



# Civil Resolution Tribunal

Date Issued: October 4, 2021

File: ST-2021-003350

Type: Strata

Civil Resolution Tribunal

Indexed as: *Martin v. The Owners, Strata Plan LMS 1367*, 2021 BCCRT 1056

**B E T W E E N :**

KENT MARTIN and COLLEEN MARTIN

**APPLICANTS**

**A N D :**

The Owners, Strata Plan LMS 1367

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Chad McCarthy

## INTRODUCTION

1. This dispute is about a defective awning. The applicants, Kent Martin and Colleen Martin, co-own strata lot 24 in the respondent strata corporation, The Owners, Strata Plan LMS 1367 (strata). The retractable awning over 1 of the 2 balconies adjacent to the Martins' strata lot is defective, and they say it is a safety hazard. The Martins

request an order that the strata replace the awning and allocate any costs to the strata's contingency reserve fund (CRF).

2. The strata says that such an order would be premature. It says the awning is not a safety hazard, and that it has not yet decided whether to replace, repair, or remove it. The strata also says that spending funds on the awning first requires an ownership vote. The strata notes that the ownership passed a motion proposed by Mr. Martin to defer voting on the purchase of a replacement awning until the strata's annual general meeting (AGM) in October 2021. Nothing before me indicates that the AGM or an awning funding vote has been held as of the date of this decision.
3. Mr. Martin represents the applicants in this dispute. The strata is represented by a strata council member.

## **JURISDICTION AND PROCEDURE**

4. 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.
5. 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.
6. 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.

7. 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.
8. The Martins say they have felt threatened, bullied, and intimidated because of the awning issue, and in particular because of the strata council's "threat" to remove the awning. I find the evidence shows the strata simply identified awning removal as one possible option it was considering. In any event, I find the Martins do not claim any remedy for this allegedly "threatening" behaviour, so I make no findings on that issue. Further, I find that the CRT's strata jurisdiction does not extend to allegations of strata council harassment (for example, see paragraphs 14 to 21 of the non-binding but persuasive decision *Saigeon v. The Owners, Strata Plan KAS1997*, 2021 BCCRT 1010).

## ISSUE

9. Is the strata required to replace the retractable awning with a new one, and should I order it to do so?

## EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, as the applicants the Martins must prove their claim on a balance of probabilities. I have read and weighed the parties' evidence and submissions, but I refer only to that which I find necessary to explain my decision.
11. The strata was formed in 1994 and presently exists as a strata corporation under the *Strata Property Act* (SPA). The strata's premises are a 5-level building with 33 strata lot apartments. On August 23, 2018, the strata repealed and replaced its bylaws under the SPA by filing an amendment at the Land Title Office. I find the bylaws filed August 23, 2018 are applicable to this dispute.

12. Two limited common property (LCP) balconies are adjacent to the Martins' strata lot and are designated for their exclusive use, as shown on the strata plan. One of the balconies has a retractable awning attached to the exterior wall of the strata lot, which covers the balcony when extended. One other strata lot's LCP balcony also has a retractable awning, and several others have fixed fabric-covered awnings. I will refer to the defective retractable awning on the LCP balcony adjacent to strata lot 24 as the Martins' awning.
13. It is undisputed that one of 3 "arms" supporting the Martins' retractable awning has begun separating, and that there is a problem with a tensioning cable inside the arm. The Martins also say there are "issues" with the awning's fabric valance, but I find the evidence does not confirm the extent of any valance issues. I find the Martins' primary concern is the awning's defective arm affecting its operation or function, although the evidence does not show that the awning has become inoperable. However, it is undisputed that the awning's support arm problem has not yet been resolved.
14. The evidence and submissions touch on whether the Martins' awning was an unapproved owner alteration subject to removal at their expense. A 1995 photo in evidence from around the time of the strata building's completion shows a similar retractable awning on a unit adjacent to strata lot 24. A 1994 price list of strata lot upgrades includes an option for "awning on Balcony." On balance, I find the evidence shows that strata lot 24's retractable awning was likely part of the strata's original construction. The evidence, including an excerpt from a 2014 depreciation report, shows that "roll-up fabric canopies", such as the strata lot 24 retractable awning, had their fabric repaired or replaced in 2009 and 2010. There is little evidence showing whether the strata or the former strata lot owners ordered or paid for those fabric repairs or upgrades to the strata lot 24 retractable awning. I find that even if the retractable awning fabric was repaired or replaced after its original installation, the available evidence does not show that the strata lot 24 awning was installed or significantly altered without strata approval. On balance, I find the present awning is likely not an unapproved owner alteration, and is an original strata feature.

