



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Nicholson v. The Owners, Strata Plan KAS 1137*, 2020 BCCRT 1117

B E T W E E N :

KENNETH NICHOLSON and MURRAY CAPSTICK

APPLICANTS

A N D :

The Owners, Strata Plan KAS 1137

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about repairs to fencing and a retaining wall in a strata corporation.

2. The applicants, Kenneth Nicholson and Murray Capstick, each own strata lots in the respondent bare land strata corporation, The Owners, Strata Plan KAS 1137 (strata).
3. The applicants say the perimeter fence and retaining wall in the strata complex were built by the owner developer, that the strata has maintained and repaired them in the past, and that they are still the strata's responsibility. They say the fence and wall require repairs, and they request an order that the strata fix them. They also request reimbursement of \$1,286.24 for a land survey.
4. The strata denies the applicants' claims. It says the fencing and retaining wall are part of each owner's strata lot, and are not the strata's responsibility to repair.
5. The applicants are self-represented in this dispute. The strata is represented by a strata council member.

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, videoconference, 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.
10. The strata provided late evidence, which the applicants say should not be accepted. The applicants had the opportunity to review the late evidence and respond to it. Consistent with the CRT's mandate that includes flexibility, I find there is no prejudice to the applicants in allowing the late evidence, and I do so.

ISSUES

11. The issues in this dispute are:
 - a. Are the perimeter fencing and retaining wall common property?
 - b. Who is responsible to repair and maintain the fencing and retaining wall?
 - c. Is any party entitled to reimbursement for a land survey?
 - d. Is the strata entitled to reimbursement for legal expenses?

BACKGROUND

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 applicants must prove their claims on a balance of probabilities.
13. The strata was created in 1992. It is a bare land strata corporation, consisting of 28 strata lots. The strata's bylaws are the Standard Bylaws under the *Strata Property Act* (SPA), along with 2 amendments that are not relevant to this dispute. I discuss the applicable bylaws in my reasons below.
14. The fencing and retaining wall are not shown on the strata plan. The parties agree that they were built by the owner developer.

15. The parties agree that the retaining wall is concrete, and that it runs along the perimeter boundaries of strata lots 2, 3, 4, and 5 in the strata, and neighbouring properties outside the strata. The strata plan shows there is no common property between strata lots 2-5 and the adjacent property.
16. Photos provided in evidence show that the perimeter fence, which is the subject of this dispute, runs parallel to the retaining wall. It is located on the side of the retaining wall that faces the strata lots.
17. The parties agree that the fence was initially maintained by the owner developer, and was later maintained by the strata until about 2008. The strata says that in 2008 the strata council learned that the legislation did not permit strata funds to be used to maintain items that were not common assets or common property, so the strata informed affected owners they were responsible to repair and maintain the fence. This is confirmed by correspondence provided in evidence.
18. The applicants say the strata must repair and maintain the perimeter fencing and retaining wall. The strata disagrees. It says the fencing and wall are located within each strata lot, and therefore each strata lot owner must repair and maintain the portions of fence and wall on their strata lot.

REASONS AND ANALYSIS

Are the perimeter fencing and retaining wall common property?

19. Based on the evidence before me, I find the portions of the perimeter fencing and retaining wall that run along the edge of strata lots 2 to 5 are not common property. Rather, I find they are part of the respective strata lots.
20. A land survey certificate was provided in evidence, created by surveying firm Maddox and Company (Maddox). The certificate is dated May 21, 2020. It shows that the retaining wall runs along the boundary between strata lots 2 to 5 and the adjacent properties that are not part of the strata. The survey certificate also shows that in 1 place, the wall has shifted and encroaches slightly onto the adjacent

property. In an accompanying email dated May 24, 2020, Maddox's surveyor wrote that the base of the retaining is situated almost entirely on strata lots 2 to 5, except for the 1 small shifted area (which is outside the strata corporation's land). I accept the evidence from Maddox, as it was prepared by a qualified BC land surveyor, and is uncontradicted.

