



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VIS 6706 v. Browning*, 2021 BCCRT 145

B E T W E E N :

The Owners, Strata Plan VIS 6706

APPLICANT

A N D :

STEPHEN ELLSWORTH BROWNING and LINDA BROWNING

RESPONDENTS

A N D :

The Owners, Strata Plan VIS 6706

RESPONDENT BY COUNTERCLAIM

AMENDED¹ REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about alleged smoking bylaw violations.
2. The applicant, and respondent by counterclaim, The Owners, Strata Plan VIS 6706 (strata) is a strata corporation existing under the *Strata Property Act* (SPA), and represented by a strata council member.
3. The respondents, Stephen Browning and Linda Browning, own strata lot 11 (SL11) in the strata. Stephen Browning represents the respondents in the strata's claim and himself as the sole applicant in the counterclaim.
4. The strata says in 2019, it properly passed a bylaw that prohibits smoking anywhere in the strata, including in all strata lots and on common property (bylaw 37). The strata says it has issued several letters to the respondents in 2020, about their breach of the smoking bylaw, but that the respondents continue to breach the bylaw. The strata asks for an order that the respondents comply with the strata's smoking bylaw and stop smoking in their strata lot or anywhere on common property.
5. The respondents do not deny they smoke and say the failure of the strata's make up air units or heating, ventilation, air conditioning (HVAC) system has caused the smoke from their strata lot to permeate through the building. In his counterclaim, Mr. Browning says the bylaw 37 is not sensible, only punishes the respondents, and that the strata owners were misled to adopt the bylaw. Mr. Browning seeks orders that the strata refund him the fines that he paid, and that the strata rescind the smoking bylaw or alternatively, a declaration that he is exempt from the smoking bylaw.
6. The strata says the smoking bylaw was properly passed, applies to all strata owners, it has a duty to enforce the bylaw, and it followed the requirements of the SPA when it did so. The strata requests Mr. Browning's counterclaim be dismissed.
7. For the reasons that follow, I find in favour of the strata.

JURISDICTION AND PROCEDURE

8. 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.
9. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, 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 10 of the CRTA, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction. A dispute that involves some issues that are outside the CRT's jurisdiction may be amended to remove those issues.
12. 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.

Harassment and Bullying

13. Mr. Browning's counterclaim contains allegations of bullying and harassment. The allegations appear to form part of his submissions, but to the extent he is making claims of bullying and harassment, I find such claims are outside the CRT's strata property claim jurisdiction. The reasons for this are explained in *Rishiraj v. The Owners, Strata Plan LMS 1647*, 2020 BCCRT 593, at paragraphs 22 to 29. While

Rishiraj is not a binding precedent, I find the reasoning I set out about bullying and harassment applicable here and I adopt it.

14. As such, to the extent Mr. Browning makes claims of bullying and harassment against the strata, I refuse to resolve them under section 10(1) of the CRTA.

ISSUES

15. The issues in this dispute are:

- a. Is bylaw 37 valid and enforceable?
- b. Have the respondents breached bylaw 37?
- c. Did the strata follow the procedural requirements of section 135 of the SPA when it imposed bylaw fines?
- d. Is bylaw 37 significantly unfair to Mr. Browning, or has the strata treated him in a significantly unfair manner when enforcing bylaw 37?
- e. What is an appropriate remedy?

BACKGROUND, EVIDENCE AND ANALYSIS

16. In a civil proceeding such as this, the applicant strata must prove its claims, and Mr. Browning must prove his counterclaims, on a balance of probabilities.

17. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision. In particular, I note that I do not find the parties' submissions and evidence about air quality and operation of make up air units or HVAC equipment relevant to this dispute. I find the operation of this equipment is not related to the passing of bylaw 37 or the strata's enforcement of it. Therefore, I will not discuss it in these reasons.

18. I also note the respondents did not provide any evidence, despite having an opportunity to do so.

19. The strata is a residential strata corporation created in November 2008 under the SPA. It consists of 56 strata lots in a single building.
20. Although there is evidence the strata received complaints about the respondents' smoking causing a nuisance to other strata owners prior to bylaw 37 coming into force, there is no evidence any fines were imposed until after March 1, 2019¹, when the smoking bylaw was in effect, as I discuss in more detail below. Therefore, I find the relevant period relating to this dispute is effectively March 1, 2019¹ through October 2, 2020, when the Dispute Notice for Mr. Browning's counterclaim was issued. This is the period I have considered in this decision.

Is bylaw 37 valid and enforceable?

