



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Bottorff v. The Owners, Strata Plan NW 2605*, 2021 BCCRT 630

B E T W E E N :

ARLENE BOTTORFF

APPLICANT

A N D :

The Owners, Strata Plan NW 2605

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about a strata corporation's ability to replace owner-altered common property, and whether an owner must contribute to a related special levy.

2. The applicant, Arlene Bottorff, owns strata lot 72 (unit 55) in the respondent strata corporation, The Owners, Strata Plan NW 2605. Ms. Bottorff purchased unit 55 in 2013 and says she paid extra for its upgraded lower floor windows and patio doors. Ms. Bottorff says she relied on the Form B Information Certificate, which appended 2 letters in which the strata granted permission to unit 55's previous owners to replace certain common property.
3. In 2020, the strata decided to replace all the windows and patio doors in the strata. The owners approved a special levy to raise money for the window and patio door replacement on the basis of unit entitlement.
4. Ms. Bottorff refused to allow the strata to replace her lower floor windows and patio doors and refused to contribute to the special levy.
5. Ms. Bottorff seeks the following remedies:
 - a. An order prohibiting the strata from removing, altering or otherwise dealing with the disputed windows and patio doors.
 - b. A declaration that the special levy is oppressive to Ms. Bottorff and an injunction preventing the strata from collecting money from unit 55 for the special levy.
 - c. An order that the strata is estopped from making any claims or taking any action to collect money from unit 55 for the special levy.
 - d. Reimbursement of \$1,150 in legal fees and disbursements.
6. Ms. Bottorff represents herself. The strata is represented by a 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.

ISSUES

11. The issues in this dispute are:
 - a. Can the strata replace unit 55's disputed windows and doors?
 - b. Is the special levy significantly unfair to Ms. Bottorff, or is the strata otherwise prevented from collecting money from Ms. Bottorff for the special levy?
 - c. What remedies, if any, are appropriate?

BACKGROUND AND EVIDENCE

12. As the applicant in this civil dispute, Ms. Bottorff must prove her claims on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.

13. The strata corporation was created in 1987 under the *Condominium Act* and continues to exist under the *Strata Property Act* (SPA). It consists of 90 townhouse-style strata lots.
14. The parties agree that unit 55's windows and external patio doors are common property, and I see nothing in the strata plan or photos to indicate otherwise.
15. The strata filed a complete new set of bylaws at the Land Title Office on December 12, 2001.
16. Bylaw 3.5 says an owner will repair and maintain their strata lot, including windows and doors, "to the standard of the development" and keep the strata lot in a state of good repair, excepting reasonable wear and tear, vandalism, break-in, fire, storm, and the like.
17. Bylaw 6.1 says an owner requires written permission from the strata council to undertake any alterations to the "exterior structure of the strata lot." It says the strata council may require the owner to agree in writing to take responsibility for any expenses relating to the alteration. It says the strata will not unreasonably withhold approval.
18. Bylaw 6.2 says an owner will not allow windows and doors, among other things, to become in a state of disrepair.
19. The strata filed repealed and replaced bylaw 11 on June 19, 2019. I find the current version of bylaw 11 applicable to this dispute.
20. Bylaw 11 says the strata must repair and maintain the structure of a building, and doors, windows and skylights on the exterior of a building or that front on the common property.
21. Ms. Bottorff purchased unit 55 in 2013. As required by SPA section 59, the strata provided an Information Certificate (Form B). Appended to the Form B were copies of 2 letters in which the strata granted permission to unit 55's previous owners to alter common property.

22. The July 13, 2009 letter gave permission to install “a new patio door”. The November 4, 2011 letter gave permission to replace “the windows in the rear of the unit.” I refer to these letters together as the permission letters.
23. Both permission letters said permission was granted to subject to “you and future owners of the unit accepting responsibility for the repair, replacement and maintenance of the same.”
24. The parties did not submit photos or diagrams showing the windows and patio doors that are the subject of this dispute, but I infer from the submissions and evidence that 2 first-floor windows and 2 sliding patio doors in unit 55 were changed and are in dispute. The strata says it only granted permission to install one new patio door. I address this issue below. In this decision I refer to the 2 patio doors and 2 first-floor windows as the “disputed fixtures”.
25. At the June 24, 2020 AGM, the owners passed a $\frac{3}{4}$ vote resolution to raise funds through a special levy to replace all common property windows and sliding patio doors.
26. Ms. Bottorff informed the strata that she would not allow it to replace her disputed fixtures. The parties engaged lawyers and exchanged a series of letters, with the strata demanding payment of the special levy, and Ms. Bottorff asserting that the strata was estopped (prevented) by the SPA or the law of equity or both from collecting the special levy or interfering with her windows and patio doors. A hearing was held but no resolution was reached.
27. I infer from the strata’s submissions that the strata’s window and door replacement project has proceeded and included replacement of unit 55’s 5 upper floor windows, but not the disputed fixtures.

