



Civil Resolution Tribunal

Date Issued: October 22, 2021

File: ST-2021-000756

Type: Strata

Civil Resolution Tribunal

Indexed as: *Fleming v. The Owners, Strata Plan 1290*, 2021 BCCRT 1117

B E T W E E N :

DOUG FLEMING

APPLICANT

A N D :

The Owners, Strata Plan 1290

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about an owner's request to install a mini split heat pump on a patio. The applicant, Doug Fleming, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan 1290 (strata). Mr. Fleming says the strata unreasonably refused to grant his request. He seeks an order for the strata to allow him to install the heat pump.

2. The strata disagrees. It says that installing the heat pump requires approval by a 3/4 vote of owners in the strata. It says Mr. Fleming did not obtain the necessary support when owners voted on a resolution about heat pumps generally at the 2019 annual general meeting (AGM).
3. Mr. Fleming represents himself. The strata council president represents the strata.
4. For the reasons that follow, I dismiss Mr. Fleming's claims.

JURISDICTION AND PROCEDURE

5. 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.
6. 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.
7. 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.
8. 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

9. The issues in this dispute are as follows:
 - a. Is a 3/4 vote required to approve the heat pump installation?
 - b. Should the strata be ordered to allow the heat pump installation?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicant Mr. Fleming must prove his claims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
11. I begin with the undisputed background facts. Mr. Fleming owns strata lot 52. The strata plan shows he has a ground-level concrete patio on the east side of the strata lot designated as limited common property (LCP) for the use of his strata lot. Mr. Fleming's strata lot and patio are connected to another strata lot and patio to the south.
12. At the October 22, 2019 AGM, the owners in the strata voted on a resolution that would permit the installation of heat pumps by any strata lot owner. The resolution said that the heat pumps would be a significant change within the meaning of section 71 of the *Strata Property Act* (SPA). It said the installation would require a 3/4 vote under that section. I discuss SPA section 71 below. The owners did not pass the resolution.
13. In August 2020 Mr. Fleming asked the strata's property manager about having the owners vote again on allowing heat pumps. The property manager replied that Mr. Fleming should first fill out a form to request the installation. In November 2020, Mr. Fleming filled out the form and described the heat pump. It included an outdoor unit that Mr. Fleming expected to place on the LCP patio. On December 22, 2020, the strata refused the request by replying on the form. It said the heat pump had to be voted on at an AGM.

14. The strata uses the Standard Bylaws with amendments registered in the Land Title Office. There are no bylaws specifically about heat pumps.

Is the heat pump installation a significant change in the use or appearance of the patio?

15. Mr. Fleming says the planned heat pump installation is not a significant change in the use or appearance of the patio and does not require approval by the owners. Section 71 of the SPA says that a strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless the change is approved by a resolution passed by a 3/4 vote at an AGM or special general meeting (SGM), or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. Changes to common property made by individual owners may also trigger SPA section 71. See *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333.

16. Mr. Fleming suggests in some submissions that his LCP patio is not common property. I disagree as SPA section 1 explicitly defines LCP as a subset of common property, designated for the exclusive use of the owners of one or more strata lots.

17. In *Foley* at paragraph 19 the court summarized the criteria for a significant change 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?
18. Court decisions suggest that the more permanent the change, the more significant it is. See for example, *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 where potted plants and trees were not considered a significant change. See also *Sidhu v. The Owners, Strata Plan VR1886*, 2008 BCSC 92, where the court held that cutting holes in an exterior wall to install vents was a significant change.
19. Mr. Fleming attached a description of the heat pump to his November 2020 application form. He said it would be the size of a small suitcase. He said installing it would not require any new duct work or alteration to the exterior of the building. He also said it would make, at most, 55 decibels of noise. He attached a chart that says 55 decibels is about the same level of noise generated by a household refrigerator.
20. As noted above, Mr. Fleming has the burden to prove his claims. Overall, I find Mr. Fleming provided little evidence about the heat pump. He said he planned to use a mini split heat pump, but I infer they are not all the same. He did not provide basic information such as the model he intended to install. He did not provide evidence to corroborate his description of the pump's size or noise output, such as a manufacturer's pamphlet or data sheet. So, I do not find those aspects of the pump proven.
21. I also find that, even if I accepted Mr. Fleming's description as accurate, the heat pump would be a significant change. This is because I find the noise level of 55 decibels would potentially affect the use or enjoyment of the adjoining strata lot to the south or create direct interference or disruption. The evidence before me indicates the strata consists of residential housing. I note that previous CRT decisions have held that heat pumps have at least the potential to create unreasonable noise. See for example *The Owners, Strata Plan 1674 v. Graham*, 2019 BCCRT 74 and *Peace v. Hyde*, 2020 BCCRT 1284.

22. Further, I find the voting results of the October 22, 2019 AGM suggest the change would be significant. As stated above, the owners decided against allowing the installation of heat pumps generally. I conclude from this that a meaningful number of the strata's community does not want heat pumps installed.
23. I also find that the heat pump installation would likely affect Mr. Fleming's use or enjoyment of his strata lot and its marketability. Mr. Fleming suggests this to be so in his submissions. I find these factors indicate the change is significant.
24. I also find the planned heat pump installation would be a significant change because there is no indication the strata permitted them in the past. It is undisputed that the strata approved windowed air conditioners. However, aside from 1 photo of such a unit on the neighboring strata lot, I have no evidence about the impact such air conditioners have or how common they are. Mr. Fleming also says his neighbour has a "very quiet" hot tub. However, he notes that new hot tubs are not permitted under the strata's rules, and the neighbor's hot tub was installed before this rule came into effect. He also provided no evidence about the hot tub. So, I find the submissions about the hot tub provide limited guidance on the issue of heat pumps.
25. I find one factor that assists Mr. Fleming is that he intends to place the exterior heat pump unit in different location than what he planned in 2019. Mr. Fleming outlined the location on a map. He says the pump is not visible from outside the patio and the strata does not dispute this. However, I do not find this enough to outweigh the other considerations discussed above.
26. In summary, I find that the heat pump installation at issue would significantly change the use of the common property. I find that it requires approval by a resolution passed by a 3/4 vote at an AGM or SGM.
27. In these circumstances, I decline to order the strata to allow Mr. Fleming to install the heat pump. The strata was previously willing to put this issue before the owners at an AGM and says that is the correct procedure now. So, I find it likely the strata would agree to have the matter heard at an AGM or SGM if Mr. Fleming requested it.

Further, the owners have not voted on Mr. Fleming's current request, which includes installing his heat pump in a different location than the one proposed in 2019.

28. For those reasons, I dismiss Mr. Fleming's claims.

CRT FEES AND EXPENSES

29. 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. The strata is the successful party. As it paid no CRT fees and claimed no specific dispute-related expenses, I order none. I dismiss Mr. Fleming's claims for reimbursement.

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

ORDER

31. I dismiss Mr. Fleming's claims and this dispute.

David Jiang, Tribunal Member