Civil Resolution Tribunal

Date Issued: August 23, 2019

File: ST-2018-008090

Type: Strata

Civil Resolution Tribunal

Indexed as: *Rintoul et al v. The Owners, Strata Plan KAS 2428,* 2019 BCCRT 1007

B E T W E E N :

Jacquelyn Rintoul and Patricia Clough

APPLICANTS

A N D :

The Owners, Strata Plan KAS 2428

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. The applicants, Jaquelyn Rintoul and Patricia Clough, co-own a strata lot (SL398) in the respondent bare land strata corporation, The Owners, Strata Plan KAS 2428 (strata). The applicants are represented by Jaquelyn Rintoul and the respondent is represented by a strata council member.

2. The applicants allege that the strata has wrongfully charged back expenses of $4,095 relating to repair of a damaged hydro line, and failed to return a $10,000 construction deposit provided in relation to construction of the applicants' cottage on SL398.

3. The applicants ask for orders that the strata remove the $4,095 charge from SL398 and refund their $10,000 construction deposit.

4. The strata says the $4,095 charge is fair and that it does not have the authority to refund the damage deposit, stating the authority lies with a consultant it retained.

5. For the reasons that follow, I order the strata to remove the $4,095 charge from SL398 and release the $10,000 construction deposit to Jaquelyn Rintoul as primary applicant.

JURISDICTION AND PROCEDURE

6. 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* (CRTA). 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.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, 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.

8. 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.

9. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

10. The issues in this dispute are:

    a. Is the strata entitled to the $4,095 charged back to the applicants for hydro line repairs?

    b. Are the applicants entitled to a refund of the $10,000 construction deposit paid to the strata?

BACKGROUND, EVIDENCE AND ANALYSIS

11. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

12. In a civil proceeding such as this, the applicants must prove their claims on a balance of probabilities.

13. Following my initial review of this dispute in July 2019, I requested further submissions from the parties that included a specific request for the strata to provide additional evidence. Most, but not all, of the requested information was provided.

14. The strata comprises 495 bare land strata lots in Vernon, B.C., created August 8, 2002 under the *Strata Property Act* (SPA). It is known to be a resort community.

15. The applicable strata bylaws are those filed in the Land Title Office (LTO) on January 18, 2007 that included Architectural Control Guidelines (AC guidelines). Subsequent bylaw amendments were filed that are not relevant to this dispute. I address relevant bylaws below as necessary noting the Standard Bylaws under the SPA do not apply.

16. I understand that the bare land strata lots were originally sold as vacant lots without buildings or landscaping but including hydro and water service.

17. The AC guidelines form part of the strata's bylaws and control the design, colour, size, and appearance of buildings, driveways and landscaping on individual strata lots by setting out procedures for owners to follow to obtain approval for such construction.

18. The AC guidelines are detailed and establish that the "scale and character of physical development should be consistent with the natural landscaped setting in which the community exists." To accomplish this, the AC guidelines designate an Architectural Control Approving Officer (Approving Officer) and provides them with broad authority to approve and disapprove "plans, specifications and details" that affect the exterior appearance of a building including new construction, retaining walls, planting and other exterior features.

19. The strata has retained Architecturally Distinct Solutions Inc. (ADS) to act as the Approving Officer under the AC guidelines. A copy of an unsigned fee proposal agreement dated October 16, 2015 was provided in evidence by the strata. It is undisputed and supported by evidence that ADS acted as the Approving Officer at all times relevant to this dispute.

20. Bylaw 48 of the January 18, 2007 bylaws states an owner wishing to construct a dwelling on their strata lot shall pay a $10,000 deposit to the strata with $7,500 allocated for building issues and $2,500 allocated to landscaping issues. The bylaw authorizes the strata to deduct costs and fines set out in the AC guidelines and requires the strata to return the deposit, less authorized deductions, to the owner within 60 days of the owner providing a "copy of an occupancy permit, landscape inspection and final letter of approval from the Approving Officer." There is no fee schedule set out in any strata bylaw or the AC guidelines.

