



# Civil Resolution Tribunal

Date Issued: December 23, 2020

File: ST-2020-001648

Type: Strata

Civil Resolution Tribunal

Indexed as: *Westerby v. Balmer*, 2020 BCCRT 1456

B E T W E E N :

THOMAS WESTERBY

**APPLICANT**

A N D :

DEBRA BALMER

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Julie K. Gibson

## INTRODUCTION

1. This is a dispute between two strata lot owners about legal fees one owner incurred in a now withdrawn claim about a hot tub's noise and the appearance of a wall separating the hot tub from the neighbour's patio.

2. The applicant Thomas Westerby owns strata lot 17 (SL17) in the strata corporation, The Owners, Strata Plan KAS731 (strata). The respondent Debra Balmer owns strata lot 16 (SL16), which is immediately next to SL17.
3. During facilitation, Ms. Balmer withdrew a dispute she brought against Mr. Westerby and the strata arising out of the same hot tub issue. Mr. Westerby then withdrew his nuisance counterclaim against Ms. Balmer but continued his counterclaim for legal fees. The strata is not named in the counterclaim, which I have treated as its own dispute as reflected in the style of cause above.
4. Mr. Westerby seeks an order that Ms. Balmer pay him \$798.01 for legal fees he incurred to address the hot tub dispute, and \$63.18 for dispute-related expenses. He also seeks reimbursement of \$275 in CRT fees.
5. Ms. Balmer asks me to dismiss Mr. Westerby's claims.
6. Mr. Westerby and Ms. Balmer are each self-represented.
7. This is a fresh decision on the merits of the dispute. I previously issued a summary decision to the parties finding my October 28, 2020 merits decision a nullity due to a jurisdictional defect.

## **JURISDICTION AND PROCEDURE**

8. These are the formal written reasons of the 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.
9. 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.

10. 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.
11. 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.

## **ISSUE**

12. The issue in this dispute is whether Mr. Westerby is entitled to have Ms. Balmer pay him:
  - a. \$798.01 for legal fees incurred dealing with the hot tub dispute,
  - b. \$61.38 in dispute-related expenses, and
  - c. \$275 in CRT fees.

## **EVIDENCE AND ANALYSIS**

### ***Background Facts***

13. Below I will briefly summarize the background to the disputes between Ms. Balmer and Mr. Westerby regarding hot tub noise and the appearance of a Styrofoam dividing wall. In this summary I am not providing every background detail. I am also not making findings about the merits of the underlying claims, which have since been withdrawn.
14. In 2002, Mr. Westerby purchased SL17.
15. In November 2011, Ms. Balmer purchased SL16.
16. The strata plan shows that SL16 and SL17 are next to each other, with each having limited common property (LCP) patios of roughly 10 square metres. The patios are situated immediately beside one another.

17. In December 2011, Ms. Balmer installed a hot tub on SL16's LCP patio, with strata permission.
18. After the hot tub was installed, Mr. Westerby complained that the hot tub noise was keeping him awake at night.
19. Ms. Balmer then took steps to try to control the noise and vibration produced by the hot tub, including installing insulation around the hot tub cavity and a timer to stop it from running at night.
20. At some point, Ms. Balmer installed a Styrofoam wall between the patios, in an effort to abate the hot tub noise.
21. Mr. Westerby complained to the strata that Ms. Balmer's hot tub continued to cause undue noise and that the wall between the patios was unsightly.
22. Ms. Balmer replied saying that she was willing to change the Styrofoam wall if she and Mr. Westerby could decide on what should replace it.
23. Despite subsequent efforts by the strata and Ms. Balmer to resolve Mr. Westerby's concerns, the hot tub noise and appearance issues remained outstanding between the parties.
24. Ms. Balmer brought a CRT dispute against Mr. Westerby arising out of the hot tub disagreement. Mr. Westerby counterclaimed in a March 25, 2020 Dispute Notice. In the Dispute Notice, Mr. Westerby sought an order that Ms. Balmer eliminate the hot tub noise nuisance and replace the Styrofoam wall with another structure acceptable to him, at her cost. Mr. Westerby also sought reimbursement for his fees and expenses associated with bringing the dispute.
25. Ms. Balmer then withdrew her dispute about the hot tub issue. Mr. Westerby withdrew his claims for an order to have the noise abated and the wall replaced. His only remaining claim is for legal fees and dispute-related expenses.

