



Civil Resolution Tribunal

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File: ST-2022-004803

Type: Strata

Civil Resolution Tribunal

Indexed as: *Ker v. The Owners, Strata Plan LMS 280*, 2023 BCCRT 54

B E T W E E N :

LOIS KER and RUSSELL KER

APPLICANT

A N D :

The Owners, Strata Plan LMS 280

RESPONDENT

AMENDED¹ REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about the enforceability of a bylaw and rule that charge a user fee for natural gas consumption.

2. The applicants, Lois and Russell Ker, co-own strata lot 19 (SL19) in the respondent strata corporation, The Owners, Strata Plan LMS 280¹ (strata). Mrs. Ker represents the applicants. A strata council member represents the strata.
3. The Kers say the strata, at a special general meeting (SGM) held March 31, 2022, passed a bylaw and ratified a rule that impose user fees for natural gas consumption which they say is inconsistent with the *Strata Property Act* (SPA) and *Strata Property Regulation* (Regulation). First, they say the SPA and Regulation do not permit the strata to “segregate common expenses such as utilities on a user fee basis”. Second, they say the user fee is unreasonable. SL19 is a strata lot that is subject to the recently approved natural gas user fee.
4. As remedy, the Kers ask for orders that the bylaw be “removed”, and that the strata stop invoicing them the monthly user fee.
5. The strata agrees it passed the bylaw and ratified the rule, but disagrees that the bylaw and rule are contrary to the legislation. I infer the strata asks that the Ker’s claims be dismissed.
6. As explained below, I find the strata must immediately stop enforcing Bylaw 35 and rule 13, and stop invoicing the Kers for gas user fees under the bylaw and rule. That includes reversing user fees already charged to the Kers or SL19.

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.

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.

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 section 123 of the CRTA and the CRT rules, 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

11. The issues in this dispute are:
 - a. Is the gas user fee a permissible user fee under the SPA and Regulation?
 - b. If so, has the strata determined the amount of the gas user fee on a reasonable basis?
 - c. What is an appropriate remedy, if any?

BACKGROUND, EVIDENCE AND ANALYSIS

12. As applicant in a civil proceeding such as this, the Kers must prove their claims on a balance of probabilities, meaning more likely than not. I have considered all the submissions and evidence provided by the parties, but refer only to information I find relevant to explain my decision.
13. The strata was created in February 1992 under the *Condominium Act* and continues to exist under the SPA. It consists of 21 residential strata lots in the 8-storey building. SL19 is located on the 7th floor of the building and undisputedly has a gas fireplace and gas cooktop.

Is the gas user fee a permissible user fee under the SPA and Regulation?

14. SPA section 110 says the strata may not impose user fees for the use of common property or common assets except as set out in the Regulation.
15. Section 6.9(1) of the Regulation sets out the 2 requirements for a valid user fee: it must be set out in a bylaw or rule and the amount must be reasonable. Section 6.9(2) says that a user fee may be for a fixed amount or may vary if it reasonably based on a number of non-exhaustive factors like the user's consumption rate, recovery of the strata corporation's operating or maintenance costs, the number of users, and the duration of the use.
16. That the strata's gas user fee is set out in **both** a bylaw **and** a rule does not mean it is non-compliant with the legislation. As the strata suggests, the rule addresses the amount of the user fee which is more easily changed by a majority vote as opposed to a $\frac{3}{4}$ vote for a bylaw amendment. I find this reasonable and compliant with the Regulation.
17. On April 5, 2017, the strata filed a complete new set of bylaws with the Land Title Office (LTO) that repealed and replaced all previously filed bylaws. The Standard Bylaws do not apply as I infer they were repealed in 2010 with prior bylaw amendments. Two additional bylaw amendments have been filed since 2017. An amendment was filed in December 2020 which does not apply here. The user fee bylaw (bylaw 35) that is the subject of this dispute was filed on July 21, 2022 and does apply. Bylaw 35 is entitled "User Fees for Private Consumption of Common Property / Goods" and reads as follows, in its entirety (reproduced as written):
 1. Gas Consumption
 - a. User fees shall be imposed for a strata lot's use of natural gas ("Gas User Fee") as long as such fee is reasonable.
 1. The Gas User Fee shall be set out in the Strata Corporations' rules and amended on a yearly basis on the Monday before that year's annual general meeting.

- b. The Gas User Fee payable shall be applied to a strata lot that is subject to the Gas user Fee on the 1st of each month, payable immediately.

18. Bylaw 35 was approved at the March 31, 2022 SGM. At the same meeting, the strata ratified rule 13 by passing a majority vote as required under Regulation 6.9. Rule 13 reads (reproduced as written):

RULE 13 USER FEE

(1) Pursuant to bylaw User Fees for Private Consumption of Common Property/Goods the Strata Corporation sets the user fees as follows:

(a) For strata lots that have gas fireplaces: \$32.00 per month; We will calculate the annual gas fireplace charge by taking our annual strata gas bill and multiply it by 3.25%. To get the monthly suite/unit charge this amount will be divide by 12

(b) For strata lots that have gas appliances: \$12.50 per month; We will calculate the annual gas stove charge by taking our annual strata gas bill and multiply it by 1.27%. To get the monthly suite/unit charge this amount will be divided by 12

19. The Kers say SPA section 110 only applies to use of common property or common assets and that natural gas is neither of those things. Specifically, the Kers say section 6.9(2) of the Regulation was brought into force in 2018 “primarily to enable strata corporations to install and charge for electricity used by electric vehicle stations, located in areas of common property” [my emphasis]. They say the strata cannot charge a user fee for the use or consumption of natural gas because to do so would be “to segregate common expenses such as utilities for strata lots on a user fee basis”, which they say is not permitted under the SPA. The Kers do not say why the SPA does not permit segregating common expenses on a user fee basis. Instead, they rely on a Condominium Home Owner (CHOA) Article dated December 2021 that says the same thing, but also does not say why.

