Civil Resolution Tribunal

Date Issued: September 28, 2021

File: ST-2021-001667

Type: Strata

Civil Resolution Tribunal

Indexed as: *Abrams v. The Owners, Strata Plan VR61*, 2021 BCCRT 1040

B E T W E E N :

SHARI ABRAMS

APPLICANT

A N D :

The Owners, Strata Plan VR61

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute is about a proposed alteration to a patio in a strata lot. The applicant, Shari Abrams, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan VR61 (strata). Ms. Abrams says that the strata denied her request to expand her patio despite there being a precedent for this type of alteration in other

strata lots. She requests an order that the strata give her permission to perform "minor landscaping" to extend her patio 3 feet onto common property (CP). The strata denies that there is a precedent for patio expansions, and says the requested alteration is a significant change to CP, requiring approval by the strata ownership.

2. Ms. Abrams is self-represented. A member of the strata council represents the strata.

JURISDICTION AND PROCEDURE

3. 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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

4. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary 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 in the interests of justice and fairness.

5. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

6. Under CRTA section 123, 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

7. The issues in this dispute are:

    a. Whether the proposed patio alteration amounts to a significant change in the use or appearance of CP,

    b. Whether the strata has treated Ms. Abrams in a significantly unfair manner by declining her request to expand her patio, and

    c. If so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

8. In a civil dispute like this, an applicant bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their respective positions. While I have considered all of this information, I will refer to only what is relevant and necessary to provide context to my decision.

9. The strata is comprised of 61 residential strata lots. The building was constructed at some point in the 1960s as a rental building, and it changed to a strata corporation after the strata plan was deposited at the Land Title Office in 1972. According to the strata plan, balconies and patios form part of the strata lots, and these areas were included in the square footage used to calculate the unit entitlements.

10. The strata's bylaw 8 addresses alterations and improvements. Bylaw 8.2 provides that an owner must obtain the strata's written approval before making alterations or additions to specified areas, including CP. According to bylaw 8.4, the strata must not unreasonably withhold its approval under bylaw 8.2.

11. Ms. Abrams purchased strata lot 22, which is also known as suite 219, in 2002. Strata lot 22 is on the front of the building and has an attached patio area that is bounded by a low brick wall. The area beyond the patio structures on the front of the building is planted with grass and shrubs. The *Strata Property Act* (SPA) definition of "common

property" includes that part of the land and buildings shown on a strata plan that is not part of a strata lot. I am satisfied that the planted area meets the definition of CP.

12. In 2005, as part of a re-roofing project, several strata lot owners on the 4th floor were required to remove portions of their roof decks that had been installed on CP. After the re-roofing was completed, the owners wished to re-build their extended decks. The issue was quite contentious, as the extended decks were not shown on the strata plan, the strata did not have a record of the decisions approving the alterations, and the extended decks had the effect of increasing the affected owners' strata lots without them paying increased strata fees to the strata.

13. After considering various options to remedy the situation, the strata called an April 24, 2006 special general meeting (SGM) for the owners to consider a resolution to allow the owners to re-build the extended decks with the intention of designating the expanded deck areas as limited common property (LCP) for the attached strata lots. The owners approved this resolution. The owners who re-built their decks signed indemnity agreements to take responsibility for the costs associated with the alterations. The strata did not update the strata plan or schedule of unit entitlements but did file the LCP designations at the Land Title Office.

14. Ms. Abrams says that she had noticed that another strata lot on the front side of the building has a different patio size than the others, including her own. According to documents in evidence, strata lot 28's patio enclosure measures approximately 73 square feet as compared to the approximately 46 square feet of Ms. Abrams' patio.

15. In 2020, the strata was undergoing repairs to the drainage system and the CP planted area in front of Ms. Abrams' patio was torn up. Given that the area was already disturbed, Ms. Abrams decided that she wished to extend her patio to have similar dimensions to the patio in strata lot 28.

16. Ms. Abrams requested permission from the strata council to alter her patio by extending it approximately 3 feet onto CP. The strata council considered the request at its August 26, 2020 meeting and decided to deny it. According to the minutes, the decision was based on the facts that the proposed work would "require a City Permit,

an amendment to the strata plan and an approval by the owners at a general meeting".

17. Ms. Abrams disagreed with the decision and, in a September 30, 2020 email to the strata's property manager, asked that a resolution about her "quite minor" request be added to the agenda of the upcoming annual general meeting (AGM). She also requested a hearing with the strata council, which was held on October 20, 2020.