21. Bylaw 48 was repealed and replaced with a completely different bylaw (bylaw 49) filed at the LTO on December 20, 2017. I find that the amended bylaw 49 is not

relevant to this dispute as the applicants provided their construction deposit when bylaw 48 was in force.

22. Section 2.7.4 of the AC guidelines sets out a number of required inspections at various stages of new construction, including a final inspection to "release the owner from the Approving Officer's jurisdiction", prior to occupancy of the dwelling.

23. Section 2.8.8 of the AC guidelines states that the strata regulates submittal fees that are payable by the subject owner directly to the Approving Officer. This section also states the fees will be reviewed from time-to-time and that new fee schedules will be will be published in advance to all owners. No fee schedule was provided in evidence.

24. The applicants purchased SL398 on September 15, 2016. They applied to construct a cottage dwelling on SL398 on September 30, 2016, were given approval in principal by the Approving Officer on October 19, 2016, and paid a $10,000 construction deposit to the strata on October 22, 2016. Based on the evidence, I infer the construction of the dwelling progressed without significant incident until the time the applicants applied for final inspection as discussed below.

25. Part of the approved construction included the relocation of a "hydro hut" that was located on SL398. A hydro hut could also be described as an electrical shed that houses several electrical meters for individual strata lots. A main electrical line comes into the hut and electricity is then distributed to the individual strata lots through individual electrical meters. From photographs provided, the hydro hut located on SL398 contained electrical meters for 13 strata lots including SL398. There are several other hydro huts located throughout the strata.

26. The applicants received approval to relocate the hydro hut and incorporate it into their approved dwelling as it was located on a part of SL398 where the applicants wanted to construct their dwelling. The evidence shows the hydro hut was relocated in early December 2016, likely as part of the dwelling's construction.

27. In February 2018, the strata became aware that strata lot 457 (SL457), a vacant strata lot located across an interior roadway from SL398, did not have electrical power. I infer this was discovered by SL457's owner or contractor when considering constructing a building on SL457. The strata determined that the electrical line for SL457 was fed from the hydro hut located on SL398.

28. On April 26, 2018 the Approving Officer on behalf of the strata, wrote to the applicants stating the strata had determined that "damage and/or a failure to reconnect the electrical service line for [SL457 that existed in the original hydro hut] occurred during the relocation of the electrical services to the closet in your cottage." The letter also advised the cost of repairing the electrical line to SL457 would be completed at the applicant's expense.

29. On April 30, 2018, the spouse of one of the applicants replied by email requesting evidence the strata had to support its claim that the electrical line for SL457 was damaged by the applicants.

30. The strata proceeded to have the electrical line repaired and forwarded an invoice dated April 30, 2018 from EPS Electric Ltd. totaling $4,095 to the applicants for payment. No response or evidence was provided to the applicant or their spouse indicating how the strata determined the applicants had damaged or not reconnected the hydro line to SL457.

Is the strata entitled to the $4,095 charged back to the applicants for hydro line repairs?

31. For the reasons that follow, I find the strata is not entitled to charge the applicants for the hydro line repairs relating to SL457.

32. The strata has neither established it has the authority to charge the applicants' strata lot for electrical line repairs nor provided any evidence the electrical line servicing SL457 was damaged or not reconnected when the hydro hut was relocated.

33. I find the decision reached in *Ward v. Strata Plan VIS #6115*, 2011 BCCA 512 provides guidance in situations where a strata corporation is seeking to charge an owner for costs the strata corporation has incurred. In *Ward*, the BC Court of Appeal found at paragraphs 40 and 41, that a strata corporation was not entitled to charge an owner legal fees without the authority to do so under a valid and enforceable bylaw or rule that creates the debt. Although the matter of including actual legal fees in a Certificate of Lien amount under section 118 of the SPA has been subsequently addressed in The *Owners, Strata Plan KAS 2428 v. Baettig*, 2017 BCCA 377, I find the reasoning in *Ward* still applies to other charges, such as electrical repairs in the dispute before me.

