



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 1378 v. Steeves*, 2019 BCCRT 1415

B E T W E E N :

The Owners, Strata Plan NW 1378

APPLICANT

A N D :

SHAYNA STEEVES and DANA TINNEY

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This is a dispute about a kitchen fan located in strata lot 69 (SL69) owned by the respondents' Shayna Steeves and Dana Tinney, (owners).

2. The applicant strata corporation, The Owners, Strata Plan NW 1378, (strata), says that SL69's kitchen fan venting system encroaches and exhausts into a neighbour's strata lot (SL68), creating a nuisance. The strata's position is that the venting system is not original to the development and needs to be relocated. The strata asks that the owners "accept one of the three options to re-vent their kitchen fan for which the strata council has offered to pay (up to a maximum of \$4,000)."
3. The owners say the venting system is original to the building, meets the building code, and does not create a nuisance. The owners refuse to accept the options. The owners also say the limitation period to bring the action has expired.
4. The strata is represented by a strata council member and the owners are represented by Dana Tinney.
5. For the reasons that follow, I dismiss the strata's claims.

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 in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
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 the parties and witnesses questions and inform itself in any 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.

ISSUES

10. The issues in this dispute are:
 - a. Is the current venting system original to the development?
 - b. Does the current venting system need relocating due to penetration of the fire wall or alleged unlawful egress?
 - c. Does the kitchen fan venting system create a nuisance?
 - d. Is the claim statute barred under section 6 of the Limitation Act?

POSITIONS OF THE PARTIES

11. The strata argues that the venting system connected to SL69's kitchen fan needs to be moved because:
 - a. it is an unapproved alteration made by a previous owner,
 - b. penetrates a fire separation wall between two legal strata lots and the vent "illegally egresses" onto another strata lot, and
 - c. causes a nuisance to SL68's owners.
12. The owners say the strata has no legal basis to require them to accept the options to change their kitchen fan venting system. They say the venting system is original to the development, does not violate the BC Building Code, has sufficient fire caulking, and is an implied easement under section 69(1)(b) of the Strata Property Act (SPA). The owners say that the strata has insufficient evidence that the vent

causes a nuisance to SL68. Further, they say in the absence of establishing an ongoing nuisance, the claim must be dismissed as out of time under section 6 of the Limitation Act.

BACKGROUND

13. In a civil claim such as this, the strata bears the burden of proving its claims on a balance of probabilities.
14. The strata is a townhouse complex registered in the Land Title Office (LTO) on November 23, 1981. A title search shows the owners purchased SL69 in 2015.
15. This dispute arose following a complaint from the owners' neighbours, SL68, to the strata property manager on July 28, 2017. The SL68 owners complained that "intolerable" smells and noise were emanating from SL69's kitchen stove fan that vents into their strata lot court yard.
16. The strata plan filed in the LTO shows that the SL68 townhouse is setback from SL69. SL69's exterior west wall runs along SL68's open-air court yard. The photographs of the townhouse show that the vent cap for the disputed ventilation system is located on the exterior of SL69's west wall facing into SL68's court yard. The plans show the court yard is part of the strata lot and not common property. The strata says that smells and noise emanate from this vent cap into SL68's strata lot whenever the owners' kitchen stove fan is in use.
17. On July 31, 2017, the strata notified the owners about SL68's complaint by email and requested that they minimize their fan use. In November 2017, the strata informed the owners that strata council "determined that the kitchen exhaust vent was relocated to its current location by former owners" and requested access to the owners' strata lot to investigate options to move it.
18. The strata did not explain or provide evidence on how it concluded in November 2017 that the "vent was relocated". There are no original 'as built' drawings of SL69 and the filed strata plans do not show the building's venting system. There are also

no written records showing the exact location of the original venting system in SL69 or that it was ever changed. The strata's records show that 2 sets of prior owners applied for and were approval for renovations that did not involve changes to the venting system. There are no records or other objective evidence showing the venting system was moved.

19. Over the following months, the parties engaged experts to inspect and find alternative options for the kitchen fan and venting system. The parties did not agree to relocate the system and the strata is now seeking direction from the tribunal to permit it to implement one of three potential options.
20. The strata says the venting system is common property, which the owners do not dispute. However, I understand the reason the strata is seeking an order is because the options involve access and alterations to the owners' strata lot and the owners are not granting the strata permission to make the alterations.
21. I have only addressed the evidence and arguments to the extent necessary to explain my decision. Apart from dispute-related expenses, the owners brought no counterclaim. Therefore, I have not discussed the owners' allegations against the strata that it improperly charged them for records, restricted their fan use contrary to the SPA, ignored their complaints, or refused to repair a water ingress issue. I have also not discussed the owners' allegations that SL68 owners are biased against them. I find I am able to explain my reasons on strata's claim without comment on these additional issues raised by the owners in response.

