



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Pickering v. The Owners, Strata Plan VIS4673*, 2021 BCCRT 389

B E T W E E N :

KAROL PICKERING and DAVID ALAN PICKERING

APPLICANTS

A N D :

The Owners, Strata Plan VIS4673

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Richard McAndrew

INTRODUCTION

1. This dispute is about a fence and landscaping in a strata corporation.

2. The applicants, Karol Pickering and David Alan Pickering, co-own strata lot 288 (SL288) in the respondent bare land strata corporation, The Owners, Strata Plan VIS4673 (strata).
3. The Pickerings want to prevent the strata from removing fencing and landscaping installed by a previous owner. The Pickerings say it is too late to remove these items under the *Limitation Act* (LA). The Pickerings also say that removing the fencing and landscaping would be significantly unfair. The Pickerings ask for an order preventing the strata from removing these items and an order requiring the strata to retroactively approve the alterations. The Pickerings request reimbursement of \$1,400 in dispute-related legal expenses.
4. The strata says it wants to remove the fence and the landscaping because they are built on common property (CP) without strata approval. The strata says that the LA does not prevent the removal of the fence and landscaping because the strata has an ongoing responsibility to maintain the CP. The strata requests reimbursement of \$8,188.63 in dispute-related legal expenses.
5. The Pickerings 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 by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions

before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the CRT's mandate of proportional and speedy dispute resolution, I decided I can fairly hear this dispute through written submissions.

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 objects to the Pickerings' reply submission because it says this submission improperly alleges new facts and arguments. I find that the strata was not prejudiced by the Pickerings' reply submission since the strata was given an opportunity to respond. So, I will allow and consider the Pickerings' reply submissions. However, I find that the Pickerings' allegations and arguments about the rock pile are beyond the scope of their application for dispute resolution and this claim is not properly before me. So, I decline to make any findings about whether the strata can remove the rock pile.

ISSUES

11. The issues in this dispute are:
 - a. Are the fence and landscaping located on CP?
 - b. Does the LA bar the strata from removing the fence and landscaping?
 - c. Must the strata retroactively approve the fence and landscaping as an alteration?

- d. Can the Pickerings prevent the strata from removing the fence and landscaping?
- e. Is the strata's plan to remove the fence and landscaping significantly unfair?
- f. Must the strata reimburse the Pickerings \$1,400 for dispute-related expenses?
- g. Must the Pickerings reimburse the strata \$8,188.63 for dispute-related expenses?

EVIDENCE AND ANALYSIS

- 12. I have read all the evidence and submissions provided but refer only to that which I find relevant to provide context for my decision. In a civil proceeding like this one, the Pickerings, as applicants, must prove their claims on a balance of probabilities.
- 13. The strata was created in 1998, and is a bare land strata.
- 14. The strata repealed its existing bylaws and filed a new set of amended bylaws in the Land Title Office in January 2018. I find that subsequently filed bylaw amendments are not relevant to this dispute.
- 15. The following bylaws are applicable to this dispute:
 - a. Bylaw 3(1)(c) says an owner must not use the CP in a way that unreasonably interferes with others' rights to use and enjoy the CP.
 - b. Bylaw 6(1)(a) says that the strata must approve changes to CP. This bylaw requirement has existed since at least July 28, 2009 when the previous set of amended bylaws were filed at the Land Title Office.
 - c. Bylaw 9 says the strata is responsible for maintaining CP.
 - d. Bylaw 10(2) says the strata has a duty to keep the CP and roads in a state of good and serviceable repair.

16. The Pickerings purchased SL288 on March 23, 2017. The strata plan shows that SL288 borders a CP roadway. The strata says that a fence and landscaping are located on the CP adjacent to SL288.
17. The strata says the road has a width of 14 feet between the fence and the power pole. The Pickerings say this space is 18 feet wide. The strata says the fence is located over the existing road surface. Since the Pickerings do not dispute this, I accept that submission as accurate. The strata also says the fence narrows the road to a single lane. Based on a photograph showing a vehicle on the road between the fence and the power pole, I find that the lane is not wide enough for 2 vehicles.
18. The Pickerings say the fence and landscaping were built by the previous owner before they purchased the strata lot. DP, the previous owner of the property, sent the strata a June 5, 2020 email saying that he built the fence in 2015. Since there is no evidence before me disputing DP's email, I accept this as accurate. Further, since the strata does not dispute the Pickerings' submission that the landscaping was built by the previous owners, I find that the landscaping was built by March 2017.
19. The strata plan shows that strata lot 26 (SL26) is located on the other side of the CP road. The Pickerings have provided 2 surveys showing that the portion of land identified as SL26 on the strata plan is part of SL288. Although both parties agree that the Pickerings own the lots on both sides of the CP road, neither party explains why the strata plan differs from the surveys. However, I find that nothing turns on a determination of whether SL288 and SL26 are separate strata lots as shown on the strata plan or both areas are part of SL288 as shown on the surveys. So, I do not find it necessary to make a finding about this discrepancy.