18. The strata council decided to seek legal advice, which it shared with Ms. Abrams. She responded in a letter dated November 19, 2020 and asked for "the same approval afforded" the owners involved in the 4th floor patio situation. She stated that that the strata council had set a precedent by giving approval to alterations for the 4th floor owners and said her proposed use of CP space was no different. Ms. Abrams expected that the area would be designated as LCP with no payment to the strata for the additional square footage, just as was approved for the 4th floor owners. Ms. Abrams noted that she was willing to sign an indemnity agreement to take responsibility for the repair and maintenance of her expanded patio.

19. At its January 21, 2021 meeting, the strata council again denied Ms. Abrams' alteration request as the requested change amounted to a permanent change to CP. In addition, the owner of the strata lot above had expressed concern about the possible impact to the enjoyment of her own strata lot. In a February 25, 2021 email, the property manager advised Ms. Abrams that the 4th floor deck extensions were considered to be historical exemptions and allowing her new expansion would set a precedent for other owners to expand their own patios.

20. Although Ms. Abrams initially requested that the CRT order the strata to hold an SGM to address her request to expand her patio onto CP, she later amended her Dispute Notice to request permission from the strata to "perform minor landscaping to [her] patio to add 3' in depth onto [CP]". Ms. Abrams submits that the strata has a history of allowing owners to use CP areas, and that a precedent has been set for this kind of use. In addition to the enlarged patio in strata lot 28 and the 4th floor decks, she says the strata has allowed the owner of strata lot 9 to install pavers and other

structures on CP. Ms. Abrams also submits that her patio alteration is not a significant change in the use or appearance of CP as contemplated by the SPA.

21. The strata disagrees and says that the patio expansion would be a significant change in use of the CP. If allowed, the strata says approving this expansion would not allow it to deny other owners' requests to expand their decks and balconies. The strata says there is no evidence to demonstrate if or when strata lot 28's patio was enlarged. It says that, before the SPA came into effect, the governing *Condominium Act* had "very few regulations and was ambiguous". It says that the use of CP by the 4th floor owners and the owner of strata lot 9 pre-dated the SPA.

Is the proposed alteration a significant change to CP?

22. Section 71 of the SPA says that a strata corporation must not make a significant change in the use or appearance of CP or land that is a common asset unless the change is approved by a resolution passed by a ¾ vote at an AGM or SGM, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

23. The British Columbia Supreme Court has held that changes to CP made by individual owners may trigger section 71 of the SPA (see *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333).

24. The SPA does not define significant changes. The parties refer to the criteria for determining whether a change is significant set out in the unpublished decision in *Chan v. The Owners, Strata Plan VR677* (Vancouver Registry No S115516). The published decision in *Foley v. The Owners, Strata Plan VR387*, 2014 BCSC 1333 paraphrases the criteria discussed in *Chan*, at paragraph 19 as follows:

    a. A change would be more significant based on its visibility to residents and towards the general public,

    b. Whether the change to common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units,

c. Is there a direct interference or disruption as a result of the changed use?

d. Does the change impact on the marketability or value of the unit?

e. The number of units in the building may be significant along with the general use, such as whether it is commercial, residential, or mixed.

f. Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the SPA.

25. Other decisions have considered whether a change would be permanent. The placement of potted plants or trees, which may be removed from the CP on request, have been found to be decorations that do not constitute a significant change (*Reid v. Strata Plan LMS 2503*, 2003 BCCA 126). By contrast, cutting holes in an exterior wall for the purpose of installing vents was found to be a significant change (*Sidhu v. The Owners, Strata Plan VR1886*, 2008 BCSC 92).

26. There is no dispute that Ms. Abrams' proposed alteration would result in a permanent expansion of the brick wall surrounding her patio onto CP. The parties disagree about the criteria set out in *Chan* and *Foley*, including whether the alteration would be visible from the street or impact other strata lots. I find that these criteria alone are not determinative.

27. In *Foley* at paragraph 28, the court considered an alteration to a roof deck that would incorporate CP into a private area, with the result that no other owner would be entitled to use or enjoy it. The court found that, despite the criteria in *Chan*, this factor alone was suggestive of a significant change.

28. I find that the circumstances of Ms. Abrams' proposed alteration are analogous to those in *Foley*. Expanding her patio onto CP would affect the use of the CP in the sense that it would change it from an area accessible to all owners to an enclosed area for her use only. Following the reasoning in *Foley*, I find that this would be a significant change.

29. I acknowledge Ms. Abrams' comment that it "shouldn't be too much to ask" for the use of the 3-foot space as it is a small area. However, unlike for minor changes to the habitable area of a strata lot set out in section 70 of the SPA and section 5.1 of the *Strata Property Regulation*, the SPA does not give any exemptions to the requirements of section 71 based on the size of the area involved with a significant change.

