



Civil Resolution Tribunal

Date Issued: May 11, 2020

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Lenahan v. The Owners, Strata Plan NW 976*, 2020 BCCRT 509

BETWEEN:

DEANNA LENAHAN

APPLICANT

AND:

The Owners, Strata Plan NW 976

RESPONDENT

AND:

DEANNA LENAHAN

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This dispute is about a shed in a strata lot. Deanna Lenahan (owner) is the owner of a strata lot in The Owners, Strata Plan NW 976 (strata). In a previous decision, a Civil Resolution Tribunal (tribunal) Vice Chair determined that a shed the owner installed in her strata lot was not compliant with the strata's bylaws and that she was not entitled to keep it in its current location as constructed. The Vice Chair encouraged the parties to come to a mutually agreeable resolution to the shed issue.
2. The owner presented a proposal to the strata that would allow her to keep her shed where it was installed, but the strata did not agree with it. The owner's position is that the strata unreasonably denied her request and acted in a significantly unfair manner. She asks for an order that the strata accept her proposal and allow her to keep the shed.
3. The strata disagrees, and says that it did not unreasonably deny the owner's request or act in a significantly unfair manner. By counterclaim, the strata asks for an order that the owner remove her shed from the strata lot within 30 days. The strata also asks for an order that, if the owner does not remove the shed, the strata may (with 48 hours' notice) enter the strata lot to remove the shed, with the costs of the removal to be paid by the owner.
4. The owner is self-represented. The strata is represented by a member of the strata council.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the 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.

ISSUES

9. The issues in this dispute are:
 - a. whether the strata unreasonably withheld its approval of the owner's proposal to keep her shed in its current location by increasing the height of the fence or planting hedges,
 - b. whether the strata acted in a manner that was significantly unfair to the owner, and
 - c. by counterclaim, whether the owner must remove her shed within 30 days and, if she fails to do so, whether the strata should be permitted to remove the shed at the owner's expense (which the strata estimates at \$2,000).

BACKGROUND, EVIDENCE AND ANALYSIS

10. The parties bear the burden of proving their respective claims on a balance of probabilities. Although I have considered all of the evidence and submissions provided by the parties, I will refer to only what is necessary to provide context to my decision.

11. As discussed by the Vice Chair in *Lenahan v. The Owners, Strata Plan NW 976*, 2019 BCCRT 462 (*Lenahan*), the strata is a bare land strata corporation existing under the *Strata Property Act* (SPA).
12. The relevant bylaws were filed at the Land Title Office on December 3, 2003. Bylaw 5(1) requires a strata lot owner to obtain the written approval of the strata council before making an alteration to various elements of a strata lot, including the exterior or a building and grounds. I note that, in November of 2019 after *Lenahan*, the strata filed an amendment to bylaw 5(1) that specifically includes sheds as an item for which the strata must approve alterations.
13. Bylaw 5(3) states that the strata council must not unreasonably withhold its approval under bylaw 5(1), but may require that the owner agree to take responsibility for any expenses relating to the alteration. The stated intent of bylaw 5 is “to ensure that the buildings are well maintained and to ensure continuity of the appearance of the buildings in the strata corporation”. Bylaw 7 states that any unauthorized alterations to a strata lot must be removed at the owner’s expense if requested by the strata council.
14. In 2015, the owner asked the strata council for permission to replace a storage shed on her strata lot. In an August 5, 2015 email message, a member of the strata council discussed her request and advised that the “size and placement of sheds have been a challenge in the past” as “[w]hen sheds are not adjacent to, and not attached to, the siding of units, they create a visual ‘clutter’ above the standard fence height which trees and shrubs do not”. The council member stated that council “must think of the integrity of the entire complex and all our fellow owners” when considering alteration proposals.
15. The strata approved a shed that was “fence height” (or approximately 52”), but the shed the owner installed was 96” at its highest point. The strata took the position that the shed was not authorized. It provided the owner with options that would permit her to keep the shed at a reduced height, either where it was installed or in a

different location on the strata lot. The parties were unable to reach an agreement, and the owner filed a dispute with the tribunal to resolve the matter.