ANALYSIS

Can the strata replace unit 55's disputed fixtures?

28. Ms. Bottorff says she and the strata are both bound by the permission letters. She argues that the permission letters gave unit 55's then-owner and future owners responsibility for the disputed fixtures, including decision-making authority about if and when to replace them.
29. SPA section 59 addresses the Information Certificate or the Form B as it appears in the *Strata Property Regulation*. SPA section 59(3)(c) says the strata must disclose in the Information Certificate any agreements that affect the liability of the owner for alterations to the strata lot, the common property or common assets. Section 59(5) says the information under section 59(3) that the strata discloses in an Information Certificate is binding on the strata where a person reasonably relies on it.
30. Ms. Bottorff says she relied on the permission letters when she purchased unit 55. She says she paid extra money for unit 55 because of the superior quality and new state of the disputed fixtures. Ms. Bottorff says she finds personal enjoyment in the disputed fixtures and perceives an increased value of her home. This evidence is largely uncontested, so I accept that Ms. Bottorff relied on the permission letters when she purchased unit 55.
31. I find Ms. Bottorff acted reasonably in relying on the information the strata provided in the permission letters. I find the permission letters confirmed that unit 55's lower windows and patio door were installed with the strata's approval. That said, I do not agree with Ms. Bottorff that the letters effectively transferred to unit 55 ultimate decision-making authority over the disputed fixtures.
32. Section 3 of the SPA says the strata corporation is responsible for managing and maintaining the common property and common assets for the benefit of the owners. Section 72 of the SPA says the strata corporation must repair and maintain common property and common assets, but may, by bylaw, make an owner responsible for the repair and maintenance of (a) limited common property that the owner has a right to

use, or (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

33. There is no regulation in force permitting a strata corporation to enact a bylaw making strata lot owners responsible for repair and maintenance of common property. As such, the strata is unable to make an owner responsible for repair and maintenance of common property through its bylaws (see *VJS Enterprise Inc. v. The Owners, Strata Plan NW 2873*, 2020 BCCRT 68, which is not binding on me). Although this calls into question aspects of bylaws 3.5 and 6.2, I find nothing turns on this because the strata does not assert that Ms. Bottorff has failed to repair and maintain the disputed fixtures.
34. It is undisputed that the permission letters granted unit 55's owners permission to alter common property by installing their own windows and a door. The strata says it granted that permission under bylaw 6.1. Bylaw 6.1 says such permission will not be unreasonably withheld. I find in order to remove the disputed fixtures, the strata must effectively rescind or revoke that permission. The bylaw and the permission letters are silent about whether permission is indefinite or how it can be revoked. I find the corollary of bylaw 6.1's requirement that the strata not unreasonably withhold permission to alter common property is that the strata cannot unreasonably revoke that permission.
35. Carrying out a strata corporation's duty to repair and maintain common property may require removal of previously approved alterations to common property, such as improved decks or balcony enclosures. In *Baker v. Strata Plan NW 3304*, 2002 BCSC 1559 (*Baker*), an owner's balcony enclosure was removed for building envelope repairs. The strata refused to allow the owner to re-enclose the balcony. The court said this refusal was not unreasonable, as it was supported by legitimate considerations. Specifically, the court said that the strata corporation's concerns about fire safety, its ability to rely on the building envelope remediation work warranty without contest, and its desire to avoid further remediation work were legitimate considerations. The court also indicated that aesthetic considerations factor into the balancing between individual and collective rights in the strata context. Together,

those considerations provided a reasonable basis for the strata corporation to refuse to permit the previously approved alteration.

