



Civil Resolution Tribunal

Date Issued: March 28, 2019

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 515 v. Kendrick et al*, 2019 BCCRT 394

B E T W E E N :

The Owners, Strata Plan LMS 515

APPLICANT

A N D :

William Kendrick and Marina Kendrick

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant, The Owners, Strata Plan LMS 515 (strata), is a strata corporation existing under the *Strata Property Act* (SPA). The respondents, William Kendrick and Marina Kendrick (owners), own a strata lot in strata. The strata is represented by a member of its strata council. The owners are represented by William Kendrick.

2. The strata alleges that the owners altered common property without its prior written approval by installing a patio cover, contrary to the strata's bylaws. The strata seeks orders that the owners remove the patio cover and pay the strata \$5,800.00 in bylaw fines.
3. The owners say they understood they had authority to install the patio cover because it was not attached to the building exterior and that it was like other patio covers in the strata. The owners say the strata has acted in a significantly unfair manner towards them and ask the tribunal to dismiss the strata's claims.
4. For the reasons that follow, I find the owners must remove the patio cover and pay the strata \$1,425.00 in bylaw fines.

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 121 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. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

9. The issues in this dispute are:
 - a. Are the strata's claims out of time under the *Limitation Act* (LA)?
 - b. Have the issues in this dispute previously been decided by the B.C. Supreme Court?
 - c. Did the owners require the prior written permission of the strata to install the patio cover?
 - d. Has the strata acted in a significantly unfair manner by demanding the owners' remove the patio cover? If not, is the strata entitled to enforce the removal of the patio cover?
 - e. What fine amount, if any, must the owners pay to the strata?

BACKGROUND, EVIDENCE AND ANALYSIS

10. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
11. In a civil proceeding such as this, the applicant strata must prove its claims on a balance of probabilities.
12. The strata consists of 109 residential strata lots in multiple buildings. It was built between August 1992 and June 1993 and is located in Delta, B.C.
13. The owners purchased strata lot 17 (SL17) in June 2011.
14. The subject patio is designated as limited common property (LCP) for SL17 on the strata plan.

15. The strata's bylaws were completely amended on November 9, 2010. The following bylaws are relevant to this dispute:

- Bylaw 6(1) that requires an owner to obtain prior written approval of the strata before making an alteration to common property, including LCP;
- Bylaw 23(a) that permits the strata to fine up to \$75 for a bylaw contravention, and
- Bylaw 24 that defines a continuing bylaw contravention as an activity or lack of activity that continues without interruption for longer than 7 days.

16. On July 13, 2017, the bylaws were substantially amended where:

- Bylaw 6(1) was renumbered to bylaw 15(1);
- Bylaw 16(8) was added that states unauthorized alteration to common property must be removed at the owners' expense if the strata council so orders;
- Bylaw 35(a) replaced bylaw 23(a) permitting fines up to \$200 for bylaw contraventions; and
- Bylaw 24 was renumbered to bylaw 36.

17. Other bylaw amendments were filed but are not relevant to this dispute.

18. In October 2011, the owners' requested permission to install an "awning" over a portion of the rear LCP patio of SL17. A sketch was provided to the strata setting out the dimensions of the patio awning and that it would be constructed of wood with a frosted plexiglass roof.

19. On October 31, 2011, the strata wrote to the owners following discussion of their awning request at a strata council meeting held October 24, 2011. The owners' request was denied as it was "not in keeping with other awnings on the property".

The strata also noted that it was obtaining information on the type of awnings and contractor information which the strata had previously approved.

