



# Civil Resolution Tribunal

Date Issued: July 30, 2020

File: ST-2019-010698

Type: Strata

Civil Resolution Tribunal

Indexed as: *Johnston v. The Owners, Strata Plan EPS 3652, 2020 BCCRT 843*

**BETWEEN:**

CAROL JOHNSTON, JEREMY PAINE, BARBARA KELLY, THOMAS  
TSANG, TAMMY TSANG, CHRISTINA FAIRBRIDGE, PATRICIA  
DUGGAN, JANE MEHLENBACHER, and Charlene McCordic

**APPLICANTS**

**AND:**

The Owners, Strata Plan EPS 3652

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Rama Sood

## **INTRODUCTION**

1. This dispute arises from using operating funds for the cost of installing safety railings around outdoor planters.

2. The applicants, Carol Johnston, Jeremy Paine, Barbara Kelly, Thomas Tsang, Tammy Tsang, Christina Fairbridge, Patricia Duggan, Jane Mehlenbacher, and Charlene McCordic (owners) own strata lots in the respondent strata corporation, The Owners, Strata Plan EPS 3652 (strata).
3. The owners say the strata failed to obtain owner approval before spending operating funds on the railings. Although the owners did not amend the Dispute Notice, they stated in their reply to the respondent's submissions that they are no longer requesting that the strata refund the cost of installing the railings. They are now seeking the following orders:
  - a. The strata must follow the *Strata Property Act* (SPA) for spending guidelines and limitations for unapproved budget and contingency fund expenses.
  - b. The strata must maintain all common property areas and in particular the elevated gardens on the 1st and 2nd floors.
  - c. The strata must secure a liability waiver from strata lot owners with strata lots adjacent to the planters and the responsibility for maintaining the planters must be transferred to the strata lot owners that are adjacent to planters, particularly for the strata lots on the 5th and 6th floors.
  - d. The strata must draft rules for maintenance and acceptable plants that can be placed on the common property and in particular for the elevated planters on the 5th and 6th floors.
4. The strata says installing the railings was necessary to ensure safety and prevent significant loss or damage so it was not required to obtain approval. It also says it already complies with the SPA and maintains all common property. The strata denies that it or the CRT can compel strata owners to sign waivers. Finally, it says that rules for planters were never proposed and are not necessary. The strata asks that the owners' claims be dismissed.
5. The owners are self-represented. The strata is represented by a council member, CH.

## **JURISDICTION AND PROCEDURE**

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.
7. The CRT 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 CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT 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 CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

### ***Late evidence***

10. The owners object to late arguments and evidence submitted by the strata and say it should be excluded. I disagree. I have discretion under the CRTA and the CRT's rules to accept evidence I consider relevant, as referenced above. The owners had the opportunity to review the late submissions and respond to it, which they did. I therefore find there is no actual prejudice to them in allowing the late evidence, and I do so.

## **ISSUE**

11. The issue in this dispute is whether the strata council required owner approval to spend money for the railings.

## **EVIDENCE AND ANALYSIS**

12. I have read all the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding like this one, the owners must prove their claims on a balance of probabilities.

### ***Strata and by-laws***

13. The strata was created in 2016, and is located in North Vancouver, BC. It consists of 55 residential strata lots and 5 commercial strata lots in a single 7-storey building above a 3 level parking garage (building). The strata plan shows outdoor planters are located on floors 1, 2, 5, and 6 (planters). The building also has a “green roof” on the seventh floor. The planters are designated as common property (CP).

14. The strata filed bylaws at the Land Title Office (LTO) in July 2016. Since then, the strata has filed 2 subsequent bylaw amendments at the LTO. None of the bylaw amendments are relevant to this dispute. The relevant bylaws applicable to this dispute are summarized as follows:

- Bylaw 6.1 - the strata must repair and maintain common assets of the strata corporation and common property not designated as limited common property.
- Bylaw 8.14 - a council member can spend the strata’s money to repair or replace CP or common assets if repair or replacement is immediately required to ensure safety or prevent significant loss or damage.

### ***Railings***

15. When the building was constructed, railings without gates were installed that blocked access to the planters located on floors 1, 2, 5 and 6. I infer from the

evidence that these railings did not extend around the perimeter of the planter and that someone standing in the planter could fall to the rooftop below.

