



Civil Resolution Tribunal

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File: ST-2020-007392

Type: Strata

Civil Resolution Tribunal

Indexed as: *Kaczan v. The Owners, Strata Plan LMS 4208*, 2021 BCCRT 421

B E T W E E N :

PAUL KACZAN

APPLICANT

A N D :

The Owners, Strata Plan LMS 4208

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. The applicant, Paul Kaczan, owns a strata lot (SL29) in the respondent strata corporation, The Owners, Strata Plan LMS 4208 (strata).
2. Mr. Kaczan takes issue with the strata's approval of a request from the owners of a neighbouring strata lot (SL28) to plant a cedar hedge higher than the existing fence between SL28 and SL29.
3. Mr. Kaczan says that the hedge violates the strata's bylaws and the strata's approval of the hedge is a breach of section 31 of the *Strata Property Act* (SPA). Further, he says that the strata has failed to enforce its bylaws and is in breach of SPA section 26.
4. Mr. Kaczan seeks an order that the hedge be removed or, alternatively, trimmed and maintained at a height that is no higher than the existing fence between SL28 and SL29.
5. The strata says that it was reasonable and fair for it to approve the request made by the owners of SL28 and that it has not failed to enforce its bylaws.
6. Mr. Kaczan is represented by a lawyer, Lyle Perry. The strata is represented by a strata council member. The owners of SL28 are not parties to this dispute.

JURISDICTION AND PROCEDURE

7. 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.
8. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. In some respects, this

dispute amounts to a “he said, it said” scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Further, bearing in mind the CRT’s mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.

9. 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.
10. 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.

ISSUES

11. The issues in this dispute are:
 - a. Does Mr. Kaczan have standing to make a claim against the strata for a breach of SPA section 31?
 - b. Did the strata misinterpret and misapply strata bylaw 5(6) when it approved SL28’s request for the cedar hedge?
 - c. Did the strata breach SPA section 26 by not enforcing strata bylaws 3(1)(a) and (c)?
 - d. Does the CRT have authority to grant the relief sought by Mr. Kaczan?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, the applicant must prove their claims on a balance of probabilities. I have read all the evidence and submissions provided but refer only to that which I find relevant to provide context for my decision.
13. The strata was created in June 2000 and is a bare land strata corporation.
14. The strata repealed its existing bylaws and filed a new set of amended bylaws in the Land Title Office in May 2005. I find that subsequently filed bylaw amendments are not relevant to this dispute. I discuss the relevant bylaws below.
15. On April 29, 2020, the owners of SL28 made a written request to the strata council seeking approval to plant a cedar hedge on SL28 “to have some personal privacy” between SL28 and SL29.
16. On May 18, 2020, Mr. Kaczan wrote to the strata council saying that the hedge being planted by SL28 would obstruct SL29’s views of the Golden Ears Mountain.
17. On June 9, 2020, the strata council held a meeting where SL28’s request to plant the cedar hedge and Mr. Kaczan’s May 18, 2020 complaint letter were considered. The meeting minutes state that the strata council granted SL28’s request on the condition that the height of the two sections of the hedge must be restricted to 1.78 metres and 1.35 metres.
18. On June 9, 2020, the strata council responded to Mr. Kaczan’s complaint letter and advised that it had approved SL28’s request for the hedge with the height restrictions.
19. On June 26, 2020, Lyle Perry wrote to the strata council:
 - a. noting that he had been retained by Mr. Kaczan,
 - b. attaching photographs taken from a single location at SL29 of the view of the mountain before and after the hedge was planted,

- c. stating that the strata's decision was in violation of the bylaws, significantly unfair to Mr. Kaczan, and fell short of the strata's obligations under the SPA, and
 - d. demanding that the strata council reconsider the matter and reverse the decision or hold an in-person meeting.
20. An in-person meeting took place on August 11, 2020. The strata delivered its final decision in its August 17, 2020 letter to Lyle Perry, confirming that it was standing by its decision granting approval to SL28 for the cedar hedge.

SPA Section 31

21. SPA section 31 sets out the standard of care for strata council members. It says that in exercising the powers and performing the duties of the strata corporation, each council member must act honestly and in good faith with a view to the best interests of the strata corporation, and must exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.
22. Mr. Kaczan says that the strata council failed to uphold this standard by relying on insufficient and inaccurate information when it considered SL28's request to plant the cedar hedge. Although he argues that the strata breached SPA section 31, Mr. Kaczan does not seek any specific order against the strata for this breach.
23. In any event, based on the applicable precedents from the BC Supreme Court, I find Mr. Kaczan has no standing to make a claim under SPA section 31. In *Wong v. AA Property Management Ltd.*, 2013 BCSC 1551, the BC Supreme Court considered a claim brought by an owner that the strata council members had acted improperly in the management of the strata's affairs. The court concluded that the only time a strata lot owner can sue an individual strata council member is for a breach of the conflict of inherent disclosure requirement under SPA section 32 (see *Wong*, at paragraph 36). Remedies for breaches of SPA section 32 are specifically excluded from the CRT's jurisdiction, as set out in CRTA section 122(1)(a).

