Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Lenahan v. The Owners, Strata Plan NW 976*, 2019 BCCRT 462

B E T W E E N :

Deanna Lenahan

APPLICANT

A N D :

The Owners, Strata Plan NW 976

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicant, Deanna Lenahan (owner), owns strata lot 37 (SL37) in the respondent strata corporation, The Owners, Strata Plan NW 976 (strata). The strata was created in 1977 under the *Strata Titles Act* and continues its existence under

the *Strata Property Act* (SPA). The owner is self-represented. The strata is represented by a member of its strata council.

2. The owner says the strata is trying to revoke permission given for the construction of a storage shed on the owner's strata lot. The owner asks the tribunal to order the strata to remove bylaw fines it has imposed against them. They also ask for an order that they be permitted to keep their shed.

3. The strata opposes the owner's allegations and asks the tribunal to dismiss the owner's claims.

4. For the reasons that follow, I order the strata to remove all fines imposed against the owner's strata lot that relate to the shed installation. However, I decline to order that the owner is entitled to keep their shed at its current location as constructed.

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. During the case management phase of this dispute, a preliminary issue was raised by the parties about whether the issues raised in this dispute were statute-barred under the *Limitation Act* (LA). I considered the LA issue separately at that time and determined that the owner's claims were not statute-barred by the LA for the reasons set out below.

10. As for the owner's claim that they are entitled to keep their shed, section 13 of the Act states the LA applies to the tribunal. However, the LA defines a claim to mean a claim to remedy an injury, loss or damage that occurred as a result of an act or omission. As the applicant has not suffered an injury, loss or damage, because they still have the shed, there is no claim under the LA and therefore the LA does not apply.

11. As for the owner's claim about bylaw fines, the Supreme Court of British Columbia has determined that a claim to enforce a bylaw fine under the SPA is not caught by the LA because a claim under the LA does not include a penalty, which is what a bylaw fine is. (See *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd*., 2015 BCSC 2273, affirmed in 2016 BCCA 370). Although the decision reached in *KAS 3549* was with respect to the enforcement or collection of bylaw fines by a strata corporation, I find the reverse situation here, where the owner seeks the fines rescinded, follows the same principles as the claim still relates to the enforcement of a bylaw fine. As a result, I find the applicant's claim that the strata rescind the bylaw fines assessed with respect to the shed is not statute-barred under the LA.

12. The issues before me now are:
    a. Was the shed built as approved by the strata?
    b. Has the owner been treated in a significantly unfair manner by the strata?
    c. Is the owner entitled to keep their shed in its current location as constructed? If not, what is an appropriate remedy?
    d. Is the owner entitled to an order that the fines charged against their strata lot be rescinded?

BACKGROUND, EVIDENCE AND ANALYSIS

13. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

14. In a civil proceeding such as this, the applicant owner must prove their claims on a balance of probabilities.

15. The *Strata Titles Act*, in force at the time the strata was created, did not address the concept of a bare land strata corporation. However, the strata continues to exit under the SPA and I find it is a bare land strata corporation as defined under the SPA.

16. The strata's relevant bylaws are those filed at the Land Title Office on December 3, 2003, when the strata completely amended its bylaws. Subsequent bylaw amendments have been filed but they are not relevant to this dispute.

17. In particular, I note the following bylaws:
    a. Bylaw 3(1) states an owner, tenant or occupant must not use a strata lot, common property or common assets in a way that:

        a. causes a nuisance or hazard to another person,

        …

c. unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot, and

…

e. is contrary to a purpose for which the strata lot or common property is intended expressly or by necessary implication on or by the strata plan.

b. Bylaw 5(1)(b) requires an owner to obtain the strata's prior written permission before making an alteration to a strata lot that involves altering the exterior of a building and grounds.

c. Bylaw 5(4) states the strata must not unreasonably withhold its approval under bylaw 5(1) and may require the owner to agree in writing to take responsibility for any expenses relating to the alteration.

d. Bylaw 5(4) further states that its intent is to ensure the buildings are well maintained and to ensure continuity of appearance of the buildings in the strata corporation.

18. I note that the strata's bylaws make no reference to storage sheds, including their design or location on a strata lot. Further, there are no written guidelines concerning the strata's permitted height, design and location of sheds.

