Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 1162 v. VCBC Leasing Corporation*, 2023 BCCRT 1042

B E T W E E N :

The Owners, Strata Plan LMS 1162

APPLICANT

A N D :

VCBC LEASING CORPORATION

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Megan Stewart

INTRODUCTION

1. This dispute is about the release of a holdback from the proceeds of a strata lot sale.

2. The respondent, VCBC Leasing Corporation (VCBC), used to own strata lot 54 (SL54) in the applicant strata corporation, The Owners, Strata Plan LMS 1162 (strata). VCBC says its tenant significantly altered SL54. VCBC signed an assumption

of liability agreement about the alterations. Upon selling SL54 to its tenant, VCBC agreed to a $16,956.91 holdback from the proceeds of sale (holdback) for expenses the strata says it incurred regarding the alterations. The strata says VCBC was responsible for these expenses under the assumption of liability agreement. The strata says VCBC refuses to allow the holdback's release, which the strata's lawyers still hold in trust. It asks for an order that the holdback be released to it. The strata is represented by a court-appointed administrator, Gerry Fanaken.

3. VCBC says it asked for clarification about the expenses making up the holdback but received an insufficient response from the strata. VCBC says some of the expenses are unjustified and the strata did not properly account for them. I infer VCBC asks me to dismiss the strata's claim. VCBC is represented by one of its directors.

JURISDICTION AND PROCEDURE

4. These are the Civil Resolution Tribunal's (CRT) formal written reasons. 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.

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.

Preliminary issue

8. I considered whether this dispute falls within the CRT's strata property jurisdiction, which is limited to claims "in respect of the *Strata Property Act*". This is because the strata says the dispute is about a breach of contract "pursuant to the terms of the Assumption of Liability".

9. However, in *Ryan-Glenlon v. Section 1 of The Owners, Strata Plan LMS 2532*, 2021 BCCRT 871, a non-binding but persuasive CRT decision, a tribunal member found that the same situation can give rise to multiple legal claims. He concluded that if a claim can be brought either under the *Strata Property Act* (SPA) or under the common law, it is in respect of the SPA. I agree. Here, I find that the strata's claim is also about the interpretation or application of the strata's bylaws (CRTA section 121(1)(a)), or alternatively, about money owing under the strata's bylaws (CRTA section 121(1)(d)). So, I find it is a claim in respect of the SPA that falls within the CRT's strata property jurisdiction.

ISSUES

10. The issues in this dispute are:

    a. Is the strata out of time to bring this dispute under the *Limitation Act*?

    b. If not, is the strata is entitled to the holdback from the proceeds of the sale of SL54?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the applicant strata must prove its claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find

necessary to explain my decision. VCBC did not provide any documentary evidence, despite having the chance to do so.

Limitation Act

12. Although VCBC did not suggest the strata's claim may be out of time under the *Limitation Act* (LA), I find I must decide this for the following reasons.

13. In submissions, the strata says its management company forwarded invoices in support of the holdback to VCBC following SL54's sale, around November 22, 2018. The strata says VCBC did not settle the debt and asked for further clarification, so Mr. Fanaken met with VCBC's representatives to explain the invoices. However, the strata says VCBC refused to allow the holdback's release, and it remains in the strata's lawyers' trust account. The strata submitted its application for dispute resolution to begin this CRT proceeding on November 4, 2022.

14. The basic limitation period under LA section 6 is 2 years from the date a party discovered a claim. Under LA section 8, a party discovered a claim when they knew, or reasonably should have known, they had a claim against another party and that a court or tribunal proceeding was an appropriate remedy. If the limitation period expires, the right to bring the claim ends, even if the claim would have otherwise been successful. Under LA section 24, the limitation period will be extended if a person acknowledges liability for a claim in writing before the limitation period expires.

15. As the strata applied for dispute resolution on November 4, 2022, I find it must have discovered its claim on or after November 4, 2020 for it to be in time, unless the limitation period was extended.

