Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Pretto v. The Owners, Strata Plan VR 2540*, 2020 BCCRT 600

B E T W E E N :

CRAIG PRETTO

APPLICANT

A N D :

The Owners, Strata Plan VR 2540

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. The applicant, Craig Pretto, owns strata lot 95 (SL95) in the respondent strata corporation, The Owners, Strata Plan VR 2540 (strata). This dispute is over planters that the applicant keeps on a section of the strata's building adjacent to SL95.

2. The strata says the planters are on common property without strata permission and contrary to both the strata and municipal bylaws. The strata asked the applicant to remove the items, but he refused. The strata fined the applicant $400 for the alleged bylaw breach.

3. The applicant says the strata has treated him significantly unfairly by fining him and asking him to remove the planters. The planters have undisputedly been in their present location for years. The applicant asks for orders reversing the fines, allowing him to keep his planters, and reimbursement of legal fees. The applicant also seeks an order that the strata cannot amend its bylaws to require removal of the planters in the future.

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

5. For the reasons that follow, I find the applicant did not breach the bylaws. I find the strata must reverse the fines and reimburse the applicant $112.50 in tribunal fees. I dismiss the applicant's remaining 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.

Preliminary Issues

Concurrent Dispute

10. I have decided a concurrent dispute published as *Heal v. The Owners, Strata Plan VR2540,* 2020 BCCRT 599. The disputes involve different applicants but the same respondent strata corporation. Many of the facts and issues are the same or similar across both disputes. This resulted in very similar written reasons. However, I decided each dispute on its own merits.

Named Parties

11. According to the strata's filed amended bylaws, the strata is made up of a residential and a commercial section as permitted under the *Strata Property Act* (SPA). I find the bylaws create 3 separate legal entities, the strata, the residential section, and the commercial section.

12. Bylaw 36 states that the residential section is comprised of 2 committees, the "Phase I Residential Committee" and the "Phase II Residential Committee". According to the strata's minutes in evidence, it appears that the residential section's Phase I Residential Committee was involved in the decisions concerning the applicant's planters. As a result, I considered whether to seek submissions from the parties on whether the residential section should be a named party to this dispute. I decided not to for the following reasons.

13. The strata filed a response to the applicant's claims and participated in the tribunal process. Therefore, I find the strata intended to be the respondent, and I find it had the authority to do so. Also, I find no prejudice by proceeding without the residential section. The disputed bylaw applies to the strata and not just the residential section. Considering the above reasons and the tribunal's mandate of speedy dispute resolution, I decided to proceed without seeking further submissions.

ISSUES

14. The issues in this dispute are:

    a. Are the applicant's planters located on common property?

    b. If yes, did the applicant breach the strata's bylaws by keeping them on common property?

    c. Did the strata act significantly unfairly? If so, what is the appropriate remedy?

    d. Should I order the strata not to amend its bylaws in the future to prevent planters on common property?

EVIDENCE AND ANALYSIS

15. In a civil claim such as this, the applicant bears the burden of proving his claims on a balance of probabilities.

16. The parties' submissions were extensive, and I have read them all. However, I have only addressed the evidence and arguments to the extent necessary to explain my decision.

Are the applicant's planters located on common property?

17. The strata plan filed in the *Land Title Office* (LTO) shows that the strata's multistoried building has a terraced shape. On each of the fifth to ninth floors, the building steps back creating exterior rooftop terraces over the living spaces of the strata lots below.

18. The applicant's photographs show that the terrace, or a portion of it, is enclosed by a guardrail. The enclosed area does not extend to the edge of the building. On the other side of the guardrail there is a gravel covered area that the parties refer to as the "well". The well is surrounded by about a 2-foot high barrier, known as a "parapet" wall. The applicant's planters that are the subject of this dispute are positioned within the well. The well is almost entirely filled with planters that contain small trees or shrubs like a hedgerow.

19. Under section 1(a) of the *Strata Property Act* (SPA), common property is that part of the land and buildings shown on a strata plan that is not part of a strata lot. I find the well is common property because it is not shown as part of a strata lot on the strata plan. Therefore, I find the applicant's planters are located on common property.

20. The parties dispute whether the well is designated as limited common property (LCP). LCP is common property that is designated for the exclusive use of the owners of one or more strata lots. A strata corporation can designate common property as LCP under section 73 of the SPA. This includes a designation of LCP on the strata plan, an amendment to the strata plan under section 257 of the SPA to create LCP, and a ¾ vote under section 74.