34. There is no provision in the SPA that permits the strata to charge the applicants for the electrical repairs and likewise, no bylaw.

35. Further, there is no evidence before me to suggest the applicants signed an indemnity agreement relating to the relocation of the hydro hut, which the strata is permitted to require under the its bylaws.

36. Had the chargeback been permitted under a bylaw, as suggested in *Ward*, or if the applicants signed an indemnity agreement, the strata would still need to establish that the applicants or their contactor caused the damage to the hydro line. It has not done so.

37. As noted, the April 26, 2018 letter from the Approving Officer stated the damage was done when the hydro hut was relocated yet in its further submissions, the strata says it now believes the line was damaged during construction of the applicants' driveway. The strata is clearly not certain of the how the hydro line was damaged, and provided no evidence establishing the cause of the damage. I find the strata changed its response as to how the line may possibly have been damaged as a result of my enquiry about the original location of the hydro hut and the location of repaired line. The strata provided further submissions that the repair was completed near the applicants' driveway. This appears to be at completely different location

than the original hydro hut, which was located near the centre of the applicants' dwelling as shown on the approved drawings.

38. For these reasons, I find the strata is not entitled to charge the applicants' strata lot with the cost of repairing the hydro line to SL457. Accordingly, I order the strata to remove the $4,095 charge from SL398.

Are the applicants entitled to a refund of the $10,000 construction deposit paid to the strata?

39. I find the applicants are entitled to a refund of their construction deposit. My reasons follow.

40. I will first address the applicants' claim that they paid a $10,000 construction deposit despite having received a summary document from ADS dated April 2016 stating a $5,000 construction deposit was required. The strata stated in its Dispute Response that a $5,000 deposit was offered to stimulate construction but gave no time frame when this alleged offer was in effect. I note also that the strata's bylaw 48, in force at the time, expressly states a $10,000 construction deposit is required.

41. I find the amount of the deposit is moot given the applicants paid a $10,000 deposit as requested by the strata.

42. On March 7, 2018, following a March 2, 2018 inspection of the applicants' constructed dwelling, the Approving Officer issued final construction approval for occupancy stating the dwelling construction appeared to conform to the approved drawings but that screening of a propane tank consistent with the AC guidelines was required. The letter states that the outstanding propane screen was minor. The Approving Officer advised it would recommend release of the of the construction deposit once the propane tank screen was completed, and an occupancy permit was issued by the Central Okanagan Regional District (CORD). The letter requested that photographs of the completed screen and occupancy permit be provided to the Approving Officer for its records.

43. The applicants say they complied with the Approving Officer's letter. Although no evidence was submitted to support the screening was complete and an occupancy permit was provided, the strata does not dispute that the screening was done.

44. On July 4, 2018, the Approving Officer issued another final construction approval for occupancy identical to its March 7, 2018 letter except noting a different outstanding item about fill required to a sloped embankment area that appears from a photograph to be above a retaining wall. The letter states this deficiency is also minor in nature and again requests photographs of the work done and the occupancy permit for their file.

45. In an email exchange between the Approving Officer and the spouse of one of the applicants between July and September 2018, the Approving Officer confirmed the type of fill required with respect to its July 4, 2018 request.

46. The applicants say that they complied with the Approving Officer's July 4, 2018 request, but were then asked to provide a geotechnical report on the stability of the subject slope which they have declined to do. The strata says the cost of the geotechnical report would not be significant and would clearly establish if there was any concern with the slope. There is no evidence before me, such as photographs or correspondence, to confirm if the Approving Officer's July 4, 2018 request was fulfilled, but the strata does not dispute the required work was done.

