



# Civil Resolution Tribunal

Date Issued: June 4, 2019

File: ST-2018-003855

Type: Strata

Civil Resolution Tribunal

Indexed as: *Birchall v. The Owners, Strata Plan BCS 61*, 2019 BCCRT 679

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

Kathleen Joan Birchall

**APPLICANT**

**A N D :**

The Owners, Strata Plan BCS 61

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Sarah Orr

### **INTRODUCTION**

1. The applicant, Kathleen Joan Birchall (owner) owns strata lot 59 in the respondent strata corporation, The Owners, Strata Plan BCS 61 (strata).
2. The owner says the strata made a significant change to the common property by wrongfully removing 7 trees from the front courtyard without approval of the

ownership, and replaced the hallway carpeting without prior approval of the ownership. She also says the strata has failed to grant hearings when requested, provide written decisions, or participate in the voluntary dispute resolution process set out in its bylaws. She wants the Civil Resolution Tribunal (tribunal) to:

- a. declare that the strata wrongfully removed 7 trees from common property;
  - b. order the strata to replace the 7 trees and restore the courtyard to its 2017 condition;
  - c. declare that the strata replaced the hallway carpets without approval from the ownership;
  - d. order the strata to state in its minutes that it proceeded with the carpet replacement knowing it would not receive approval from the ownership;
  - e. order the strata to grant hearings when requested, provide decisions in writing, and participate in the voluntary dispute resolution process when requested; and
  - f. order the strata to reimburse her \$5,000 in legal fees.
3. The strata says it has fulfilled its responsibilities under the *Strata Property Act (SPA)* and bylaws in relation to these issues. It also claims reimbursement of \$5,000 in legal fees, property management fees, and additional council time required to deal with this dispute.
  4. The owner is self-represented and the strata is represented by a council member.

## **JURISDICTION AND PROCEDURE**

5. These are the formal written reasons of the 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.
7. The owner requested an oral hearing on the basis that she is not a lawyer and she cannot be certain she submitted the proper documents. In the circumstances, I deny the owner's request. I find there are no extraordinary circumstances necessitating an oral hearing in the interests of justice, as set out in section 39 (3) of the Act, and that the nature of the dispute does not require an oral hearing. One of the tribunal's mandates is proportionality, and I find this \$5,000 dispute does not warrant an oral hearing. The parties each had full opportunity to provide evidence and written submissions including photographs and diagrams. I find it is unlikely that an oral hearing would reveal the evidence any better than the contemporaneous written statements before me. I have drawn my conclusions below based on the evidence before me.
8. The owner has also asked for special accommodation for hearing impairment and other unspecified disabilities. I find a hearing by written submissions is the most appropriate format to accommodate the owner's hearing impairment. Without details of the owner's other disabilities, it is unclear how she wishes to be accommodated. However, the owner has provided evidence and submissions which indicate she understands the issues and can meaningfully participate in the hearing process through written submissions. Therefore, I am satisfied that I can fairly decide this dispute through written submissions.
9. 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.
10. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

11. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may make 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.
12. On November 8, 2018 the tribunal issued a preliminary decision in which a tribunal vice chair refused to resolve the owner's claim that the strata made significant changes to the appearance of common property because the relief the owner sought was to remove the responsible council member from the strata council. The tribunal member found that such a remedy falls outside the tribunal's jurisdiction. The owner also wanted the strata to remove one of its council members for altering the floor in their strata lot in breach of the bylaws. For the same reasons, the vice chair ordered this relief to be removed from the owner's claim, and the owner amended her claims accordingly.
13. The owner initially sought an order for the owner of the strata lot who had altered their flooring to reinstall carpet to comply with the strata's bylaw. In the tribunal's preliminary decision, the vice chair found that if the owner wished to pursue this relief, the owner of the affected strata lot must be added as a respondent to the dispute. After the tribunal issued the preliminary decision the strata notified the tribunal that in a strata council hearing on October 18, 2018 it had directed that strata lot owner to reinstall carpet in their strata lot. The parties agree that this issue has been resolved and I will not address it in my decision.
14. The owner initially sought an order that the strata designate more parking stalls for disabled people, however she has since withdrawn that requested remedy.

## **ISSUES**

15. The issues in this dispute are:
  - a. Did the strata breach section 71 of the SPA when it removed 7 trees from the courtyard, and if so, what is an appropriate remedy?
  - b. Is there any other legal basis requiring the strata to replace the 7 trees?