21. The strata floor plan shows that the terraces adjacent to SL95 are designated, "LCP SL95". Therefore, I find the terrace is LCP. The strata says the LCP terrace only includes the area enclosed by the guardrails and not the well.

22. The filed strata plan shows it was signed by a surveyor in 1989. There are no filed amended floor plans for the relevant seventh floor. There is also no expert opinion before me that the strata building was improperly surveyed or that the building is other than what is shown on the strata plan. Therefore, I infer the strata plan is correct. I find it is more likely than not that the well is part of the LCP terrace because that is what the strata plan shows. It is not shown as common property. In other words, I conclude that the well is part of the "LCP SL95" terrace.

Bylaw enforcement

23. This dispute arises over the strata's enforcement of bylaw 3(1). I find bylaw 3(1) applies to common property including the LCP terrace well. Bylaw 3(1) reads:

24. 3(1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that

    a. causes a nuisance or hazard to another person,

    b. causes unreasonable noise,

    c. unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

    d. is illegal, or

    e. is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.

25. The records show that the residential section received a complaint from an owner about the applicant's planters in 2015 and again, in 2017. There is very little evidence before me on the 2015 complaint. The email correspondence shows that in November 2017 some members of the residential section's executive discussed the complaint and issues about keeping items in the wells. The applicant was an executive member and part of these discussions. I have no meeting minutes from the strata council or the section executive from the time. However, it is undisputed that the strata and section did not take any enforcement action in 2015 or 2017. It is also unclear to what extent they investigated the complaint.

26. The strata says it received a complaint from an owner about the planters in May 2018 and another complaint in October 2018. The May 8, 2018 email complaint states simply, "Plant Pots and items on [the applicant's] Rooftop". The email includes photographs of the planters but no details of the owner's concern.

27. On October 9, 2018 the property manager wrote the applicant that, "*The Strata Council has received a report of color planters and plants on the Common Property."* The property manager asked the applicant to take action to remedy the situation and cited bylaw 3(1)(e). The letter did not state the required action or explain how the planters or plants were contrary to the bylaw.

28. The applicant responded on October 23, 2018. He disputed that the planters contravened bylaw 3(1)(e) and provided information showing planters and plants had been there for years. He also included an architect's opinion that the well was suitable to hold planters.

29. On November 19, 2018 the strata said the section's residential committee was "not convinced that it was an appropriate and safe way to use the common property." The letter notified the applicant he must remove the planters and plants from the well within 14 days. The applicant did not then remove the planters or plants.

30. On February 15, 2019, the strata sent the applicant another letter that reproduced the content of the November 19, 2018 letter, quoted bylaw 3(1) in full, and notified him of strata council's intention to fine him for "each" bylaw contravention. The applicant had a hearing on March 12, 2019 before the residential committee.

31. On March 22, 2019 the strata wrote the applicant that the residential committee concluded (*as written*):

    a. The planters in question are, indeed occupied a common property without approval from Owners, and

    b. The planters in question impose a hazard to residents of Pacific Point community and to the integrity of common property, and

    c. Where the planters in question are located is contrary to a purpose for which the common property is intended as shown expressly or by necessary implication on or by the Strata plan.

32. The strata informed the applicant he was required to remove the planters within 14 calendar days or it would impose a $200 fine every 7 days. The applicant did not then remove the planters. I understand the strata levied $200 fines on May 6, 2019 and on May 15, 2019. The relevant strata account records are not in evidence. Since the applicant asks only that the fines be reversed and not refunded, I infer they are not yet collected.

Did the applicant breach the strata's bylaws by keeping planters on common property?

33. I find the strata's bylaws do not require approval from the ownership for the applicant to keep planters on the terrace LCP. Therefore, I find no bylaw breach based on a lack of strata approval.

34. As for the alleged hazard, there are no documents in evidence that show the strata inspected the planters and found they were a hazard to persons when it imposed the fine. I accept the applicant's undisputed evidence that the planters had been in the well location for years. There is no evidence that the planters fell, were seen off-balance, or that anyone was injured by the planters. There is also no expert evidence or other documents that show the planters posed a hazard by compromising the building's integrity.

35. I note that after imposing the fines, the strata obtained a December 20, 2019 report from GHL Consultants Ltd (GHL) on the "occupant safety within floor area" provisions of the Vancouver Building Bylaw 2014. I cannot tell from the report whether the consultant, Sunny Ngan, had the expertise to provide an opinion on risk. His credentials are not explained. Therefore, I put no weight on the GHL report. Also, the report was obtained after the strata imposed the fines. I find the strata cannot use the report to justify its conclusion the previous year that the planters were hazardous.

