



Civil Resolution Tribunal

Date of Original Decision: May 26, 2020

Date of Amended Decision: June 5, 2020

File: CS-2019-009679

Type: Societies and Cooperatives

Civil Resolution Tribunal

Indexed as: *Berger v. Le Coeur Housing Co-operative*, 2020 BCCRT 571

BETWEEN:

MICHELLE BERGER

APPLICANT

AND:

LE COEUR¹ HOUSING CO-OPERATIVE

RESPONDENT

AMENDED REASONS FOR DECISION

Tribunal Member:

Luningning Alcuitas-Imperial

INTRODUCTION

1. This dispute is about a decision and a threatened action of a cooperative in relation to a member.
2. The respondent, Le Coeur¹ Housing Co-operative (cooperative), is an association incorporated under the *Cooperative Association Act* (CAA). It is a not-for-profit housing cooperative.
3. The applicant, Michelle Berger, is a member (member) of the cooperative. The member says that the cooperative is interfering with her use of a hot tub on her residential premises, and wants her to remove it. The hot tub is installed in the backyard of her unit 3652.
4. The cooperative says that the member did not get prior written approval to install the hot tub. It says that she is in breach of her occupancy agreement with the cooperative.
5. The member asks that I order the cooperative to:
 - a. Stop interfering with her use of the hot tub, and
 - b. Stop harassing her.
6. The member is self-represented. The cooperative is represented by an individual.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over certain cooperative claims under section 125 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

8. This dispute is about a decision and a threatened action of the cooperative in relation to the member. CRTA section 125(1)(b) says, in part, that the tribunal has jurisdiction over a claim concerning an action or threatened action by an association or its directors in relation to a member. Also, CRTA section 125(1)(c) says, in part, that the tribunal has jurisdiction over a claim concerning a decision of the association or its directors in relation to a member. Based on these provisions, I find that the tribunal has jurisdiction to decide this dispute.
9. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email 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 tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
11. Under section 127 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, or order a party to pay money. If an order is necessary to prevent or remedy an unfairly prejudicial action or decision, the tribunal may make an order directed at the cooperative or its directors. However, the tribunal may not make an order requiring the sale or other disposition of real property.

ISSUE(S)

12. The issue in this dispute is whether the member can continue to use her hot tub. This will involve examining whether the member is in breach of her occupancy agreement by installing it.

PRELIMINARY ISSUES

Harassment

13. The member asked for an order stopping the cooperative from harassing her. I find that allegations of harassment are outside the tribunal's jurisdiction, as they are not mentioned in section 125 of the CRTA. The tribunal can only decide matters that the CRTA gives it power to decide. I decline to grant the order requested by the member.
14. If I am wrong in my analysis about the tribunal's jurisdiction, I find that the weight of the evidence does not support that the cooperative engaged in harassing behaviour towards the member. While the member mentions 8 years of interaction with the cooperative, she did not provide enough details and evidence of these interactions or disputes to establish harassment. I also did not find evidence of inappropriate language or persistent communications about the hot tub dispute that rose to the level of harassment.

Cooperative's claim

15. The cooperative asked for an order that the hot tub be removed. This was contained in the cooperative's response to this dispute.
16. A respondent to a dispute can make a counterclaim against an applicant under the rules of this tribunal. In order to do so, the respondent must indicate its claim, complete and submit a counterclaim form and pay the required fee.
17. I decline to resolve this claim as the cooperative has not taken these steps.

BACKGROUND AND EVIDENCE

18. I have read all the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding like this one, the applicant must prove its claim on a balance of probabilities.
19. The cooperative consists of 77 units. The cooperative is governed by a board of directors (cooperative board).
20. The cooperative has rules, formulated in 2015. I paraphrase the relevant portions of the rules as follows:
 - a. Rule 1.1: A unit is the residential premises owned or operated by the cooperative which has been assigned to the member to occupy on a full-time basis.
 - b. Rule 6.1: The right of a member to possession or occupancy of the unit is terminated upon withdrawal from membership, termination of membership, or if membership ceases for any other reason.
 - c. Rule 17.1: The cooperative board must manage or supervise the management of the business of the cooperative in accordance with the CAA and the cooperative's memorandum and rules, as well as exercise all powers of the cooperative.
21. An occupancy agreement is Schedule A to those Rules. I paraphrase the relevant portions of the occupancy agreement as follows:
 - a. Item C: A member's right to possession or occupancy of a unit is dependent upon the member complying with their obligations, continuing to be a member, and holding the required number of shares.
 - b. Item D: The cooperative is founded on international principles of co-operation and relies on the active engagement of its members to foster good governance and principled leadership in the exercise of democratic member control.

