



Civil Resolution Tribunal

Date Issued: November 8, 2021

File: ST-2021-002030

Type: Strata

Civil Resolution Tribunal

Indexed as: *Brookes v. The Owners, Strata Plan NW 1890*, 2021 BCCRT 1181

B E T W E E N :

KIMBERLEY BROOKES

APPLICANT

A N D :

The Owners, Strata Plan NW 1890

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Richard McAndrew

INTRODUCTION

1. The applicant, Kimberley Brookes, co-owned a strata lot (SL32) in the respondent strata corporation, The Owners, Strata Plan NW 1890 (strata). Ms. Brookes says the strata failed to enforce its nuisance bylaws relating to complaints of second-hand smoke in the hallway in front of her strata lot, coming from neighbouring strata

lot 35 (SL35). Ms. Brookes says that she had to vacate and sell her strata lot to avoid the smoke odour because of the strata's inaction. She claims \$19,472.50 in moving and property sale expenses. Ms. Brookes also asks for an order requiring the strata to issue a \$2,600 bylaw fine against SL35 for continuing to let smoke seep into the hallway. Further, Ms. Brookes requests an order requiring the strata to add a bylaw amendment banning smoking.

2. The strata denies Ms. Brookes' claims. The strata says it enforced its nuisance bylaws in a reasonable manner. The strata says that it sent multiple bylaw violation notices to SL35, installed an air purifier in SL35, improved hallway ventilation, added weather stripping to SL32 and SL35, arranged a voluntary dispute resolution (VDR) meeting and proposed a bylaw amendment resolution banning smoking inside strata lots.
3. Ms. Brookes is self-represented. A strata council member represents the strata.

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. Since Ms. Brookes no longer owns or resides in SL32, I find that her requests for orders requiring the strata to issue bylaw fines for smoking and to amend the bylaws to ban smoking are moot. This means that Ms. Brookes' claims relating to this requested relief are no longer legally relevant. I reach that conclusion because I find that Ms. Brookes no longer has a legally recognized interest in the strata's future operation after she sold and vacated her strata lot. So, I dismiss Ms. Brookes' request for these orders. I will consider Ms. Brookes' claim for damages below.

ISSUES

9. The issues in this dispute are:
 - a. Did SL35's owners breach the strata bylaws by smoking in their strata lot?
 - b. Did the strata adequately investigate and enforce its bylaws after receiving Ms. Brookes' complaints, and if not, what are the appropriate remedies?

BACKGROUND AND EVIDENCE

10. In a civil proceeding like this one, Ms. Brookes must prove her claims on a balance of probabilities. I have read all the parties' evidence and submissions but only refer to them as necessary to explain my decision.
11. The strata was created in 1982 and operates under the *Strata Property Act* (SPA). The strata consists of 39 strata lots in a 3-storey building with apartment-style housing.

12. The strata filed a complete set of amended bylaws with the Land Title Office (LTO) in March 2013, which replaced previous bylaws. The strata also filed further bylaw amendments which are not relevant to this dispute.
13. Bylaw 3(1)(a) says that owners must not use a strata lot in a way that causes a nuisance or hazard to another person. Bylaw 3(1)(c) also prohibits owners from using a strata lot in a way that unreasonably interferes with the rights of other persons to use and enjoy the common property or another strata lot.
14. Ms. Brookes, and a co-owner, purchased and moved into SL32 in January 2019. SL 32 is located across a common property hallway from SL35. Ms. Brookes says that, shortly after she moved in, she smelled cigarette smoke in the hallway coming from under SL35's door. SL35's owners admitted that they smoked in their strata lot.
15. Ms. Brookes began complaining to the property manager in a February 21, 2019 email. Ms. Brookes continued making additional smoke complaints in March and April 2019. The strata council discussed the issue at the April 17, 2019 strata council meeting and it sent SL35 a bylaw violation letter on April 30, 2019.
16. The June 12, 2019 strata council minutes say that SL35's owners refused to smoke outside on their balcony. The minutes say that the strata would try to improve the ventilation. The strata sent Ms. Brookes a June 24 2019 letter recommending additional weather stripping for her strata lot. Ms. Brookes' smoke complaints continued in June and July 2019.
17. The August 7, 2019 strata council minutes say that the strata would issue a bylaw fine against SL35 if further complaints were made before the October 2019 strata council meeting. There was no evidence of smoke odour complaints between August and October 2019. The October 16, 2019 strata council minutes say that the smoking issue appeared to be resolved as there had been no further complaints.
18. Ms. Brookes began complaining about the smoke odour again in November 2019. She said that the smoking odour was continuous, with a strong smell when she

opened her door. Ms. Brookes said that it was hard not to cough and it was affecting her throat.