36. Although *Baker* involved a strata's consideration of an owner's request to restore a previously approved common property alteration rather than a strata's revocation of approval, I find the *Baker* reasoning helpful. I find that for the strata to revoke the common property alteration permission it granted unit 55, it must have valid reasons related to its duty to manage, repair and maintain common property.
37. The strata says its concern is that Ms. Bottorff 's disputed windows and patio doors do not meet the "current standards or quality" of the rest of the windows and patio doors in the strata. It suggests Ms. Bottorff is required to provide evidence that her windows and patio doors are equal in quality to the replacement windows and doors. I find that because the strata asserts the right to remove the altered fixtures contrary to the permission letters, the strata must provide evidence that Ms. Bottorff's windows are below a reasonable standard and put common property or common assets at risk. I find the strata has not done so. Although the disputed fixtures are now older than the new windows and doors, there is no evidence that they are of lower quality. There is also no evidence that the disputed fixtures are in a state of disrepair.
38. The strata says as part of its window and door replacement project, its contractors are checking around the windows and doors for evidence of "dry rot". It says dry rot was found in several units during installation. The strata submitted 1 photo that appears to show rotted wood and exposed insulation around a strata lot window. The strata does not say how many strata lots experienced dry rot or how extensive the damage was. I find that while it may be convenient to inspect the surrounding structures when replacing windows, it is not necessary to replace windows in order to investigate the surrounding structures. So, I find the strata's desire to inspect for dry rot does not provide a reasonable basis for the strata to revoke its common property alteration permission.
39. The strata says it is concerned that, should future damage to the building envelope or a strata lot attributed to the disputed fixtures, there will be a dispute over who is

responsible. I find this concern speculative as there nothing in the evidence that suggests the disputed fixtures are allowing water penetration.

40. The strata says it is concerned that the disputed fixtures do not have the same warranty as the new windows. In *Baker*, the strata had a letter from its building envelope contractor stating that any alterations by others would void the building envelope warranty. Voiding the warranty is not an issue here as the warranties apply to individual windows and doors and not a continuous building envelope. There does not appear to be a risk of voiding the warranty on the rest of windows and doors by leaving the disputed fixtures as they are. So, I find the warranty concerns are not a sufficient reason for the strata to revoke its alteration permission.
41. The strata seems concerned that the disputed windows and doors have “mutton bars” while other windows do not. While aesthetic concerns may properly factor into the strata’s common property management decisions, I find there is insufficient evidence of an aesthetic concern here. The strata provided no photos to support its position. The strata also suggested a future owner of unit 55 may expect their fixtures to match, but I find a future owner will be aware of the different fixtures and the permission letters that the strata is required to disclose under SPA section 59(3)(c).
42. In summary, I find the strata has not established that it is necessary to replace Ms. Bottorff’s disputed fixtures to meet its obligation to repair and maintain common property. As the duty to repair and maintain common property is not engaged and there are no other significant concerns present, it would be unreasonable for the strata to revoke permission for the disputed fixtures.
43. I find the permission letters serve to prevent the strata from replacing unit 55’s lower windows and 1 patio door at this time. I order the strata not to replace the windows and the patio door that are the subject of the permission letters. I make no order about the second patio door that is not the subject of the permission letter.
44. This decision does not prevent the parties from reaching an agreement on replacing the disputed fixtures. It also does not prevent the strata from replacing the disputed fixtures should circumstances engage the strata’s duty to repair and maintain

common property. In order to reflect this duty but give the parties a degree of certainty, I have framed the order such that the strata is prevented from replacing the disputed fixtures unless a qualified independent professional recommends their replacement to prevent common property damage. The requirement for a qualified independent professional will ensure any decision the strata makes is based on valid, objective concerns.

Special levy, significant unfairness, and estoppel

45. At the June 24, 2020, AGM, the owners voted 80% in favour of a special levy resolution for the window and door replacement project. The resolution proposed that the project would be funded by up to \$400,000 from the contingency reserve fund (CRF) and a special levy of \$348,630. Contribution was based on unit entitlement, in accordance with sections 108 and 99 of the SPA.
46. The strata's position is that all owners must contribute to the special levy in proportion to their unit entitlement. Ms. Bottorff's position is that the special levy is oppressive and gives rise to a remedy under SPA section 164. Declaring the special levy oppressive would be a declaratory order the CRT does not have jurisdiction to make. However, the CRT can order a strata corporation to do or stop doing something.
47. SPA section 164 sets out the BC Supreme Court's authority to remedy significantly unfair actions. The CRT has jurisdiction over significantly unfair actions under CRTA section 123(2), which has the same legal test as cases under SPA section 164: see *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164). Significantly unfair conduct is conduct that is 1) oppressive, in that it is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith, or 2) unfairly prejudicial, in that it is unjust or inequitable: see *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 (*King Day*).
48. Ms. Bottorff analogizes her situation to the unfairness that the court found in *King Day*. In *King Day*, the court noted that despite using a fair process and holding a democratic vote, an outcome may be significantly unfair to the interests of minority owners. Ms. Bottorff says requiring her to contribute to the special levy in proportion

to unit entitlement when she is not having all her windows and doors replaced would similarly be burdensome, harsh, wrongful, and lacking in probity or fair dealing. She says it goes against the spirit of unit-based entitlement.

