



Civil Resolution Tribunal

Date Issued: July 16, 2019

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 2597 v. West*, 2019 BCCRT 856

B E T W E E N :

The Owners, Strata Plan LMS 2597

APPLICANT

A N D :

Kevin West

RESPONDENT

A N D :

The Owners, Strata Plan LMS 2597

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This dispute is about the installation of a heat pump/condensing unit (heat pump) to provide a strata lot with heating and air conditioning.
2. The respondent Kevin West owns strata lot 71 (SL71) in the applicant strata corporation the Owners, Strata Plan LMS 2597 (strata).
3. The strata plan shows that SL71's balcony is limited common property (LCP).
4. The strata says Mr. West had the heat pump installed without its permission, in violation of strata bylaws, and without the required building, electrical and development permits. In July 2017, the strata became aware of the installation and demanded its removal.
5. The strata asks for an order that the heat pump be removed from the balcony and the building envelope be repaired, at the owner's expense.
6. A strata council hearing was held. Strata council denied Mr. West's request to keep the heat pump in place.
7. Mr. West's further request to modify the heat pump installation so the pipes passed through a window, rather than through the building envelope, was also denied. The strata says it has historically denied such requests due to concerns about maintenance, liability, noise and vibration.
8. The parties resolved some issues in this dispute prior to adjudication. Those issues are not before me.
9. On his counterclaim, Mr. West says that the heat pump can be operated in such a way that the building's exterior wall is not penetrated. He proposes that the heat pump be installed through a window in his strata lot, with alterations to the cabinet and wall inside the unit to accommodate the heat pump hose. Mr. West says the existing opening in the building envelope would be closed.

10. Mr. West asks for an order that,
 - a. all fines related to bylaw infraction for noise or illegal activity be cancelled, and
 - b. the heat pump and its related components be allowed as presently installed in his strata lot and the common property or, in the alternative, allowing an installation through a window.
11. The strata asks that Mr. West's counterclaim be dismissed. The strata says it acted appropriately in denying Mr. West permission to keep the heat pump installed.
12. Mr. West is represented by his sister, Jane Solovyov. The strata is represented by strata council member Brenda Baker.

JURISDICTION AND PROCEDURE

13. 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.
14. 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.
15. 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.

16. 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

17. The issues in this dispute are:

- a. whether the strata's decision to require Mr. West to remove the heat pump installation is reasonable,
- b. whether the fines imposed for violating the bylaws through the heat pump installation, and failing to remove it, should be upheld, and
- c. whether the strata must approve Mr. West's request to an alternate heat pump installation through the window.

BACKGROUND AND EVIDENCE

Bylaws

18. The applicable bylaws were filed at the Land Title Office (LTO) on May 21, 2002, subject to certain later amendments that do not directly address the issue of the heat pump installation.

19. Bylaw 3 says that a resident may not use a strata lot in a way that causes unreasonable noise, nuisance or hazard to another person.

20. Bylaw 3(2) says that a resident must not damage common property.

21. Bylaw 5 requires that an owner obtain the strata's written approval before altering the structure or exterior of the building, windows on the exterior of the building or that front on common property, or any common property located within the boundaries of a strata lot.

22. Bylaw 5(2) says a strata must not unreasonably withhold its approval under Bylaw 5(1), but may require as a condition of approval that the owner agree to take responsibility for any expenses relating to the alteration.
23. Bylaw 6(1) says that a resident must obtain the strata's written approval before altering common property, including limited common property.
24. Bylaw 6(2) says that the strata may require an owner to take responsibility for any expenses relating to the alteration, in writing, as a condition of granting approval.
25. An April 23, 2018 bylaw amendment shows that the strata allows hot tubs, with use and operation between 8:00 a.m. and 10:00 p.m. only.
26. An April 26, 2017 bylaw amendment sets conditions for installation and use of hot tubs, including requirements for professional engineering approval and that they be isolated from the deck by a sound absorbing material.
27. Section 1 of the *Strata Property Act* (SPA) defines common property as including pipes for the passage or provision of heating and cooling systems, or other similar services, if they are located within a wall that forms a boundary between a strata lot and common property.

