Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Hensman v. Ostrom et al,* 2019 BCCRT 785

B E T W E E N :

Dave Hensman

APPLICANT

A N D :

Leigh Ostrom and Karen Ostrom

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Kathleen Mell

INTRODUCTION

1. This dispute is about the placement of a shed and a hedge on a strata lot. The applicant, Dave Hensman, owns strata lot 2 in a strata corporation, The Owners, Strata Plan EPS614 (strata). The strata consists of 3 strata lots and some common property, including a roadway. Each strata lot contains a house and a yard area.

The respondents, Leigh Ostrom and Karen Ostrom, own strata lot 1 (SL1), the strata lot beside the applicant.

2. The applicant submits that the respondents should not have placed a shed and a hedge on their strata lot. He argues the hedge goes through a shared garden and that the shed devalues his view of the of the gardens and the forest, in contravention of the strata's bylaws. The respondent requests $1,000.00 to restore the landscape to its original design and an order that the shed be removed.

3. The respondents made joint submissions and say that the shed was put up in 2014, before the applicant purchased his strata lot, and therefore this aspect of the dispute is barred under the *Limitation Act* (LA). The respondents submit that the hedge is on their strata lot and not running through a shared garden or common property. They argue they are not in violation of any bylaw. All parties are self-represented.

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. In some respects, this dispute amounts to a "he said, they said" scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

6. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also

note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.

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, in resolving this dispute the tribunal may make one or more of the following orders:

    a. order a party to do something;

    b. order a party to refrain from doing something;

    c. order a party to pay money.

ISSUES

9. The issues in this dispute are:

    a. Is the claim about the shed barred by the LA?

    b. if not, was the placement of the shed in contravention of the strata's bylaws?

    c. If so, what is the correct remedy?

    d. Was the planting of the hedge in contravention of the strata's bylaws and if so what is the correct remedy?

EVIDENCE, FINDINGS AND ANALYSIS

10. While I have read and viewed all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.

11. I note that the evidence does not suggest that the applicant requested a hearing under section 34.1 of Strata Property Act (SPA) with the strata council before requesting resolution of the claim with the tribunal as required under section 189.1 of the SPA. This is a small strata with only three strata lots. The applicant says that one of the respondents is the president of the strata. The evidence indicates that the owners of all three strata lots have communicated their positions regarding the issues both verbally and via email and were unable to resolve their differences. Although applicants must generally request a hearing from the strata council before applying to the tribunal for strata property resolution, the tribunal can waive that requirement in certain circumstances. I have decided to waive the hearing requirement as I do not believe a hearing of the strata council would assist the parties to resolve this dispute.

The Shed

12. The respondents purchased their strata lot in September 2014. The applicant purchased his strata lot in March 2016. The applicant alleges that after he took possession of his strata lot a temporary shed was placed adjacent to the garden in the front yard of the respondents' strata lot.

13. The respondents say that the applicant's statement is inaccurate and that the shed was erected on their private parking area in 2014 and that it was already there when the applicant took possession of his strata lot. The respondents argue that this claim is barred by the LA.

14. The respondents provided the invoice for the shed which is dated September 2014. The applicant did not provide evidence to support his claim that the shed was erected after he took possession. He was also vague as to what exact date he alleges the shed was erected. Based on the evidence, I accept the respondents' evidence that the shed was erected in 2014.

15. Section 6 (1) of the LA says that a court proceeding in respect of a claim must not be commenced more than two years after the day on which the claim is discovered. Further, a claim is discovered by a person on the first day on which the person

knew or reasonably ought to have known that an injury, loss or damage had occurred. The applicant filed this dispute on November 6, 2018. Since I have found that the shed was erected in 2014 and was already there when the respondent took possession of his strata lot in March 2016, I find that he had knowledge as of that date and did not suffer an injury, loss or damage afterward. The applicant purchased the property knowing that the shed was there, and the evidence does not support a finding that the claim was discovered after March 2016.

16. Accordingly, I find that this claim is barred by the LA. I therefore dismiss it.

The Hedge

17. Both parties agree that the Standard Bylaws from the SPA apply to this dispute. Amended bylaws were filed in May 2014 at the Land Title Office. The amended bylaws did not refer to the issues involved in this dispute. Therefore, the relevant Standard Bylaws are as follows:

> **3** (1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that
>
> (a) causes a nuisance or hazard to another person,
>
> (b) causes unreasonable noise,
>
> (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,
>
> (d) is illegal, or
>
> (e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.

18. The applicant says that the respondents planted a hedge through the shared garden in late 2018. The applicant does not dispute that the hedges are solely on the respondents' strata lot and are not on common property. The applicant says there is caselaw that prevents strata owners from altering their strata lots including

by making changes related to flooring and window coverings. He relies on this to support his position that the respondents are in contravention of the bylaws by altering their property and planting a hedge without strata approval.

