Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Bright Smile Enterprises Ltd. v. The Owners, Strata Plan LMS 1490*, 2019 BCCRT 752

B E T W E E N :

Bright Smile Enterprises Ltd.

APPLICANT

A N D :

The Owners, Strata Plan LMS 1490

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute concerns the enforcement of a strata corporation's bylaws. The applicant, Bright Smile Enterprises Ltd., owns 3 strata lots in the respondent strata corporation, The Owners, Strata Plan LMS 1490 (strata). The applicant says that the strata unfairly determined that its tenant was in breach of strata bylaws

regarding noise and hours of business operation. The applicant also says that the strata did not comply with the requirements of the *Strata Property Act* (SPA) in assessing fines for these alleged bylaw breaches. The applicant seeks an order that the bylaw fines be set aside and that the strata obtain independent third-party verification of future noise complaints.

2. The strata says that it acted in accordance with the bylaws and the SPA. The strata also says that a portion of the applicant's claims have been brought outside the applicable limitation period.

3. The applicant is represented by a principal. The respondent is represented by a member of the 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. 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.

ISSUES

8. The issues in this dispute are:

    a. whether any of the applicant's claims are out of time;

    b. whether the applicant's tenant breached the strata's bylaws;

    c. whether the strata complied with section 135 of the SPA; and

    d. whether the strata should be ordered to obtain independent third-party verification of any future noise complaints.

BACKGROUND AND EVIDENCE

9. The strata is located in the Yaletown neighbourhood of Vancouver, and is surrounded by businesses, restaurants, bars and residential properties. The strata is comprised of both commercial and residential strata lots. The applicant owns commercial strata lots 5, 32, and 33, which are all located on the ground floor of the building. These strata lots are leased to a tenant which operates a restaurant. The tenant has permission from the City of Vancouver for an outdoor patio located on the sidewalk adjacent to Mainland Street.

10. The strata's bylaws were filed at the Land Title Office in February of 2014. The documents show that the strata repealed all previous bylaws and replaced them with the February 2014 amendments. The bylaws define a "resident" as an owner, tenant, or an occupant of a residential or commercial strata lot.

11. Bylaw 8 governs the use of property, and provides that a resident or visitor must not use, or permit to be used, a strata lot or the common property (CP) in a way that, among other things, causes a nuisance or hazard to another person; causes

unreasonable noise; unreasonably interferes with the rights of other persons to use and enjoy the CP or another strata lot; or is illegal or contrary to any applicable statute, ordinance, bylaw, or regulation of any governmental authority (including, without limitation, all applicable zoning and noise control bylaws).

12. Bylaw 9 addresses quiet enjoyment, and places restrictions on the hours during which a resident may use heavy appliances or the roof deck. Bylaw 9.2 states that a resident or visitor must not use electronic equipment or musical instruments at a noise level and/or in a location that disturbs or is likely to disturb a resident in another strata lot. According to bylaw 9.3, an arriving or departing visitor must not disturb the quiet enjoyment of others. Bylaws 9.5 and 9.6 state that a resident must ensure that the noise level from visitors and children "is kept at a level that, in the sole discretion of a majority of council, will not disturb" the quiet enjoyment of others.

13. Bylaw 22 applies to commercial strata lots. According to bylaw 22.1, a commercial owner or commercial tenant must, among other things, close for business no later than 11:00 p.m. and have no speakers located on the outside of the strata lot, or placed such that they can be heard outside the strata lot. Commercial owners and commercial tenants must also provide adequate ventilation, insulation, and isolation of equipment so as not to disturb the residences above, and must comply with all applicable bylaws, regulations, and legislation (including all applicable zoning and noise control bylaws). As set out in bylaw 22.2, if a commercial owner or a commercial tenant contravenes bylaw 22.1, the strata may, after issuing an initial warning letter, levy against the commercial owner a fine of $200 for each contravention.

14. Starting in 2015, the strata received a number of complaints from residents of the strata that the applicant's tenant was not operating in compliance with the bylaws. The complaints concerned noise emanating from the restaurant and patio, and the fact that the restaurant tenant remained open beyond 11:00 p.m. The strata's property manager wrote to the applicant (with some letters also sent or carbon copied to the tenant) about the complaints.

