Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

LILI-ANNE BOUCHARD, RANDAL RIDGWAY and RIAZ JETHA

APPLICANTS

A N D :

The Owners, Strata Plan NW 2153

RESPONDENT

REASONS FOR SUMMARY DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a summary decision of the Civil Resolution Tribunal (CRT). The underlying strata property dispute is primarily about expense allocations.

2. The applicants, Lili-Anne Bouchard, Randal Ridgway and Riaz Jetha, each own or co-own a strata lot in the respondent strata corporation, The Owners, Strata Plan NW 2153 (strata).

3. The strata was created under the *Condominium Act* (CA) and was built in 8 phases between 1984 and 1989. It is comprised of 250 residential strata lots in over 20 buildings. The phase-4 buildings are known as the "Terraces". The applicants' strata lots are all located in the Terraces. Phase 4 includes a recreation centre that is used by all owners of all phases. The recreation centre is located on the ground level below 1 of the phase-4 buildings, and below a concrete walkway, which is covered by a glass canopy.

4. According to the parties, the strata has operated with a unique set of bylaws since its inception. The bylaws allow for each phase (except phases 1 and 2, which are combined) to have a separate budget, operating fund, and contingency reserve fund to which only the strata lots in that phase contribute. The recreation centre and other areas common to all strata lots, such as landscaping, have historically been maintained through funding from all strata lots on the basis of unit entitlement (common facilities).

5. The applicants say, based on the strata's bylaws, historical conduct, and legal advice, the strata is responsible to partially reimburse the Terraces the cost to replace 1 of 3 glass canopies. Specifically, they ask that the strata reimburse the Terraces the cost of replacing the glass canopy located above the walkway which is partly above the recreation centre. The applicants seek an order that the strata reimburse the Terraces $295,000 for this work.

6. The applicants also say a retaining wall located next to the patio of strata lot 113 (also in the Terraces) requires replacement. They say the retaining wall is common property so the repair expense must be shared by all strata lots as part of the common facilities. They also say the retaining wall is a safety issue and estimate its repair at $20,000. I infer the applicants seek an order that the strata must repair the retaining wall under the strata's bylaws with repair costs allocated to all strata lots. Ms. Bouchard represents the applicants.

7. The strata disagrees with the applicants' claims. It says it has made its best efforts to comply with its obligations and has acted honestly, in good faith, and in the best interests of the strata. The strata says the Court would likely interpret its bylaws to

require all phases to contribute to a common expense unless the expense relates solely to a phase. The strata says it has been unable to determine if the glass canopy repair claimed by the strata benefits the recreation centre, and therefore, all strata lots.

8. As for the retaining wall repair, the strata says the bylaws historically required each type of strata lot to repair and maintain its own buildings and "immediate surrounding areas". The strata says the Terraces should pay to repair the retaining wall consistent with similar past expenses. The strata asks that the applicants' claims be dismissed. A strata council member represents the strata.

9. As explained below, I refuse to resolve the claims in this dispute under CRTA sections 11(1)(a)(i) and 11(1)(c) because I find the BC Supreme Court is a more appropriate venue for a complex dispute such as this.

JURISDICTION AND PROCEDURE

10. These are the formal written reasons of the 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.

11. Under CRTA section 10, the CRT must refuse to resolve a claim that it considers to be outside its jurisdiction. A dispute that involves some issues that are outside the CRT's jurisdiction may be amended to remove those issues. The CRT may also refuse to resolve a claim within its jurisdiction under CRTA section 11(1)(a)(i) if it considers the claim would be more appropriate for another legally binding process and section 11(1)(c) if the issues are too complex or otherwise impractical for the CRT to resolve.

12. 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.

13. 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.

ISSUES

14. The issues in this dispute are:

    a. Does the CRT have jurisdiction to decide the claims in this dispute?

    b. If so, should the CRT decide the dispute or is another legally binding process more appropriate?

BACKGROUND

15. As applicants in a civil proceeding such as this, Lili-Anne Bouchard, Randall Ridgway and Riaz Jetha must prove their claims on a balance of probabilities, meaning more likely than not. I have considered all the parties' submissions and evidence but refer only to information I find relevant to explain my decision.

16. As mentioned, the strata was created under the *Condominium Act*. It continues to exist under the SPA. The Terraces include buildings R, S, T and U. Each of the buildings is 3 levels. The recreation centre is below buildings R and S. There are concrete stairs between buildings R and S that provide access to the strata lots in those buildings. The glass canopy in question is located above the concrete stairs between buildings R and S, which are partially located above the recreation centre.

17. SL113 is located at the south end of building U. The strata plan shows a patio next to SL113 that is designated as limited common property for the SL113 owner.

18. The strata filed a new set of bylaws with the Land Title Office on February 27, 2007. The strata filed 5 additional bylaw amendments between February 2007 and October 4, 2019, which I find are not relevant to this dispute. On October 4, 2019, the strata filed another new set of bylaws which were in effect when the Dispute Notice was issued for this dispute. Subsequent bylaw amendments were filed after October 4, 2019 that are not relevant to this dispute. I discuss relevant bylaws in more detail below.

