



Civil Resolution Tribunal

Date Issued: October 22, 2018

File: ST-2017-002370

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 1763 v. Maclean et al*, 2018 BCCRT 638

BETWEEN:

The Owners, Strata Plan LMS 1763

APPLICANT

AND:

William Maclean and June Maclean

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This is a dispute about smoking in a strata lot.

2. The respondents William and June Maclean (collectively, the Macleans or owners) are owners of unit 113 also known as strata lot 12, in the applicant The Owners, Strata Plan LMS 1763 (strata). The strata says the respondents smoke in their strata lot, contrary to the strata's Bylaws. Fines have been imposed but the respondents continue to smoke in their unit. The respondents say they have been unfairly targeted and fined.
3. The applicant strata seeks an order prohibiting the respondents, their occupants or guests, from smoking in strata lot 12.
4. The strata also wants the owners to pay \$7,950.00 for past bylaw breaches. I find that, while the central issue between the parties involved smoking, the validity of bylaw fines for a variety of other issues was also before me.
5. The applicant appears through a member of its strata council. The respondents represent themselves.

JURISDICTION AND PROCEDURE

6. 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.
7. 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.
8. 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.

9. 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

10. The issues in this dispute are:
 - a. Have the owners breached the strata's bylaws by smoking in their strata lot?
 - b. Should the owners be ordered to stop smoking in their strata lot?
 - c. Should the owners be ordered to pay the \$7,950.00 in levied fines, in respect of smoking and other bylaw violations?

BYLAWS

11. Bylaw 4.1 has been in effect throughout the time period relevant to this dispute. It prohibits an owner from using a strata lot in a way that creates a nuisance or interferes with the use and enjoyment of the common property or another strata lot.
12. On July 3, 2013, the Bylaws were amended to include, at 43.17, a requirement that an owner must not permit smoke to escape from their strata lot such that it can be smelled by another owner.
13. In July 2017, after the Dispute Notice was issued, the Bylaws were amended to replace the smoking provisions with sections 44.1 to 44.3 such that smoking is prohibited in a strata lot, on common and limited property, on patios and balconies and within 3 metres of doors or windows.

EVIDENCE and ANALYSIS

14. The Dispute Notice was issued June 7, 2017.
15. This is a civil claim in which the applicant strata bears the burden of proof. I have reviewed all of the materials submitted, but will only refer to what is necessary to explain my decision.

Have the owners breached the strata's bylaws by smoking in their strata lot?

16. The owners filed identical Dispute Responses on June 19, 2017. They do not deny smoking in their strata lot, but say that there are smokers in at least two other suites on their floor. They say there was no bylaw prohibiting smoking in their strata lot at the relevant time.
17. The strata says it received reports that the owners were smoking in their strata lot in January 2013, and that they have been in violation of the no smoking bylaw since that time.
18. The strata says it received complaints from occupants of unit 114 saying that the smoke is impacting their health and has permeated their belongings.
19. The owners' evidence about smoking in their strata lot was inconsistent. They admitted that their brother had smoked in their strata lot "...since and before we moved in".
20. On November 17, 2015, December 21, 2015, January 8, 2016, January 22, 2016, March 14, 2016, November 7, 2016, February 9, 2017, February 23, 2017, February 27, 2017, March 15, 2017, April 6, 2017, April 19, 2017, April 24, 2017, and May 25, 2017, the strata received, through the property manager, written complaints about smoke emanating from strata lot 12, from the occupant of the adjacent unit.
21. The respondents say they occupied their unit from May 2006, but started to receive complaints in May 2014, with the first fine being imposed in early 2015.

22. They deny that their unit smells of smoke, or that the nearby hallways ever smelled of smoke. The respondents suggest that a smoker in an adjacent unit is responsible for the smoke smell.
23. Unit 114 is adjacent to unit 113. Written statements of complaint from the occupant of unit 114 were filed in evidence, and establish the smoke smell is worse in their master bedroom and its closet than elsewhere in their unit. Given the shared wall between units 113 and 114 onto the unit 114 master bedroom, this evidence supports the finding that the smoke was coming from unit 113.
24. Taken together, the complaint emails report smoking on several different dates, with smoke emanating from the shared master bedroom and closet wall between the two units. The emails also detail negative health impacts on the occupants of unit 114. I find that the smoking created a nuisance to the owner of unit 114 and interfered with her ability to use and enjoy her strata lot and the common property.
25. Given the details in the complaints and the relative position of the 2 strata lots as shown on the strata plan, I find that smoke was emanating from strata lot 12 into the adjacent strata lot and common hallways on several occasions between December 21, 2015 and late May 2017. The fact that other unit owners may be smokers does not absolve the owners from their responsibilities under the Bylaws. I am satisfied that these emails each report new incidents of smoke coming from strata lot 12.
26. The respondents argue that the complaints came from a single source, which they suggest discounts their validity. I disagree. On May 25, 2017, a restoration project manager who met with the owners independently reported the intense smell of smoke while in their unit, requiring him to go home and change his clothing.
27. The respondents also wonder why they are still being fined when they are "...not allowed to smoke in the unit" since the July 2017 general meeting. The Dispute Notice was issued on June 7, 2017, and so I only have fines levied up to that date before me.

