Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Suter v. The Owners, Strata Plan EPS1699*, 2024 BCCRT 1086

B E T W E E N :

WERNER SUTER

APPLICANT

A N D :

The Owners, Strata Plan EPS1699

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Alison Wake

INTRODUCTION

1. Werner Suter co-owns a strata lot in the respondent strata corporation. He says that the strata is charging a fee for geothermal heating and cooling expenses to all strata lots despite the fact that some strata lots, including his, are not equipped with geothermal systems. He asks for an order that the strata stop charging this fee to the strata lots that do not have geothermal systems.

2. The strata says that it has acted reasonably and fairly, and has complied with the *Strata Property Act* (SPA) and its bylaws, in charging the geothermal fee to all owners. The strata asks me to dismiss this dispute.

3. Mr. Suter is self-represented. A strata council member represents the strata.

JURISDICTION AND PROCEDURE

4. 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.

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, neither party requested an oral hearing, and I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Considering the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.

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.

7. In its Dispute Response, the strata questioned the CRT's jurisdiction to award the order Mr. Suter seeks. It asked for a preliminary consideration about whether Mr. Suter's dispute would be more appropriate for an application under SPA section 164, which allows the BC Supreme Court to make an order it considers necessary to prevent or remedy a significantly unfair action or decision by the strata corporation.

8. However, the strata did not pursue this argument in its later submissions. As the strata correctly notes in submissions, the CRT has similar jurisdiction under CRTA section 123(2) to make an order against a strata if it is necessary to remedy a significantly unfair action or decision. I infer the strata no longer disputes the CRT's jurisdiction to

award the requested remedy, and I am satisfied I have jurisdiction to hear this dispute under CRTA sections 121 and 123.

ISSUE

9. The issue in this dispute is whether the strata must stop charging the geothermal fee to strata lots that do not have geothermal heating and cooling systems.

BACKGROUND

10. As the applicant in this civil dispute, Mr. Suter must prove his claims on a balance of probabilities. This means more likely than not. I have read all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

11. The strata consists of 69 strata lots. 44 strata lots were built between 2014 and 2016. These units use geothermal heating and cooling, so I will refer to them as the geothermal units.

12. In 2021, 25 new strata lots were added. These units do not use geothermal heating and cooling. Instead, they have natural gas furnaces and air conditioning. I will refer to these 25 units as the non-geothermal units.

13. The strata's annual operating budget includes a geothermal fee. The strata's 2021, 2022 and 2023 budgets in evidence show that the geothermal fee has ranged from $35,100 to $36,100 per year for those years. There is no dispute that each of these budgets was validly passed by the strata's owners at its annual general meetings.

14. All strata lot owners pay monthly strata fees, which are calculated based on their unit entitlement under SPA section 99. Mr. Suter says that as part of their strata fees, the non-geothermal unit owners pay between $30.36 and $61.26 per month for the geothermal fee, depending on their unit entitlement. A table in evidence shows that for strata lot 57, Mr. Suter's strata lot, the geothermal fee is $41.64 per month.

15. On June 6, 2022, Mr. Suter wrote to the strata council after reviewing the strata's proposed budget. He noted that the non-geothermal units do not benefit from the

geothermal system, and have to pay for their own heating and cooling systems in addition to contributing to the geothermal fee.

16. In response to Mr. Suter's complaint, on April 18, 2023, the strata held a special general meeting (SGM) to consider a resolution to amend its bylaws to create separate strata lot types. Under the proposed new bylaw, strata lots would be identified as either geothermal or non-geothermal. The resolution incorporated language from section 6.4(2) of the *Strata Property Regulation*, which says that if a contribution to the operating fund relates to and benefits only one type of strata lot, and that type is identified in the strata's bylaws, the contribution is shared only by that type's owners.

17. The parties agree that the bylaw amendment resolution required ¾ approval to pass. It was defeated at the SGM, with 30 votes in favour and 25 against.

18. Mr. Suter disagrees with this outcome, and seeks an order that the geothermal fee only be charged to the geothermal unit owners.

ANALYSIS

Cost allocation under the SPA

19. As the strata notes, SPA section 91 says that the strata is responsible for common expenses. SPA section 99 says that owners must contribute to the strata's operating and contingency reserve funds through strata fees, which are calculated according to unit entitlement unless the strata passes a unanimous resolution to use a different formula. The strata undisputedly has not passed such a resolution here.