EVIDENCE AND ANALYSIS

Does the CRT have jurisdiction?

19. There are 2 elements to the applicants' claims.

20. First, the applicants appear to want a declaration that the strata's cost allocation bylaws are valid and enforceable. Based on the strata's submissions, it also wants an order about the validity and enforceability of its bylaws. Such an order is known as a declaratory order, which the BC Supreme Court has the authority to make. The CRT can only make a declaratory order if it is incidental to a claim over which the CRT has jurisdiction. See *The Owners, Strata Plan VR320 v. Day*, 2023 BCSC 364, at paragraph 54.

21. I do not find an order about whether the strata's cost allocation bylaws are valid and enforceable is incidental to the applicants' claims. Rather, I find the interpretation of the cost allocation bylaws is an integral part of the applicants' claims, which I find is outside the CRT's jurisdiction.

22. The second element of the applicants' claims relates to money, namely whether the strata must pay the Terraces $295,000 for the glass canopy repairs and complete repairs to the retaining wall.

23. CRTA section 121(1) sets out the CRT's jurisdiction for strata property disputes. Section 122(1) sets out specific sections of the SPA over which the CRT does not have jurisdiction. I find the CRT has jurisdiction to decide the monetary elements of the applicants' claims. The question is whether it should.

Should the CRT decide the applicants' claims?

24. For the reasons that follow, I refuse to resolve this dispute under CRTA sections 11(1)(a)(i) and 11(1)(c). In particular, I find the issues in this dispute would be more appropriate for the BC Supreme Court to resolve due their significance to the strata's operation and their complexity.

25. Given my finding that the issues are significant and complex, I did not get submissions from the parties on my refusal to resolve the dispute because the parties' submissions would not have made a difference. I also note that my refusal to resolve the dispute is not a final decision on the merits. CRTA section 13.2 sets a 28-day deadline for bringing or continuing a claim in a court where the CRT has refused to adjudicate a claim under section 11. Therefore, I see little prejudice to the applicants, especially considering I have ordered the CRT to refund their fees.

The Cost Allocation Bylaws

26. I will first review the relevant bylaws filed on October 4, 2019, which include the following (reproduced as written with my emphasis):

> Bylaw 2.1 At each Annual General Meeting the strata council shall present *an annual operating budget for each Phase* for the following 12 month period and all owners of each Phase shall, subject to Bylaw 2.2 and Bylaw 2.3, pay a monthly assessment.
>
> Bylaw 2.2 Each owner's contribution to the expenses of the strata corporation *shall be levied in accordance with the [SPA]* and shall consist of the sum of the following two elements:
>
> a) The assessment of a strata lot's contribution to the *administration fund* and common expenses of the strata corporation is

proportionate to the unit entitlement of the strata lot, and is calculated as follows:

Unit Entitlement of lot x total common contribution ($)
Total unit entitlement of all lots

b) The assessment of a strata lot's contribution to the expenses of the Phase in which the strata lot is located *and the contingency reserve fund of that Phase*, shall be in proportion to the unit entitlement of the strata lot, and is calculated as follows:

Unit Entitlement of lot x total common contribution ($)
Total unit entitlement of all lots

Bylaw 2.3 An owner shall:

a) Pay strata fees on or before the 1st day of the month to which the strata fees relate, and

b) Pay all special levies approved in accordance with the [SPA].

Bylaw 2.7 The following types exist:

a) Strata lots 1 to 48 (inclusive) shall be one type of strata lot and shall be referred to in these bylaws collectively, as the "Phase 1 Strata Lots" (Also known as "the Lodges").

b) Strata lots 49 to 64 (inclusive) shall be one type of strata lot and shall be referred to in these bylaws collectively, as the "Phase 2 Strata Lots" (Also known as "the Original Mansions").

c) Strata lots 65 to 122 (inclusive) shall be one type of strata lot and shall be referred to in these bylaws collectively, as the "Phase 3 Strata Lots" (Also known as "the Terraces").

[I have not reproduced the remaining subsections of bylaw 2.7 but note they create the additional 4 types of strata lots, which are not relevant here.]

27. I find that bylaw 2.2(a) is vague given “administration fund” is not a defined term in the bylaws or the SPA, and “common expenses” under the SPA means expenses relating to the common property and common assets of the strata corporation. That means the definition of common expenses would include all expenses that are not attributable to a specific type of strata lot. However, that is not necessarily what the strata has argued to be the historical practice used to allocate common expenses. The retaining wall expenses are a good example.

28. I also find that 2.2 conflicts with the SPA and regulations.

29. First, bylaw 2.2 creates a different method of calculating strata fees. The bylaw purports to establish a separate operating and contingency reserve fund for each type of strata lot. Regulation 6.4(2) addresses how contributions are calculated for different types of strata lots. It allows only operating expenses to be allocated by type of strata lot. It does not permit contingency reserve fund expenses to be allocated by strata lot type. Separate contingency reserve funds are only permitted under SPA section 191 if there are sections, which is not the case here. While the cost allocations among phases seem to be made in a “section-like manner”, I find the bylaws have not formally created sections.