20. Presumably, the Kers’ argument is based on SPA sections 99 and 100 that say a strata corporation must calculate common expenses based on unit entitlement unless

a different formula is approved by passing a unanimous vote, which the strata has not done.

21. The strata opposes the Kers' view and says the gas line used to transport the natural gas to the strata lots is a common asset.
22. SPA section 1(1) defines common property to include pipes used for the passage or provision of gas depending on the pipes' location. Based on this definition, I find the pipes themselves can be common property but cannot be a common asset as the strata suggests. The location of the pipes supplying gas to individual strata lots, including SL19 is unclear. However, this dispute is not about the pipes, it is about charging a user fee for the use of natural gas, which I find is a common asset. The SPA's definition of a common asset under section 1(1) includes both personal property and land held by the strata corporation. The online version of the Merriam-Webster dictionary (www.merriam-webster.com) defines personal property as "property other than real property consisting of things temporary or movable". Applied broadly, I find the natural gas itself that flows through the pipes forms part of the strata's common assets, since it is purchased by the strata from a natural gas supplier. Therefore, I find the strata can charge a user fee for the use of natural gas contrary to what the Kers suggest.
23. I do not agree with the Kers that this dispute is about "segregation of common expenses". Rather, I find the strata's argument that owners who consume additional natural gas should not expect the remaining owners in the strata to pay for their consumption is reasonable. I find that a plain reading of section 6.9(2) creates an ability for the strata to charge a user fee for gas consumption given it states a user fee can be determined based on "the recovery of operating or maintenance costs by the strata corporation". Clearly, an operating or maintenance cost of the strata is a common expense of the strata. Put another way, I find section 6.9(2) allows for a strata corporation to recover common expenses paid by the strata corporation. The distinction here is that the strata is not "segregating" gas charges, but rather charging gas expenses as a common expense based on unit entitlement and then recovering the portion of the common expense used by SL19 by way of a user fee.

24. For these reasons, I find the strata is permitted to charge a user fee for the consumption of natural gas that relates solely to a strata lot. The difficulty for the strata is whether the fixed user fees for gas fireplaces and appliances set out in the bylaw and rule are reasonable.

Has the strata determined the amount of the gas user fee on a reasonable basis?

25. I find the answer to the question is no.

26. In *The Owners, Strata Plan LMS 3883 v. De Vuyst*, 2011 BCSC 1252, the BC Supreme Court said that a user fee must be objectively reasonable. An assessment of whether a user fee is reasonable may account for prevailing market conditions and costs incurred by the strata.

27. I find the wording of bylaw 35 and rule 13 difficult to follow. However, read together, bylaw 35 and rule 13 appear to say the strata will gross up the prior years' natural gas expenses by certain percentages, divide that number by 12 to calculate a separate average cost per strata lot for gas fireplace gas consumption and gas appliance gas consumption, and charge that amount monthly to the strata lots that use gas fireplaces and gas appliances. I do not find that the strata's explanation of how the user fees are calculated is objectively reasonable. The explanation provided by the strata in its submissions is confusing and unclear and based on speculative assumptions. For example, there is no consideration of when a strata lot is not used, such as while the owner is on vacation. There is also no attempt to calculate actual gas consumption, which may be different for different owners depending on the use, make and model of the fireplace or appliance.

28. For these reasons, I find the strata has not calculated the gas user fee on an objectively reasonable basis.

Remedy

29. Given my analysis above, I find an appropriate remedy is for the strata to immediately stop enforcing Bylaw 35 and rule 13 and to stop invoicing the Kers for gas user fees

under the bylaw and rule. That includes reversing user fees already charged to the Kers or SL19 and I so order.

CRT FEES AND EXPENSES

30. Under CRTA section 49 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 not to follow that general rule here.
31. The Kers are the successful party and paid \$175 in CRT fees so I order the strata to reimburse them that amount. They did not claim any dispute-related expenses so I order none.
32. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the Kers or SL19.

ORDERS

33. I order the strata to immediately stop charging the gas user fee to the Kers or SL19.
34. Within 30 days of the date of this decision, I order the strata to:
 - a. Reimburse the Kers \$225 for CRT fees, and
 - b. Reverse all prior gas user fees charged to the Kers or SL19.
35. The Kers are entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

36. 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.

J. Garth Cambrey, Vice Chair

¹ Amendment Note: Paragraphs 2, 13 and 22 were amended to correct inadvertent typographical errors in under authority of section 64 of the *Civil Resolution Tribunal Act*.