Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

ABDOLLAH EHTESHAMI and SHAHROOZ DEHGHANI

APPLICANTS

A N D :

The Owners, Strata Plan EPS3752

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This dispute is about the enforceability of an insurance deductible bylaw in a strata corporation.

2. The applicants, Abdollah Ehteshami and Shahrooz Dehghani, are registered owners of a strata lot in the respondent strata corporation, The Owners, Strata Plan EPS 3752 (strata).

3. In October 2019 the strata's water damage insurance deductible increased to $500,000. In January 2020 the strata enacted bylaw 39(5) which limits any insurance deductible or uninsured repair cost charged to an owner to $100,000. The strata also approved a special levy to build a fund to pay for the portion of the strata's insurance deductible or uninsured repair costs above $100,000.

4. The applicants say bylaw 39 contravenes the *Strata Property Act* (SPA) and is significantly unfair to the owners. The applicants also say the bylaw results in the strata insuring the owners against future losses, which means the strata is acting as an unlicenced insurer, contrary to the *Insurance Act* (IA). For these reasons, the applicants ask the CRT to declare that bylaw 39, or at least subsection (5), is unenforceable.

5. The strata says the insurance deductible bylaw was passed by a ¾ vote at an Annual General Meeting (AGM), as required under the SPA. It denies the bylaw is significantly unfair, contravenes the SPA, or results in the strata acting as an unlicenced insurer. The strata says the bylaw is not unenforceable and asks that the applicants' claim be dismissed.

6. The applicants are self-represented. The strata is represented by a council member.

7. For the reasons set out below, I decline to grant the order requested by the applicants. I find bylaw 39, and specifically subsection (5) is not unenforceable.

JURISDICTION AND PROCEDURE

8. 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). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly

and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

9. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

10. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

11. 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.

ISSUE

12. The issue in this dispute is whether the insurance deductible bylaw is unenforceable and, if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

13. In a civil claim, such as this one, the applicant owners must prove their claim on a balance of probabilities. The owners did not file reply submissions, although had the opportunity to do so. I have reviewed all evidence and submissions provided, but only refer to the evidence necessary to explain my decision.

14. The strata was incorporated on July 31, 2017. It consists of 321 residential strata lots in 2 towers.

15. It is undisputed that the strata's former insurance policy was set to expire on August 15, 2019. Based on the policy submitted by the strata, I find that the strata's former insurance deductible for water damage was $50,000 per occurrence. It is undisputed

that the strata had difficulty renewing its insurance coverage policy and obtained coverage extensions from its insurance broker. The strata obtained new insurance coverage, effective October 15, 2019. Based on that policy, also submitted by the strata, I find the strata's new insurance deductible is $500,000 per occurrence for water damage, flood, or sewer backup, $100,000 for all risk property damage, and less other listed types of damage or loss.

16. It is undisputed that the bylaw 39 amendment passed by a ¾ vote at the January 28, 2020 AGM with a quorum of owners present or voting by proxy. It is also undisputed that the strata advised the owners of the proposed bylaw 39 amendment in advance of the AGM. According to the January 28, 2020 AGM minutes the strata advised the owners that the bylaw amendment was proposed due to the strata's high water damage deductible of $500,000. The strata explained that the purpose of the bylaw was to limit the amount that the strata can charge to an individual owner. The strata also advised the owners of the various deductibles for different types of damage, under the strata's insurance policy.

17. It is also undisputed that the strata's proposed special levy passed by a ¾ vote at the January 28, 2020 AGM. According to the AGM minutes the purpose of the $64,000 special levy was to build a fund to pay the strata's insurance deductible should there be a future insurance claim. The strata advised the owners that similar levies would be proposed at future AGMs to build up the insurance deductible fund for the strata.

18. The strata filed its amended bylaws in the Land Title Office on February 13, 2020.

19. Bylaw 39(1) states that an owner, tenant, occupant or visitor must not cause damage to the strata's common property, assets, or the parts of a strata lot the strata is responsible for. Subsection (2) of the bylaw holds an owner responsible for any such damage caused by the owner's visitors, occupants, or tenants. Subsection (3) requires an owner to indemnify the strata for any investigation, maintenance, repair or administration expense necessary to repair such property which arises from any damage or incident for which that owner is responsible or which occurs or originates in the owner's strata lot, but only to the extent that such expense is not reimbursed

from “any” insurance policy. Subsection (4) says any insurance deductible or uninsured repair costs charged to an owner is due and payable the month after it is charged. Subsection (5) says the strata must limit any insurance deductible or uninsured repair costs charged to an owner to a maximum of $100,000 per occurrence.

