



Civil Resolution Tribunal

Date Issued: April 27, 2021

File: ST-2020-001409 and
ST-2020-004683

Type: Strata

Civil Resolution Tribunal

Indexed as: *Mellor v. Foslien*, 2021 BCCRT 440

B E T W E E N :

JANE MELLOR and BRADLEY ROSS KERNAN

APPLICANTS

A N D :

DANNY FOSLIEN and The Owners, Strata Plan EPS800

RESPONDENTS

A N D B E T W E E N :

DANNY FOSLIEN

APPLICANT BY COUNTERCLAIM

A N D :

JANE MELLOR, The Owners, Strata Plan EPS800, and BRADLEY ROSS
KERNAN

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about the right to exclusive use of a common property parking stall in the respondent strata corporation The Owners, Strata Plan EPS800 (strata). This decision relates to 2 linked disputes that I find are a claim and counterclaim, so I have issued 1 decision for both disputes.
2. The applicants in dispute ST-2020-001409, and respondents in the counterclaim ST-2020-004683, are Jane Mellor and Bradley Ross Kernan. Ms. Mellor owned strata lot 44 (SL44) in the strata, which she sold to the current owner, Mr. Kernan. Ms. Mellor and Mr. Kernan say that the sale included an assignment of the rights to parking stall 88 (PS88) and parking stall 11 (PS11). PS11 is the subject of this dispute.
3. The respondent in dispute ST-2020-001409, and applicant in the counterclaim, Danny Foslien, claims the exclusive right to use PS11. Mr. Foslien owns strata lot 15 (SL15). PS11 was once allocated to SL15, which was once owned by Ms. Mellor. Mr. Foslien says the right to use PS11 reverted to SL15 when Ms. Mellor sold SL44. Mr. Foslien seeks an order declaring that as the owner of SL15, he is the rightful assignee of PS11 and has all the rights to its exclusive use.
4. Ms. Mellor and Mr. Kernan seek a declaration that PS11 is legally assigned to SL44. They also seek interest on \$60,000 set aside from the sale of SL44 pending the resolution of the PS11 issue.
5. The strata is a respondent in both the claim and the counterclaim. The strata generally agrees with Ms. Mellor and Mr. Kernan's position.
6. Ms. Mellor and Mr. Kernan are represented by a lawyer, initially Jordan Kinghorn and later Ben Scheidegger. Mr. Foslien was initially represented by a lawyer, Adam Shee, and later represented himself. The strata is represented by a lawyer, Geoffrey Trotter.

7. For the reasons that follow, I find that Ms. Mellor validly assigned her interest in PS11 to Mr. Kernan in SL44 and I order Mr. Foslien not to use PS11. I dismiss the claim for interest on the \$60,000.

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, 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.

Jurisdiction to hear dispute filed by former owner

12. Ms. Mellor sold SL44 before filing her CRT dispute. Section 189.1(1) of the *Strata Property Act* (SPA) says that only a strata corporation, owner or tenant may apply for dispute resolution with the CRT.
13. In *Downing v. Strata Plan VR2356*, 2019 BCSC 1745, the BC Supreme Court stated that the fact that an owner becomes a former owner does not, by itself, result in their

no longer being an “owner” under the SPA or remove the CRT’s ability to decide a dispute. The Court also noted the finding in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32, that the SPA definition of “owner” includes former owners. Given these decisions, I find that I have jurisdiction to consider Ms. Mellor’s claims.