15. The applicant and the tenant disputed the alleged breaches and the applicant requested hearings pursuant to section 135 of the SPA. The applicant asked for objective evidence of the level of noise, as well as proof that the offending noise was caused by the tenant rather than another source in the neighbourhood. The tenant did not deny that patrons were in the restaurant after 11:00 p.m., but took the position that as no sales transactions were conducted it was not open for business at that time. The tenant also stated that a television is not a speaker and is therefore not prohibited by the bylaws. The tenant also stated that the strata could not regulate what occurs on the patio, as that is on municipal property.

16. On October 1, 2015, the strata's property manager wrote to the applicant about the decision taken by the strata following a September 17, 2015 hearing. The strata decided that, in recognition of the efforts made by the tenant to comply with the bylaws and the fact that there had been no further complaints, it would remove all fines currently levied.

17. Subsequently, the strata received further complaints about noise and the tenant remaining open after 11:00 p.m. The strata advised the applicant and tenant of these complaints, and held hearings at the applicant's request. The strata decided that the bylaw contraventions had been established, and imposed fines accordingly.

POSITION OF THE PARTIES

18. The applicant says that there are other restaurants on the same block that have patios and are open past 11:00 p.m., and that it is reasonable for owners to tolerate a certain level of noise. It says that residential owners bought into the Yaletown area, and cannot now expect something different.

19. The applicant argues that the strata has not established that there has been a breach of any bylaws, and should not have imposed any fines. In particular, the applicant submits that the allegations of nuisance have not been established. It says that there has been no objective assessment of the noise, such as an acoustical assessment, bylaw violation ticket or police report to establish that any excessive

noise occurred in the strata lots that would meet the legal test for nuisance. The applicant also states that neither municipal nor strata bylaws prohibit the placement of a television on a patio.

20. The applicant's position is that bylaw 22.1(a) regarding closing time is unenforceable pursuant to section 121 of the SPA or, in the alternative, is significantly unfair to it and its tenants. The applicant submits that the fines levelled against it were not properly imposed as the strata failed to comply with the requirements of section 135 of the SPA.

21. The applicant seeks orders that the fines be set aside as there were no bylaw breaches. The applicant also seeks an order that the strata corporation obtain independent third-party verification of future noise complaints.

22. The strata's position is that it appropriately dealt with complaints about the applicant's tenant, and that it made decisions about bylaw breaches and levied fines in accordance with the bylaws and the SPA. The strata says that the applicant's claim with respect to fines levied more than 2 years prior to the filing of its dispute notice are statute-barred.

ANALYSIS

Limitation Period

23. The *Limitation Act* applies to disputes before the tribunal, and places a limit on the time period in which a claim may be brought. If that time period expires, the claim may not be brought, even if it might have been successful. The current version of the *Limitation Act* became law in British Columbia on June 1, 2013 and requires, with some exceptions, that a claim be started within 2 years of when it was discovered.

24. The events that gave rise to this dispute began in 2015. The strata says the 2-year limitation period has expired for the parts of the applicant's claim that occurred more

than 2 years before it filed its Dispute Notice on January 2, 2018. The applicant does not agree that any portion of its claim is statute-barred.

25. In *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd.*, 2015 BCSC 2273, (affirmed 2016 BCCA 370), the British Columbia Supreme Court noted that the *Limitation Act* applies to claims which are defined as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". The Court found that, as the payment of a penalty is not a claim to remedy an injury, loss, or damage, the *Limitation Act* did not apply to the claim to enforce a bylaw fine under the SPA.

26. The applicant seeks to reverse rather than enforce bylaw fines. This situation was considered in *Lenahan v. The Owners, Strata Plan NW 976*, 2019 BCCRT 462 at paragraph 11, where a tribunal member found that the same principles outlined by the Court in *KAS 3549* for the enforcement of a fine apply where a party seeks to rescind a fine. This decision is not binding upon me, but I find it to be persuasive. As the bylaw fines are not to remedy an injury, loss or damage, I find that the *Limitation Act* does not apply and the applicant's claims are not statute-barred.