20. The strata says the bylaw was proposed in accordance with the strata’s duty to manage and maintain the strata’s property in the best interests of all owners, and represents part of the strata’s response to the prevailing and adverse insurance market conditions. It says the bylaw was passed by a ¾ vote at the 2020 AGM and that the CRT should not interfere with the strata’s democratic process.

21. The applicants say bylaw 39 is unenforceable because it is unconscionable and invites extensive litigation, is significantly unfair pursuant to section 164 of the SPA, contravenes section 121(1)(c) of the SPA, and contravenes the IA and the *Financial Institutions Act* (FIA). I will address each of the applicants’ arguments in turn.

Is bylaw 39 unconscionable?

22. The applicants say bylaw 39 is unconscionable because, if owners rely upon it, it invites extensive litigation between owners, the strata, tenants, and insurance companies. They also say the bylaw unfairly benefits some owners, to the detriment of others, which makes it unconscionable.

23. An unconscionable agreement is one that is substantially unfair and where the parties had unequal bargaining power due to ignorance, need, or distress by one of the parties (see *McNeill v. Vandenberg,* 2010 BCCA 583). I find that bylaw 39 is not an agreement between the applicants and the strata, just as municipal bylaws and laws are not agreements.

24. Section 121 of the SPA sets out when a bylaw will be unenforceable. Unconscionability is not mentioned in section 121, or anywhere else in the SPA. It does not mention unconscionability. Overall, I find the doctrine of unconscionability does not apply to strata bylaws.

25. Even if unconscionability did apply to strata bylaws, I would find that bylaw 39 is not unconscionable. As noted above, bylaw 39 was passed by a ¾ vote of owners at the January 28, 2020 AGM. There is no suggestion that the strata exercised any duress or undue influence over the owners prior to the vote, or that any of the owners were in need, distress or ignorant of the issue. Based on the AGM minutes, I find the strata explained the purpose of the proposed bylaw 39 amendment to the owners. So I find there is no imbalance of power between the strata and the applicants.

26. The applicants say bylaw 39 is unfair to some owners as it creates 3 different classes of owners: 1) those that are able to obtain strata insurance deductible coverage up to $500,000, 2) those that are able to, but choose not to, obtain insurance deductible coverage up to $500,000, and 3) those that cannot obtain $500,000 worth of deductible coverage so only obtain $100,000 of coverage. The applicants say the bylaw will apply differently to each class of owners if there is loss or damage for which the owner is responsible and that this will lead to litigation between the insurers, the owners, and the strata. I disagree.

27. First, the applicants have provided no evidence showing whether $500,000 of strata deductible insurance coverage is available in the current insurance market, what the cost of such insurance is, whether that cost is prohibitive to any of the strata owners, or whether there are restrictions on that type of insurance coverage that might apply to any of the strata owners. Further, I find the theoretical “classes” of owners described by the applicants appear to relate, at least in part, to the choices those owners may make about their own personal insurance policies, rather than the bylaw itself. So I find the does not create different “classes” of owners. Even if bylaw 39 did result in different classes of owners, that would only make the bylaw unenforceable if the difference between owners was significantly unfair, which I will discuss below.

28. Second, I find bylaw 39(5) expressly limits the amount of money the strata can recover from any owner who is responsible for strata property damage. Regardless of whether the money is for repair costs and administration expenses or as reimbursement of the strata’s insurance deductible, I find the strata can only recover

a maximum of $100,000 from any responsible owner, per occurrence, by operation of bylaw 39(5).

29. I note that subsection (3) only requires the owner to pay the repair costs or expenses not reimbursed by "any" insurance policy. I infer the applicants have interpreted this to mean that any owner only has to pay the costs and expenses remaining after any applicable contributions from both the strata's property damage insurance policy and the responsible owner's personal insurance policy. So, those owners with more than $100,000 worth of strata deductible insurance coverage would pay the strata more than $100,000 through their insurance policies. I find this interpretation is inconsistent with the wording of bylaw 39(5) and inconsistent with the purpose of the proposed amendments to bylaw 39, as set out in the AGM minutes.