28. On a balance of probabilities, I find that the owners of strata lot 12 smoked in their strata lot between November 2015 and late May 2017 on several occasions in such a way that smoke entered another strata lot and the common area, contrary to bylaws 4.1 and 43.16.

Should the owners be ordered to stop smoking in their strata lot?

29. I have found that the owners violated the bylaws by smoking inside their strata lot in a way that creates a nuisance to other strata lot owners and where other occupants smelled the smoke. I acknowledge the significant negative impact the owners' smoking behaviour has had on other occupants trying to use and enjoy their strata lots. I order that the owners cease smoking in their strata lot immediately.

Should the owners be ordered to pay the \$7,950.00 in levied fines?

30. For the reasons given below, I find that \$200 of the levied fines were valid and imposed for a bylaw violation. I find the smoking bylaw fines are not valid because the strata did not follow the proper process in imposing them. I also find the fines imposed for a cockroach infestation invalid due to a failure to follow *Strata Property Act* (SPA) section 135(2).
31. Section 135 of SPA says that a strata cannot impose a fine against a person for contravening a bylaw unless the strata has received a complaint about the contravention and given the owner or tenant "...the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant." Then, section 135(2) requires the strata to convey a written report of the decision to impose a fine to the owners. Once a strata has complied with section 135 in respect of a particular bylaw contravention, it may impose a fine for a continuing contravention of that bylaw without further compliance with section 135.
32. On each of January 25, 2013, February 18, 2013, April 3, 2013 and March 17, 2014, the property manager, on behalf of the strata, wrote to the owners about a

variety of bylaw violations. However, I find that none of these letters offered a reasonable opportunity for the owners to respond to the complaint. Therefore, I find that none of these letters meet the requirements of SPA s. 135.

33. On May 30, 2014, the property manager, on behalf of the strata, wrote to the owners indicating that strata council was continuing to receive numerous complaints about excessive smoke ingress from their unit to other nearby units and the common hallways.
34. The May 30, 2014 letter refers to Bylaw 43.16, which required that an owner, occupant or visitor who smokes within a strata lot must not permit the smoke to escape from their strata lot “such that it can be smelled by another resident.”
35. The May 30, 2014 letter asks that the owners adhere to the bylaws or be subject to \$200 fines every 7 days. It then indicates that if the owners have any questions, they should put them “in writing for consideration at the next regularly scheduled meeting of council.” Asking the owners if they have questions does not indicate that they have an opportunity to respond to the complaint.
36. Again, I find that the May 30, 2014 letter fails to comply with SPA section 135, because it does not afford a reasonable opportunity to respond.
37. On November 24, 2014, the property manager, on behalf of the strata, wrote to the owners notifying them of a complaint regarding window coverings and untidy items on their patio. The letter then refers to section 135 of SPA and gives the owners an opportunity to provide a response, including a right to request a hearing, within 14 days. I find that this letter meets the SPA section 135 requirements in respect of a bylaw violation for window coverings and items on the patio. The letter does not refer to the smoking complaints.
38. On March 19, 2015, the strata wrote to the owners notifying them of a report that they had covered their smoke detector, contrary to Bylaw 4.1 which requires that a resident must not use a strata lot in a way that causes a nuisance or hazard to another person. The letter indicates that if the owners refuse to comply with the

request to immediately remove any covering from the smoke detector, then \$200 fines will be levied against their strata lot every 7 days. I find that this letter fails to provide a reasonable opportunity to respond as required by section 135.

