Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Kardoes v. The Owners, Strata Plan LMS 2733*, 2020 BCCRT 182

B E T W E E N :

ERIC KARDOES

APPLICANT

A N D :

The Owners, Strata Plan LMS 2733

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The applicant, Eric Kardoes, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 2733 (strata). The applicant requested an exemption from the strata's rental prohibition bylaw under section 144 of the *Strata Property Act* (SPA). The strata refused the exemption. In this dispute, the applicant

challenges the strata's decision and asks for an order that he be permitted to rent his strata lot.

2. The strata says that it previously granted the applicant a 1-year exemption from the rental prohibition bylaw. The strata says that the applicant's circumstances had changed when he applied for a second 1-year exemption and that he is no longer entitled to an exemption. The strata asks that I dismiss the applicant's claim.

3. The applicant is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

5. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

7. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUE

8. The issue in this dispute is whether the strata acted unreasonably in denying the applicant's request for an exemption from the strata's rental prohibition bylaw.

BACKGROUND AND EVIDENCE

9. In a civil claim such as this, the applicant must prove his case on a balance of probabilities. While I have read all the evidence and submissions, I only refer to what is necessary to explain and give context to my decision.

10. The strata consists of 58 townhouse-style strata lots in Abbotsford.

11. The strata filed a consolidated set of bylaws in the Land Title Office on June 20, 2005. Bylaws 8 and 33 prohibit all rentals, tenancies or licenses of occupancy (rental prohibition bylaw). It is unclear why there are 2 separate bylaws prohibiting rentals.

12. The applicant has lived in Abbotsford since 1994. From 1994 to 2018, he commuted daily to Burnaby by car for work.

13. According to the applicant, he and his wife separated in early 2017. After separating, they decided that their younger daughter would live with the applicant until she finished school in Abbotsford, at which point the applicant and his daughter would move closer to the applicant's work. With that plan in mind, the applicant bought strata lot 24 in the strata in September 2017.

14. However, in January 2018, the applicant's daughter moved to live with her mother in the Kootenays. In February 2018, the applicant's employer announced that it would be closing in June 2018. The strata does not dispute any of this.

15. The applicant decided to look for work closer to his daughter, so he put his strata lot up for sale. The applicant says that over the next 6 months, he had 2 realtors and eventually lowered the asking price to $42,000 less than what he had paid for it, but received no offers. During this time, he found work in the Kootenays.

16. After finding this job, the applicant applied to the strata for an exemption from the rental prohibition bylaw under section 144 of the SPA. The strata approved the application for a period of 1 year, ending October 31, 2019. The details of that decision are not before me, but the strata says that it relied primarily on the fact that the applicant's new job was not local.

17. The applicant says that in the spring of 2019, he hired another realtor to try to sell his strata lot, but again with no success.

18. In April 2019, the applicant decided to move back to the lower mainland and found a job in Vancouver. Because he had a tenant in his strata lot, the applicant rented a condominium close to his work.

19. The applicant emailed the strata's property manager on June 4, 2019, because his tenant had given notice that they would be moving out on July 15, 2019. The applicant said that he was still trying to sell the strata lot, still with the price $42,000 below what he had paid. He said that if he could not sell it, he would need another year exemption from the rental prohibition bylaw. The applicant did not explicitly ask for an exemption in this email.

20. On June 19, 2019, the strata denied the applicant's request for another exemption from the rental prohibition bylaw. The strata gave no reasons for its decision.

21. On July 3, 2019, the property manager told the applicant that he could re-apply for an exemption. The property manager asked for proof of hardship. On July 4, 2019, the applicant provided a bank statement, paystubs, a mortgage statement and a budget. According to the budget, he could not afford to keep the strata lot vacant while renting in Vancouver. The documents also showed that the applicant had no assets other than the strata lot, which he describes as his "nest egg".

22. On July 12, 2019, the strata again denied the application. The property manager told the applicant that the original exemption was still effective until October 31, 2019.