16. Through CRT staff, I asked the parties for submissions on whether any part of the strata's claim is out of time under the LA, and whether VCBC acknowledged liability for the holdback in writing before the limitation period expired. The strata, relying on *Price Security Holdings Inc. v. Klompas & Rothwell*, 2018 BCSC 129 (appealed on other grounds), says the limitation period was extended because the parties were in email negotiations for many months following the holdback's payment into trust, and

admitted a portion of the claimed amount during these negotiations. VCBC denies acknowledging any liability and says its communications were "merely a courtesy response in an attempt to resolve the differences in a peaceful manner."

17. The test to determine whether written communication contains an acknowledgment of liability that extends a limitation period is whether, on an objective basis, the party who made the communication meant to admit some liability (see *Price* and *Trombley v. Pannu,* 2016 BCCA 324). Inquiries into settlement demands may not amount to an admission of liability, when, for example, the communication is marked "without prejudice". Such an express reservation or disclaimer will likely be sufficient to ensure there was no acknowledgment of liability (see *Trombley* and *Podovinikoff v. Montgomery*, 1984 CanLII 52 (BC CA)).

18. The strata included excerpts from 2 emails it received from VCBC's director as evidence VCBC acknowledged liability of the holdback amount, neither of which was marked "without prejudice". VCBS does not dispute the excerpts or say the strata should not have disclosed them because they were the result of settlement discussions. I find for the purposes of deciding whether this dispute is out of time, I can consider them.

19. The first excerpt is dated October 15, 2020. So, I find that even if it was an acknowledgement of liability, it was made before November 4, 2020 and does not assist the strata in sufficiently extending the limitation period.

20. The second excerpt was dated December 1, 2020.

21. As noted above, the strata provided VCBC with the invoices in support of the holdback on November 22, 2018. In the covering letter, the strata's management company asked VCBC to review the invoices and contact Mr. Fanaken when it was prepared to proceed with settlement. It is undisputed VCBC then required an explanation of the invoices. However, there is no evidence about when Mr. Fanaken met with VCBC's representatives or when VCBC indicated its refusal to allow the holdback's release. In these circumstances, I find it reasonable to imply a 30-day invoice review period beginning November 22, 2018. So, I find the earliest date the

strata could have discovered its claim was December 22, 2018. This means the December 1, 2020 email was within the 2-year limitation period.

22. The excerpt of the December 1, 2020 email discussed settling for an amount within a particular range. I find this excerpt supports an objective conclusion that VCBC intended to admit some liability for the amount the strata claims. Although VCBC clearly disputes the amount owing and called the negotiation process "redundant and unfair", I find it does not deny owing the strata some amount. In addition, I find the fact that the parties' communications were never characterized as being without prejudice suggests liability itself was not in question. Rather, the live issue was the amount owing. Based on the second email excerpt, I find the limitation period was extended under LA section 24 to December 1, 2022. So, I find the strata submitted its application for dispute resolution in time.

Background and applicable bylaws

23. The strata was created in 1993 under the *Condominium Act* and continues under the SPA. It is made up of 60 non-residential strata lots.

24. On June 25, 2020, the strata filed a consolidated set of bylaws in the Land Title Office that repealed and replaced all previous bylaws. Before that, the strata filed a set of amended bylaws on April 18, 2002, with further amendments that followed. Since the events that gave rise to the parties' dispute occurred before the June 25, 2020 bylaws existed, I find that the bylaws filed on April 18, 2002 applied, and I discuss the relevant bylaw below. I note that the amendments filed between April 18, 2002 and June 25, 2020 bylaws are not relevant to this dispute.

25. By way of undisputed background, an elected strata council governed the strata from 1993 until February 2011. After that, the BC Supreme Court appointed an administrator, Mr. Fanaken, to exercise the strata's powers and perform its duties under SPA section 174. Mr. Fanaken's term ended on August 31, 2020, but during his term the dispute at the centre of this CRT proceeding arose.

26. In September 2017, VCBC's tenant approached the strata to inquire about using SL54 for "entertainment purposes" if it bought the strata lot from VCBC. It proposed significant renovations to SL54. The strata does not explicitly say what it told VCBC's tenant, but I infer it gave some indication it would allow it to use SL54 for entertainment purposes (at least in part), if the tenant purchased the strata lot. I say this because the strata submitted a January 8, 2018 assumption of liability agreement (the agreement) signed by VCBC in consideration of the strata's "approval of a common property/strata lot alteration".

