



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *White v. The Owners, Strata Plan NW 2184*, 2019 BCCRT 1380

BETWEEN:

SCOTT WHITE and TANYA MACKENZIE

APPLICANTS

AND:

The Owners, Strata Plan NW 2184

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about netting that was used to enclose a patio. The respondent, The Owners, Strata Plan NW 2184 (strata), is a strata corporation. The applicant, Tanya Mackenzie, is a tenant at strata lot 30 in the strata. Strata lot 30 is also known as

unit 111. The co-applicant, Scott White, is a tenant or occupant at unit 111. The parties dispute Mr. White's status under the *Strata Property Act* (SPA).

2. The applicants say the strata wrongly denied Mr. White a hearing. They say the strata also failed to provide him copies of complaints about the netting. They submit Mr. White is entitled to both as a tenant. They also want permission for the netting to be put up again. Finally, the applicants seek an order for the strata to either fairly enforce bylaws and rules or not at all.
3. The strata disagrees. It says that Mr. White is an occupant and not a tenant. As such, he has no standing to request a hearing or strata documents. The strata also submits this dispute is premature. It says that no owner or tenant requested a hearing first before applying for dispute resolution. The strata submits the netting breaches strata bylaws and rules. Finally, the strata denies it enforces strata bylaws or rules unfairly.
4. Mr. White represents the applicants. A property manager employee or principal represents the strata.

JURISDICTION AND PROCEDURE

5. 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.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Some of the evidence in this dispute amounts to a "he said, she said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to

be the 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.

7. 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.
8. 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

9. The issues in this dispute are as follows:
 - a. Is Mr. White a tenant under the *Strata Property Act* (SPA)?
 - b. Is this proceeding premature?
 - c. Is Mr. White entitled to a hearing?
 - d. Are the applicants entitled to the requested documents?
 - e. Did the strata act in a significantly unfair manner, and if so, what is the appropriate remedy?

BACKGROUND AND EVIDENCE

10. In a civil claim such as this, the applicants bear 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.
11. The parties do not dispute the following facts. The strata consists of 138 residential strata lots in two buildings. Each building has three floors. Strata lot 30 is on the first floor of one of the buildings. It has a patio that provides a view of a landscaped area and the other building. According to the strata plan filed in the Land Title Office, the patio is designated as limited common property. The landscaped area is designated as common property.
12. Ms. Mackenzie is a tenant at strata lot 30. According to a Form K, Ms. Mackenzie began her tenancy on December 1, 2015. I find that Mr. White moved into strata lot 30 by July 27, 2017 at the latest. On that date, Ms. Mackenzie sent an email to the property manager to complain about noise from unit 211. The applicants both appear as authors in that that email, and several subsequent emails as well.
13. The applicants own at least 2 cats. The cats freely roamed the exterior landscaped area until one was attacked in February 2018. The strata does not dispute the cat's injury.
14. The applicants subsequently enclosed their patio by hanging netting from the balcony above strata lot 30. The applicants did this to provide the cats access to the outdoor patio without allowing them to escape.
15. The strata received a written complaint about the netting. On January 30, 2019, the property manager emailed the owner of strata lot 30 (owner). The owner is not a party to this dispute. The property manger wrote that the netting breached bylaws 43.7 and 43.13. He asked the applicants to remove the netting by February 11, 2019, otherwise the owner's strata lot would potentially be fined. The strata enclosed a photograph of the netting.

16. The strata's bylaws, with amendments, are registered in the Land Title Office. Bylaw 43.7 says an owner, tenant, or occupant must not erect signs, fences, or other fixtures on common property or in a strata lot, unless authorized by the strata. Bylaw 43.13 says an owner, tenant, or occupant must not display or erect fixtures, poles, clotheslines, racks, and similar structures on limited common property or common property.
17. In a February 1, 2019 email to the property manager, Mr. White agreed that that netting "did violate a rule". However, he wrote that the strata unfairly targeted him. Mr. White subsequently removed the netting. The strata did not levy a fine for the netting.
18. Mr. White requested a hearing with the strata council in a February 11, 2019 emailed letter. Mr. White wrote that he requested the hearing because the strata was improperly enforcing strata bylaws and rules.
19. SPA section 34.1 says that an owner or tenant may request, in writing, a hearing at a strata council meeting. Once received, the council must hold a council meeting within 4 weeks of the applicant's request.
20. I find that Mr. White requested the hearing under SPA section 34.1 He referred to the SPA generally and said the hearing had to be held within 4 weeks.
21. On February 20, 2019, the applicants submitted their application for dispute resolution.
22. On March 14, 2019, the property manager emailed the owner and forwarded Mr. White's letter. The property manager wrote that only an owner or tenant could request a hearing under the SPA. He added that there was no Form K indicating that Mr. White was a tenant. The property manager concluded that Mr. White had no standing to request a hearing. The hearing never occurred.

