Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Au v. The Owners, Strata Plan EPS3242*, 2020 BCCRT 1091

B E T W E E N :

EILEEN AU, JERRY PALIPOWSKI, and JENNIFER JOE

APPLICANTS

A N D :

The Owners, Strata Plan EPS3242

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about common property storage lockers leased by strata lot owners.

2. The applicants, Eileen Au, Jerry Palipowski, and Jennifer Joe (owners), own strata lots in the respondent strata corporation, The Owners, Strata Plan EPS3242 (strata). The owners say they purchased leasehold interests in common property

storage lockers from the strata's owner developer (developer), 501 Robson Residential Limited Partnership (developer), before the developer built the lockers. The parties agree the City of Vancouver (city) later ordered the lockers' removal, because they contravened the city development permit for the building and the "fire code", so the developer removed them.

3. The owners say the strata failed to rebuild their leased storage lockers, or provide other storage lockers for their exclusive use, contrary to the strata's duty to repair and maintain common property. The owners also say the strata's decision not to do so was significantly unfair. The owners seek an order for the strata to build or make available storage lockers for their exclusive use.

4. The strata says it was not involved in the storage lockers' lease or construction, and that the strata has no obligation to replace the lockers or to provide alternative lockers. Further, the strata says that providing storage lockers for the owners' exclusive use requires a special resolution of the strata ownership, an amendment to the building's development permit, and a building permit, none of which has been obtained. The strata says its decision not to build new lockers for the owners is not significantly unfair, and it denies the owners' claims.

5. Ms. Au represents the applicants in this dispute. The strata is represented by a strata council member, who is a lawyer.

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.

ISSUES

10. The issues in this dispute are:

    a. Is the strata required to provide storage lockers for the owners' exclusive use?

    b. Was the strata's decision not to provide storage lockers for the owners significantly unfair in the circumstances, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

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

Background

12. Ms. Au and Mr. Palipowski jointly own strata lot 411, known as unit 4901, in the strata. Ms. Joe owns strata lot 229, known as unit 2805. The strata building was constructed by the developer. The owners are the original owners of the strata lots,

which they purchased new from the developer. The owners took possession of their strata lots in 2016.

13. Each owner's respective Contract of Purchase and Sale (CPS) for their strata lot purchases included an addendum about a storage locker lease on an underground parking level. In the addendums, Ms. Joe agreed to pay the developer $5,000 for the storage locker lease, and Ms. Au and Mr. Palipowski agreed to pay $7,500. On the evidence before me, I am satisfied that the owners paid the developer these amounts. In return, the developer was to provide a storage locker sub-lease agreement between the owners and a party identified in the developer's disclosure statement as holding an original lease to the parking area (storage company). According to the addendums, the developer said it leased, or would lease, all the storage lockers to the storage company under the original lease, and the storage company would sub-lease individual lockers to the owners. The owners were to sign and return the future sub-lease agreement prior to the completion of each strata lot's sale.

14. The addendums did not identify which lockers would be assigned to the owners, and the parties agree that the lockers were not built until after the strata lot purchases were completed. Further, there are no sub-lease agreements in evidence, or other documents showing that the owners signed storage locker sub-leases with the storage company, or anyone else. However, the owners maintain, and the strata does not directly dispute, that Ms. Au and Mr. Palipowski leased storage locker 15, and Ms. Joe leased storage locker 136, from the storage company, 501 Robson Parking Inc. For the purposes of this dispute, I accept that the owners agreed to sub-lease those lockers from the storage company, although I find that the sub-leases' terms are not revealed in the evidence before me.

15. The developer built the owner's leased storage lockers as wire cages on a parking level. The evidence does not show that the strata was directly involved in their construction. Although the evidence does not identify the lockers' exact location, it is not disputed that they were built on common property on a parking level. I find that the strata plan and other strata documents show that the areas in which the storage

lockers were located were not designated as limited common property (LCP) for the owners' exclusive use. Notably, I also find the owners' storage lockers are not part of the strata plan.

