Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *McBean v. The Owners, Strata Plan EPS1766*, 2021 BCCRT 1288

B E T W E E N :

BRYAN MCBEAN and JO-ANNE MCBEAN

APPLICANTS

A N D :

The Owners, Strata Plan EPS1766

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Laylí Antinuk

INTRODUCTION

1. This dispute is about whether an owner can keep a shed in the yard behind their strata lot.

2. The applicants, Bryan and Jo-Anne McBean, own strata lot 77 (SL77) in the respondent strata corporation, The Owners, Strata Plan EPS1766 (strata).

3. When the McBeans bought SL77 in May 2019, the shed was already in the backyard. About a year later, the strata manager sent the McBeans a Notice of Complaint (notice) on behalf of the strata. The notice says the shed violates a strata bylaw so the McBeans had to remove it within a month, or the strata would.

4. The McBeans have not removed the shed. Nor has the strata. The McBeans ask me to order the strata to stop requiring the shed's removal.

5. The strata says the shed contravenes the bylaws, so the McBeans should remove it.

6. Mr. McBean represents himself and Mrs. McBean. A strata council member represents the strata.

7. As explained below, I find that the shed does not contravene the bylaws, so the strata cannot require the McBeans to remove it.

JURISDICTION AND PROCEDURE

8. 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. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the parties that will likely continue after the CRT process has ended.

9. The CRT has the discretion to decide the format of the hearing. A hearing can occur by writing, telephone, videoconferencing, email, or a combination of these. I have decided that a written hearing is appropriate in this case. I find I am properly able to assess and weigh the documentary evidence and submissions before me. Keeping in mind the CRT's mandate, which includes proportionality and speedy dispute resolution, I see no reason for an oral hearing.

10. The CRT can accept any evidence that it considers relevant, necessary and appropriate, even if the evidence 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.

11. In resolving this dispute, the CRT may order a party to pay money, or to do or stop doing something. The CRT may also order any other terms or conditions it considers appropriate.

ISSUES

12. The issues in this dispute are:

    a. Does the shed contravene the bylaws?

    b. If so, did the strata act in a significantly unfair manner by telling the McBeans to remove the shed?

    c. What remedies, if any, are appropriate?

EVIDENCE AND ANALYSIS

13. In a civil claim like this one, the McBeans as the applicants must prove their claims on a balance of probabilities (meaning "more likely than not").

14. I have read all the parties' evidence and arguments. However, I will refer only to what is necessary to explain my decision.

15. The strata is a residential strata corporation that consists of 105 townhouse-style strata lots in 34 buildings. It was created as a phased strata corporation in 2014. The strata plan shows that each strata lot has a backyard designated as limited common property.

16. In December 2020, the strata filed a complete new set of bylaws with the Land Title Office (LTO). The filed Form I confirms that the December 2020 bylaw amendment replaced all previously filed bylaws. The strata filed further bylaw amendments in November 2021, but I find these recent amendments irrelevant here. I find that the December 2020 bylaws apply to this dispute.

Does the shed violate the bylaws?

17. As noted, the McBeans bought SL77 in 2019. The bylaw in place at that time (the old bylaw) was bylaw 6 from the SPA's Standard Bylaws. The bylaw in place now, bylaw 2.9, differs quite significantly. I will discuss both bylaws.

18. The notice says the shed violates bylaw 2.9 (the new bylaw). The new bylaw states:

> 2.9 **Obtain approval before altering common property**
>
> (a) An Owner has no rights to alter common property.
>
> (b) For purposes of alteration, changes that affect the appearance of the common property, such as enclosure and/or addition of any exterior living space such as a deck, shed or veranda or security bars must be considered an alteration of common property.

19. The new bylaw kept the same heading as the old bylaw (shown in bold above). However, the similarities end there. Unlike the new bylaw, the old bylaw:

    a. Allowed owners to alter common property if they obtained the strata's written approval.

    b. Empowered the strata to require an owner to agree to take responsibility for an approved alteration's expenses.

    c. Did not include examples of what alteration means.

20. In short, the old bylaw allowed owners to alter common property with the strata's written approval. The new bylaw simply says owners have no right to alter common property. Under the new bylaw, there is no way for owners to alter common property even if the strata approves the alterations. By repealing the old bylaw and replacing it with the new bylaw, I find that the strata removed the process that allowed owners to alter common property with the strata's written approval.

21. Confusingly, the new bylaw's heading suggests that owners must "obtain approval before altering common property". However, I do not consider the heading

determinative. The strata's bylaws qualify as an enactment under the *Interpretation Act*. The *Interpretation Act* says that headings do not form part of an enactment itself. In other words, the words in the heading are not part of the bylaws, so I place little weight on them. The words in the new bylaw that matter most say an owner has no right to alter common property.