Factual Background

28. In April 2015, Mr. West purchased SL71.
29. At the time of purchase, Mr. West says there was an opening in the building exterior at SL71, used to service a hot tub that once sat on the balcony.
30. The strata disputed that SL71 ever had a hot tub installed. However, the strata filed a real estate video of SL71, predating Mr. West's purchase, that clearly shows a hot tub operating on the balcony. Based on this and the real estate listing evidence, I find that there was once a hot tub on the SL71 balcony.
31. However, based on the evidence I am unable to find that the hole in the building envelope used to run the pipe from the heat pump was the hole originally used for

the hot tub. I find that a new hole in the building envelope was made to install the heat pump, based on the photographic evidence.

32. The real estate listing also shows, and I find, that SL71 had no heat pump or air conditioning prior to being purchased by Mr. West.
33. Mr. West admits in submissions, and I find that, at some point after he purchased SL71, he installed the heat pump. The heat pump itself is movable and not fixed to the balcony, but rests on the balcony deck. The pipe from the heat pump is passed through a hole in the building envelope.
34. The heat pump is presently the only form of heating for SL71.
35. The only alternative to heat the unit would be baseboard heaters. Mr. West argues that baseboard heaters are unsafe because they can cause fires. I dismiss this argument. Many other owners in the strata use baseboard heating. Prior to the heat pump installation, SL71 also had baseboard heating. I accept that baseboard heating is reasonably safe if installed to code and used appropriately.
36. If Mr. West had to reinstall baseboard heaters in SL71, I find it would cost around \$12,000, based on a quote from Powerhouse Electrical he filed in evidence.
37. On November 2015, the strata inspected SL71. Mr. West says the strata did not raise any concerns about the heat pump installation at that time. It was unclear, on the evidence before me, that the heat pump installation was part of that inspection. An email dated November 10, 2015 shows that the strata inspected renovations in SL71, raising issues about the lack of permits for the installation of a gas fireplace and new bath tubs.
38. On June 17, 2017, strata council received an email from another owner saying that built-in air conditioning had been installed at SL71. The owner asks why, if SL71 has air conditioning, the strata did not approve that owner's previous request to install it.

39. On June 17, 2017, the strata wrote to Mr. West indicating he would be fined \$200 for violating Bylaw 3(2) and 5(1) for installing the heat pump and penetrating the building envelope.
40. At about that time, the strata's property manager generated a letter, described as a "Fine – One Time" notice for \$200. I infer that this letter was sent on July 25, 2017.
41. On July 25, 2017, the strata wrote to Mr. West saying that the heat pump and the penetration of the building envelope was an "unauthorized alteration" and asked that it be removed, and the building envelope be returned to its original condition within 30 days.
42. The July 25, 2017 letter says the heat pump installation is a violation of Bylaw 3(2), which prohibits a resident from damaging common property, Bylaw 5, which requires a resident to obtain the strata's written approval before altering the structure or exterior of the building or the common property located within strata lot boundaries, and Bylaw 6, which requires a resident to obtain the strata's written approval before altering common property.
43. The July 25, 2017 letter also says the installation "will result in a fine of \$200 being billed" to Mr. West's strata lot account. The letter then offers an opportunity to dispute the fine, by requesting a council hearing within 14 days of July 25, 2017.
44. On August 3, 2017, then counsel for Ms. Solovyov wrote to the strata saying that Michael and Jane Solovyov disputed the fine mentioned in the July 25, 2017 letter, and asked that the strata refrain from levying any fines until a further investigation had been made.
45. On August 11, 2017, Mr. West hired a contractor who provided an opinion that the heat pump and its components were installed according to the Canadian Electrical Code.
46. On September 13, 2017, Ms. Solovyov appeared at a strata council hearing on the issue of the heat pump. Strata council's letter says that, at the hearing, Ms. Solovyov said that the baseboard heaters had been removed and the heat pump/air

conditioning system installed prior to Mr. West purchasing the unit. This is noteworthy, because Mr. West now admits installing the heat pump in SL71. Ms. Solovyov argued that a requirement to remove the system would put the owners of SL71 at a hardship to replace all wiring and heaters.