Are the fence and landscaping located on CP?

20. The SPA defines CP as that part of the land and buildings shown on a strata plan that is not part of a strata lot. The strata plan identifies the road area as CP. So, I find this area is CP.

21. The Pickerings say that they thought that the pre-existing fence and landscaping were located on SL288 when they bought the strata lot. The strata says the landscaping and fence are located on CP.
22. The Pickerings provided an April 17, 2020 survey. Although the survey is not signed, I find the surveyor had sufficient education, training and expertise to prepare the survey since it was prepared by a surveying business. So, I find that the survey plan meets the criteria for an expert report under CRT rule 8.3. The survey shows that the fence is located 3.5 m to 4.4 metres onto the CP. The survey also shows a bank of rocks and a power pole located on the CP on the opposite side of the road. Based on the April 17, 2020 survey, I find that the fence is located on the CP. Further, photographs show that the landscaping is very close to the fence. Based on the proximity to the fence shown on the photographs, I find that the landscaping is also on the CP.
23. I now consider whether the strata can remove the CP fence and landscaping.

Limitation Act

24. The Pickerings say that it is too late under the LA for the strata to remove the fence and landscaping. The LA applies to CRT claims and sets out limitation periods, which are specific time limits for pursuing claims. If the time limit expires, the right to bring the claim disappears.
25. The Pickerings say that the LA's limitation periods apply to CP alterations. The Pickerings refer to the case of *Harvey v The Owner, Strata Plan VR 390*, 2019 BCCRT 944. In *Harvey*, a vice chair found that a previous owner made changes to the CP that included the replacement or installation of a gate 10 years earlier. The vice chair found that the limitation period under the LA has expired. The Pickerings also rely on *The Owners, Strata Plan KAS 510 v. Nicholson*, 2017 BCCRT 48. In *Nicholson*, a vice chair found that the strata could not force an owner to remove unauthorized deck alterations after the expiration of the limitation period. Although non-binding, I find the decisions in *Harvey* and *Nicholson* persuasive and I find that limitation periods in the LA apply to CP alterations.

26. However, this does not end the analysis because the strata is not pursuing a dispute against the Pickerings, or seeking a counterclaim in this dispute to remove the fence and landscaping. LA section 6 says that a court proceeding cannot be started more than 2 years after a claim is discovered. So, LA section 6 only provides a deadline for parties to start court proceedings, or a CRT dispute. Since the strata is not attempting to start a dispute, I find that the LA's deadline in section 6 is not applicable.
27. Further, the strata is required to repair and maintain the CP under SPA section 72 and bylaws 9 and 10. The strata argues that its duty to maintain the CP is ongoing based on the CRT's decisions in *Kel Jess Holdings Ltd. v. The Owners, Strata Plan LMS 163*, 2020 BCCRT 227 and *Befus v. The Owners, Strata Plan VR 1741*, 2020 BCCRT 347. In *Kel Jess* and *Befus*, tribunal members held that strata corporations have an ongoing duty to maintain and repair CP which does not expire under the LA. Although the decisions in *Kel Jess* and *Befus* are non-binding, I agree with the reasoning and find that the strata has an ongoing duty to repair the CP. So, I find that the strata's responsibility to repair and maintain the road has not expired under the LA.
28. For the above reasons, I find that the LA does not prevent the strata from removing the fence and landscaping.

Must the strata approve the alterations?

29. The Pickerings request an order requiring the strata to retroactively approve the construction of the fence and landscaping on the CP. However, for the following reasons, I find that the strata cannot approve these alterations under the SPA.
30. Section 71 of the SPA says the strata cannot make a significant change to the use or appearance of CP without approval by a 3/4 vote of the owners at a general meeting. In *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333, the owner changed the CP without prior approval. The BC Supreme Court decided that the approval requirements of section 71 still applied even though the owner had already made the changes. The court noted that the owner should not be in a better position by making significant changes without the proper approval. Similarly, in this matter I find that,

although the fence and landscaping were built by a previous owner, this circumstance should not circumvent the other strata owners' voting rights protected in section 71.

