



Civil Resolution Tribunal

Date Issued: May 4, 2020

File: ST-2019-007659

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan KAS879 v. Casorso*, 2020 BCCRT 491

Default decision – non-compliance

B E T W E E N :

The Owners, Strata Plan KAS879

APPLICANT

A N D :

SHERRI CASORSO

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. This dispute is about smoking in a strata complex. The respondent, Sherri Casorso (owner), owns strata lot #28 in the applicant strata corporation, The Owners, Strata Plan KAS879 (strata). The strata says the respondent smokes on the patio adjacent to her strata lot, contrary to the strata's Bylaws. The strata imposed fines on the

respondent, but she continues to smoke on the patio. The respondent says the bylaws do not prohibit smoking and that she has taken reasonable steps to dissipate the smoke.

2. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the owner's participation, due to her non-compliance with the tribunal's mandatory directions, as discussed below.
3. The strata seeks an order that the owner pay a \$350 fine for violating the strata's nuisance bylaw, and an order that the owner stop smoking on the patio.
4. The strata is represented by a strata council member. The owner, while she participated, was self-represented.

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 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.
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 the parties and witnesses questions and inform itself in any 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.

Non-Compliance

9. Section 36 of the CRTA applies if a party to a dispute fails to comply with the CRTA or its regulations. It also applies if a party fails to comply with tribunal rules about the case management phase of the dispute, including specified time limits, or an order of the tribunal made during the case management phase. After giving notice to the non-compliant party, the case manager may refer the dispute to the tribunal for resolution and the tribunal may:
 - a. Hear the dispute in accordance with any applicable rules.
 - b. Make an order dismissing a claim in the dispute made by the non-compliant party, or
 - c. Refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.
10. For the reasons that follow, I allow the strata's claim.

ISSUES

11. The issues in this dispute are:
 - a. Should I decide the dispute without the owner's further participation, given her non-compliance?
 - b. Has the owner breached the strata's bylaws by smoking on the patio adjacent to her strata lot?
 - c. Should I order the owner to stop smoking on the patio?
 - d. Should I order the owner to pay the \$350 in fines, for bylaw violations?

EVIDENCE AND ANALYSIS

12. The owner is the non-compliant party in this dispute. She has failed to participate in the case management phase, as required by sections 25 and 32 of the CRTA and tribunal rules 1.4(1), 5.1 to 5.4 and 7.1 to 7.3. This non-compliance occurred despite multiple contact attempts by the case manager, with requests for reply.
13. The owner filed a Dispute Response Form with the tribunal on October 24, 2019. She provided an email address and telephone number on that form. The respondent was hospitalized on February 28, 2020. The case manager made the following contact attempts by email, text message, and telephone, but received no responses:
 - a. February 28, 2020 – Case manager requested the respondent to submit evidence with a due date of March 6, 2020.
 - b. March 9, 2020 – Case manager left a voicemail for the owner, directing her to call back as soon as possible.
 - c. March 11, 2020 – Case manager emailed the owner, directing her to respond.
 - d. March 18, 2020 – Case manager sent a final warning to the respondent.

Should I decide the dispute without the owner's further participation, given her non-compliance?

14. As noted, the owner filed a Dispute Response Form with the tribunal. The applicant advised the respondent was hospitalized on February 28, 2020 but the tribunal has not been provided an update about her condition. I find the case manager made a reasonable number of contact attempts, and that a reasonable amount of time has passed. Given that the case manager contacted the owner through the email address and phone number provided by the owner on the Dispute Response Form, I find it is more likely than not that the owner knew about the case manager's contact attempts and failed to respond. I therefore conclude that the owner is non-compliant, as contemplated in CRTA section 36.
15. Tribunal rule 1.4(2) states that if a party is non-compliant, the tribunal may:

- a. decide the dispute relying only on the information and evidence that was provided in compliance with the CRTA, a rule or an order,
 - b. conclude that the non-compliant party has not provided information or evidence because the information or evidence would have been unfavourable to that party's position, and make a finding of fact based on that conclusion,
 - c. dismiss the claims brought by a party that did not comply with the CRTA, a rule or an order, and
 - d. require the non-compliant party to pay to another party any fees and other reasonable expenses that arose because of a party's non-compliance with the CRTA, a rule or an order.
16. Rule 1.4(3) says that to determine how to proceed when a party is non-compliant, the tribunal will consider:
- a. whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute;
 - b. the stage in the facilitation process at which the non-compliance occurs;
 - c. the nature and extent of the non-compliance;
 - d. the relative prejudice to the parties of the tribunal's order addressing the non-compliance; and
 - e. the effect of the non-compliance on the tribunal's resources and mandate.
17. In the circumstances of this case, I find it is appropriate to decide the strata's claim without the owner's further participation, on a default basis. My reasons are as follows.
18. This dispute affects persons other than the named parties, specifically the owner's neighbour.

19. The non-compliance here occurred at the end of the case management phase of the tribunal process. Given the owner failed to participate in the tribunal process as requested by the case manager, I find the nature and extent of the non-compliance is significant.
20. I see no prejudice to the strata in hearing the dispute without the owner's participation. The prejudice to the owner of proceeding to hear the dispute is outweighed by the non-compliance. I find it would be unfair to the strata if I refuse to hear the dispute as the strata would be left without a remedy.
21. The tribunal's resources are valuable and its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party does not participate. I find it would be wasteful for the tribunal to continue applying its resources to a dispute by making further attempts to seek participation from the owner.
22. In weighing all of the factors, I find the strata's dispute should be heard without the participation of the owner. In deciding to hear the strata's dispute I have put significant weight on the following factors:
- a. the extent of the non-compliance is significant;
 - b. the applicant owner is not prejudiced if an order is made; and
 - c. the tribunal's resources should be conserved.

Has the owner breached the strata's bylaws?

23. The strata says the owner retired in 2019 and began spending much of the day smoking on her outdoor patio, which is limited common property. PH, the owner of the neighbouring strata lot #30, made numerous complaints to the strata about the owner's smoking from April 2019 to August 2019. In each complaint, PH provided the strata with dates and times she was bothered by the owner's smoking.

24. The owner admits that she smokes on her patio. However, she says she has installed professional canvas blinds and uses a fan outside so the smoke does not blow towards PH's unit. She also says that the Bylaws do not restrict smoking.
25. While the strata does not have a specific bylaw about smoking, bylaws 3(1)(a) and (c) prohibit an owner, tenant, occupant, or visitor from using a strata lot or common property in a way that causes nuisance or hazard to another person, or unreasonably interferes with the rights of other persons to use and enjoy the common property or another strata lot. In a strata setting, nuisance is defined as an unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462). This conduct is also prohibited under bylaw 3(1)(c).
26. In this case, the smoking is admitted, and occurred outdoors adjacent to PH's unit. Based on those facts, I accept that while the smoking is occurring, and for a short period afterward, the smoke fumes are detectable by PH from her patio and inside the nearby rooms of her strata lot if any doors or windows are open. Based on PH's statements, I accept that she finds the odour unpleasant. I also take judicial notice of the fact that second hand smoke is a generally accepted health hazard, although I note there is no evidence before me about concentration levels or the health effect of the smoke in this case. For these reasons, I accept that the smoke from the owner's patio is a nuisance and creates an unreasonable interference with PH's use and enjoyment of her strata lot. Based on these reasons, I find that the owner has violated strata bylaws 3(1)(a) and 3(1)(c).

Can the strata impose a fine?