- c. Did the strata require owner approval to replace the hallway carpets? If the strata failed to obtain a necessary approval, what is an appropriate remedy?
- d. Did the strata refuse to grant requested hearings, fail to provide written decisions, or refuse to follow its Voluntary Dispute Resolution Process, and if so, what is an appropriate remedy?
- e. Are either of the parties entitled to reimbursement of their legal fees?

## **BACKGROUND AND EVIDENCE**

- 16. The strata is a residential complex established in 2002. In October 2004 the strata filed bylaws with the Land Title Office (LTO) which repealed and replaced all previous bylaws. The strata has made numerous subsequent amendments to the bylaws, none of which are relevant to this dispute.
- 17. On August 16, 2016 the strata manager sent the owners a notice that the carpet installer would start installing carpeting tile on August 22, 2016.
- 18. On August 18, 2016 the owner sent a letter to the strata asking the cost of the re-carpeting and stating that since the money was coming from the strata's contingency reserve fund (CRF), the ownership was required to vote on it.
- 19. On September 28, 2016 the strata held a special general meeting (SGM) at which the ownership passed a  $\frac{3}{4}$  resolution vote to retroactively authorize the strata to spend up to \$40,000 to replace the hallway carpets in both buildings excluding the gym, out of the carpet reserve that had been established at its 2015 annual general meeting (AGM).
- 20. On September 21 and 22, 2017, the strata's landscaper, ParaSpace, sent the strata council its initial recommendations for the trees on the property. ParaSpace recommended removing the beech tree at the front entry because it was leaning heavily and blocking the real estate sign. They also recommended removing a tree close to the courtyard gate as well as removing 3 "failing" cedar trees, to be replaced with 3 different trees.

21. The strata says that at its October 5, 2017 meeting the strata council discussed ParaSpace's recommendations, approved some of them and decided to adjust other recommendations, and subsequently issued ParaSpace further directives. The revised scope of ParaSpace's work was set out in a November 1, 2017 document which states that all recommendations for tree removals were based on safety. On November 20, 2017, ParaSpace removed 7 trees from the strata's common property.
22. On November 28, 2017, the owner and 4 other strata lot owners sent a letter to the strata complaining about the tree removal, noting that the expense was of the type that occurred less than once per year, meaning the decision to remove the trees required prior approval from the ownership. The owner requested ParaSpace's report recommending removal of 7 trees and asking for a full explanation for its actions.
23. ParaSpace conducted a tree count on September 27, 2018 which found a total of 95 trees on the strata's property, 17 of which were on 29<sup>th</sup> and Ross Road, and 63 of which were within Sunnyhurst Park.
24. The owner claims the strata has mistreated her and "demonized" her by making libelous statements and derogatory comments, and that they have "brainwashed" other owners into believing the owner is a problem for the strata. She says she has been excluded from part of at least 1 SGM so the rest of the ownership could discuss the strata's involvement in litigation with her, and she says the manner in which she was excluded from these meetings was rude, and at one point forced her to wait outside in the rain. She says someone poured water into the gas tank of her car causing it to break down, and she blames the strata. She says she is now afraid to enter the parkade and she fears another owner might attack her car. She says she has twice been assaulted in common areas by people "shoving a phone in her face." She says she received an anonymous threat in 2015. While I do not wish to diminish the owner's claims in this regard, the tribunal does not have jurisdiction over claims for libel, and the owner has not articulated these allegations as part of

her claims or requested remedies for them in this dispute, therefore I find I cannot address them.

25. The owner asks the tribunal to consider the deterioration of her health as a result of her conflict with the strata, however she has not claimed damages for pain and suffering, nor has she submitted any medical evidence to support her alleged health concerns.
26. In her submissions the owner raises concerns about how the strata has dealt with plumbing issues in her strata lot, however she has not articulated those plumbing issues as part of her claims in this dispute, so I decline to address them.
27. In her reply submissions the owner raises for the first time concerns with how the strata repairs or maintains limited common property, and in particular, the fireplace venting, handrails in stairwells, and cleaning gutters on balconies. She also raises an issue with her hot water and she says the AGM and 2 SGMs in 2019 should not have occurred in accordance with a 2016 agreement. However, the owner did not articulate these concerns as part of her claims, and by raising them in her reply submissions she deprives the strata from responding to them. I therefore make no findings with respect to these claims.

## **ANALYSIS**

28. In a civil claim like this one, the owner must prove her claim on a balance of probabilities. This means the tribunal must find it is more likely than not that the owner's position is correct.
29. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.

