



Civil Resolution Tribunal

Date Issued: August 7, 2019

File: ST-2019-001675

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VIS1100 v. Daam*, 2019 BCCRT 946

B E T W E E N :

The Owners, Strata Plan VIS1100

APPLICANT

A N D :

DOLF DAAM

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. The applicant strata corporation The Owners, Strata Plan VIS1100 (strata) says the respondent strata lot owner Dolf Daam is in breach of the bylaws for failing to replace his hot water tank.
2. The strata seeks an order that Mr. Daam replace his hot water tank.

3. Mr. Daam says the strata is exceeding its authority by trying to dictate the use of a strata lot. He argues that the hot water tank has no “actual or probable impact” on other strata lot owners or the common property, so the Bylaw requiring hot water tank replacement is invalid.
4. The strata is represented by strata council member Margaret Wood. Mr. Daam is self-represented.

JURISDICTION AND PROCEDURE

5. 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.
6. 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.
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 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.
9. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan 1100. Based on section 2 of the SPA, the correct legal name of the

strata is The Owners, Strata Plan VIS1100. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

ISSUES

10. The issues in this dispute are:

- a. Whether Mr. Daam must comply with Bylaw 2(7) and replace his hot water tank, or let the strata replace it?
- b. Is either party entitled to tribunal fees or dispute-related expenses?

BACKGROUND AND EVIDENCE

11. I have reviewed all of the evidence and submissions, but only refer to them below as I find necessary to explain my decision.
12. The strata was created on April 21, 1982, under the *Condominium Act*. The strata continues to exist under the *Strata Property Act* (SPA), which replaced the *Condominium Act* on July 1, 2000.
13. The strata is a 7-storey, 38-unit, concrete and steel building with one level of indoor parking.
14. Mr. Daam owns strata lot 37 (SL37), which is unit 703, in the strata. SL37 is on the top floor, on the northeast corner of the strata building.
15. The strata filed bylaws with the Land Title Office (LTO) on November 9, 2017, repealing and replacing most previous bylaws. I find that the November 9, 2017 bylaws apply to this dispute, subject to an amendment that is not relevant here.

16. Bylaw 2(7) says that an owner must:
- a. ensure their hot water tank is in “proper operating condition” at all times,
 - b. replace the tank within 6 years from the date of installation, “or such longer period as warranted by the manufacturer”,
 - c. provide the strata with proof that the tank has been replaced, and
 - d. within 7 days of receipt of a written request from the strata, provide documentary proof of the age and warranty expiry date of their tank.
17. Bylaw 2(8) says that if an owner refuses to replace the hot water tank or provide proof of its age or remaining warranty coverage, contrary to Bylaw 2(7), then the strata may enter onto the strata lot on 7 days written notice and replace the hot water tank and charge any related costs and expenses back to the owner, including legal costs on a full indemnity basis.
18. Bylaw 2(7) and 2(8) were filed at the LTO after the owners passed a $\frac{3}{4}$ resolution to include them in the Bylaws, at a Special General Meeting (SGM) on October 25, 2017.
19. It was uncontested, and I find, that there were several water leaks in the building prior to 2013.
20. On September 10, 2013, strata council met and discussed a recent hot water tank failure and related damage. The council recommended that all units purchase a \$12.00 water leak detector, check the age of their hot water tank and inform the strata of the age, if determinable.
21. It was uncontested, and I find, that Mr. Daam has a water leak detector installed for SL37’s hot water tank.
22. On April 15, 2015, strata council wrote to Mr. Daam advising him of the recommendation to replace his hot water tank by the end of the warranty period. The strata council gave these reasons for the recommendation:

- a. the warranty period is a reasonable indication of the hot water heater's safe life, and
 - b. if the tank leaks and damages common property, the strata's insurance carries a \$5,000 deductible which may be billed to the responsible owner.
23. Strata council requested that Mr. Daam provide it with the date of installation and the warranty expiry date for his hot water tank.
24. In 2017 the strata introduced Bylaw 2(7). The strata says that it chose to use the warranty expiry date as the required latest date of replacement because:
 - a. the tank is unlikely to leak before the warranty expires,
 - b. warranty periods vary by manufacturer, meaning an owner could choose a tank with a longer warranty if they wished,
 - c. the warranty expiry date is easily identifiable and does not alter based on frequency of use.
25. On May 7, 2018, strata council again requested that Mr. Daam provide the date of installation and the warranty expiry date for the SL37 hot water tank.
26. On May 8, 2018, Mr. Daam responded saying that his hot water tank was past the warranty date. He added that he "seldom" used it.
27. It was uncontested, and I find, that Mr. Daam did not provide the date of installation nor the date of warranty expiry for the SL37 hot water tank. Mr. Daam also did not provide this information in his evidence or submissions before the tribunal.
28. On May 29, 2018, the strata wrote to Mr. Daam, through its property manager, to inform him that he was in breach of Bylaw 2(7). The letter asked that he replace his hot water tank no later than June 7, 2018.