30. Second, without the creation of separate sections, the strata governs each phase because the phases do not have their own powers and duties. I see this as being problematic when voting is required. The strata seems to allow voting within a phase only by the strata lots in that phase. However, the bylaws do not establish these voting requirements, which I find is contrary to voting requirements required in the SPA, which contemplate all strata lot owners being permitted to vote. I note that sections allow for separate votes.

31. From the evidence, the strata appears to create committees to help it with governance, but the committees are not established by bylaw and have no authority other than delegated powers and duties given them by the strata council. Therefore, it is the strata council that governs the affairs of each phase, including the Terraces.

32. I also note that bylaw 2.3(b) requires special levies to be allocated to all strata lots. This is consistent with the SPA, but it is not how the strata has historically allocated special levies.

33. It is undisputed that the strata held a special general meeting (SGM) on June 11, 2018 to consider several ¾ vote resolutions. One of the resolutions (#7) proposed a special levy of $711,000 to replace the 3 glass canopies above the concrete walkway and stairs of the Terraces buildings to be paid only by the Terraces strata lots. The ¾ vote was approved by the Terraces strata lot owners at the meeting with 32 in favour, 3 opposed, and 3 abstentions.

34. Significantly, the strata's bylaws in place on June 11, 2018, when the special levy was approved, do not address special levies in the same manner as they do strata fees for operating and contingency reserve funds. That is, there is no bylaw that states special levies for a phase are allocated only to the strata lots in the phase. Rather, the bylaws at that time did not include bylaw 2.3(b) and were silent on how special levies were calculated.

35. SPA section 108 addresses special levies. Section 108(2) says a strata corporation ***must*** calculate each strata lot's share of a special levy in accordance with sections 99, 100 or 195. Sections 100 permits a special levy to be allocated in a manner other than by unit entitlement only if passed by a unanimous vote and section 195 only applies to sections. So, neither section 100 nor 195 apply here. The only way the strata could have allocated the June 2018 special levy is under SPA section 99, which requires all strata lots to contribute to the special levy on the basis of unit entitlement.

36. Therefore, it appears the special levy for the 3 canopy repairs in the Terraces may have been incorrectly calculated in 2018 because the special levy was not allocated to all strata lots as per SPA section 108(2).

37. Using the same reasoning, it would be inappropriate for me to make the order requested by the applicants for the glass canopy expense and I decline to do so. I also note that it is not clear on the evidence before me how the strata has governed itself in the past.

38. I acknowledge that in certain circumstances, the courts have determined that a strata corporation which has historically used a different method of calculating strata fees, can continue to use that method even though it does not comply with the legislation. See for example, *The Owners, Strata Plan LMS 1934 v. Westminster Savings Credit Union et al*, 2004 BCSC 1718 and *The Owners, Strata Plan VR2654 v. Mason*, 2004 BCSC 685.

39. What is clear is the matter of cost allocation among the phases has been an issue since at least 2005, shortly after the SPA came into force. The applicants and respondent both submitted copies of legal opinions obtained by the strata since 2005 that deal with the validity of the cost allocation bylaws noted above. There are 6 opinions before me from 4 different lawyers. They do not all reach the same conclusion and offer different advice.

40. The CRT's mandate includes providing dispute resolution services in a manner that recognizes any continuing party relationships after the tribunal proceeding is concluded. I find the monetary aspects of the applicants' claims are so highly intertwined with the interpretation, validity, and enforceability of the strata's cost allocation bylaws, it would be impractical for me to resolve some and not others. I also note the amount at stake likely goes far beyond the claimed amounts here, given there are 6 other phases and the common facilities that follow the same bylaws and will likely need to fund other large projects in the future. In other words, resolving the dispute about the 1 glass canopy and 1 retaining wall will require a decision on the strata's whole governance and funding model, with far-reaching economic and governance consequences for all the owners in a large strata.

41. Further, while the CRT's strata property jurisdiction has no monetary limit, I find it is appropriate to defer to the BC Supreme Court and its more robust processes for a decision on the issues before me. Finally, I note the legislature acknowledged through CRT section 11(1)(c), that some disputes will be too complex for the CRT's process. Although rare, I find this is such a dispute.

42. I acknowledge that I have made findings of fact in this decision that could be the subject of future court proceedings. I made these findings only to fully explain my decision not to resolve this dispute.

43. Therefore, in the circumstances of this dispute, I find the BC Supreme Court is a more appropriate venue to decide the claims in this dispute considering the complexity. Therefore, I refuse to resolve this dispute under CRTA sections 11(1)(a)(i) and 11(1)(c).

CRT FEES AND EXPENSES

44. 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. Neither party was successful but considering my decision to refuse to resolve this dispute, I direct the CRT to reimburse the applicants $225 for their CRT fees.

45. Neither party claimed dispute-related expenses, so I order none.

46. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against the applicants.

DECISION

47. I refuse to resolve the applicants' claims under CRTA section 11(1)(a)(i) and 11(1)(c) as I find the BC Supreme Court is a more appropriate venue for such a complex dispute.

48. I direct the CRT to reimburse the applicants $225 for CRT fees.

J. Garth Cambrey, Vice Chair