



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Hill v. The Owners, Strata Plan VR 145*, 2019 BCCRT 1153

B E T W E E N :

SUSAN HILL

APPLICANT

A N D :

The Owners, Strata Plan VR 145

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kathleen Mell

INTRODUCTION

1. The applicant, Susan Hill (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.
2. The owner says she moved out of her strata lot in 2018 because of the smoking and asks for \$28,262.25 reimbursement for rent. She also asks for \$2,783.81 for the cost of moving out. She requests \$1,487.50 in reimbursement for the security deposit on the rental property and \$675.00 she paid for parking while she lived at the rental property. She further requests the \$100.00 she paid to the strata to move out. The owner moved back in after nine and a half months because her strata lot did not sell. She wants reimbursement of the \$300.00 in fees she says she paid the strata to move back in and the \$2,904.00 moving cost. She requests the \$500.00 she says she paid for vacant condo insurance and \$144.27 for the cost of mail forwarding.
3. The owner also asks for \$409.57 for the cost of cleaning her carpet due to the alleged smoke damage and \$2,163.08 she says she paid for air filters. The owner also requests \$10,000.00 for emotional suffering. She also seeks reimbursement for the \$75.00 cost for a doctor's letter.
4. The owner further requests an order to stop the three alleged smokers from smoking and an order to increase fines \$50.00 each time a violation of the smoking bylaw occurs. The owner is self-represented.
5. The strata says that it properly investigated all the owner's complaints and has acted reasonably to enforce the non-smoking bylaw so the owner is not entitled to the requested compensation. The strata also submits that the owner has not substantiated her claims for reimbursement. The strata objects to the owner's request for reimbursement of the doctor's letter as this amount was not requested at the time of the Dispute Notice.

6. The strata also says that bylaws can only be changed by a $\frac{3}{4}$ vote and therefore this cannot be part of an order. The strata is represented by PC, a strata council member.

JURISDICTION AND PROCEDURE

7. 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.
8. 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.
9. 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.
10. 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.

11. I note that I previously made a decision involving another owner in the same strata and there is an overlap in the parties' issues and evidence, see *Blanchard v. The Owners, Strata Plan VR 145*, 2019 BCCRT 1107

ISSUES

12. 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, including by increasing the amount of the fines?
- c. If there has been a contravention of the non-smoking bylaw, what damages is the owner entitled to?

EVIDENCE, FINDINGS AND ANALYSIS

13. In a civil dispute such as this, the applicant must prove her claims. She bears the burden of proof on a balance of probabilities.

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

15. The strata was built in 1974 and is a concrete residential complex with 56 strata lots. The owner lives in unit 1002. 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.

16. The owner submits the strata has failed to properly investigate the second-hand smoke that has been coming into her strata lot. She says she has been bothered by the smoke since 2011 and that after the non-smoking bylaw passed the strata failed to enforce it. The owner has provided smoke logs which show multiple incidents where the owner alleges she smelled smoke. The evidence indicates that the owner has filed numerous complaints with the strata.
17. The strata says that it has done everything it can including investigating complaints where there was enough specific information provided. It says it also posted signs reminding strata lot owners of the non-smoking bylaw, sent out bylaw infraction letters, and imposed 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

18. In her submissions, the owner states that she kept smoking logs from 2011 to June 2017 but she made mistakes because it took her a few years to figure out who smoked when and where. She says that she finally put it together that she had three smokers around her in units 1001, 902, and 903. The owner rejects the strata's suggestion that the smoke could be coming from elsewhere, including the street and park nearby, or from a youth who lives in the apartment building next door and smokes on his deck.
19. The owner says that council members have told her that they smelled smoke in her strata lot, but she does not have a witness to this. She says that some of those same people have now provided affidavits saying that they never smelled smoke. She says that they are not truthful. She also says the affidavits from other owners who say they do not smell smoke are because they do not live near a smoker.

20. The owner's smoke logs indicate when she says she has been affected by smoke coming into her strata lot. She says she began recording the issues with smoke in 2017 and prepared a letter for the strata. The owner also submitted letters from her friends who say they have smelled smoke in the owner's strata lot. She also submitted a jointly-created smoking log with her neighbour who filed her own dispute against the strata about contravention of the smoking bylaw. This is the owner who was the applicant in the decision noted above.
21. The owner says she moved out of her strata lot in May 2018 because she was suffering health issues because of the smoke. She submits that this was on her physician's advice. The owner has submitted an August 14, 2017 letter from her doctor saying that the owner needs a smoke-free environment. I have reviewed this letter and note that it discussed the owner's symptoms but does not supply any information regarding where the smoke is coming from.
22. The owner has also provided a photograph of a TobacAlert test which she says she took on July 7, 2019. The test is a urine test which I presume measures nicotine. The owner says that she tested at level one, which means she has been exposed to second-hand smoke. There is a picture of the test, but it is difficult to make out what the results say. There is also no evidence verifying the circumstances in which the test was taken. Further, even if the test showed that the owner was exposed to second-hand smoke, this still does not show where the smoke is coming from. For these reasons, I place little weight on this evidence.

