



Civil Resolution Tribunal

Date Issued: September 19, 2019

File:ST-2018-006393

Type: Strata

Civil Resolution Tribunal

Indexed as: *Blanchard v. The Owners, Strata Plan VR 145*, 2019 BCCRT 1107

BETWEEN:

Patricia Blanchard

APPLICANT

AND:

The Owners, Strata Plan VR 145

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. The applicant, Patricia Blanchard (owner), owns a strata lot in the respondent strata corporation The Owners, Strata Plan VR 145 (strata). This dispute is about the strata's alleged failure to enforce a non-smoking bylaw. The owner says that the

strata has failed to properly investigate and address the issue of second-hand smoke entering her strata lot since 2016.

2. The owner requests an order that the strata uphold its non-smoking bylaw. The owner requests \$10,000.00 as compensation for her exposure to the smoke and the loss of peaceful enjoyment of her strata lot. The owner also asks for reimbursement for the cost of air filters and painting of her hallway to repair smoke stains. The owner had asked for repair and replacement of missing fire walls under her sinks, but this issue has been resolved so I will not address it. The owner had also asked for reimbursement of \$918.53 for an expert report but has withdrawn that claim as the report was not provided. The owner is self-represented.
3. The strata says that it properly investigated all the owner's complaints and has acted reasonably to enforce the non-smoking bylaw. The strata is represented by PC, a strata council member.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims 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. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.
5. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. In some respects, this dispute amounts to a "she said, it 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. 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.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
7. 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, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

8. The issues in this dispute are:
 - a. Has the strata conducted an appropriate investigation into the owner's second-hand smoke complaints?
 - b. Has there been a contravention of the non-smoking bylaw and, if so, should I order that the strata enforce the bylaw and take steps to ensure the second-hand smoke does not enter the owner's strata lot?
 - c. If there has been a contravention of the non-smoking bylaw, is the owner entitled to \$10,000.00 in damages as well as reimbursement for the cost of air filters and painting of her hallway to repair smoke stains.

EVIDENCE, FINDINGS AND ANALYSIS

9. In a civil dispute such as this, the applicant must prove its claim. It bears the burden of proof on a balance of probabilities.
10. While I have reviewed all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.

11. The strata was built in 1974 and is a concrete residential complex with 56 strata lots. The owner lives in unit 1003. On November 4, 2013, the strata filed an amendment to its bylaws at the Land Title Office. Bylaw 3(29) says that an owner, resident, tenant, occupant, guest or visitor cannot smoke anywhere within a strata lot or within the strata corporation common property including but not limited to balconies, patios, the common area hallways, elevators, stairwells, the parking garage, the amenity rooms, service rooms, exercise room and the lawn and garden areas adjacent to the building. Bylaw 3(29)(b) says that current owners could register to be grandfathered out of the non-smoking bylaw.
12. The owner submits the strata has failed to properly investigate the second-hand smoke that has been coming into her strata lot since 2016 and that it has not enforced the non-smoking bylaw. The owner has provided smoke logs which show multiple incidents where the owner alleges she smells smoke. The owner estimates this to have occurred thousands of times. She notes that she has filed numerous complaints with the strata. The owner disputes that the remedial efforts taken by the strata have had any effect. She disputes the methodology and validity of air quality testing conducted.
13. The strata says that it has done everything it can including investigating where there was enough specific information provided, posting signs reminding strata lot owners of the non-smoking bylaw, sending out bylaw infraction letters, and imposing fines. It relies on the results of air quality testing which came back negative as proof there is no smoke ingress into the owner's strata lot. The strata argues if it had proof of smoke entering the owner's strata lot it would respond appropriately.

The Smoking Complaints

14. The owner has provided smoke logs that indicate that she has been affected by smoke coming into her strata lot almost daily for the last three years. The logs mostly detail smoke coming from units 902 and 903 which are beneath the owner's strata lot. The owner submitted letters from her friends that say they have smelled smoke in the owner's strata lot. She has also provided a jointly-created smoking log

with her neighbour who has her own dispute against the strata about contravention of the smoking bylaw.

15. The owner has submitted several letters from her doctors saying that she is reacting negatively to second-hand smoke. I have reviewed these letters and note that they are mostly based on the owner's self-reporting of smoke in her strata lot. The letters also indicate that the owner was herself a smoker many years ago and noted that smokers could develop respiratory difficulties such as the ones the owner was reporting years after stopping smoking.
16. The owner also submits that there is stain on her wall that is the result of the smoke pooling there. The owner provided a picture of the stain and a letter from her painter which she says supports her position. However, the letter does not say this. The painter says that there is a dark, shiny, oily stain and that he has never seen anything like it. He notes that he has painted over stains before, including those from smoke, but that he is "at a loss" to know what this stain is.

Has the strata conducted an appropriate investigation into the owner's second-hand smoke complaints?

