

## The Case of the Valid Vacation Accommodation

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Preventing owners from using their strata lot, often through websites such as Air BnB and VRBO, for vacation or short term accommodation, is the desire of many strata corporations. A strata corporation's ability to control such use was recently enhanced when the legislature amended s. 7.1 of the Strata Property Regulation to permit strata corporations to pass a bylaw that allows for a fine of up to \$1,000 per day for violation of a bylaw that prohibits or limits the use of a residential strata lot for remuneration as vacation, travel or temporary accommodation.<sup>1</sup>

However, a recent case from the British Columbia Supreme Court<sup>2</sup> has held that the wording of the bylaw is critical if a strata corporation wishes to prevent such use.

In *Semmler*, the strata corporation fined Ms. Semmler for allegedly breaching bylaws which, in the strata corporation's view, prohibited an owner from using a strata lot for short term accommodation. Ms. Semmler subsequently applied to the Court for an order that the strata corporation's bylaws were inapplicable and thus did not prevent her from granting licenses for short term accommodation. The strata corporation applied

to the Court for an order that Ms. Semmler comply with the bylaws.

### Background

In 2006 the strata corporation passed the following bylaw which restricted the use of a strata lot for business purpose:

4 (11) No strata lot shall be used for any business purpose whatsoever without prior approval by the Council. No inventory for the purpose of a business shall be visibly stored upon any strata lot.

Subsequently in 2008 Ms. Semmler purchased a strata lot in the strata corporation. Beginning in 2010 Ms. Semmler licensed the use of the property to guests on a short-term basis through her company Cobblestone Creek Cottage and Lodging Co. (Cobblestone).

In 2015, the strata corporation passed a bylaw which restricted the term of a rental as follows:

4(47) No strata lot may be rented for term of less than thirty (30) consecutive days.

### <sup>1</sup> Maximum fine

**7.1 (1)** For the purposes of section 132 of the Act, the maximum amount that a strata corporation may set out in its bylaws as a fine for the contravention of a bylaw or rule is

...

(c) in the case of a bylaw that prohibits or limits use of all or part of a residential strata lot for remuneration as vacation, travel or temporary accommodation, \$1,000 for each contravention of the bylaw

(2) For the purposes of section 132 of the Act, the maximum frequency that a strata corporation may set out in its bylaws for the imposition of a fine for a continuing contravention of a bylaw or rule is

...

(b) in the case of a bylaw described in subsection (1) (c), daily.

<sup>2</sup> *Semmler v. The Owners, Strata Plan NES 3039*, 2018 BCSC 2064

The Court was required to consider whether the short term occupancies were in breach of either bylaw. The Court also considered whether Ms. Semmler was in breach of the bylaw that required an owner to submit a Form K in respect of the persons occupying the strata lot.

#### Business Purpose

The first issue for the Court was to determine whether the use of the strata lot for vacation accommodation was a breach of bylaw 4(11) which prohibited the use of a strata lot for a business purpose. The strata corporation argued that the income arising from the short term accommodation was business income, and thus, the strata lot was being used for a business purpose. The strata corporation also argued that the income from long term rentals was not business income, but rather was passive income.

As a first step, the Court considered the process that should be used when determining the meaning of the bylaw and confirmed that the bylaws must be read as a whole and that the bylaw should be interpreted in a manner that allows the bylaws to work together harmoniously and coherently.

The Court noted that the strata corporation's bylaws, including bylaw 4(47) do not prohibit the rental of a strata lot. Bylaw 4(47) only restricts rentals for periods of less than 30 consecutive days. Therefore, by implication, rentals for periods of more than 30 days are permitted. The Court was unwilling to find that there was a distinction in the way short term and long term rent should be categorized. Thus, if bylaw 4(11) were interpreted to prohibit the rental of a strata lot as a business purpose, the Court found that bylaws 4(11) and 4(47) would be inconsistent.

The Court also held that the fact that Ms. Semmler hired Cobblestone to arrange for the short term accommodation did not change the analysis. Whether Ms. Semmler arranged for the accommodation herself or through her company, the bylaw prohibiting the operation of a business did not apply.

In interpreting the meaning of bylaw 4(11) the Court also considered the bylaw's reference to inventory and found that bylaw 4(11) was intended to prohibit the use of a strata lot for such things as a business office, a retail outlet or a production facility for a business.

#### *Rentals less than 30 days*

To determine whether Ms. Semmler was in breach of bylaw 4(47), the Court considered the meaning of "rented". After considering the relevant case law the Court set out the following principles:

- A person may occupy a strata lot under a tenancy agreement or a license agreement;
- A tenant is a person who rents all or part of a strata lot and who, through that arrangement receives an interest in the property including exclusive possession of the premises;

The Court agreed with the analysis in the case of *Strata Plan VR 2219 v. Duncan*<sup>3</sup> which held that a tenancy tends to arise where a tenant is given a grant of exclusive possession of the premises and that a license is normally created where a person is granted the right to use the premises without an entitlement to exclusive possession.

- An occupant is a person other than an owner or tenant who occupies a strata lot;

The *Strata Property Act* defines an occupant as a person other than an owner or a tenant. The Court in *Duncan* concluded that the Act contemplated persons lawfully occupying a strata lot who were neither owners nor tenants.

- A licensee is an occupant but not a tenant;
- Provisions of the *Strata Property Act* which relate to tenants and tenancies do not apply to licensees.

After considering these principles and the nature of the agreements that guests entered into, the Court in *Semmler* found that the agreements that Cobblestone entered into with guests were license agreements and that there was no intention to create a tenancy.

<sup>3</sup> 2010 BCPC 123

Although the strata corporation argued that the scheme of the *Strata Property Act* was intended to apply to all occupancies, and not just rentals, the Court disagreed. The Court was unwilling to find that the terms used in Part 8 of *Strata Property Act*, which deals with rentals, also applied to licenses or other occupancies.

The Court concluded that because bylaw 4(47) only referenced rentals it did not restrict the length of occupancies under other types of commercial agreements such as a license. Thus, bylaw 4(47) only restricted “rentals” of less than 30 days, but it did not restrict occupation by way of a license.

The Court concluded that Ms. Semmler was not in breach of bylaw 4(47) and that since she had not created tenancies, Form K’s were not required to be provided in respect of the guests occupying the strata lot on a short term basis.

Although the Court also considered the matter of significant unfairness, the discussion has not been included as it is not relevant to this article.

### Conclusion

Generally speaking, agreements establishing short term accommodation arrangements are created by license rather than a lease. The *Semmler* case confirms that relying on a bylaw that relates to the rental of a strata lot will not be sufficient to prevent such short term accommodation arrangements. Additionally, in the *Semmler* case, the bylaw prohibiting a business use was also of no value in prohibiting short term accommodation.

Strata corporations wishing to prohibit short term accommodation should approve and register a bylaw that specifically references the use of a strata lot by way of a license. Additionally, in order to take advantage of the amendment to s. 7.1 of the *Strata Property Regulation*, which permits a fine of up to \$1,000/day for a breach of a short term accommodation bylaw, strata corporations must also amend their bylaws to permit such a fine and to permit its application on a daily basis. As with all bylaw amendments, a legal review of the proposed wording is always recommended. In the case of bylaws attempting to prohibit short term accommodation and permit the maximum fine for

breaches of such bylaws, the *Semmler* case has confirmed that the wording is critical.