



# Civil Resolution Tribunal

Date Issued: July 4, 2022

File: ST-2021-005176

Type: Strata

Civil Resolution Tribunal

Indexed as: *Ferrer v. The Owners, Strata Plan LMS 3463*, 2022 BCCRT 759

**B E T W E E N :**

**GINA FERRER**

**APPLICANT**

**A N D :**

**The Owners, Strata Plan LMS 3463**

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Micah Carmody

## **INTRODUCTION**

1. This dispute is about procedures at a strata corporation's annual general meeting (AGM).

2. The applicant, Gina Ferrer, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 3463. Gina Ferrer asked to be identified as “Gin” and did not provide pronouns, so I have used gender-neutral pronouns in this decision.
3. Gin says the voting procedures at the strata’s 2020 AGM did not comply with the *Strata Property Act* (SPA) and the strata did not correctly count the votes. Gin says therefore the budget and all resolutions passed are invalid and the strata council was not validly elected. Gin seeks various orders related to the 2020 AGM.
4. The strata says Gin’s claims are now moot because the 2021 AGM has been held, a new budget passed and a new council elected. The strata also says many of Gin’s requested resolutions are declaratory orders that are beyond the CRT’s jurisdiction. The strata asks me to dismiss the claims.
5. Gin is represented by a lawyer, Polina Furtula. The strata is represented by a lawyer, Jamie Bleay.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. 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. 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.

8. 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.
9. 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.

## **ISSUES**

10. Are Gin's claims moot or beyond the CRT's jurisdiction?
11. If not, what remedies, if any, are appropriate?

## **EVIDENCE AND ARGUMENT**

12. As the applicant in this civil proceeding, Gin must prove their claims on a balance of probabilities, meaning more likely than not. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
13. The strata plan indicates that the strata was created in 1998 and includes 148 strata lots in a single tower. Strata lots 1 through 127, including Gin's strata lot 82, are residential. The schedule of voting rights says the residential strata lots hold 1 vote each. Strata lots 128 through 148 are non-residential (commercial). They hold between 1.1 and 3.8 votes each, for a total of 57 of the strata's 184 votes.
14. The strata held an AGM on September 3, 2020 (2020 AGM). The 2020 AGM was conducted by "restricted proxy" with no in-person attendance.
15. The 2020 AGM minutes show that the budget was approved and strata fees increased by about 10%, largely because of increased insurance premiums. The ownership voted on and defeated 4 resolutions that would have amended the strata's bylaws. A new strata council was elected.

16. Gin argues that strata's restriction of proxies at the 2020 AGM made the meeting invalid. Gin relies on several CRT decisions that have found that the SPA requires strata corporations to allow owners to participate in general meetings if they wish and to select their proxies without restriction (e.g., *Balayewich v. The Owners, Strata Plan LMS317*, 2021 BCCRT 110 and *Hodgson v. The Owners, Strata Plan LMS 908*, 2021 BCCRT 463). The strata says it did not have a viable electronic meeting platform in place for the 2020 AGM. The strata does not dispute that it did not allow owners to freely select proxies without restriction or participate in the 2020 AGM.
17. Gin also argues there were irregularities in the vote counts. The strata submitted the proxy forms as evidence in this dispute. Upon reviewing the proxy forms, Gin submitted a tabulation of the votes, which I accept as a late submission. Gin says the strata assigned significantly higher votes to commercial strata lots than what is set out in the strata plan's schedule of voting rights. The strata did not provide any explanation for the discrepancy.
18. The 2020 AGM minutes counted 60.4 commercial votes, but the schedule of voting entitlement provides for only 57 commercial votes. A "sign in sheet" the strata manager apparently used to tally the votes shows that only 2 of the 20 commercial strata lots were assigned their correct votes. 23.9 votes were assigned to a single commercial strata lot that should have had 2.3 votes. Many commercial strata lots were assigned 1 vote but should have had more. The end result was 72 possible commercial votes, had every commercial strata lot owner submitted a proxy form. This is 15 more votes than the 57 votes the commercial strata lots should have had. In contrast, the residential strata lots were each correctly assigned 1 vote per strata lot.
19. This vote assignment error appears to have affected the strata council's election. Rather than 5 commercial owners and 2 residential owners, it appears council should have consisted of 5 residential owners and 2 commercial owners. It also appears that BD, who served as president, was not among the voters' top 7 candidates.

## ANALYSIS

20. Taken together, the evidence shows that the strata incorrectly assigned votes to commercial strata lots and did not comply with the SPA's proxy voting and meeting participation requirements (see SPA section 50(2), 53(1) and 56(3) and (4), and the discussion in *Balayewich and Hodgson*). The question is whether Gin has a claim that can be remedied.
21. As noted, the strata says Gin's claims are moot. A claim is "moot" when something happens after a legal proceeding starts that removes any "present live controversy" between the parties (see *Binnarsley v. BCSPCA*, 2016 BCCA 259).
22. The strata says Gin's claims are moot because at the October 7, 2021 AGM a new budget was passed, the 2020 bylaw amendment resolutions were reconsidered, and a new strata council was elected. The strata says there is no longer any live controversy and it would serve no purpose to declare that the 2020 AGM was invalid.
23. Gin does not make specific arguments about mootness but says strata corporations must strictly comply with democratic rights contained in the SPA. Gin says courts and tribunals have no authority to relieve against compliance failures causing breaches of an owner's democratic rights, even where the prejudice to an owner is overshadowed by greater prejudice to the strata corporation. Gin relies on *Omnicare Pharmacy Ltd. v. Strata Plan LMS 2854*, 2017 BCSC 256 and *The Owners, Strata Plan NW499 v Kirk*, 2018 BCSC 1249. Those decisions are binding on me, and I return to them shortly.
24. Gin framed this dispute as one claim with 7 requested remedies.
25. First, Gin seeks an order that the strata provide copies of all proxy forms received for the 2020 AGM. The strata provided the proxy forms as evidence in this dispute, so I find this request has been satisfied and I dismiss this claim.
26. Second, Gin seeks orders making the following declarations:
  - a. The 2020 AGM was invalid,