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

23. The strata says that the owner's smoking logs are subjective and should be given little weight. The strata also says that the owner began making complaints of smoking in October 2016 and that it posted a notice reminding the owners that there was a non-smoking bylaw. The owner made another complaint on October 31, 2016. The strata provided evidence that in November 2016 it sent non-smoking

bylaw contravention letters to the three units the owner complained about: 203, 701, 903.

24. The strata says that the complaint against 701 was withdrawn. The evidence suggests that the complaint was withdrawn 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.
25. The strata says that the owners of unit 903 requested a hearing which took place on December 13, 2016. Council determined that there was no reasonable basis to find the owners of unit 903 were in contravention of the bylaw.
26. The owner continued to make complaints, but the strata council meeting minutes from January 2017 indicated that the complaints were not specific enough to warrant further action.
27. The strata says that when the owner provided enough information to warrant a contravention letter it sent one to unit 203. The strata provided evidence that a hearing then took place with the owner of unit 203. The strata concluded that the owner of unit 203 did contravene the non-smoking bylaw and imposed a fine.
28. The owner continued to complain about smoke, but the strata says that again the owner was providing logs about her perception of smoke but there was not enough specific information to investigate. However, the strata says that it did post a memo in the mail room reminding owners about the non-smoking bylaw.
29. After another complaint in August 2017, the strata also sent contravention letters to the owners of unit 903 who requested a hearing, which took place in November 2017. As a result of this hearing the strata decided not to impose a penalty.
30. The strata also provided a November 1, 2017 email from the owner in which she acknowledges that a youth in a building nearby “power smokes” and the wind brings the smoke to her.

31. After a further complaint in November of 2017, the strata sent a bylaw contravention letter to the owner of unit 902 who responded that she had serious medical issues and therefore did not smoke and could not be around anyone who did. The strata accepted this evidence.
32. 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 notes that at one point the smoking log alleged that smoke was coming from unit 903 when they were not in town. The strata also points to a November 2017 email where the property manager tells the owner that three council members volunteered to be contacted whenever the owner smelled smoke but she responded that she was not sure about members visiting and preferred to get testing done.
33. In contrast, the strata has provided a letter from the owners of unit 903 inviting council members to come to their unit any time smoking was alleged to be occurring.
34. The strata provided other owner's statements that they do not smoke and that there was no smell of smoke coming from strata lots in the building. Some owners stated that they occasionally smelled smoke or the smell of cooking 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.
35. In January 2019 complaints were again received from the owner and on February 12, 2019 bylaw contraventions letters were sent to units 902 and 903. The strata held hearings and based on the evidence found there were no contraventions of the non-smoking bylaw. On May 27, 2019, the strata mailed a reminder to all owners of the non-smoking bylaw.
36. The strata says to follow-up on complaints it also had air quality testing conducted.

Air Quality Testing

37. 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, as noted, filed her own dispute), as well as the strata lots below her 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.
38. The owner disputes the air quality testing report and says the results are invalid because thresholds for allowable nicotine levels are different for different people. She says she is extremely sensitive. She also says that the one day of testing did not represent the air she typically lives in. I do not accept the owner's submission on this point. Her own smoke log for March 1, 2018 states that there was heavy fresh smoke from 7:30 a.m until 9:30 p.m. the day before the testing. There is no proof that the other owners changed their alleged smoking habits.
39. 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. The owner did 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. She also provided no contrary expert report showing different air quality findings.
40. 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.

41. The owner also noted that the lab results indicated that “expired media” were used. Antiquity stated that despite this there was “very little chance that the media would break down enough to affect its surface chemistry.” Antiquity indicated that in their opinion, and in the opinion of the laboratory, the results were valid. Antiquity also pointed out that part of their testing included bringing an objective person who was allergic to second-hand smoke and extremely sensitized, but that he could not detect any odour related to second-hand smoke.
42. 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. I accept the report as expert evidence, as contemplated in tribunal rule 8.3, and rely upon it.
43. The strata says the evidence referenced above shows that it acted reasonably in investigating and enforcing the non-smoking bylaw.

APPLICABLE LAW

44. 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.
45. 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).

46. 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.
47. 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”.
48. 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:
- 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 that expectation violated by an action that was significantly unfair?
49. 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.

50. 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.
51. 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, including by increasing the amount of the fines?

52. 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.
53. 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 1001, 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 in their strata lots 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 to perform spot checks on them.

54. 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.
55. 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 bylaws or to take specific steps to prevent second-hand smoke from entering the owner's strata lot.
56. I also note that even if I had found the owner successful in her claim, I do not have the jurisdiction to order the strata to change its bylaws regarding the amount of fines it should impose for contravention of its bylaws.
57. 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, what damages is the owner entitled to?

58. 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 compensation for the damages she has claimed including for moving, cleaning, air filters, and other expenses. Further, I would not have awarded the amounts requested because the owner has not supplied evidence establishing that she paid these amounts.
59. Because the owner has not proven her claim she is also not entitled to compensation for emotional suffering.

TRIBUNAL FEES AND EXPENSES

60. 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. She is also not entitled to the expenses for her doctor's letter.

ORDER

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

Kathleen Mell, Tribunal Member