19. The December 4, 2019 annual general meeting (AGM) minutes say that the owners discussed the option of adding a non-smoking bylaw amendment. However, the minutes say that owners wanted the strata council to resolve the issue with the affected owners before amending the bylaws to ban smoking. The AGM minutes say that the strata council would arrange a VDR meeting between the affected owners.
20. Ms. Brookes sent the strata property managers a January 2, 2020 email complaining about the smoking. She said that her throat was scratchy and she had trouble breathing. She also said that her toddler had a cough since November 2019.
21. The strata sent SL35 a February 10, 2020 bylaw violation notice for smoking. The notice referred SL35 to VDR. The VDR meeting was held on February 19, 2020 with the strata and the owners of SL32 and SL35. The parties were unable to resolve the smoking issue.
22. The February 19, 2020 strata council minutes say that the strata would hire a contractor to inspect and repair SL35's door. The minutes also say that the strata would conduct a negative air test to determine whether the hallways were adequately pressurized and whether the rooftop ventilation units were operating correctly. The minutes say that the strata would also research the costs of an air purifier system for SL35.
23. Ms. Brookes continued to complain of smoke odours in March 2020. The March 25, 2020 strata council minutes say that the strata had contacted a contractor to repair SL35's door but it was unable to do the work at that time because of the COVID-19 pandemic. The strata said that a quote for a negative air test was in progress. The minutes also say that the strata had ordered an air purifier and it was waiting for delivery.
24. Ms. Brookes complained of smoke smells throughout April 2020. The strata sent SL35's owners an April 7, 2020 bylaw violation notice for smoking. The strata cleaned

the hallway carpet in April 2020 and arranged to clean the walls. The April 22, 2020 strata council minutes say that the strata would look into door upgrades to prevent smoke transmission.

25. The property managers sent SL32 a May 7, 2020 letter saying that the air purifier was delivered to SL35, the hallway ventilation was operational and the strata was working on upgrading SL35's doors. Ms. Brookes sent the property managers a May 12, 2020 email saying that she did not smell any smoke so far in May 2020. However, Ms. Brookes complained of smoke again on May 21, 2020.
26. Ms. Brookes' smoke complaints continued in June 2020. The June 24, 2020 strata council minutes say that the weather stripping had not been installed properly and it would be repaired.
27. The strata counsel sent a bylaw violation notice to SL35 for smoking on July 9, 2020. Ms. Brookes sent the strata a July 16, 2020 email saying that there was no smoke and the issue was resolved. However, she complained of smoke odours again on July 22, 2020. The July 22, 2020 strata council minutes say that SL35's door closing arm would be replaced and new weather stripping was ordered. The strata council sent SL35 another bylaw violation notice for smoking on July 30, 2020.
28. The strata council's August 12, 2020 minutes say that the strata was waiting for the closing arm and weather stripping repairs. There were no documented smoke complaints from August to September 2020.
29. Ms. Brookes sent the strata an October 14, 2020 email again complaining of smoke. The October 14, 2020 strata council minutes say that the strata would ask owners to smoke outside and the strata would present a proposed smoking ban bylaw amendment to the owners. The November 4, 2020 strata council minutes say that the smoking complaints would be "tabled" until a smoking bylaw amendment was presented.

30. Ms. Brookes complained of smoke odours again in January 2021. At the January 27, 2021 AGM, the owners did not approve the proposed smoking ban bylaw amendment.
31. Ms. Brookes complained of smoke odours again in February 2021. The strata council sent SL35 another bylaw violation notice for smoking on March 16, 2021.
32. Ms. Brookes says that she sold SL32 because of health concerns relating to the smoke exposure from SL35. Based on Ms. Brookes' undisputed submissions, I find that she sold SL32, at least in part, due to the second-hand hallway smoke. Ms. Brookes started this dispute before SL32's March 31, 2021 sale completion date.
33. Ms. Brookes claims \$19,472.50 in moving and property sale expenses relating to sale of SL32. Ms. Brookes provided invoices and property sale documents showing that she spent \$16,865.63 in real estate agent fees, \$2,354.02 in mortgage prepayment penalty fees, \$1,680 in moving expenses and \$1,438.88 in notary public fees to sell and vacate SL32. Based on this undisputed evidence, I find that Ms. Brookes has proved that her moving and strata lot sale expenses exceed the \$19,472.50 she claims.