- c. Item 2.01: The cooperative grants the unit to the member for a specified term.
- d. Item 2.02: The cooperative grants the member non-exclusive use during the term to the entrance, passageways, roadways, sidewalks, common grounds and other common areas of the development.
- e. Item 9.01(a): A member may not make any structural alterations, changes or additions in or to the unit, except with the prior written consent of the cooperative board.
- f. Item 9.01(b): A member may not make any alterations, changes or additions in or to the exterior of the development or any building or structure, or any part of the interior, except with the prior written consent of the cooperative board.
- g. Item 9.02: A member shall pay all costs of repair and restoration of the unit resulting from alterations, changes, or additions that were not approved by the cooperative board.
- h. Item 9.03: When consent is given for alterations, changes or additions, the member shall comply with all applicable municipal by-laws and regulations, as well as provincial and federal building codes.
- i. Item 9.05: A member shall comply with the procedures established by the cooperative for authorization and installation of alterations, changes or additions.
- j. Item 11.01: The cooperative is not liable for any loss of property or personal injury for which a member (or another occupant or visitor) is responsible. The member shall hold the cooperative harmless from any such claim.
- k. Item 11.02: The member shall maintain third party liability, standard fire and comprehensive insurance coverage on the member-supplied fixtures and improvements, furniture, and all other contents of the member's unit under a policy satisfactory to the cooperative board. However, the cooperative board's

acceptance does not mean approval of or liability about the adequacy or suitability of the policy.

22. In August 2017, the member installed a hot tub in the backyard of her unit. A foundation was laid, consisting of 4" of crushed road base, 4" interlocking pavers, a pad which has a series of pressure treated 2x8's laying flat, and topped with a layer of 3/4" pressure treated plywood. Electrical wiring and a new electrical box were installed. Photographs of the exterior of the hot tub, its foundation, as well as the electrical box were submitted to the tribunal.
23. On April 26, 2018, the cooperative wrote the member about the hot tub. The cooperative said that any alterations to the exterior of a unit had to be pre-approved by the cooperative board. The cooperative mentioned items in the occupancy agreement about insurance hazards and alterations.
24. The cooperative also said that its insurer had advised that the cooperative would be responsible for any injury or damage from the hot tub, as it was an exterior addition. The cooperative said its policy did not cover the cooperative from damage, injury, or death resulting from use of the hot tub.
25. The cooperative said that it was investigating whether the member could purchase additional insurance coverage. Once this determination was made, the cooperative would discuss retroactive approval of the hot tub with the member. In the meantime, the cooperative asked the member to stop using the hot tub and to drain it.
26. The member responded to the cooperative on April 30, 2018. She said that as the hot tub and its electrical wiring were not permanent alterations and could be moved, there was no need to get the cooperative's prior approval. She stated that she had purchased additional insurance to increase her liability to \$2 million (from \$1 million) for bodily injury arising from use of her premises (including the backyard).
27. On May 29, 2018, a property manager wrote to the member on behalf of the cooperative board. The cooperative's insurer had made suggestions to improve

safety. The cooperative asked the member to secure the hot tub cover and back yard gate with locks no later than June 5, 2018.