27. Even if I am incorrect in my conclusion regarding the application of the *Limitation Act*, the fines that would have been statute-barred were reversed by the strata, as communicated in the property manager's October 1, 2015 letter.

Bylaw Breaches

28. The parties hold differing views as to whether the tenant's use of the strata lots as a restaurant operation resulted in breaches of the strata's bylaws. The applicant suggests that, as there is noise from many sources given the vibrant nature of the Yaletown area, it cannot be proven that the tenant's patio was the source of the problem.

29. The applicant also says that complaints should be made with reference to a third-party document (such as a municipal bylaw ticket or police report) or assessed by an objective standard. I note that the City of Vancouver's noise bylaw does identify

specific noise levels that are acceptable in certain areas. However, this noise bylaw is not adopted by the strata. The bylaws give discretion to the strata council to determine reasonable levels of noise and standards of quiet enjoyment. In their current form, the bylaws do not require reference to an objective standard or third-party document.

30. With respect to the patio, I find that the bylaws do not apply to this area as it is not part of a strata lot. However, the bylaws do apply to the tenant's overall use of the strata lots as a restaurant operation. This includes its use of a television to entertain its patrons. I find that bylaw 22.1 applies to a television, as it contains speakers that emit sound that can be heard outside the strata lot. Even if I am incorrect in my assessment in that regard, bylaw 22.1 requires that equipment be insulated and isolated so as not to disturb the residences above, and I am satisfied that a television would be captured within the meaning of equipment.

31. The strata received complaints from a resident or residents, one of whom provided video footage. Some of the footage was taken from inside the strata lot, while other portions were taken from a balcony area overlooking the patio. The footage shows the patio and the surrounding sidewalk, and patrons are clearly visible on the patio area. Some footage documents instances of noise that appear to relate to television sports broadcasts. Commentators can be heard, in addition to noise from patrons in the form of cheering, clapping, shouting, whistling, chanting, singing and a thumping noise that appears to come from patrons banging on tables. Portions of the footage show people on the sidewalk adjacent to the patio, some walking by and others appearing to stand and watch the television on the patio. While it is possible that some noise is coming from these pedestrians, I find that the footage establishes that a large amount of noise is coming from the patrons on the patio.

32. Bylaw 8 is not limited to nuisance, but has a broader scope that includes unreasonable noise. Thus, it is not necessary for conduct to meet the legal test of nuisance in order for the bylaw to be breached. Based on the boisterous behaviour of the patrons on the tenant's patio, I find that it was reasonable for the strata to

determine that the tenant had breached the bylaws about noise and interfering with quiet enjoyment of residents.

33. Some of the complaints dealt with the tenant being open beyond 11:00 p.m. The tenant's evidence is that it did not conduct any sales transactions after 11:00 p.m., and that there is no bylaw against having occupants in the strata lots after that time. Bylaw 22.1 requires that a commercial tenant close for business, not just cease transactions, by 11:00 p.m. I find that the tenant's evidence amounts to an admission that it remained open and did not close by 11:00 p.m. as required by bylaw 22.1.

34. I do not agree with the applicant's submission that the closing requirement in bylaw 22.1 is unenforceable as contemplated by section 121 of the SPA. This section states that a bylaw is not enforceable to the extent that it contravenes the SPA and associated regulations, the *Human Rights Code*, or any other enactment or law; destroys or modifies an easement created under section 69; or prohibits or restricts the right of an owner to feely sell, lease, mortgage or otherwise dispose of the strata lot. The tenant holds provincial and municipal licences that permit (but do not require) operation until later hours. I do not find that the bylaws contravene any enactment or law in this regard, and the licences do not alter the tenant's responsibility to adhere to the strata's bylaws.

35. The applicant also argues that bylaw 22.1 is significantly unfair as it puts the tenant at a competitive and financial disadvantage as it is required to close by 11:00 p.m. while neighbouring restaurants (many of which have patios) are allowed to remain open.

36. Section 164 of the SPA permits the courts to make orders to remedy or prevent significant unfairness in strata disputes. Section 123(2) of the Act contains similar language to section 164 of the SPA, and addresses remedies for significant unfairness. Section 123(2) provides that the tribunal has discretion to make an order directed at the strata, the 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.