Is the current venting system original to the development?

22. It is undisputed that the owners renovated their strata lot kitchen with strata approval after they purchased the strata lot in 2015. It is also undisputed that the owners connected their new range hood fan into the strata's existing duct vent and did not alter the common venting system. The owners' own renovations are not at issue.

23. The strata argues that a prior owner changed the original “downdraft system that vented through the strata lot’s roof to the current system that penetrates the west side of the exterior wall of Strata Lot 69” without strata permission as required under its bylaws. Bylaw 8 requires owners to obtain approval before altering common property.
24. The strata says bylaw 8 was amended in 2017 to make current owners responsible for unapproved alterations of previous owners. However, there was only one set of bylaw amendments filed in the LTO in 2017. These amendments were filed on December 28, 2017 under CA6536774, and add bylaw 8.5, which refers to exclusive use and special privileges. The amendment does not reference alterations as the strata states. There were no further bylaw amendments filed in the LTO after 2017. In any event, as I discuss below, I find it is more likely than not that the current venting system was not altered and therefore, the issues do not engage the alleged amendment.
25. To support its position that a prior owner relocated the venting system, the strata relies in part, on the owners’ own email to a former strata council member on November 22, 2017. In that email exchange, the owners ask about the history of the venting system and state that the prior owners moved the vent. However, my interpretation of the full email exchange is that the owners were quoting something they heard third hand and had no direct knowledge of the venting system’s history. I find the respondents’ 2017 comment is not reliable evidence of the venting system’s history and I have not relied on it.
26. The strata submitted a February 26, 2019 letter from its engineer. The strata says the engineer conducted a number of inspections of the strata complex over the prior 10 years. The engineer’s letter states that the venting system was “installed illegally during renovation by previous owners” and none of the other strata lots “have these vents penetrating the fire walls between units”. However, the engineer does not explain how he came to these conclusions. The engineer does not state his assumed facts or the records he reviewed to reach these conclusions. I therefore

put no weight on the engineer's February 26, 2019 statement as to whether or not the venting system was moved.

27. The strata says it reviewed the plans and drawings with its property manager and found no indication that any other strata lots had "the original kitchen exhaust fan venting system installed other than through the roof". However, the strata plans show no exhausts or vents, just the outline of the strata lot boundaries. I find the plans cannot be relied on for the vent location. Also, the strata does not explain its statement about roof venting in relation to several photographs in evidence that depict exterior wall vents on the outside walls of other strata lots. For these reasons, I put no weight on the strata's own interpretation that the system's original positioning must have been through the roof.
28. There are mechanical drawings in evidence dated 1979 for a different building in the same strata complex. The owners say it is the reverse layout of their own strata lot, which the strata does not specifically dispute. I accept the drawings are the reverse layout and I find them helpful to understand the venting plan for SL69 at the time of development.
29. The parties give conflicting interpretations of mechanical drawings. The strata argues that it "would not make sense to have a vent exhausting into the interior of another strata lot." I agree it would not make sense to exhaust into an interior of a building, but the wall vent shown in the drawings does not vent into an interior strata lot but into an exterior courtyard. The photographs show that SL69's vent similarly exhausts into SL69's outside courtyard.
30. The strata also argues that the drawings show that the original vent likely went through the roof because the drawings show other vents on the roof. The drawings do show several roof vents, but most seem to be over plumbing fixtures. I find the presence of other roof vents is not determinative of whether there was a kitchen range vent.
31. The owners provided an interpretation of the mechanical drawings from Lee Her, an architectural technologist and designer with SEL Engineering Limited. Ms. Her

inspected the venting system on January 28, 2019. Ms. Her also reviewed the mechanical drawings. I accept on the technologist's experience and credentials in evidence that she is qualified to provide an expert opinion evidence according to tribunal rule 8.3(3) about the venting system.