28. The member complied with these suggestions and submitted photographs of both locks. As well, she submitted a photograph of a July 28, 2018 inspection of her unit. A municipal officer indicated that the unit “passed” the electrical inspection.
29. On September 13, 2019, the cooperative wrote the member. It rejected the hot tub as a liability issue. The member’s insurance would not cover damage to her neighbours, the cooperative development itself, or personal injury. The member was asked to remove the hot tub within 30 days. If she had concerns about the decision, she could come to the next cooperative board meeting or ask that it be discussed at the next general meeting of the membership.
30. The member responded to the cooperative on September 22, 2019. She would not remove the hot tub. She would explore a legal action against the cooperative for harassment, as she felt “picked on,” “unwelcome,” and “like they were being pushed out” for the last 8 years.
31. There was a further exchange of correspondence in October 2019, including an October 18, 2019 letter giving the member 15 days to remove the hot tub. The member also provided information to the cooperative about her insurance policy and liability coverage.
32. On November 15, 2019, the cooperative wrote the member. The cooperative decided that her failure to remove the hot tub was a material breach of the terms of the occupancy agreement. She was given until December 3, 2019 to remedy her breaches. If she failed to do so, the cooperative board would call her to attend a meeting to discuss a special resolution. The special resolution could terminate her membership in the cooperative and her occupancy agreement.

ANALYSIS

Did the member breach the occupancy agreement by installing a hot tub in the backyard of her unit?

33. To answer this question, I must look at each part of item 9.01 and the meanings of the words used. I must also consider the nature of the hot tub and its characteristics. Also, I must consider the CAA and the nature of the relationships and obligations it creates between the cooperative and the member.
34. Item 9.01(a) is about the unit, but item 9.01(b) is about the development. "Unit" is defined in the occupancy agreement, but "development" is not.
35. Having read the cooperative's rules and the occupancy agreement, I interpret the word "development" to mean the cooperative housing complex as a whole. This would make the meaning of "common area" under item 2.02 sensible. Also, I interpret the word "unit" to include the member's backyard. This includes the location of the hot tub. There is no evidence that the backyard is a common area of the development. I find that the evidence establishes that the backyard and anything located upon it are generally for the exclusive use of the member. This follows from the member's right of occupancy of the unit. Although it may be that other members or the public are able to enter the backyard without permission (and this is why the member installed a bamboo fence), this does not mean that the backyard is a common area of the development.
36. I do not need to interpret item 9.01(b) about alterations, changes or additions to the interior or exterior of the development. I will now focus on the meaning of the words in item 9.01(a).
37. Item 9.01(a) talks about structural alterations, changes or additions to the unit. The word structural is not defined in the occupancy agreement, the cooperative's rules, or the CAA. Also, I am not aware of any court decisions interpreting this term in the context of the CAA.

38. I looked at the Oxford English Dictionary for the meaning of the word structural when used as an adjective. Structural is defined as “forming a necessary part of the structure of a building or other construction, as distinct from its decoration or fittings; of or relating to this structure.”
39. I find that the hot tub is not a structural alteration, change or addition to the unit. The hot tub is not a necessary part of the structure of the member’s unit – whether the portion of the cooperative development or building that is assigned to her or whether the backyard that is associated with that portion of the development or building.
40. I accept the member’s evidence that the hot tub is a free-standing item that can be moved at any time. Although I considered her evidence about the dimensions and components of the foundation under the tub and whether that made it a necessary part of the unit structure, I conclude that the foundation itself can also be moved at any time.
41. I acknowledge that the cooperative argued that the electrical wiring and electrical box were an alteration to the unit. The photographs clearly show that it is attached to the building of the unit.
42. I considered whether the degree of attachment of the electrical box to the unit’s building makes it a “structural” alteration. I looked at Halsbury’s Laws of Canada about the meaning of “chattels” and “fixtures.” These are terms in the law that look at buildings, objects, and other items (personal property) that are on real property (usually land) and whether those items are part of the owner’s right over the land. A “chattel” or item may become a “fixture” or part of the land (and thus part of what the owner owns).
43. Halsbury’s Laws of Canada state that to determine whether an item is a fixture, the court must consider the degree of annexation (including the physical manifestation of the annexation), the relationship of the parties interested in the land, the nature of

the property added, and the purpose of annexation. It is ultimately a question of circumstances and many different factual scenarios can arise.