36. Under SPA section 130 the strata may only fine an owner if a bylaw or rule is contravened. When the strata fined the applicant in 2019, I find the strata had insufficient evidence to conclude that the planters posed a hazard to a person. I find

the strata therefore had no authority to fine the applicant for a contravention of bylaw 3(1)(a).

37. The strata also concluded that the planters' location was contrary to the common property's intended purpose. As stated above, I find the strata plan shows the well area is a terrace. I find a terrace is commonly understood to be an outdoor living space. I find the terrace is also shown as a roof on the strata plan. The evidence does not show that the planters interfered with the roof's purpose to shelter and protect the building below. I find that the planters' location is not contrary to the purpose of a rooftop terrace. I find the applicant has not breached bylaw 3(1)(e) by locating the planters in the well.

38. In this dispute, the strata says the applicant's well use poses a liability risk. It says there is a risk of falling when entering the well and such use is contrary to municipal bylaws. The applicant disputes that his personal well use contravenes strata or municipal bylaws. At any rate, the only contraventions stated in the strata's March 22, 2019 were about the planters' location. They were not about the applicant occupying or accessing the well area himself or an alleged municipal bylaw contravention. I find the strata cannot raise new alleged bylaw contraventions to justify the 2019 fines.

39. I order that the strata reverse the bylaw fines imposed on the applicant or SL95 related to the planters in the well.

Did the strata act significantly unfairly? If so, what is the appropriate remedy?

40. Under section 164 of the SPA, the court has authority to make an order to prevent or remedy a significantly unfair action of the strata corporation, including the strata council, in relation to an owner. Section 123(2) of the CRTA provides the tribunal with similar authority to make an order to remedy a significantly unfair action, decision or exercise of voting rights. In *Reid v. Strata Plan LMS2503*, 2003 BCCA 126 the court described "significantly unfair" actions as actions that are

"oppressive", which it defined as burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable (*Reid* paragraph 13).

41. I find the strata improperly fined the applicant when there was no bylaw breach and I find this action was unjust. So, I find the strata's action was significantly unfair. I find the appropriate remedy is to reverse the fines, which I have already ordered above.

42. The applicant also asks for an order that the planters remain in the well. However, there is no evidence that the applicant ever removed the planters or that the strata had the planters removed from the well. Therefore, I infer the planters remain in the well. The bylaws do not require strata approval to keep personal items on LCP and there are no bylaws specifically restricting planters. The strata's authority is only as set out in the SPA and bylaws. Absent a bylaw contravention, I find the strata has no authority to have the planters removed. I find no reason in the circumstances to specifically order that the planters remain.

Should I order the strata not to amend its bylaws in the future to prevent planters on common property?

43. The applicant asks that I order the strata not to amend its bylaws in the future to prevent him from keeping planters in the well.

44. In considering this request, I have considered Madam Justice Stromberg-Stein, comments on the realities of living in a strata corporation in *Oakley et al v. Strata Plan VIS 1098*, 2003 BCSC 1700 at paragraph 16:

> It is not for this court to interfere with the democratic process of the strata council. Those who choose communal living of strata life are bound by the reality of all being in it together for better or for worse.

45. I find the same caution applies to the tribunal. Under SPA section 126, the strata is entitled to amend its bylaws as voted upon by the owners under SPA section 128. I find that there is no basis for the tribunal to interfere with the future democratic

governance of the strata corporation. I dismiss the applicant's claim for an order that the strata not amend its bylaws to prevent planters.

TRIBUNAL FEES AND EXPENSES

46. 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 find the applicant was partially successful in this dispute. I therefore order the strata to reimburse the applicant $112.50, which is half his tribunal fees.

47. Under tribunal rule 9.5, the tribunal typically does not award a party legal fees in a strata dispute, unless there are extraordinary circumstances. While I find the strata was wrong to impose the fines, I find there were no extraordinary circumstances here. I dismiss the applicant's claim for legal fees. The applicant did not claim any other dispute-related expenses.

48. The strata seeks reimbursement of half its expenses for the GHL report. I did not rely on the GHL report. Therefore, I dismiss the strata's claim for reimbursement of the GHL report. The strata did not incur any tribunal fees.

49. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicant.

ORDERS

50. I order that:

    a. the strata immediately reverse the bylaw fines imposed on the applicant or SL95 related to the planters in the well;

    b. within 30 days of this order, the strata pay the applicant a total of $112.50 as reimbursement for tribunal fees;

    c. the applicant's remaining claims are dismissed; and

d. the strata's claim for dispute-related expenses is 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 applicant 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.

Trisha Apland, Tribunal Member