclusion that the SPA does not allow a strata corporation to simply choose to amend its SVR. In any event, there is no guarantee that the Superintendent of Real Estate or the LTO would permit the strata to establish a new SVR even if the owners were able to agree on one in a fair and democratic fashion.

42. The second difficulty with Ms. Knelsen's proposed order is that it would serve no purpose. I say this because of the court's reasoning in *Azura* about a strata corporation's ability to vote when it owns a strata lot, which Ms. Knelsen raised in her claim about the 2013 SGM.

43. In that case, the strata corporation owned 24 "common area" strata lots. One was a shared laundry facility and the other 23 were permanent "green space". The strata council used these 24 votes to support its agenda at an AGM. The court concluded that this was inappropriate because the 24 strata lots were owned by all of the owners, so its votes should not be used to support one faction of owners over another in a contentious vote. The court found that the strata corporation should only use its votes when there is a resolution that requires unanimity.

44. I find that the same reasoning applies to the strata's use of SL1's votes in this dispute. In short, the strata is not allowed to use them, so whether SL1 has 1 vote or 15.6 votes going forward makes no difference.

45. In summary, while I agree with Ms. Knelsen that SL1 only has 1 vote, I find that no remedy is warranted. I find that even if the strata could establish a fair SVR, which is uncertain, doing so would be pointless.

TRIBUNAL FEES AND EXPENSES

46. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. While I agreed with some of Ms. Knelsen's arguments, I find that she was ultimately unsuccessful. I dismiss her claim for CRT fees. The strata did not claim any dispute-related expenses or pay any CRT fees.

47. The strata must comply with the provisions in section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Knelsen.

DECISION AND ORDER

48. I dismiss Ms. Knelsen's claims, and this dispute.

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Eric Regehr, Tribunal Member