



# Civil Resolution Tribunal

Date Issued: December 12, 2018

File: ST-2018-002191

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VIS 4266 v. Johanson*, 2018 BCCRT 844

**B E T W E E N :**

The Owners, Strata Plan VIS 4266

**APPLICANT**

**A N D :**

Fay Johanson

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Megan Volk

## INTRODUCTION

1. The respondent, Fay Johanson (owner), owns a strata lot (unit #201) in a strata corporation known as The Owners, Strata Plan VIS 4266 (strata). This dispute is about second-hand smoke escaping from the unit.

2. The strata is represented by an authorized member of the strata council. The owner is self-represented.
3. For the reasons that follow, I order the owner to immediately stop smoking in the unit.

## **JURISDICTION AND PROCEDURE**

4. 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 relationships between parties that may continue after the dispute resolution process has ended.
5. 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.
6. 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.
7. 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 to stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The issues in this dispute are whether:
  - a. The respondent breached the accommodation agreement, and

- b. The respondent breached bylaw 3(1)?

## **BACKGROUND AND EVIDENCE**

9. I have reviewed all submissions and evidence provided. I refer only to the relevant evidence and submissions necessary to give context to my decision.
10. The strata is a 63-unit residential strata corporation comprising a 4-storey building in Victoria, B.C. The owner's unit #201 is on the second floor of the building with 1 adjacent strata lot beside the unit and 2 above.
11. The strata registered a complete set of new bylaws at the Land Title Office on January 22, 2014 with some immaterial exceptions. The relevant strata bylaws are 3(1) (nuisance bylaw) and 4(1) (no smoking bylaw). The nuisance bylaw restricts an owner from using a strata lot in a way that causes a nuisance or hazard to another person or unreasonably interferes with the rights of other persons to use and enjoy other strata lots or common property. The no smoking bylaw prohibits smoking on common property and in a strata lot.
12. On February 27, 2014 the owner and strata signed an agreement allowing the owner to smoke in her unit notwithstanding the no smoking bylaw. The agreement required the owner to take all necessary steps to prevent the escape of second-hand smoke into the hallways and other strata lots. The agreement also required her to comply with reasonable strata requests to reduce and prevent the release of smoke.
13. It is undisputed that the owner smokes within her strata lot.
14. This dispute is the result of years of complaints regarding smoke from the owner's unit. Most recently, between June 2016 and July 2018, the strata received 21 complaints from 3 different residents, many of which detailed several instances of cigarette and e-cigarette smoke coming from the owner's unit. As well, on at least one occasion 2 council members smelled smoke outside the owner's unit, while on common property.

15. Between August 2016 and January 2018, the council sent, or had sent, 6 letters to the owner and conducted 2 inspections of the owner's unit regarding smoke. The letters notified the owner of complaints and requested, at various times, the owner to take general and specific actions to stop smoke from escaping her strata lot. On her own or at the request of the strata, the owner took steps to stop the smoke from escaping. She:
- a. Closed windows and at other points opened windows, as requested,
  - b. Installed and used 5 air purifiers or filters, 1 of which was an electrostatic charcoal filter machine purchased by the strata,
  - c. Stopped using fans so as not to draw air away from the air purifiers,
  - d. Removed an ill-fitting air conditioning unit to reduce air escape,
  - e. Installed new weather stripping on windows,
  - f. Installed a new door sash on the front door of her unit,
  - g. Sealed around electrical switches and outlets,
  - h. Sealed around plumbing lines entering and exiting the strata lot,
  - i. Installed a specific bathroom vent requested by the strata council,
  - j. Fitted the kitchen hood vent with a carbon and particle filter, and
  - k. Saw medical professionals in an effort to quit or reduce her smoking.
16. As well, the strata or another owner repaired noticeable holes and cracks in 1 unit above the owner's unit to stop smoke from entering that unit.
17. Despite the parties' efforts, smoke continued to escape from the owner's strata lot. The complaints and medical documentation detail how the smoke affects the physical health of 2 residents. In particular, the smoke negatively affects 1 resident's asthma and another resident's lung disease. The complaints also detail how the smoke impacted 3 residents in enjoying using their units. The residents

have had to smell the smoke, restrict their use of their units, or leave their units to escape the smoke.

18. On January 24, 2018 the council asked the owner to completely stop smoking in her unit, relying on the signed agreement and bylaw 4. At the same time, the council warned that they may apply fines if the smoking did not stop. The owner did not follow the strata's request because of the signed agreement. The owner continued improving her unit in an attempt to stop smoke from escaping.