16. The parties do not deny that the lockers were not part of the building's city-approved plans, were not permitted under the building's city development permit, and contravened the "fire code". The City of Vancouver issued a December 20, 2017 order to the strata, saying that the storage lockers were unapproved and not permitted, that they violated the city's Zoning and Development bylaw and Building bylaw, and that they blocked sight lines and could potentially compromise sprinkler coverage. The order said that by January 22, 2018, the strata must submit revised building plans showing all deviations from the approved plans, or remove the unapproved lockers and restore the parking area to its last approved condition. The order said that failing to do so would result in the matter being referred to the city prosecutor "for the laying of charges."

17. The developer then removed the offending storage lockers, including the owners' lockers. The lockers have not been replaced. The owners each rejected the storage company's offer to refund the owners' storage locker lease payments. The storage company also paid to move the possessions in those lockers to a private storage facility for 1 year after the lockers' removal.

Is the strata required to provide storage lockers for the owners' exclusive use?

18. In various strata council and annual general meeting minutes, and correspondence with the owners, the strata indicated that providing replacement or alternative storage lockers for the owners would require an amendment to the building's development permit to allow the new use of proposed common property locker locations. The strata noted that if this approval was granted, a building permit would be needed for the lockers' construction. The strata also said that to lease any replacement or alternative lockers to the owners for a period of longer than 1 year at a time, as I find the owners claim here, the locker area would need to be designated as LCP for the applicable owner's exclusive use. The strata says, and I agree, that

this would require the strata ownership to pass a special resolution by ¾ vote under *Strata Property Act* (SPA) section 74. The owners do not directly dispute these requirements for providing storage lockers.

19. In addition, I note that SPA section 71 says that the strata must not make a significant change in the use or appearance of common property unless the change is approved by a resolution passed by a ¾ vote at a general meeting of the strata ownership. Given that the owners' removed storage lockers do not presently exist, and are not shown on the strata plan or the approved development permit, I find that adding storage lockers would be a significant change, and would require a section 71 resolution. So, I find a ¾ strata ownership vote is required to provide new common property storage lockers for the owners' exclusive use.

20. The parties agree that the strata gave the developer permission to seek an amendment to the development permit, which is the first requirement. The developer's amendment application is not in evidence. However, in a December 31, 2019 email from the developer to Ms. Joe, the developer said its amendment application had been to remove excess bike lockers from room P1-21 and replace them with "25 locker cages". I note that Vancouver issued a corresponding development permit amendment on December 14, 2018. The amendment said that the existing bike spaces in room P1-21 were replaced with "larger bike locker storage". The amendment said that no other changes or deviations from the originally approved permit were approved. I find that the amendment permitted larger bike lockers, but did not permit a change in use of room P1-21 to general residential storage.

21. The amendment also said that common residential spaces must not be put to any other use other than as shown in the development permit. As a result, the strata says, and the owners do not specifically deny, that this means the strata cannot allow bike locker areas to be used as general storage areas under the present development permit. Given the evidence on file, I agree. I also find that there is no evidence before me showing that other common property areas, beyond this bike

locker area, are available and appropriate for conversion to residential storage lockers, if the appropriate permits and strata ownership resolutions are obtained.

22. The owners agree that the strata asked the developer to propose an additional amendment to the development permit, to change the permitted use of bike locker common property to general residential storage locker use. The developer has not done so. The strata says it made this request and worked with the developer to help the owners who had lost their storage lockers leased from the developer, but that the strata was not obligated to do so. The strata indicates that the developer was best positioned to seek development permit amendments, and that the strata was not involved in any storage locker leases with the developer, the storage company, or the owners. The strata says that in the circumstances, it decided not to propose a special resolution for the designation of common property as LCP for the construction of new lockers.

23. So, the strata says it is not required to seek city permits allowing the construction and use of new storage lockers, as the original lockers were never allowed and are not shown on the strata plan, and the strata is not required to construct new ones. In contrast, the owners say section 72(1) of the SPA requires the strata to rebuild the removed lockers, or provide equivalent replacement lockers, because that section says the strata must "repair and maintain common property and common assets."