15. Under the SPA and strata bylaws, responsibility for maintaining and repairing the retractable awning depends on whether it is located in a strata lot or on common property (CP), including LCP. Under SPA section 68(1), the boundary between the Martins' strata lot and their LCP balcony is midway between the surface of the structural portion of the wall facing the strata lot and the surface facing the balcony. Given that the awning is mounted to the building's exterior wall, I find it is located entirely within LCP when either retracted or extended. Although awning fasteners likely extend an unknown distance into the wall, I find this does not make the awning part of the Martins' strata lot, or make it non-LCP common property. So, I find the awning is LCP designated for the Martins' exclusive use.
16. SPA section 72(2) says that the strata may, by bylaw, make an owner responsible for the repair and maintenance of LCP that the owner has a right to use. Strata bylaw division 1 section 2(2), which I will refer to as bylaw 1(2)(2), makes an owner who has the use of LCP responsible for repairing and maintaining it, except for repair and maintenance that is the responsibility of the strata under the bylaws. Bylaw 1(1)(1)(c) says that the strata must repair and maintain LCP where the repair and maintenance ordinarily occurs less often than once a year. Under that bylaw, the strata must also repair and maintain the exterior of a building, balconies and other things attached to the exterior of a building, and fences, railings, and similar structures that enclose patios and balconies, no matter how often the repair or maintenance ordinarily occurs. It is undisputed that the retractable awning's arm defect ordinarily occurs less than once per year, and that the awning is attached to the exterior of the building and encloses the balcony when extended. So, I find the strata has a duty to repair and maintain the awning.
17. The Martins contend that the strata has not addressed the awning problem quickly enough. They say the awning is a safety hazard and is unrepairable. The Martins say that because of the alleged safety hazard, the strata should replace the awning immediately with a similar retractable awning, and it does not need ownership approval to do so. The strata says that the awning is not a safety hazard, particularly if left in the retracted position. The strata says that because there is no immediate danger or risk of significant damage, it must seek ownership approval to fund the

awning replacement suggested by the Martins, because it exceeds the threshold for unapproved expenditures in its bylaws. The Martins declined a strata proposal to share the cost of replacing the awning, which the strata says would increase the likelihood of the ownership voting to approve the replacement cost.

18. What approvals does the strata need before it can pay for awning work? SPA section 92(b) says that the strata must establish a contingency reserve fund (CRF) for common expenses that usually occur less often than once a year or that do not usually occur. As noted, it is undisputed that the awning arm problem usually occurs less often than once a year, so I find any awning repair, replacement, or removal would be funded from the CRF rather than the strata's operating fund.
19. SPA section 96 says CRF expenditures must first be approved by a resolution passed by majority vote at an annual or special general meeting if they are related to repair, maintenance, or replacement of common property or common assets as recommended in the most current depreciation report, or by  $\frac{3}{4}$  vote for other common property repair, maintenance, or replacement. Unapproved operating fund expenditures may be authorized under SPA section 98(2) if they are less than a specified threshold, but as noted the Martins' awning work requires a CRF expenditure so section 98(2) does not apply. However, SPA section 98(3) says that the strata may make an unapproved CRF expenditure if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise. This is consistent with bylaw 5(1)(3), which says a strata council member may spend the strata's money to repair or replace common property or common assets if required to ensure safety or prevent significant loss or damage.
20. I find that before the strata can pay funds to repair, replace, or remove the Martins' awning, the expenditure must either first be approved by an ownership vote, or there must be reasonable grounds to believe that the expenditure is necessary to ensure safety or prevent significant loss or damage. I note that the Martins oppose awning removal or repair.

