



# Civil Resolution Tribunal

Date Issued: December 15, 2020

File: ST-2019-011030

Type: Strata

Civil Resolution Tribunal

Indexed as: *Barkh v. The Owners, Strata Plan EPS5056*, 2020 BCCRT 1415

B E T W E E N :

MOHSEN BARKH

**APPLICANT**

A N D :

The Owners, Strata Plan EPS5056

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

David Jiang

## INTRODUCTION

1. The applicant, Mohsen Barkh, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan EPS5056 (strata). Some of the siding near his patio entrance is made of aluminum rather than wood. He seeks an order for the strata to replace the aluminum siding with wood siding, so it will appear consistent with the

neighboring strata lots. He says the strata is obligated to do so under its duty to repair and maintain common property.

2. The strata disagrees. It acknowledges that the patio entrance is limited common property and that it has a duty to repair and maintain it under section 72 of the *Strata Property Act* (SPA). However, the strata says the siding requires no repairs or maintenance. It also argues that under the SPA, the siding replacement would be a significant change in the appearance of common property. As such, it says the owners in the strata would need to approve the replacement first by a special resolution passed by a 3/4 vote margin at an annual or special general meeting.
3. Mr. Barkh represents himself. A strata council member represents the strata.
4. As discussed below, I find Mr. Barkh's request is much like a request for an upgrade of common property. I find that that strata acted reasonably in refusing this request and has met its duties under SPA section 72. I refuse to resolve some of Mr. Barkh's claims, outlined below, and dismiss his remaining claims. My reasons follow.

## **JURISDICTION AND PROCEDURE**

5. 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.
6. 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.
7. 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.

8. 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.

***Allegations of a Breach of the Standard of Care by Strata Council Members and a Failure to Disclose a Conflict of Interest***

9. Mr. Barkh says the strata council and its property manager, FirstService Residential BC Ltd. (FSR), have been negligent and deceitful. He also alleges that a strata council member, GM, was in a conflict of interest and failed to disclose this. He says that GM is an employee of the strata's owner developer, WFC, and did not act impartially.
10. The strata denies these allegations. It also says the CRT should not consider such arguments because they were raised late in the process and amount to "trial by ambush".
11. I find that the allegations of negligence and deceit against the strata council arise under SPA section 31. As noted in many CRT decisions, SPA section 31 sets out the standard that strata council members must meet in performing their duties. It says that each council member must act honestly and in good faith, with a view to the best interests of the strata corporation, and exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances. The duties of strata council members under section 31 are owed to the strata corporation and not individual owners. As such, the appropriate applicant for a claim of an alleged breach of these duties is the strata corporation and not a strata lot owner. See *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 at paragraph 267.
12. The only time a strata lot owner can successfully sue an individual strata council member is for a breach of the conflict of interest disclosure requirement under SPA section 32. See *Wong v. AA Property Management Ltd*, 2013 BCSC 1551. Remedies for breaches of section 32 are specifically excluded from the CRT's jurisdiction, as

set out in CRTA section 122(1)(a). Thus, the CRT does not have jurisdiction over claims brought by an owner against an individual strata council member.

13. For those reasons, I find Mr. Barkh has no standing to bring claims about negligence or deceit against the strata council. I dismiss those claims. Under CRTA section 10(1), I also refuse to resolve Mr. Barkh's claims about disclosure of conflict of interest under SPA section 32.
14. Under CRTA section 10(1), I also refuse to resolve any claims against FSR as it is not a party to this dispute. FSR has not had the opportunity to defend itself. I am also unable to make any orders against non-parties.
15. Given the above, I find it unnecessary to decide whether Mr. Barkh raised these allegations too late in the CRT process.

### ***Late Evidence***

16. The strata provided late evidence about 2 hearings with Mr. Barkh and a photo of completed patio repairs. Mr. Barkh did not object and had the opportunity to review the evidence and provide submissions and evidence in response. I also find the evidence is largely about undisputed background information and partially duplicates Mr. Barkh's submitted evidence. Consistent with the CRT's mandate that includes flexibility, I find the late evidence does not result in any prejudice to Mr. Barkh and I allow it.

### **ISSUE**

17. The issue in this dispute is whether the strata breached its obligation to repair and maintain the siding outside of Mr. Barkh's patio entrance.

### **EVIDENCE AND ANALYSIS**

18. In a civil claim such as this, Mr. Barkh bears the burden of proof on a balance of probabilities. Although I have reviewed all the evidence and submissions (including case law), I only address them to the extent necessary to explain my decision.