## **POSITION OF THE PARTIES**

19. The strata asks for an order that the respondent stop smoking in her unit. The strata says that the owner is in breach of the accommodation agreement allowing her to smoke in her unit because smoke is escaping the owner's strata lot. Further, the strata says that the owner is contravening bylaw 3(1) because the smoking is causing a health hazard and interfering with other residents' enjoyment of their units.
20. The owner says that she is meeting the requirements of the accommodation agreement. She also says that in future she will smoke outside the property where she can and in her sunroom when she cannot leave the property. The owner says that she will re-seal her sunroom, add an air purifier to the sunroom, paint her strata unit, remove the carpets in the strata unit and remove the couch to reduce any lingering odors. The owner agrees to reimburse the \$225 tribunal fees.

## **ANALYSIS**

21. In a civil claim such as this, the strata bears the burden of proof, on a balance of probabilities.

### ***Whether the owner breached the accommodation agreement***

22. The owner agreed to take all necessary steps to prevent the escape of smoke into the hallways and other units under the accommodation agreement. Additionally, the

owner agreed to follow all reasonable requests by the strata council to prevent the release of smoke into hallways and other units.

23. The owner took extensive steps to prevent the escape of smoke from her unit. Despite those efforts, I find that smoke continues to escape into the hallways and other units.
24. The owner does not dispute that smoke escapes her unit. However, she says that smoke from her unit may not be the only cause of smoke. In this regard, she points to 2 complaints that mention smoke when she was not at home, to forest fire smoke, pollen and to observations of cigarette butts in stairwells and near the building. Insufficient details are provided to assess the impact of these other causes; however, even if a connection was found the owner does not deny that smoke is also escaping from her unit. The complaints of smoke are detailed with dates, times, and location of smoke which shows a connection to the owner's unit and, often, the impact of the smoke. I find it is more likely than not that smoke escaped from the owner's unit into the hallways and other units as reported in the complaints.
25. Given the continued escape of smoke, the council told the owner she must stop smoking in her unit. I accept that council made this request to prevent the release of smoke as intended by the agreement. I find the request was reasonable given the unsuccessful efforts undertaken by the parties to stop the egress of smoke.
26. When the council reasonably requested the owner stop smoking, the owner was obligated under the agreement to comply with the council's request. I find that the owner breached the accommodation agreement when she failed to stop smoking in her unit as requested.
27. I note that after the council requested the owner stop smoking in her unit she purchased an air purifier that provides a printout of the air quality. The owner says that 1 hour after smoking a cigarette the air purifier records the particle count in the air as less than the pollen in Victoria's weather report. Without further evidence, I

am unable to assess the relevance of this evidence or apply it to the facts in this dispute.

***Whether the owner breached bylaw 3(1)***

28. Irrespective of the accommodation agreement, I find the strata can prohibit the owner from smoking in her unit under bylaw 3(1).
29. The parties agree that the owner is exempt from the no smoking bylaw because of the accommodation agreement. While she is exempt from the no smoking bylaw, the respondent is not exempt from bylaw 3(1), requiring her not to use her strata lot in any way that unreasonably interferes with the rights of other residents to use and enjoy the common property or another unit or causes a nuisance or hazard to another person.
30. The owner says that it is unreasonable to ask her, a person in her 80s, to stop smoking or to go outside to the roadside bench every time she smokes. The owner did not provide evidence of physical or other restrictions preventing her from smoking away from her unit.
31. Given the evidence, I find that the owner's smoking in her unit interfered with other residents' health, safety, enjoyment or use of their property, contrary to the strata's nuisance bylaw.
32. I order that the owner stop smoking in her strata lot.

**TRIBUNAL FEES AND EXPENSES**

33. Under section 49 of the Act, and the tribunal rules, the tribunal will order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Here, the owner has agreed to pay the tribunal fees. I order the owner to reimburse the strata for the tribunal fees totaling \$225. There are no claims for dispute-related expenses and, accordingly, I make no such order.

## DECISION AND ORDERS

34. I order that:

- a. The owner immediately stop smoking in her strata lot, and
- b. Within 30 days of the date of this decision the owner pay to the strata \$225 for tribunal fees.

35. The strata is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

36. 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.

37. 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.

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Megan Volk, Tribunal Member