27. Bylaw 2.05, as it was at the time, is relevant to this dispute. That bylaw prohibited an owner from making alterations to the exterior or structure of their strata lot, or to any "electrical, plumbing, heating, ventilating, cooling or other system", without the strata's prior written approval. It also made the owner responsible for "any consultants fees reasonably incurred by the Strata Corporation in order for it to **properly consider and review** such proposed fixturing or alteration" (reproduced as written except my bold emphasis).

28. The principles of statutory interpretation apply to a strata corporation's bylaws (see *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064 at paragraph 18). Bylaws should be read as a whole and interpreted in a way that best achieves their purposes. Applying that here, I find bylaw 2.05 meant an owner was responsible for reasonable consultants' fees that the strata paid for consideration and review of the alterations before, during and after the work, to ensure they were completed consistent with the strata's approval.

Alterations to SL54 and the strata lot's sale

29. The strata says in spring 2018, the tenant began making alterations to SL54. It is undisputed that the alterations included drilling through exterior walls to install air conditioning units and other alterations to the strata lot's venting, plumbing, electrical, and fire systems. It is also undisputed that VCBC, as SL54's owner, did not apply to the strata for advance approval of the alterations as required by bylaw 2.05.

30. I pause here to note that the strata plan says that "strata lot boundaries shown on this plan are to the outside of exterior walls". This is different to SPA section 68(1), which says a strata lot boundary is "midway between the surface of the structural portion of the wall floor or ceiling" that separates the strata lot from the common property or another strata lot. Where the strata plan identifies different boundaries to the SPA, the strata lot boundary delineation in SPA section 68(1) does not apply. So, I find that SL54's boundaries extend to the outside of exterior walls.

31. On August 7, 2018, the strata's management company wrote to VCBC to provide retroactive approval of VCBC's proposed alterations to SL54, subject to certain terms and conditions. The strata says Mr. Fanaken told VCBC the alterations would require engineering review, and that VCBC would be responsible to reimburse the strata all engineering and legal fees resulting from the review process. VCBC does not dispute that this is what it was told. Further, I find it reflects bylaw 2.05's requirement that VCBC was responsible for the strata's reasonable consultants' fees to review SL54's alterations. Also, under the agreement's clause 5, VCBC agreed to pay "all costs for retaining qualified trades and professional to review, monitor, inspect and report the work, if required" (reproduced as written).

32. Around September 25, 2018, the strata received a request for a Form F Certificate of Payment to facilitate SL54's sale from VCBC to the tenant. The strata's lawyer wrote to VCBC's lawyer to request payment, in trust, of amounts the strata alleged VCBC owed it regarding SL54's alterations before the strata provided the Form F. VCBC's lawyer agreed to pay the strata's lawyer the holdback upon completion of the transaction. The holdback was to be held in trust pending a written agreement between the parties, or an order of an arbitrator, the CRT or the Supreme Court. The parties proceeded on these terms.

33. As noted above, the strata's management company forwarded VCBC the final invoices on November 22, 2018, and VCBC requested an explanation of the invoices. Mr. Fanaken met with VCBC's representatives to explain the invoices, but the parties could not reach an agreement.

VCBC's liability

34. I have already found VCBC admitted owing the strata some amount for costs the strata incurred regarding the SL54 alterations. Further, I find that under bylaw 2.05, VCBC is liable for the expenses the strata reasonably incurred to consider and review SL54's alterations. I note that the agreement does not refer to the strata's expenses needing to have been reasonably incurred. However, since I have already found the dispute is a claim in respect of the SPA, I find the bylaws' wording applies.

35. I find that to prove its claims, the strata must show the expenses in support of the holdback's release were reasonably incurred under bylaw 2.05. With that, I turn to the strata's invoices in evidence.

36. First, the engineering expenses. VCBC questions whether the "engineering report" was necessary, but otherwise does not specifically question the reasonableness of these expenses. The strata submitted 4 invoices totalling $6,481. The invoices cover hourly consulting with a professional engineer, a technologist, and an administrator, as well as disbursements for drawings. They also include an electrical assessment fee of $2,500. Given that SL54's alterations undisputedly required significant electrical work, I find nothing obviously unreasonable about the engineering expenses. Also, there is no charge for an engineering report mentioned in any of the invoices, so it is unclear to me what VCBC means when it queries whether the report was necessary. I find the strata reasonably incurred $6,481 for engineering expenses.