Claim not raised in Dispute Notice

14. It is undisputed that because Mr. Foslien asserted a right to use PS11, Ms. Mellor and Mr. Kernan agreed that Ms. Mellor’s notary would withhold \$60,000 from the SL44 sale proceeds. In this dispute, Ms. Mellor seeks interest on the \$60,000 withheld at 2.45%, amounting to \$1,670.82 as of submissions.
15. In submissions, Ms. Mellor and Mr. Kernan argue that they are entitled to interest on the \$60,000 because Mr. Foslien committed the torts of conversion and unlawful interference with economic relations. They also appear to raise conversion as an independent claim for which Mr. Kernan seeks \$5,000 in damages.
16. I refuse to resolve the independent conversion claim that did not appear in the Dispute Notice. The CRTA and CRT rules permit an applicant to request to amend the Dispute Notice to add new claims or remedies. Although the dispute notice in ST-2020-001409 was amended, no new claims or remedies were added. The purpose of a Dispute Notice is to define the issues and provide notice to the respondents of the claims against them. CRT rule 1.17 says that the Dispute Notice will only be amended after the dispute entered the CRT decision process where exceptional circumstances apply. I find no exceptional circumstances here that would allow adding new claims at this late stage in the CRT process. I find Mr. Foslien has not received fair notice of Ms. Mellor’s and Mr. Kernan’s claims made only in argument to allow him to adequately respond.
17. I address the other arguments as they relate to the interest claim below.

Late evidence

18. The strata submitted a witness statement after the evidence submission deadline, during the exchange of written arguments. The other parties were notified of the late evidence and advised that they could comment on it in their final reply statements. None of the parties objected to that process. Given the CRT's mandate that includes flexibility, and since all parties had an opportunity to respond to the late evidence, I admit it and where relevant I discuss it below.

ISSUES

19. The issues in this dispute are:
- a. Who has the right to use PS11?
 - b. What remedies, if any, are appropriate?

EVIDENCE AND ANALYSIS

20. As the applicants in this civil dispute, Ms. Mellor and Mr. Kernan must prove their claims on a balance of probabilities. Mr. Foslien must prove his claims in the counterclaim to the same standard. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

Strata plan, lease and bylaws

21. The strata plan was filed at the Land Title Office (LTO) on August 3, 2012. The strata plan indicates 155 strata lots and 2 levels of parking. Where the strata plan identifies the parking areas it also says, "refer to lease plan EPP18540".
22. Lease plan EPP18540 is appendix A to the Option to Lease, also filed with the LTO on August 3, 2012. Appendix B to the Option to Lease is an August 3, 2020 agreement between Cressey Cook Holdings Ltd. (owner developer) and CR Thirty Three Holdings Ltd (tenant) (Lease). Under the 200-year Lease, the owner developer leased all the parking stalls excluding the visitor parking stalls, and all the lockers, to

the tenant. The Lease said that the tenant may assign its rights under the Lease to particular parking stalls to strata lot purchasers.

23. The Lease said the strata plan will designate the parking stalls and lockers as common property for the strata. It is undisputed that the parking stalls that are the subject of this dispute are common property. It is also undisputed that on August 2, 2012, the strata assumed responsibility for managing the common property parking as permitted under Article 4.7 of the Lease.
24. The Lease also allowed strata lot owners to assign their parking stall rights to other owners and purchasers of strata lots. Such assignments are subject to certain limitations and procedural requirements that are central to this dispute, discussed below.
25. On February 25, 2015, the strata filed a complete set of bylaws replacing its previous bylaws. In this dispute, the strata cites bylaw 38.5, which says the strata assumes no liability for information it provides about parking stalls. I also note bylaw 32.2 says parking spaces are for the sole use of permanent residents of the strata and cannot be rented or leased to non-residents.

Assignments

26. The facts surrounding the assignment of the rights to PS11 are substantially undisputed.
27. According to the July 25, 2013 original parking assignment schedule, SL15 was one of the few strata lots originally assigned the rights to 2 stalls, rather than 1. SL15 was assigned the rights to parking stall 10 (PS10) and PS11. SL44 was assigned the rights to PS88.
28. In 2014, Ms. Mellor purchased SL15 and had exclusive use of PS10 and PS11.
29. On March 2, 2016, Ms. Mellor sold SL15 to CJ. The strata issued a February 22, 2016 “Form B” information certificate stating that PS10 and PS11 were allocated to SL15. The Form B is issued under section 59 of the SPA. It discloses certain information

about a strata lot on the request of an owner or purchaser, including which parking stalls, if any, have been allocated to the strata lot. Information disclosed in a Form B is binding on the strata but only the BC Supreme Court may hear claims about inaccurate information in a Form B. None of the parties here have claimed against the strata.