16. In *Lenahan*, a tribunal Vice Chair found that the owner did not build her shed as approved by the strata. He also determined that the strata had not treated the owner in a significantly unfair manner as the owner knew that the strata's approval for her fence was limited to fence height. At paragraph 46 of the decision, the Vice Chair stated that the owner was "not entitled to keep their shed at its current location as constructed". The Vice Chair encouraged the parties to resolve the matter through one of the options previously identified by the strata. However, the Vice Chair also stated at paragraph 48 that nothing in his decision prevented the parties from agreeing to "other options not previously pursued, such as increasing the height of the fence that the shed abuts to, or to planting hedging or other plants against the fence that will block the view of the shed from CP [common property]".
17. The strata council (through its property manager) wrote to the owner and asked her to advise which of the previously identified options she wished to pursue. The owner presented a proposal to the strata that would see her increasing the height of the fence or add hedges, at her own cost, which would allow her to keep her shed, as constructed, in its current location. At a May 15, 2019 strata council meeting, the council decided to deny the owner's request.
18. In a May 24, 2019 letter, the property manager advised that the strata had denied the owner's request. The letter outlined the options that had been previously discussed, and added a fourth option, as follows:
 - a. keep the shed at its current location but reduce its height to 60" at the apex,
 - b. relocate the shed to an approved area at the side of the unit, reducing the size of the shed to fit in the approved location, and reducing the height of the shed to 89",
 - c. remove the shed entirely, or

- d. relocate the shed to the deck (where the original shed was located), reducing the size of the shed to fit in the approved location.
19. The owner did not select one of the options identified by the strata, but continued to advocate for her proposed solution. In a June 17, 2019 email message, the owner asked for the rationale behind the strata's decision, noting that the fence behind the shed had been higher before being reduced as the result of a repair several years earlier. The owner asked why shrubs were not acceptable given that they were discussed as a requirement to move the shed to a different location. She also noted that there was no complaints about the shed and stated that the strata had refused to consider input from neighbouring units.
20. A July 17, 2019 letter from its legal counsel stated that the owner's proposal was not acceptable to the strata council as it "significantly changes that area". The strata's legal counsel provided additional details about the strata's decision-making process in a September 3, 2019 letter to the owner's lawyer. Counsel stated that raising the fence or planting hedges would not work as the "very high" height would not be "in keeping with the look and feel" of the complex. She also noted that allowing an exception for the owner would create a precedent for other owners to install sheds at the locations and in the sizes of their choice provided they raised the height of the fence or installed a hedge. In the owner's case, counsel stated that planting a hedge would more than double the width of the boundary between the strata lot and the CP on the other side, and would significantly change the look and feel of the boundary area.
21. The owner did not accept any of the options proposed by the strata. She filed a Dispute Notice on September 3, 2019. The strata filed its counterclaim on December 11, 2019.
22. The owner argues that, because the Vice Chair allowed for the increased fence height or the addition of a hedge or shrubs as solutions for the shed problem, it was unreasonable for the strata to deny her request. The owner says that there are other sheds in the complex that are higher than nearby fences, and provided

images to support her position. She says that the strata is treating her in a significantly unfair manner and is unwilling to work with her to resolve the issue. In support of her position, the owner provided letters from other strata lot owners who say they have no issue with the shed.

23. The strata denies that its decision to deny the owner's proposal was unreasonable, and says that it was in keeping with the continuity and conformity of the complex. The strata says the Vice Chair could not have known about its concerns about fence and hedge height as the owner did not suggest this option before the Vice Chair rendered his decision. The strata says that the views of the neighbouring strata lot owners do not govern, and they do not represent the majority of owners. According to the strata, allowing the owner's proposal would dramatically change the height of the fence at the back of her strata lot "unlike any other" in the complex, and would set a precedent for other owners to ask for similar alterations. The strata's position is that it has made reasonable attempts to resolve the matter. It asks that the owner remove the shed or select an available option to relocate it. If she fails to do so, the strata asks for an order that it may remove the shed.

Did the strata unreasonably withhold its approval of the owner's proposal?

24. Although the Vice Chair suggested possible options to achieve a mutually agreeable resolution to the shed issue, his comments were not binding on the parties. Nothing in the Vice Chair's decision required the strata to accept the owner's proposal to add a higher fence or hedge behind the shed. The strata was obliged to consider the owner's proposal and, under bylaw 5(3), not unreasonably withhold its approval. Therefore, the question is whether the strata's decision was unreasonable given the particular circumstances of the owner's shed.
25. Photographs in evidence show that there are fences and shrubs of varying heights in the strata's complex. The fences between buildings appear to be higher than those that surround the yard areas of the strata lots. The fact that the strata has approved other sheds of equal or possibly greater height in other strata lots is not determinative of the reasonableness of the strata's decision about the owner's

shed. Neither is the presence of complaints about, or support for, the owner's shed from other strata lot owners.

