



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Hunter v. The Owners, Strata Plan NW 1874*, 2021 BCCRT 499

B E T W E E N :

MARILYN HUNTER and MARILYN THOMAS

APPLICANTS

A N D :

The Owners, Strata Plan NW 1874, SHEENA WELSH and DAMIAN WELSH

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This strata dispute is primarily about enforcement of the strata's non-smoking bylaws.
2. The applicants, Marilyn Hunter and Marilyn Thomas, own strata lot 17 (SL17) in the respondent strata corporation The Owners, Strata Plan NW 1874 (strata). The

respondent, Damian Welsh, resides in strata lot 1 (SL1), which is owned by his sister, Sheena Welsh.

3. The applicants say Mr. Welsh has been harassing owners over the years and smokes marijuana on strata property contrary to the bylaws. They say the marijuana smoke exposure exacerbated their medical conditions and forced them to temporarily move out of their home. The applicants say the strata has failed to adequately enforce its bylaws to stop Mr. Welsh's behaviours.
4. The applicants seek \$1,000 in damages plus injunctive orders against the respondents. An injunctive order is an order requiring a person to do something or stop doing something. In particular, the applicants seek injunctive orders that the Welshes stop violating the bylaws and that Mr. Welsh stop smoking marijuana in "proximity of the common area and our unit" and stop "terrorizing owners by his aggressive posturing, foul language, threats and stalking behaviours". Further, they seek an order that the strata enforce its bylaws against the Welshes, including by imposing a \$200 fine each time the strata "receives a written complaint".
5. The strata says it has no current issues with Mr. Welsh's behaviours and he stopped smoking marijuana in areas prohibited by the bylaws. The Welshes also say Mr. Welsh stopped smoking marijuana in prohibited areas. Further, they deny the harassment allegations and ask that I dismiss the applicants' claims.
6. The applicants are self-represented. The Welshes are represented by Ms. Welsh. The strata is represented by a strata council member.

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. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
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.

Withdrawn Claims

11. During the CRT's facilitation process, the applicants withdrew claims about posting information in council meeting minutes and creating a rule to prohibit smoking on strata property. As these claims were withdrawn, I have not resolved them here.

Harassment claims

12. The applicants allege Mr. Welsh has been "harassing many owners and terrorizing them over a number of years". They describe a history of Mr. Welsh using foul language and displaying postures and eye contact that they interpret as threatening. The applicants allege Mr. Welsh's aggressive or intimidating behaviours have resulted in "an extreme loss of enjoyment" of their home.
13. The Welshes deny that Mr. Welsh has engaged in harassing behaviours and say he has been the subject of personal attacks by others. The strata says it spoke with Mr. Welsh about his behaviours and foul language and this behaviour has since stopped.
14. For the reasons that follow, I find the applicants' claims about Mr. Welsh's alleged harassment are outside the CRT's strata property jurisdiction as set out in CRTA section 121.

15. Section 121 gives the CRT jurisdiction over a claim “in respect of the *Strata Property Act* [SPA]” and sets out the scope of the CRT’s strata property jurisdiction. There are no provisions under the SPA or strata bylaws that deal specifically with harassment between strata residents. I find the applicants’ harassment allegations do not involve matters “in respect of the SPA” and the CRT does not have authority to resolve them. My conclusion is consistent with several prior non-binding CRT decisions. See for example *Rishiraj v. The Owners, Strata Plan LMS 1647*, 2020 BCCRT 593 and *Morrissey v. The Owners, Strata Plan K400*, 2020 BCCRT 592.
16. To the extent the applicants are alleging criminal harassment or threats under the *Criminal Code*, I find these allegations are also outside the CRT’s jurisdiction.
17. I find using loud foul language on common property could constitute a nuisance or unreasonable interference in a person’s right to use common property or their strata lot under the strata’s bylaw 3. Bylaw 3(1) says that an occupant must not use a strata lot, the common property or common assets in a way that causes a nuisance or hazard to another person, unreasonable noise, or unreasonably interferes with the rights of other persons to use and enjoy the property. Bylaw 3(4) says that an occupant must not make undue noise in or about any strata lot or common property or do anything which will interfere unreasonably with any other owners or occupants.
18. However, the applicants’ evidence does not show Mr. Welsh is using foul language repeatedly and loudly in a way that contravenes bylaw 3. I find the applicants’ claims about Mr. Welsh’s behaviours are substantially allegations of harassment or interpersonal conflicts rather than about use of strata property contrary to bylaw 3. I find the only claims that fall under the CRT’s strata jurisdiction are those about Mr. Welsh’s alleged marijuana use on strata property and the strata’s enforcement action.
19. Under CRTA section 10, 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.
20. I refuse to resolve the applicants’ claims against the respondents about Mr. Welsh’s alleged harassment, verbal behaviour and body language under CRTA section 10.