23. The strata gave reasons for its denial on July 17, 2019. The strata said that its initial approval was based on the applicant's move out of the local area. Based on the applicant's financial disclosure, the strata noted that the applicant would be able to meet his obligations by living in the strata lot and commuting. The strata noted that several residents of the strata commuted to Vancouver.

24. In addition to the above financial information, the applicant has provided a letter from a general practitioner, Dr. Wickman, dated October 21, 2019. She says that the applicant takes medication for an unspecified medical condition that has a "sedating side-effect". She says that the applicant "feels that he is at increased risk of falling asleep at the wheel in stop and go commuter traffic lasting 60 minutes or longer". She says that she "would endorse" the applicant not commuting to and from Vancouver.

ANALYSIS

Did the strata unreasonably deny the applicant's request for an exemption from the rental prohibition bylaw?

25. Section 144(1) of the SPA says that an owner may apply to the strata for an exemption from a bylaw that prohibits rentals if the bylaw causes "hardship" to the owner. Section 144(5) of the SPA says that the strata may grant an exemption for a limited time. Section 144(6) of the SPA says that the strata must not unreasonably refuse to grant an exemption.

26. The leading case about hardship exemptions under section 144 of the SPA is *Als v. Strata Corporation NW 1067*, 2002 BCSC 134. The Court confirmed that each hardship application would turn on its individual facts, stating that what may be hardship for one owner may not be for another. The Court identified several factors that may arise in a hardship application and I find that the following are relevant to this dispute:

    a. Whether the strata lot's sale price would be less than the purchase price.

b. Whether the owner has been unable to sell the strata lot.

c. Whether the strata lot makes up all or substantially all the owner's assets.

27. I agree with the strata that if the applicant lived in his strata lot and commuted, there would be no hardship because the applicant could afford to live in his strata lot on his salary. The applicant does not deny this, but he says that the commute is unreasonable. Applying the factors in *Als*, I agree with the applicant that if he cannot commute between Abbotsford and Vancouver, he has met the financial part of the test for hardship. First, the applicant says that he has attempted to sell his strata lot more than once, and at a considerable loss, but without success. Second, the applicant's financial disclosure shows that the strata lot is his only asset. This reasonably makes the prospect of selling the strata lot at a substantial loss unpalatable to the applicant. Finally, the applicant's budget shows that the applicant could not afford to rent even a small condominium in Vancouver and leave the strata lot vacant. In short, he would need the rental income to stay solvent.

28. Therefore, this dispute turns on whether it was reasonable for the strata to base its decision on the assumption that the applicant could commute.

29. The applicant says that even though he tolerated the commute to Burnaby for many years, it took a physical and psychological toll on him. He says he would no longer find it tolerable and that it would be bad for his health. He also says that he does not feel that he can safely drive that distance daily. He relies on Dr. Wickman's letter to support this point.

30. The strata says that the applicant commuted between Abbotsford and Burnaby for 24 years before taking the job in the Kootenays. I take the strata's point to be that the applicant cannot now claim that the commute is unreasonable having done a similar commute for so long. The strata says that Dr. Wickman's letter does nothing more than restate the applicant's subjective concerns about driving. Finally, the strata says that the applicant can reasonably commute by public transit, which may be inconvenient but is not a hardship.

31. Neither party provided clear evidence about how long the commute between the strata and the applicant's workplace would likely take. In one email to the property manager, the applicant says it would be 3 to 4 hours per day. However, I find that the better evidence about the applicant's likely commute time is Dr. Wickman's letter. It is clear that the applicant asked Dr. Wickman about a commute of 60 minutes. I also rely on the fact that, according to the applicant, his previous commute to South Burnaby was roughly an hour, and the applicant's new job is close to the Vancouver-Burnaby border.

32. So, is an hour long commute reasonable? It is a difficult question to answer because it is an inherently personal choice. A long commute may be tolerable, or even enjoyable, to some people but unacceptable to others. So, just because other owners in the strata commute to Vancouver everyday, does not make it reasonable. By the same token, just because other people, like the applicant, do not want to commute to Vancouver, does not make it unreasonable.