31. So, I now consider whether CP alteration is a significant change within the meaning of section 71 of the SPA. The criteria for this determination are set out in *Foley*:

- a. A change would be more significant based on its visibility or non-visibility to residents and its visibility or non-visibility towards the general public.
- b. Whether the change to common property affects the use or enjoyment of the strata lot or number of strata lots or an existing benefit of all strata lots.
- c. Is there a direct interference or disruption as a result of the change to use?
- d. Does the change impact on the marketability or value of the strata lot?
- e. The number of strata lots in the building may be significant along with the general use, such as whether it is commercial, residential or mixed-use.
- f. Considerations should be given as to how the strata corporation has governed itself in the past and what it has followed.

32. Based on these factors, I find that these CP alterations are significant. The fence is visible to residents from the CP road. Further, as discussed above, I find that the fence significantly encroaches onto the CP, partially blocking the road. The Pickerings say that there is little traffic on the road since it ends shortly past their strata lot. Further, the Pickerings provided a statement from neighbour JG who says they live on the road and the fence does not affect their ability to drive there. However, even if the road has limited use, I find that all owners, not just those owners with adjacent strata lots, have the right to access and use the CP road. Further, even though JG says they have no issues with the width of the road, I find that the narrowing of the road with a fence could make it more difficult for owners to drive there.

33. Further, the fence prevents other owners from entering and using a portion of the CP, including the landscaped area behind the fence. I note that the Pickerings also have a sign on the fence prohibiting trespassing on the CP located behind the fence. So, I

find that the Pickerings have attempted to exercise exclusive use of the CP area behind the fence. In *Foley*, the court said exclusive use of CP alone can be sufficient to consider a change significant. I find the reasoning in *Foley* persuasive and find that the Pickerings' exclusive use of the CP is a strong indication that this is significant change from an unenclosed area that could be accessed by all owners.

34. Based on the above factors, I find that the placement of the fence and the landscaping is a significant change in the use and appearance of the CP. Since there is no evidence before me that the owners have approved the alterations in accordance with SPA section 71, I find that strata is unable to retroactively approve the construction of the fence and landscaping without a vote and I dismiss this claim.

Can the Pickerings prevent the strata from removing the fence and landscaping?

35. As discussed above, section 72 of the SPA and bylaws 9 and 10 require the strata to repair and maintain the CP. The strata argues that the fence and landscaping must be removed because they interfere with its ability to provide necessary road maintenance.
36. The strata says the fence the needs to be removed for safety reasons because it obstructs the road and makes driving dangerous. As discussed above, the fence encroaches 4.4 metres onto the CP near the power pole which the strata says makes the road dangerously narrow. The strata says, and the Pickerings do not dispute, that a car crashed into the fence in June 2020. The strata also says the narrow distance between the fence and the power pole creates a liability risk for strata since it is responsible for the maintenance of the road. The Pickerings say the road is safe as is.
37. The strata has a duty to make repairs that are reasonable in the circumstances (*Wright v. The Owners, Strata Plan #205*, 996 CanLII 2460 (S.C.), aff'd (1998), 43 B.C.L.R. (3d) 1, 1998 CanLII 5823 (C.A.)). Also, an owner cannot direct the strata how to conduct its repairs (*Swan v. The Owners, Strata Plan LMS 410*, 2018 BCCRT 241). In *Weir*, the Court said the strata council is entitled to deference, as approved

by the owners, in fulfilling its maintenance and repair obligations because the strata council must act in the best interest of all owners, which requires it to balance competing interests and work within a budget that the owners can afford.

38. Based on the decision in *Weir*, I find that the strata should be given broad discretion to perform repair and maintenance, especially in relation to repairs that are directed towards safety concerns such as this. I find that the strata's plan to remove barriers on CP from the road's edge which it finds dangerous is within the strata's broad repair discretion.
39. For the above reasons, I find that the Pickerings have failed to establish that the strata should be prevented from removing the fencing and landscaping from the CP for safety reasons as long as the strata is not treating the Pickerings significantly unfairly, which is discussed below.

Significant unfairness

40. I have also considered whether the strata's plan to remove the fence and landscaping is significantly unfair to the Pickerings.
41. Section 123(2) of the CRTA gives the CRT authority to issue orders preventing a strata corporation from performing a significantly unfair action. In *Time Share Section of The Owners, Strata Plan N 50 v. Residential Section of The Owners, Strata Plan N 50*, 2021 BCSC 486, the court says that the CRT's jurisdiction to consider significant unfairness is limited to the categories set out in CRTA sections 121(1)(e)-(g). This includes circumstances where a strata corporation has taken action, threatened action, or made decision in relation to an owner.
42. In *Time Share*, the strata corporation created multiple sections and an owner argued that a section was acting significantly unfairly by changing the use of LCP. The section altered a general recreation area that all owners could access to a recreational vehicle storage area. The court said that this claim did not fit within any of the categories in CRTA sections 121(1)(e)-(g) because the alteration of LCP did not relate to an owner. So, the court held that the CRT did not have jurisdiction to make

a determination whether the section acted significantly unfairly by changing the LCP's use.