22. About six months after the new bylaw came into force, the strata added a new rule (rule 6.3) approving "storage lockers" on limited common property if the lockers meet certain requirements. The council meeting minutes from May 12, 2021 that include the new rule say, "any alternations [*sic*] to common property (which includes your front/backyards) cannot be carried out without the prior approval from the Strata Council." This suggests the strata council continues to behave as though the bylaws still contain an approval process for owners who want to alter common property. As noted, I find that the new bylaw contains no such approval process.

23. SPA section 125(5) says if a rule conflicts with a bylaw, the bylaw prevails. Here, I find that rule 6.3 conflicts with the new bylaw because it purports to give owners the option of requesting strata approval to alter common property. The new bylaw says owners have no right to alter common property.

24. I note that the December 2020 bylaw package also includes bylaw 2.8. Under bylaw 2.8, an owner can seek strata approval to make an alteration **to a strata lot** that involves common property located **within the boundaries of a strata lot** (my bold emphasis added). However, I find that bylaw 2.8 does not apply here for two reasons. First, I find that SL77's backyard is not common property located within SL77's boundaries. Instead, based on the strata plan, I find that SL77's backyard is limited common property *outside* SL77's boundaries. Second, I find that the shed is not an alteration to SL77.

25. In its submissions, the strata says that the old and new bylaws "are all clear and precise regarding obtaining written approval before altering common property". I disagree. As I have explained, the old bylaw required owners to get the strata's written

approval before altering common property. The new bylaw does not permit alterations to common property.

26. The parties agree that the shed was already in SL77's backyard when the McBeans bought SL77. As such, I find that the McBeans did not put the shed in SL77's backyard. Given this, I find that the McBeans have not contravened the new bylaw. The new bylaw says owners have no right to alter common property. The McBeans have not altered common property. They did not put the shed in SL77's backyard.

27. In coming to this conclusion, I have considered the SPA's definition of "owner". It does not include former owners. It says an "owner" means a person shown in the LTO register as the owner of a freehold estate in a strata lot. The LTO register lists the McBeans as SL77's registered owners.

28. I recognize that the new bylaw explicitly mentions sheds as an example of an alteration. However, I find that the examples merely illustrate what qualifies as an alteration, which owners have no right to make. I have found that the McBeans did not alter common property, so the list does not apply. Notably, the bylaw does not prohibit sheds in any general sense. It prohibits owners from altering common property.

29. In short, I find that the McBeans did not alter common property because they did not put the shed in SL77's backyard. So, the shed does not contravene the new bylaw.

30. Both parties make arguments about whether SL77's former owner received the strata's written approval before putting the shed in the backyard. As noted, the old bylaw required owners to obtain strata's written approval before "making an alteration to common property". The strata argues that strata council has never approved any sheds. The McBeans say the former owner received the strata's permission to put the shed in SL77's backyard. Both parties supplied email evidence to support their arguments.

31. I find it unnecessary to resolve this conflict in the evidence for two reasons. First, the old bylaw no longer applies. The strata repealed and replaced it with the new bylaw.

The strata has no authority to enforce a repealed bylaw. Second, I find that the old bylaw did not require the former owner to get the strata's written approval for the shed. I say this because I find that the shed would not have qualified as an "alteration to common property" under the old bylaw.

32. As noted, the old bylaw did not give examples of what alteration meant. As I have also said, the old bylaw is bylaw 6 of the SPA's Standard Bylaws. The BC Supreme Court has said that the term "alteration" in bylaw 6 means a change to the structure of common property. See *The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363 at paragraphs 40-41.

33. For example, courts have found that the following actions qualify as alterations:

    a. Cutting a hole in a common property wall to install permanent pipes for an air conditioning unit affixed to a limited common property patio.

    b. Replacing windows and flashings on an exterior common property wall and affixing an air conditioner to a limited common property patio.

    See *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591*, 2017 BCSC 1646 at paragraph 35 (affirmed on appeal 2018 BCCA 187) and *Simon Fraser University Foundation v. The Owners, Strata Plan BCS 1345*, 2021 BCSC 360 at paragraphs 45-46.

34. Conversely, courts have found that the following actions do not qualify as alterations:

    a. Placing a hot tub and air conditioning unit on a roof deck. The court came to this conclusion because the hot tub and air conditioner were not designed to be permanent.

    b. Placing an unaffixed hot tub on a limited common property patio. The only thing attaching the hot tub to common property was an electrical cable.

See *The Owners, Strata Plan LMS 4255 v. Newell,* 2012 BCSC 1542 at paragraph 90 and *Wentworth Condominium Corp. No. 198 v. McMahon*, 2009 ONCA 870 at paragraphs 10 and 12.