16. The strata says although it is required to do so under the SPA and the bylaws, it had not maintained the planters since they were not easily accessible. The strata says maintaining the planters was a safety risk because a person standing in the planter risked falling 5 to 6 stories. The strata says it would have to hire a landscaper who could use a harness for safety reasons, which was very expensive. In the meantime, the strata says owners with strata lots adjacent to the planters on floors 5 and 6 were climbing over the railings to access the planters and maintain them since there were no gates.
17. On April 12, 2018, the strata held a Townhall meeting to address the landscaping issue. The meeting notice stated that landscaping costs were relatively high due to the difficulty in accessing “the elevated gardens on the roof, and on floors 1 and 2”. By roof, I infer the notice was referring to the garden roof on floor 7. The meeting notice did not mention floors 1 and 2. The notice included a copy of the 2018/2019 Proposed Budget which showed the strata owners had approved \$16,000 for landscaping maintenance in the 2017/2018 budget and \$10,000 in the 2018/2019 budget. Neither party provided the meeting’s minutes.
18. The strata’s annual general meeting was held on April 26, 2018 (2018 AGM). The AGM notice repeated that landscaping costs were relatively high due to the difficulty in accessing “the elevated gardens on the roof and floors 1 and 2”. In the meeting’s minutes, the only reference to landscaping was that Ms. Johnston, the council president (and one of the applicant’s in this dispute), reviewed the remedial landscaping work. There were no details about what was discussed.
19. On August 22, 2018, the strata held an informal meeting about maintaining the planters that was open to all strata owners. According to the minutes, Ms. Johnston was the strata president and stated that it was difficult to hire landscapers to maintain the planters. The minutes also state that 3 options were presented to the strata owners:

- a. Remove all garden material on floors 1 and 2 and install a rock garden. This option had the highest one-time cost but also the lowest ongoing maintenance costs.
  - b. Remove all plants and shrubs but leave the hedge and trees for some greenery and privacy, put down weed control cloth, and install a rock garden over the cloth. This option had medium range one-time cost but much lower ongoing maintenance cost and reduced access requirement to once a year for trimming hedges.
  - c. Attempt to maintain the gardens as they were. This was a high cost (quotes coming in at \$1,200 per visit) option with heavy access requirements (every other week at a minimum).
20. The minutes also stated that the strata owners who were present agreed that strata should proceed with the second option. There is no indication that strata had any further discussions with the owners on this issue.
21. On January 8, 2019, the strata held a council meeting. According to the minutes, “due to significant safety issues, no landscaper would consent to do all landscaping”. Council members agreed that the savings in the current fiscal year landscaping budget should be used to reduce exposure of legal liability and address these issues.
22. According to the current strata council president CH’s written statement, the strata held a council meeting in March 2019 and voted in favour of installing railings and gates on floors 5 and 6. He also stated the strata members who had a conflict of interest did not participate in the discussion or vote. The strata did not provide a copy of the March 2019 strata council meeting minutes.
23. Between April 11, 2019 and April 29, 2019, new railings and gates were installed around the planters on floors 5 and 6. The total cost was \$7,665 (railings expenditure). The strata used the operating fund to pay the railings expenditure.

24. The strata's 2019 annual general meeting was held on June 20, 2019. The strata council president, JL, reported that railings had been installed for accessibility and safety of the owners and future landscapers. Aside from this, there was no mention about the railings expenditure in the minutes or the 2019/2020 budget.

***Did the strata council require owner approval for the railings expenditure?***

25. The owners say the strata used the operating fund for the railings expenditure, which was an un-budgeted and unapproved capital project. They say the strata was already over-budget on regular repair and maintenance expenses. The owners also say the strata council required approval from the strata owners to install the railings because the expenditure occurred less often than once per year and was not otherwise approved or an emergency.

26. Section 92 of the SPA states that a strata corporation must establish an operating fund for common expenses that usually occur at least once a year, and a contingency reserve fund for common expenses that do not usually occur.

27. Section 97 of the SPA states that a strata corporation cannot spend money from the operating fund unless the expenditure occurs at least once a year or is necessary to obtain a depreciation report and is in the budget. If the expenditure is not in the budget, the expenditure may be made from the operating fund, provided that it is approved by a resolution passed by a  $\frac{3}{4}$  vote at an annual general meeting (AGM) or special general meeting (SGM) (see section 97(b)).

28. Section 98(3) of the SPA states that a strata corporation can incur unapproved expenditures from the operating fund (or the contingency reserve fund) if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise. However, the expenditure must not exceed the minimum amount needed to ensure safety or prevent significant loss or damage (section 98(5)). Further, the strata corporation must inform owners as soon as feasible about any "emergency"-type expenditure (section 98(6)).