19. I do not accept this argument. The prohibited alterations the applicant refers to are usually based on restrictions set out in amended strata bylaws. This strata has no such amended bylaws regarding alterations and therefore this argument does not assist the applicant.

20. The Standard Bylaws contain bylaw 5(1)(e) which says an owner must get strata permission before altering "fences, railings or similar structures that enclose a patio, balcony or yard." Although I accept that a hedge can fit within this description, the pictures do not reveal, and the applicant did not argue, that the line of shrubs making up the hedge enclose the yard. I also find that in its current state the hedge is not the equivalent of a fence. There are gaps between the shrubs and it looks to be of a size a person could simply walk over. Therefore, I find that this bylaw does not apply in this case.

21. The applicant also argues that although the gardens crossing over the boundaries of the strata lots are not common property they are shared, they were architecturally designed this way, and they are part of the original design of the strata. He says that they are for the mutual enjoyment of all the strata owners. The applicant relies on bylaw 3(1)(e) and says that the gardens were designed to be shared and for the respondents to plant a hedge making it an exclusive garden is in contravention of what is expressly or by necessary implication shown on the strata plan.

22. The respondents argue that they planted the hedge to mark off property lines between the two lots, that the hedge is on their strata lot, and they reject the applicant's position about shared gardens.

23. I have reviewed all the photos provided as well as the strata plan. The applicant has also submitted his own illustration of what he says is the positioning of approximately eleven shared gardens crossing the strata boundaries. This is the

applicant's rendering and he has not provided any evidence that this is what was intended by the strata plan.

24. I find that the strata plan does not support the applicant's position. It shows the individual strata lots with the property lines running through them. The only common property shown is the roadway. Accordingly, I do not accept the applicant's position that planting the hedge violated bylaw 3(1)(e). The strata plan does not support the applicant's claim that the planting of a small hedge on the respondents' strata lot is contrary to the strata plan.

25. I note that the photos reveal, and the applicant does not contest, that the hedge is completely on the respondents' strata lot. At its current size the hedge does not interfere with the larger garden or forest area but rather is a small row of shrubs marking the property line. Therefore, it also does not appear to affect the view of the larger landscape in a way that would affect the applicant's use and enjoyment of his property under bylaw 3(1)(c). Also, bylaw3(1)(c) is effectively a bylaw preventing nuisance to other strata lot owners. Courts have held that blocking or changing a view is not a legal nuisance: see *Zhang v. Davies*, 2017 BCSC 1180; *Christensen v. District of Highlands*, 2000 BCSC 196. Thus even if I were to accept that the respondents' hedge limits the applicant's view, I find it is not prohibited by bylaw 3(1)(c).

26. The applicant argues that the hedge is not full grown and, when it is, it will either encroach on his strata lot or the respondents will have to cross onto his strata lot to maintain it. The applicant has not provided any evidence establishing how large this type of hedge will grow. Also, there is no way of knowing now that the respondents would allow the hedge to grow to the point where they could not maintain it from their own strata lot or that they would allow it to encroach on the applicant's strata lot. I find this argument speculative and therefore will not make an order based on this hypothetical scenario.

27. Both parties made submissions about whether the applicant could build a fence which would block the respondents' view of the ocean. This issue is not before me

and my decision that the hedge is not in contravention of the Standard Bylaws in no way is a finding that a fence on the applicant's property would not be in contravention of the Standard Bylaws. Each dispute is fact specific. I again note that the strata does not have amended bylaws in place to address these issues. It may be advisable that the strata proactively consider bylaw amendments.

28. The respondents suggested that the applicant's spouse should be added as a party to this dispute as she is also an owner of SL2. Because I have made no order requiring the applicant or his spouse to do anything, I do not find it necessary to add the applicant's spouse as a party.

TRIBUNAL FEES, EXPENSES AND INTEREST

29. Under section 49 of the Act, and the tribunal's rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable expenses related to the dispute resolution process. As the applicant was unsuccessful in this dispute I find he is not entitled to reimbursement.

30. The respondents have requested $472.50 for the appraisal report about how much their property would go down in value if the applicant was allowed to construct a fence interfering with their view. As this was not an issue in this dispute, I find that the respondents are not entitled to be reimbursed for this expense.

31. The respondents have also requested $525.00 for a sketch plan which shows where the boundary line is between their strata lot and the applicant's. From the beginning of the dispute the applicant alleged that the hedge was planted on a shared garden but did not allege that it was not within the respondents' strata lot. Although this expense is related to the dispute, I find it was not a reasonable expense as this fact was not in dispute. Further, the respondents have not provided an invoice to establish the cost of the report. Therefore, I find that the respondents are not entitled to be reimbursed for the cost of the sketch plan.

DECISION AND ORDERS

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

Kathleen Mell, Tribunal Member