43. Although the decision in *Time Share* is binding, I find that this dispute is significantly different. In *Time Share*, the dispute related to a change in LCP that did not directly affect a specific owner. In this dispute, I find that strata's plan to remove the fence and landscaping directly affects the Pickerings, who are currently exclusively using these items. On April 27, 2020, the strata emailed the Pickerings demanding that they remove the fence and landscaping within 30 days. On June 26, 2020, the strata's lawyer sent the Pickerings a letter dated saying that it will remove the fence and landscaping from the CP and move any salvageable materials to their strata lot. Based on these correspondences, I find that strata's plan to remove the fence and landscaping is a threatened action against specific owners, the Pickerings. So, I find that the CRT does have jurisdiction to determine whether the strata is treating the Pickerings significantly unfairly under CRTA sections 121(1)(e) and 123(2).
44. The courts have described a "significantly unfair" action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust and/or inequitable (*Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, aff'd 2003 BCCA 128).
45. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the majority of the BC Court of Appeal applied a "reasonable expectations" test when considering a discretionary action of council. The test, in short, is to ask whether the objectively reasonable expectation of the applicant was violated by an action that was significantly unfair. While the "reasonable expectations" test is not a universal test, it has been applied to discretionary decisions of council when deemed appropriate (see discussion in *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576.) I find that the strata's plan to remove the fence and landscaping is a discretionary action by the strata council. So, I find that it is appropriate to use the "reasonable expectations" test in this dispute.
46. The Pickerings say they had an expectation that the strata would not remove the fence and landscaping built by the previous owner. I find that this was not an

objectively reasonable expectation, given bylaw 3 which says that an owner cannot use CP in a way that unreasonably interferes with others' rights to use and enjoy CP. I find that narrowing the CP road with the fence unreasonably interferes with other owners' rights to safely use the CP road. Further, by fencing a portion of CP, I find that the Pickerings prevented owners from using CP. I find the Pickerings' expectation that this would continue indefinitely to be unreasonable.

47. A similar issue was considered in *Kunzler* where the applicants purchased their strata lot relying on then existing bylaws that permitted the operation of their planned business. The applicants argued that they had a reasonable expectation that the bylaws would not later change and prohibit their business. The court rejected this argument and held that it was not reasonable for the applicants to think that the expectations they had when they purchased their strata would bind the other owners and exempt them from any subsequent bylaw amendment. Similarly, I find that it is not objectively reasonable for the Pickerings to expect that the strata will refrain from removing barriers on CP that the strata later determines to be unsafe.
48. The Pickerings say that it would be significantly unfair to remove the fence and landscaping because they would incur significant costs rebuilding the fence, removing the established landscaping, and removing a paved pathway. While I accept that this would involve some expense, the Pickerings have not provided estimates of these costs. Further, in its June 26, 2020 letter, the strata says it will move salvageable materials to SL288 which may reduce the Pickerings rebuilding costs. I find that the Pickerings have not proved that their rebuilding expenses are burdensome.
49. The Pickerings also argue that the strata's plan to remove the fence and landscaping is made in bad faith because this was never raised when the previous owner resided in the strata. The Pickerings argue that Ms. P, a former strata council member resided at SL288 before the Pickerings purchased the strata lot and the strata was biased in her favour. They say the strata was aware of, but overlooked, the fence location before the Pickerings purchased the strata lot. I note that the BC Supreme Court held in *Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 that strata owners

have a reasonable expectation that the strata will consistently enforce bylaws which I find includes an expectation that the strata will act without bias.