19. The background facts are undisputed. Mr. Barkh is one of the registered owners of strata lot 4. The strata lot provides townhouse-style housing. It is attached to other strata lots that comprise a building. It has a ground level patio that is limited common property meant for the exclusive use of strata lot 4.
20. The patio is located outside of the main entrance to Mr. Barkh's strata lot. Immediately outside of the main entrance is a vestibule. The vestibule is a small semi-enclosed area. From the photos I find its size restricts its use to a waiting area for visitors.
21. As I will explain below, the siding at issue is located inside the vestibule. Based on the strata plan and the parties' submissions, I find the vestibule is also limited common property meant for the exclusive use of strata lot 4.
22. Mr. Barkh purchased the strata lot before the owner developer, WFC, completed it. In June 2019 Mr. Barkh emailed FSR. He advised that WFC had left some patio work unfinished. This work included some missing siding in the vestibule. FSR said it would add the unfinished work to a list of deficiencies for WFC to address. WFC emailed Mr. Barkh on August 28, 2019 and said the missing siding would be installed shortly.
23. In October 2019 WFC installed the missing siding but used aluminum siding instead of wood. The photos and the parties' submissions indicate that the strata complex mainly uses wood siding. The aluminum siding is similar in colour to the wood siding. However, it has a uniform and smooth appearance that is unlike wood.
24. WFC did not use aluminum siding for the entire vestibule. From the photos I find the aluminum siding is not visible to a passerby. The affected areas face inward and likely cannot be seen unless standing near or inside the vestibule. Mr. Barkh also provided an October 11, 2019 estimate from a contractor to replace the aluminum siding. The estimate shows about 80 square feet are affected.

25. Mr. Barkh says that the vestibule attached to his strata lot is the only one that uses any aluminum siding. I accept this submission as fact as he provided a photo of a neighbor's vestibule, and the strata provided no contrary evidence. The photo shows wood siding installed throughout, and Mr. Barkh says it is representative of all the other vestibules, save his.
26. Mr. Barkh says that the strata decided on or approved the installation of the aluminum siding, but I find this unlikely. Mr. Barkh correctly points out that there is no evidence that the strata made such a decision. I infer that WFC decided to substitute aluminum siding, likely under the terms of a construction contract. This is consistent with the strata's submission that WFC had a dispute with its siding contractor and that there was a shortage of the specific siding wood used, which was imported from Italy. Mr. Barkh also submits that the contractor that provided the October 11, 2019 estimate says it could not find a source for the same wood.
27. Mr. Barkh asked WFC to change the aluminum siding but WFC refused. On November 1, 2019, WFC emailed Mr. Barkh's son, HB, and said it considered the patio and vestibule work substantially complete. HB replied that Mr. Barkh had filed an application for dispute resolution in the CRT against WFC. Mr. Barkh refers to this as dispute number SC-2019-007953. CRT staff advised me that Mr. Barkh started drafting an application for dispute resolution but left it incomplete. The CRT therefore did not issue a Dispute Notice for that dispute.
28. Mr. Barkh requested 2 hearings with the strata. At the October 25, 2019 hearing, the strata council agreed that Mr. Barkh could carry out siding alterations and repairs. In its November 1, 2019 letter to Mr. Barkh, the strata noted the purpose of the request was to allow for Mr. Barkh to replace the aluminum siding if WFC did not.
29. At the next April 28, 2020 hearing, the strata council unanimously voted to reject Mr. Barkh's request for the strata to change the siding. The strata council wrote in its May 15, 2020 decision letter to Mr. Barkh that WFC had explained that the aluminum siding was an intentional part of the building's design.

## THE POSITIONS OF THE PARTIES

30. Mr. Barkh says his strata lot is the “black sheep” of the strata complex. He says the aluminum siding looks worse and is cheaper than the originally intended Italian wood. He also says the aluminum siding does not provide an edge to edge finish with an adjoining dark brown frame. He says this has led to some paint peeling on the frame. He also says that the strata did not deal with his other complaints about the patio in a speedy manner, which I detail below. He alleges that the strata misled him by advising that any complaints about the siding were an issue for him and WFC to resolve.
31. The strata says that it acted reasonably in rejecting Mr. Barkh’s request. It says the siding requires no repairs, nor does the rest of the patio. It also says the siding is visually consistent with the rest of the strata complex. Finally, the strata says changing the siding would be a “significant change” in common property, within the meaning of SPA section 71. So, the owners would need to vote to approve the change first.

### ***Did the strata breach its obligation to repair and maintain the siding outside of Mr. Barkh’s patio entrance?***

32. Under SPA section 72, the strata must repair and maintain common property and common assets. SPA section 3 also says the strata corporation is generally responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.
33. The strata’s bylaws are registered in the Land Title Office. The strata uses the Schedule of Standard Bylaws, with some amendments. Bylaw 8 requires the strata to repair and maintain common property and assets, as well as the structures and exterior of buildings.
34. As stated in *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784 at paragraphs 23 to 32, the strata has a fundamental duty to repair and maintain its common property. In performing that duty, the strata must act reasonably in the circumstances. The starting point for the analysis should be deference to the decisions made by the strata

council as approved by the owners. In carrying out its duty, the strata must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number.