### ***Did the strata breach section 71 of the SPA when it removed 7 trees from the courtyard, and if so, what is an appropriate remedy?***

30. The owner says the strata made a significant change to the appearance of common property by removing 7 trees from the courtyard without prior approval of the

ownership. She wants the tribunal to declare that the strata wrongfully removed the trees, and to order the strata to replant them and return the courtyard to its 2017 condition.

31. Under section 71 of the SPA, the strata cannot make a significant change in the use or appearance of common property unless the change is approved by a  $\frac{3}{4}$  vote at a general meeting, or unless there are reasonable grounds to believe immediate change is necessary to ensure safety or prevent significant loss or damage.
32. The strata says the removal of the trees was not a significant change and relies on the decision in *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333 (CanLII) in which the Supreme Court stated the factors which must be considered to determine whether there has been a significant change in the use and appearance of common property. Those factors include the visibility of the change to residents and the general public; whether the change affects the use, enjoyment, or existing benefits of a unit or units; whether the changed use results in direct interference or disruption; whether the change impacts the marketability or value of the unit, the total number of units in a building and whether they are of residential, commercial or mixed use, and how the strata governed itself in the past with respect to similar changes.
33. The strata says at the time it removed the 7 trees there were over 100 trees on the strata's property, and that it replaced 3 of those 7 trees with recommended alternatives leaving the strata property with 4 less trees. The strata says this is a reduction of less than 4 percent of the strata's trees, and therefore the change does not meet the definition of "significant." The strata submitted evidence of a tree count ParaSpace conducted in September 2018 which generally supports this assertion.
34. The owner says the 7 trees removed were large, healthy, prominent trees which were "momentous in defining the appearance of the property." She says the 3 replacement trees were very small and grew very slowly, so the "look" of the front of the building was significantly altered. The owner submitted several photographs of the roundabout in the front of the strata property, however there are no comparable



“before” and “after” photographs, so I am unable to observe how different the property looked after the trees were removed.

35. The owner says the katsura tree removed was directly in front of her strata lot, and although she did not specify how the tree’s removal affected her use or enjoyment of her unit, she alleges that the strata removed this tree in a vengeful act against her. I find the evidence does not support this allegation, as ParaSpace’s documentation specifically notes the issues with multiple katsura trees on the property.
36. I find there is no evidence the removal of the trees interfered with or disrupted any owners or tenants, and there is no evidence to indicate the removal affected the marketability or value of the owner’s unit or any other unit.
37. On balance, I find the evidence does not establish that the removal of 7 trees constituted a significant change to the use or appearance of common property. However, If I am wrong in this finding, I find the evidence establishes that the strata had reasonable grounds to believe the removal of the 7 trees was necessary in the interests of safety to prevent loss or damage. While the documents in evidence about the tree removal are somewhat convoluted, and the owner says that ParaSpace did not use the word “safety” in its initial recommendations to remove the trees, I find ParaSpace’s November 1, 2017 scope of work document includes the recommendations to remove the trees and states that the recommendations were based on safety. In these circumstances I find the strata was not required to obtain ownership approval through a  $\frac{3}{4}$  vote under section 71 of the SPA, and I dismiss this claim.

***Is there any other legal basis requiring the strata to replace the 7 trees?***

38. The owner says ParaSpace are not landscape architects, they are merely lawn cutters. She says it was in ParaSpace’s interest to remove the 7 trees so they could complete their work faster, and therefore their recommendations may not have been what was best for the strata. However, I find ParaSpace’s recommendations to be reasonable and to be supported by reasonable explanations. The strata says none

of its council members at the time were professional gardeners, and that they reasonably relied on ParaSpace's recommendations to remove the 7 trees. I agree.

39. The owner submitted a report the strata council received from a tree expert company in 2012 stating that no trees needed to be removed. She says the strata received another report in 2015 (Diamond Head report), which is not in evidence, and she says those experts verbally recommended that the strata should not remove any trees. The owner says the Diamond Head report shows only 44 trees on the strata property and that the trees the strata removed in 2017 were not listed as "priority" trees in that report.
40. The owner also says she was on the strata's garden committee in 2016 and she knew there were no safety issues with the 7 trees removed. She says when the sprinklers broke in the summer of 2016 the gardening committee took great care to hand water the trees, and none of them were leaning or had aphids. She says purple beeches tend to droop, and their branches could have easily been pruned. She also says if any of the trees had aphids the strata could have used spray to remove them. She denies that any storms affected the trees.
41. However, I find the owner's evidence about the status of the trees between 2012 and 2016 is outdated. She did not submit any expert reports or other evidence from the fall of 2017 refuting ParaSpace's recommendations. In the circumstances I find it was reasonable for the strata to rely on ParaSpace's recommendations.
42. The owner also says that removing the 7 trees damaged the ground because it removed a root system which held the earth in place and prevented run-off of soil, however she provided no evidence to support this allegation. The owner says the strata falsified the cost of the tree removal, however I find this allegation is not substantiated by the evidence. The strata submitted ParaSpace's invoice as well as various documents showing the costs of each of its recommended services, including tree removal.
43. The owner says the minutes from the October 5, 2017 strata council meeting do not accurately reflect the strata's intentions. The minutes from that meeting state, "Tree

