



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Berezan v. The Owners, Strata Plan NW 9*, 2019 BCCRT 438

B E T W E E N :

Grant Berezan

APPLICANT

A N D :

The Owners, Strata NW 9

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Jordanna Cytrynbaum

INTRODUCTION

1. The applicant, Mr. Berezan, owns strata lot 15 (unit) in the respondent strata corporation, The Owners, Strata Plan NW 9 (strata). The strata is a townhouse complex located in Steveston, made up of 20 residential units.

2. This dispute is about whether the applicant is entitled to keep a shed that he built on common property adjacent to his unit (shed).
3. The applicant claims that the strata authorized him to build the shed and that it does not contravene the strata's bylaws. In the alternative, the applicant claims that the strata may not rely on its bylaws to require that he remove the shed because the strata has not consistently enforced the bylaw in issue. The strata maintains that the shed was not authorized and that it contravenes the *Strata Property Act* (SPA), as well as the strata's bylaws and rules, and that the shed must be removed.
4. The applicant is self-represented. The strata is represented by a council member.

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. It must also 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 these disputes the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

9. The issues in this dispute are as follows:
 - a. Did the strata authorize the applicant to build the shed?
 - b. Is the strata entitled to require the applicant to remove the shed?
 - c. What, if any, remedies should the tribunal award the applicant?

EVIDENCE AND ANALYSIS

Introduction

10. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities. That means, the applicant must prove his claim.
11. The applicant purchased the unit with his wife in December 2016.
12. The applicant claims that in 2017 the strata authorized him to build the shed for personal storage. He says that the shed does not contravene the strata's bylaw that requires owners to get written approval before making an alteration to common property (bylaw) because the shed is not an "alteration". The applicant also argues that other strata owners have altered the common property adjacent to their strata lots by planting gardens, trees, shrubs and flowers both in pots and in the ground (collectively referred to as "gardens"), and that this contravenes the same bylaw. On this basis, the applicant claims that the strata has failed to enforce the very bylaw it relies on to require him to remove the shed, and as a result it would be unfair to permit the strata to selectively enforce the bylaw.

13. The strata's position is that it is entitled to require the applicant to remove the shed. The strata insists that it did not authorize the applicant to build the shed. It says that the shed is in breach of the SPA that requires an owner to obtain approval to change the use or appearance of common property. The strata also says that the applicant breached the strata's bylaw, and the strata's rule that prohibits using common property for storage.
14. The parties filed submissions containing both their arguments and evidence. I will not refer to all of the evidence or deal with each point raised. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.
15. Section 71 of the SPA restricts a significant change in the use or appearance of common property unless: a) the change is approved by a resolution passed by a $\frac{3}{4}$ vote at an annual or special general meeting; or b) an immediate change is necessary for safety reasons or to prevent significant loss or damage. I find that the latter exception is not applicable to the circumstances before me.
16. The SPA definition of "common property" includes that part of the land and buildings shown on a strata plan that is not part of a strata lot. Based on my review of the strata plan and other evidence in the record, I am satisfied that the shed was constructed on common property.
17. A strata corporation's bylaws may regulate things like the use and enjoyment of common property. The SPA sets out a number of restrictions on bylaws, none of which are relevant to the issues in this case. The SPA also sets out the process for a strata corporation to amend its bylaws.
18. Section 120 of the SPA provides that the bylaws of a strata corporation are the standard bylaws (under the SPA), unless a strata corporation amends or adopts different bylaws.
19. The relevant section of the strata's bylaws provides that: an owner must obtain written approval from the strata before making an alteration to common property

(section 6). The applicant claims that the shed is not an alteration because it is not affixed to the ground with a foundation. I disagree. The shed is built out of cedar wood. It is not collapsible, and based on the materials used, the applicant's description of the shed and photographs in the record, I am satisfied that the shed is a structure that was constructed to have a degree of permanence.

20. A strata corporation may also make rules that regulate things like the use and condition of common property. In this case, the strata's rules prohibit using common property for personal storage (section 9). The applicant acknowledges that he is using the shed for storage, but claims it was authorized.

21. I next turn to whether the strata authorized the shed.

Did the strata authorize the applicant to build the shed?