17. The strata says that the owner's smoking logs are subjective and should be given little weight. The strata also provided evidence that it says shows the logs were inaccurate, as on one occasion in May 2017 the owners of the strata lot the owner said the smoke was coming from, 903, were not in town.
18. The strata also argues that, despite keeping a detailed smoking log, notification to the strata was only provided after the alleged smoking incidents. The strata submits that it wanted an opportunity to investigate at the time of the alleged infractions. The strata says that the owner said she would only allow one council member into her home to witness the smell of smoke. The strata wanted two members to go at the same time to be able to corroborate their findings. The owner admits that she did not allow this as she did not trust the council members.

19. I note that the owners of unit 903 provided an affidavit saying that they offered to allow council members or the police to enter their strata lot at any time if there was a report of smoking. The strata has provided evidence that council went to unit 903 without notice to talk about a noise complaint against the owner and there was no smell of smoke.
20. The strata says that from the very beginning when the owner began making complaints of smoking that it posted a notice reminding the owners that there was a smoking bylaw. The strata provided evidence that in November 2016 it sent smoking bylaw contravention letters to three units: 203, 701, 903. The owner submitted a letter from her physician who has an office across the street saying that he observed the owner of unit 701 smoking on his balcony. However, the strata says that the complaint against 701 was withdrawn. The evidence suggests that the complaint was because the owner was vaping and not smoking. I note that in her submissions to this tribunal, the owner also says smoke from unit 701 is not the problem.
21. The strata says that the owner made a complaint in November 2016 against the owners of unit 903 who requested a hearing. Council determined that there was no reasonable basis to find the owners of unit 903 were in contravention of the bylaw.
22. The owner made another complaint against unit 203 in February 2017 and the strata sent a bylaw contravention letter. The owners requested a hearing and the strata concluded that the owner of unit 203 did contravene the non-smoking bylaw and imposed a fine.
23. The owner made further complaints against units 203, 902, and 903 between August and November of 2017. The strata sent bylaw contravention letters. The owner of unit 902 provided a letter stating that she had serious medical issues and therefore did not smoke and could not be around anyone who did. The strata accepted this evidence.

24. The owners of 903 told the strata that they did not smoke in their unit and always go to the park across the street to smoke. The strata accepted this statement. I note that the owners of 903 provided a statement to the tribunal saying the same thing.
25. The strata provided other owner's statements that there was no smell of smoke in the owner's strata lot when they visited or in other areas of the building. Some owners stated that they occasionally smell smoke coming from the sidewalk below the strata, a nearby building, and the park across the street, but not from another strata lot or the common property.
26. The strata noted that at the same time that the owner was making complaints to the strata about smoking, she also filed a complaint with the Human Rights Tribunal. As a result of that process, the strata agreed to conduct air quality testing.

Air Quality Testing

27. The strata hired Antiquity Environment Consulting Ltd to conduct an onsite assessment and investigate the smoking complaints. Antiquity's testing included ambient sampling and surface sampling from the owner's strata lot, her neighbour's strata lot (who has filed her own dispute), as well as the strata lots below them on the 9th floor. Antiquity also obtained a control sample in order to have a reference nicotine concentration of a "non-problem location." On March 2, 2018, Antiquity's senior consultant provided a report analyzing and interpreting the results and said that based on both onsite observations and review of the lab samples there did not appear to be any evidence of second-hand smoke on the surfaces or in the air of the units tested, including the owner's strata lot.
28. The applicant disputes the air quality testing report and says the results are invalid because the units being tested received 7 days' notice of the test and therefore had time to change their smoking habits and clean their units. I do not accept the owner's submission on this point. Her own smoke log for the dates before the testing indicate that she continued to smell smoke including on the day of the testing.

29. Additionally, air quality testing was done on the owner's unit as well, which also came back negative. The owner suggests that this was because testing was not done in the proper areas. She also argues that second-hand smoke can only be detected within hours of the smoking. She suggests that she has been told this by another expert but does not provide any report or evidence to support her claim that the methodology or science of the air quality testing report is not valid or should not be accepted.
30. The strata asked the air quality testing firm to comment on the owner's argument that the second-hand smoke would only be detectable for a short period of time. It responded that second-hand smoke can remain on surfaces for extended periods of time.
31. I am persuaded by the report of the air quality testing company and its conclusions. I have been given no reason not to, except for the applicant's suspicions about its methodology and her rejection of its conclusions. There is nothing in the report itself that suggests that its approach was without logic or that its results were skewed in any way to prefer an outcome that might favour the strata.
32. The strata says the evidence referenced above shows that it acted reasonably in investigating and enforcing the non-smoking bylaw.

APPLICABLE LAW

33. I note that under Section 27(2) of the *Strata Property Act* (SPA) owners may not interfere with council's discretion to determine, based on the facts of a particular case, whether a person has contravened a bylaw, whether a person should be fined, or the amount of the fine. However, the strata must act reasonably.
34. Section 135 of the SPA sets out a procedure for investigating a complaint, which includes providing the subject owner or tenant the opportunity to be heard, before any fine is levied. This protection is for the benefit of the owner or tenant that is the subject of the complaint, not the person making the complaint. Notably, there is otherwise no particular complaint procedure set out in the SPA and a strata council

is permitted to deal with complaints of bylaw violations as the council sees fit, so long as it complies with the principles of procedural fairness and is not “significantly unfair” to any person who appears before the council (*Chorney v. Strata Plan VIS 770*, 2016 BCSC 148).