35. Here, I find that the shed is an unaffixed, portable, freestanding unit. I make this finding based on the McBeans' submissions and photographic evidence. The photos show the shed in various locations in SL77's backyard, including on a concrete patio and on the grass. As such, I accept the McBeans' submission that the shed sits on the patio with no foundation or anchors to limited common property.

36. The strata claims that the shed is "permanent". I disagree. Based on the evidence, I find the shed easily moveable and removeable. I also find that the shed has not caused or required changes to the structure of any common property. As a result, I find that the shed does not qualify as an "alteration" within the meaning of the old bylaw. So, no one needed to get the strata's written approval to put the shed in SL77's backyard.

37. I have also considered bylaw 2.5(j) although neither party made arguments about it. Bylaw 2.5(j) is part of the December 2020 bylaws. It says owners must not "erect on or fasten to" the strata lot or common property "any item, except with the written permission" of the strata.

38. I have already found that the McBeans did not put the shed in SL77's backyard, so they have not contravened bylaw 2.5(j). In any event, I would not have found a contravention of bylaw 2.5(j) even if the McBeans had put the shed in SL77's backyard. I have found the shed easily moveable and removeable. As I see it, an item that is 'erected on' or 'fastened to' common property is not easily moveable and removeable. Therefore, I find that bylaw 2.5(j) does not apply to the shed.

39. To summarize, I find that the shed does not contravene the bylaws. As a result, I find that the strata has no authority to order the shed's removal.

Did the strata act in a significantly unfair manner?

40. Given my conclusion about the bylaws, I find it unnecessary to decide whether the strata acted in a significantly unfair manner.

What remedies, if any, are appropriate?

41. I have found that the bylaws do not prohibit the McBeans from keeping the shed in SL77's backyard. As a result, I order the strata to stop requiring the McBeans to remove the shed.

CRT FEES AND EXPENSES

42. Under CRTA section 49 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 to depart from the general rule in this case.

43. The McBeans succeeded in this application. They claim $225 in CRT fees. They also claim $411.68 in dispute-related expenses as follows:

    a. $224 for a legal consultation about dispute-related issues,

    b. $87.68 for strata meeting minutes that pre-date their purchase of SL77, and

    c. $100 for a Condominium Home Owners Association (CHOA) membership.

44. The McBeans say they bought the CHOA membership so they could get advice about the SPA and bylaw interpretation for this dispute. They say they bought the strata meeting minutes to get information and history regarding SL77 and the strata's responsibilities and decisions prior to their purchase of SL77. They also say they paid for a legal consultation about the shed. They ask me to order the strata to reimburse all these expenses because the expenses "are directly attributable to this dispute and would not have been incurred otherwise."

45. I find the CHOA membership and meeting minute expenses reasonable and directly-related to this dispute. Additionally, CRT rule 9.5 lists only two exceptions to the

general rule that the CRT will usually order an unsuccessful party to reimburse the successful party's reasonable dispute-related expenses. One exception is for fees charged by a lawyer (more on this below). The other is compensation for time a party spends dealing with the CRT proceeding. Neither exception applies to these two expenses. So, I order the strata to reimburse the McBeans for these expenses. I note that the strata did not argue that the expenses are unreasonable or unrelated to this dispute.

46. However, I dismiss the McBeans' claim for $224 in legal fees. CRT rule 9.5 says the CRT will only order reimbursement of fees charged by a lawyer in a strata dispute in extraordinary circumstances. The CRT can consider a variety of factors when deciding whether to order a party to pay legal fees. These factors include the complexity of the dispute, the degree of the lawyer's involvement in the dispute and whether a party or lawyer's conduct has caused unnecessary delay or expense.

47. The McBeans have not argued that this case involves any extraordinary circumstances. Considering the factors listed above, I do not consider this dispute overly complex. Additionally, I conclude that the McBeans' lawyer had minimal involvement considering the fee amount ($200 plus tax). Lastly, nothing in the evidence before me suggests that either party caused unnecessary delay or expense. Taking all this into account, I find no evidence of exceptional circumstances that would call for an order reimbursing the McBeans' legal fees.

48. To summarize, I order the strata to reimburse the McBeans for $225 in CRT fees and $187.68 in dispute-related expenses for a total of $412.68.

49. The strata claims $450 in dispute-related expenses. I dismiss this claim because the strata did not succeed in this case.

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

ORDERS

51. I order the strata to:

    a. Immediately stop requiring the McBeans to remove the shed in SL77's backyard, and

    b. Within 30 days of this decision's date, reimburse the McBeans a total of $412.68, broken down as follows:

        i. $225 for CRT fees, and

        ii. $187.68 in dispute-related expenses.

52. The McBeans are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

53. Under CRTA sections 57 and 58, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia. The order can also be enforced by the Provincial Court of British Columbia if it is an order for financial compensation under $35,000. Once filed with a court, the order has the same force and effect as if it were a judgment of that court.

Laylí Antinuk, Tribunal Member