20. In October 2013, 2 years later, the strata learned the owners were constructing a wooden structure over the patio to the rear of SL17. On October 29, 2013, the strata wrote to the owners advising the wooden structure was installed contrary to the strata's bylaw 6(1), requiring written permission to alter common property, and asked they cease further construction and remove the wooden structure by November 8, 2013.
21. On November 6, 2013, the owners' then lawyer wrote to the strata saying the owners would not comply to the strata's request because its demand was unreasonable and noted that deck coverings were installed over patios of 2 other strata lots, among other things. The strata responded to the owners in a letter dated November 19, 2013. The letter advised the bylaws require the strata's written approval in advance of the alteration being made and asked that the owners provide a written request for a patio cover. The letter did not address bylaw fines.
22. The strata again wrote to the owners on February 19, 2014, stating the council had assessed a \$75 fine at its January 27, 2014 meeting and that the bylaws permitted a bylaw fine to be imposed every 7 days for continuing bylaw contraventions. The strata said the matter would be discussed at the next strata council meeting and requested that the owners provide a written request to include a full description of the alteration, including a sketch drawing.
23. A further \$75 fine was imposed at the February 24, 2014 strata council meeting and the owners were advised of the fine by letter dated March 3, 2014. The letter also stated that a \$75 fine would be imposed every 7 days. By March 21, 2014 the fines had accumulated to \$375 as set out in letter to the owners on that date. The letter stated the fines would continue and that the owners could discuss the matter with the strata at their upcoming meetings.
24. On April 7, 2014, the owners, through their lawyer, requested permission to install the wooden structure they had already installed. The strata acknowledged receipt of

the letter and requested the dimensions of the patio cover and an explanation about the installation of what appeared to be a gas line on the exterior of SL17. The information was requested before the next strata council meeting of April 28, 2014.

25. On April 9, 2014, 2 strata council members inspected the patio cover installation.
26. On May 16, 2014, the strata's lawyer wrote to the owners' lawyer advising the owners' request to keep the installed patio cover was denied stating it was not in keeping with other awnings in the complex. The letter requested the patio cover be removed by May 23, 2014, failing which the strata would take further steps to enforce bylaw 6(1). The April 28, 2014 council minutes confirm the gas line installation was no longer an issue.
27. The owners did not remove the patio cover by May 23, 2014 as requested, and on July 3, 2014, the strata wrote to the owners enclosing a copy of its lawyer's letter to the owners' former lawyer and advising the \$75 fines continued every 7 days. The letter stated the bylaw fines totalled \$1,125.00 as of June 30, 2014.
28. The owners replaced their lawyer and on July 14, 2014, the owners' new lawyer requested copies of the October 29 and November 19, 2013 letters noted above, as well as the February 19 and May 16, 2014 letters, stating the owners had not received them. I do not accept that the owners did not receive the strata's correspondence. It was issued to the owners' address filed at the Land Title Office for SL17 and complies with the notice requirements under section 61 of the SPA.
29. On October 2, 2014, the owners' lawyer wrote to the strata's lawyer in reply to the May 16, 2014 letter stating the strata was not consistently applying its bylaws because similar patio covers existed at 2 other strata lots. The letter stated the strata was acting in a significantly unfair, biased and inconsistent manner by not approving the owners' request.
30. On April 28, 2015, the strata's lawyer replied to the owners' lawyer explaining how the owners' patio cover differed from the 2 existing patio covers and requesting it be removed immediately.

31. The owners largely rely on the strata's reasons about how the owners' patio cover differs from the other 2 patio covers over which the strata has no objection. As discussed below, I do not find the owners' patio cover to be similar to the 2 other existing ones. I also do not find that the alteration request relates to bylaw 5 which concerns an alteration to a strata lot, as suggested by the owners. A strata lot is defined as being a lot shown on the strata plan. The alteration involving the patio cover does not concern SL17. It clearly relates to the LCP patio designated to SL17. The significance of this distinction is that, unlike alterations to a strata lot under bylaw 5, the strata may unreasonably refuse an alteration to LCP under bylaw 6.
32. On February 22, 2016, the owners filed a Petition in the BC Supreme Court (BCSC) asking for an order that the strata be directed to approve the patio cover and that all fines imposed against the owners be revoked.
33. In their response to the BCSC Petition filed March 16, 2016, the strata opposed the relief sought by the strata. There is no evidence that the Petition was heard, so I find that I have jurisdiction to hear the dispute before me. I also note that in the Petition, the strata was not the applicant as it is here.
34. On July 18, 2016, the strata issued a demand for payment of bylaw fines totaling \$2,700.00 (plus an outstanding special levy that is not part of this dispute) under section 112(2) of the SPA. It is unclear if the bylaw fines noted in the letter are strictly for the patio cover or if they include other bylaw fines.
35. On January 28, 2018, the strata wrote to the owners advising they were still contravening the strata's bylaw about alterations to common property which had been revised to include bylaw 15. The letter stated the strata continued to impose a \$75 bylaw fine every 7 days, set out the requirements of section 135 of the SPA, and requested the owners answer the complaints, provide information to the strata council or request a hearing.
36. On May 25, 2018, the strata again advised the owners the weekly \$75 fines were continuing and that it was in the process of applying to the tribunal for orders the patio cover be removed and fines totaling \$4,200.00 be paid.