ISSUES

21. The remaining issues in this dispute are:

- a. Is Mr. Welsh continuing to smoke marijuana on strata property contrary to bylaw 41(1)? If so, what is the appropriate remedy.
- b. Are the applicants entitled to \$1,000 in damages?

EVIDENCE AND ANALYSIS

22. In a civil claim such as this, the applicants must prove their claims on a balance of probabilities. This means the applicants must prove their position is more likely than not the correct one. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.

Is Mr. Welsh continuing to smoke marijuana on strata property contrary to bylaw 41(1)?

23. The strata's bylaw 41(1) prohibits an owner, tenant, occupant or visitor from smoking cigarettes, marijuana and other substances in a strata lot, or the interior of common property, including parking garages, on patios and balconies, and within 7 meters of a door, window or air intake. Bylaw 41(3) says owners and tenants must ensure persons they allow into the building do not violate this bylaw. Bylaw 41(4) has an exemption for certain regular tobacco smokers, which I find does not apply here.
24. Mr. Welsh does not deny smoking marijuana on SL1's first floor patio in the past. The parties all agree that Mr. Welsh has stopped smoking marijuana on the SL1 patio.
25. The applicants say Mr. Welsh continues to smoke in the common property underground parking lot, which Mr. Welsh denies. In support of their position, the applicants submitted their October 2020 email complaint to the strata that states they smelled marijuana in the underground parking lot and it was stronger near Mr. Welsh's parked car. They also submitted other owners' October and November email complaints to the strata about a marijuana smell in the parking lot. None of the email

complaints specifically identify who was smoking. There is no video footage or photographs of Mr. Welsh smoking in the parking lot. In their written statement for this proceeding, the strata property manager wrote that they had followed up on the parking lot smoking complaints and no one had witnessed Mr. Welsh smoking in the parking lot.

26. I find the applicants' evidence does not establish that it is more likely than not that Mr. Welsh was smoking marijuana in the underground parking lot or that he continues to smoke on strata property contrary to bylaw 41(1). The applicants have not established a continuing bylaw violation on a balance of probabilities and I find no basis to make the requested injunctive orders about it.
27. The applicants say they brought this CRT dispute because the council was ineffective in controlling Mr. Welsh's past non-compliance under SPA section 26. They seek a prospective order that the strata impose a \$200 fine against SL1 for each and every complaint it receives about Mr. Welsh.
28. I find the strata cannot impose a fine against the Welshes based solely on receiving a complaint that may or may not have any merit. The strata can only impose a fine under SPA section 130 where it concluded a bylaw was breached. Also, SPA section 135 says that before imposing bylaw fines, the strata must give the person being fined written particulars of the complaint and a reasonable opportunity to answer the complaint. 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: *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449. The strata's bylaw enforcement must comply with the principles of procedural fairness and cannot be significantly unfair: *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148. So, even if the applicants had proven continuing bylaw violations, I would not order the requested order. I dismiss the applicants' claims on this issue.

Are the applicants entitled to \$1,000 in damages?

29. The CRT can make orders to remedy significantly unfair actions or decisions by a strata corporation, including its council, under section 123(2) of the CRTA. For the

reasons that follow, I find the strata acted significantly unfairly in failing to take enforcement action in response to the applicants' complaints about Mr. Welsh's marijuana smoking.

30. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, the BC Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable. In *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, the BC Court of Appeal confirmed that the reasonable expectations of an owner may also be relevant to determining whether the strata's actions were significantly unfair. In considering an owner's reasonable expectations the courts have applied the following test from *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44:

- a. What were the applicants' expectation?
- b. Was that expectation objectively reasonable?
- c. Did the strata violate that expectation with a significantly unfair action or decision?

31. In bringing this claim, the applicants rely on the non-binding CRT Vice Chair decision in *Bahmutsky v. Petkau*, 2020 BCCRT 244. In *Bahmutshy* the Vice Chair considered whether the applicant was entitled to damages for the strata corporation's failure to enforce its no-smoking bylaw. The applicant had complained in writing to the strata about second-hand smoke from another strata lot. However, the strata decided not to enforce its bylaws by imposing a fine as permitted under SPA sections 129 and 130. Instead, it hoped to find a harmonious solution and the smoking did not stop. The applicant was exposed to ongoing second-hand smoke for 16 months with no effective enforcement action. The Vice Chair applied the reasonable expectations test in *Dollan* and held that the applicant had an objectively reasonable expectation that the strata would enforce its bylaws and it did not. The Vice Chair concluded that the strata's failure to enforce its bylaws was significantly unfair to the applicant and awarded \$1,000 in damages.