Issue #1. Is Mr. White a tenant under the SPA?

23. The applicants say that Mr. White is a tenant under the SPA. They submit he can request a hearing.
24. The strata says that without the Form K, Mr. White is an occupant under the SPA. As such, he is unable to request a hearing.
25. SPA section 1(1) defines
 - a. a tenant as a person that rents all or part of a strata lot (including a subtenant),
 - b. an occupant as a person, other than owners or tenants, who occupies a strata lot, and
 - c. a landlord as an owner who rents a strata lot to a tenant and a tenant who rents a strata lot to a subtenant.
26. SPA section 146(1) says that a landlord must give a prospective tenant a copy of the current strata bylaws and rules and a Notice of Tenant's Responsibilities. The *Strata Property Regulations* prescribe the Form K as the form of the notice. SPA section 146(2) says the landlord must give the strata a copy of the Form K, signed by the tenant. The landlord must give the Form K within 2 weeks of renting all or part of the strata lot.
27. SPA section 146(3) says that if the landlord fails to comply with SPA sections 146(1) or (2), the tenant is still bound by the strata's bylaws and rules. SPA section 164(4) allows the tenant to end the tenancy early in such circumstances.
28. I find that Mr. White is a tenant under the SPA. On September 16, 2019, the owner of strata lot 30 emailed Mr. White to say she submitted a new Form K for him. While this new Form K is not in evidence, the owner's email supports the conclusion that Mr. White is her tenant. I find the owner to be the best source of evidence on this issue. The Form K in evidence shows that the owner is Ms. Mackenzie's landlord. The September 26, 2019 email also indicates she is Mr. White's landlord and Mr. White is a tenant.

29. The strata's evidence also shows that, prior to this dispute, the strata viewed Mr. White as a tenant. At the January 31, 2018 AGM, Mr. White attempted to stand for election to strata council. The minutes say he had to present a signed lease of at least 3 years to be eligible under the bylaws. He did not do so. However, the minutes otherwise identify Mr. White as a tenant.
30. The strata says that Mr. White is an occupant because it has no Form K for Mr. White. It denies receiving the most recent Form K from the owner. However, SPA sections 146(3) and (4) state the consequences in such circumstances. They state that Mr. White is still bound by strata bylaws and rules. SPA sections 146(3) and (4) continue to refer to individuals in Mr. White's situations as tenants. There is nothing in SPA section 146, or the rest the SPA, that indicates Mr. White ceases to be a tenant.
31. In summary, I find that Mr. White is a tenant under the SPA.

Issue #2. Is this proceeding premature?

32. SPA section 189.1(2) says that an owner or tenant must first request a council hearing under SPA section 34.1 before asking the tribunal to resolve a strata dispute. The tribunal may waive this requirement at the request of a party.
33. The strata says that this proceeding is premature because no owner or tenant requested a hearing. I disagree.
34. As noted above, SPA section 34.1 says that a tenant may request, in writing, a hearing at a strata council meeting. Mr. White is a tenant. In his February 11, 2019 letter he requested a hearing at a strata council meeting. The request was in writing. I have also found that Mr. White made his request under SPA section 34.1. The applicants submitted their application for dispute resolution on February 20, 2019. This is 9 days after the hearing request. I find that Mr. White fulfilled the requirements of SPA section 189.1(2) before applying for dispute resolution.

Issue #3. Is Mr. White entitled to a hearing?

35. The strata did not address whether Mr. White was entitled to a hearing if he was, in fact, a tenant. I find that the strata inappropriately refused to grant him a hearing.

36. Having said that, I decline to order the strata to hold a hearing. The issues for the hearing are now before the tribunal. I will consider the merits of this dispute.

Issue #4. Are the applicants entitled to the requested documents?

37. The applicants say the strata ignored their document disclosure request. The applicants seek copies of complaints about the netting.

38. SPA section 35 lists records and documents a strata corporation must prepare and keep. SPA section 35(2)(k) says the strata must keep correspondence sent or received by the strata and strata council.

39. SPA section 36 says that a tenant may inspect or obtain copies of the documents referred to in section 35. However, the tenant must be assigned the landlord's right to inspect or obtain copies of those documents. SPA section 147 says that such an assignment is not effective until the strata is provided written notice of the assignment. The written notice must also include the name of the tenant, the powers and duties assigned and the time period of the assignment.