44. I infer that the reason for the electrical box and wiring of the hot tub is to utilize and connect to the development's power supply. This is supported by the member's obtaining an electrical inspection. However, I am not persuaded that this use of the development's power supply makes the hot tub itself a "structural" alteration within the meaning of item 9.01(a). An overly broad interpretation of item 9.01(a) would mean that other items using electricity in the unit (whether in the interior or exterior) require the cooperative board's prior approval. I agree with the member that the electrical box can easily be moved, since the physical manifestation of the attachment are the screws,
45. The cooperative did not present any other evidence about the permanency of the hot tub, how it is joined or connected to the unit's structures, the challenges of moving it due to its size or location, or other characteristics that would show that it is a structural alteration, change or addition to the unit.
46. I note that the member cited an Ontario court decision in support of her position. However, this decision was about the Ontario law on condominiums. I am cautious about using court decisions about a different law in a different province, when looking for guidance to interpret the relationship and obligations between a member and a housing cooperative in British Columbia (BC).
47. Housing cooperatives are formed and governed differently than strata corporations under the law in BC. While they have some similarities, there are also important differences. As noted by the court at paragraph 5 in *Potter v. Vancouver East Cooperative Housing Association*, 2019 BCSC 871, members own shares of the cooperative, they collectively own the development itself, and they are allocated and occupy a unit based on the cooperative's rules and policies. The rules are in turn administered by the cooperative board and its members. Under the *Strata Property Act* (SPA), a strata corporation manages and maintains the common property and

assets for the benefit of the owners, who own their separate strata lots as well as common property.

48. I acknowledge that there are court decisions (such as *The Owners, Strata Plan LMS 4255 v. Newell*, 2012 BCSC 1542) and decisions of this tribunal (such as the noteworthy decision *Graham v. The Owners, Strata Plan EPS104*, 2020 BCCRT 344) about the use and alteration of common property or limited common property, including the installation of hot tubs. However, these were decided under the SPA. While these cases provide some direction about factors to consider, the dispute before me must be decided on a review of the facts and the applicable law. In this dispute, the law is the CAA and any court decisions interpreting and applying the CAA.
49. In summary, I find that the hot tub and its wiring are not structural alterations to the unit.
50. Also, I note that the cooperative's September 13, 2019 letter rejected the hot tub on the grounds of liability concerns. There was some exchange of information about the member's insurance policy, as well as interpretations from both the cooperative's insurer and the member's insurer about the coverage. However, I find that there was no express decision by the cooperative board under item 11.02 that the member's insurance policy was unsatisfactory and that the member was in breach of item 11.02. I make no finding about this matter.
51. I am aware that court decisions in this province have expressed that deference should be given to a cooperative board's decision to terminate a person's membership when the cooperative board's decision was reasonably supported by the facts (see paragraph 8 of *Kovac v. Alexander Laidlaw Housing Co-operative*, 2016 BCSC 2049). However, these court decisions are generally in the context of appeals under section 172(2) of the CAA about whether a cooperative board's termination of membership was done in accordance with the principles of natural justice. A decision about the termination of the member's membership is not before

me and appeals under section 172(2) are outside this tribunal's jurisdiction under section 126(1)(d) of the CRTA.

52. In reaching my conclusion, I acknowledge that there is a balance to be struck between the interests of the collective ownership of the cooperative and the member's quiet enjoyment of her unit. I understand the cooperative's position and duty to look at the collective interests of its members. However, the terms in the occupancy agreement are important and create expectations of members. If the cooperative wished to prohibit hot tubs, it could do so in its rules and occupancy agreement.
53. In summary, I find that the hot tub installed in the member's unit was not a structural alteration within the meaning of item 9.01(a) of the occupancy agreement. It follows that the member did not require prior written consent of the cooperative board before installing it. I find that the member did not breach item 9.01(a) of the occupancy agreement.

TRIBUNAL FEES AND EXPENSES

54. The member was successful in this dispute. Under the CRTA and the tribunal rules, I find that the member is entitled to reimbursement of her tribunal fees of \$225.00. The member did not claim any other dispute-related expenses. The cooperative did not claim any dispute-related expenses.

ORDER(S)

55. I order that:
 - a. Within 14 days of the date of this decision, the cooperative shall reimburse the member for \$225 in tribunal fees.
56. The member is entitled to post-judgment interest under the *Court Order Interest Act*, as it applies.

57. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). Once filed, a tribunal order has the same force and effect as a BCSC order.
58. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the CRTA, a party can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.

Luningning Alcuitas-Imperial
Tribunal Member

¹ Amendment Notes - Amendments made to correct the spelling of the respondent's name in the style of cause and paragraph 2 under the authority of section 64 of the *Civil Resolution Tribunal Act*.