47. On September 27, 2017, the strata wrote to Mr. West and Ms. Solovyov to say that it had reviewed photographs of SL71 made public by the seller prior to purchase of SL71, showing space heaters but no air conditioning units. The strata concluded that the installation of the heat pump was completed without authorization, after Mr. West purchased S71. The strata decided to require the heat pump to be removed and the building envelope returned to its original condition, within 30 days.
48. The strata then levied fines of \$800 per month, broken down as \$200 weekly.
49. On October 27, 2017, the then lawyer for Mr. West wrote to the strata indicating that this matter would be brought before the tribunal. In submissions, Mr. West suggests that the strata should have stopped issuing fines on this date.
50. On March 1, 2018, the City of Whistler informed Mr. West that a complaint was received about unauthorized construction having taken place to common property, and that Technical Safety BC confirmed no electrical permit had been issued.
51. On March 6, 2018, Mr. West asked the strata council for permission to modify SL71's balcony window for a pipe from the heat pump to be placed through it, meaning there would not be no screws or nails, and no holes through the exterior wall.
52. On March 21, 2018, the strata refused to permit the window installation of the heat pump. In its letter, the strata said that council voted to deny the request because the initial installation was unauthorized, resulting in a section 83 work order from Whistler, and because requests to install air conditioning systems in individual strata lots had been "denied historically to other owners."
53. On May 29, 2018, Mr. West obtained an electrical certificate of inspection for the existing heat pump installation.

POSITION OF THE PARTIES

54. Mr. West argues that:

- a. There was a pre-existing hole in the building envelope, so there was no change to the common property by installing the heat pump pipe through the hole.
- b. Mr. West says any change to the building exterior or to the common property was not a “material change”.
- c. As an alternative, Mr. West asks that the strata approve his alternate installation, which would involve building a custom window into SL71, and alterations to a cabinet and wall inside SL71 to accommodate the heat pump hose, with the hole in the building envelope being sealed.

55. Mr. West requests that I order the strata to

- a. cancel all fines relating to bylaw infractions regarding the heat pump installation, and
- b. permit him to install and use the heat pump whether through the existing installation or the window installation.

56. The strata asks that Mr. West’s counterclaim be dismissed. It says that the fines were properly imposed for Mr. West’s breach of the bylaws by installing the heat pump without advance written permission.

57. The strata says its decision to deny permission for the alternate installation is reasonable. The strata says there are concerns about noise, vibration and liability. It points out that other owners’ requests for air conditioning installations of this type have been refused.

ANALYSIS

Did Mr. West violate strata bylaws by installation the heat pump without the strata's permission?

58. I find that Mr. West altered limited common property by installing the heat pump on his balcony. At the time, I find he did not have advance written authorization from the strata. I find that he violated Bylaws 5 and 6 by conducting the installation.

59. Specifically, the part of the exterior wall where a hole was cut to install the heat pump piping was common property. The balcony itself is LCP. The installation is an alteration to the common property. (see *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS 4591*, 2018 BCCA 187, at paragraphs 11-13)

Is the strata's decision to refuse to allow the heat pump to remain installed, or to approve the alternate window installation, significantly unfair?

60. Section 164 of the SPA provides that a court may make an order it considers necessary to remedy a significantly unfair action against an owner who applies for relief. Section 123(2) of the act mirrors the language of section 164 and thus grants similar authority to the tribunal. The Supreme Court of British Columbia confirmed this authority of the tribunal in *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.

61. The courts and the tribunal have considered the meaning of "significantly unfair" in a number of contexts, equating it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the British Columbia Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

62. The Court of Appeal has also considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *Watson* at paragraph 28:

The test under s. 164 of the *Strata Property Act* also involves objective assessment. [*Dollan*] requires several questions to be answered in that regard:

1. What is or was the expectation of the affected owner or tenant?
2. Was that expectation on the part of the owner or tenant objectively reasonable?
3. If so, was that expectation violated by an action that was significantly unfair?