Was the shed built as approved by the strata?

19. In about July 2015, the owner wrote to the strata requesting permission to replace a storage shed on their strata lot that was in poor condition. About the same time, the strata, previously self-managed, retained the services of a strata management firm.

20. The owner had several email exchanges with strata council members and the new property manager. After the owner provided a sketch of the proposed shed with dimensions and a description of its construction as requested by the strata, the

strata wrote to the owner on August 19, 2015, advising that the strata had denied the owner's request but gave no reasons for its denial.

21. The owner followed up with the property manager by telephone on August 26, 2015, and says they were advised that the strata council had refused their request for a shed on the side of their home but that a shed constructed in their backyard, unattached to their home and "fence high in height" was acceptable. The owner confirmed their understanding of the telephone conversation in an email that same day, ending it with a request for a reply as they were anxious to "get on with the project".

22. On August 27, 2015, the property manager wrote to the owner advising their request to "install a shed in the backyard (within your property line) has been approved", provided the alterations:
    a. Complied with all applicable bylaws, rules and policies of the strata in effect,
    b. Complied with the requirements of all applicable Federal, Provincial, and Municipal laws, bylaws, rules, regulations and building codes in effect,
    c. Did not make structural changes to any common property, and
    d. In the opinion of the strata council, did not adversely affect any other strata lot or the common property.

23. The letter did not address the height or design of the shed but requested the owner complete an "Alteration Agreement" and return it to the property manager before commencing any work.

24. The owner signed and retuned the "Alteration Agreement" provided by the strata on September 8, 2015, which in essence, makes the owner responsible for all costs of the shed installation and grants indemnity to the strata for any injury, financial loss, or damage to common property or the strata lot.

25. The owner says the shed was completed by September 8, 2015, and that on September 21, 2015, the property manager left them a voicemail stating the height of the shed was a concern.

26. The owner says the August 27, 2015 letter approving their request is sufficient proof that the strata approved their requested shed, including design and dimensions, anywhere in their backyard and that there are no bylaws that govern the installation of sheds.

27. They say their August 26, 2015 email reference to the shed being "fence high in height" was in reference to a telephone discussion with the property manager but that the approval given by the strata in the August 27, 2015 letter did not include any restriction about the height of the shed or where it could be located on their strata lot, only that their requested shed installation was approved.

28. The strata relies heavily on the owner's August 26, 2015 email referencing the shed height and, in its submissions, says it granted approval of the shed "at fence height" but that the property manager erroneously and prematurely granted permission for the installation of the shed without waiting for proper drawings, measurements, and a description of the materials to be used. It also says the owner did not comply with the condition of the strata's approval that the shed must be "fence high".

29. I do not agree with the strata that the property manager did not have the requested details of the shed prior to issuing the August 27, 2015 approval letter as the strata acknowledges receiving these details on August 1, 2015. The owner states they agreed to reduce the height of their shed but those details were not provided.

30. Regardless, based on the correspondence, I find the owner was aware of the council's concern about the shed height not exceeding the height of fence as that was what she noted in her email communication with the property manager following her August 26, 2017 telephone discussion. That the August 27, 2015 approval letter did not include the shed height restriction is unfortunate, but it does not mean the height restriction to fence height was not part of the strata's approval, which I find the owner essentially acknowledged in their submissions. I do not

accept the owner's argument that her reference to "fence high" was a reference to any type of standard fence height.

31. For these reasons, I find the owner did not build their shed as approved by the strata.

Has the owner been treated in a significantly unfair manner by the strata?

32. However, this does not end the discussion. After the owner received the property manager's telephone massage about the height of the shed, the owner emailed the property manager stating the design of their shed was in keeping with sheds on other strata lots and listing the locations of other sheds that measured higher than theirs. The owner stated that if they were being asked to remedy the height or location of their shed, then the strata should also address the other sheds. I find the owner's argument in this respect amounts to a claim of significant unfairness.

33. I note that I do not need to address the owner's arguments relating to the height and location of other approved sheds given my finding that the owner knew the strata's approval for their shed was restricted to the fence height. I would, however, encourage the strata to put its guidelines about sheds in writing and suggest an appropriate bylaw be crafted for consideration by the ownership so as to avoid similar arguments in the future.