39. On May 14, 2015, the property manager, on behalf of the strata, wrote to the owners saying that it was continuing to receive complaints regarding smoke emitting from strata lot 12. The letter quoted bylaw 43.14 and indicated that the strata would consider seeking a court order to stop bylaw contravention. The letter went on to say “since you have not responded and the issue continues the Council has now agreed to fine you \$100.00 every 7 days for continuing contravention until such time as you comply with the Bylaws.” I find that this letter does not meet the requirements of SPA section 135 to provide a reasonable opportunity to respond.
40. The letter refers to a February 19, 2015 letter and the fact that the respondents did not respond to it. The February 19, 2015 letter filed in evidence only refers to a bylaw violation regarding the blinds, and imposes a \$200 fine. Because I found that the November 24, 2014 letter regarding blinds met the requirements of section 135, the imposition of this fine is appropriate. The letter makes no mention of the smoking bylaw issue.
41. Because the strata provided no evidence to show it complied with SPA section 135 prior to taking the decision to impose the \$100.00 fines for smoking, every 7 days until the owners complied, I find that the fines levied for the smoking violation are invalid because they were not imposed through the required process
42. Nothing in this decision prevents the strata from levying fines that fall outside this dispute, though the strata should issue appropriate section 135 letters as required by the SPA.
43. In a handwritten letter dated February 11, 2016, the owners respond to the smoking complaints in which they argue that there are smokers in other units near them. They do not dispute having smoked in the suite but wonder why they are being “targeted”. It is unclear whether the strata received the letter on February 11, 2016, but I find they did for the purposes of this decision.

44. On March 22, 2016, strata council met to consider the numerous complaints about smoke from strata lot 12. The strata council considered response materials from the respondents and decided that a \$200 fine should be levied against them.
45. At that time, the relevant bylaw read “An owner, resident, occupant or visitor who smokes within a strata lot must not permit the smoke to escape from their strata lot such that it can be smelled by another resident.”
46. The March 22, 2016 fine and an April 4, 2016 letter imposing it are invalid because no proper section 135 letter regarding the smoking complaint had yet been issued by that date.
47. On May 27, 2016, the strata wrote to the owners regarding a cockroach infestation in their unit. This letter particularized the complaint and bylaw 39 requiring that a resident not allow a strata lot to become unsanitary or untidy. The letter then offers an opportunity for the owners to respond or request a hearing, within 14 days. I find that this letter satisfies the SPA section 135 requirements.
48. On June 1, 2016, the strata council met again and considered continued complaints regarding smoke from strata lot 12. It was noted that letters to the owners and the imposition of fines had yielded no results.
49. On June 3, 2016, the strata wrote to the owners and asked that they have the cockroach infestation properly treated and their unit thoroughly cleaned on or before June 9 or the strata would do so and charge the work to their strata lot account. The letter also indicated that a fine was appropriate.
50. On June 15, 2016, legal counsel for the strata wrote to the respondents, notifying them that their smoking put them in breach of the bylaws, and was subject to fines. The letter demanded they cease their behaviour or be subject to the imposition of fines. The letter does not allow for an opportunity to respond.
51. On July 8, 2016, strata council met and determined it would impose a \$200 fine against the owners for smoking, every seven days for the continuing contravention.

52. On July 26, 2016, the strata wrote to the owners, through counsel, detailing a complaint of a nuisance, contrary to Bylaw 4(1)(c) when a resident was awoken by someone standing near strata lot 12's balcony yelling and whistling at the occupant of strata lot 12. The letter offers an opportunity to respond and I find is compliant with SPA section 135.
53. On August 16, 2016, the strata wrote to the owners again via counsel, indicating that the cockroach infestation remained an issue, based on an inspection by a pest control company, and that the strata would levy a \$200.00 fine every 7 days that the infestation remained.
54. The letter goes on to note a complaint about video surveillance cameras hanging off the strata lot 12 balcony, and says the strata intends to impose a \$200 fine. The letter gives an opportunity to respond and meets the section 135 requirement.
55. In August 2016, the strata also imposed a \$200.00 fine for breach of Bylaw 4.1(c) on the respondents for hanging coloured lights on their balcony. The respondents say they have never had any lighting on their deck other than what was built-in.
56. On September 30, 2016, strata legal counsel wrote to the owners saying that there had been no response to the August 2016 letter and so a fine would be imposed for the coloured lights on the balcony and the smoking, on a continuous basis every 7 days at \$200 per incident.
57. On February 22, 2017, a strata council meeting was held where it was noted that strata lot 12 had been sent letters and fined continuously for second hand smoke "emitting from their unit affecting adjacent units and the Common Property."
58. On October 13, 2017, the strata manager inspected unit 113 and found it smelled heavily of smoke.
59. On February 23, 2017, the owner of the adjacent unit wrote an email to the property manager noting continuing ingress of smoke into her unit. She noted she had taped the wall outlets and baseboards and purchased a Hepa-Filter. The

owner also noted negative health impacts on occupants of her unit, due to the continuous smoke from unit 113.