37. On June 19, 2018, the strata wrote to the owners under section 112(2) of the SPA demanding payment of \$4,425.00 in outstanding bylaw fines and enclosed a statement of account for SL17 for the period July 1, 2011 through June 15, 2018.
38. The Dispute Notice for this dispute was issued on July 4, 2018.

Are the strata's claims out of time under the Limitation Act (LA)?

39. I note the strata submitted a legal opinion with respect to the application of the LA and the owners did not contest it. For the sake of completeness, I will briefly address the LA.
40. Section 13 of the Act states that the LA applies to the tribunal. The LA applies to claims, which are defined as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".
41. The applicant's claim is for payment of a penalty and an order for enforcement of the strata's bylaws. As such, I find the strata's claims are not to remedy an injury, loss or damage within the meaning of the LA. See *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd.*, 2015 BCSC 2273, affirmed 2016 BCCA 370.
42. Therefore, I find that the LA does not apply to the strata's claims and it is not out of time to commence these proceedings.

Have the issues in this dispute previously been decided by the B.C. Supreme Court?

43. Based on the evidence and submissions before me, and as earlier noted, I find the BCSC Petition filed by the owners has not previously been decided and that I have jurisdiction to decide it.

Did the owners require the prior written permission of the strata to install the patio cover?

44. Based on my review of the strata's bylaws, the owners were at all times required to obtain the prior written permission of the strata before altering the LCP patio as set

out in bylaw 6(1) until July 13, 2017, when it was replaced with bylaw 15(1) noted above.

45. I find the owners installed the patio cover in contravention of bylaw 6(1) in 2013 after being advised by the strata in 2011 that their request was not approved. I also find the owners' request to keep the unauthorized patio cover in 2014 was denied, which is undisputed and supported by the correspondence exchanged with the strata and legal counsel set out above.

Has the strata acted in a significantly unfair manner by demanding the owners' remove the patio cover? If not, is the strata entitled to enforce the removal of the patio cover?

46. The tribunal has jurisdiction to determine claims of significant unfairness effectively because the language in section 164 of the SPA is similar to the language of section 123(2) of the Act, which gives the tribunal authority to issue orders with respect to significant unfairness. (See *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.)
47. The courts and the tribunal have considered the meaning of "significantly unfair" in a number of contexts, equating it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the British Columbia Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.
48. The British Columbia Court of Appeal has considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *Watson* at paragraph 28:

The test under s. 164 of the Strata Property Act also involves objective assessment. [*Dollan*] requires several questions to be answered in that regard:

1. What is or was the expectation of the affected owner or tenant?
2. Was that expectation on the part of the owner or tenant objectively reasonable?

3. If so, was that expectation violated by an action that was significantly unfair?

49. Applying the test to the facts before me, I find the stated expectation of the owners was they could install their patio cover without the strata's approval because the structure was not attached to the building and because there were at least 2 other patio covers that were installed. However, I do not find the owners' expectations were objectively reasonable for the following reasons.

50. First, the owners applied for permission to install the patio cover in 2011 and were denied. Therefore, they knew permission was required but 2 years later went ahead with the installation of the exact patio cover the strata denied. The fact that the structure was not fixed to the building exterior is not determinative. The strata denied the installation because it did not meet with the strata's view of acceptable alterations, which is something the strata was entitled to decide.

51. Second, just because there were other patio covers installed does not mean the owners can go ahead without permission. Based on the photographs provided, I agree with the strata and find the owners' patio cover is distinctly different than the 2 other wooden patio covers raised by the owners. Specifically, the owners' cover has a sloped, covered roof that stands higher than the other 2 patio covers, which are flat without any roof covering.

52. Third, the strata never deviated from its position of denying the owners' requests for permission to install the requested patio cover. The owners also did not revise their request for a cover that more closely matches the 2 other wooden patio covers.