pruning recommendations from Para Space were reviewed and approved by Council. One issue raised was a safety issue, regarding the trunk of one of the trees in the courtyard. Council discussed the options, and decided the safest option was to have the individual tree removed.” However, the evidence before me indicates that the strata had various communications with ParaSpace between that council meeting and the tree removal on November 20, 2017 during which time they altered their plans. This is supported by ParaSpace’s November 1, 2017 scope of work document which contains many revisions from its September recommendations. While the minutes from the October 5, 2017 meeting do not reflect the strata’s ultimate decision to remove the 7 trees, I find the council made that decision after October 5, 2017. Therefore, I find there is no basis on which the strata is required to amend the minutes from that meeting.

44. I find the owner has not established any legal basis requiring the strata to replace the 7 trees it removed from common property and I dismiss this claim.

***Did the strata replace the hallway carpets without prior approval from the ownership, and if so, what is an appropriate remedy?***

45. The owner wants the tribunal to declare that the strata replaced the hallway carpets without prior approval from the ownership, and to order the strata to state in the minutes that it proceeded with projects knowing it would not receive approval from the ownership.
46. The strata says at its 2015 AGM the ownership voted to create a carpet reserve fund and approved the replacement of the carpets in principle, with a plan to have a follow-up vote at its 2016 AGM to finalize plans for the re-carpeting project. The strata completed the re-carpeting in August 2016 without a  $\frac{3}{4}$  vote at its 2016 AGM to confirm the ownership’s previous intention to use the carpet reserve. When the strata realized its error, it called the September 28, 2016 SGM at which the ownership voted to retro-actively approve the use of the carpet reserve for the re-carpeting.

47. The minutes from the September 28, 2016 SGM support the strata's explanation. The minutes state that while the carpeting issue was discussed at the 2016 AGM it was not voted on, and that once the strata learned of its error it was too late to back out of the carpet replacement contract without significant financial penalty to the strata. Under its contract with the carpet contractor the strata paid 50 percent of the cost of the carpet replacement up front out of the CRF under section 98 (3) of the SPA, and the \$40,000 authorized at the SGM to be paid out of the carpet reserve was the remaining balance of the carpeting contract.
48. While it is clear the strata erred by completing the re-carpeting before obtaining approval from the ownership, the evidence before me is that the ownership had approved the project in principle, and the error was simply an oversight. Members of a strata council are volunteers and they are not held to a standard of perfection. Rather, they are required to act reasonably and in the best interests of the strata. I find the strata acted reasonably by remedying its error within a month of it occurring, and I find there is no evidence to indicate the strata's error was intentional or an attempt to deceive the ownership. I dismiss this claim.

***Did the strata refuse to grant requested hearings, fail to provide written decisions, or refuse to follow the Voluntary Dispute Resolution Process, and if so, what is an appropriate remedy?***

49. The owner says the strata refused to grant requested hearings and did not provide written decisions or follow the Voluntary Dispute Resolution process. She wants the tribunal to order the strata to grant hearings when requested, provide decisions in writing, and hold Voluntary Resolution Committees when requested.
50. Section 34.1 of the SPA and bylaw 20 says that an owner may request a hearing before the strata council by applying in writing and setting out the reasons for the request. If such a request is made the strata must hold a council meeting to hear the applicant within 4 weeks after the request. If the applicant seeks a decision from the strata at the hearing, the strata must provide the applicant with a written decision within 1 week after the hearing date.