REASONS AND ANALYSIS

Did SL35's owners breach the strata bylaws by smoking in their strata lot?

34. For the reasons set out below, I find that SL35's owners breached bylaws 3(1)(a) and (c) by smoking inside their strata lot. As noted above, these bylaws prohibit owners from using a strata lot in a way that causes a nuisance or hazard to another person.
35. As discussed above, the evidence shows that Ms. Brookes complained of smoke almost continually from February 2019 to March 2021, except for 2 intervals from August to October 2019 and August to November 2020. So, I find that she complained of smoke for a total of 19 months. In support of her smoke complaints, Ms. Brookes provide an undated statement from LM, her real estate agent. LM says that there was a smoke smell in the hallway when they listed SL32 for sale.

36. In contrast, the strata provided a May 31, 2021 affidavit from KM, who says they have lived in the strata lot next door to SL32 for 10 years. KM says that they have not smelled smoke in the hallway outside SL32. The strata also provided an April 3, 2020 email from AD, who provided strata cleaning services. AD wrote that they smelled strong cigarette odour coming from under SL32's door when they smoked. AD wrote that they did not otherwise smell smoke in the hallway.
37. In considering the conflicting witness statements, every witness reported smoke in the hallways except KM. Though I accept that KM's statement may be an accurate report of her observations, I note that different individuals do not necessarily have the same level of scent sensitivity. Based on the statements from the applicant, AD and LM, on balance I am satisfied that smoke was regularly escaping from SL32 to the hallway during the 19 months of Ms. Brookes' complaints.
38. Ms. Brookes claims that the hallway smoke was a health hazard which caused her to suffer coughing, shortness of breath and sore throats. She says she also suffered stress and anxiety about her children's health. Ms. Brookes provided a letter from Dr. Eric Cadesky, a physician. Dr. Cadesky wrote a May 7, 2021 statement saying that there are no safe levels of exposure for second-hand smoke. Since Dr. Cadesky is a physician, I am satisfied that he has sufficient expertise to provide an expert opinion about smoke's health risks under CRT rule 8.3.
39. Based on Ms. Brookes' undisputed submissions about the smoke's effect on her health, and Dr. Cadesky's undisputed opinion, I am satisfied that the second-hand cigarette smoke in the hallway was hazardous. Previous non-binding but persuasive CRT decisions have reached the same conclusion about the danger of second-hand smoke. See, for example, *Yee v. The Owners, Strata Plan EPS3863*, 2021 BCCRT 45 at paragraph 42, *The Owners, Strata Plan KAS879 v. Casorso*, 2020 BCCRT 491 at paragraph 26 and *McIntosh v. Weinehl*, 2021 BCCRT 18 at paragraph 37.
40. In a strata setting, a nuisance is defined as a substantial, non-trivial, and unreasonable interference with an owner's use and enjoyment of their property (see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC

1502 at paragraph 33). The test is an objective one, measured with reference to a reasonable person occupying the premises. The courts have said that in a strata corporation, a certain amount of “give and take” is necessary among neighbours (*Sauve v. McKeage et al.*, 2006 BCSC 781.)

41. Based on my finding that the second-hand smoke was hazardous, I find that Ms. Brookes’ use and enjoyment of her property was substantially affected. So, I find that the smoke escaping from SL35 was a nuisance contrary to the bylaws during the 19 months of Ms. Brookes’ complaints.

Did the strata adequately investigate and enforce its bylaws after receiving Ms. Brookes’ complaints, and if not, what are the appropriate remedies?

42. SPA section 26 requires the strata, through strata council, to enforce the strata’s bylaws and rules. The strata corporation may investigate bylaw contravention complaints as it sees fit, so long as it 1) complies with the principles of procedural fairness and 2) does not act in a significantly unfair manner to any person who appears before its strata council: *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148 at paragraph 52.
43. A strata corporation will meet its obligations under SPA section 26 so long as it acts reasonably. See the CRT decisions of *LeBlanc v. The Owners, Strata Plan LMS 600*, 2020 BCCRT 783, *Jamal v. Rushton*, 2020 BCCRT 585, and *Chau v. The Owners, Strata Plan NW 155*, 2020 BCCRT 1161. Although these CRT decisions are not binding on me, I find the reasoning in these decisions to be persuasive.
44. In considering whether the strata responded to Ms. Brookes’ complaints in a timely manner, I am mindful that the strata council consists of lay persons performing volunteer roles and is generally only required to meet a handful of times per year. As such, some latitude is justified when scrutinizing their conduct. See, for example, *Mitchell v. The Owners, Strata Plan KAS 1202*, 2015 BCSC 2153 at paragraphs 50 to 51.