26. As noted above, bylaw 5(3) allows the strata to consider the continuity of appearance when approving alteration requests. The owner says that any shed changes the look and feel of the complex. The strata says there is not a "one size fits all" rule, and that the sizes of sheds are dictated by the location and the potential for "visual clutter". The strata draws a distinction between sheds that are adjacent to a unit and sheds that are not, such as the one installed by the owner, which abuts a short fence at the back of her yard, and which is bounded by CP. The strata's view is that sheds adjacent to units blend in with the existing structures, but that the owner's shed sticks out, and is simply too large for its location.
27. The evidence before me shows that the strata has required other strata lot owners to move sheds or revise their proposals depending upon their locations. Based on an August 5, 2015 email exchange with a member of the strata council, I find that the owner was aware of the strata's specific concern about the placement of sheds and the potential for "visual clutter" before she installed her shed. Although the owner may disagree with the strata's view that a high fence or shrub at the rear of the strata lot would change the look of the area, I find that it was reasonable for the strata to take that position. Based on the photographs in evidence, I agree with the strata's submission that such a fence or shrub would not be consistent with the other boundaries between strata lots and CP.
28. Taking into account the documented considerations about "visual clutter", the concern about setting a precedent for other strata lot owners to, and the strata's authority under bylaw 5(3) to ensure the continuity of the appearance of the complex, I find that the strata did not unreasonably withhold its approval for the owner's proposal. Accordingly, I dismiss this claim.

Was the strata's decision significantly unfair?

29. Section 123 of the CRTA contains language similar to section 164 of the SPA, which allows a tribunal member to make an order to remedy a significantly unfair act

by a strata corporation. A “significantly unfair” act encompasses oppressive conduct and unfairly prejudicial conduct or resolutions. The latter has been interpreted to mean conduct that is unjust and inequitable (see, for example, *Strata Plan VR1767 (Owners) v. Seven Estate Ltd.*, 2002 BCSC 381).

30. The test for significant unfairness was summarized by a tribunal vice chair in *A.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94, with reference to *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44: what is or was the expectation of the affected owner or tenant? Was that expectation on the part of the owner or tenant objectively reasonable? If so, was that expectation violated by an action that was significantly unfair?
31. The owner says that her claim about significant unfairness encompasses much more than the strata’s refusal to allow her to increase the height of the fence. She says the strata did not communicate properly, a member of the strata council, T, called her a “cancer”, and the strata set deadlines for dealing with the shed during a time it knew she was away on her annual family vacation.
32. Although I do not doubt that the owner found her interactions with the strata to be frustrating, I do not find that there was any significant unfairness. While it may have been preferable for the strata to provide the owner with the rationale behind its decision to reject her proposal promptly, I note that the strata’s legal counsel did eventually provide an explanation. It is apparent that the shed dispute has caused some dissent among the strata lot owners, and (based on the video footage in evidence) I accept that T called the owner a “cancer” during a heated discussion about the shed. However, there is no indication that T inappropriately influenced the strata council’s unanimous decision to reject the owner’s proposal, or that the decision of any council member was motivated by personal hostility. Further, the evidence does not suggest that the strata deliberately set deadlines during the owner’s vacation, and I note that she was provided with additional time to address the matter. I find that the strata’s conduct was not unjust or inequitable in this regard.

33. Turning to the decision about increasing the height of the fence, I find that the owner's expectation was that the strata would set aside its concerns about continuity and agree to her proposal because it was an option identified by the Vice Chair in his decision. As discussed above, this suggestion was not binding on the parties and contemplated mutual agreement. I find that it was not objectively reasonable for the owner to expect that the strata would adopt the Vice Chair's suggestion (the contents of which apparently had not been contemplated by the parties before). This is so despite the fact that the strata council may not have discussed the matter as much as the owner may have wished it to.
34. Even if I am incorrect in this regard, I find that the evidence does not establish that the strata's decision was significantly unfair. As discussed above, the strata has a documented concern about continuity in appearance and has required other strata lot owners to modify their sheds to comply with these concerns. There is no indication in the evidence before me that the strata has permitted other strata lot owners to determine the height of their shed structures, or that unauthorized structures have been allowed to remain. I find that the evidence does not support the conclusion that the strata engaged in oppressive, unjust or inequitable conduct.
35. For these reasons, I find that the strata did not act in a significantly unfair manner, and dismiss this claim.

Is the strata entitled to an order that the owner remove her shed?

36. There is no dispute that the owner constructed a shed that was not approved by the strata. As discussed above, bylaw 7 states that any unauthorized alterations to a strata lot must be removed at the owner's expense if requested by the strata council. The owner does not argue that this bylaw applies to her situation. Her position is that the strata does not have the authority to remove the shed from the strata lot under the SPA.
37. Section 133 of the SPA states that a strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including:

- a. doing work on or to a strata lot, the CP or common assets, and
 - b. removing objects from the CP or common assets.
38. The owner says that “doing work” and “removing objects” are conceptualized differently, and suggests that the SPA only permits objects to be removed from CP. As her view is that section 133 does not allow for the removal of objects from a strata lot, the owner says that the strata “misused” the SPA and should not have “threatened” to remove her shed from the strata lot.
39. I disagree with the owner’s interpretation of section 133, as it would result in a strata corporation having no remedy to remove unauthorized alterations from within the boundaries of a strata lot. I note that several other tribunal decisions have dealt with the removal of unauthorized alterations from strata lots, as follows:
 - a. in *Wallin v. The Owners, Strata Plan NW 1076*, 2018 BCCRT 776, a tribunal member found that removing an unauthorized fence from a strata lot amounted to carrying out work on the strata lot under section 133,
 - b. in *The Owners, Strata Plan BCS 2568 v. Rapp*, 2019 BCCRT 677, a tribunal member held that section 133 would also govern the removal of an unauthorized hot tub from a strata lot, and
 - c. in *The Owners, Strata Plan NW 177 v. Martin*, 2020 BCCRT 285, a tribunal Vice Chair found that section 133 permitted a strata corporation to remove an unauthorized awning from a strata lot if the strata lot owner failed to do so.
40. Although not binding upon me, I agree with the reasoning in these decisions. I am satisfied that section 133 does not limit a strata corporation’s ability to remedy a bylaw contravention within a strata lot. Even if I am incorrect, I find that the act of disassembling the shed and moving the materials and contents to the owner’s deck (as proposed by the strata) amounts to “doing work” on the strata lot as permitted by section 133(1)(a).

41. I find that section 133 of the SPA gives the strata the authority to remove the owner's shed if she does not remove it herself, or if the parties do not come to an agreement about its relocation. In her submissions, the owner indicated that she wishes to move her shed if she is not permitted to keep it in its current location. The owner asked that I order the shed to be relocated to a specific location and reconfigured to a particular size. It is not clear to me whether the size and location cited by the owner are consistent with the option proposed by the strata. Further, it is not clear to me whether there may be topographical or other issues in the area that may impact the placement of the shed. In these circumstances, I find that it is not appropriate to order that the shed be relocated to a specific location or reconfigured to a particular size.
42. I acknowledge that the parties have indicated a willingness to work within the proposed options to relocate the owner's shed. However, each party has also expressed a concern that the other will not work constructively to resolve the matter. I find that it is appropriate to order that actions occur within specific time frames in order to bring an end to this dispute, which started almost 5 years ago. My orders follow.
43. The owner must, within 30 days of the date of this decision, submit her plans (including the exact dimensions and specific location) for the proposed shed relocation to the strata council for its consideration. In accordance with bylaw 5(3), the strata must not unreasonably refuse to approve the owner's request to relocate her shed.
44. The owner must, within 90 days of receiving approval from the strata council, complete the work involved with the relocation of the shed.
45. If the owner does not submit her plans to the strata council within 30 days of the date of this decision, or if she does not complete the relocation work within 90 days of receiving approval from the strata (assuming she does not select the option to remove her shed), then the strata may exercise its authority under section 133 of the SPA and remove the shed. The strata may require that the owner pay the

reasonable costs of the removal as set out in section 133(2) of the SPA, which I note requires the strata to follow the requirements set out in section 135 of the SPA. Although notice is not required to remedy a contravention under section 133 of the SPA, the strata may choose to provide the owner with notice if it wishes.

TRIBUNAL FEES AND EXPENSES

46. Under section 49 of the CRTA, and the tribunal rules, the tribunal generally will 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. As the strata was successful in its counterclaim, I order the owner to reimburse the strata for its tribunal fees of \$125.
47. Each party submits that they had to hire lawyers and incur legal expenses due to the behaviour of the other. Rule 9.4(3) states that the tribunal will not order one party to pay to another party any fees charged by a lawyer or other representative in a strata property dispute unless there are extraordinary circumstances which would make such an order appropriate. Although it was open to the parties to seek legal advice, I do not find that the circumstances of this dispute are extraordinary and I decline to order any reimbursement of legal fees.
48. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDERS

49. I order that:
 - a. within 30 days of the date of this decision, the owner must submit her plans (including the exact dimensions and specific location) for the proposed shed relocation to the strata for its consideration. In accordance with bylaw 5(3), the strata must not unreasonably refuse to approve the owner's request to relocate her shed,

- b. within 90 days of receiving approval from the strata, the owner must complete the work involved with the relocation of the shed,
- c. if the owner does not submit her plans to the strata within 30 days of the date of this decision, or if she does not complete the relocation work within 90 days of receiving approval from the strata, then the strata may exercise its authority under section 133 of the SPA and remove the shed, and
- d. within 30 days of the date of this decision, the owner must pay the strata \$125 as reimbursement of tribunal fees.

50. The remainder of the parties' claims are dismissed.

51. 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.

52. 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 strata can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.

Lynn Scrivener, Tribunal Member