30. In *Strata Plan VIS4663 v. Little,* 2001 BCCA 337, the Court of Appeal warned against highly technical and literal interpretations of strata bylaws. The court stated that strata bylaws should be interpreted purposively, pragmatically and fairly, with an eye to accomplishing their community's goals. While the court's comments were directed toward the interpretation of a specific bylaw, I take those comments to be generally applicable. So, I find bylaw 39, as a whole and as amended by subsection (5), limits each owner's liability to the strata to $100,000 for damage or loss for which they are responsible, regardless of how much insurance coverage each owner carries personally. I find the applicants' prediction of litigation about insurance coverage is speculative, at best.

31. Third, even if I am wrong about my interpretation of bylaw 39, I find it is not unreasonable that bylaw 39 might be the subject of legal challenge in the future, as any other strata bylaw might be. The applicants predict legal challenges relating to failed future special levy resolutions to pay the remaining $400,000 of the strata's water damage insurance deductible. However, under section 158(3) of the SPA, strata approval is not required for the strata to pay an insurance deductible by special levy, or out of the contingency reserve fund (CRF) (see *Wong et al v. The Owners, Strata Plan LMS 2461*, 2018 BCCRT 255). So, I find the applicants' prediction of litigation about special levies is incorrect.

32. I do not find bylaw 39 onerous or unconscionable. Further, such findings would not make the bylaw unenforceable, unless the bylaw was also found to be significantly unfair.

Is bylaw 39 significantly unfair?

33. The applicants say bylaw 39 is significantly unfair to all the owners that are able to obtain $500,000 of strata deductible insurance coverage, because those owners have to pay for their own insurance coverage, and also fund any insurance deductible for responsible owners who did not obtain $500,000 of strata deductible coverage. As noted above, I find bylaw 39 applies equally to all owners, so I find all owners must contribute to the common expense of the strata's insurance deductible above $100,000 in the event of a claim. I will, however, address the applicants' argument that the bylaw is significantly unfair as it requires all owners to fund the strata's insurance deductible instead of obtaining their own insurance policies.

34. Section 123(2) of the CRTA gives the CRT the power to make an order directed at the strata, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. This is similar to the powers given to the Supreme Court under SPA section 164.

35. The BC Court of Appeal considered the language of SPA section 164 in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 28:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

36. To be significantly unfair, the strata's conduct must be more than "mere prejudice" or "trifling unfairness" (see *Dollan* at paragraph 27). "Significantly unfair" means conduct that is oppressive or unfairly prejudicial. "Oppressive" is conduct that is burdensome,

harsh, wrongful, lacking fair dealing or done in bad faith while "prejudicial" means conduct that is just and inequitable (see *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed in 2003 BCCA 126).

37. It is important to note that a strata is obligated to work toward the greatest good for the greater number of owners. Decisions may be unfair to a particular strata lot owner, or owners, so long as that unfairness is not significant (see *Gentis v. Strata Plan VR 368*, 2003 BCSC 120).

38. The applicants say that, when they purchased their strata lot, they had an objectively reasonable expectation that every owner would obtain their own insurance and that, if any owner was responsible for loss or damage to the strata, that owner would pay the strata's insurance deductible and that, if the owner did not pay the deductible, the strata would sue the owner to recover the deductible. The applicants say bylaw 39(5) violates that expectation.

39. I do not find the applicants' expectation that every owner would obtain their own insurance to cover the cost of the strata's deductible is objectively reasonable. While section 161 of the SPA says an owner can obtain their own property damage insurance, it is not required. Neither is there any such requirement in the strata's bylaws.

40. Section 158(1) of the SPA says that payment of a strata's insurance deductible is a common expense to be shared amongst the owners. Bylaw 39, as it was before the January 2020 amendment, required a responsible owner to pay for repair costs, or the strata's insurance deductible and allowed the strata to charge that amount to the owner's strata lot. Section 158(2) allows a strata to sue an owner to recover the insurance deductible if the owner is responsible for the loss or damage. While section 158(2) is permissive rather than mandatory, I find the owners prior expectations that the strata would seek to recover its insurance deductible from a responsible owner were objectively reasonable, given former bylaw 39.