34. I turn back to the issue of significant unfairness.

35. The strata then undertook a review of the correspondence exchanged and communications involving the owner's shed approval and in a December 21, 2015 letter advised the owner it had rescinded its approval of the shed because the owner was aware the height of the shed was restricted to the fence height and that the height of other sheds was "irrelevant". The letter incorrectly stated that the owner was aware of bylaw 5 "dealing with sizes and locations of any shed being installed anywhere in the complex" which it clearly does not say as I have set out above. The letter offered the owner 3 options with the respect to the installed shed:

a. Reduce the height of the shed to 52 inches (from 83 to 96 inches), and keep the shed at the installed location,

b. Relocate the shed to a different location, with a different height restriction as approved by the strata council depending on the agreed location, or

c. Remove the shed.

36. Further correspondence was exchanged that included the strata providing deadlines for the owner to decide on one of the options and advising bylaw fines would be imposed if they did not. I discuss the fine issue separately below.

37. On February 26, 2016, the strata's lawyer wrote to the owner reiterating the strata's 3 alternative options and requested a response by March 31, 2016. It does not appear the owner responded.

38. In a May 10, 2016 letter to the owner, the strata restates the owner's options are to modify the shed or remove it and refers the owner to its December 21, 2015 letter that details the options given to the owner. The letter also states the strata will commence fining the owner on April 21, 2016 should the owner not take "corrective action".

39. Between May 2016 and January 2018, the parties exchanged correspondence that mostly included letters from the strata to the owner that fines were continuing. However, as result of a change in strata council members and a change in property managers, the strata again reviewed the shed construction and location. In March 2017, after the strata's further review, it provided the owner with 3 revised options (March 13, 2017 proposal) that included:

a. Reducing the height of the shed to 60 inches at its current location,

b. Relocating the shed to an area beside the owner's home and reducing to the size of the shed to fit in the approved location and reducing the height of the shed to 89 inches, or

c. Removing the shed.

40. At a hearing conducted on January 31, 2018 under section 34.1 of the SPA, the strata considered the owner's objections to the strata's proposed options and their request to keep their shed as built at its current location.

41. On February 8, 2018, the strata wrote to the owner denying their request to keep the shed as constructed at the location against the rear fence and advised of 3 revised options (February 8, 2018 letter) as follows:

    a. Relocation of the shed to the owner's deck against a dividing fence with another strata lot and lowering the height of the shed to the height of the fence,

    b. Relocating the shed to the side of the owner's home and reducing the height and size of the shed, or

    c. Remove the shed.

42. 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.)

43. 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.

44. The Court of Appeal has also 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?

45. Applying the test to the facts before me, I find the owner's expectation was they could install their shed anywhere in their backyard but subject to the height of a fence, as I have found they were aware of that restriction. Given the owner installed their shed contrary to the strata's approval, I find the owner's expectation was not objectively reasonable and it must fail the second part of the test. I therefore find the owner was not treated significantly unfairly by the strata when the strata rescinded its approval of the constructed shed and gave the owner options with respect to modifying and keeping the shed they had built.

Is the owner entitled to keep their shed in its current location as constructed?

46. Based on my conclusions above, I find the owner is not entitled to keep their shed at its current location as constructed. I find the strata's various attempts to accommodate the owner keeping a modified version of their shed to be reasonable and within the meaning of bylaw 5(3).

47. Bearing in mind the tribunal's mandate to recognize the continuing relationship of the parties, I encourage the parties to resolve the issue through one of the options already provided by the strata. That is, by allowing the owner to decide on one of the options provided by the strata in either the March 13, 2017 proposal or the February 8, 2018 letter.

48. Further, nothing in this decision restricts the parties from mutually agreeing to other options not previously pursued, such as increasing the height of the fence that the shed abuts to, or to planting hedging or other plants against the fence that will block the view of the shed from CP.

Is the owner entitled to an order that the fines charged against their strata lot be rescinded?

49. 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.

50. I accept the strata received a complaint about the height of the shed as the SPA does not require the complaint to be in writing (See *The Owners, Strata Plan NW3075 v. Stevens*, 2018 BCPC 2) Nor does the SPA restrict a strata council member from making a complaint, if that was the case.