- b. All resolutions voted on at the 2020 AGM are invalid,
  - c. Strata council members were not properly elected at the 2020 AGM, and
  - d. All strata council actions since the 2020 AGM are invalid.
27. The CRT does not generally have jurisdiction to make declaratory orders. Although CRT decisions are not binding on me, I agree with and adopt the vice chair's reasoning in *Fisher v. The Owners, Strata Plan VR 1420*, 2019 BCCRT 1379, at paragraphs 62-67. I find that the CRT may only make a declaratory order if it is incidental to an order within the CRT's jurisdiction. The scope for such orders is narrow. As I explain below, I make no orders in this dispute, so I find it would be beyond the CRT's jurisdiction to make any declaratory orders.
28. Gin seeks 2 requested remedies that are not declaratory. Gin seeks an order that the strata not act on or rely on the 2020 AGM results, and an order that the strata hold a "properly constituted AGM for 2020" as soon as possible and with the same 4 bylaw amendment resolutions.
29. The 2020 AGM minutes show that the budget was approved by majority vote, resulting in a strata fee increase of about 10%. The evidence shows that, using the schedule of voting rights, the budget motion would not have achieved a majority vote and would have failed. The question of what remedy is appropriate after a budget approval is found to be flawed is one that the CRT has grappled with in other decisions. For example, in *Hodgson*, the CRT found that an AGM did not comply with the SPA and ordered the strata to hold a special general meeting (SGM) within 45 days so owners could vote on the AGM agenda items. However, the CRT said the strata fees, budget and council remained in effect until that SGM. In that case, unlike here, the strata had not yet held its next AGM.
30. In *Ottens v. The Owners, Strata Plan LMS 2785*, 2022 BCCRT 19, the CRT found that the budget approval and council election had effectively been replaced by subsequent AGM decisions, so it would serve no purpose to have the owners vote again. I agree with this approach. Put another way, the claim that the strata should be ordered not to act or rely on the budget and council elections from the 2020 AGM

is moot because after the 2021 AGM, the strata was no longer acting or relying on the 2020 AGM.

31. In *Kirk*, the BC Supreme Court found that a strata corporation's claim for strata fees and other debts from 2011 to 2018 was invalid because its bylaws were invalid, and therefore so were its budgets and strata fees. However, while the strata's debt claim failed, the court confirmed that the applicant owners were still responsible for paying their share of the strata fees necessary to operate the strata from 2011 to 2018. There is no debt claim here and Gin does not ask to be relieved of the obligation to pay strata fees, so I find *Kirk* does not assist Gin.
32. I turn to the bylaw amendment resolutions. Because the strata includes residential and commercial strata lots, the resolutions considered at the 2020 AGM required  $\frac{3}{4}$  vote approval from both residential and commercial owners under SPA section 128(1)(c). The resolutions were supported by the commercial owners but not the residential owners, and were defeated. Gin does not take issue with the counting of the residential owners' votes. The bylaws were not amended and there is no evidence that the strata attempted to enforce the proposed bylaws, so there is nothing I can order the strata to stop doing. I also note that all the bylaw amendments were considered again at the 2021 AGM, where 3 of the 4 were approved. This means that the owners have had the opportunity to consider and vote on the 2020 AGM resolutions. So, I find this aspect of the claim is moot.
33. As noted, Gin relies on *Omnicare*, a BC Supreme Court decision. In *Omnicare*, the court found that a strata council was not properly constituted because it did not include the commercial representation its bylaws required. The court concluded that it was significantly unfair for the strata to impose fines against *Omnicare*, a commercial owner, and cancelled the fines. While I am bound to follow *Omnicare*, I find *Omnicare* means an owner may challenge fines and other strata decisions that affect that owner where the strata council was not properly constituted. While I find the strata council was not properly constituted here, Gin does not challenge any strata council action or decision or allege that the strata treated them unfairly. So, I find *Omnicare* does not apply here and Gin is not entitled to a remedy.

34. In summary, I dismiss each of Gin's claims because they are moot or beyond the CRT's jurisdiction or both.

### **CRT FEES AND EXPENSES**

35. Based on the CRTA and the CRT's rules, as Gin was unsuccessful I find they are not entitled to reimbursement of CRT fees or dispute-related expenses. The strata did not pay fees or claim expenses.

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

### **ORDER**

37. I dismiss Gin's claims and this dispute.

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Micah Carmody, Tribunal Member