45. That said, I have also considered the authority of *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462. In that case, the court found that in cases of nuisance, a remedy should be made without undue delay once the strata corporation is aware of the nuisance. Similarly, in the CRT decision of *McIntosh* at paragraph 54, a CRT member decided that a strata corporation should have immediately required the respondent owner to stop smoking or permitting smoking in their strata lot. She wrote that the strata should have also used the process in SPA section 135 to fine the respondent owner if smoking continued.
46. I have also considered the CRT decision in *Yee*, cited earlier, involving similar facts as in this dispute. In *Yee*, a tribunal member found that a strata corporation delayed enforcing its nuisance bylaws relating to smoking complaints for approximately 5 months. The tribunal member found this delay to be inappropriate and wrote that strata corporations need to exercise greater urgency in response to second-hand smoke complaints because it is a health hazard. Although non-binding, I find this reasoning to be persuasive and apply it here.
47. Ms. Brookes argues that the strata unreasonably failed to enforce its nuisance bylaws by not issuing bylaw fines against SL35. It is undisputed that the strata did not do so. However, I find that the strata did take numerous measures to address Ms. Brookes' smoking complaints. While the strata must enforce its bylaws, it is not required to levy a fine for each bylaw contravention. SPA section 130(1) says the strata corporation *may* fine an owner if a bylaw or rule is contravened, and section 129(2) says a strata corporation may give a warning or give time to comply.
48. In the CRT decision in *Bahmutsky v. The Owners, Strata Plan KAS 3860*, 2021 BCCRT 642, a Vice Chair considered a dispute involving similar facts. In *Bahmutsky*, the Vice Chair found that the strata corporation did not treat the applicants significantly unfairly by failing to issue bylaw fines to a neighbour who smoked nearby. The Vice Chair found that the strata corporation took reasonable and appropriate action by sending multiple bylaw violation notices and discussing the problem with the smoking neighbours. Though this decision is not binding, I find the reasoning to be persuasive.

49. On balance, I find that the strata reasonably investigated Ms. Brookes' smoking complaints and took sufficient measures to address her concerns. The strata sent SL35's owners multiple notices warning them that the smoke violated the bylaws and could result in fines. The strata also attempted to resolve the issue by discussing the problem with SL35's owners informally and by arranging a VDR meeting. The strata also took multiple measures to physically prevent the transmission of smoke including the installation of an air purifier, improving hallway ventilation and adding weather stripping. Further, the strata council minutes show that the council repeatedly considered Ms. Brookes' smoking complaints and proposed potential solutions. Overall, I find that the strata reasonably investigated Ms. Brookes' complaints and it met its duties under the SPA.

50. For the above reasons, I dismiss Ms. Brookes' claim.

CRT FEES, EXPENSES AND INTEREST

51. 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. Since Ms. Brookes was unsuccessful, I find that she is not entitled to reimbursement of her CRT fees.

52. The strata requested reimbursement of \$3,988 in legal fees and \$261.44 in legal services disbursements as dispute-related expenses. The strata provided a May 27, 2021 letter from its lawyer saying that the strata had incurred \$9,735 in legal fees and \$261.44 in disbursements responding to this dispute. CRT Rule 9.5(3) says that except in extraordinary circumstances, the CRT will not order reimbursement of legal fees in a strata property dispute. Rule 9.3(3) says that relevant factors in assessing whether the dispute is extraordinary, the CRT may consider the complexity of the dispute, to what degree representatives were involved, whether there was unnecessary delay or expense. I find that there are no extraordinary circumstances in this dispute to justify reimbursement of legal fees. The issues in the dispute were not particularly complex, no party had approved representation, and I find there was

no significant unnecessary delay or expense. So, I dismiss the strata's claim for reimbursement of legal fees and disbursements.

ORDER

53. I dismiss Ms. Brookes' claims and this dispute.

Richard McAndrew, Tribunal Member