21. Based on Maddox's evidence, I find that the portions of retaining wall that run along strata lots 2 to 5 are part of those strata lots. As explained above, the photos in evidence show that the perimeter fence runs parallel to the retaining wall, on the side facing the strata lots. Based on the survey certificate, this means that the fencing behind strata lots 2 to 5 is entirely located within those strata lots.
22. Since the fencing and retaining wall are located within the boundaries of the strata lots, I find they are part of those strata lots, and are not common property. In reaching this conclusion I rely on the reasoning in *Erdmann v. The Owners, Strata Plan KAS 2452*, 2018 BCCRT 398. Although prior CRT decisions are not binding precedents, I find *Erdmann* provides useful guidance, as it considered similar facts.
23. In *Erdman*, the tribunal member considered whether a retaining wall built by an owner developer in a bare land strata was common property that the strata corporation was responsible to repair. A survey document showed that a portion of the retaining wall was located on an owner's strata lot. The owner argued that despite this, the wall was common property because it was built to support more than one strata lot. The tribunal member rejected this argument, and found instead that the retaining wall was part of the owner's strata lot, and not common property. He noted that the only common property shown on the strata plan was the driveway.
24. I find this case is similar to *Erdmann*, as it involves a retaining wall located within strata lot boundaries in a bare land strata. Also, as in *Erdmann*, the only common property shown on the strata plan is a roadway.

25. Based on the evidence before me, and following *Erdmann*, I find the retaining wall and perimeter fencing within strata lots 2 to 5 are part of those strata lots, and are not common property.
26. I note that in paragraph 36 of *Erdmann*, the tribunal member noted that the wall was made of interlocking bricks, and was not continuous. This is different from the retaining wall in this case, which is made of poured concrete and appears to be continuous. However, this does not change my conclusion. There is no evidence before me to confirm the applicants' assertion that the retaining wall provides infrastructure necessary to any strata property. Rather, I find the retaining wall only provides support to strata lots 2 through 5.
27. I have also considered whether the fencing and retaining wall are common assets. SPA section 1(1) says "common asset" includes personal property held by or on behalf of a strata corporation.
28. Based on the facts before me, I find the fencing and retaining wall are not common assets. They are not moveable without destruction. Rather, they are fixed to the land. They have the character of fixtures, rather than chattels. Thus, I find they are not properly characterized as "personal property". Rather, I find they are part of the individual strata lots upon which each portion is located.
29. In conclusion, I find the retaining wall and perimeter fencing within strata lots 2 to 5 are part of those strata lots, and are not common property or common assets.

Who is responsible to repair and maintain the fencing and retaining wall?

30. Under SPA section 72(1), a strata corporation has a duty to repair and maintain common property and common assets. In general, owners are responsible to repair and maintain their own strata lots. However, under SPA section 72(3), a strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot. This is confirmed by Standard Bylaw 2(1), which says an owner must repair and maintain their strata lot, except for repair and maintenance that is the responsibility of the strata corporation under the bylaws.

31. Standard Bylaw 8(d) sets out the specific parts of strata lots that a strata corporation must repair and maintain. However, the wording of Standard Bylaw 8(d) specifically exempts bare land strata corporations. 8(d) says it applies to “a strata lot in a strata plan that is not a bare land strata plan.” Since the respondent strata is a bare land strata corporation, and since its maintenance obligations are governed by the Standard Bylaws, in this case the strata has no responsibility to repair and maintain any parts of a strata lot.
32. Since the fencing and retaining wall are part of the strata lots, I find they cannot be the strata’s responsibility to repair and maintain. Again, this determination hinges on the fact that Standard Bylaw 8(d) does not apply to bare land strata corporations.
33. The parties each made submissions about who maintained the fencing and retaining wall in the past. They agree that the fencing and wall were built by the owner developer, and maintained by the strata from 1997 to 2008. The parties also agree that in 2009 a new strata council decided that it was individual owners’ responsibility to maintain and repair the fencing and retaining wall.
34. Since it is undisputed, I accept that the strata repaired and maintained fencing and retaining wall in the past. However, that does not mean it is required to do so now. Again, since I have found that the fencing and retaining wall are part of the individual strata lots, the strata is only responsible for their repair and maintenance if specified in the bylaws, which is not the case here. I also note that at a special general meeting held in April 2018, the strata ownership voted against a resolution that would have made the strata responsible to repair and maintain the perimeter fencing.
35. The applicants rely on 2 other CRT decisions. The first is *Newman v. The Owners, Strata Plan EPS 680*, 2017 BCCRT 122. However, I find the reasoning in *Newman* is not helpful in determining this dispute. That case was about whether heat pumps, related plumbing, wiring and ducts, and gas fireplaces were common property, and whether the strata was responsible to repair them. Those components are different from fencing and retaining wall, and I find the reasoning used by the tribunal

member is therefore not helpful in this dispute. In particular, the tribunal member found that the heat pumps were not located within the boundaries of any strata lot, which is different from the facts before me. Also, I note that in *Newman*, the tribunal member found that since the gas fireplaces were located within the strata lots, each owner was responsible to repair and maintain their own fireplace. This does not support the applicants' position in this dispute.