30. As I have determined that the proposed alteration to Ms. Abrams' patio would be a significant change, it cannot be approved by the strata council alone. Instead, it must be approved by a resolution passed by a ¾ vote at an AGM or SGM. I dismiss Ms. Abrams' request for an order that the strata council grant her permission for the alteration.

Significant Unfairness

31. Although she did not say so specifically, I infer that Ms. Abrams' position is that the strata has treated her in a significantly unfair manner when handling her request to alter her patio as other alterations have been approved while hers was not. The courts have interpreted "significantly unfair" to mean conduct that is oppressive or unfairly prejudicial. "Oppressive" conduct has been interpreted as conduct that is burdensome, harsh, wrongful, lacking fair dealing or done in bad faith. "Prejudicial" conduct means conduct that is unjust and inequitable (*Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed 2003 BCCA 126).

32. Section 164 of the SPA sets out the authority of the British Columbia Supreme Court to remedy significantly unfair actions. The CRT has jurisdiction over significantly unfair actions under section 123(2) of the CRTA, which involves the same legal test as cases under SPA section 164. I find that the circumstances of this claim fall within section 121(1)(f) of the CRTA, as they involve a decision of a strata corporation in relation to an owner.

33. The test for significant unfairness was summarized by a CRT Vice Chair in A*.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94, with reference to *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44: what is or was the expectation of the

affected owner or tenant? Was that expectation on the part of the owner or tenant objectively reasonable? If so, was that expectation violated by an action that was significantly unfair? The British Columbia Court of Appeal has confirmed that consideration of the reasonable expectations of a party is "simply one relevant factor to be taken into account" (see *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 at paragraph 89).

34. Ms. Abrams' expectation is that she would be treated the same way as other owners when applying for permission to alter her strata lot. As noted, Ms. Abrams and the strata disagree about whether the previous alterations in other strata lots set a precedent for allowing owners to use CP.

35. Although the expectation of equal treatment is reasonable, the evidence before me does not establish that the strata has treated Ms. Abrams differently than other strata lot owners when it comes to the use of CP.

36. Although the previous *Condominium Act* contains a provision to allow for the designation of LCP, it did not have a section dealing with significant changes to CP. The thrust of the strata's submissions is that, although there may have been use of CP under this more lenient legislative scheme, it is enforcing the current requirements of the SPA about its CP. I find that the available evidence supports this.

37. Although it is not entirely clear what decision-making process was used with respect to the 4th floor decks, an April 9, 2021 statement from owner DC suggests that the alterations were made in the 1970s. According to DC, when she bought her strata lot in 1989, she was told that the 4th floor decks were 15 years old. So, these alterations were in place long before the SPA came into force in 2000. There is no dispute that the owners followed the requirements of the SPA in approving the resolution to re-build the extended decks with LCP designations in 2006.

38. Although strata lot 9 previously was allowed to place a retaining wall, planters and various garden-related items on CP, the strata required that these items be removed during a maintenance project. The strata council meeting minutes from October 20, 2020 show that the owner's request to install new structures on CP was denied. The

April 13, 2021 strata council meeting minutes indicate that the strata council may reconsider the owner's request but has not yet decided on landscaping items in this area as recommended by its own contractor. This does not support the conclusion that the strata is permitting the owner of strata lot 9 to use CP without following the current requirements in the SPA.

39. As for the enlarged patio in strata lot 28, photographs in evidence and a 2001 landscaping plan do appear to show that strata lot 28's patio enclosure is larger than what is shown on the strata plan. However, the evidence before me does not establish whether this patio was originally constructed with a larger enclosure or whether it was altered later (either before or after the strata plan was deposited). An April 9, 2021 email from PH, who has been a strata lot owner since 1976, states that the ground floor patios have "always looked the same" and "are not all necessarily the same size". PH did not recall that there had ever been an alteration request for this patio. I find that the evidence does not establish that this patio was altered from the way it was constructed originally or whether any alteration was approved by the strata.

40. Based on the evidence before me, I find that the strata has enforced the requirements of the SPA consistently. There is no indication that the strata addressed Ms. Abrams' alteration request in a different manner than those made by other owners. I find that the strata did not treat Ms. Abrams in a significantly unfair manner.

41. Although I dismiss Ms. Abrams' claims, nothing in my decision would prevent her from using the procedure set out in section 43 of the SPA to require the strata to hold an SGM to consider a resolution for the change in use of CP surrounding her patio.

CRT FEES AND EXPENSES

42. 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. As. Ms. Abrams was not successful, I dismiss her claim for reimbursement of CRT fees. Although the strata was successful, it did not pay any

CRT fees or claim any dispute-related expenses, so I make no order for reimbursement.

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

ORDER

44. I dismiss Ms. Abrams' claims and this dispute.

Lynn Scrivener, Tribunal Member