41. However, I find the strata's amendment of bylaw 39 has not violated the applicants' expectation that the strata require a responsible owner to pay for the strata's

insurance deductible. While bylaw 39(5) limits the amount the strata can recover from a responsible owner, the bylaw continues to hold a responsible owner liable for at least a portion of the strata's property damage insurance deductible. In other words, bylaw 39(5) narrows the strata's application of section 158(2) of the SPA.

42. In *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519 (*Morrison*), the court considered a strata bylaw which required an owner's negligence to have caused strata property damage in order for the strata to recover the repair costs or insurance deductible from that owner. The court also considered SPA section 158(2), which requires only that an owner be responsible for the damage in order for the strata to recover its costs from that owner. The court found that a strata bylaw could specify the type of responsibility which attracts liability under SPA section 158(2). The court found the strata's bylaws imported a standard of negligence. The BC Supreme Court confirmed this concept in *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785.

43. Applying the reasoning of the court in *Morrison*, I find the strata can, through its bylaws, limit the amount of money it can recover from responsible owners, just as a strata can restrict the type of responsibility which would attract liability. I find bylaw 39(5) operates to narrow the strata's application of SPA s. 158(2). I find this does not violate the applicants' expectation that the strata will seek to recover its insurance deductible from responsible owners.

44. The applicants say the strata catered to the interest of a small minority of owners in proposing bylaw 39(5). However, the bylaw amendment passed by a 3/4 vote. I find the strata has expressly acted in the best interests of the majority of owners in proposing bylaw 39(5) and I find the strata did not act in a significantly unfair manner to the applicants in proposing the bylaw.

45. The applicants also say that the bylaw is significantly unfair because each owner is now required to contribute to the remaining $400,000 of the strata's water damage deductible should a future claim be made. I do not find it reasonable for the applicants to expect that they would not have to fund a common expense, such as the strata's

insurance deductible, when that expense increases from $50,000 to $500,000. I further find it unreasonable for the applicants to expect that the bylaws in a strata complex with over 300 strata lots might not change over time, with increased strata expenses.

46. For all these reasons, I do not find bylaw 39 itself is significantly unfair to the applicants or any other owners.

Does bylaw 39 contravene other enactments?

47. Section 121(1)(a) of the SPA says a bylaw is not enforceable to the extent that it contravenes any other enactment or law. The applicants say bylaw 39(5) contravenes section 75 of the *Financial Institutions Act* (FIA) and several sections of the IA, because it creates an unlicenced insurance contract between the owners and the strata and results in the strata carrying on an insurance business without a licence to do so.

48. Section 1 of the FIA defines "insurance business" as any of the following, whether or not the activities are done for gain or profit:

    a. Offering or undertaking to indemnify another person against loss in respect of a certain risk or peril to which the object of the insurance may be exposed,

    b. Soliciting or accepting any risk,

    c. Soliciting, or delivering an insurance contract, or a receipt for the same,

    d. Receiving an insurance contract premium,

    e. Adjusting any loss covered by an insurance contract, or

    f. Advertising for any of the above

49. Section 75 of the FIA says a person, or business, cannot carry on insurance business in B.C., unless they are licenced or otherwise authorized to do so. It is undisputed that the strata is not licenced, or otherwise authorized, to carry on insurance business.

50. Section 1 of the IA defines insurance as:

> the undertaking by any person to indemnify another person against loss, or liability for loss, in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event.

51. The applicants say that the strata has undertaken to indemnify the owners against loss in respect of a certain risk or peril to which the owners may be exposed. They say bylaw 39(5) guarantees that the strata will pay the difference between the strata's and the owner's insurance deductibles, in the event of damage or loss, which creates an unlicenced insurance contract between the strata and the owners. For the reasons set out below, I disagree.

52. First, I disagree that bylaw 39(5) guarantees that the strata will pay the difference between the strata's and the responsible owner's insurance deductibles. The bylaw does, however, mean the strata will pay for any repair costs, or strata insurance deductible, above $100,000, in the event an owner is responsible for strata property damage or loss above that amount.

