



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 1017 v. Ahern et al*, 2019 BCCRT 617

B E T W E E N :

The Owners, Strata Plan NW 1017

APPLICANT

A N D :

Tracey Ahern and Michael Ahern

RESPONDENTS

A N D :

The Owners, Strata Plan NW 1017

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. The respondent, Michael Ahern, is the owner of strata lot 2 (SL2) in the applicant (and respondent by counterclaim) strata corporation, The Owners, Strata Plan NW 1017 (strata). The respondent (and applicant by counterclaim), Tracey Ahern, is an occupant of SL2. For clarity, I will refer to Mr. Ahern and Ms. Ahern together as the respondents. The strata claims that the respondents built a deck and replaced a fence without the strata's approval. The strata seeks an order that the respondents modify the deck to prevent damage to the building and that they pay outstanding fines for breaching the strata's bylaws.
2. Ms. Ahern counterclaims against the strata to cancel fines that the strata imposed against SL2 after the respondents built the deck and replaced the fence. She also claims reimbursement of the cost of replacing the fence.
3. The respondents are self-represented. The strata is represented by a member of strata council.

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 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.
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. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
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, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

ISSUES

9. The issues in this dispute are:
 - a. Did Mr. Ahern breach the bylaws when he replaced the deck?
 - b. Did Mr. Ahern breach the bylaws when he rebuilt the fence?
 - c. Should the strata reimburse the respondents for the cost of rebuilding the fence?
 - d. Did the strata comply with section 135 of the *Strata Property Act* (SPA) before imposing the fines?
 - e. What remedies, if any, are appropriate?

BACKGROUND AND EVIDENCE

10. In a civil claim such as this, the strata must prove its case on a balance of probabilities. By the same token, Ms. Ahern must prove her counterclaims on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.

11. The strata consists of 14 townhouse-style strata lots in 3 buildings in Delta. Each strata lot has a backyard that is limited common property (LCP) for the exclusive use of the adjacent strata lot.
12. The strata filed consolidated bylaws with the Land Title Office on December 31, 2014. Prior to these bylaws being filed, the strata had filed 12 bylaw amendments since the strata was created. The consolidated bylaws repealed 8 of the 12 bylaw amendments, leaving the other 4 in place. It also appears that the strata intended to repeal another bylaw amendment but, due to a typographical error, failed to do so.
13. The consolidated bylaws also adopted the Standard Bylaws in the SPA, except to the extent that they are amended from time to time. The strata has filed 1 bylaw amendment since filing the consolidated bylaws.
14. It is unclear why the strata filed consolidated bylaws without repealing all of the previous bylaws. The result is a confusing and, at times, contradictory set of bylaws that is difficult to understand. The strata should consider reviewing and consolidating its bylaws. That said, none of the filed bylaw amendments other than the consolidated bylaws are relevant to this dispute. All references to the bylaws are references to the consolidated bylaws.
15. I summarize the relevant bylaws as follows:
 - a. Bylaw 6(3): An owner may not make additions, alterations, major repairs or modifications to common property or LCP without express written permission from the strata. In order to get permission and before undertaking the addition, alteration, major repair or modification, the owner must:
 - i. Provide the strata with plans for the proposed alteration in a manner that satisfies the Corporation of Delta,
 - ii. Be prepared to address questions concerning the impact on other owners in the strata,
 - iii. Obtain permits and provide them to the strata on request, if applicable,

- iv. Be responsible for repairing and maintaining the alteration and pay for any damage to the building that the alteration may cause, and
 - v. Agree to sign a waiver of liability in the form provided by the strata.
 - b. Bylaw 8(c)(ii)(E): The strata must repair and maintain fences.
 - c. Bylaw 23(1): The strata may fine an owner a maximum of \$50 for each contravention of a bylaw after the first warning is given in writing.
 - d. Bylaw 24(a): If an owner fails to pay the strata money owing within 15 days of the money coming due, the strata, after giving written notice of the default and providing the owner with a reasonable opportunity to respond, may assess a fine of \$10 and, if the default continues for a further 15 days, additional fines of \$25 for each month that the default continues.
- 16. As a preliminary matter, I note that only Ms. Ahern brought a counterclaim, even though she is not an owner of SL2. I considered whether it was necessary to add Mr. Ahern as an applicant in the counterclaim. However, because of my conclusions, I find that it is unnecessary for me to address this issue. That said, because bylaw 6(3) only applies to owners, only Mr. Ahern can be found to have breached bylaw 6(3).
- 17. On August 19, 2015, the strata council sent a memo to all owners warning that there were carpenter ants in several strata lots. The strata council said that some wooden patio decks needed to be replaced because they were rotting. The strata council also asked owners to advise the strata council if they have deteriorated fencing. Ms. Ahern responded that their fence was deteriorating.
- 18. On April 11, 2016, the respondents sent a letter to the strata saying that they planned to replace their deck. It is undisputed that the deck was rotting and in need of replacing. They provided a sketch of the dimensions of the new deck, but no detailed plans. On April 13, 2016, the strata acknowledged receipt of the letter and said that they would consider the request at the next strata council meeting. The letter did not indicate when the strata council would next meet.