60. I find that smoking in unit 113 continued through March, April and May 2017, as established by several email complaints.
61. On March 27, 2017, counsel for the strata wrote to the owners regarding \$6,000.00 in unpaid bylaw violation fines, and demanding payment within 21 days.
62. On May 8, 2017, strata legal counsel wrote to the owners about an incident that occurred when they let someone into the building who then became involved in a violent confrontation. The letter says the incident is a violation of Bylaw 4.1(a)(c) and (d) and indicates that the strata intends to levy a \$200 fine. The letter allows for a response or a request for a hearing. I find that this letter meets the requirements of SPA section 135.
63. On May 10, 2017, strata council met and again noted the continuous bylaw violation due to smoke from strata lot 12, and noted the imposition of a continuous fine.
64. On May 29, 2017, strata legal counsel wrote to the owners offering to provide them with requested copies of strata council meeting minutes for a photocopying charge of 0.25 cents per page, of \$4.75 total.
65. On September 13, 2017 the strata council met and noted that the cockroach infestation in strata lot 12 had been treated, but that an inspection was needed to ensure the infestation had been addressed.
66. The strata itself was unclear on which bylaw violation was the impetus for imposing the continuous fines listed on the respondent's strata lot account. Their property manager thought the fines starting August 24, 2016 were imposed for smoking. On the documents before me, these fines appear to be meant to address the cockroach infestation. Reviewing the strata lot account, on the strata levied a fine on August 24, 2016 for \$200.00, as well as the fines for \$1,200.00 for the recurring violation every 7 days through September and October.

67. The strata then levied a \$200.00 fine per 7 day period in each of November 2016, December 2016, January 2017, February 2017, March 2017 and April 2017.
68. However, the strata did not provide evidence that it gave the owners notice of the decision to impose fines for the infestation, after giving notice to the owners and giving them an opportunity to respond in the August 16, 2016 letter.
69. SPA Section 135(2) requires a strata to give written notice of the decision to fine an owner, after the decision is made. Here, the strata gave notice of fines relating to smoking and coloured balcony lights. No letter to the owners reporting on the decision to impose fines for the infestation was filed in evidence. Instead, the strata filed two letters in which it gave the owners an opportunity to respond to the issue of the infestation. I find that the fines imposed for the infestation are not valid under section 135(2) and must be reversed.
70. I find the \$200.00 fine, levied against the strata lot account on March 1, 2015, for the window blinds violation was appropriate and ought to be paid immediately. This fine was noted, on the strata lot account statement, to be for blinds, making the reason for the fine clear.
71. I did not have sufficient evidence to consider the fine amount for the hanging coloured balcony lights.
72. I find all smoking bylaw fines must be reversed because there was no section 135 letter issued to the owners prior to those fines being imposed.
73. The respondents argue that the \$1,225.71 amount for an incident regarding their suite door should be removed from the strata's claim because the respondents never received a bill for it. I make no determination regarding an incident involving the respondents' suite door because there was not sufficient evidence before me.

DECISION AND ORDERS

74. The SPA does not permit interest to be charged on fines, though interest applies to outstanding strata fees and levies. Having said that, the *Court Order Interest Act*

(COIA) applies to tribunal disputes and I find the strata is entitled to pre-judgment interest under the COIA on the \$200 bylaw fine from the March 1, 2015 to October 22, 2018 for a total of \$6.42.

75. The applicant is entitled to post-judgment interest as applicable.

76. I order that:

- a. the respondents immediately stop smoking in their strata lot;
- b. the respondents immediately bring themselves into compliance with the strata's smoking bylaw including barring any occupants or guests of strata lot 12 from smoking in it ; and
- c. within 7 days, the respondent owners pay the strata \$200.00, being the outstanding fine and pre-judgment interest of \$6.42; and
- d. within 7 days, the strata reverse any infestation related bylaw fines, and any smoking bylaw fines issued against the respondent owners' strata lot account between November 2013 and May 2017, because the SPA process was not followed.

77. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case to deviate from the general rule. The strata has been largely successful but paid no tribunal fees and claimed no expenses. I therefore make no order in this regard.

78. 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.

79. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial 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 Provincial Court of British Columbia.

Julie K. Gibson, Tribunal Member