24. Similar to *Wong*, in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32, the BC Supreme Court said that the duties of strata council members under SPA section 31 are owed to the strata corporation, and not to individual strata lot owners (see paragraph 267). This means that a strata lot owner cannot succeed in a claim against the strata or against individual strata council members for a section 31 breach.
25. These court decisions are binding precedents and the CRT must apply them. Following *Wong* and *Sze Hang*, I therefore dismiss Mr. Kaczan's claim that the strata violated SPA section 31.

Interpretation of Bylaw 5(6)

26. Bylaw 5 includes many subsections that address when strata approval is required for certain alterations on strata lots.
27. Bylaw 5(6) sets out the maximum height allowed for a fence on a strata lot at 1.5 metres plus a lattice top of an additional 0.3 metres. It further provides that any alterations to an existing fence must be approved in writing by the strata council who will consider how the view lines of others will be impacted. The bylaw states that hedges must not be higher than the top of the fence unless prior written consent of the strata council is obtained. When considering a request for a higher hedge, the bylaw requires council to consider how the view lines of neighbours are impacted.
28. Mr. Kaczan says the strata's interpretation of this bylaw is incorrect and that the hedge does not comply with bylaw 5(6).
29. He argues that there is a distinction between the word "fence" and "lattice" in the bylaw. Because bylaw 5(6) says that hedges should not be higher than the top of the fence, Mr. Kaczan argues that the hedge would therefore need to be 1.5 metres or shorter in order to comply with the bylaw.
30. Mr. Kaczan further says that bylaw 5(6) requires the strata to consider the impact on the view line of others as the primary factor when deciding whether to approve a request for a hedge.

31. The strata says the intent of the bylaw is to allow for a fence with a maximum height of 1.5 metres with an additional 0.3 metre lattice on top, subject to approval from the strata council. The strata says that the hedge is in compliance with bylaw 5(6) because:
- a. The hedge is not higher than the maximum allowable height,
 - b. The strata council considered how SL29's view would be impacted, and
 - c. The owners of SL28 requested and received approval prior to planting the hedge.
32. For the reasons set out below, I find that the strata did not misinterpret or misapply bylaw 5(6) and the hedge complies with this bylaw.
33. When interpreting the strata's bylaws, I must apply the plain meaning rule of statutory interpretation (see *Sze Hang* at paragraph 179). The rule requires me to reasonably interpret the plain and ordinary meaning of the words in an individual bylaw within the context of the entire bylaws.
34. I find that bylaw 5(6) does not restrict hedges to a maximum height of 1.5 metres. The bylaw is unambiguous and provides that a fence with a maximum height of 1.5 metres and a lattice top of an additional 0.3 metres may be erected without council approval. Council approval is only required if an owner wants to alter an existing fence or erect a fence higher than 1.5 metres plus the 0.3 metre lattice.
35. Further, I find that the bylaw allows hedges that are no higher than the top of an existing fence to be planted without council approval. If an owner wants to plant a hedge that will be higher than an existing fence, strata council's approval is required and the strata must consider the impact on the view lines of neighbours in making its decision.
36. The photographs in evidence show that the hedge is higher than the existing fence. Council's June 9, 2020 letters noted that it would require SL28 to maintain the relevant section of the hedge to 1.78 metres.

37. I find that so long as the hedge is maintained to the height restrictions imposed by the strata, the hedge does not contravene bylaw 5(6). There is no evidence before to me suggest that the owners of SL28 have not been maintaining the hedge to the required height since the strata issued its final decision on August 17, 2020.
38. Further, I find that in making its final decision about whether to approve the hedge, the strata considered the impact on SL29's view lines.
39. The strata's June 9, 2020 letter to Mr. Kaczan notes that it considered the impact of the hedge on SL29's view lines and found that the impact would be acceptable. Further, in making its final decision, the strata was able to consider various photographs that Mr. Kaczan presented at the August 11, 2020 meeting including the before and after photographs of his view.
40. The strata submits that Mr. Kaczan's view should not be contingent on one fixed location and that he has a view from multiple locations in his yard.
41. Mr. Kaczan submits that there is no other view of the Golden Ears Mountain from SL29. However, he has not provided any reliable evidence supporting this submission. I have reviewed the before and after photographs provided by Mr. Kaczan, the additional photos provided by the strata showing different angles of SL28, SL29, and the disputed hedge, and the diagrams in evidence. Based on what I can see from the photos and diagrams, I find that it is unlikely that Mr. Kaczan only has a view of the Golden Ears Mountain from one location on SL29 and prefer the submissions of the strata on this point.
42. I find that the strata properly considered the impact of the hedge on SL29's view lines and balanced that impact with SL28's desire for privacy.
43. I do not agree with Mr. Kaczan's submissions that view lines are the primary factor that the strata should have considered. The bylaw requires the strata to consider the view lines of neighbours as a factor in making its decision. However, there may be other relevant factors for the strata to consider as well.
44. I find that the strata did not misinterpret or misapply bylaw 5(6) and dismiss this claim.

