Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VR2062 v. Novosad et al*, 2017 BCCRT 143

B E T W E E N :

The Owners, Strata Plan VR2062

**APPLICANT**

A N D :

Greg Novosad and John Novosad

**RESPONDENTS**

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**REASONS FOR DECISION**

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Tribunal Member: Maureen E. Baird

## INTRODUCTION

1. The applicant, The Owners, Strata Plan VR2062 (strata) asks the tribunal to order the respondents to vacate a storage room which, although designated on the strata plan as common property, is currently occupied by them to the exclusion of other owners.

2. The first respondent is the son and tenant of the owner of strata lot 3 (SL 3) in the strata. The strata is a townhouse development comprised of 9 strata lots in two buildings. By agreement the owner of SL 3 was added as a second respondent with the right to respond to the claim. Reference in this decision to the respondent will be to the son who is the occupant of SL 3 and is also the person who has taken exclusive use of the subject storage space. I will refer to the second respondent as the owner. As they filed a joint submission, I will refer to the respondent and the owner collectively as the respondents.

3. The strata is represented by an authorized council member. The respondents are self-represented.

4. The applicant does not ask for reimbursement of any tribunal fees or other costs relating to the claim.

## JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

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

8. I have read all of the materials provided by the parties. In this decision I only refer to the evidence that is required to give context to and to explain my decision.

9. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

10. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

## ISSUES

11. The issues in this dispute are:

    a. Have the respondents acquired the right to exclusive possession of the storage room and, if so, for what period of time; and

    b. Are the respondents entitled to any fees or costs incurred.

## BACKGROUND AND EVIDENCE

12. Strata plan VR2062 was deposited in the land title office on January 5, 1988. At that time the *Condominium Act*, RSBC 1979, c. 61 governed strata property in British Columbia. The strata plan has remained unchanged since deposit.

13. It is not contested that the storage room that is the subject of this claim has, at all times, been designated on the strata plan as common property.

14. The storage room measures approximately 20’ x 10’. It is undivided, in the sense that it does not have dividers or lockers. It is located in the basement of the strata and is not attached to SL 3. It is not included in the unit entitlement of SL 3.

15. SL 3 was purchased by the owner in January, 2004. SL 3 is the only unit in the strata that does not have a basement. Since January 2004, the respondents have exercised exclusive use of the storage room to the exclusion of other owners.

16. In May 2014, the owner proposed a ¾ vote resolution to have the designation of the storage room changed from common property to limited common property for the exclusive use of SL 3. At a Special General Meeting on May 21, 2014, this resolution failed to achieve the ¾ vote of owners required for it to pass.

17. The respondents rely upon real estate advertisements for the sale of SL 3 in March 1994 and September 2003 both of which refer to the storage area/room as part of the strata lot. They also rely on an email from an owner of a unit in the strata from 2000 to 2015. This email confirms the exclusive use of the storage room during that period. There is no evidence from the developer, previous strata councils or from owners of SL 3 prior to the current owner.

18. Following the defeat of the ¾ vote resolution, the strata wrote to the respondents requiring that the storage room be vacated. The respondents refused.

19. The respondents have not asked permission from the strata for exclusive use of the storage room.

## POSITION OF THE PARTIES

20. The strata says that in accordance with its duty to act in the best interest of all owners it applies to the tribunal to have the storage room made available to all owners. It says that the respondents have no legal right to exclusive use of the storage room nor have they acquired any such right by virtue of the time that they or any earlier owners have exercised exclusive use.

21. The respondents say that it was the intention of the owner developer that SL 3 would have use of the storage room because it did not have a basement. The respondents say that this intention is confirmed by the fact that prior owners have had exclusive use. The respondents' position is that there was a grant from the owner developer to the original owner pursuant to section 117 (f) of the *Condominium Act*. Since 1988 there has been exclusive and open use of the storage room by successive owners of SL 3. The respondents say that acquiescence by the strata in this exclusive use amounts to agreement that the

use continue. The respondents acknowledge that the current strata council is entitled to give notice to terminate the use, but say that notice must be reasonable and the only notice that would be reasonable in the circumstances is that the use terminate when the owner sells SL 3.

## ANALYSIS

### Have the respondents acquired the right to exclusive possession of the storage room and, if so, for what period of time.

22. The respondents say that the right to exclusive possession was established in 1988 or 1989 pursuant to section 117 (f) of the *Condominium Act* which governed strata properties at that time, as a result of a grant from the owner developer or, alternatively, from the strata council at the time. I set out that section because it is central to the position of the respondents:

> "**Powers of strata corporation**
>
> **117**. The strata corporation may
>
> . . .
>
> (f) grant an owner the right to exclusive use and enjoyment of common property, or special privileges for them, the grant to be determinable on reasonable notice, unless the strata corporation by unanimous resolution otherwise resolves;"

23. The respondents say that section 17.7 of the *Strata Property Regulation* has the effect of continuing the grant given under section 117 of the *Condominium Act*. It is acknowledged that the right can be terminated but only on reasonable notice which the respondents say is concurrent with any sale of SL 3 by the owner.

24. The first question to be answered is whether the respondents have established that there was a grant by the strata corporation that meets the requirements of section 117 (f) of the *Condominium Act*. For the reasons below, I find that there was no such grant.