36. The second decision the applicants rely on is *Bruzas et al v. Bjornson et al*, 2019 BCCRT 1070. That case was about whether an owner had to remove a fence located on limited common property. I find that the reasoning in *Bruzas* is not applicable to this dispute. This is because the contested fence was located on limited common property. That is different from the facts in this case, where the fence is located within strata lots. Standard Bylaw 8(c)(ii) was engaged in that dispute, and was determinative of who must replace the fence. However, that bylaw does not apply in this dispute, because it only applies to limited common property.
37. The applicants also rely on a November 15, 2019 legal opinion they provided in evidence. The strata contests the authenticity of the legal opinion, but I find that does not matter because I put no weight on the opinion. A lawyer's opinion about the issues in a CRT dispute is not determinative, and carries no evidentiary weight. Rather, it is essentially admissible as a form of submission. I note that such evidence would not be admissible at all in a court proceeding, but the formal rules of evidence do not apply to the CRT.
38. Also, I find the arguments in the November 15, 2019 legal opinion unpersuasive. The lawyer based her opinion that the strata was responsible to repair the fencing on her understanding that the fencing was located "between strata lots", and was not built on a strata lot. However, the evidence before me, particular the Maddox survey certificate, proves that is incorrect. Also, the lawyer cited *Newman* and *Bruzas*, and said the CRT has "repeatedly found that fences which are not specifically designated as part of a strata lot are 'limited common property' and are the responsibility of the Strata Corporation to maintain."

39. I find this is an incorrect characterizing of *Newman* and *Bruzas*. I find that prior CRT cases do not support this argument by the lawyer. In particular, while fences can be located on limited common property, as in *Bruzas*, in neither case did the CRT find that fences were, in themselves, limited common property. In fact, *Newman* did not discuss fences at all.
40. For these reasons, I place no weight on the November 15, 2019 legal opinion.
41. For the reasons set out above, I conclude that the strata is not responsible to repair or maintain any part of the strata lots, which includes the perimeter fencing and retaining wall. I therefore dismiss the applicants' claim for an order that the strata repair the fence and wall.

Is either party entitled to reimbursement for a land survey?

42. Both parties requested reimbursement for a land survey. I find no party is entitled to reimbursement.
43. I infer that the reimbursement is for the Maddox survey certificate, as that is the only survey in evidence (apart from the strata plan, which includes survey information). However, it is unclear from the evidence who commissioned the Maddox report. The email in evidence suggests it was requested by PM, strata council vice president. However, it is unclear whether PM requested the survey in his capacity as an owner, or on behalf of the strata.
44. In any event, neither party provided an invoice showing what the Maddox survey cost, or who paid for it. While the applicants request reimbursement in the amount of \$1,286.24, they provided no receipt or invoice to support this expense.
45. For these reasons, I order no reimbursement for a land survey.

Is the strata entitled to reimbursement for legal expenses?

46. The strata requests reimbursement for legal expenses, but did not provide evidence to support this claim. I deny the claim for that reason, and because CRT rule 9.4(3) says the CRT will not order one party to pay another party's legal fees in a strata

property dispute except in extraordinary circumstances,. I find the circumstances of this dispute are not extraordinary. There was not an unusually large amount of evidence or submissions, and the issues in the dispute were not unusually complex.

47. For these reasons, I deny the strata's claim for reimbursement of legal expenses. Rather, the dispute involved issues about repair and maintenance obligations that are common in strata property disputes resolved by the CRT.

CRT FEES AND EXPENSES

48. 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.
49. The strata is the most successful party, but it paid no CRT fees, so I order none. Neither did it claim any expenses other than survey and legal, which I have already addressed.
50. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants.

ORDER

51. I dismiss the applicant's claims, and the strata's claim for reimbursement of expenses. I dismiss this dispute.

Kate Campbell, Vice Chair