22. In March 2017 at the strata's annual general meeting, the strata decided to purchase a storage shed and undertake other projects. After this meeting, the applicant says he was elected as a member of the strata's council, and that he donated his time and labour for some of these projects.

23. It is not disputed that the applicant purchased the materials for the strata's shed (and was later reimbursed). At the same time, he purchased materials to build his own shed. While he was building the strata's shed, the applicant also began building his own shed.

24. The applicant says that, while he was building the shed, the strata council's former president asked what he was doing. The applicant says he responded by explaining that he was building a shed to store tools and other materials while he was completing renovations on his unit. The applicant says the former council president did not say anything at the time except "okay", so he "didn't think anything more of it". The applicant suggests that this constituted approval to build the shed.

25. The former council president denies that he, or the strata council ever gave the applicant verbal or written approval to build the shed.

26. As a strata council member, the applicant ought to have been aware that he required the strata's authorization before he could build the shed. I do not consider it reasonable to rely on or characterize the above casual verbal exchange with the former council president as approval or authorization on behalf of the strata. I therefore find that the exchange (described above) that the applicant relies on did not authorize him to build the shed.
27. There is no evidence that the strata provided written approval to make an alteration to common property by building the shed as required by the bylaw.
28. I next turn to consider whether the shed was a significant change in the use or appearance of common property. What constitutes a "significant change" in use or appearance has been determined by the courts with reference to consideration of objective and subjective factors, including the following:
- a. A change is more significant if it is visible to residents and the general public;
 - b. Whether the change to common property affects the use or enjoyment of a unit or a number of units;
 - c. Whether the change affects the marketability or value of the unit;
 - d. The number of units in the building may be significant; and
 - e. How the strata corporation has governed itself in the past and what it has allowed, such as whether it permitted similar changes in the past.

See: *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 at para. 18-29.

29. The strata is a relatively small strata corporation made up of only 20 units. The shed converts what was green space or a yard to personal storage for the applicant's unit. On the evidence before me, the shed is plainly visible to both the other residents (many of whom find it unsightly) and the general public, and there are no other sheds for personal storage on common property. By reason of the alteration, the applicant has ostensibly converted that portion of the common property to his

own private use. This appears to affect the marketability of the unit because it now offers a unique feature that is likely to enhance the value of the unit.

30. Based on the foregoing, I find that the shed is a significant change in the use and appearance of common property. There is no evidence that the strata passed a $\frac{3}{4}$ resolution as required by section 71 of the SPA to authorize the shed as a significant change in use or appearance of common property.
31. A short time after the shed was built, on May 4, 2017 the former council president advised the applicant that 2 owners had complained about the shed. Then, on May 16, 2017 the strata gave the applicant notice of a letter it received from a number of owners with complaints about the shed. On August 9, 2017 the applicant responded to the strata and challenged the strata to prove that there were rules restricting a structure for temporary storage. The applicant stated that he expected to complete his renovations within a month, and did not have time to deal with the issue further. He concluded by saying "I am not willing to remove my shed at this time." The strata in turn explained how the shed breached the bylaws and the SPA. More than a year later, after this dispute was commenced, the applicant claims not to have completed his renovations and cannot say when they will be finished.
32. While the strata may have initially deferred taking action about the shed in the hope that the applicant would remove it once his renovations are completed, I do not accept that the strata led the applicant to believe that he could keep the shed.
33. In the result, I find that the strata did not authorize the applicant to build or keep the shed.

Is the strata entitled to require the applicant to remove the shed?