51. The correspondence involving fines imposed or contemplated by the strata is voluminous and not all of it has been provided in evidence. Some detail is required to describe the sequence of events relating to fines and I discuss the significant correspondence below.

52. On February 4, 2016, the strata wrote to the owner advising they were in breach of bylaws 3(1)(a) and (c), which prohibit an owner from causing a nuisance or unreasonably interfering with other persons to use or enjoy common property or a strata lot. The letter states the owner must advise the strata by February 9, 2016 of their decision regarding the shed options, failing which the strata would impose a $200 fine.

53. The owner responded to the letter advising they only received it on February 9, 2016. They requested a copy of the complaint received as well as an explanation of how the shed contravened bylaws 3(1)(a) and (c). The owner also correctly noted the strata bylaws only permitted a maximum $100 fine for bylaw contraventions.

54. The strata extended an invitation for the owner to attend the April 6, 2016 council meeting to “explain why the shed should not have to be altered or removed”, which the owner did. The minutes of the council meeting show the shed issue was

discussed with the owner stating the owner would provide a modified proposal to the strata council by April 22, 2016. In a follow up email dated May 25, 2016, the owner denies that they said they would provide a revised proposal and confirmed in that email they would not.

55. On April 21, 2016, the strata wrote to the owner referencing its February 4, 2016 letter, saying the strata council agreed to impose a fine at its April 6, 2016 meeting and, and under bylaw 29, it could "re-issue the $100 fine every 7 days if it deems it necessary to resolve the problem."

56. In a separate email on May 25, 2016, the owner reiterated their request for a copy of the complaint letter and an explanation of why the strata council found they were in violation of bylaws 3(1)(a) and (c). It appears the strata did not respond.

57. Based on the evidence and submissions, I do not find the strata followed the requirements of section 135 of the SPA before imposing the $100 fine set out in its April 21, 2016 letter because I find it did not provide the owner with sufficient particulars of the alleged bylaw contravention.

58. At the time of the April 6, 2016 meeting, the owner had received correspondence about potential fines for the owner contravening bylaws 3(1)(a) and (c) and had asked for clarification of the bylaw contraventions. Given bylaws 3(1)(a) and (c) do not address the height or location of sheds, which is what the complaint was about, I find it was reasonable for the owner to request clarification, and for the strata to provide clarification on the alleged bylaw contraventions prior to imposing fines. The strata did not provide the requested clarification, which I find puts the strata in contravention of section 135 of the SPA given the finding in *Terry* at paragraph 28 which states:

> An owner or tenant who may be subject to a fine must be given notice that the strata corporation is contemplating the imposition of a <u>fine for the alleged contravention of an identified bylaw or rule, and particulars sufficient to call to the attention of the owner the contravention at issue</u>. [My emphasis]

59. In *Stevens,* the BC Provincial Court expanded on the finding in *Terry* stating that the "particulars must simply be sufficient to make the alleged bylaw violator aware of what his or her alleged breach is." Given the owner requested clarification of the alleged breach of bylaws 3(1)(a) and (c), I find they did not have sufficient particulars. I do not believe it is reasonable for the strata to state the owner's shed installation results in the owner causing a nuisance or hazard, or interfering with the rights of others to use and enjoy the common property, common assets or another strata lot, without an explanation as to why.

60. As the owner was not given the particulars of the complaint, I find the $100 fine imposed by the strata as set out in its April 21, 2016 letter to be invalid.

61. I also find it is unlikely that the strata agreed to impose fines at the April 6, 2016 meeting despite the strata's April 21, 2015 letter. First, the April 6, 2016 minutes do not reflect that fining the owner was ever discussed at the meeting, either with the owner or after the owner had left the meeting. Second, the minutes clearly state the strata was expecting the owner to provide a modified proposal for the strata council to consider so it does not make practical sense that the strata would impose fines before receiving the owner's revised proposal.

62. On May 26, 2016, the strata wrote to the owner referencing the strata's April 21, 2016 letter stating it was "re-issuing' another $100 fine "as per the [SPA]" and that another $100 fine may be issued again in 7 days "if the shed problem has not been resolved at the discretion of the Council."