29. On May 29, 2019, Mr. Daam replied to strata council, saying he agreed with the hot water tank bylaw as a "...laudable effort to proactively prevent a potential problem", but did not think he should have to comply because:
- a. He resides at SL37 only five months a year, on average,
 - b. He shuts down the hot water tank while away,
 - c. Zinc anode does not corrode in cold water, so he estimated his tank would last "240% longer than "normal"", and
 - d. A further extension of the tank's life would occur if the temperature were set slightly lower, such that his tank would last 360% longer than "normal".
30. Mr. Daam offered to check the drain pan and batteries in the water leak alarm annually.
31. On August 9, 2018, the strata wrote to Mr. Daam warning that a fine would be levied against him for failing to comply with Bylaw 2(7).
32. On August 13, 2018 Mr. Daam wrote to the strata objecting to its "Orwelian" approach in dictating the maintenance of his strata lot. Mr. Daam asked whether the strata could change his washing machine hoses on their schedule or dictate the brand of dishwasher that he must buy. Mr. Daam then suggested that, because he rarely turns on his hot water tank, the strata could consider it inactive.
33. Mr. Daam has offered his own opinion regarding the hot water tank. Mr. Daam says he is a "specialist in corrosion and cathodic protection, due to his engineering training and his role running "Western Canada's largest hot dip galvanizing plant" for over 30 years.
34. Mr. Daam says he offered the strata a letter stating the "...tank does not impose a risk", taking on full responsibility and liability for any costs arising from any tank issues.

35. It is uncontested, and I find, that 37 of the strata's 38 strata lots are in compliance with Bylaw 2(7).
36. On December 20, 2018, Mr. Daam appeared before strata council. Mr. Daam expressed his view that the Bylaw should not apply to his circumstances. Strata council disagreed but gave Mr. Daam until January 15, 2018 to consult with legal counsel, at his request.

POSITION OF THE PARTIES

37. The strata argues that:

- a. Requiring hot water tank replacement within the manufacturer's warranty period is a reasonable way to reduce the risk of water damage to common property and strata lots.
- b. Bylaw 2(7) has been consistently enforced.

38. The strata requests that I order that Mr. Daam, within 60 days of this decision:

- a. replace the SL37 hot water tank, providing proof of its installation and warranty to the strata,
- b. permit two strata council representatives to access SL37 to verify the new installation,
- c. pay the "fees and expenses related to this dispute incurred by the owners as represented by Strata Council", and
- d. if Mr. Daam does not comply, permit the strata to have a qualified tradesperson replace the hot water tank, dispose of the old tank and charge the costs of replacement and disposal to Mr. Daam.

39. Mr. Daam argues that, while the intent of Bylaw 2(7) to prevent water damage from failed hot water tanks is commendable, the bylaw should not apply to his lower risk situation.

40. Mr. Daam says

- a. The tank has a slower rate of erosion due to reduced use and lower operating temperature, relative to “normal”.
- b. 7 months of the year, the hot water tank is off, so the strata has “zero risk” of a leak during this time.
- c. Requiring him to replace his hot water tank is wasteful.
- d. Requiring him to comply with Bylaw 2(7) is “unnecessary and unfair”.
- e. It is not financially or technically justifiable to require him to replace SL37’s hot water tank with the frequency laid out in Bylaw 2(7).

41. Mr. Daam argues that the strata ought to exercise its discretion not to enforce this bylaw. He asks that I dismiss the strata’s claim against him.

ANALYSIS

42. Section 26 of the SPA says that the strata council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws.

43. The strata council must act in a reasonable and fair manner in enforcing bylaws. Section 133 of the SPA says a strata may do what is reasonably necessary to remedy a bylaw contravention, including doing work on or to a strata lot.

44. Section 121(1) of the SPA provides that certain types of bylaws are unenforceable. These include bylaws that contravene the SPA, its regulations, the *Human Rights Code* or any other enactment or law, or where a bylaw prohibits or restricts an owner’s right to freely sell or otherwise dispose of their strata lot. However, a bylaw that is enacted for a legitimate purpose is not unenforceable simply because some owners do not agree with it, or it makes a strata lot less desirable (see *Strata Plan VIS 4686 v. Craig*, 2016 BCSC 90).