30. On April 15, 2016, Ms. Mellor purchased SL44, which was allocated PS88.
31. On May 5, 2016, CJ and Ms. Mellor executed a parking stall assignment for PS11 (2016 PS11 assignment). The 2016 PS11 assignment assigned PS11 to SL44. This assignment is critical to the dispute, and I return to its specific terms and its relationship to the Lease below.
32. On October 15, 2019, Mr. Foslien purchased SL15 from CJ. The August 7, 2019 Form B said that PS10 and PS11 were allocated to SL15, but subsequent Form Bs, dated September 10, 2019 and October 3, 2019 said that only PS10 was allocated to SL15. I return to this issue below.
33. On December 16, 2019, Ms. Mellor sold SL44 to Mr. Kernan. As part of that sale, Ms. Mellor executed a December 12, 2019 assignment of PS88 and PS11 to Mr. Kernan (2019 PS11 assignment). An October 10, 2019 Form B for SL44 indicates that PS88 and PS11 were allocated to SL44.

The parties' positions

34. Mr. Foslien says CJ temporarily transferred the right to use PS11 to Ms. Mellor for as long as Ms. Mellor owned SL44. He says the 2016 PS11 assignment states in clause 2 that the assignee, Ms. Mellor, will only be entitled to the rights with respect to PS11 for as long as she owns SL44. Therefore, Mr. Foslien says, when Ms. Mellor sold SL44 on December 16, 2019, her right to use PS11 terminated and reverted to Mr. Foslien as the owner of SL15.
35. Ms. Mellor and Mr. Kernan say that the 2016 PS11 assignment was a transfer of parking rights contemplated by the Lease. They say the wording of the 2016 PS11

assignment, which includes that it is binding on successors and assigns, together with the wording of the Lease itself, indicate a “permanent” assignment.

36. The strata says Ms. Mellor and Mr. Kernan’s interpretation is correct. The strata says it is a neutral record keeper and is not liable for any damages, relying on bylaw 38.5. As noted above, none of the parties claimed damages against the strata.

Analysis: who has the right to use PS11?

37. This dispute turns on the interpretation of the 2016 PS11 assignment. The 2016 PS11 assignment is an assignment of the right to use a parking stall under the Lease. It is in the form provided in Schedule A of the Lease, and refers to the Lease in clauses 1, 4 and 5. Under clause 5, Ms. Mellor agreed to be bound by the Lease’s terms. Therefore, before considering the 2016 PS11 assignment’s specific terms, I review the key terms of the Lease.
38. Article 4.1 of the Lease, which I have paraphrased, says the following about the assignment of rights to a parking stall by the original tenant or any subsequent assignee:
- a. It is absolute, and “the assignee and its guests, lessees, successors and permitted assigns” will be entitled to use the stall for the balance of the Lease term (200 years).
 - b. The assignee, other than the strata, is only entitled to the rights for so long as the assignee owns a strata lot within the strata.
 - c. It may only be assigned to a strata lot owner or purchaser or the strata.
 - d. It will not be effective until written notice is delivered to the strata, with a copy to the tenant, subject to article 4.2.
39. Article 4.2 says if an owner sells their interest in a strata lot to which a parking stall is allocated as shown on the strata’s register, without assigning the stall to another owner or purchaser of a strata lot, then the interest in the stall is deemed to have been assigned to the purchaser without delivery of notice to the strata.