37. The courts have determined that "significantly unfair" actions are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable (see *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128). The British Columbia Court of Appeal considered section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in this case was restated in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, as follows: What is or was the expectation of the affected owner or tenant? Was that expectation on the part of the owner or tenant objectively reasonable? If so, was that expectation violated by an action that was significantly unfair?

38. I am not satisfied that the applicant or its tenant had an objectively reasonable expectation that the strata would not enforce bylaw 22.1 and permit the tenant to operate later than 11:00 p.m. simply because other businesses in the area are not subject to the strata's bylaws. There is no indication that the strata has permitted other commercial strata lots to operate in contravention of the bylaws for this or any other reason. I am unable to conclude that the strata's enforcement of its bylaws amounts to a significantly unfair action in these circumstances.

Compliance with Section 135 of the SPA

39. The applicant submits that the fines were not imposed appropriately as the strata did not comply with the requirements of section 135 of the SPA. This section states that a strata must not impose a fine against a person, require a person to pay the costs of remedying a contravention, or deny a person the use of a recreational facility for a contravention of a rule or bylaw unless the strata has received a complaint about the contravention, given the owner or tenant the particulars of the complaint, and a reasonable opportunity to answer the complaint, including a hearing if requested.

40. The applicant says the complaint letters did not provide it with sufficient particulars of the alleged contraventions. It says that the letters contain broad time frames,

generalized descriptions of the noise, and references to unidentified patrons. I find that the letters contained sufficient details about the timing and nature of the conduct that attracted the complaints.

41. The applicant also expressed concern that the letters contained preliminary conclusions about bylaw breaches. Section 135 prevents a strata from imposing a fine without warning, but does not restrict a strata's ability to form a preliminary conclusion. I do not find these references to preliminary conclusions bring the strata out of compliance with section 135.

42. I do find that, in one instance, the strata did not meet its obligations under the SPA. The May 8, 2015 letter provided particulars of a complaint, and imposed a fine of $200 before the applicant had an opportunity to respond or request a hearing. This communication did not comply with section 135 of the SPA. However, this contravention was remedied when the strata reversed the fine, as communicated in the October 1, 2015 letter.

43. I find that the remainder of the bylaw breaches were communicated to both the applicant and the tenant (addressed directly or by carbon copy, which I find to be sufficient), and that the applicant had hearings to address the complaints. I am satisfied that the strata's decisions to impose fines were in compliance with section 135 of the SPA. The applicant is responsible for the associated fines.

44. I would point out that, based on the ledger submitted in evidence by both parties, it is not clear whether the fines said to be reversed in the October 1, 2015 letter have been removed from the applicant's account. In accordance with the strata's previous decision, the applicant is not responsible for fines levied prior to this date. The applicant is responsible for the remainder of the fines assessed by the strata.

Independent Verification of Future Complaints

45. The applicant seeks an order that the strata obtain independent third-party verification of any future noise complaints. It is not clear to me whether the applicant

wishes to create a new bylaw or set of guidelines for interpreting the bylaws as they pertain to noise.

46. As discussed above, the bylaws contain language that allows the strata council to use its discretion when assessing issues surrounding noise and quiet enjoyment. I find that I do not have the jurisdiction to order a change to the bylaws or to place limits on the manner in which the strata council exercises its discretion. The applicant may wish to pursue this option directly with the strata council and/or strata ownership.

TRIBUNAL FEES AND EXPENSES

47. 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. As the applicant was not successful, I dismiss its claim for reimbursement of tribunal fees and dispute-related expenses. The strata did not make a claim in this regard.

48. The applicant requested that the strata reimburse its legal fees on the basis that the strata engaged in heavy-handed conduct that is worthy of rebuke. The applicant was unsuccessful, and did not provide any evidence that it incurred such fees. Even if it had, I would not make the order requested. Rule 9.4(3) states that the tribunal will not order one party to pay to another party any fees charged by a lawyer or other representative unless there are extraordinary circumstances which would make such an order appropriate. I do not find that the circumstances of this dispute are extraordinary, and I dismiss the applicant's claim for reimbursement of legal fees.

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

DECISION AND ORDERS

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

Lynn Scrivener, Tribunal Member