20. Mr. Suter does not dispute that the geothermal equipment is common property under the SPA, and that the geothermal fee is a common expense. However, he says it is unfair for non-geothermal unit owners to contribute to the geothermal fee when they do not benefit from it.

Significant unfairness

21. As noted above, the CRT has jurisdiction to make orders that are necessary to remedy a significantly unfair action by the strata corporation. Significantly unfair actions are those that are burdensome, harsh, wrongful, lacking in probity and fair dealing, done in bad faith, unjust, or inequitable. In applying the test, the owner's objectively reasonable expectations are a relevant factor, but are not determinative.[1]

22. The strata says it has complied with the SPA and bylaws in allocating expenses. It relies on *The Owners, Strata Plan BCS 3202 v. Paz*,[2] in which a CRT vice chair found that a strata's refusal to grant an alteration request that had not been approved by a ¾ vote was not significantly unfair, because approving the request would have contravened the SPA. The strata says it is not reasonable for Mr. Suter to expect that the strata contravene the SPA by splitting expenses differently, or by implementing a bylaw amendment that did not pass.

23. I acknowledge this submission and the strata's efforts to maintain compliance with the SPA. The BC Supreme Court has found that generally, conduct that complies with the SPA's prescribed cost allocation method will not be significantly unfair. However, in some circumstances, such compliance may still be oppressive or unfairly prejudicial.[3] In other words, despite a fair process and democratic vote, in some cases the outcome may still be significantly unfair to minority owners. This is precisely the type of harm that significant unfairness remedies may address.[4]

24. So, in what circumstances will a strata's compliance with the SPA's cost allocation provisions be significantly unfair? Previous CRT and court decisions have found that it was significantly unfair for a strata to calculate expenses based on an incorrect schedule of unit entitlement,[5] to insist on allocating costs based on unit entitlement

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[1] See *Dollan v. The Owners, Strata Plan 1589*, 2012 BCCA 44, *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173.
[2] 2022 BCCRT 457.
[3] See *King Day* at paragraph 69.
[4] See *Dollan* at paragraph 24.
[5] See, for example, *Klassen v. The Owners, Strata Plan LMS 1710,* 2022 BCCRT 705, and *Strata Plan VR1767 (Owners) v. Seven Estate Ltd.,* 2002 BCSC 381.

despite established past practices of allocating costs on a different basis,[6] or where there were very different costs applicable to the strata's two buildings.[7]

25. In contrast, it is generally not significantly unfair to allocate expenses among all owners where there is at least some benefit to all owners. The SPA's general approach to cost allocation is that strata owners are "all in it together", and that some owners may contribute to expenses they do not necessarily benefit from.[8] For example, in *Gartner v. The Owners, Strata Plan VIS 2592*,[9] a CRT member found that it was not significantly unfair to allocate building envelope repair expenses according to unit entitlement, as maintaining the building's integrity benefits all owners. In *Poloway v. Owners, Strata Plan K692*,[10] the BC Supreme Court found that repairs to the strata's apartment building benefited its townhouse owners, albeit not to the same extent as the apartment owners, because the apartment building housed common amenities that were used by the townhouse owners.

26. Finally, in *Schultz et al v. The Owners, Strata Plan KAS 3313*,[11] a CRT vice chair found that because a central geothermal system serviced a common amenity building, it benefited all strata lot owners, including those whose strata lots did not have geothermal heating and cooling. Relying on *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*,[12] the vice chair found that expenses that benefit more than one type of strata lot, even disproportionately, must be shared among all strata lots.

27. However, I find the circumstances of this dispute are distinguishable from those in *Gartner, Poloway* and *Schultz,* as here there is no evidence before me that the non-geothermal unit owners benefit in any way from the geothermal equipment. Indeed, Mr. Suter's undisputed evidence is that not only do the non-geothermal unit owners not receive services from the geothermal system, they also incur additional expenses for their own heating and cooling systems. Mr. Suter estimates his natural gas heating

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[6] See, for example, *King Day* and *Brown v. The Owners, Strata Plan VR 42, VR 64, VR 153,* 2022 BCSC 812.
[7] See *Fraser v. Strata Plan VR1411*, 2006 BCSC 1316.
[8] *Owners, Strata Plan LMS 1537 v. Alvarez,* 2003 BCSC 1085, at paragraph 35.
[9] 2022 BCCRT 1076.
[10] 2012 BCSC 726.
[11] 2018 BCCRT 148.
[12] 2004 BCCA 597.

expenses are approximately $65 per month. The geothermal unit owners also undisputedly receive free yearly maintenance of their geothermal systems under the strata's contract with its geothermal supplier, while non-geothermal unit owners must arrange and pay for their own heating and cooling system maintenance.