32. Ms. Her states in her September 9, 2019 email to the owners, "based on the drawings the duct comes up from the basement level running parallel with your floor joists and up the exterior wall and out to the exterior." I find the engineer's interpretation that the venting system comes up from the basement is reasonably consistent with the mechanic drawing notations. Specifically, the basement level notations under the main floor kitchen "stove top" states, "exhaust duct up to range" and "range exhaust terminate with approved wall cad". The drawings also show a solid line, which I infer is the exhaust travel path, running along the length of the room and curving to exit out the side exterior wall. I find the reasonable interpretation of the mechanical drawings is that the venting system vented up from the basement and through the wall.
33. The owners submitted several witness statements about the venting location. The general contractor who worked on the owners' kitchen renovation says he saw no evidence of pre-existing ducting that would indicate that the venting system was moved. The photographs show that the owners brought the kitchen down to the stud wall framing during their own renovation. Considering the framing was exposed, I find the contractor would have been able see what was and was not there.
34. The strata says the owners' contractor only completed this renovation after the vent was relocated by another owner years prior without the consent or knowledge of the strata. However, there is again no objective evidence that the venting system was moved and the strata concedes there is "no evidence when the vent was altered as there were numerous other unapproved alterations." I find the strata is only speculating on the prior alteration.

35. I find it more likely than not that the venting system originally vented through the wall as shown on the mechanical drawings. I find the strata has not established on a balance of probabilities that current venting system was altered after development.

Does the current venting system need relocating due to penetration of the fire wall or alleged unlawful egress?

36. On January 28, 2019 the owner's expert, Lee Her from SEL Engineering inspected the venting system on site. While the venting penetrates a fire wall, Ms. Her says the fire caulking in place is sufficient. She says the current venting system meets all aspects of the Building Code and Municipal Bylaws. I accept Ms. Her's expert opinion on the venting system's compliance.

37. At any rate, the strata concedes that the Building Code is not breached. It says however, that it needs to relocate the vent because "it illegally egresses onto another legal strata lot".

38. The venting system itself is undisputedly common property. The owners say the venting system is an implied easement under section 69(1)(b) of the SPA. Though I paraphrase, section 69(1)(b) says an easement exists in favour of each strata lot for the passage of such items as water, gas, oil, electricity, heating and cooling systems, and other services, through or by means of any pipes, wires, chutes, ducts or other facilities existing in the common property or another strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of the strata lot.

39. The strata argues that the vent is not an implied easement under section 69(1)(b) because it is altered from its original construction. I find I do not need to get into the merits of the strata's argument on this point because I have not found that it was altered.

40. The Court of Appeal in *Shaw Cablesystems Limited v. Concord Pacific Group Inc.*, 2008 BCCA 234 (CanLII) interpreted that the legislature's intention in section

69(1)(b) was to grant each strata lot owner a privilege over the common property having the qualities of an easement at common law.

41. A vent from a kitchen stove fan allows the passage of exhaust through the venting system ducts to clean the air when a person cooks foods. I accept this is a passage of items through common property or another strata lot connected to the enjoyment of that strata lot. Therefore, I accept that the venting system is an implied easement under section 69(1)(b). Accordingly, I find the strata has not established that the current venting system unlawfully egresses another strata lot and needs to be moved.

Does the kitchen fan venting system create a nuisance?

42. The strata bylaw 4.1 provides that an owner must not use a strata lot in a way that causes a nuisance or hazard to another person, unreasonable noise, or unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot.
43. The strata argues that the odors and noise from the owners' venting system creates a nuisance to the owners of SL68 and for that reason, it cannot allow the current venting system to remain. The owners deny that the venting system creates a nuisance.
44. The owners say the strata has not proved the legal test for nuisance. They rely on several court and tribunal cases on nuisance. Rather than summarizing all the cases, I summarize the two-part test for private nuisance set out by the Supreme Court of Canada in *Antrim Truck Centre Ltd. Ontario (Transportation)*, 2013 SCC 13 (CanLII).

19 The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the

reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances [emphasis original].

45. In concluding that the fan venting system creates a nuisance the strata seems to rely almost entirely on the complaint itself and the fact that some noise and odors emanate from the vent when the fan is turned on. It is common knowledge that a kitchen fan vent might make some noise or produce some smell. However, the question is whether this was to such a substantial and unreasonable extent to create a nuisance.
46. In their July 28, 2017 complaint, the SL68 owners stated in part, that the owners' stove top exhaust fan "is used to extract fried food odours, those odours are blown directly into our courtyard creating a very unpleasant environment there, and worse, if our windows and door are open the cooking smells quickly permeate throughout our unit". Further, that the owners' fan is "operated for hours at a time at high speeds. It is very noisy and is a nuisance." There are no further documented complaints in evidence.
47. One of the SL68 owners provided the strata with a current statement dated September 9, 2019 in relation to this dispute, which is similar to their July 2017 complaint. However, in this statement, the SL68 owner says the fan was not really an issue when the former owners of SL69 were living there because they "rarely used it; particularly once they became aware of how noisy it was and that the fumes into our home". The SL68 owners' state that both them and their neighbours, the SL69 owners, are frequently out of town. He says when they are home, the fan is "noisy" and the cooking odors "unpleasant".
48. The SL69 owners provided some evidence that they rarely cook at home and do not fry foods. I have not summarized the evidence further on this point because I find it is not needed. I find the SL68 owners' complaint and statement of a "noisy" fan and "unpleasant" odors are not enough to establish a "substantial interference", or one that is non-trivial.