53. Fourth, the owners argue that one of the strata council members advised they would ensure the owners' request for permission to keep the unauthorized installation made in April 2014 would be approved, and that the owners need not attend the strata council meeting where it was discussed. The owners argue this created significant unfairness. The council member, in affidavit evidence submitted for the BCSC Petition, denied the owners' allegations. I agree with the strata that the owners' reliance on the alleged assistance of a strata council member, even if it

was true, was only with respect to the owners' application to keep what they had installed. The owners were aware that the strata's prior written permission was required under the bylaws and the alleged verbal comments of one council member do not constitute approval of the strata. The bylaws did not change between the owners' original request in 2011 and their request to keep their unauthorized installed patio cover in 2014.

54. For these reasons, I find the owners' expectations were not objectively reasonable. Therefore, I find the strata did not act in a significantly unfair manner in denying the owners' request to install the patio cover.
55. Accordingly, I find the strata is entitled to require the owners to remove the unauthorized patio cover and I so order.
56. Nothing in this decision restricts the owners from submitting a new request to the strata for permission to construct a different patio cover.

What fine amount, if any, must the owners pay to the strata?

57. The Dispute Notice shows outstanding fines to be \$4,200.00 calculated to June 15, 2018. In its submissions, the strata claims \$5,800 in fines to December 1, 2018 after acknowledging an inadvertent duplication of fines in March 2018. However, I find the strata's claim is limited to \$5,625, which is the amount for which the owners had notice in the tribunal decision plan.
58. Section 135(1) of the SPA states that a strata corporation may not require a person to pay the costs of remedying a bylaw contravention unless it has received a complaint, given the owner or tenant written particulars of the complaint and a reasonable opportunity to answer the complaint, including a hearing if requested. The requirements of section 135 must be strictly followed before a fine can be imposed as set out in *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449.
59. I am satisfied that the strata received a complaint about the patio cover and provided the particulars of the complaint to the owner in its October 29, 2013 letter referenced above.

60. The strata's February 19, 2014 letter to the owners referenced the October 29, 2013 letter and advised the strata had fined the owners \$75 as shown in the January 27, 2014 council meeting minutes that were enclosed with the letter. I find the strata imposed the \$75 fine on January 27, 2014 contrary to section 135 of the SPA as the owners were not provided with a reasonable opportunity to answer the complaint.
61. Based on the letters provided in evidence, I find the strata did not properly follow the requirements of section 135 of the SPA until it wrote to the owners on January 26, 2018. In that letter the strata identified the owners were violating new bylaw 15(1), that replaced bylaw 6(1), and properly set out the requirements of section 135 of the SPA. Therefore, I find the fines imposed up to that date to be invalid, even though the January 26, 2018 letter indicated the fines totalled \$2,700 and were being imposed every 7 days.
62. Allowing the owners a reasonable period to answer the complaint, I find the \$75 fines did not start until February 16, 2018. Applying a \$75 fine every 7 days from that date, I calculate the amount of fines the owners must pay the strata to be \$1,425 to July 4, 2018, the date of the Dispute Notice (19 weeks at \$75).

TRIBUNAL FEES, EXPENSES AND INTEREST

63. 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. I find the strata was the successful party and I order the owners pay the strata \$225 for tribunal fees. The strata did not claim dispute-related expenses.
64. The *Court Order Interest Act* (COIA) applies to the tribunal. Given my decision that the owner must pay bylaw fines, I find the strata is owed pre-judgement interest on the unpaid bylaw fines from the dates they were incurred until the date of this decision. I calculate pre-judgement interest to be \$19.72.

65. The strata must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

DECISION AND ORDER

66. I order that, within 30 days of the date of this decision, the owners:

- a. Remove the unauthorized patio cover installed over the LCP patio of SL17,
and
- b. pay to the strata \$1,669.72, broken down as follows:
 - i. \$1,425.00 for bylaw fines,
 - ii. \$19.72 for pre-judgement interest under the COIA, and
 - iii. \$225.00 for tribunal fees.

67. The strata is entitled to post-judgement interest under the COIA, as applicable.

68. The strata's remaining claims are dismissed.

69. 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.

70. 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.

J. Garth Cambrey, Vice Chair