19. On April 14, 2016, the respondents told the strata that their previous letter was a courtesy and that they would proceed with the replacement of the deck. They were concerned that the strata council would not meet soon even though they considered the deck to be dangerous.
20. On April 24, 2016, the strata wrote to the respondents to give approval “in principle only”. The strata believed that the respondents required a permit from Delta. The strata also advised the respondents that the deck may be in contravention of Delta’s bylaws. The strata advised that strata council would meet on May 9, 2016. The strata provided materials about Delta’s requirements and a portion of the BC Building Code that dealt with protecting cladding from moisture.
21. The respondents did not respond to this letter. On April 25, 2016, the respondents’ contractor installed the deck. Parts of the deck are flush with the building’s cedar cladding. The respondents’ contractor also replaced the fence between SL2 and another strata lot.
22. The strata’s cedar contractor did an annual inspection of the strata’s buildings on May 17, 2016. The cedar contractor noted that the respondents’ deck did not have the required 1 to 1.5 inch clearance between the deck and the cedar cladding of the building.
23. On June 6, 2016, the strata’s lawyer wrote to the respondents’ lawyer. Among other things, the strata’s lawyer raised the issue of the deck. The strata’s lawyer said that the respondents had not complied with bylaw 6 because they did not receive express written approval from the strata. Nevertheless, the strata’s lawyer said that the strata would “reset” relations with the respondents if they altered their deck to provide for a 1 to 1.5 inch gap between the deck and the cedar cladding and signed an alteration agreement taking responsibility for the repair and maintenance of the deck.
24. The respondents’ lawyer responded on July 15, 2016. The respondents took the position that there were no municipal requirements to meet and so the April 24, 2016 letter represented the express consent that the bylaws required. The

respondents' lawyer also asked for proof from an expert that the deck required a 1.5 inch gap with the building.

25. In response, the strata retained a building envelope consultant to inspect all of the decks in the strata. The consultant provided a written report dated August 24, 2016. The consultant noted that some of the decks, including the respondents' deck, were constructed too tight to the building. The consultant recommended that these decks be cut back to 1.5 inches from the building's siding.
26. The respondents had a hearing with strata council on October 5, 2016. The strata provided a written decision on October 12, 2016. The strata imposed a \$50 fine for the unauthorized installation of the deck and a \$50 fine for the unauthorized installation of the fence. The strata later imposed more fines for continuing violations, as I discuss below.

POSITION OF THE PARTIES

27. The strata argues that the respondents built the deck and fence without the strata's express consent, which is required by the bylaws, and that there is inadequate clearance between the deck and the building's cedar siding.
28. The strata asks for the following orders:
 - a. That the respondents cut back the deck to provide 1.5 inches of separation from the cedar siding of the building.
 - b. That the respondents pay fines of \$660 for breaching the bylaws.
29. The respondents argue that the strata gave them permission to build the deck and that the deck does not require any modification. The respondents argue that they rebuilt the fence because the strata failed to repair and maintain it. They also say that the strata wrongly imposed the fines.
30. The respondents ask that I order the strata to cancel all fines related to the deck and fence and reimburse the respondents \$600 for the cost to replace the fence.

The respondents also ask that I order the strata to comply with sections 72, 130 and 164 of the SPA and with Standard Bylaw 3.

ANALYSIS

Did Mr. Ahern breach the bylaws when they replaced their deck?

31. The strata says that it only gave approval in principle for the respondents to rebuild the deck, but that this approval was conditional on complying with the rest of bylaw 6(3).
32. The respondents say that the strata's letter only refers to municipal bylaws. The respondents say that their contractor told them they did not need a permit, so they assumed that they had permission.
33. I find that the respondents did not receive express written permission to rebuild the deck as required by bylaw 6(3).
34. First, I do not accept the respondents' submission that they thought that they had permission because they did not need a municipal permit. The respondents' April 14 letter made it clear that they had no intention of complying with bylaw 6(3) by getting the strata's express written permission by referring to their previous letter as a "courtesy". In addition, I infer that the respondents had scheduled their contractor well before they received the April 24 letter, which confirms that they intended to rebuild the deck with or without the strata's consent.
35. Second, I do not agree that the strata's April 24 letter says that the strata consented to the new deck subject only to municipal approval. The strata referred to bylaw 6(3)(a), which requires plans that would satisfy Delta. I find that the only reasonable interpretation of the April 24 letter is that the strata would not give its consent to rebuild the deck without more detailed plans. In addition, the strata included portions of the BC Building Code that refer to protecting cladding from moisture, which shows that the strata wanted to ensure that the proposed deck would not pose a threat to the building.