27. Section 135 of *Strata Property Act* (SPA) says that a strata cannot impose a fine against a person for contravening a bylaw unless the strata has:
- a. received a complaint about the contravention,
 - b. given the owner or tenant the particulars of the complaint, in writing,

- c. given the owner or tenant a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
 - d. provided the owner with its decision in writing to impose a fine.
- 28. Once a strata has complied with section 135 in respect of a particular bylaw contravention, it may impose a fine for a continuing contravention of that bylaw without further compliance with section 135. The strata must strictly follow the SPA section 135 requirements before fines can be imposed (see *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449).
- 29. The strata sent several letters to the owner notifying her of PH's complaints and imposing fines for violating the bylaw. I find these letters did not comply with section 135 of the SPA.
- 30. On April 23, 2019, the strata notified the owner that it received complaints that the owner was smoking on her patio and the smoke was causing an unreasonable disturbance contrary to Bylaw 3(1)(c). The strata asked the owner to refrain from smoking on the patio and asked her to find alternative places to smoke from time to time or invest in an air purifier so she could smoke indoors. The letter included a list of dates in March 2019 that PH said she was disturbed by the owner's smoking. The strata also notified the owner that she could respond or request a hearing.
- 31. On June 3, 2019, the strata notified the owner that since she did not respond to the April 23, 2019 letter it was imposing a \$50 fine under bylaw 23. It also stated her smoking was creating a nuisance for the neighbouring unit and was an unreasonable disturbance under bylaw 3(1). It also stated that further complaints about her smoking would result in further bylaw contravention measures. The letter included a list of dates in May 2019 that PH said she was disturbed by the owner's smoking. Again, the strata also notified the owner that she could respond or request a hearing.
- 32. On June 7, 2019, the strata repeated its warnings in its April 23, 2019 letter and again, notified the owner that she could respond or request a hearing. It also stated

that further complaints about her smoking would result in further bylaw contravention measures and included a copy of bylaw 23. The letter included a list of additional dates in May 2019 that PH said she was disturbed by the owner's smoking.

33. On June 28, 2019 the strata notified the owner that it was imposing a \$100 fine. It also stated that there were further complaints in May and June that constituted an unreasonable disturbance and would result in further bylaw contravention measures if more complaints were received. The strata also notified the owner that the fine would increase to \$200 for new complaints if the owner did not respond to the letter within 14 days. The letter included a list of dates in May and June along with an invoice for \$150. Again, the strata also notified the owner that she could respond or request a hearing.
34. In response to the June 28, 2019 letter the owner requested a hearing at the strata council meeting on July 18, 2019. According to the minutes for the July 18, 2019 meeting, the owner pointed out there was no bylaw restricting smoking on patios. However, she agreed to work with PH to minimize the impact of her smoking.
35. The strata scheduled voluntary dispute resolution between PH and the owner to take place on August 6, 2019. Prior to the meeting the owner notified the strata by email that she checked with her lawyer and she was not breaking any strata rules. She also advised she was not going to attend any further meetings regarding this matter and would bring harassment charges against PH if this continued.
36. On August 26, 2019 the strata sent a letter to the owner notifying her it was fining her \$200 for the complaints noted in the June 27, 2019 letter. This was in addition to the \$150 fines that had already been issued. The letter also included a list of further dates that the strata received complaints in June, July, and August, 2019.
37. I find the strata did not comply with the requirements in section 135 of the SPA since it never restricted the owner from smoking on the patio or mention that the strata might impose a fine if the owner did not stop smoking on the patio. For this

reason, I find the strata could not impose fines on the owner and I dismiss the strata's claim for payment of the fines it imposed.

Order to stop smoking

38. The strata requests an order that the owner stop "causing nuisance or hazard to another person and unreasonably interfering with persons use of her strata lot due to smoking continuously on outdoor patio". Since the complaint is about smoking on the patio, not in the owner's unit, I order that the owner not smoke on the patio of her unit.

TRIBUNAL FEES, EXPENSES AND INTEREST

39. 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. Here the strata was only partially successful, so I do not order reimbursement of tribunal fees. The strata did not claim dispute-related expenses.
40. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDERS

41. I order that effective immediately, the respondent must not smoke on the patio.
42. The strata's remaining claims are dismissed.
43. 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). Once filed, a tribunal order has the same force and effect as a BCSC order.

Rama Sood, Tribunal Member