



Civil Resolution Tribunal

Date Issued: November 14, 2019

File: ST-2019-002467

Type: Strata

Civil Resolution Tribunal

Indexed as: *O'Connor v. The Owners, Strata Plan VR 2105*, 2019 BCCRT 1288

BETWEEN:

DIANE O'CONNOR

APPLICANT

AND:

The Owners, Strata Plan VR 2105

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. In this dispute the parties disagree on whether certain southside fencing should be removed. The applicant, Diane O'Connor (owner), owns strata lot 6 (SL6) in the respondent strata corporation, The Owners, Strata Plan VR 2105 (strata). The

southside fencing stands between several ground-floor outdoor patios (including the owner's) and a larger garden area.

2. On February 20, 2019, at an annual general meeting (AGM), the strata passed a $\frac{3}{4}$ vote resolution to make several changes to the patios and garden area that include removal of the southside fencing. I will refer to the $\frac{3}{4}$ vote resolution as resolution #5, as this was its title in the strata's AGM minutes. The owner says the strata presented resolution #5 misleadingly. In particular, she says the removal of the southside fencing is "retaliation" for a related dispute between the same parties, dated April 25, 2018 and indexed as 2018 BCCRT 153 (April 25, 2018 Decision). She also says the southside fencing is necessary to enclose her patio for security and privacy purposes.
3. The owner submits the strata's actions are significantly unfair and she seeks an order that the strata not remove the southside fencing that stands between her outdoor patio and the garden area. In her arguments she alternatively seeks an order that resolution #5 be dismissed, if I have the jurisdiction to do so. She also seeks legal fees of "close to \$2,000".
4. The strata disagrees with the owner's claims. It says resolution #5 is part of its efforts to comply with the April 25, 2018 Decision and that the owner's security concerns are exaggerated. The strata says it has not acted unfairly and the owner's claims should be dismissed.
5. The owner is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

6. 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.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a "he said, she said" scenario as to what occurred and did not occur during the respondent's employment. Credibility of interested witnesses, particularly where there is a conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary 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 that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.
8. 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 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, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

Background and Preliminary Matter

10. I will first begin by outlining the facts, which are largely undisputed.
11. According to the strata plan filed at the Land Title Office, strata lots 3, 4, 5, 6, 7 and 8 are ground level strata lots in a building located next to each other, running west to east. As noted above, the owner's unit is SL6. Each of these strata lots has an

outdoor patio on its south side that is designated as limited common property (LCP) for the exclusive use of the respective strata lot. The south side of the patios are next to a shared garden that is designated as common property (CP) on the strata plan. The CP garden has a gravel pathway and hedges that are close to the area bordering between the LCP patios and the CP garden area.

12. The LCP patio of SL6 is enclosed by fences on the east, west, and south side. The east and west fences provide a barrier between the owner's LCP patio and her neighbors' LCP patios. The southside fence provides a barrier between her LCP patio and the CP garden. Other owners have similarly enclosed their LCP patios by installing a southside fence. These include the owners of strata lots 3, 4, and 7, as noted in their letters dated September 1, August 22, and August 29, 2019, respectively.
13. The strata says, and I find, that the east and west patio fencing on strata lots 3, 4, 5, 6, 7, and 8 is preexisting and part of the original design of the strata building. The fences therefore originally separated the owners' LCP patio areas but did not fully enclose them. The strata says, and I find, that the LCP patios, including the LCP patio of SL6, originally had an unobstructed view of the CP garden and that the southside fence did not exist.
14. In its April 25, 2018 Decision, the tribunal found that the common pathway and hedges in the CP garden encroached upon the southern 5 feet of the owner's LCP patio. The tribunal made two orders that relate to this dispute:
 - a. Within 60 days of the date of its decision, the strata had to obtain at least 2 quotes to remove the common path and hedges that are located in the south patio LCP area of SL6.
 - b. Within 30 days of receiving the quotes, the strata had to call a general meeting to consider a $\frac{3}{4}$ vote resolution to approve altering the LCP of SL 6 consistent with the quotes.
15. On June 19, 2018, the owner emailed the tribunal that the strata advised her it had never received the April 25, 2018 Decision. By inadvertence, the tribunal had sent

the notice to the strata's former, and not current, representative. The tribunal acknowledged its error in an October 4, 2018 message and wrote that the timeframes and deadlines in the April 25, 2018 Decision would begin as of October 4, 2018.