36. I note that the respondents have alleged that the strata council president gave verbal permission to build the deck. Bylaw 6(3) requires that the strata provide written consent, so if the strata council president gave verbal permission, it is insufficient to satisfy bylaw 6(3).
37. Therefore, I find that Mr. Ahern breached bylaw 6(3) by building the deck without express written consent.

Did Mr. Ahern breach the bylaws when they rebuilt their fence?

38. As discussed above, in August 2015, the strata notified the owners about carpenter ants and asked the owners to advise if their fence was deteriorating. The respondents said that their fence was deteriorating. They say that the strata did nothing after August 2015 to fix their fence, which by April 2016 was falling down. The respondents say that their contractor told them that leaving the rotten fence in place could damage their new deck.
39. The strata admits that it did not do anything to fix the clearly rotten fencing. It also admits that it “should have acted faster”. It is undisputed that the bylaws require the strata to repair and maintain the fence.
40. The strata does not raise any concerns about the new fence’s construction.
41. A strata corporation’s obligation to repair and maintain common property under section 72 of the SPA requires the strata corporation to act reasonably. I find that in the context of an ongoing carpenter ant infestation, the strata’s failure to take any steps for 8 months to repair a rotten and falling fence was unreasonable. I find that the strata breached its obligation to repair and maintain the fence.
42. That said, bylaw 6(3) prohibits Mr. Ahern from altering common property without express written permission. It is undisputed that he did not have express written permission to replace the fence. I therefore find that Mr. Ahern breached bylaw 6(3). I will address whether the strata acted reasonably in imposing fines for this breach below.

43. Ms. Ahern claims \$600 in costs for rebuilding the fence. However, the respondents provided no evidence of the actual cost of repairing the fence, such as an invoice.
44. More importantly, in the context of this dispute, I am not satisfied that it is appropriate to require the strata to pay for the new fence. In some circumstances, it may be necessary for an owner to conduct repairs that are the strata corporation's responsibility and seek reimbursement, such as in an emergency. However, in general, if an owner unilaterally decides to repair common property, they usurp the strata corporation's ability to prioritize repair and maintenance for the benefit of all of the owners and within a budget.
45. In this dispute, there is no evidence that the respondents made any effort after August 2015 to have the strata repair the fence, such as written communication demanding that the strata repair the fence. By repairing the fence without telling the strata, the respondents failed to give the strata the opportunity to seek out quotes and potentially achieve savings by having more than one section of fence repaired. There is no evidence that replacing the fence was such an emergency that it required immediate action, especially given that the respondents did nothing to press the issue in the 8 months after their August 2015 email.
46. For these reasons, I dismiss Ms. Ahern's claim for reimbursement of the cost of the fence.

Did the strata comply with section 135 in imposing the fines?

47. Section 135 of the SPA sets out the procedural requirements for the strata to impose a fine against an owner. The strata must:
- a. Receive a complaint.
 - b. Write to the owner to tell them the details of the complaint.
 - c. Give the owner a reasonable opportunity to respond to the complaint, including having a hearing if requested.

- d. Give the owner written notice of its decision to impose a fine as soon as feasible.
48. Section 135(3) of the SPA says that if the strata complies with the proper procedures when it imposes a fine and the contravention continues, the strata may impose more fines without going through the procedure again.
49. As I understand the respondents' submissions, they do not suggest that the strata failed to properly impose the fine about the deck. The strata's lawyer's June 6 letter refers to section 135 and provides the respondents with the details of the complaint about the deck and an opportunity to have a hearing. The strata held a hearing on October 6, 2016, and provided prompt written reasons for imposing the fine. I find that the strata complied with section 135 before imposing the fine for building the deck. I order Mr. Ahern to pay the \$50 fine.
50. As for the breach of bylaw 6(3) for replacing the fence, the strata has discretion in how, or whether, to impose fines for breaching a bylaw. While that discretion is limited, it must be exercised reasonably and in the best interests of all owners. See *Abdoh v. The Owners, Strata Plan KAS2003*, 2014 BCCA 270. With that in mind, I find that it is unreasonable for the strata to impose a fine on the respondents for doing necessary repairs that the strata should have done.
51. In addition, the lawyer's June 6 letter makes no mention of the fence. There is no evidence that the strata complied with any of the requirements in section 135 before imposing the fine for rebuilding the fence. Therefore, I order the strata to cancel the fines against Mr. Ahern for breaching bylaw 6(3) by rebuilding the fence.
52. As for the fines for continuing contraventions of the bylaws, the strata did not initially provide any evidence about the dates, amounts and reasons for each fine. I asked the strata to provide evidence to support the fines for a continuing contravention. The strata provided its 2018 year-end financial statement, which states that there were \$860 in outstanding fines owed to the strata. The strata also provided the minutes of a strata council meeting on October 16, 2017, which said that they would impose one year of "retroactive" fines.