21. In order for bylaw 37 to be valid and enforceable it must have been passed by a $\frac{3}{4}$ vote of the strata's owners, filed at the Land Title Office (LTO), and in compliance with sections 119(2) and 121(1) of the SPA.
22. The strata provided an excerpt from the February 21, 2019 annual general meeting (AGM) minutes that shows the proposed resolution to add bylaw 37 was passed by a vote of 25 in favour, 2 opposed and 2 abstentions. The strata says the vote exceeded the 75% threshold required under the SPA to amend its bylaws. While the evidence does not show the total number of votes in attendance at the AGM, I accept the resolution was properly passed largely because the respondents did not argue the opposite. Neither did the respondents argue that notice of the AGM was not properly given. Further, the fact Mr. Browning filed a counterclaim to have the bylaw rescinded and his paid fines returned supports he agrees the bylaw was properly passed. Therefore, on a balance of probabilities, I find bylaw 37 was properly passed by a $\frac{3}{4}$ vote.
23. LTO documents prove that bylaw 37, as shown in the February 21, 2019 AGM minutes excerpt, was filed at the LTO on March 1, 2019. Under section 128(2) of the SPA, a bylaw has no effect until it is filed with the LTO, so I find bylaw 37 was not enforceable until March 1, 2019¹. Subsequent bylaw amendments show bylaw 37

has not been repealed or replaced, so I find it was in force during the period of this dispute.

24. Bylaw 37 reads, in its entirety:

37 Smoking

1. An owner, tenant, occupant, or visitor must not smoke or vape any substances including but not limited to tobacco, marijuana or other chemicals or e-cigarettes;
 - a. On all interior common property and limited common property;
 - b. Within a strata lot;
 - c. In parking stalls, storage lockers and balconies designated as limited common property for the exclusive use of a strata lot: and
 - d. on all exterior property.

25. Under section 119(2) of the SPA, bylaws may provide for, among other things, “the control, management, maintenance, use and enjoyment of the strata lots, [and] common property... of the strata corporation”. Section 121(1) sets out when a bylaw is not enforceable, such as if it contravenes any legislation, or prohibits or restricts certain rights of an owner that do not apply here. I find bylaw 37 meets the requirements of section 119(2) and is enforceable under section 121(1).

26. For these reasons, I find bylaw 37 is valid and enforceable.

Have the respondents breached bylaw 37?

27. The respondents admit that they smoke inside their strata lot and based on the evidence before me it appears they did not, until this dispute arose, challenge the bylaw violation notices or request a hearing. Although there are no letters of complaint from other owners before me, the letters written by the strata to the respondents described below, clearly contain details of each complaint received by the strata.

28. Further, I find the respondents have not argued they did not breach bylaw 37. Rather, the focus of their argument is their belief bylaw 37 is “bogus” and not “sensible”, and that they have been unfairly targeted. I find this is sufficient evidence for me to conclude the respondents have breached bylaw 37.

Did the strata follow the procedural requirements of section 135 of the SPA when it imposed bylaw fines?

29. Under section 26 of the SPA the strata council, acting on the strata’s behalf, must enforce the strata’s bylaws. Enforcement options available to the strata are set out under section 129 of the SPA and include one or more of the following actions:

- a. Impose a fine,
- b. Remedy a contravention, or
- c. Deny access to a recreation facility, but only if the contravention relates to the recreation facility.

30. The only available option to the strata in this case was to impose fines.

31. Under section 135(1) of the SPA, before imposing bylaw fines, the strata must have received a complaint, given the owner written particulars of the complaint and a reasonable opportunity to answer the complaint, including a hearing if one is requested. Under section 135(2), the strata must also give the owner written notice of its decision “as soon as feasible”.

32. The BC Court of Appeal has found that strict compliance with section 135 of the SPA is required before a strata corporation can impose fines. The court also determined that bylaw fines may be found to be invalid if the procedural requirements set out in section 135 are not followed: *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449.

33. Between February 19 and July 31, 2020, the strata wrote to the respondents or to Mr. Browning 7 times providing details of complaints received about smoking in or about SL11 in breach of bylaw 37, requesting a response with 20 days of the date of the

letter, and advising that the strata could take further action, including imposing fines if there was no response. The letters mostly attached a copy of bylaw 37 and section 34.1 of the SPA, that addresses hearing requests.

34. I find the strata's 7¹ letters provided the respondents with proper notice of the smoking complaints as required under section 135(1) of the SPA.
35. There is no evidence the respondents provided a response to the letters or requested a hearing.
36. On April 1, June 1, and August 1, 2020, the strata wrote to the respondents providing details of fines imposed and the dates of the strata council meetings that approved the fines. Some letters referenced more than one complaint letter, and, in total, the strata imposed \$1,050 against the respondents for contravening bylaw 37.
37. I find the fines imposed against the respondents are valid as they meet the requirements of section 135(2) of the SPA.
38. Therefore,¹ I dismiss Mr. Browning's counterclaim that the strata refund his bylaw fines.