16. I find that the strata did not strictly comply with the April 25, 2018 Decision. Based on the October 4, 2018 tribunal letter, the strata should have obtained 2 or more work quotes by December 5, 2018. That did not happen. The strata does not deny that it missed the specified deadlines. Instead, the strata says it was uncertain if the April 25, 2018 Decision was valid. After obtaining a legal opinion, it decided to try to comply with the tribunal's orders and contacted 6 contractors. The strata says, and I find, that it was difficult to find quotes as the work was in minor in scope and would occur during the busy season for landscaping. There are 3 quotes before me dated January 15, March 12, and April 2, 2019, regarding the removal of the encroaching common path and hedges and other improvements to the same areas.
17. I also find that the strata did not call a general meeting within 30 days of receiving at least 2 quotes. Instead, I find that the strata decided to use the AGM to consider a $\frac{3}{4}$ vote resolution to approve resolution #5, which would alter the LCP patio of SL6. The strata only had 1 landscaping quote at the time.
18. I cite a portion of resolution #5 here:

BE IT RESOLVED BY A 3/4 VOTE RESOLUTION OF THE OWNERS, STRATA PLAN VR 2105 pursuant to section 71 of the Strata Property Act that the following changes in use and appearance of common property, including limited common property, be approved in relation to the back garden limited common property associated with strata lots 2, 3, 4, 5, 6, 7 & 8 (the "LCP areas"):

1. Removal of hedging plants (Choisya variety only) and the gravel pathway directly behind each of the LCP areas;
2. Removal of the fencing on the southern end of each of the LCP areas;
3. Install new hedging plants to extend the LCP of each of the subject back garden LCPs and use the same hedging material to form the southern boundary of each of the subject back garden LCPs. The hedging plants shall not exceed approximately 1.0 meter in height at any point;

4. Install the same hedging plants on the southern boundary of Strata Lot 2 (which is currently in compliance with the registered Strata Plan);

5. The ground cover on the portions of the LCP areas shall be 20 millimeter washed gravel.

[Emphasis added.]

19. As noted in the submissions of the owner and statement provided by the owners of strata lots 3, 4, and 7, resolution #5 is not limited to affecting the owner or SL6. Instead, resolution #5 would remove the southside fencing from several LCP patios, including the owner's. A hedge would separate the LCP patios from the CP garden.
20. According to the AGM minutes, following discussions the vote passed by the necessary $\frac{3}{4}$ vote margin with 29 votes in favour, 2 opposed, and 1 abstaining. Approximately 1 month later, the owner filed her application for dispute resolution on March 27, 2019. Although the owners of strata lots 3, 4, and 7 have expressed concerns in their letters over the removal of the southside fencing in support of the owner's dispute, I note they are not parties to this dispute.
21. The strata has yet to remove any of the southside fencing.
22. In a July 18, 2019 preliminary decision, the tribunal considered whether two claims in the Dispute Notice were *res judicata* (already decided) in the tribunal's April 25, 2018 Decision. For the reasons that follow I agree with the tribunal's preliminary decision and will proceed to consider the owner's claim regarding southside fencing only.
23. First, the owner asked for an order that the strata, at its expense, extend the preexisting east and west fences in the LCP patio of SL6 5 further feet. The tribunal decided that this claim was *res judicata* (already decided) and refused to resolve the claim under section 11(1)(a)(ii) of the CRTA. From my review of the April 25, 2018 Decision, it is clear the tribunal addressed this issue at paragraph 51. The tribunal wrote that the strata had no obligation to extend the east and west fencing bordering the east and west sides of the SL6 LCP patio.

24. In her reply submissions the owner says she never requested, and is not requesting, such an order. This contradicts the Dispute Notice. In any event, given the tribunal's preliminary decision with which I agree and the owner's submission that she is not pursuing this claim, I find it unnecessary to address the owner's claim for extending her LCP patio east and west fences.
25. Second, as noted above, the owner seeks an order that the strata not remove the southside fencing of SL6 that stands between her LCP patio and the CP garden. In the July 18, 2019 preliminary decision, the tribunal decided that this claim was not already decided and the owner was entitled to challenge resolution #5 in this dispute. The tribunal member noted her decision was preliminary and not binding upon the tribunal member issuing the final decision on the merits of the dispute.
26. Although not binding upon me, I agree with the July 18, 2019 preliminary decision and find that the issue of the removal of southside fencing has not already been decided. The tribunal found in the April 25, 2018 Decision that the common path and hedges encroached upon the south patio LCP area of SL6. The tribunal also ordered the strata to obtain at least 2 quotes for a $\frac{3}{4}$ vote resolution to approve measures to remediate this issue. The tribunal made no decision as to whether the southside fence should be removed.

ISSUES

27. The issues in this dispute are:
 - a. Whether the strata should be ordered not to remove the southside fencing that stands between the LCP outdoor patio of SL6 and the garden area.
 - b. Should I dismiss resolution #5 for being in noncompliance with the April 2018 Order?

EVIDENCE AND ANALYSIS

Issue #1. Should the strata be ordered not to remove the southside fencing that stands between the LCP outdoor patio of SL6 and the garden area?