32. Here the applicants' correspondence shows that they complained on April 21, 2020 to the strata about Mr. Welsh regularly smoking marijuana on his patio. In their April complaint letter the applicants complained that Mr. Welsh was using marijuana daily at 7am, 10am, 1pm, 4pm, 10pm and 1:30 am, plus other times. They complained the smoke was entering their strata lot windows requiring them to keep them shut. They followed up and sent the strata detailed logs about Mr. Welsh's alleged regular marijuana smoking between April 23, 2020 and June 2, 2020. In their logs, they identified the date and time of the alleged smoking, informed the strata that they had health conditions, and described the negative impact of the second-hand smoke. On May 20, 2020 the applicants wrote to the strata they booked their flights to Manitoba earlier than anticipated because it was "the only way to escape the health issues" caused by marijuana smoke exposure. On June 2, 2020 the applicants flew to Manitoba and returned on October 1, 2020.
33. In addition to the complaints, the applicants wrote the strata on May 13, 2020 asking the strata to take action to enforce its bylaws against Mr. Welsh with an attached petition signed by the applicants and other owners. The strata obtained legal advice about the petition but the records do not show whether it took any enforcement action. There are no notice letters to Ms. Welsh in evidence about the applicants' complaints or other evidence showing enforcement action against the Welshes for Mr. Welsh's alleged smoking in April through June 2020. I find the strata did not take any enforcement action in response to the applicants' complaints.
34. Council member GH states in their February 3, 2021 statement that council was forced to "revisit the fines" and to solve the problem differently after the applicants applied to the CRT on June 21, 2020. Indeed, the correspondence shows that the strata took enforcement action in response to complaints from another owner about Mr. Welsh's smoking in July and August 2020 and imposed fines. It is undisputed that Mr. Welsh had been smoking on the patio and then stopped after the strata imposed the fines and spoke with him about it.
35. As it is not disputed, I find Mr. Welsh was regularly smoking marijuana on the SL1 patio in April through June 2020 as the applicants' alleged in their detailed logs. The

photographs show the applicants' SL17 windows are only 2 floors above the SL1 patio, so I accept second-hand smoke directly entered their strata lot. I find it is common knowledge that second-hand marijuana smoke can be offensive and can have an impact on a person's health. I also accept the applicants had health conditions that were exacerbated by marijuana smoke exposure because it is confirmed by medical evidence. In the circumstances, I find Mr. Welsh's breach was not of a trifling nature.

36. I find the strata, though its council, was required to enforce its bylaws as set out in SPA section 26. I find the applicants had a reasonable expectation the council would notify Ms. Welsh about their complaints and take bylaw enforcement action promptly to try and stop the behaviour. However, as mentioned, I find the council did not take any action in response to the applicants' complaints. They only enforced the bylaws after a different owner complained several months later. I find the strata violated the applicants' reasonable expectations by failing to take the required enforcement action and this was significantly unfair to the applicants.
37. I acknowledge the strata says the applicants would have left their strata lot to travel to Manitoba at some point as they do every year and argues it is not responsible for any loss. There is no dispute the applicants would have travelled to Manitoba at some point in 2020. However, based on the applicants' May 20, 2020 letter and the medical evidence, I find the applicants were forced to leave their strata lot early to avoid further marijuana smoke exposure for health reasons.
38. Considering the overall impact of the marijuana exposure on the applicants, I find the applicants are entitled to the claimed damages. I find the \$1,000 damages sum is reasonable to remedy the significant unfairness. I order the strata to pay the applicants \$1,000.
39. Under the *Court Order Interest Act* (COIA), I find the applicants are also entitled to pre-judgement interest on the \$1,000. I find their cause of action reasonably arose on May 13, 2020, the date the applicants submitted the petition for bylaw enforcement

action. So, I have calculated interest from May 13, 2020 to the date of this hearing, which equals \$6.50.

40. I have not also considered whether Mr. Welsh would have been liable in nuisance at common law for 2 reasons. First, I find a common law nuisance claim is not “in respect of the SPA” and falls outside the CRT’s jurisdiction over strata property disputes. Second, I have already found the strata responsible for the full claimed damage sum.

CRT FEES AND EXPENSES

41. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicants were partially successful against the strata and order the strata to reimburse ½ the applicants’ CRT fees for a total of \$112.50. The respondents did not pay CRT fees and none of the parties claimed dispute-related expenses.
42. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants.

ORDERS

43. I order that within 30 days of this order the strata pay the applicants a total of \$1,119 calculated as:
- a. \$1,000 in damages,
 - b. \$6.50 in pre-judgment interest under the COIA, and
 - c. \$112.50 for CRT fees.
44. The applicants are entitled to post-judgement interest under the COIA, as applicable.
45. I refuse to resolve the applicants’ claims about Mr. Welsh’s alleged harassment, verbal behaviour, body language.

46. I dismiss the applicants' remaining claims.

47. 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.

Trisha Apland, Tribunal Member