Is bylaw 37 significantly unfair to Mr. Browning, or has the strata treated him in a significantly unfair manner when enforcing bylaw 37?

39. Mr. Browning submits, "the anti smoking bylaw only punishes the Brownings". It is unclear from Mr. Browning's submissions if he feels the passage of bylaw 37 is unfair, or if he believes the strata has treated him unfairly when enforcing bylaw 37. I will address both arguments.

The law on significant unfairness

40. The CRT has jurisdiction to determine claims of significant unfairness under section 123(2) of the CRTA (formerly section 48.1(2): *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164.
41. The courts and the CRT have considered the meaning of "significantly unfair" and have largely followed the interpretation adopted by the BC Court of Appeal (BCCA)

in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128. In *Reid*, the court said that actions are “significantly unfair” when they are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable.

42. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the BCCA established an expectation test, restated in *Watson* at paragraph 28 as follows:

- 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?

43. In *Kunzler v The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, the BC Supreme Court said that consideration of an owner’s expectations is not always necessary when determining significant unfairness. The court found the “reasonable expectation” test from *Dollan* may make sense when a strata council is exercising its discretionary authority, but found in a situation where it could result in an order that a bylaw does not apply to a particular owner, it would be unreasonable to apply the “reasonable expectation test”. The court said this would create a “grandfathering regime”, which is not contemplated in the SPA except for restrictions on pets, age and the rental of strata lots. In circumstances involving an owner being exempt from a bylaw, the court found the appropriate test is whether the disputed action falls within the definition of significant unfairness as described in *Reid*.

44. Following *Kunzler*, I find the proper test of significant unfairness about both the passage of the no smoking bylaw, and the strata’s attempts to enforce it, is the test from *Reid*.

Is the passing of bylaw 37 significantly unfair?

45. Based on my finding above that bylaw 37 was properly passed, I cannot conclude it is significantly unfair or otherwise unjust to Mr. Browning. The strata is entitled to amend its bylaws and the requisite number of owners approved the addition of bylaw 37.

46. Further, Mr. Browning has not provided any evidence to support his assertion that the owners were somehow misled when they approved bylaw 37. Following *Kunzler*, I find the passing bylaw 37 was not done in bad faith, or in an unjust fashion. Therefore, I find the passing bylaw 37 was not significantly unfair to the respondents or Mr. Browning.

Has the strata treated Mr. Browning in a significantly unfair manner?

47. I have found the strata properly followed the procedural requirement of section 135 of the SPA by notifying Mr. Browning complaints were received and giving him the opportunity to respond or request a hearing. There is no evidence to suggest that the strata has not enforced its no smoking bylaw against other owners, so I do not agree with Mr. Browning that bylaw 37 “only punishes the Brownings”. That Mr. Browning or Mrs. Browning chose not to challenge the bylaw complaints does not mean the action taken by the strata was unfair.

48. Therefore, I find the strata has acted in good faith when enforcing its no smoking bylaw. I find the strata has not treated Mr. Browning in an unfair manner.

49. I dismiss Mr. Browning’s claims that he was treated in a significantly unfair manner.

What is an appropriate remedy?

50. As earlier noted, the strata seeks orders that the respondents comply with the strata’s smoking bylaw and stop smoking in their strata lot or anywhere on common property. I make this order based on my findings above.

51. Notably, the strata did not request an order that the respondents pay the imposed fines. As such, I make no order about payment of fines.

52. I dismiss Mr. Browning’s counterclaims and decline to order the strata rescind the smoking bylaw or exempt him from the smoking bylaw, or reimburse Mr. Browning for fines paid.

CRT FEES AND EXPENSES

53. 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 to deviate from this general practice. I find overall, the strata is the successful party and paid \$225 in CRT fees. I order the respondents to reimburse the strata this amount. Mr. Browning paid \$125 in CRT fees for his counterclaim but was unsuccessful. Therefore, I decline to order the strata to reimburse him for CRT fees paid.
54. Neither party claimed dispute-related expenses, so I make no order for expenses.
55. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the respondents.

ORDERS

56. To the extent Mr. Browning makes claims of bullying and harassment against the strata, I refuse to resolve them under section 10(1) of the CRTA.
57. I order the respondents to immediately comply with the strata's smoking bylaw 37, and stop smoking in their strata lot or anywhere on strata common property.
58. Within 21 days of the date of this decision, I order the respondents to reimburse the strata \$225 for CRT fees.
59. Mr. Browning's counterclaims are dismissed.
60. The strata is entitled to post-judgment interest for its CRT fees under the *Court Order Interest Act*, as applicable.

61. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court 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.

J. Garth Cambrey, Vice Chair

¹ Amendment Note: Amendments made to correct the date bylaw 37 was filed at the Land Title Office under authority of section 64 of the *Civil Resolution Tribunal Act*.