28. In a civil claim such as this, the applicant owner bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
29. The strata says that resolution #5 was proposed under section 71 of the *Strata Property Act* (SPA). SPA section 71 states that the strata must not make a significant change to the use or appearance of common property unless it is approved by a $\frac{3}{4}$ vote at a general meeting. SPA section 1 defines LCP as common property designated for the exclusive use of the owners of one or more strata lots.
30. I find that section 71 applies as the LCP is common property. I also find that section 71 requires a $\frac{3}{4}$ vote to pass at an annual or special general meeting before the strata can make any significant changes to the LCP patio areas. There is no dispute that the removal of the southside fencing would be a significant change under SPA section 71.
31. As noted above, resolution #5 was approved by the owners by a $\frac{3}{4}$ vote at the AGM. Resolution #5 consists of several landscaping changes that include the removal of the encroaching common pathway and hedges, and the removal of the southside fence of a number of strata lots, including the owner's. For the reasons that follow, I find that the strata should not be ordered to refrain from removing the southside fencing in the south patio LCP area of SL6.
32. The owner says that the strata's actions are significantly unfair. Under SPA section 164 and CRTA section 123(2), the tribunal has authority to make findings and orders to remedy significantly unfair actions by a strata corporation. See, for example, *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.

33. The British Columbia Court of Appeal has considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44.
34. As noted in *Dollan*, the results of a fair process and democratic vote may still potentially result in significant unfairness to minority strata lot owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The test established in *Dollan* was restated in *Watson* as follows:
- 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?
35. As noted in *The Owners, Strata Plan VR2122 v Wake*, 2017 BCSC 2386 at paragraph 140, significant unfairness includes conduct or consequences that are burdensome, harsh, or done in bad faith. The term “significant” indicates that the unfairness must be of “great importance or consequence”.
36. The issue before me is whether strata should be ordered to refrain from removing the owner’s southside fencing standing between her outdoor patio and the CP garden. The owner expected to retain the fencing. For the reasons that follow, I find that this expectation in the circumstances was objectively reasonable. However, this expectation was not violated by an action that was significantly unfair.
37. I note that the owner never obtained written approval for the southside fence from the strata. The strata registered amended bylaws on November 29, 2001. Bylaw 6(1) says that an owner must obtain the written approval of the strata before making any alteration to common property, including LCP. The owner became the registered owner of her strata lot in 2012. The owner acknowledges the southside fencing did not exist at the time. The owner says she had the southside fence built at her own expense in 2014 following a building envelope remediation project. The strata says this happened in 2015 but I do not find it necessary to determine which

date is more accurate. The owner acknowledges that she never obtained written approval for the fence. She says she attempted to obtain approval beforehand from the strata council but the strata never responded to her request.

38. In other circumstances I might find that the owner's expectations regarding her southside fence were unreasonable. However, the owner was not alone in building a southside fence to enclose her LCP patio. The strata says, and I find, that multiple strata lots erected southside fencing to similarly enclose their LCP patios, in breach of the bylaws. The strata submits it ignored these bylaw breaches for a number of years to "keep peace in the valley".
39. From the above, I find a reasonable expectation would be that no particular owner of a ground floor unit would be singled out for building a southside fence to enclose their LCP patio. Further, it would be reasonable to expect that such a fence could be kept for a period of time.
40. However, for it to be reasonably held, this expectation would be tempered by the fact that it was known the southside fence was built in breach of strata bylaws. A person would reasonably expect the continued existence of the southside fence was more uncertain than usual. Put another way, it would be reasonable to expect the strata to address the southside fence at some point in the future. That might include having the owners vote on the issue under SPA section 71, through a $\frac{3}{4}$ vote resolution at a general meeting, which is what occurred in this case.
41. I now consider the third branch of the test in *Dollan and Watson*. I find that the owner's reasonable expectation was not violated by a significantly unfair action. The removal of the southside fencing was discussed at the AGM. It was part of a larger resolution to comply (albeit imperfectly) with the tribunal's April 25, 2018 Decision. The owner had the opportunity to discuss resolution #5 and suggest amendments. Resolution #5 was voted upon and approved by the strata owners.
42. The owner says resolution #5 was drafted by the strata in retaliation for previous tribunal proceedings. I find this unlikely as resolution #5 applies uniformly to multiple strata lots, including SL6. As noted in the tribunals' April 25, 2018 Decision, the

tribunal found that the common pathway and hedges encroached upon the LCP patio of SL6. The strata says this is also the case for strata lots 3, 4, 5, 7, and 8, with which the owner appears to agree.