49. *King Day* confirmed that although compliance with the SPA's cost allocation methods will not normally be significantly unfair, in some cases compliance will be oppressive or unfairly prejudicial. I find these circumstances do not rise to that level.
50. It is undisputed that Ms. Bottorff had 5 windows replaced under the strata's window and door replacement project. Ms. Bottorff could have had her disputed 2 windows and doors replaced but declined because she preferred her existing fixtures. While Ms. Bottorff received a lesser benefit from the project than she otherwise would have, it was her choice. I find Ms. Bottorff could not have reasonably expected when she purchased unit 55 that she would be exempt from future special levies for window and door repair simply because she had some superior fixtures.
51. Apportioning special levies in accordance with unit entitlement does not always mean each owner will benefit from the common property repairs in exact proportion to their contribution. As one example, in *Terry v. The Owners, Strata Plan LMS 2153*, 2006 BCSC 950, the court found it was not significantly unfair for owners of phase 2 and phase 3 buildings to pay for repairs to leaking phase 1 buildings, even though phase 2 and 3 buildings did not require the same repairs. The organizing principle of the SPA is that in a strata corporation, "you are all in it together": see *Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085, at paragraph 35.
52. Ms. Bottorff's estoppel argument is that if the strata is prevented from replacing the disputed fixtures, it is necessarily estopped from using a levy to try to accomplish the same goal. I do not agree that the strata is trying to use the special levy to replace the disputed fixtures. They are distinct issues. The special levy was approved by 80% of the owners to address the issue of aging windows and doors.
53. I find that Ms. Bottorff has not demonstrated that paying her proportionate share of the special levy based on unit entitlement is significantly unfair. I decline to make orders prohibiting the strata from collecting the special levy funds from Ms. Bottorff.

CRT FEES AND EXPENSES

54. 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. Ms. Bottorff was partially successful. I therefore order the strata to reimburse half her \$225 CRT fees, or \$112.50.
55. Ms. Bottorff claims \$1,150 for legal fees and disbursements. She says the strata's refusal to address her concerns directly forced her to engage a lawyer, and she had to "incur additional legal fees in preparation for" this CRT dispute. It is not clear to what extent, if any, these additional legal fees, are included in the \$1,150 claim.
56. I am not persuaded that Ms. Bottorff reasonably needed to hire a lawyer to assist her in her dealings with the strata. The strata asserted its position, but nothing prevented Ms. Bottorff from filing a CRT dispute at the outset. I find it would be inappropriate to award Ms. Bottorff her legal expenses that she incurred before this dispute.
57. CRT rule 9.5(3)(b) states the CRT will not order one party to pay to another party any fees charged by a lawyer or another representative in the CRT dispute process except in extraordinary circumstances. Considering the factors set out in the CRT rule 9.5(4), I find the circumstances of this dispute are not extraordinary. The dispute was of moderate complexity, there were no approved representatives, and neither party caused unnecessary delay or expense in the CRT dispute. So, I find Ms. Bottorff is not entitled to reimbursement of legal fees and disbursements.
58. I also note that Ms. Bottorff did not provide any documentation of the legal fees she says she incurred, so even if she were entitled to legal expenses she has not proved them.
59. The strata did not pay any CRT fees or claim any expenses. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Bottorff.

ORDERS

60. I order that the strata must not replace unit 55's lower windows and patio door that are the subject of the permission letters unless Ms. Bottorff agrees or a qualified independent professional recommends replacing them to prevent common property damage.
61. I order the strata, within 30 days of this decision to pay Ms. Bottorff \$112.50 for CRT fees.
62. Ms. Bottorff is entitled to post-judgment interest under the *Court Order Interest Act*.
63. I dismiss Ms. Bottorff's remaining claims.
64. 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