37. Next, the legal fees and disbursements. The strata submitted invoices from its lawyers totalling $8,074.69. The difficulty for the strata is that the descriptions of the work undertaken in 6 of the 7 invoices are at least partly redacted, and so I cannot tell what the expenses relate to. The only invoice for which I can see the work's description is the final invoice dated November 5, 2018 for $1,342.68. The description includes emails to Mr. Fanaken, VCBC's lawyer, and the strata manager, which I find likely relate to the holdback's release following SL54's sale. I find the $1,342.68 for this work qualifies as reasonable consultants' fees.

38. One of the remaining 6 invoices is for legal services provided up to June 30, 2017, which I find pre-dates this dispute. Turning to the other 5, I note the strata management company's November 22, 2018 covering letter to VCBC indicated the expenses were incurred in connection with the alterations and a bylaw violation that required the strata to retain legal counsel to seek compliance. The strata provided no evidence of any bylaw violations by either VCBC or its tenant, or that it followed the SPA's requirements in terms of investigating and enforcing alleged bylaw violations. As I cannot tell which of the expenses in these invoices relate to bylaw enforcement and which relate to SL54's alterations, I find the strata has not proven that it reasonably incurred them under bylaw 2.05.

39. Next, there is an invoice for $189 for fixing light shades "at parking" and checking a recessed pot light in the lobby. Based on the description, I find these are not expenses the strata incurred to review SL54's alterations. Likewise, I do not find that $315 for weeding on the 6th floor roof garden designated as limited common property for strata lots 54 to 60 falls within the expenses described in bylaw 2.05.

40. Next, I turn to 3 estimates. The first is a $1,300 plus GST estimate for power washing and weeding the 6th floor roof garden, which appears to include a duplicative amount for the $315 weeding charged separately by the same company. The second is a $787.50 estimate for supplying and installing a new remote reader for an existing water meter. The third is a $240 plus GST estimate to dismantle and dump a wooden realty sign rack that was outside of SL54. However, there is no evidence the strata incurred these expenses at all, or that if it did, they fall within the expenses described in bylaw 2.05.

41. The strata also estimates $880 (or $40 per month) for SL54's water consumption it says it paid between December 15, 2015 and September 28, 2018. The strata provided no invoices in support of this amount, which I find it would not have incurred to consider and review SL54's alterations in any event.

42. Finally, I turn to a September 26, 2018 invoice from the strata's property management company for $316.58. This invoice was addressed to the strata's lawyers for providing

the Form F, a Form B Information Certificate, and other related documents requested by VCBC's lawyer to facilitate SL54's sale in exchange for agreement to the holdback. Given the connection to the holdback, and so to the alterations, I accept that this was a reasonably incurred expense under bylaw 2.05.

43. In sum, I find the strata has proven the following reasonably incurred expenses regarding SL54's alterations under bylaw 2.05, which total $8,140.26:

    a. $6,481 for engineering expenses,

    b. $1,342.68 for legal fees and disbursements, and

    c. $316.58 for strata property management expenses.

44. Based on the above, I find VCBC must pay $8,140.26 of the holdback to the strata. I find the strata is not entitled to the balance of the holdback based on bylaw 2.05.

CRT FEES, EXPENSES AND INTEREST

45. 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. As the strata was partly successful, I order VCBC to reimburse the strata $112.50 for CRT fees. The strata does not claim any dispute-related expenses.

46. The *Court Order Interest Act* (COIA) applies to the CRT. The strata is entitled to prejudgment interest on the $8,140.26 award from December 1, 2020, the date I find the limitation period was extended, to the date of this decision. This equals $476.21.

ORDERS

47. I order that within 30 days of the date of this order, VCBC instruct its lawyers to pay the strata $8,140.26 of the holdback.

48. I order that within 30 days of the date of this order, VCBC pay the strata a total of $588.71, broken down as follows:

    a. $476.21 in pre-judgment interest under the COIA, and

    b. $112.50 for CRT fees.

49. The strata is also entitled to post-judgment interest from the date of this order.

50. 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.

Megan Stewart, Tribunal Member