47. The applicants say the strata should have released the construction deposit after they complied with the approving officer's March 7, 2018 request, or at least after the July 4, 2018 request. They are concerned that the strata or the Approving Officer will continue to find matters to fix and continue to hold back release of the construction deposit.

48. The strata's position is that the Approving Officer has not finalized the applicants' construction approval because the slope is not within the AC guidelines and the strata has not released the construction deposit for that reason.

49. As I have noted above, I find bylaw 48, that deals with construction deposits, to be relevant to this dispute. While the AC guidelines provide details for approving construction and landscaping, and the authority for the Approving Officer to control such things, the guidelines do not address the construction deposit.

50. Bylaw 48 clearly requires the owner pay to the strata a $10,000 construction deposit, which the applicants have done. A copy of the applicants' cancelled cheque proves this, and the strata admits its property manager holds these funds in a separate trust account. Under the bylaw, the strata is obligated to release the construction deposit within 60 days of the applicant providing a "copy of an occupancy permit, landscape inspection and final letter of approval from the Approving Officer." However, the AC guidelines do not require a landscape inspection. Section 2.7.4 of the AC guidelines deals with inspections, and does not mention a landscape inspection.

51. Section 2.7.5 of the AC guidelines deals with "re-inspections" and states that "AC staff will re-inspect work associated with necessary or recommended changes following initial inspection." I interpret this to mean that the Approving Officer can re-inspect the construction to determine conformity with items it may have noted in its final inspection. I conclude that adding additional, unrelated changes during a re-inspection later is unreasonable.

52. I find the Approving Officer's letter of March 7, 2019 is a final inspection within the meaning of the AC guidelines. That the letter was conditional upon the applicants screening their propane tank means that when that work was completed, the applicants were in a position to request release of the construction deposit by proving a copy of the occupancy permit and proof of the propane tank screening to the strata. I find the re-inspection of July 4, 2018 did not determine the propane tank screening was contrary to the AC guidelines and it was unreasonable for the Approving Officer to add new issues for the owner to fix.

53. That a subsequent or re-inspection was completed, and the Approving Officer noted another minor concern with slope, was no reason for the strata not to release the construction deposit.

54. However, there is no evidence before me to indicate the applicants have applied to the strata for return of the deposit by providing the Approving Officer's March 7, 2018 inspection, proof the propane tank was screened, and a copy of the occupancy permit issued by the CORD. It seems impractical to require the applicants to make a formal request now and I find the applicants need only provide the strata with a copy of the occupancy permit.

55. Therefore, I order the strata to release the applicants' $10,000 construction deposit to the primary applicant, Jaquelyn Rintoul, within 60 days of receiving a copy of the occupancy permit for SL398. If the strata has already received the permit, the 60-day period is to be calculated from the date the strata received it. If the 60-day period has already lapsed, the strata must immediately release the deposit to Ms. Rintoul.

TRIBUNAL FEES AND EXPENSES

56. Under section 49 of the CRTA, 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 to deviate from the general rule in this case. I find the applicants are successful party and order the strata to pay Jaquelyn Rintoul as primary applicant, $225.00 for tribunal fees. The applicants did not claim dispute-related expenses, so I order none.

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

DECISION AND ORDERS

58. I order the strata, within 15 days of the date of this decision, to:

a. Pay the applicants $225 for tribunal fees,

b. Remove the $4,095 charge for electrical repairs from SL398.

59. I also order the strata to release to applicant Jaquelyn Rintoul, the applicants' $10,000 construction deposit within 60 days of receiving a copy of the occupancy permit issued by the CORD for SL398. If the strata has already received a copy of the occupancy permit the 60-day period is to be calculated from the date the permit was received. If the 60-day period has already lapsed, the strata must immediately release the deposit to Ms. Rintoul.

60. The applicants are entitled to post judgement interest under the *Court Order Interest Act*, as applicable.

61. Under section 57 of the CRTA, 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 CRTA 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.

62. 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 CRTA, 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 CRTA 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.

J. Garth Cambrey, Vice Chair