40. The strata says it only received a document request from Mr. White. It says that Mr. White cannot request documents under SPA section 36. The strata submits that there is no evidence that Mr. White was assigned the landlord's right to inspect or obtain documents.

41. I find that the applicants are not entitled to the requested documents. The applicants provided no evidence or submissions on whether their landlord assigned any rights to either of them. I find this to be a key point. I was also not provided a copy of Mr. White's document request, or any other evidence, to support this claim.

42. I dismiss this claim.

Issue #5. Did the strata act in a significantly unfair manner, and if so, what is the appropriate remedy?

43. The applicants say the strata should allow them to put the netting up again. They acknowledge the netting breaches strata bylaws. However, they submit that other owners breach bylaws without consequence. These bylaws relate to parking, noise, and the use of patios and balconies. They say the strata has unfairly targeted them for bylaw enforcement.
44. The applicants provided many photos of other strata balconies and patios. They say the photos show breaches of strata bylaws. I have summarized the applicable bylaws as follows:
- a. Bylaw 37.1 says bicycles must be stored in the bike storage locker or in a strata lot.
 - b. Bylaw 40.1 says an owner, tenant, or occupant must not allow a strata lot to become untidy.
 - c. Bylaw 40.2 says an owner, tenant, or occupant must ensure garbage is placed in the garbage containers.
 - d. Bylaw 43.7 says an owner, tenant, or occupant must obtain authorization to erect or display signs, fences, notices, or other fixtures on common property or in a strata lot.
 - e. Bylaw 43.11 says an owner, tenant, or occupant must ensure that publicly visible drapes or blinds must be a neutral colour.
 - f. Bylaw 43.12 says an owner, tenant, or occupant must ensure that no air conditioning units, laundry, flags, clothing, bedding or other articles are hung or displayed from windows, balconies or other parts of the building.
 - g. Bylaw 43.13 says an owner, tenant, or occupant must not display or erect fixtures, poles, clotheslines, racks, storage sheds, and other similar structures on limited common property, common property, or land that is a common asset. However, planter boxes, summer furniture, and barbeques are permitted.

- h. Bylaw 43.14 says Christmas lights may only be displayed during the holiday season.
45. I find that the netting breaches bylaws 43.12 and 43.13.
46. Bylaw 8.1 says that an owner must obtain written approval from the strata before making an alteration to common property, including limited common property. There is no evidence that the owner or applicants attempted to obtain written approval for the netting under bylaw 8.1.
47. Most of the photos show a timestamp for August 19, 2019. There are too many to address individually. However, several photos show the following:
- a. bicycles stored on balconies,
 - b. garbage bags (presumably filled with garbage) on balconies,
 - c. fences and blinds added to patios and balconies,
 - d. clothing hung up on balconies,
 - e. rack and clotheslines erected on balconies,
 - f. Christmas lights displayed in July 2019 (according to the photo timestamp), and
 - g. several patios and balconies that appear untidy.
48. Multiple photos show blinds or roller shades. These are mounted on the overhead balconies. When pulled down, the blinds enclose the balcony.
49. I find that the applicants' legal basis for their claim is that the strata has acted in a significantly unfair manner. SPA section 164 allows the BC Supreme Court to make an order to prevent or remedy significant unfairness. The tribunal has jurisdiction to determine claims of significant unfairness under CRTA section 123(2). This is because the language of CRTA section 123(2) is similar to the language of SPA section 164: *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 (*Watson*) at paragraph 119.

50. A “significantly unfair” act includes oppressive and unfairly prejudicial conduct. “Unfairly prejudicial” has been interpreted to mean conduct that is unjust and inequitable: *Strata Plan VR1767 (Owners) v. Seven Estate Ltd.*, 2002 BCSC 381.
51. The test for significant unfairness was set out by the BC Court of Appeal in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, and restated in *Watson*, as follows:
- a. What was the expectation of the affected tenant?
 - b. Was that expectation on the part of the tenant objectively reasonable?
 - c. If so, was that expectation violated by an action that was significantly unfair?
52. In this case, the applicants expected to enclose their patio with netting for an indeterminate period of time. This would allow their cats to access the patio without escaping. For the reasons that follow, I find the applicants’ expectation was unreasonable.
53. The applicants provide two reasons for why the cats needed patio access. First, they say their unit becomes dangerously hot during the summer. Second, the applicants say their cats are “outdoor cats”.
54. I find that the reason for the netting is relevant to whether the applicants could reasonably expect to keep it. However, the applicants did not provide any evidence on this point. It is unclear how hot unit 111 becomes. The applicants did not discuss any other options. For example, it is unclear if opening a screened window would sufficiently lower the temperature. The applicants did not otherwise explain why the cats needed to be outdoors. As noted above, the applicants bear the burden of proof.
55. The applicants acknowledge that the netting breaches strata bylaws. Bylaw 8.1 allows an owner to seek approval for the netting. The applicants do not own the strata lot. However, the emails in evidence show that Ms. Mackenzie and the strata lot owner are related. The owner responds to the applicants’ emails.