21. July 5, 2021 special general meeting minutes in evidence confirm that Mr. Martin proposed a successful motion to delay a vote on funding an awning replacement from the CRF until the strata's annual general meeting in October 2021. The evidence before me does not indicate that this meeting and vote have been held, and the strata has not yet decided how to address the awning issue. So, I find the strata has not obtained the required SPA section 96 approval for a CRF expenditure to address the awning issue.
22. The parties referred to case law, including the decision *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784. *Weir* says the strata has discretion to approve "good, better or best" solutions when deciding to repair or replace CP, and that courts should be cautious before interfering with the manner in which the strata decides to make repairs. I find that it is reasonable for the strata not to make a final decision on how to address the Martins' awning defect until the October 2021 CRF vote has been held. I find that the strata has not unreasonably delayed its awning investigations, and strata council meeting minutes show that it has been attentive to this issue. Further, I note that the CRF funding vote delay was endorsed by Mr. Martin. I find I should not direct the strata to pursue a particular awning resolution before it has had the opportunity to properly exercise its discretion about repairing, replacing, or removing the awning, absent a proven safety risk or potential for significant loss or damage.
23. So, is the damaged awning a safety hazard, and does it present a risk of significant loss or damage? If so, the strata may be entitled to make an unapproved CRF expenditure to under SPA section 98(3) as noted. The Martins are alleging a safety risk, so they bear the burden of proving it. I find that the subject of whether the defective awning arm is a safety risk or presents a risk of loss or damage is a subject outside ordinary knowledge expertise, and requires expert evidence to prove.
24. The Martins submitted a September 3, 2020 email from PL at Langley Awning & Sign, who undisputedly viewed the Martins' awning in person. PL said that he was concerned that the awning arm joint was "separating and is unsafe". PL said that he had at least 30 years experience in the awning industry, but he did not describe what this experience consisted of, or whether he had any training or other qualifications in

awning design, repair, or safety. I find the evidence is not sufficient to prove that PL is a qualified expert under CRT rule 8.3, so I place no weight on his evidence. Even if I had accepted PL as an expert, I note that PL did not say why the arm joint was unsafe and which specific risks it presented, if any. Overall, I find there is no expert evidence before me about safety, loss, or damage risks from the awning.

25. Further, I note that the strata advised the Martins to leave the awning retracted after the Martins alleged there was a safety risk. However, later photographs in evidence show that the Martins continued to extend the awning and allow persons to sit underneath it. I find this is inconsistent with the Martins' claim that they think the awning is unsafe, especially given that the Martins also have the use of a second covered balcony. I find the evidence does not provide reasonable grounds to believe that a CRF expenditure is needed to ensure safety or prevent significant loss or damage from the awning.
26. I find that under the SPA, the strata was not authorized by ownership vote or due to safety, loss, or damage risks, to spend money from the CRF to address the defective awning. I find the strata has not yet had a reasonable opportunity to exercise its discretion on what to do about the awning, given that it is not yet authorized to spend funds on any particular solutions. In the circumstances, I find it is premature and inappropriate to interfere with the strata's exercise of that discretion, especially in light of the anticipated CRF expenditure vote in October 2021. I dismiss the Martins' claim for an order that the strata replace the awning.

## **CRT FEES AND EXPENSES**

27. 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 strata was successful in this dispute, but it paid no CRT fees and claimed no CRT dispute-related expenses. So, I order no reimbursements.



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

## **ORDER**

29. I dismiss the Martins' claim, and this dispute.

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Chad McCarthy, Tribunal Member