35. Section 123(2) of the CRTA is substantially similar to section 164 of the SPA and addresses remedies for significant unfairness in strata property disputes. Section 123(2) provides that a 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.
36. The phrase “significantly unfair” has been interpreted to be simply a plain language version of earlier terms “oppressive or unfairly prejudicial” (see *Chow v. Strata Plan LMS 1277*, 2006 BCSC 335). As noted in *Chow*, oppressive conduct is “burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith”.
37. In *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, the court restated the test for determining significant unfairness as set out in *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44. While that test was considered under section 164 of the SPA,, I find it would equally apply to an analysis under section 123(2) of the Act. In particular, in *Watson* the court stated: The test under s. 164 of the SPA also involves objective assessment. The *Dollan* decision requires several questions 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?
38. The owner had an objectively reasonable expectation that the strata would investigate and enforce the non-smoking bylaw. However, I find that the strata did not violate that expectation by an action that was significantly unfair. The evidence

shows that the strata made significant efforts to investigate and enforce the non-smoking bylaw. As shown above, it took the owner's complaints seriously and followed up on them by putting up notices, investigating, sending out bylaw infraction letters, holding hearings, imposing a fine, and conducting air quality testing.

39. The strata also explained why it made the decisions it did and why it only sometimes followed up on complaints. It noted that when the complaints did not have enough specific information to warrant an investigation it could not proceed. The strata also stated that often the evidence came down to the owner saying somebody was smoking and the accused person denying it. Without more evidence the strata argues it could not take action against the accused owner.
40. Based on all of the evidence, I find that the strata made its decisions in good faith and on reasonable grounds. Therefore, I find that the strata was not significantly unfair to the owner in the way it dealt with complaints of bylaw violations and that the strata conducted an appropriate investigation into the owner's second-hand smoke complaints.

Has there been a contravention of the non-smoking bylaw and, if so, should I order that the strata enforce the bylaw and take steps to ensure the second-hand smoke does not enter the owner's strata lot?

41. Based on all of the evidence, I accept that there has been some smoking in the past in contravention of the non-smoking bylaw. The strata has sent out warning letters and on at least one occasion has issued a fine, and this indicates an awareness that smoking is occurring. However, as shown above, the strata has properly dealt with those contraventions. Therefore, I find that the strata has overall acted reasonably in enforcing the non-smoking bylaw.
42. With regard to the owner's complaints of contraventions specifically affecting her, the owner has not proved that there has been smoke ingress into her unit coming from units 902 and 903. The empirical air quality testing came back negative. Further, the owners of the units the owner accused of smoking have provided statements that they do not smoke and evidence that on occasion when they have been accused they were not even home. Also, the owners of unit 903 offered to allow the strata and even the police to perform spot checks on them. The evidence also shows that unannounced visits were made to unit 903 and there was no smell of smoke.

43. I accept that the owner has a real belief that she is being affected by smoke every day and to a great extent. However, she has not proved this on a balance of probabilities.
44. Based on all of the evidence, I find that the owner has not proved that the strata failed to enforce the smoking bylaw. I also find that she has not proved that smoke is entering her strata lot from other units in the building. Therefore, I find that it is unnecessary to make an Order that the strata enforce its by-laws or to take specific steps to prevent second-hand smoke from entering the owner's strata lot.
45. I note that the strata has indicated it continues to be willing to investigate any further complaints. Nothing in this decision prevents the owner from making second-hand smoke complaints to the strata in future, and in that event, it would be in the owner's best interest to do so at the time the second-hand smoke is entering her strata lot and to allow council members into her strata lot to investigate.

If there has been a contravention of the non-smoking bylaw, Is the owner entitled to \$10,000.00 in damages as well as reimbursement for the cost of air filters and painting of her hallway to repair smoke stains.

46. I have found that the owner has not proved on a balance of probabilities that there has been a contravention of the non-smoking bylaw resulting in smoke coming into her strata lot. Therefore, she is not entitled to \$10,000.00 as compensation for her exposure to the smoke and the loss of peaceful enjoyment of her strata lot.
47. Similarly, the owner is not entitled to reimbursement of the cost of air filters and the painting of her hallway to repair smoke stains. I again note that the worker's painter did not say that these were smoke stains. Further, I would not have awarded this amount because the owner has not supplied evidence establishing the amount she had paid for the painting or the filters.

TRIBUNAL FEES

48. 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 dispute-related expenses. As the owner was unsuccessful in this dispute she is not entitled to have her tribunal fees reimbursed.

ORDER

49. I dismiss the owner's claims and this dispute.

Kathleen Mell, Tribunal Member