56. I find that seeking approval for the netting was, and still is, open to the applicants. However, neither applicant attempted to do so through the owner. This supports the conclusion that the applicants' expectations were unreasonable.
57. The photos do not show any other unit using netting. The closest parallels are units using blinds attached to overhanging balconies. When the blinds are pulled down, it is difficult to see anything beyond them. However, unlike the netting, the blinds can be rolled up. I find that the netting is unlike the existing alterations shown in the photos. This factor does not assist the applicants.
58. The applicants say that the strata often fails to enforce bylaws. I find that this would affect the reasonableness of the expectations at issue. On my interpretation of the bylaws and evidence, the photographed patios and balconies do not conform to the bylaws. However, I am not persuaded, on a balance of probabilities, that the strata has failed to fulfill its responsibilities under the SPA. It is unclear if the strata was aware of these incidents. Further, the strata may reasonably choose not to enforce a bylaw where the contravention is of a trifling or trivial nature. See, for example, *Abdoh v. Owners of Strata Plan KAS 2003*, 2013 BCSC 817, affirmed 2014 BCCA 270. The courts have also said the strata may give a liberal interpretation to its bylaws and exercise its discretion in reasonable and realistic manner, as long as they ensure that in doing so, the strata is not prejudicial to others. See *Strachan v. The Owners of Strata Corporation VR574*, 1992 CanLII 2233 (B.C.S.C.).
59. The applicants say that the strata failed to enforce parking bylaws 38.1 to 38.5. They submitted numerous photos of parked vehicles. They say these photos show, among other things, owner or tenant vehicles parked in the visitor parking spots.
60. I find this evidence has limited relevance to the issue of the netting. These photos relate to parking, rather than the use and appearance of the strata balconies and patios.
61. Further, the photos lack context or details. It is not readily apparent if the strata bylaws are being breached. I find that the photos do not show, on a balance of probabilities, that the strata is failing to enforce bylaws 38.1 to 38.5.

62. The applicants also say that the strata failed to enforce noise bylaws. Strata bylaws 4.1, 42.1, and 42.2 restrict unreasonable noise. They say the occupants of unit 211 were excessively noisy. Various emails document the history of the noise complaints.
63. I find that the noise complaints are also of limited relevance to the netting. The emails show that strata took steps to enforce noise bylaws. The applicants and the different tenants of unit 211 disagreed on whether any bylaws were being breached:
- a. In February 2016, the applicants complained about noise from unit 211. The occupant of unit 211 disagreed. The strata held a hearing on February 24, 2016.
 - b. On May 5, 2016, the applicants emailed the property manager about ongoing noise from unit 211. The property manager replied that a “noise violation warning” would be sent to unit 211.
 - c. On October 23, 2016, the applicants emailed the property manager again to complain about noise. The property manager emailed the applicants to say that a “violation fine letter” would be sent to unit 211. The property manager asked the applicants for further details.
 - d. On May 22, 2017, the new unit 211 tenant complained about the applicants. She described several interactions with them and said she “felt threatened”. The property manager emailed unit 211’s owner to advise he would take measures.
 - e. On July 27, 2017, the applicants complained about noise from unit 211 again. The property manager replied that a visiting child was the source of the noise. The property manager wrote he advised the unit 211 owner to have residents wear soft-soled footwear and place rugs on the floor.
 - f. On September 20 and 24, 2017, the applicants complained about noise from unit 211 again. The property manager provided a form for written complaints.

64. The various tenants of unit 211 are not parties to this proceeding. I am unable to conclude that the strata dealt with the applicants' noise complaints unreasonably or unfairly.
65. I have decided that the applicants' expectation that they could leave netting in place indefinitely was not objectively reasonable. I therefore find it unnecessary to address if the owner's expectations were violated by a significantly unfair action of the strata.
66. In summary, the applicants seek orders for the strata to permit the netting and either enforce its bylaws and rules fairly or not at all. I find that the strata has not acted in a significantly unfair manner. I decline to make these orders.
67. I dismiss these claims.

TRIBUNAL FEES AND EXPENSES

68. 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.
69. 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 tribunal fees or dispute-related expenses.
70. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDERS

71. I dismiss the applicants' claims and this dispute.

David Jiang, Tribunal Member