43. There is no indication that the landscaping work in the CP garden requires the removal of the southside fences. I attach some significance to this as a factor that supports the owner's position. However, there is a rational connection between the removal of the southside fences and the rest of resolution #5.
44. The southside fences were built while the owners were unaware that the common path and hedges encroached upon their property. Removing the fencing would extend the usable area of the LCP patios for their owners. A key point of resolution #5 is that the strata would place new hedges "to form the southern boundary of each of the subject back garden LCPs". This is a new feature, as the pre-existing hedges in the photographs in evidence do not border the LCP patios and provide almost no privacy at all. The strata therefore chose to remove the southside fencing but provided a replacement in the form of hedges. I find such hedges would provide some privacy and a barrier to entry, though to a differing degree than the fencing. Although alleged by the owner, I do not find there to be sufficient evidence that the strata put forth resolution #5 in bad faith. While another approach might be preferable to the owner, I find that the strata's conduct and the consequences of resolution #5 do not result in significant unfairness.
45. The owner also argued that the strata misrepresented the removal of the southside fencing as necessitated by the tribunal's April 25, 2018 Decision. However, I find there is limited evidence to support this claim. Further, the owner acknowledges that she had the opportunity to speak and explain at the AGM that the removal of the southside fencing was not required under the April 25, 2018 Decision.
46. I also reviewed the letters from the owners of strata lots 3, 4, and 7, to determine if the strata misrepresented the facts at the AGM. The owner of strata lot 3 was not an owner at the time of the AGM. The owner of strata lot 7 was not present at the AGM. The owner of strata lot 4 says she does not support the removal of the

southside fencing. However, she did not say that the strata misrepresented what the tribunal ordered in April 2018 at the AGM.

47. As noted above, the owner raises safety and privacy concerns. The owner reports two occasions upon which other owners intruded upon her privacy by walking up to her bedroom patio door, prior to her installing the southside fence. The owners of strata lots 3, 4, and 7 provided letters similarly expressing concerns about privacy and security. However, they did not discuss any instances of break-ins, intruders, or unwanted visitors.
48. The owner says, and I find, that the southside fence provides more privacy and security than the replacement hedge discussed in resolution #5, which will only measure up to 1 meter. I acknowledge the owner's concerns and might have reached a different conclusion if there was more evidence that the owner's privacy and safety were substantially affected. However, the hedges would presumably dissuade other owners from walking up to the owner's patio door. The strata building and CP garden are also surrounded by a fence to keep out intruders from outside the strata property.
49. I also acknowledge that the owner provided an April 17, 2019 photo from another strata owner showing that the lock to the east gate of the strata building had "disappeared again". While this is a security concern, the email does not say the missing lock is related to a break-in or if it continues to be an issue. The strata says it makes the necessary repairs and improvements to ensure such entrance points are reasonably secure. I find that the east gate security can be addressed separately from the southside fencing.
50. Further, the strata provided pictures of the southside fence showing that it has a crisscross (or lattice) design. I note the neighboring strata lots use a similar design. I find someone standing at the fence would be able to look through the fence. The level of privacy afforded by the southside fence is therefore limited.
51. Finally, in its submissions the strata says the strata council intends to present a resolution at the next AGM that would allow the owners with LCP patios to keep

their southside fences, subject to approval from the owners. As the strata has thus far refrained from removing the southside fences, there appears to remain some possibility of an amicable solution.

52. In summary, I find that strata did not act in a significantly unfair manner, nor has resolution #5 resulted in significant unfairness. I decline to order the strata to refrain from removing the southside fencing that stands between the outdoor patio of SL6 and the CP garden.

53. I note that the owner free to apply to the strata under the strata's bylaws to construct a fence, if it is removed.

Issue #2. Should I dismiss resolution #5 for being in noncompliance with the April 2018 Order?

54. In her arguments the owner alternatively seeks an order that resolution #5 be dismissed, if I have the jurisdiction to do so.

55. The owner's submissions on this alternative relief are limited, but I infer that she says resolution #5 should be dismissed because it does not comply with the tribunal's April 25, 2018 Decision. I decline the owner's alternative request to dismiss resolution #5. The tribunal does not have authority to enforce its own orders. Under sections 57 and 58 of the CRTA, that authority lies with either the BC Provincial Court or the Supreme Court of BC.

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 in this case not to follow that general rule.

57. The strata is the successful party in this dispute. The strata paid no tribunal fees and does not claim dispute-related expenses. I therefore decline to make any orders for any party to pay tribunal fees or dispute-related expenses.
58. The owner also claims legal fees of “close to \$2,000”. Under tribunal rule 9.4(3), the tribunal generally does not order one party to pay another party legal fees save in extraordinary circumstances. I decline to order payment of such legal fees. The owner is the unsuccessful party, and in any event, I do not find the circumstances to be extraordinary.
59. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDERS

60. I refuse to resolve the owner’s claim that resolution #5 be dismissed for being in noncompliance with the April 25, 2018 Decision.
61. I dismiss the owner’s remaining claims.

David Jiang, Tribunal Member