50. However, the strata says that it did not give Ms. P preferential treatment. Rather, the strata says that it did not address the fence location earlier because it was not aware that the fence was obstructing the road until it investigated a landslide that occurred on January 6, 2020 which washed out the road. I find that the Pickerings have not proved that the strata was aware of the fence before January 2020. So, I find that the Pickerings have failed to prove that the strata's delay in addressing the fence was the result of bias in favour of Ms. P rather than the strata's lack of awareness of the fence.
51. The Pickerings also say that they were not aware that the alterations were made without strata approval. Further, they say that the strata did not notify them that the fence and landscaping encroached on the CP when they purchased SL288. The Pickerings say that the strata should have disclosed its plans to remove the fence and landscaping on the Information Certificate it provided the Pickerings. SPA section 59 says the strata must provide an Information Certificate to a purchaser disclosing certain information about the strata and the owner's strata lot account. This information includes disclosure of any notices or work orders received by the strata corporation that remain outstanding for the strata lot, the CP or the common assets. However, I find that section 59 does not require the strata to disclose the strata's opinions about potential encroachment on the CP or future repair plans that have not resulted in a dispute or work order. I find that the Pickerings have not proved that the strata had an obligation to notify them of the status of alterations to the CP that were not the subject of an existing dispute or work order. So, I find this expectation to be unreasonable.
52. The Pickerings also argue that the strata treated them unfairly by attempting to remove their fencing and landscaping while permitting other strata lot owners to erect similar fencing on the CP. In essence, the Pickerings argue that the strata is selectively enforcing its maintenance actions against them and disregarding other owners' CP encroachment. As discussed above, the decision in *Sze Hang Holding Inc.* says that strata owners have a reasonable expectation that the strata will

consistently enforce bylaws. I find that this also includes a reasonable expectation that the strata will consistently exercise its discretion in removing fences and landscaping to perform CP repairs and maintenance.

53. Mr. Pickering provided a statement with 24 photographs showing various strata roads. Mr. Pickering says he measured the width of the CP roads at various locations and the widths ranged from 11 feet to 22 feet. Mr. Pickering argues that the strata is ignoring these narrow roads and targeting the road next to his strata lot. However, I note the photographs only show 2 strata lots with fences along the roads and both of those fences appear to be significantly farther from the roads' edge than the fence on SL288. As such, I am not satisfied that the other CP roads identified by the Pickeringings raise similar safety concerns as the road in front of SL288.
54. The Pickeringings also says that other strata lots have personal items such as septic systems, vehicles and fencing on CP but the strata does not take action against those strata lots. Mr. Pickeringings' statement specifically refers to strata lots 263 and 264. However, the Pickeringings did not provide any photographs showing that the owners of these strata lots stored personal items or built fences on CP and the strata denies being aware of such items. In the absence of any supporting evidence, I find the Pickeringings have not proven their allegation that strata lots 263 and 264 have items on the CP.
55. For the above reasons, I find that the Pickeringings have not proved that the strata has treated them significantly unfairly. So, I dismiss their claims.

CRT FEES AND EXPENSES

56. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. As the Pickeringings were unsuccessful, I dismiss their claim for CRT fees and their claim for reimbursement of \$1,400 in dispute-related legal fees.

57. The strata did not pay CRT fees but it claims reimbursement of \$8,188.63 in dispute-related legal expenses. According to a letter from the strata's lawyer, \$8,188.63 is the total legal fees and disbursements billed to the strata to defend the Pickerings' claims in this dispute. However, while the CRT will generally order an unsuccessful party to reimburse the a successful party for reasonable dispute-related expenses under CRTA section 49, section 189.4(b) of the SPA expressly states that an owner who brings a claim against a strata corporation is not required to contribute to the expense of defending the claim. Here, the expense amount claimed by the strata is the total amount of its legal cost to defend the applicants' claims. Barring exceptional circumstances, which are not present here, I find that ordering reimbursement would be contrary to section 189.4(b) of the SPA. Additionally, given the CRT's general rule that parties are self-represented, reimbursement of legal fees is not ordinarily ordered. Further, CRT rule 9.5(3)(b) says that the CRT will not order one party to pay another party any fees charged by a lawyer in a strata dispute, unless there are extraordinary circumstances. To determine whether it is appropriate to order reimbursement of legal fees, CRT rule 9.5(4) says that the CRT may consider the complexity of the dispute, the degree of the lawyer's involvement, whether a party or lawyer's conduct has caused unnecessary delay or expense, and any other factors the CRT considers appropriate. In considering these factors, I find that issues in this dispute relating to the strata's plan to remove fences and landscaping from CP are not complex. There is no evidence before me describing the extent of the strata's lawyer's involvement in this dispute or whether any party or their lawyers contributed to a delay. I find that the strata has not shown that an extraordinary circumstance exists under CRT rule 9.5(4) to justify awarding reimbursement of legal fees. So, I see no reason in this case to deviate from the general rule and I dismiss the strata's request for reimbursement of dispute-related expenses.

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

ORDER

59. I dismiss the Pickerings' claims and this dispute. I also dismiss the strata's claim for reimbursement of legal fees.

Richard McAndrew, Tribunal Member