Did the strata fail to enforce its bylaws?

45. Mr. Kaczan says that the cedar hedge obstructs SL29's view of the Golden Ears Mountain and the owners of SL28 are therefore in breach of strata bylaws 3(1)(a) and (c). He argues that the strata has failed to enforce its bylaws by allowing the cedar hedge to remain.

46. The relevant parts of bylaw 3(1) provide as follows:

- Bylaw 3(1)(a) says that an owner must not use a strata lot in a way that causes a nuisance or hazard to another person.
- Bylaw 3(1)(c) says that an owner must not use a strata lot in a way that unreasonably interferes with the rights of others to use and enjoy the common property, common assets or another strata lot.

47. For simplicity, I will refer to these bylaws together as the "nuisance bylaws".

48. A strata must investigate complaints and decide whether a bylaw breach has occurred before it determines if bylaw enforcement actions should be taken. Under SPA section 26, the strata council has a duty to exercise the powers and perform the duties of the strata, including the enforcement of bylaws and rules. When carrying out these duties, such as bylaw enforcement, the strata council must act reasonably. This includes a duty to investigate alleged bylaw violations.

49. A strata council is permitted to deal with complaints of bylaw violations as the council sees fit, so long as it complies with the principles of procedural fairness and is not "significantly unfair" to any person who appears before the council (*Chorney v. The Owners, Strata Plan VIS770*, 2016 BCSC 148).

50. The BC Court of Appeal considered how to determine whether a strata's action is "significantly unfair", as contemplated in the SPA, in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated by the BC Supreme Court in *The Owners, Strata Plan LMS 1721 v. Watson*, 2017 BCSC 763 at paragraph 28:

- 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?
51. Based on SPA section 26, I find Mr. Kaczan had an objectively reasonable expectation that the strata would investigate his complaint, make a decision about whether the nuisance bylaws had been breached, communicate that decision to him, and take action to enforce the bylaws if it found a breach. Based on the evidence before me, I find the strata did not take any of these steps and was therefore significantly unfair in how it dealt with Mr. Kaczan's nuisance complaint.
52. Specifically, Lyle Perry's June 26, 2020 letter contained formal notice of Mr. Kaczan's complaint that SL28's hedge was in breach of the nuisance bylaws.
53. The strata's August 17, 2020 decision letter did not address Mr. Kaczan's complaint about SL28's breach of the nuisance bylaws and the strata has not provided any evidence to suggest that this specific complaint has been addressed.
54. For these reasons, I find the strata's actions in dealing with Mr. Kaczan's complaint about the nuisance bylaws were significantly unfair.
55. I order the strata to issue a written decision to Mr. Kaczan about whether the owners of SL28 are in breach of the nuisance bylaws. If the strata determines that a bylaw contravention has occurred, the SPA requires it to take steps to address the contravention, whether by imposing fines or taking remedial action under SPA section 133.
56. Mr. Kaczan made submissions about whether the obstruction of his view is a nuisance. Given my finding that the strata did not properly deal with his complaint about the nuisance bylaws, it would be premature for me to make a finding about whether such an obstruction is a nuisance especially since the owners of SL28 are not parties to this dispute.

Relief sought by Mr. Kaczan

57. Given my findings set out above, I decline to grant the relief sought by Mr. Kaczan. Since I have not found a breach of the strata's bylaws, I do not have the authority to order the strata to remove or trim the hedge. Similarly, since the owners of SL28 are not parties to this dispute, I cannot make any orders against them.

CRT FEES AND EXPENSES

58. Under section 29 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. As Mr. Kaczan was partially successful, I order the strata to reimburse him for half of the CRT fees paid, or \$112.50.

59. The strata must comply with SPA section 189.4 of the SPA, which includes not charging dispute-related expenses to Mr. Kaczan.

ORDERS

60. I order that within 30 days of the date of this order:

- a. The strata must issue a written decision to Mr. Kaczan about whether the owners of SL28 are in breach of strata bylaws 3(1)(a) and (c), and
- b. The strata must reimburse Mr. Kaczan \$112.50 for CRT fees.

61. The remainder of Mr. Kaczan's claims are dismissed.

62. 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.

Nav Shukla, Tribunal Member