40. Article 4.3 allows for an interest in a parking stall to be: a) exchanged, which involves 2 owners trading stalls, or b) transferred, which involves 1 owner effectively selling an extra parking stall to another owner. The selling owner must retain an interest in at least 1 parking stall. The exchange or transfer is on the terms set out in Article 4.1(a) to (c) and is not effective until written notice of the assignment is delivered to the strata.
41. I find the Lease makes clear that the owner developer intended for all strata lots to have at least one parking stall, and for every parking stall to be associated with a strata lot. Article 4.1(c) prevents owners from keeping their parking stall when they sell their strata lot. Article 4.3 means an owner cannot transfer a parking stall to a non-owner. Subject to exchanges and transfers, parking stalls under the Lease follow title to a strata lot. This is consistent with bylaw 32.2, which prohibits non-resident's use of parking stalls.
42. I agree with Mr. Foslien that once Ms. Mellor ceased to be an owner of SL44, she lost all rights to PS11. This is consistent with Article 4.1(b) of the Lease, which does not allow non-owners to hold rights to parking stalls. However, I find that Ms. Mellor assigned the PS11 rights to Mr. Kernan on December 12, 2019 before she ceased to be an owner on December 16, 2019. As she was still an owner at the time, I find Ms. Mellor was permitted by both the Lease and the 2016 PS11 assignment to assign her interest in PS11 to Mr. Kernan as purchaser of SL44.
43. I do not agree with Mr. Foslien that Ms. Mellor could not assign the rights to PS11 if that assignment extended beyond the time period in which Ms. Mellor herself had the rights to PS11. The 2016 PS11 assignment said in clause 1 that CJ assigned Ms. Mellor a partial interest in the lease – the right to use the parking stall – for the balance of the Lease term, 200 years. It also said in clause 4 that Ms. Mellor may assign her rights under the 2016 PS11 assignment in accordance with the Lease.
44. The Lease says that any assignment of rights to a parking stall will be “absolute”, and the assignee and its guests, lessees, successors and permitted assigns will be entitled to use and enjoy the stall for the balance of the 200-year term.

45. What does “absolute” mean? In *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, 1996 CanLII 244 (SCC), the Supreme Court of Canada said the ordinary legal meaning of “absolute” is unconditional. The court defined an absolute assignment as one where all interests are transferred, and no property remains in the hands of the assignor (at para. 30). That case was about debts rather than rights under a lease, but I find the same ordinary legal meaning applies. The “unconditional” meaning is also consistent with the rest of the Lease, including Article 4.2’s automatic assignment upon the sale of the strata lot associated with the parking stall, and article 4.6’s automatic release of obligations and liabilities upon assignment.
46. Mr. Foslien’s interpretation attaches a condition to CJ’s transfer of the PS11 rights, namely that the rights reverted back to SL15 when Ms. Mellor sold SL44. Such a condition would be contrary to both the 2016 PS11 assignment and the Lease in that it would prevent Ms. Mellor from freely transferring or otherwise assigning her PS11 rights. The 2016 PS11 assignment and the Lease both state that they “enure” (take effect) to the benefit of and are binding on successors and assigns, which is consistent with an absolute assignment.
47. Mr. Foslien’s interpretation would mean that all parking stall assignments under the Lease were temporary, because clause 2 in the 2016 PS11 assignment is found in all assignments under the Lease. That interpretation would be incompatible with an absolute assignment and inconsistent with the general principle that parking stall rights follow title to the strata lot.
48. There is no indication in either the 2016 PS11 assignment or the Lease that a parking stall reverts back to the assignor’s strata lot once the assignee is no longer an owner in the strata. Even if Ms. Mellor sold SL44 without assigning the PS11 rights, the PS11 rights would not revert back to SL15. They would remain with SL44 under Article 4.2.
49. I find the 2016 PS11 assignment was absolute once the notice was sent to the strata. Although the strata manager did not immediately update the strata’s records, the evidence is clear that Ms. Mellor’s former lawyers provided the required notice on

August 8, 2016. The strata's delay in updating its records was a result of an administrative error that I find did not affect Mr. Foslien's purchase of SL15. Mr. Foslien does not dispute that the strata provided a correct Form B before his October 15, 2019 purchase. As well, the July 31, 2019 Property Disclosure Statement for SL15 said only parking stall 10 was included.

50. In reply submissions in the counterclaim, Mr. Foslien says the fact that the 2016 PS11 assignment did not reference a purchase or refer to any funds exchanged indicates PS11 was assigned on a temporary basis. The other parties did not have an opportunity to respond to this new argument, which Mr. Foslien could have raised earlier. On that basis it may not be appropriate to consider this argument, but I find it unpersuasive anyway. The Lease contemplates a transfer "for such consideration" as the assignor in their own discretion determines, and the evidence shows that CJ and Ms. Mellor negotiated the PS11 transfer as part of the purchase of SL15.
51. I conclude that the 2016 PS11 assignment was effective August 8, 2016 upon Ms. Mellor's delivery of written notice to the strata. Ms. Mellor made a valid and absolute assignment of her rights to PS11 to Mr. Kernan as the purchaser of SL44. I find Mr. Kernan is the current assignee of PS11. I therefore order Mr. Foslien not to use PS11.
52. In submissions, Ms. Mellor and Mr. Kernan asked for orders about PS11 and PS88. There is no evidence that PS88's allocation to SL44 has ever been in question, and no evidence that Mr. Foslien has ever used PS88. I therefore decline to make any order about PS88.