53. Based on the strata's submissions and the amount of the ongoing fines, I find that the strata sought to impose further fines under bylaw 24(a). Bylaw 24(a) allows the strata to impose fines for failing to pay money that an owner owes to the strata, including overdue fines. Bylaw 24(a) requires the strata to provide the owner written notice of the default and a reasonable opportunity to respond. There is no evidence that the strata complied with either requirement under bylaw 24(a) prior to imposing further fines.

54. For these reasons, I order that the strata must cancel all of the fines it has imposed on Mr. Ahern other than the initial \$50 fine for building the deck. Mr. Ahern must pay the \$50 fine.

What remedy, if any, is appropriate?

55. In addition to the fines, strata seeks order that the deck be cut 1.5 inches to avoid damaging the building.

56. The respondents say that the deck was built by a "licensed contractor" and that it is "to Code". They provided no evidence to support these assertions. In particular, they did not provide any evidence to respond to the strata's consultants that inspected the strata's decks.

57. The respondents have offered no justification for refusing to modify their deck. I find that Mr. Ahern must ensure that the deck does not cause preventable damage to the building. I order that he ensure that no part of the deck be within 1.5 inches of the building's cladding.

58. I also find that based on bylaw 6(3), it is appropriate to order that Mr. Ahern sign an agreement taking responsibility for the repair and maintenance of the deck and for any damage the deck may cause to the building and a waiver of liability in the strata's standard form.

59. Because Mr. Ahern is the only owner of SL2, I dismiss the strata's claims against Ms. Ahern.

60. The respondents did not make any submissions about their requested order that the strata comply with sections 72, 130 and 164 of the SPA and Standard Bylaw 3. The strata is required to follow the law, whether I order them to do so or not. In the context of this dispute, I find that it would be redundant and unnecessary to make an order requiring the strata to comply with the SPA or the bylaws when it is already legally obligated to do so. In addition, I find that I have already addressed the respondents' specific concerns about the strata's actions. I dismiss this aspect of the respondents' counterclaim.

TRIBUNAL FEES AND EXPENSES

61. 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. The strata was successful in its claim to have the deck modified but largely unsuccessful in its claim to recover fines. I order the respondents to reimburse the strata for half of its tribunal fees of \$225 and dispute-related expenses of \$28.71, which totals \$126.86. As for Ms. Ahern's counterclaim, she was unsuccessful in her claim for reimbursement for the fence. I dismiss her claim for tribunal fees and dispute-related expenses.

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

DECISION AND ORDERS

63. I order that:

- a. The strata immediately cancel all fines imposed against SL2 except for the \$50 fine imposed on October 26, 2016, for breaching bylaw 6(3) by building the deck without express written consent from the strata,
- b. Within 14 days of the date of this decision, Mr. Ahern pay the strata a total of \$176.86, broken down as follows:

- i. \$50 for the October 26, 2016 fine, and
 - ii. \$126.86 for the strata's tribunal fees and dispute-related expenses,
 - c. Mr. Ahern sign the strata's standard assumption agreement and waiver of liability for the deck within 14 days of the strata providing the form to him,
 - d. Within 120 days of the date of this decision, Mr. Ahern ensure that no part of the deck is within 1.5 inches of the building's cladding, and
 - e. After Mr. Ahern has signed the strata's assumption agreement and waiver of liability and ensured that no part of the deck is within 1.5 inches of the building's cladding, the strata is deemed to have approved the construction of the deck.
64. The strata is entitled to post judgement interest under the *Court Order Interest Act*, as applicable.
65. The strata's remaining claims and Ms. Ahern's counterclaims are dismissed.
66. 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.

67. 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.

Eric Regehr, Tribunal Member