63. Mr. West argues that because the strata inspected SL71 in 2015, but did not object to the heat pump until 2017, he had a reasonable expectation that the strata did not oppose the heat pump installation.

64. I find Mr. West's expectation that he could install a heat pump system, including piping installed through a hole in the building envelope, leaving a large, quite permanent item on the balcony, was unreasonable. As an owner, Mr. West should have known that the Bylaws required advance written approval for the installation. He is bound by the bylaws, even if he was unaware of them. Considering the Bylaws, the 2015 inspection was not something Mr. West can rely on as tacit strata approval.

65. Mr. West says it is burdensome to require him to install baseboard heaters, which he estimates would cost \$12,000, when the heat pump is an existing heat source.

66. I disagree. Given that he installed the heat pump, I find that Mr. West himself removed the baseboard heating. I find he cannot rely upon that to bolster the argument that the strata has been significantly unfair. On this point I refer to the Chambers judge's decision in *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS 4591*, 2018 BCSC 1646, at paragraph 44, where the court

noted that where an unauthorized installation took place, the degree of unfairness had been compromised by the actions of the applicant.

67. I find that strata council's decision not to approve the installation as it stands is not significantly unfair. I say this because the heat pump will cause some noise and vibration and has piping installed through a hole in the building envelope, which raises the spectre of water ingress.
68. Section 133 of the SPA allows a strata to do what is reasonably necessary to remedy a breach of its bylaws. I find that the requirement to have the authorized heat pump installation removed was a reasonable requirement to remedy the bylaw violation.
69. I find the strata's decision to require Mr. West to repair the hole in the building envelope, at his own expense, reasonable.

Is the strata's decision not to approve Mr. West's alternate installation, through the custom-made window, significantly unfair?

70. Mr. West asked that the strata approve his alternate installation, which would involve building a custom window into SL71, and alterations to a cabinet and wall inside SL71 to accommodate the heat pump hose, with the hole in the building envelope being sealed. The strata refused its permission for this installation.
71. I find that the alternate installation will not impair the building envelope. The pipe being installed would be run through an existing window, according to the photographs filed in evidence. The strata could attach conditions about soundproofing around the unit and liability and indemnity provisions, as it does with hot tubs within the strata.
72. I have considered the fact that the strata allows hot tubs, subject to certain restrictions. If it did not, a heat pump system such as this might constitute a significant change. The installation proposed by Mr. West is no more unsightly than

a hot tub. As well, hot tubs are associated with some noise and vibration, as well as liability and damage risks.

73. Bylaw 5 says the strata must not unreasonably withhold approval for an alteration to the windows on the building's exterior or any common property located within the boundaries of a strata lot. Given the reasonableness standard set out in this bylaw, I find the alternate installation should have been approved.
74. Mr. West argues that where a bylaw gives strata council discretion to allow or disallow a request, the strata council must have a justifiable reason for refusing permission. (see *Maslek et al v. The Owners, Strata Plan LMS 2778*, 2018 BCCRT 106)
75. I agree. In *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44, the court set a high threshold for significant unfairness. The fact that a decision adversely affects some owners to the benefit of others is not enough to find significant unfairness.
76. I find that the strata acted unreasonably in refusing to approve an alternate installation of the heat pump that will use the window for the piping and close the hole in the building envelope. I say this because the strata can impose conditions about its concerns. It can require soundproofing of the deck, and a written liability and indemnity agreement.
77. The fact that certain other owners have been denied permission to install air conditioning/heating systems is not, on its own, enough to find that it would be significantly unfair to allow Mr. West to install his heat pump, using his alternate proposal.
78. I find that Mr. West's alternate proposal, to alter the installation so that the piping goes through the window rather than the building envelope, should be approved, with conditions similar to those required for hot tub installations in the strata. The strata may make it a condition of approval that Mr. West obtain professional engineering approval and agree to take responsibility for any expenses relating to the alteration.
79. I direct the strata to approve the alternate installation of the heat pump, on conditions of professional engineering approval, a grade of soundproofing

equivalent to what it requires for hot tubs, and a requirement for a liability and indemnity commitment from Mr. West for the alteration.