49. It is uncontested that the strata neither inspected nor monitored the noise or odor. The strata produced no professional measurements on the interference. There is no data on the odor or noise levels or on their frequency and duration. The strata provided a letter from its engineer dated February 26, 2019 that states, “exhaust fumes are irritating the neighbour” and there is a “stench”. However, the engineer does not state the source of the facts he relies on in coming to his opinion and does not say he inspected the odor himself. He provides no data or other metrics on odor levels. For these reasons I have put no weight on the engineer’s evidence about the odor.
50. Considering the lack of any objective evidence, I find the strata has not established the first branch of the test that the noise or the odor was a substantial or non-trivial interference.
51. Even had the strata satisfied the first branch, I find it would have failed on the second branch of the test. The common law principle of nuisance liability “focuses on the harm suffered rather than on prohibited conduct” (*St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at 77). I find a neighbour’s statement that the alleged interference is “unpleasant” and enters their home to be insufficient evidence of harm. There is no specific evidence on the impact of the noise or the odor on the SL68 owners’ lives. Therefore, I find strata has also failed to establish that the alleged interference was unreasonable.
52. I find the strata has not established that the kitchen fan venting system created or continues to create a nuisance.

Is the claim statute barred section 6 of the Limitation Act?

53. Considering my conclusions above, I find no need to consider the respondent’s limitation defence.

Summary

54. The strata has the burden of proof. I find the strata has not established a basis in law to require the owners to relocate, change or move the venting system or their

kitchen fan. I find the strata is not entitled to the order it seeks. Accordingly, I dismiss the strata's claims.

TRIBUNAL FEES and EXPENSES

55. 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. The strata was unsuccessful in this dispute and I dismiss its claims for tribunal fees and dispute-related expenses.
56. The owners claim expenses for expert reports and legal fees. I will deal with each claim individually.
57. First, the owners submit an invoice of \$1,575.00 for the SEL Engineering report authored by Lee Her. I relied on Ms. Her's expert opinion evidence on the current venting system. I find this dispute-related expense reasonable and allow it. I order the strata to reimburse the owners \$1,575.00 for the SEL Engineering invoice.
58. Second, the owners submit an invoice from TAG Engineering for \$551.25. They say it is related to the letter in evidence dated September 18, 2019 requesting Lee Her's qualifications. However, the September 18, 2019 letter is from SEL Engineering Limited and not TAG Engineering. Since there is no TAG Engineering letter in evidence, I have not allowed this expense.
59. Third, the owners submit an invoice from Ocean Park Plumbing for \$397.95 concerning water ingress from the vent system that they say the strata council refused to investigate or repair. However, the owners made no counterclaim on the merits of this issue. I also find the water ingress issue is not relevant to my determination on the strata's claim. For these reasons, I have not allowed this expense.
60. Fourth, the owners submit an invoice for legal fees in the amount of \$4,516.77. The owners argue that this dispute is exceptional because the strata allegedly engaged

in “bullying tactics”, threatened to block the vent without just cause, and misrepresented the truth. I find the strata pursued its claim with little evidentiary basis and was wrong in its conclusions about the venting system for the reasons set out above. However, I do not find its mistaken conclusions amounted to bullying, threatening tactics or untruthfulness.

61. I find the dispute mostly turned on its facts and it is not an extraordinary case. I find no reason to depart from the tribunal’s general practice not to award legal fees. The tribunal’s practice follows from the general rule in section 20(1) of the CRTA that parties are to represent themselves in tribunal proceedings. I dismiss the owners’ claim for legal fees.
62. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owners.

ORDERS

63. I order that:
 - a. The strata pay the owners a total of \$1,575.00 for the SEL Engineering invoice;
 - b. The owners are entitled to post-judgement interest as applicable under the *Court Order Interest Act*;
 - c. The owners’ remaining claims for dispute-related expenses are dismissed; and
 - d. The strata’s claims are dismissed in full.
64. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA has expired and leave to appeal has not

been sought or consented to. Once filed, a tribunal order has the same force and effect as a BCSC order.

65. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the CRTA, the owners can enforce this final decision by filing a validated copy of the attached order in the BCPC. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as a BCPC order.

Trisha Apland, Tribunal Member