24. The owners cited caselaw in support of their SPA section 72(1) argument. I find the situations contemplated in this caselaw are different from the circumstances of this dispute. For example, *Frank v. The Owners, Strata Plan LMS 355*, 2016 BCSC 1206, affirmed in 2017 BCCA 92, addresses a strata corporation's responsibility for the costs of altering LCP. But the alterations in *Frank* were allowed under city development and building permits, and the strata plan, and were needed to bring the LCP into compliance with the *BC Building Code*. I find that is a very different matter than the one here. Overall, I find the circumstances in the cited caselaw are unlike the present case. In particular, I find the owners' request requires further

amendments to the building's development permit, as well as a ¾ strata ownership vote.

25. Further, the *Frank* British Columbia Court of Appeal decision cited *Kearsley v. The Owners, Strata Plan KAS 1215*, 2008 BCSC 1606. *Kearsley* found that although an owner-built structure contravened a city building code, this did not mean that SPA section 72 required the strata corporation to alter the structure. In that case, the court expressly rejected the argument that the strata corporation was "implicated" in the dilemma facing the plaintiff. I find this reasoning persuasive, and applicable to the facts of this dispute.

26. The owners also cited *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, where the strata was ordered to provide a transparent view window that was a promised feature of a strata lot. However, in that case, altering a window did not require amended permitting or an LCP designation, and the window was not a discretionary feature or purchased under an optional lease agreement with the developer, as the owners' storage lockers were in this case. More on that below.

27. On the evidence before me, I find that installing the requested lockers at this point would, at minimum, contravene the development permit. As further described below, while SPA section 72(1) requires the strata to maintain and repair common property and common assets, I find this obligation does not extend to building new structures on common property, or new common assets, that are not shown on the strata plan, and without required permissions such as, in this case, amended city permits and resolutions of the strata ownership.

28. A related question is whether the removed lockers, promised by the developer, are now "defective". The owners indicate that their leased storage lockers were a mandatory feature of the strata development and their strata lot purchases, and that the strata must "repair" the "defective" lockers by replacing them.

29. First, I find that the storage lockers were not physically defective, in part because the evidence does not reveal any construction defects, only that they were installed without required permissions and approvals. The owners' lockers do not presently

exist, and I find in this case that they are not defective or in need of repair under the SPA.

30. Second, the owners say that the developer's amended disclosure statement shows that storage lockers were a promised part of the development. However, I find that disclosure statements are not binding on strata corporations. See *The Owners, Strata Plan BCS 2429 v. Onni Development (The Point) Corp.*, 2019 BCCRT 1177 at paragraph 23, which is not binding on me, but whose reasoning I find applicable here.

31. Further, I find that the disclosure statement only says that the developer intended to build storage lockers in its sole discretion, and that there is nothing in the disclosure statement requiring storage lockers to be built. Also, as noted above, I find the evidence fails to show the strata plan or building development plan provided for or required the owners' leased storage lockers to be built. On the evidence before me, I find the only storage locker requirement was the CPS storage locker lease addendum between each owner and the developer, in which the developer promised to obtain storage locker sub-lease agreements from the storage company. I find the addendums were private agreements between the developer and the owners and did not bind the strata or require the strata to build or provide common property storage lockers for the owners' exclusive use.

32. The owners also say that the developer transferred to the strata its interest in the original lease of the storage locker areas with the storage company. So, the owners say the strata is now the original leaseholder and is responsible for providing the storage lockers promised by the developer. I find the disclosure statement described the developer's intent to eventually transfer the original lease to the strata. But there is no lease transfer document in evidence, and I find none of the evidence before me shows that the developer's interest in an original storage locker lease was transferred to the strata. The owners also rely on the preamble of a partially executed storage locker release document, which said the developer had transferred the original storage locker lease to the strata. I place no weight on that

evidence because it is hearsay and its accuracy not supported by other, reliable evidence.

33. For these reasons, I find that the strata is not required, under SPA section 72(1) or otherwise, to build or provide new storage lockers to the owners. However, if the required permitting and strata ownership approvals for such new storage lockers are obtained in the future, and the lockers are built, the strata will be responsible for maintaining the lockers in accordance with the SPA and its bylaws. I dismiss the owners' claim on this issue.

Was the strata's decision not to provide storage lockers significantly unfair?