Should the bylaw fines levied against Mr. West be reversed?

80. I now turn to Mr. West's claim to have the fines imposed against SL71 reversed.
81. I find that the September 27, 2017 letter complies with section 135 of the SPA in giving timely written notice of strata council's decision to require that the heat pump be removed and the building envelope returned to its original condition by October 28, 2017.
82. However, I find that the September 27, 2017 letter does not comply with the requirement under section 135 to give written notice of a decision in respect of the fines. In my view, section 135 requires enough detail of the decision that a strata lot owner is made aware of what has been decided, what the penalties or requirements are, and why. The September 27, 2017 letter from the strata does not mention fines at all. For these reasons, I find that the strata failed to give notice of its decision to impose the initial \$200 fine.
83. Mr. West asks for reversal of \$11,876.61 in fines and interest.
84. The SL71 account shows that the strata levied a \$200 fine on a "weekly recurring" basis from November 2017 to November 2018, plus interest.
85. Mr. West submitted that the ledger shows \$11,876.61 in fines and interest. On review of the strata lot ledger, the \$11,876.71 includes strata fees of \$510.64 for each of December 2018 and January 2019.
86. I have deducted these strata fees from the total claimed. I find that the fines and interest total \$10,855.33.
87. This figure is based on weekly fines of \$200 assessed for about 1 year between November 2017 and 2018.

88. Bylaw 23 (a) allows the strata to fine an owner a maximum of \$200 for each contravention of a bylaw.
89. Bylaw 24 provides that, where an activity or lack of activity that is a bylaw contravention and continues uninterrupted for over 7 days, the strata may impose a fine every 7 days.
90. Section 132(2) and 132(3) of the SPA permit a strata to enact bylaws setting different fines for different bylaws, and how often fines may be imposed for continuing contraventions – provided that the maximum amount and frequency of the fine does not exceed the maximums set out in the regulations. I find that the amount of the fines and frequency of the fines set out in the bylaws accord with the regulations.
91. Before imposing a fine, section 135 of the SPA requires that a strata must have:
 - a. Received a complaint,
 - b. Given the owner written details of the complaint and an opportunity to answer, including a hearing if requested.
92. As well, the strata must give written notice of its decision as soon as reasonably possible. Once the strata has met these requirements under section 135, it may impose further fines for continued contraventions of the same bylaw without having to through the same exercise.
93. Mr. West says that the strata failed to comply with section 135 of the SPA. I agree. I found that the strata failed to comply with section 135 (2) in its written decision. The written decision issued September 27, 2018 does not provide any notice of the decision to impose a fine.
94. I find the initial fine, and the continuing fines under section 135(3), invalid because of this failure to comply with section 135(2).
95. Given this finding, I order the strata to reverse \$10,855.33 in fines and interest charged to SL71's account for bylaw fines related to heat pump installation.

TRIBUNAL FEES and EXPENSES

96. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Here, success was divided. For this reason, I order that each party bear its own tribunal fees and dispute-related expenses.
97. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

DECISION AND ORDERS

98. I order that, within 30 days of this decision:
- a. the strata reverse \$10,855.33 in fines and interest charged to SL71's account for heat pump installation;
 - b. Mr. West, at his own expense, remove the heat pump piping and repair the hole in the building envelope through which it runs;
 - c. the strata approve Mr. West's alternate installation for the heat pump, through the existing window, with no holes through the building envelope, on the condition that Mr. West obtains engineering approval, agrees to be responsible for all expenses arising from the alteration, sufficiently soundproofs the heat pump unit that will sit on the balcony to the standards required for hot tubs in the strata, and provides the strata with a written assumption of liability and indemnity, satisfactory to it.
99. 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 123.1 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.

100. 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 123.1 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.

Julie K. Gibson, Tribunal Member