33. The employment law context provides some guidance about what is considered a reasonable commute. In *Borsato v. Atwater Insurance Agency Ltd.*, 2008 BCSC 724, the Court found that the employee acted reasonably in refusing to apply for a job in Chilliwack when she lived in White Rock, which is roughly the same distance as Abbotsford to Vancouver. In *Maguire v. Sutton*, 1998 CanLII 6771 (BC SC), the Court accepted the employee's decision to restrict her search to a 30-40 minute commute, in part because she cared for her elderly parents. In *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316, the Court found that the plaintiff had failed to mitigate her damages for refusing to commute between Hope and Chilliwack, a shorter commute than the applicant's.

34. I take from the above sources that there is no hard rule about what length of commute is unreasonable. It will depend, in part, on the individual circumstances of the commuter. I find that an hour long commute could be reasonable in some cases, and unreasonable in others.

35. I find that the applicant’s personal circumstances do not support his position that the commute is unreasonable. For example, he has no family obligations and he works a standard 40 hour work week.

36. What about Dr. Wickman’s letter? I agree with the strata’s comments that in some respects Dr. Wickman’s letter simply records the applicant’s views about how much he should drive. While Dr. Wickman says that the applicant’s medication is sedating, I infer that the sedating effect must be mild because Dr. Wickman does not state any concerns about the applicant driving generally.

37. I also find that Dr. Wickman’s letter lacks objectivity. She says that “physicians normally do not provide letters specifying exact medical conditions to those who are not medical care providers or insurance agencies”, which is inaccurate since physicians routinely provide detailed letters for use in legal proceedings. She says that she believes that the applicant’s consent to provide medical information was “coerced”. Furthermore, she restricts her opinion to stating that the applicant should not drive in “stop and go commuter traffic lasting 60 minutes or more”. I find that such a specific recommendation is more likely an attempt to help the applicant’s application than a medically supported conclusion. I find that these aspects of Dr. Wickman’s letter suggest that she is an advocate for the applicant rather than an impartial witness.

38. The letter also lacks detail. In his submissions, the applicant says that Dr. Wickman reviewed his medical history and provided a summary letter. However, Dr. Wickman’s letter says nothing about reviewing and summarizing his medical history. It only mentions the sedating prescription. The letter also does not “allude” to any other health reasons that the applicant should not commute every day, as the applicant asserts. For these reasons, I have placed little weight on Dr. Wickman’s letter.

39. On balance, I find that the strata acted reasonably when it decided to assess the applicant’s hardship application on the assumption that he could live in the strata lot and commute to work. In other words, the applicant has not proven that his personal

circumstances make the commute unreasonable. As mentioned above, the applicant can afford to live in the strata lot and has therefore failed to prove hardship. I dismiss the applicant’s claim for an exemption to the rental prohibition bylaw.

40. I note that the applicant refers in his submissions to other medical conditions that he says impact his ability to commute. He has chosen not to describe them, or provide objective medical evidence about them, for privacy reasons. The applicant says that he would consider providing evidence of these conditions if the tribunal requests it.

41. It is not the tribunal’s role to tell a party what evidence they should bring to prove their case. The tribunal’s rules require the parties to provide all relevant evidence, and they are instructed to do so in writing. It is true that applying for an exemption from the rental prohibition bylaw and the tribunal process both require the applicant to give up some privacy. However, the strata and the tribunal can only make decisions based on the evidence that the applicant provides.

42. Nothing in this decision prevents the applicant from re-applying to the strata for a hardship exemption with new or more evidence.

TRIBUNAL FEES AND EXPENSES

43. 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 to deviate from the general rule. I therefore dismiss the applicant’s claim for tribunal fees and dispute-related expenses.

44. The strata must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the applicant.

DECISION AND ORDER

45. I dismiss the applicant’s claims, and this dispute.

Eric Regehr, Tribunal Member