34. The applicant makes several arguments in favour of his position that he should be entitled to keep the shed.

35. First, the applicant alleges that the bylaw is unenforceable. He says that there has been inconsistent enforcement of the bylaw and suggests that the strata's lack of enforcement makes the bylaw unenforceable. I do not agree.
36. The applicant relies on photographs of common property adjacent to other strata owners' units depicting gardens. He says this demonstrates that other owners made significant alterations to common property without authorization, and argues that this means the strata has not enforced the bylaw.
37. As to whether the gardens are a "significant change" in the use or appearance of common property, I note that the Court of Appeal has ruled that things like potted plants, cedar bushes, and shrubs are decorative and do not constitute a significant change to the use or appearance of common property under section 71 of the SPA. See: *Sidhu v. The Owners Strata Plan VR1886*, 2008 BCSC 92.
38. Even if the gardens were a "significant change", the bylaw gives the strata discretion to approve requested alterations, and there is no evidence before me to suggest that the gardens were not permitted.
39. Sections 129 – 138 of the SPA deal with a strata corporation's enforcement of bylaws. Section 135 prevents a strata corporation from enforcing its bylaws (pursuant to section 129) unless it has received a complaint about the bylaw contravention, given the owner or tenant the particulars of the complaint in writing, and a reasonable opportunity to answer the complaint. There is no evidence before me that the gardens were not authorized, or that the strata received a complaint about the gardens.
40. There is also no evidence before me that would suggest the applicant is exempt from the application of the bylaw. In this regard, there is no general provision in the SPA or the bylaws that exempts owners from the application of the bylaw, or circumstances when the bylaw does not apply.

41. As noted above, I find that the shed contravenes section 71 of the SPA on the basis that it was an unauthorized significant change in the use or appearance of common property and is also in breach of the bylaw.
42. Pursuant to section 133 of the SPA, the strata may do what is reasonably necessary to remedy a breach of its bylaws or the rules, and it may require that the person responsible for the breach pay the reasonable costs of remedying the breach.
43. I now turn to deal with the applicant's argument about significant unfairness.
44. The applicant claims that it is unfair to require him to remove the shed where other owners have planted gardens on common property. In this regard, he claims that the gardens are just as much a breach of the bylaw. However, as set out above, I do not find that the gardens breach section 71 of the SPA or the bylaw.
45. Section 123(2) of the Act provides the tribunal with discretion to make orders directed at a strata, its council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights in strata property disputes.
46. The British Columbia Supreme Court recently confirmed the tribunal's jurisdiction to remedy significant unfairness on the part of a strata corporation: *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164 at para. 119.
47. Since section 123(2) of the Act is substantially similar to section 164 of the SPA, the case law interpreting section 164 of the SPA is instructive. The leading case on significant unfairness is *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. In order to be significantly unfair, the conduct at issue must be more than "mere prejudice" or "trifling unfairness". To meet the threshold, the actions of a strata corporation would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct is conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith." Unfairly prejudicial conduct means "conduct that is unjust and

inequitable.” See also: *Sherwood v. The Owners, Strata Plan VIS 1549*, 2018 BCSC 890.

48. On the record before me, I cannot find that the strata’s direction that the applicant remove the shed is significantly unfair. In coming to this conclusion, I rely on the following findings.

- a. The strata did not authorize the shed.
- b. It was not reasonable for the applicant to rely on his exchange with the former strata council president to build the shed.
- c. The strata’s decision to require the applicant to remove the shed was in keeping with s. 71 of the SPA, the bylaw and the strata’s rules.
- d. There is no evidence that the strata has permitted other owners to have a shed for personal storage on common property.
- e. There is no evidence that the strata has failed to enforce its own bylaws.

49. Based on the evidence before me, the strata’s decision appears to have been arrived at after putting the matter to a $\frac{3}{4}$ vote of the owners. As in *Dollan*, I agree that the tribunal should give deference to the democratic decisions of the strata. The effect of their decision was to maintain the existing bylaw and rules.

50. For these reasons, it cannot be said that the strata’s conduct toward the applicant is oppressive or unfairly prejudicial. As such, I conclude that the strata has not acted in a significantly unfair manner. I therefore find that the applicant is not entitled to an order that he be permitted to keep the shed.

What, if any, remedies should the tribunal award the applicant?

51. Based on my conclusions above, I find the applicant has failed to establish his claims on a balance of probabilities. As such, it is unnecessary to consider the applicant’s request for remedies.

TRIBUNAL FEES AND EXPENSES

52. 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. Given the applicant was not successful, I find he is not entitled to reimbursement for tribunal fees or expenses.
53. The strata must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

ORDER

54. I order that the applicant's dispute is dismissed.

Jordanna Cytrynbaum, Tribunal Member