34. The owners say most other strata lot owners have leased storage lockers, but the owners and others paid the developer extra for larger lockers. The owners say it is significantly unfair for the strata not to provide the owners with the promised lockers, when other strata lot owners have lockers. I describe the circumstances of the strata's decisions below.

35. I find the evidence fails to show how many storage lockers exist at the strata, and whether the prices of any other storage locker leases were included in the price of the other strata lots. But the strata does not dispute that 4 to 5 strata lot owners had their leased storage lockers removed following the Vancouver order. There are several hundred strata lots in the strata.

36. I found above that new storage lockers cannot be constructed without additional city permitting and a strata ownership vote. I find that the strata asked the developer to seek the required city permit changes and has given the strata's permission to do so. I find the evidence, including the correspondence between the parties, shows the strata does not seek to obstruct the construction of new storage lockers, if the owners or the developer obtain the required permitting and the strata ownership approves the necessary resolutions.

37. The question is, was the strata council's decision not to independently seek permit approvals for additional storage lockers significantly unfair? And was the strata council's decision not to propose a strata ownership resolution about additional storage lockers significantly unfair? For the reasons below, I find the strata's decisions were not significantly unfair, and the owners are not entitled to a remedy.

38. Section 164 of the SPA is similar to section 123(2) of the CRTA, which gives the CRT authority to issue orders preventing or remedying a significantly unfair action, decision, or exercise of voting rights: *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119. I find this gives the CRT jurisdiction to decide claims of significant unfairness.

39. The courts and the CRT have considered the meaning of "significantly unfair" and have found it means oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128, the BC Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

40. The BC Court of Appeal considered the language of SPA section 164 in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *Watson* at paragraph 28:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

41. The recent decision *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, indicates that the consideration of an owner's expectations is not always necessary when determining significant unfairness. The Court in *Kunzler* found that the reasonable expectations portion of the test may not be appropriate in all circumstances, but that it may make sense when a strata council is exercising its

discretionary authority. That was the case in this dispute, so I will consider the reasonableness of the owners' expectations.

42. I find the owners expected the storage lockers promised to them by the developer under the CPS addendum. Necessarily, I find this would include applying for and obtaining an amended development permit and passing required strata ownership resolutions. However, the owners now expect the strata to provide storage lockers.

43. Was it reasonable to expect the strata, rather than the developer, to provide new storage lockers? As noted, the owners' removed storage lockers have never been allowed by a Vancouver development permit, are not part of the strata plan, and no longer exist. Rebuilding the owners' original lockers would contravene the development permit. And constructing any new lockers on common property for the owners' exclusive use would require a ¾ strata ownership vote.

44. On balance, I find the strata has neither taken responsibility for building new storage lockers, nor stood in the way of those lockers being built. The strata permitted the developer to apply for a further development permit amendment to allow new storage lockers, but the developer has not done so. The owners have not requested permission to apply for such a permit amendment themselves. Further, although the strata has not proposed resolutions to the strata ownership about new storage lockers, under SPA section 43 the owners could require the strata to hold such a strata ownership vote, with the support of 20% of the strata ownership. I find that here, the strata is not implicated in the owners' difficulties in completing the private storage locker lease, which I find involves only the owners, the developer, and the storage company. As a result, I find the owners' expectations of the strata were not reasonable in the circumstances.

45. Even if I am wrong, and the owners' expectations were reasonable, I find they were not violated by a strata action that was significantly unfair. I find the strata simply declined to take steps on the owners' behalf, such as applying for permit amendments and proposing strata ownership resolutions, that the strata was not required to take under the SPA, a contract, or for another reason. I find the strata's

decisions do not prevent the owners and the developer from seeking the city and strata ownership approvals required for new storage lockers. So, I find the strata's actions were not harsh, wrongful, done in bad faith, or unjust.

46. Overall, I find the strata's actions about the storage lockers were not significantly unfair to the owners. I dismiss the owners' claims on this issue.

CRT FEES AND EXPENSES

47. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses.

48. The strata was successful, but did not pay any CRT fees, so I order no fee reimbursement. Neither party claimed any CRT dispute-related expenses.

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

ORDER

50. I dismiss the owners' claims, and this dispute.

Chad McCarthy, Tribunal Member