35. In *Weir* at paragraph 28, the court explained that a strata corporation may choose from “good, better or best” solutions. Choosing a “good” solution does not mean the strata corporation’s approach is unreasonable. The court also said that, in the case before it, the petitioner’s approach might have been the wiser and preferable course of action. However, this did not mean the strata corporation’s approach was unreasonable.
36. I find that the strata, through strata council, acted reasonably when it declined to replace the aluminum siding on the vestibule. I reach this conclusion for several reasons. The most significant is that there is no evidence or submission that the siding is defective or requires repairs. There is no indication it breaches any building codes or is not suitable to function as siding. As noted above, the siding was installed in late 2019 and is nearly brand new.
37. Mr. Barkh referred to peeling paint, but the photos show the paint is on a dark brown frame rather than the aluminum siding. I find the peeling affects a relatively small area that is only visible on close inspection. I reach this conclusion in part because a photo of the affected area shows someone’s finger to provide a sense of scale. I do not find it would be reasonable to replace the aluminum siding to address this paint issue, even if the siding is causing the peeling. I find it likely that paint touchups would be a proportionate response.
38. This leaves the question of whether the strata reasonably refused to replace the aluminum siding based on its appearance. I find the strata’s decision was reasonable in the circumstances. I reach this conclusion in part because I find Mr. Barkh’s request to replace the siding is much like a request for an upgrade of common property. In *HARVEY v. The Owners, Strata Plan VR 390*, 2019 BCCRT 1417, a CRT Vice Chair wrote that while the strata is required to maintain and repair common property, it has no obligation under the SPA to perform and pay for upgrades of common property.

Although CRT decisions are not binding, I find the Vice Chair's comments are accurate and persuasive. I also find the strata's bylaws impose no such obligation on the strata in this dispute.

39. I am also mindful of the court's comments in *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493 at paragraph 12, also cited in *HARVEY*, that the democratic government of the strata community should not be overridden by the court except where absolutely necessary. I find those comments apply to the CRT and this dispute falls far short of that standard. I find that the aluminum siding minimally impacts the appearance of the vestibule outside of Mr. Barkh's strata lot. As noted above, the aluminum siding is not visible unless one is standing inside the vestibule. It is installed on only a portion of the vestibule. Its colour generally matches the adjoining wood siding.
40. The strata also says the building uses the same aluminum siding in other non-vestibule areas. I find this to be the case, because the strata provided a photo of another strata lot from the same building, on the third floor. The aluminum siding is visible on the exterior of the strata lot. As such, I find the aluminum siding on the vestibule is generally consistent with the materials and appearance of the building.
41. Mr. Barkh said that the siding would reduce the market value of his strata lot. I find this submission speculative as Mr. Barkh provided no evidence to support it.
42. Mr. Barkh also submitted that the strata did not deal with his other complaints about the patio fast enough. He raised as issues missing vent covers, some missing caulking, and 2 holes in the siding under a water bib and a natural gas outlet.
43. I do not find this relevant to the strata's refusal in April 2020 to replace the aluminum siding. In any event, I am not satisfied that the strata could have acted any faster. The emails show that both the strata and Mr. Barkh pointed out the patio deficiencies to WFC so WFC could address them. In one email, HM (Mr. Barkh's son) says WFC had until March 4, 2021 to address exterior deficiencies. Mr. Barkh acknowledges that WFC installed the vent covers at some point after November 2019, completed the caulking by November 18, 2019, and filled the 2 holes in by late July 2020.

44. Mr. Barkh also says the strata incorrectly identified the aluminum siding as being an issue that he and WFC should have resolved. I find this has limited relevance to assessing the reasonableness of the strata's decision in April 2020. This is because, ultimately, the strata considered Mr. Barkh's request to change the siding and issued a decision.
45. I dismiss Mr. Barkh's remaining claims.
46. Given the above, I do not find it necessary to decide whether changing the aluminum siding to wood siding would be a significant change, under SPA section 71, in the use or appearance of common property. I note that the strata already gave Mr. Barkh permission to change the siding in the November 2019 decision letter, though the strata will not pay for it.

## **CRT FEES AND EXPENSES**

47. 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.
48. The strata is the successful party. The strata paid no CRT fees and claimed no dispute-related expenses. So, I do not order any.
49. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner, Mr. Barkh.

## **ORDER**

50. Under CRTA section 10(1), I refuse to resolve any claims against FSR and any claims about disclosure of conflict of interest under SPA section 32.

51. I dismiss Mr. Barkh's remaining claims.

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David Jiang, Tribunal Member