28. Further, minutes of an April 22, 2023 meeting between Mr. Suter and the strata council say that it is unlikely at this point that non-geothermal units could be connected to the geothermal system. So, I find the geothermal fee is a significant and ongoing expense for which the non-geothermal unit owners receive no benefit.

29. As noted, Mr. Suter's reasonable expectations are a relevant factor in the significant unfairness analysis. Here, I find it is objectively reasonable for Mr. Suter to expect that he will not be expected to subsidize other owners' heating and cooling costs by contributing to the geothermal fee, despite not deriving any benefit from the geothermal system and not receiving a similar subsidy of his own heating and cooling costs.

30. Overall, I find Mr. Suter has established that the geothermal fee is inequitable and unduly burdensome. Despite the strata's good faith efforts to address Mr. Suter's concerns without contravening the SPA, I find that its practice of including the geothermal fee in its operating budget is significantly unfair to the non-geothermal unit owners, including Mr. Suter.

Remedy

31. So, what is the appropriate remedy? The strata says that it should not be ordered to pass the bylaw amendment proposed at the 2023 SGM to create strata lot types, because it has not treated Mr. Suter significantly unfairly. Although I have found that Mr. Suter has established significant unfairness, I find that ordering the strata to amend its bylaws to create strata lot types is not an appropriate remedy, for two reasons. The first is that Mr. Suter has not requested this as a remedy. Instead, he has requested an order that the geothermal fee be excluded from the strata's general operating budget and not be charged to the non-geothermal unit owners.

32. Second, I note that in *Merchant v. The Owners, Strata Plan LMS 992*,[13] a CRT member found that under *Strata Property Regulation* section 17.13, types bylaws must have been enacted before January 1, 2002, to be enforceable. While prior CRT decisions are not binding on me, I agree with this conclusion and find that it is no longer open to the strata to enact a bylaw creating different strata lot types.

33. The strata also says that I should not order it to reimburse Mr. Suter or any other non-geothermal strata lot owners for their paid geothermal fees. Mr. Suter does not seek an order for reimbursement, on behalf of himself or any other non-geothermal unit orders. Rather, as noted, Mr. Suter asks me to order the strata to stop charging the geothermal fee to non-geothermal unit owners.

34. Given my finding that the current cost allocation is significantly unfair to Mr. Suter, I agree that such an order is appropriate in the circumstances. I acknowledge that this order may benefit other non-geothermal unit owners, who are not parties to this dispute. However, I find that Mr. Suter's claim is about proper strata governance generally, and so he has standing to ask for the order sought, even if that order will affect other owners.[14] Under CRTA section 123(2), I order the strata to immediately stop charging geothermal expenses to the non-geothermal unit owners.

CRT FEES AND EXPENSES

35. 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. As Mr. Suter was successful, I order the strata to reimburse him $225 in CRT fees. Mr. Suter did not claim dispute-related expenses.

36. The strata claimed legal fees as a dispute-related expense. It estimated the amount of legal fees at $10,000. As the strata was unsuccessful, I dismiss this claim. I note that I would not have awarded the strata's legal fees in any event, for two reasons.

[13] 2021 BCCRT 263.
[14] See, for example, the non-binding but persuasive reasoning in *Gulf Manufacturing Ltd v. The Owners, Strata Plan BCS 1348*, 2019 BCCRT 16, and *Robert v. The Owners, Strata Plan NES2402*, 2021 BCCRT 536.

First, the strata provided no evidence to establish that it incurred the claimed legal expenses. Second, even if it had, CRT Rule 9.5(3) says that the CRT will not order one party to pay another party's legal expenses except in extraordinary circumstances, which I find the strata has not established here.

37. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against Mr. Suter.

ORDERS

38. I order the strata to immediately stop charging expenses associated with its geothermal heating and cooling system to non-geothermal unit owners.

39. Within 21 days of this decision, I order the strata to reimburse Mr. Suter $225 for CRT fees.

40. Mr. Suter is entitled to post-judgment interest under the *Court Order Interest Act*.

41. I dismiss the strata's claim for dispute-related expenses.

42. This is a validated decision and order. Under CRTA section 57, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under CRTA section 58, 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.

Alison Wake, Tribunal Member