63. The BC Supreme Court has found that continuing fines under section 135(3) are invalid if section 135(1) has not been followed in the first place. (See *Dimitrov v. Summit Square Strata Corp.*, 2006 BCSC 967 at para. 33)

64. Given the strata did not remedy its non-compliance with section 135(1) before imposing further fines for a continuing contravention, I find the fines imposed on May 26, 2016 are also invalid.

65. Further correspondence was exchanged between the parties between June and October 2016 in which the strata noted fines would continue and could escalate, but the strata did not provide written particulars to the owner about the complaint.

66. On October 17, 2016, the strata again wrote to the owner advising that an additional $200 in fines had been imposed, being $100 on each of October 5, 2016 and October 12, 2016. The letter stated that additional fines of $100 would be imposed every 7 days until "the unauthorized shed is removed or altered to comply with" the strata's bylaw 3(1)(a), (c) and (e). The strata added bylaw 3(1)(e) to the list of bylaw infractions suggesting the shed is contrary to the purpose for which the strata lot was intended to be used as shown on the strata plan but provided no explanation as to why the shed was contrary to any of the quoted bylaws and did not provide the owner with an opportunity to answer the alleged bylaw infraction. I also find the $200 fines imposed in the October 17, 2016 letter to be invalid for the same reasons as the earlier fines. Namely, the strata did not follow section 135 of the SPA.

67. On January 31, February 28, March 31, April 28 and May 31, 2017, the strata wrote identical letters to the owner advising that their account had an outstanding balance of $3,100 in bylaw fines. The letters also state that, pursuant to section 135 of the SPA, the owner may be further fined for being in arrears even though the SPA does not permit fines to imposed on outstanding fines. The letters do not identify any specific bylaw violation fines and do not include a statement of account. However, the letters do request payment in 14 days and set out the process of section 135 of the SPA including the ability of the owner to question the strata council and request a hearing. I do not find the letters rectify the deficiencies of the strata's non-compliance with section 135 noted above and I therefore find the fines to be invalid.

68. On June 2, 2017 the strata wrote to the owner referencing several previous letters by date and advising that the strata was "re-issuing fines every 7 days" retroactive for the period February 1, through May 31, 2017 and that the fines now stood at $4,900. The letter does not say the amount of the fines that were "re-issued", how the new balance was arrived at, what the fines were for, or set out the owner's

ability to contest the fines. I find these additional fines are invalid as clearly retroactive fines do not comply with section 135 of the SPA.

69. On July 31, 2017, the strata wrote to the owner advising they were in arrears for bylaw violation fines totally $4,900. The letter was identical to the letters referenced in paragraph 67 except as to the date and amount and, for the same reasons, I find the letter does not rectify the strata's non-compliance with section 135 of the SPA.

70. On August 4, 2017, the strata wrote to the owner requesting the shed be removed by September 4, 2017 in compliance with bylaw 7, which states an alteration made without approval must be removed if the council "orders" the unauthorized alteration removed. The letter did not mention fines or what might occur if the owner did not remove the shed.

71. Also on August 4, 2017, the strata wrote a separate let to the owner advising that the strata was again "re-issuing fines every 7 days" from June 7 through August 2, 2017 and that the outstanding balance now stood at $5,800. Again, the letter does not state the amount of the fines that were "re-issued", how the new balance was arrived at, what the fines were for, or set out the owner's ability to contest the fines. I find these additional fines are invalid as, retroactive fines do not comply with section 135 of the SPA as I have stated.

72. Having found the strata did not comply with section 135 of the SPA before imposing any fines against the owner, I order the strata to reverse all fines assessed against the owner's strata lot for the shed construction.

TRIBUNAL FEES AND EXPENSES

73. 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. Here, I find both parties were partially successful. I order the strata to reimburse the owner one-half of their tribunal fees of $225.00 and dispute-related expenses $4.73 for a total of $114.86. I note the strata paid no tribunal fees and did not claim any dispute-related expenses.

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

DECISION AND ORDERS

75. I order the strata, within 15 days of the date of this order, to:
    a. pay the owner $114.86 for tribunal fees dispute related expenses, and
    b. remove all fines imposed against the owner's strata lot for the shed construction.

76. The owner is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

77. 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.

78. 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