25. It is not contested that the onus is on the owner to prove, on a balance of probabilities, that it has acquired the right to exclusive use of the storage room. The respondents have failed to prove that there was a grant of exclusive use made in 1988 or 1989 by the strata corporation or by the owner developer.

26. In my view, the evidence presented does not support the respondents' position. Section 117 (f) of the *Condominium Act* requires that the grant of exclusive use must be made by the strata corporation. Further, the plain wording of section 117 (f) of the *Condominium Act* requires that there be a "grant" of exclusive use. This requires that there be a positive action or decision taken by the strata corporation, not just acquiescence to an existing state of affairs. There is no evidence that the owner developer or strata council in place at the time of the alleged grant ever took any steps to effect such a grant to the original owner of SL 3 or to any subsequent owner. There is no note, no minute of the strata council, no evidence of any sort evidencing that such a grant was made. Since there was no grant made, there was no legal or other right acquired by any predecessor owner to pass along to the current owner. The real estate listing information purporting to show the storage room as part of SL 3 has no legal effect. It may show that previous owners had formed an incorrect view of their right to the storage room but that error does not give rise to the right which they erroneously believed they possessed.

27. The strata says that it has some sympathy with the owner who may have believed from the advertisements that the storage room was being acquired, but notes, correctly in my view, that a search of the strata plan in the Land Title Office at the time of purchase would have conclusively shown that the storage room was not part of SL 3. As I find that Section 117 (f) of the *Condominium Act* has no application to this case, section 17.7 of the *Regulation* also has no application.

28. The respondents rely on *Carney v. Owners, Strata Plan VR634,* 1981 CanLII 578 (BCSC). This case is distinguishable because in the *Carney* decision, the owners who were seeking to have use of the parking stalls had been given notice of the rights of the other parties at the time of purchase and so had full notice that parking was not included with their purchase. That is not the case here. I do not

agree with the submission of the respondents that it was up to other owners, including purchasers, to take note of the exclusive use of the storage room that they had taken. In my view, purchasers were entitled to rely on the strata plan on file with the Land Title Office. Further, there is no evidence that the owner developer intended the storage room to be used exclusively by the owner of SL 3. As submitted by the strata, if this was the intention then it was readily available to the owner developer to include it in the strata plan, and presumably include that space in the sale price and in the unit entitlement as well. This was not done.

29. The next consideration is whether the owner acquired any right under the *Strata Property Act* (SPA). On the evidence, I find that he did not. At best, the evidence shows that from 2000 to 2014 when the ¾ vote resolution advanced by the respondents failed, that there was acquiescence by the strata to the exclusive use by the respondents and their predecessors. The respondents have not provided evidence that any of the requirements of section 73 (a) – (c) of the SPA to designate the storage area as limited common property for SL 3 have been met. There is no evidence of designation by the owner developer, amendment to the strata plan or ¾ vote resolution to create the exclusive use contended for by the respondents.

30. I also find that the evidence does not support any right of short term exclusive use of the storage room under section 76 of the SPA. To the contrary, the owners expressed their wishes with respect to the storage room when they defeated the ¾ vote resolution in May 2014. No permission has been sought from the strata by the respondents for use under section 76. The strata council has, quite properly, sought to enforce the decision the owners expressed when the respondents' ¾ vote resolution was defeated.

31. Lastly, I consider whether there are any issues of fairness that might apply to give the respondents any continued exclusive us of the storage room.

32. The respondents refer to the decision of the Court of Appeal of British Columbia in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 (CanLII) saying that

their expectation of exclusive use ought to be considered and prevail. I disagree. In my view, any expectation formed by the present owner was not reasonable. The true legal status of the storage room was readily ascertainably by a search of the strata plan on file in the Land Title Office. This search would have disclosed the status of the storage room as common property and an enquiry of the strata council could have confirmed whether permission had been granted under section 27 of the SPA. I do not accept that the current owner's failure to take these basic steps can support the reasonable expectation that he asserts.

33. I find that there is no evidence that this decision requiring that the respondents give up the exclusive possession they have enjoyed works any hardship. It may be inconvenient for the respondents, but that, in my view, does not amount to unfairness. The owner had the ability to ascertain the ownership of the storage room at the time of purchase and for unknown reason did not do so. Any expectation the owner may have had that the storage room was limited common property for the exclusive use of SL 3 was because of a failure to ascertain the correct facts that were readily available in the Land Title Office. Since then the respondents have had a benefit to which they have no legal entitlement. It would also seem that they were not paying strata fees for this benefit as the storage room is not part of the unit entitlement of SL 3. The owners defeated the ¾ vote resolution over three years ago.

34. There is no obligation on the strata to provide a reason or an intended use for the storage room. The fact is that it is common property and as such it is appropriate for the strata council on behalf of the owners to make decisions as to how that common property will be used.

35. For the reasons above, I order that within 14 days of this decision, the respondents vacate and give exclusive possession of the storage room to the strata.

36. The strata has said that it does not seek any costs of this proceeding and so I make no order of costs.

### Are the respondents entitled to any fees or costs incurred.

37. The respondents, having been unsuccessful, are not entitled to any costs or reimbursement.

## DECISION AND ORDERS

38. I order that within 14 days of this decision, the respondents vacate and give exclusive possession of the storage room to the strata.

39. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

Maureen E. Baird, Tribunal Member