29. The parties agree that the railings installed around the planter are common property and that although landscaping maintenance was in the 2018/2019 financial statements and budget and approved by the strata owners, the railings expenditure was not. This meant that in order for the railings expenditure to be made from the operating fund, it would either have to be approved by a  $\frac{3}{4}$  vote at an AGM or SGM, or there would have to be reasonable grounds to believe that the immediate expenditure was necessary to ensure safety or prevent significant loss or damage. The parties agree the strata owners never voted on whether to approve the railings expenditure before the railings were installed.
30. The strata says it had authority under bylaw 8.14, bylaw 9.14, and section 98(3) of the SPA to replace the railings without approval from the strata owners. It says the new railings and gates were immediately required to ensure safety or prevent significant loss or damage. It also says that the strata is entitled to deference when exercising its decision-making powers.
31. Bylaw 9.14 states that an executive member of a section can spend the section's money to repair or replace limited common property designated for the section's use if repair or replacement is immediately required to ensure safety or prevent significant loss or damage. Since none of the sections are named as a party to this dispute, I find bylaw 9.14 does not apply to this dispute.
32. Were there reasonable grounds to believe that the railings was immediately necessary to ensure safety or prevent significant loss or damage? The strata says the potential risk if someone fell from the planters on floors 5 and 6 was extremely high and the risk of injury was greater given the height.
33. I find the strata did not demonstrate the need was immediate. The strata did not explain why it could not wait 2 months until the 2019 AGM to seek approval for the expenditure. The issue about accessing the planters was first brought up in April 2018, 1 year before the new railings and gates were installed. That the need for new railings had been outstanding for 1 year suggests that there was not an immediate need. Since the railings expenditure was not in the 2018/2019 budget,



based on section 97 of the SPA, I find the strata required approval by a resolution passed by a  $\frac{3}{4}$  vote at an AGM or SGM before using the operating fund for it.

34. Should strata be given deference? The strata says that the CRT should give deference to strata council decisions concerning repair and maintenance and the appropriate standard of review is reasonableness. I find the issue before the CRT is not whether the strata should have installed the new railings but instead whether railings expenditure was an emergency expense under section 98(3) of the SPA. Given my finding that the expenditure did not meet the criteria in section 98(3), the strata's decision is not provided any deference.

### ***What remedy is available?***

35. The strata says the railings expenditure was disclosed and approved by majority vote at the AGM as part of the 2019 year end financial statements. The 2019 AGM minutes only state that the strata council president provided a summary of the railings expenditure. Neither the 2018/2019 operating budget nor the 2019/2020 operating budget approved by  $\frac{3}{4}$  vote referred to the railings expenditure.
36. Since the strata council did not obtain approval under section 97(b) of the SPA, I order that the strata seek  $\frac{3}{4}$  vote approval for the railings expenditure from the strata owners at the next AGM or SGM. The owners may consider filing a fresh dispute with the CRT if the strata does not obtain  $\frac{3}{4}$  vote approval for the railings expenditure.
37. The owners seek orders for the strata to follow the SPA with regard to spending guidelines for unapproved budget and contingency fund expenses, and to maintain all CP areas and in particular the elevated gardens on floors 1 and 2. As a general rule, everyone is expected to follow the law. Consequently, I find it unnecessary to make such orders because the strata is already legally obligated to do so. I decline to make the requested orders.
38. The owners also seek an order for the strata to draft rules about maintaining and selecting plants that are placed on the common property and in particular in the

planters on floors 5 and 6. 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 that “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.”

39. I find the same caution applies to the CRT. Under section 125 of the SPA, the strata may make rules governing the use, safety, and condition of the CP. Under SPA section 126, the strata is entitled to amend its bylaws as voted upon by the strata owners under SPA section 128. I find that there is no basis for the CRT to interfere with the future democratic governance of the strata corporation. I refuse to grant this order.
40. The owners also seek an order that the strata council secure liability waivers from owners that have units adjacent to the planters and that the responsibility to transfer the responsibility to maintain the CP to those owners, particularly for the planters on floors 5 and 6. I decline to make this order because I find it would be contrary to section 72 of the SPA, which states that the strata must repair and maintain CP.

## **CRT FEES, EXPENSES AND INTEREST**

41. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. Since the owners were only partially successful, I order the strata to reimburse the owners for ½ of the CRT fees which is \$112.50.
42. No party sought reimbursement of dispute-related expenses, so I order none.
43. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

## ORDER

44. I order that:

- a. at the next SGM or AGM, the strata must seek  $\frac{3}{4}$  approval of the \$7,665 railings expenditure,
- b. if the strata is not able to obtain  $\frac{3}{4}$  approval for the railings expenditure, the owners may file a fresh dispute with the CRT, and
- c. within 30 days the strata must reimburse the owners for \$112.50 in CRT fees.

45. The remainder of the owners' claims are dismissed.

46. The owners are entitled to post-judgement interest under the *Court Order Interest Act*.

47. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia. Under section 58 of the CRTA, the order can also be enforced by the Provincial Court of British Columbia if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

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Rama Sood, Tribunal Member