45. Here, the owners passed a $\frac{3}{4}$ vote resolution to adopt Bylaw 2(7). More than a majority of the owners agreed that a bylaw requiring timely replacement of hot water heaters was prudent, given that common property is shared and strata lots are closely physically connected in the same building. The decision to adopt Bylaw 2(7) was made against a background of water leaks and damage, including some caused by failed hot water tanks.
46. In *Lodto v. The Owners, Strata Plan VIS 4612*, 2018 BCCRT 736 at paragraph 41 the tribunal explained that, under section 119 of the SPA, a "strata is able to pass bylaws that provide for the control, management, maintenance, use, and enjoyment of strata lots as well as common property ..." While I am not bound by this decision, I find this analysis helpful.
47. I find that Bylaw 2(7) is valid and enforceable. It does not contravene the SPA section 121. The Bylaw is directed at the valid purpose of reducing the incidence of water leaks in the building. In his submissions, Mr. Daam himself acknowledges the validity of the Bylaw's purpose.
48. Mr. Daam argues that he should be exempt from Bylaw 2(7) and (8) because he uses his hot water tank less often than average. I find that there is no provision for an exemption from the bylaw on this basis. Further, because Mr. Daam failed to provide the date of installation or date of warranty expiry for his existing hot water tank, he has made it impossible for the strata to confirm whether his hot water tank is "in proper operating condition" as Bylaw 2(7) requires.
49. Mr. Daam's other main argument is based on his own opinion that his tank has less erosion due to lower temperature and less use. I find that his opinion is not an acceptable expert opinion because Mr. Daam, as the respondent, lacks objectivity in this dispute. On this point, I refer the tribunal's rule 8.3(7) which says that an expert giving evidence to the tribunal is there to assist the tribunal and not to advocate for any side or party in a dispute.
50. Even had I accepted his opinion, I find it impractical to require the strata to tailor bylaws to the specific use of a hot water tank in each strata lot. Such a requirement

would make it overly difficult for the strata to effectively reduce the risk of a burst tank, which could impact several owners.

51. As for the argument that premature replacement of a hot water tank is an ecologically wasteful requirement, stratas can require remediation within strata lots where the bylaws have been violated, if their bylaws permit. Some of this required work may produce waste. Appropriate disposal and recycling options can be used to achieve compliance with Bylaw 2(7). As such, I do not find that an exemption ought to have been granted to Mr. Daam on this basis.
52. Mr. Daam argued about financial barriers to hot water tank replacement within the terms of the appliance's warranty, which is perhaps every 6-10 years. However, he did not provide proof of financial hardship, nor any specifics about it. As well, the bylaws do not provide for an exemption on this basis.
53. On a similar note, Mr. Daam's argument that enforcing the bylaw is not "technically justifiable" misses the point that strata living involves compromises to ensure harmoniously function of the communal arrangement. I find that warranty expiry date is a practical method for dating hot water tanks. While Bylaw 2(7) may mean that hot water tanks are replaced before they meet a certain scientific standard of erosion, the overall risk of a leak, the fact of past leaks, and the damage potential within a building, make the bylaw nonetheless enforceable.
54. Mr. Daam also argued that the requirement for him to comply with Bylaw 2(7) is unfair. The test for significant unfairness was set out in *Dollan v. The Owners, Strata Plan BCSC 1589*. The Court held that, to be significantly unfair, the conduct at issue must be more than "mere prejudice" or "trifling unfairness". To meet the threshold, the actions of a strata corporation would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct is conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith." Unfairly prejudicial conduct means "conduct that is unjust and inequitable." See also: *Sherwood v. The Owners, Strata Plan VIS 1549*, 2018 BCSC 890.

55. The test established in *Dollan* involves an assessment of the following questions:
- a. What is or was the expectation of the affected owner or tenant?
 - b. Was that expectation on the part of the owner or tenant objectively reasonable?
 - c. If so, was the expectation violated by an action that was significantly unfair?
56. I find that Mr. Daam was aware of the strata's intentions of adopting Bylaw 2(7). He had an opportunity to vote against it, if he wished. The strata communicated with him frequently and consistently about its expectations that he comply with Bylaw 2(7).
57. I find that the strata has been consistent in applying the bylaw. All other owners are currently compliance. The strata has replaced the common property hot water heater, consistent with the spirit of Bylaw 2(7). Mr. Daam is the outlier.
58. I find that Mr. Daam did not have a reasonable expectation that he would be excused from the need to comply with Bylaw 2(7), when assessed objectively.
59. For these reasons, I allow the strata's claim and find that Mr. Daam must comply with Bylaw 2(7).

TRIBUNAL FEES and EXPENSES

60. 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. I see no reason in this case to deviate from the general rule. The strata was successful, and so I order that Mr. Daam pay the strata \$225 for tribunal fees. Although the strata made reference to dispute-related expenses, it did not specify an amount or prove those expenses. As a result, I make no order for dispute-related expenses.
61. 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

62. I order that Mr. Daam, within 60 days of this decision:

- a. replace the SL37 hot water tank, provide written proof of its installation and warranty to the strata,
- b. permit two strata council representatives to access SL37 to verify the installation,
- c. if Mr. Daam does not comply, the strata may on 7 days written notice as required by Bylaw 2(8), have a qualified tradesperson(s) replace the SL37 hot water tank, dispose of the old tank and charge the costs of replacement and disposal to Mr. Daam, and
- d. pay the strata \$225 for tribunal fees

63. 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. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

64. 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. 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