53. Second, I do not find that the strata has undertaken to indemnify the owners against loss in respect of a certain risk or peril to which the owners have been exposed. Bylaw 39(5) says that any owner responsible for water damage or loss to the strata is only responsible for paying $100,000 of that loss. So, a responsible owner's potential loss is $100,000. A responsible owner does not have a potential loss above that limit, rather it is the strata's potential loss to bear. The strata cannot undertake to indemnify a responsible owner for an amount that owner is not required to pay. The bylaw simply limits the amount the strata can attempt to recover.

54. Third, as set out in section 158(1) of the SPA, the strata's insurance deductible is a common expense, to which all owners must contribute. By enacting bylaw 39(5) the strata has balanced the owners' collective obligation to pay the insurance deductible under subsection (1) with the strata's ability to recover an insurance deductible under

subsection (2). I find the strata is not acting as an unlicenced insurer by financing its property insurance deductible in accordance with section 158 of the SPA.

55. On balance, I find that bylaw 39 does not result in the strata acting as an unlicenced insurer and so I find the bylaw does not contravene the *FIA* or the *IA*.

Does bylaw 39 contravene section 121(1)(c) of the SPA?

56. Section 121(1)(c) of the SPA says a bylaw is unenforceable to the extent that it prohibits or restricts the right of an owner to freely sell, lease, mortgage, or otherwise dispose of the strata lot. The applicants say bylaw 39(5) places a significant burden and risk on current and future mortgagors and lenders that may deter them from extending or renewing funds. The applicants say a current, or prospective owner might not be able to afford to pay into one or more special levies per year and service their personal financial obligations.

57. Based on the January 28, 2020 AGM minutes, I find each strata lot owner was required to contribute between $15.15 and $462.93 toward the $64,000 special levy, depending on each strata lot's unit entitlement. I calculate that, for the strata to raise a $400,000 special levy, each strata lot owner would have to contribute between $984.82 and $3,009.05, depending on their unit entitlement. I do not find such a special levy contribution to be a financial burden that might prevent an owner from obtaining financing.

58. Further, the applicants have provided no evidence of how many, if any, past water damage losses the strata experienced or how much cost was associated with any such damage. There is no way of knowing how many occurrences of water damage or loss there might be or the value of repair costs or number of insurance deductibles the strata may have to fund in the future. On balance, I find the applicants have failed to show that contributing to the strata's insurance deductible in the future would prohibit or restrict the right of any owner to sell, lease, mortgage, or otherwise dispose of the strata lot.

59. Even if the applicants had proven that bylaw 39 made it more difficult for an owner to obtain personal financing, I would have found that would not make the bylaw unenforceable under section 121 (1)(c) of the SPA. A bylaw that is enacted for a legitimate purpose is not unenforceable, simply because the bylaw makes a strata lot less desirable or more difficult to sell (see *Kok v. Strata Plan LMS 463*, 1999 BCJ No. 921 (SC), as cited in *The Owners, Strata Plan VIS 4686 v. Craig*, 2016 BCSC 90). I find bylaw 39 does not contravene section 121(1)(c) of the SPA.

60. In summary, I do not find bylaw 39(5), or the whole of bylaw 39, is unconscionable, significantly unfair, contrary to section 121(1)(c) of the SPA, or contrary to the provisions of the FIA or the IA which prohibit unlicenced insurers. I do not find that bylaw 39(5), or the whole of bylaw 39, is unenforceable. I dismiss the applicants' claims.

61. Even if I had not dismissed the applicants' claims, I would have found the CRT does not have authority to make a declaratory order unless the declaration is incidental to another claim for relief, which is not the case here. This was discussed by a CRT Vice Chair in the non-binding but persuasive decision of *Fisher v. The Owners, Strata Plan VR 1420,* 2019 BCCRT 1379. Given that I made no declaratory order I consider that I have not acted outside of the CRT's jurisdiction in strata disputes, as set out in section 123 of the CRTA.

62. 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 applicants were unsuccessful in this dispute, I find they are not entitled to any reimbursement. The strata did not pay any CRT fees or claim any dispute-related expenses.

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

ORDER

64. I dismiss the applicants' claims and this dispute.

Sherelle Goodwin, Tribunal Member