Interest on the holdback

53. As referenced above, Ms. Mellor's notary withheld from the SL44 sale proceeds \$50,000 for the dispute over PS11 and \$10,000 for Mr. Kernan's potential legal fees. Ms. Mellor seeks interest on the \$60,000 withheld. Ms. Mellor and Mr. Kernan raise conversion but do not explain how it applies to these facts or the requested remedy. The only argument articulated is unlawful interference with economic relations.

54. The tort of unlawful interference with economic relations allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Ms. Mellor argues that she has been denied access to \$60,000 as a result of Mr. Foslien's interference with PS11.
55. The test for unlawful interference with economic relations requires that Mr. Foslien 1) committed an unlawful act, 2) against a third party (presumably Mr. Kernan although that was not explained), and 3) intended to cause economic harm to Ms. Mellor: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12. In *A.I. Enterprises*, the court described the tort as of one limited application in very specific scenarios.
56. I find the evidence before me does not establish that Mr. Foslien intended to cause economic harm to Ms. Mellor. The court in *A.I. Enterprises* said it is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes it is extremely likely that harm to the plaintiff may result. I am satisfied that Mr. Foslien raised the issue about PS11 because of his interpretation of the 2016 PS11 assignment. The facts do not establish that he intended to harm Ms. Mellor's economic interests.
57. As Ms. Mellor has not established any other basis her claim for interest on the withheld funds, I dismiss the claim.

CRT FEES and EXPENSES

58. 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 find Ms. Mellor and Mr. Kernan were largely successful, I order Mr. Foslien to reimburse them \$225 for CRT fees for dispute ST-2020-001409. I decline to order any fee reimbursement for the counterclaim, given Mr. Foslien was unsuccessful. I decline to order the strata to reimburse any fees because I make no order against the strata.
59. Ms. Mellor and Mr. Kernan claim \$6,000 for legal expenses.

60. CRT rule 9.5(3) says that except in extraordinary circumstances, the CRT will not order one party to pay another party's legal fees in a strata property dispute. 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 CRT considers appropriate.
61. Mr. Foslien says there are no exceptional circumstances in this dispute, so there should be no order for legal fees. Counsel for Ms. Mellor and Mr. Kernan argues that Ms. Mellor only hired a lawyer in response to Mr. Foslien's decision to hire a lawyer. Counsel also says Mr. Foslien has persisted in relying on an unreasonable and patently incorrect interpretation of the 2016 PS11 assignment. While I do not agree with Foslien's interpretation, I do not find it unreasonable or patently incorrect. I also find he did not engage in reprehensible conduct or cause unnecessary delay or expense.
62. Counsel for Ms. Mellor and Mr. Kernan argues that the subject matter of this dispute is complex, involving the intersection of various areas of law. In my view, in essence this dispute is about the right to use a common property parking stall. The CRT has decided many disputes of this nature before.
63. Weighing these factors, I find Ms. Mellor and Mr. Kernan have not proved that the circumstances of this dispute were extraordinary. I dismiss their claim for reimbursement of legal fees, which in any event was not supported by receipts or invoices.

ORDERS

64. I order that:
- a. Mr. Foslien immediately refrain from using PS11 or interfering with Mr. Kernan's use of PS11.

b. Within 14 days of the date of this order, Mr. Foslien pay Ms. Mellor and Mr. Kernan \$225.

65. I dismiss Mr. Foslien's claims in dispute ST-2020-004683.

66. I refuse to resolve Mr. Kernan's conversion claim.

67. I dismiss Ms. Mellor's and Mr. Kernan's remaining claims.

68. Ms. Mellor and Mr. Kernan are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

69. 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.

Micah Carmody, Tribunal Member