51. Section 4.01 of the SPA regulation (regulation) defines a hearing under section 34.1 of the SPA as an opportunity to be heard in person at a council meeting.
52. On December 14, 2017 the owner had a hearing before the strata council in relation to the tree removal. The minutes from that meeting state the owner was, “seeking answers to five (5) questions pertaining to the recent removal of trees on the property. Council made notes of the questions and will be responding to these Owners by way of letter within 7 days as per the hearing requirements set out in the Strata Property Act.”
53. On December 20, 2017 the strata sent the owner a letter answering her 5 questions about the tree removal.
54. On January 10, 2018 the owner had another hearing before the strata council in relation to the tree removal. The minutes from that meeting state, “Council heard the concerns from each Owner and was also provided a list of questions and requests for the Council...Council reviewed the list of questions and requests related to the tree removal. It was moved and seconded for the Council to discuss the questions and allegations with the parties involved and for the questions to be discussed and responded to in more detail by the new Council of 2018.”
55. It is undisputed that on January 17, 2018, the strata sent its written decision to the owner by registered mail, but she did not claim it.
56. In late January the owner requested another hearing in relation to the tree removal. On February 16, 2018 the strata’s counsel sent the owner a letter denying her request as she had already had 2 hearings on the subject.
57. On February 26, 2018 the strata’s counsel sent the owner a letter reiterating that the council’s decision to remove the 7 trees was within its responsibility to manage and maintain common property under the SPA.
58. On March 2, 2018 the owner requested another hearing before the strata council about “unanswered questions” in relation to the courtyard. If the strata responded to this request it is not in evidence.



59. At its March 15, 2018 council meeting the strata voted to amend the minutes from the January 10, 2018 meeting to reflect that the owner attended a scheduled hearing on that date, and that it was the second hearing the owner requested about the courtyard. The minutes from the March 15, 2018 meeting indicate the strata followed legal advice not to dialogue with the owner on the subject anymore, and to deny the owner's request for a third hearing on the subject.
60. The strata says the owner is "bullying" the strata council by requesting multiple hearings on the same issue and seeking a different outcome. The strata says this interferes with the council's ability to attend to other matters during its limited meeting time.
61. I find the strata has not breached section 34.1 of the SPA or bylaw 20. It is undisputed that the strata granted the owner 2 different opportunities to be heard on the issue of the tree removal and provided its written decision within 7 days after each hearing. I find the strata's refusal to grant the owner additional hearings on the same subject does not deprive her of her opportunity to be heard, as she has already had 2 such opportunities. I agree with the strata that the owner's continued requests for more hearings on the same issue hoping for a different outcome impedes the strata's ability to function properly.
62. With respect to voluntary dispute resolution, section 124 of the SPA says that a strata's bylaws may provide for voluntarily resolving disputes among owners, tenants and the strata, but that a voluntary dispute resolution process must not require a person to use it or confer on any person or body the power to make a binding decision.
63. The strata's bylaw 36 says that a dispute among owners, tenants, the strata, or any combination may be referred to a dispute resolution committee by a party to the dispute if all the parties to the dispute consent, and if the dispute involves the SPA, the Strata Property Regulation, or the bylaws or rules.
64. On July 4, 2016 the owner sent the strata a letter requesting a dispute resolution committee about plumbing issues in her unit. On June 18, 2018 the owner sent the

strata an email stating that she had a dispute resolution committee ready and they were waiting for the strata. If the strata responded to these letters its response is not in evidence. However, given the voluntary nature of the dispute resolution process set out in the SPA and the bylaw, I find the strata was not required to engage in that process with the owner.

65. I find the strata has acted in accordance with the SPA and its bylaws with respect to hearings, written decisions and the voluntary dispute resolution process, and therefore I dismiss this claim.

***Are either of the parties entitled to reimbursement of their legal fees?***

66. The owner says she was required to hire a lawyer to assist her with her claim and she wants the strata to reimburse her \$5,000 for her legal fees.

67. The strata says there is nothing extraordinary about the owner's claims, that they are "fundamentally pedestrian and mundane," and as such the owner is not entitled to reimbursement of her legal fees. I agree that there is nothing extraordinary about this dispute entitling the owner to reimbursement of her legal fees and therefore I dismiss this claim in accordance with tribunal rule 132 which was in force at the time this dispute was commenced.

68. The strata says that since the owner's claims have no substance she should reimburse the strata \$5,000 for legal fees, and additional strata management fees and council time to deal with this dispute. However, as I have found there is nothing extraordinary about this dispute, I find the strata is not entitled to reimbursement of any portion of its legal fees or strata management fees. I dismiss this claim.

**TRIBUNAL FEES, EXPENSES**

69. Under section 49 of the Act, and the tribunal rules, since the owner was unsuccessful I find she is not entitled to reimbursement of her tribunal fees or dispute-related expenses.



## **DECISION AND ORDERS**

70. I dismiss the applicant's claims and this dispute.

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Sarah Orr, Tribunal Member