26. Mr. Westerby provided receipts for \$798.01 for legal services provided to him as he prepared his Dispute Response to Ms. Balmer's claim, his counterclaim and related correspondence.
27. Mr. Westerby also provided an Amazon receipt for \$61.38, but it does not specify what he purchased. I dismiss Mr. Westerby's claim for the \$61.38 in dispute-related expenses because he has not proven what the expenses were for, nor that they were required for the dispute.

***Should the CRT order Ms. Balmer to pay Mr. Westerby \$798.01 for legal fees?***

28. CRT Rule 9.4(3)(b) states that, except in extraordinary circumstances, the CRT will not order one party to pay to another party fees charged by a lawyer or other representative. Consistent with this Rule, for the reasons given below, I dismiss Mr. Westerby's claim for legal fees.
29. CRT Rule 9.5(4) says to determine whether, and to what degree, to order reimbursement of fees charged by a lawyer or other representative, the CRT may consider the complexity of the dispute, the degree of involvement by the representative, whether a party or representative's conduct has caused unnecessary delay or expense, and any other factors the tribunal considers appropriate.
30. In terms of dispute complexity, the issues between the parties were hot tub noise nuisance and the alleged unsightly appearance of a dividing wall, in a strata. These are common legal issues within the CRT's jurisdiction. I find the dispute was not unduly complex.
31. Neither party had legal representation in the dispute itself, though both parties received legal advice regarding the process.
32. Turning to the question of whether a party or representative caused unnecessary delay or expense, I have considered *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330. In *Parfitt*, a CRT Vice Chair found that the CRT's authority to order reimbursement of legal fees is different from but analogous to an award of

special costs. Though other CRT decisions are not binding on me, I find the Vice Chair's decision persuasive.

33. I find that Mr. Westerby's claim for legal fees is different from but analogous to a request for special costs under the BC Supreme Court Civil Rules. Under this analysis, special costs may be awarded where a party engages in reprehensible conduct during litigation, persists in unfounded allegations of fraud or makes resolution of an issue far more difficult than it should have been.
34. Mr. Westerby's submission is that, because Ms. Balmer had "no reason to go to the CRT", she should be responsible for his legal fees in responding to her claim and bringing his counterclaim.
35. In response, Ms. Balmer provided an October 26, 2020 letter in which strata council writes that Ms. Balmer had gone to "great lengths to alleviate" the hot tub problem, and that after many changes to the hot tub setup, decibel readings decreased to the 30-decibel range.
36. Ms. Balmer also provided receipts for her own legal fees, which she did not seek to recover from Mr. Westerby after withdrawing her claims. As well, Ms. Balmer provided receipts for items she purchased to try to abate the hot tub noise. These items include material to construct a "wall" on the patio, noise dampening curtains and dolly rollers to move the hot tub. I find that Ms. Balmer took many steps to try to address the noise issue, and reasonably started her CRT dispute when those steps did not prompt a resolution.
37. Mr. Westerby submits that he had to go to a lawyer to find out how to proceed when Ms. Balmer started her CRT dispute. However, I find it was Mr. Westerby's decision to counterclaim, and that he chose to obtain legal advice both in responding to Ms. Balmer's initial dispute and pursuing his counterclaim. Mr. Westerby could have opted not to hire a lawyer, consistent with CRT Rule 20 which provides that generally parties are to represent themselves.

38. While Mr. Westerby submits that the hot tub disagreement should have been resolved sooner, I find he did not prove any reprehensible or blameworthy conduct on Ms. Balmer's part to establish extraordinary circumstances. On the contrary, Ms. Balmer provided evidence of ongoing efforts to try to resolve the hot tub concerns. I find that there were no extraordinary circumstances in the underlying dispute.
39. Consistent with CRT Rule 9.4(3), I dismiss Mr. Westerby's claim for legal fees, as I find the underlying strata disputes about hot tub noise and appearance were not unusual nor was Ms. Balmer's conduct reprehensible.

## **CRT FEES AND EXPENSES**

40. 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. Mr. Westerby was unsuccessful in this dispute. I dismiss his claim for \$275 in CRT fees.
41. Above, I dismissed Mr. Westerby's claim for \$61.38 in dispute-related expenses.

## **ORDER**

42. I dismiss Mr. Westerby's claims and this dispute.

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Julie K. Gibson, Tribunal Member